

ENVIRONMENTAL LAW

The Newsletter for the TBA's Environmental Law Section

Jon E. Hastings: A Lawyer Who Made A Difference

By A. Gregory Ramos

We hear a lot these days about what many perceive as a serious decline in civility and professionalism in the practice of law. These problems are intensified no doubt by the constant and seemingly never ending deadlines and client demands we lawyers are faced with each day. In partial response to these problems and concerns, I hold up NBA member Jon E. Hastings, who passed away recently after a long battle with cancer, as a shining example of all that is good and right with our profession. Jon was a living model of what the practice of law should be all about as well as what it means to be a lawyer. I personally believe he made a true and remarkable difference in this world.

I met Jon years ago as a result of the fact that our offices were in the same building. What I will remember most about Jon is how easy it was to approach him. When you talked to Jon he had a way of making you feel that you were the most important person in the entire world to him at that particular moment in time. By this I mean that he would be totally focused on what you had to say as opposed to all that may have been going on all around him. In my opinion, Jon personified courtesy, respect, and professionalism.

Jon was always respectful and professional with the lawyers he faced and dealt with in his practice. These same qualities served him well as he participated in other activities, including state and local politics. Jon was actively involved in drafting legislation concerning various environmental and telecommunications issues. Mayor Bill Purcell appointed him to the Metro Stormwater Management Commission. Jon also served as legal counsel for the Democratic Party. He was listed in the 2003-2004 edition of *The Best Lawyers in America* and was recognized for his work in public utility law.

Jon's busy law practice and political activities notwithstanding, he always found the time and energy to advocate on behalf of numerous philanthropic causes that were important to him and to serve on the boards of a number of foundations and



civic groups. These organizations included, just to mention a few, Friends of the Public Library, the Marcus Robertson Children's Foundation (a not-for-profit organization to enhance the physical and emotional well being of the disadvantaged and at risk youth), the

Nashville Downtown Partnership, and Visions With Infinite Possibilities (a not-for-profit organization to help foster the educational and artistic dreams of children). Amazingly, the list of boards, committees, and activities goes on and on.

In 2003, Jon was honored for his community service with the Good Guy Award from the Women's Political Caucus and the Volunteer of the Year award from the Nashville Area Chamber of Commerce. And earlier this year, our own Nashville Bar Association honored him for his long-standing service and support of our CLE program. In fact, I myself had the personal honor of having my picture taken with Jon that day (see the February, 2004 edition of the *Nashville Bar Journal*).

My point in all of this is that even though Jon was taken from us at the young age of 45, he lived an incredibly full, and fulfilling, life. He certainly was the embodiment of what it means to be a lawyer. Most of all however, Jon Hastings made a difference – as a lawyer and as a person. We'll all miss him.

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Association

Letter from the Chair



By J. Wayne Cropp

As the new Chair-man of the Environmental Law Section, I want to express my appreciation for the confidence placed in me by my peers. I realize that I stand on the shoulders of a number of great leaders, who have ably guided and directed this organization to its position of prominence in the Tennessee Bar Association. We have positive momentum because of the hard work of our officers, Executive Council, and members. If everyone will contribute as they have in the past, we will continue to grow and have a positive impact on our profession.

As my first official duty in this newsletter, let me express my appreciation to Jim Wright for his many hours of hard work and leadership as our Chairman for 2003/2004. I sometimes tease Jim about his "lack of brevity", but on the subject of Jim's contribution to the Section, I could become effusive myself. Jim's dedication to continuing legal education, and the ethics of the profession, is very much appreciated. Thank you for a great year, Jim.

As you will read in this newsletter, there have been many positive developments and one sad note since our last newsletter.

I know we all felt a tragic loss on learning of the death of Jon E. Hastings (1958-2004), of Boulton, Cummings, Conners & Berry, PLC, who passed away on August 22 after a two year battle with cancer. Jon was one of the founding members of our Section. As Greg Ramos noted in the Nashville Bar Journal, even though he was only 45, Jon led an incredibly full and fulfilling life. Jon was a proud member of our Environmental Law Section, and an outstanding lawyer in the fields of environmental, telecommunications, and public utility law. Jon's wit, warmth, and professionalism will be greatly missed in the Section. We are seeking an appropriate mechanism through

which to recognize Jon's contribution to the field of environmental law, and hope that you will help with a fitting tribute to Jon's memory in the future.

