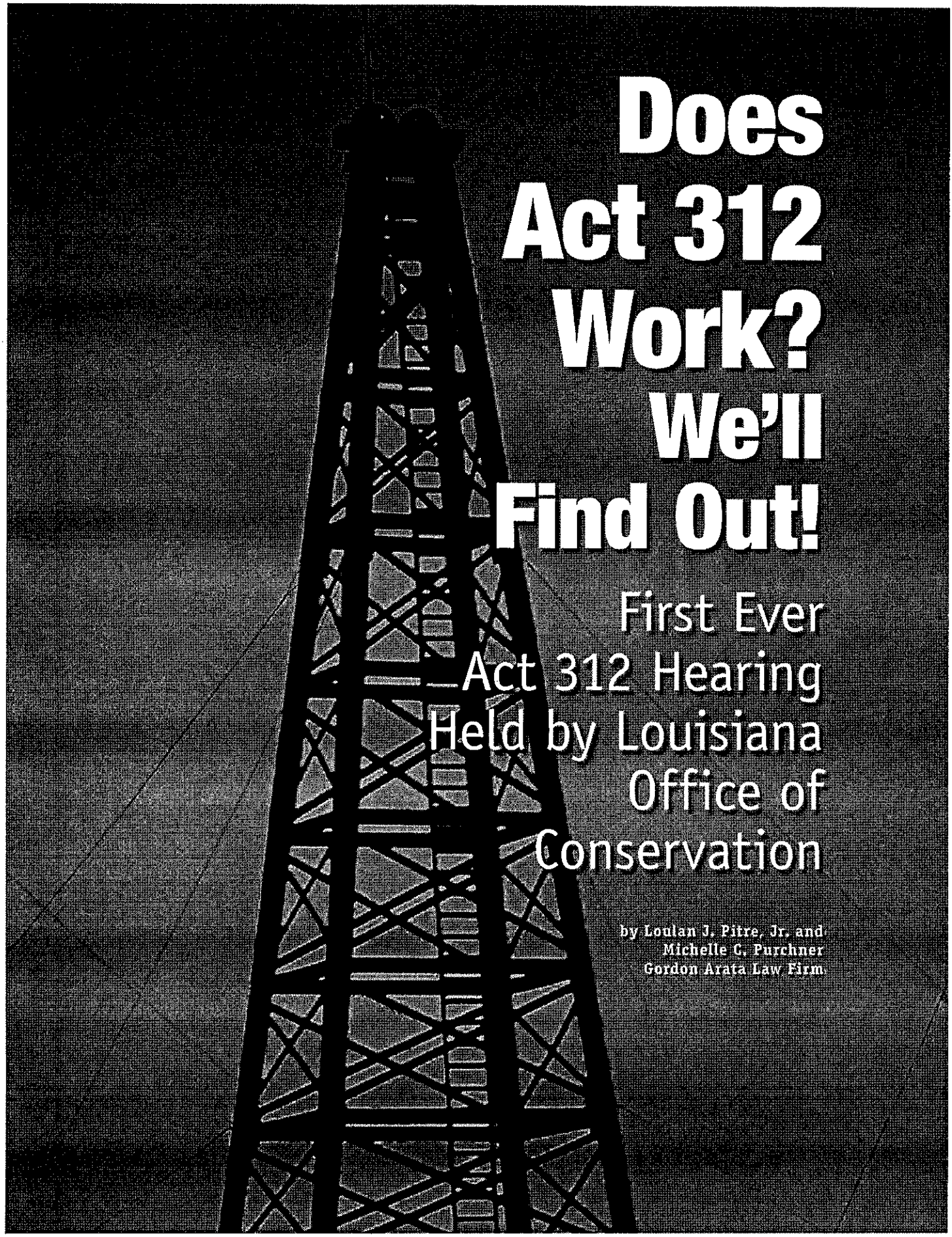

Does Act 312 Work? We'll Find Out!

First Ever Act 312 Hearing Held by Louisiana Office of Conservation

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For the first time ever, and amidst much excitement and interest, the Louisiana Office of Conservation held in February a contested hearing pursuant to Act 312 of the 2006 Regular Session of the Louisiana Legislature ("Act 312"). Act 312 reformed the procedure in "legacy lawsuits" by landowners. These legacy lawsuits allege environmental damage arising from oil and gas exploration and production activities. The hearing was a step toward the remediation of environmental damage found by the jury in Tensas Poppadoc, Inc. v. The responsible party, et al. ("Poppadoc").

The *Poppadoc* hearing brings the effectiveness of Act 312 to a critical test. A key component of Act 312 gives the Louisiana Office of Conservation a major role in formulating remediation plans. Both industry and landowner constituencies eagerly await a determination by the Office of Conservation — due this April – of the "most feasible plan." But don't hold your breath – the plan recommended by the Office of Conservation will then be subject to more proceedings in court.

Act 312 was a legislative response to the large number of landowner lawsuits filed after the Louisiana Supreme Court's landmark *Corbello* decision in 2003. *Corbello* held that a damage award for remediation need not be "tethered" to the value of the property. Notably, *Corbello* also held that, under Louisiana law as it then existed, a landowner collecting remediation damages did not have to remediate the property. Act 312 requires that environmental damage actually be remediated.