Today (October 7, 2004), I had the pleasure of having lunch with Judge Susan Lee, one of our outstanding past Chairs. I won't steal the thunder of the newsletter article concerning Judge Lee's Investiture as the new federal Magistrate for the Eastern District of Tennessee, but Judge Lee asked that I express her appreciation to the Environmental Law Section for the recognition we provided her at her Investiture. Thank you to David Higney for drafting the Resolution, and to Jim Wright for delivering the Resolution at Judge Lee's Investiture.

It is also appropriate for us to express our appreciation for the hard work of many of our current members. In this issue, I would like to single out: Justin Wilson, for his draftsmanship of the Tennessee Bar Association's position on the Department of Transportation's suspension and debarment rule; to LeAnn Mynatt for chairing our Newsletter Committee this coming year; to Jason Holleman for chairing our Membership Committee, and to Max Fleischer for chairing our CLE program at the upcoming Solid & Hazardous Waste Conference in Gatlinburg next May. And, there is no way we could ever say thank you enough to Bill Penny for his long-standing service to our Section on issues related to continuing legal education and the exchange of ideas between the respective state Environmental Law Sections.

With the hard work of individuals like these, there is no doubt that we will have a great year!

J. Wayne Cropp
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TBA Environmental Law Section Executive Council - 2004-2005

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TBA Environmental Law Section Comments on Proposed Rule 1680-5-1 of the Department of Transportation

The Tennessee Bar Association, in consultation with the Environmental Law Section, has submitted comments on the proposed Rule of the Tennessee Department of Transportation relating to the suspension and debarment of contractors to bid on highway construction projects.

The comments are set forth in a letter signed by Bar President Charles Swanson and Executive Director Allan Ramsaur and deal with procedural matters to assure that contractors faced with possible suspension and debarment are afforded constitutional due process and the protections of the Uniform Administrative Procedures Act.

Proposed Rule 1680-5-1 of the Department of Transportation provides for a system of suspending and debarring highway contractors from bidding on road projects. Under the proposed rule, one of the grounds for suspension of a contractor is that adequate evidence exists to suspect violations of statutory or regulatory provisions or

requirements under the Federal Water Pollution Control Act and the Tennessee Water Quality Control Act.

The initial impetus for the proposed Rule was the mandate of Consent Order between the Transportation Department and the state's Department of Environment and Conservation to put in place a Rule that establishes "a system of contractor suspension, specifically the ability of a contractor to bid on highway projects involving high quality and impaired waters."

The Bar Association's comments suggest (a) that notice and an opportunity for a hearing be provided prior to suspension except in cases of substantial risk to public health and safety (b) that contractor should be able to contest the facts on which any suspension is to be based and (c) that the contractor have an explicit right to judicial review as provided in the Uniform Administrative Procedures Act. The comments also suggest that the Rule not permit an indictment to form the factual basis for suspension. n

August 25, 2004 – VIA HAND DELIVERY

Office of the General Counsel
Tennessee Department of Transportation
James K. Polk Building, Suite 300
505 Deaderick Street
Nashville, Tennessee 37243-0326

RE: Notice of Rulemaking, Construction Division,
Rule 1680-5

Dear Sir or Madam:

The Tennessee Bar Association ("TBA"), makes the following comments for consideration as part of the rulemaking in the above matter:

1. The Rule should provide for notice and opportunity for a hearing prior to suspension except in cases of substantial risk to public health or safety.

The proposed rule on suspensions, 1680-5-1-.04, allows summary suspension upon an external finding in an often-unrelated proceeding. This summary suspension without notice or hearing is effective immediately.

Fundamental fairness and constitutional due process require notice and opportunity for fact finding prior to taking such actions. The summary suspension and after-the-fact hearing does not meet this standard.

In exceptional cases of imminent threat to public health or safety, a summary suspension for the minimum period necessary until a hearing can be held might be appropriate.

2. The Rules should not permit an indictment to form the factual basis for suspension.

Proposed Rule 1680-5-1-.04 (1)(a) would permit suspension following an indictment. An indictment is not a finding of fact, it is not a finding of a reasonable belief, it is an accusation that a crime has occurred and that the defendant committed the crime. The accused has had no opportunity to test the witnesses, confront the evidence or otherwise put the government to its proof.

3. If a contractor is not to be permitted to contest the facts upon which the suspension is based, there should be no suspension.

Section 1680-5-1-.04 (8)(a) 4 of the proposed rules indicates that a contractor may not contest the facts upon which the suspension is based if such contest would compromise an ongoing investigation.

Again fundamental fairness and due process as well as good administrative practice require that allegations be put to the rigors of examination. This provision would allow a suspension and then preclude an opportunity to know the facts or test the validity of accusations upon which the suspension is grounded upon an assertion that an investigation is ongoing. Investigations frequently take years. A contractor may be ultimately exonerated. In the interim, the contractor loses their livelihood in the process. Fairness requires that the process allow certain protections.

4. The Rules should expressly and explicitly provide for judicial review of an agency decision under the rules.

The proposed rules assert that the suspension and debarment proceedings are informal and not governed by the Uniform Administrative Procedures Act (UAPA). The UAPA governs these matters by statute. DOT Rule 1680-4 also makes the UAPA contested case procedures applicable. Actions taken under the rule are thus subject to judicial review under TCA Section 4-5-322. The rule should acknowledge and explicitly provide guidance that the decisions are subject to the UAPA and reviewable.

We appreciate the opportunity to share the views and concerns of the Bar on this matter. Please keep us informed as to the status of any changes in the proposed rules and also regarding the adoption of these rules.

Sincerely,
Charles W. Swanson, President
Allan F. Ramsaur, Executive Director

Municipal Solid Waste Landfills — Past, Present, and Future

By Victor R. Donald, P.E. and Jeffrey J. Breedlove, P.E.

INTRODUCTION

Each day we in Tennessee generate and throw away approximately 10,000 tons of trash that must be disposed of safely. The United States Environmental Protection Agency and the Tennessee Department of Environment and Conservation (TDEC) use the term municipal solid waste to refer to this large volume of unwanted waste material that we throw away.

Today civil engineers are responsible for siting and designing the facilities to dispose of municipal solid waste in a manner that is protective of human health and of the environment. Part of this challenge is the complication of dealing effectively with the geology typical of a large portion of the state of Tennessee — carbonaceous bedrock and high rock content soils.

There is another complication to the disposal of municipal solid waste that can be far more challenging than dealing with geology issues. Nobody wants a municipal solid waste landfill in their community. This public opposition has created an immense difficulty in obtaining the permits required for municipal solid waste landfill sites. Those of us who are old enough to remember the typical town dump where we took our trash as late as 20 years ago would not want one of these public nuisances in our community today. It is on this basis that a poor public reception can be easily explained. Let us look at why this distant but strong memory persists.

THE PAST

Prior to the 1980's there were very simple, and often neg-

lected, regulations — inadequate by current standards — that specified how sites that were to receive municipal solid waste should have been selected, designed and maintained. The consequences of inadequate regulation compounded by inadequate operation and enforcement became obvious. Town dump sites were selected with convenience and least cost as the main considerations with few regulatory constraints. Many may recall an old abandoned borrow pit that was being filled with trash. They were simply referred to as the dump. Those who can remember, vividly recall the overwhelming stench, the rodents, the foul liquids, and the other undesirable aspects of these dump sites. In more recent memory, there is the knowledge gained from the frequent and often disturbing news reporting contamination of the soil, ground water and surface water resources caused by inappropriately located and/or managed dump sites. All of these awful memories and experiences are the unfortunate consequences of the lack of adequate regulations compounded by inadequate operation and enforcement that led to dump site selections in what often may have been the worst possible locations.

Borrow pits or depressions that result from mining sand and/or gravel, or borrow pits for excavating select soils that are cut to a depth where more permeable soil conditions will not allow deeper excavation are examples of the worst possible dump site locations. They are sites that are typically abandoned and remain an eyesore resulting in low property values. If they were also conveniently located, they were strong candidates for a waste dump site based on the previous inadequate regulations and the lack of their enforcement. This practice resulted in many dump sites being located on permeable soils all across America. The resulting serious consequence was the conveyance of the contaminants from the dump sites through the permeable soils that led to the contamination of potable ground water — often a source of drinking water. Another example is the location of dump sites in the ravines and bluffs along rivers and streams causing surface water contamination that often rendered scenic rivers as little more than sewer ditches.