Under Act 312, if environmental damage is found in litigation relating to an oil and gas exploration and production site, either by a finder of fact or by the admission of a responsible party, the matter is referred to the Louisiana Office of Conservation to assess the "most feasible plan" to remediate the damaged property. *Poppadoc* is the first, but almost certainly not the last case that has gone to trial under the provisions of Act 312 and then been referred to the Office of Conservation for consideration of an appropriate remediation plan.

Poppadoc arose out of the alleged contamination of soil and groundwater on property in the Lake St. John oilfield in Concordia Parish. After a two-week trial in the spring of 2008, the jury rendered a verdict finding environmental damage. The jury further found that the remediation of the property would cost $1 million, which was the amount that the defense expert said it would cost to implement his remediation plan.

Following the *Poppadoc* trial, the court issued an order requiring the "responsible party" to submit to the Office of Conservation a remediation plan in compliance with state standards. The responsible party submitted the same $1 million remediation plan that it had presented at trial, which generally involved soil remediation. The plaintiff's counsel submitted a competing –and much more expensive – "pump and treat" remediation plan.

The Office of Conservation may accept a plan submitted by a party, or even come up with a completely different plan. Act 312 states that the Office of Conservation shall adopt the "most feasible plan" to evaluate or remediate the environmental damage in a manner that is in compliance with applicable standards and regulations. Prior to adopting a plan, Act 312 requires that the Office of Conservation hold a public hearing regarding the plans submitted.

Poppadoc was the first public hearing held by the Office of Conservation under the procedures set forth in Act 312. The estimated cost of the hearing was funded by the responsible party. Also, Act 312 allows plaintiffs to recover attorney fees and expert and testing costs associated with proving environmental damage.

Some people expected Act 312 hearings to be similar to the Office of Conservation's unitization hearings, which are usually over in an hour or two, even when contested. These people were wrong. The *Poppadoc* hearing lasted for six days and was, in effect, a second trial of many issues that had previously been litigated to the jury.

ACT 312 STATES that the Office of Conservation shall adopt the "most feasible plan" to evaluate or remediate the environmental damage in a manner that is in compliance with applicable standards and regulations.

The attorney for the Office of Conservation presided over a technical panel including four members of the staff of the Office of Conservation's Environmental Division. The procedure followed was similar to that of a trial in the courtroom.

- Opening statements were given by both the plaintiff's and defense counsel. Each side argued that its plan was the most feasible, most practical and the only one that could really be implemented with any result.
- Multiple experts were brought in to address the plans. The defense offered eight experts and the plaintiff offered four. Each expert was subjected to qualification proceedings, as would be expected in court. In a dramatic step, one of the proffered experts was disqualified from testifying.
- Each expert was subject to direct examination, cross examination and re-direct examination – as well as questions from the panel – regarding the remediation plan that he or she supported. Modern technology was evident, with a large screen being used to show photographs, maps, documents, results of sampling and other demonstrative exhibits.
- On the last day of the hearing, each party presented a closing argument.
- After completion of the hearing, the parties were allowed three days to file post-hearing briefs, limited to 10 pages each.

Act 312 required that the Office of Conservation submit its recommended plan to the court in April. Specifically, based on the evidence

submitted, the Office of Conservation must adopt what it determines to be the "most feasible plan to evaluate or remediate the environmental damage and to protect the health, safety, and welfare of the people." A "feasible plan" is defined in Act 312 as "the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1 to protect the environment, public health, safety and welfare, and is in compliance with specific relevant and applicable standards and regulations promulgated by a state agency in accordance with the Administrative Procedure Act in effect at the time of clean up to remediate contamination resulting from oilfield or exploration and production operations or waste."

If no one challenges the plan selected by the Office of Conservation, then the court must adopt that plan. However, any party may challenge the plan, creating the possibility of what would be, in effect, a third trial on the issue of the appropriate remediation plan. If the court finds by a preponderance of the evidence that another plan is more "feasible" than the one recommended by the Office of Conservation, the court may approve that plan instead. In case you think that would end it, the plan adopted by the district court is then subject to *de novo* review by the court of appeal.

Upon final adoption of a plan, Act 312 provides that the court shall order the responsible party to fund the implementation of the plan. This is done by placing estimated costs in the registry of the court. The court shall then issue orders as necessary to ensure that funds are expended in a manner consistent with the adopted plan. The court and the Office of Conservation retain oversight to ensure compliance with the plan. The court may order the responsible party to deposit additional funds into the registry of the court if the court finds that the amount of the initial deposit is insufficient.

When Act 312 was passed by the legislature, it was perceived by many that the role of the Office of Conservation – as a statewide agency with the appropriate technical expertise – would help to avoid the possibility that inconsistent standards would be used by the various local judges and juries hearing legacy cases. Interestingly, in *Poppadoc*, the jury adopted the remediation plan offered by the defense, which was much less expensive than the plan presented by the plaintiff's side. Everyone who cares about legacy litigation is waiting on pins and needles to view the decision of the Office of Conservation. Then we will all keep watching to see what happens after that – back in the courts. ●

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Pitre and Purchner frequently represent defendants in legacy litigation, but were not involved in the Poppadoc matter.

This article is a general overview and should not be considered a substitute for specific legal advice.