Also once lacking were the standards that regulated the type of chemical wastes and the methods by which they could be disposed, the industries in Tennessee dumped wastes that provided an even greater potential for contamination than the municipal waste dumps. Many of these industrial waste dumps were sited in the same indiscriminate manner as were the municipal waste dumps. These dump sites accommodated the disposal of liquid chemical wastes or industrial wastes that eventually reached the surface and/or the ground water resources in the area adjacent to them. The results have been devastating.

In Tennessee alone, millions of dollars have been spent just defining the extent of the contamination around the industrial waste dump sites and the areas polluted by them and beginning to clean up some of these sites. Unfortunately, due to the difficulties and



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extreme cost associated with the anticipated cleanup, many of these sites are not expected to be cleaned up in our lifetime.

The general public has become aware of the problems associated with chemical and industrial waste contamination much in the same way it has become aware of municipal waste contamination — through the media coverage of the past practices and their consequences. This awareness is the reason why the mere suggestion of siting a municipal solid waste landfill, much less a hazardous waste landfill, in a new area brings out intense public apprehension and opposition. It has been said that if you want to replace community apathy with activism, try getting a landfill permitted.

REGULATORY INTERVENTION AND AWARENESS

By the 1970's, America's post-World War II population had grown tremendously to over 200 million souls. For the cities, this explosive growth in population was further exacerbated by the migration of the population from the rural farming communities to the urban areas. This caused exponential growth concentrated in the urban areas with greater population density. America was a prosperous nation, and as such as its citizens had long become accustomed to the convenience of disposable products, containers, etc. to the extent that they dubbed themselves the disposable society. The result of these trends was a huge increase in — and concentration of — trash that had to be disposed of in the relatively small urban setting.

Also, post-World War II prosperity in America resulted in huge growth in chemical and industrial production. With this increased capacity, industrialized areas were generating record volumes of waste product. The essentially free disposal of industrial waste created no incentive to minimize the waste generated. The public began to appreciate the consequences of unbridled industrial waste generation and disposal and to anticipate exposure to even greater problems in the future. These conditions combined to create obvious and serious health risks and environmental contamination leading to the outcry for more stringent regulations. This was closely followed by new regulations with restrictions to better protect our health and environment — land, air and water.

In the 1970's there was also a gathering awareness in America of the potential for serious environmental degradation as the consequence of poor landfill siting, design and management. The result of this gathering awareness was the initiative for corrective regulations and can be attributed to many different origins. However, the most compelling origin for the corrective regulations can be attributed to the clichéd expression "Necessity is the mother of invention."

FEDERAL REGULATION

The Federal government began to set similar standards with the Resource Conservation and Recovery Act (RCRA) that was originally established in 1976. This legislation called for a cradle-to-grave methodology to control environmental degradation caused by land disposal of wastes. The initial priority of the Resource

Conservation and Recovery Act included industrial and hazardous wastes. In 1980, RCRA:

- established methods to minimize waste
- introduced standards for land disposal and
- reduced the effects of existing environmental impact caused by previous hazardous waste disposal.
- In 1991, Subtitle D of the RCRA regulations addressed municipal solid waste landfills. Although these regulations gave specific authority to the individual states, they set:
- minimum criteria for landfill location,
- design standards,
- management and monitoring standards,
- closure and post-closure requirements, and
- financial assurance requirements.

STATE REGULATION

These regulations required states to create and/or update existing solid waste landfill regulations. Tennessee began managing solid wastes through promulgation of the Tennessee Solid Waste Disposal Act, T.C.A. §68-211-101 et. seq. The original rule was amended in 1991 to incorporate RCRA requirements and has been amended numerous times since. Solid waste rules and regulations are provided in the Rules of The Tennessee Department of Environment and Conservation, Division of Solid Waste Management, Chapter 1200-1-7, Solid Waste Processing and Disposal.

A significant result of these new regulations is the reduction in the number of landfills and an increase in their size. The many small town dumps have been replaced by fewer large, regional landfills.

THE PRESENT

The location of today's municipal waste landfills are the result of careful siting studies and detailed engineering. Engineered landfill components include excavations, bottom liner systems, leachate collection and treatment systems, and final cover systems.

These elements are designed to be consistent with their planned use and management. A concept of composite (clay and synthetic) liners, combined with a leachate collection system designed to prevent the buildup of liquids on the liner system is an example of the redundant — belt and suspenders — approach to environmental protection. In a sense, landfills are designed as a "dry tomb" of waste. These measures are in combination with an elaborate waste screening and handling program that includes the strict restriction of liquid and hazardous wastes.

Together, these systems provide preventative measures that are consistent with the planned management of the typical waste landfill. These measures essentially eliminate the potential for the contamination of the ground and surface water that was common and that many in the public experienced and remember

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prior to the 1980s. The result of these stringent landfill design, operation and monitoring standards has been a very successful program for the disposal of municipal wastes. There have been no observed releases from these landfills documented in their more than 10-year history of operation. Of course, the test of time will tell if the design standards are adequate to provide a perpetually safe disposal system. All the monitoring information collected to date looks encouraging.

THE FUTURE

Engineers didn't stop thinking after the establishment of sound and specific regulations for municipal solid waste landfills. There has been a great deal learned about landfill design, construction and management since the regulations that are now followed were implemented. This improved understanding of landfills has allowed some significant changes in the thought processes about landfills.

GEOSYNTHETIC COMPONENTS

The technological advancements that have been observed in the geosynthetics industry now allow the use of various geosynthetic replacements of typical earthen landfill components. For example, sites where little or no clay is available can use a geosynthetic product called Geosynthetic Clay Liners (or GCLs) to supplement or replace the clay liner. These products are manufactured by sandwiching a powdered bentonite clay inside geotextiles. The GCL can simply be rolled out on a prepared subgrade and overlapped to form a low permeability barrier to replace or to enhance the compacted clay liner component. The powdered bentonite can also be adhered to an HDPE liner, creating a composite lining system with one product.

Sands and gravels used for leachate collection layers can be replaced with geosynthetic products called geonets or geocomposites. The geonet is constructed with the same HDPE used for liner, but by forming a highly pervious 3-D matrix that allows planar flow of fluids. A geocomposite is a geonet that is manufactured with a geotextile fastened to it top, bottom or both, creating a very good filtration system to hold out the solids from the garbage and the subgrade, allowing the fluids to rapidly pass to the leachate collection sump.

Recent years have seen a pronounced growth in the use of these geosynthetic innovations in landfill construction. Tennessee has been a part of this futuristic trend. GCLs and geosynthetic leachate systems are commonly used in the state to replace or enhance the clays used for liners and the sands or gravels used for leachate collection systems. The regulations set a very stringent acceptance criterion that requires a designer to demonstrate that the proposed alternative systems will be as protective of human health and the environment as the traditional liner and leachate collection systems. The variations also require permit modifications that includes a public awareness and participation process.

BIOREACTOR LANDFILLS

Perhaps the most exciting change that the future holds is the transition in thinking from the "dry tomb" to the "wet

tomb" concept. All prior regulation and design standards were set to prevent the exposure of liquids to the waste mass. This thinking was related to the obvious conclusion that even the most toxic waste would be harmless if there is no medium to transport the harmful constituents to the environment. As a result, the provisions for daily cover and for a final cap that is at least as impermeable as the liner system were always a part of the regulations for municipal solid waste landfills. The problem with this approach is the simple fact that we are merely storing our waste at landfill sites, and a perpetual waste stream will create a continually growing landfill need.

Over the past decade, a significant amount of research has been dedicated to the evaluation of waste biodegradation in both aerobic and anaerobic environments. However, biological degradation requires the introduction of water, and the very regulations that set forth criteria for landfill design prohibit the introduction of liquids in the landfills. The EPA has very recently proposed to add a new section to the Criteria for Municipal Solid Waste Landfills to allow states to issue research, development and demonstration (RD&D) permits for landfill operations at variance with some parts of the former criteria, provided landfill operators demonstrate that these operations will not result in an increased risk to human health and the environment. EPA has proposed this alternative to promote innovative technologies for the landfilling of municipal solid waste. The reason for these RD&D permits is to allow the reintroduction of leachate that is collected from the leachate collection systems back into the waste mass in an effort to enhance biodegradation of the waste. This concept has been coined the "bioreactor landfill".

The future will see an enhanced use of the bioreactor landfill process because it is a very efficient means to manage leachate, and it creates a substantial reduction in waste mass volume as the biodegradation process occurs. Much more attention will be placed on the design and construction of the leachate collection system because of the increased volume of liquid that will be transported through the landfill cell. Daily cover placement will require greater scrutiny to allow for the proper flow of fluids through the waste mass. More elaborate gas collection systems will be necessary because the bioreactor landfill will generate much higher gas volumes due to more rapid decomposition of the waste.

WASTE TO ENERGY

Another innovation that the solid waste landfills now see is related to the waste biodegradation process. Methane, or natural gas, is a by-product of anaerobic decomposition of the waste. Thus, the gas emissions from many landfills are being collected and used to create energy. The "waste to energy" concept is another practical sense trend that makes use of the otherwise troublesome gas in a beneficial manner. The methane gas emissions from many high capacity landfill sites provide the fuel source to generate high quantities of electricity by fueling turbines or to fuel burners for industrial processes. Of course, the conversion of landfill gas to electricity requires a large capital investment,

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Susan Lee's Investiture



On August 31, a ceremony was conducted in the courtroom of Judge R. Allan Edgar, United States District Court Judge for the Eastern District of Tennessee, in Chattanooga, to celebrate the Investiture of United States Magistrate Judge Susan K. Lee. As many of you know, Susan is a past Chair of the Section, and was recently selected

to fill the newly created magistrate's position. Susan

received a gavel and Resolution from the TN Bar Association Environmental Law Section, which was presented by past-Chair Jim Wright of Knoxville. In addition, she was presented gavels from several organizations and given a robe by the Chattanooga and Federal Bar Associations.

Following the Investiture, a reception was held at the Bessie Smith Hall, where a crowd of over 250 celebrated Susan's selection to the judiciary with the new magistrate judge and her family. Numerous judges — both federal and state — attended, as well as Judge Lee's former partners from the Chattanooga law firm of Grant, Konvalinka & Harrison PC; her husband's colleagues from Miller & Martin PLLC; several former clients and co-counsel from around the country (Ohio, Maine, NY, DC, Mass., and Atlanta); several law school classmates from the University of Georgia; and, her former colleagues from the Chattanooga Bar. n

Don't miss this December CLE program presented by TBA Environmental Law Section

Environmental Ethics Videoconference

Dec. 14, 2004

11:30 a.m. CST, 12:30 p.m. EST

Live videocasts at Baker Donelson Offices in Memphis, Nashville, Knoxville, Chattanooga and Johnson City

This one-hour session will focus on the broad subject of the *Ingersoll v. Coal Creek Co.*, 98 S.W. 178 (Tenn. 1906), case, regarding the Fraterville mine explosion at Coal Creek, Anderson County, Tenn. The case deals with numerous ethical dilemmas that we face in everyday practice in the context of this interesting and sad portion of Tennessee History involving one of the largest mine disasters in the United States. Leading the discussion will be Jim Wright, Lucian Pera, Carl Pierce, and Lance Bracy

Register online at www.tba.org or Contact TBA in

2005 Solid/Hazardous Waste Conference

The Solid/Hazardous Waste Conference will take place in Gatlinburg, Tennessee May 18, 2004 through May 20, 2005.

Please contact Max Fleischer at 401 Church Street, Nashville, Tennessee 37243 or Max.Fleischer@state.tn.us with any suggestions for topics to be covered in the envi-




Municipal Solid Waste Landfills — Past, Present, and Future *(continued from page 6)*

but, particularly with the growth of the bioreactor landfill concept and green energy concepts, this is a concept that is beginning to see reality.

So there you have it. What was, only 30 years ago, a large and growing source of environmental detriment, is now an example of successful human environmental stewardship and energy preservation. This is certainly an example of how engineers, lawyers and planners have teamed with communities and regulators, to use innovation and an entrepreneurial spirit to take the proverbial lemon and create lemonade. n

Victor R. Donald, P. E., obtained his masters and undergraduate degrees from Louisiana State University in Civil Engineering. He is a Principal in, and is Chief Operating Officer of, Aquaterra Engineering, LLC. He has over 20 years experience in landfill design and construction.

Jeffrey J. Breedlove, P. E., has a degree in Civil Engineering from Mississippi State University. He is a Principal in Aquaterra, and leads its Landfill Design and Construction Group. Jeff had over 10 years experience in this field.



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