SUPREME COURT
OF THE
STATE OF LOUISIANA

No. _____

In the Matter of
BELLE CO., LLC, TYPE I & II SOLID
WASTE LANDFILL PROCEEDINGS UNDER LA. ENVTL. QUALITY ACT

No. 442-943

NINETEENTH JUDICIAL DISTRICT

PARISH OF EAST BATON ROUGE

No. 2006-CA-1077

LOUISIANA FIRST CIRCUIT
COURT OF APPEAL

ON APPLICATION FOR WRIT OF CERTIORARI AND/OR REVIEW FROM THE DECISION OF THE FIRST CIRCUIT COURT OF APPEAL
ON APPEAL FROM
THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE,
THE HONORABLE JUDGE CLARK, DISTRICT JUDGE

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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO._____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Belle Co., L.L.C.

VS.

Dr. Michael McDonald

Applicant: Assumption Parish People's Env'l Action League
Have there been any other filings in this Court in this matter? ☐ Yes ☑ No

Are you seeking a Stay Order? No
Priority Treatment? No
If so you MUST complete & attach a Priority Form

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Pleading being filed: ☑ In proper person, ☐ In Forma Pauperis
Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court:_____ Docket No._____
Judge/Commissioner/Hearing Officer:_____ Ruling Date:_____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Nineteenth Judicial District Court Docket Number: 442-943
Judge and Section: Judge Clark Date of Ruling/Judgment: December 25, 2005

APPELLATE COURT INFORMATION

Circuit: First Circuit Docket No. 2006-CA-1077 Action: Reversed District Court on writ of mandamus
Applicant in Appellate Court: Belle Co., L.L.C. Filing Date: April, 19, 2006
Ruling Date: Dec., 28, 2007 Panel of Judges: Parro, Kuhn, Guidry, Downing, and Hughes En Banc: ☐

REHEARING INFORMATION

Applicant:_____ Date Filed:_____ Action on Rehearing:_____
Ruling Date:_____ Panel of Judges:_____ En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date:_____, ☐ Trial in Progress, ☑ Post Trial
Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No
If so, explain briefly_____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

January 28, 2008
DATE

SIGNATURE

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TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Federal Cases

La. Admin. Code Provisions

MAY IT PLEASE THE COURT:

Petitioner Assumption Parish People's Environmental Action League ("APPEAL") respectfully petitions this Court for certiorari review of the First Circuit Court of Appeal opinion in In re Belle Co., L.L.C., No. 2006 CA 1077, 2007 WL 4554153, (La. App. 1 Cir. 12/28/07) (Appendix, Ex. A).

INTRODUCTION

Petitioner APPEAL seeks review of a Louisiana First Circuit Court of Appeal decision that orders an executive agency to take final action on a permit *without regard* for whether that permit is illegal and *without regard* for risks to public health and welfare. Specifically, the First Circuit held that the Louisiana Department of Environmental Quality ("DEQ"): 1) must render a final decision on Belle Co., L.L.C.'s ("Belle's") application to build a landfill for waste disposal in Assumption Parish but, 2) that DEQ has no authority to consider any "issues other than the one for which the case was remanded" more than 10 years ago. This decision conflicts with a U.S. Supreme Court opinion on the same legal issue; it also conflicts with other Louisiana appellate decisions. The decision concerns an important issue of administrative law that this Court has not yet, but should, resolve. Moreover, as Judge Guidry recognized in dissent, the First Circuit's order that DEQ act without regard to current legal standards and changed circumstances violates separation of powers and is inconsistent with DEQ's duty as public trustee of the environment under La. Const. art. IX § 1.

STATEMENT OF WRIT CONSIDERATIONS

A. The First Circuit's opinion conflicts with a decision of the Supreme Court of the United States, on the same legal issue, meriting review under La. Sup. Ct. R. X, § 1(a)(1).

The First Circuit ruled that once a court remanded a DEQ permit, "DEQ did not have authority . . . to consider issues other than the one for which the case was remanded." Exh. A at 12. In this respect the First Circuit's decision conflicts with the U.S. Supreme Court's holding on the same issue that "[o]n review the court may thus correct errors of law and on remand the [agency] is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its

charge." Fed. Commc'n Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 145 (1940). The U.S. Supreme Court carefully distinguished the "familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest." Id. The Court explained that "[t]o assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process." Id. The U.S. Supreme Court couched its decision in terms of separation of powers, warning that "[u]nless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." Id.

B. The First Circuit's opinion also conflicts with decisions of another court of appeal, again meriting review under La. Sup. Ct. R. X, § 1(a)(1).

Both the First and Second circuits have recognized that the doctrine of *stare decisis* is not applicable to the decisions of administrative agencies and that an "administrative agency is not bound by its own prior determinations." Int'l Paper, Inc. v. Bridges, 07- 42,023 (La. App. 2 Cir. 4/4/07); 954 So.2d 321, 328-29, writ granted 07-1151 (La. 9/21/07), 964 So.2d 319; Kidd v Bd. of Trustees Retirement System of La., 294 So.2d 265, 271 (La. App. 1 Cir. 1974), writ denied, 301 So.2d 46 (La.1974). But now the First Circuit has held that if part of an agency determination survives review under the "arbitrary and capricious standard" of La. Rev. Stat. § 49:964(G)(5), the agency is bound by its prior decision, even—as here—a decade later. This is because the First Circuit ruled that executive agencies lack "authority . . . to consider issues other than the one for which the case was remanded." Exh. A at 12.

C. The First Circuit decided a significant issue of law that this Court has not, but should, resolve, meriting review under La. Sup. Ct. R. X, § 1(a)(2).

The First Circuit ruled that DEQ is locked into a permit decision made more than 10 years ago, because the Petitioner appealed that permit and it was remanded on limited grounds. This Court has not considered the scope of an administrative agency's authority to continue to implement the law and respond to changing circumstances after one of its decisions has been subject to judicial review. This issue is important. As the U.S. Supreme Court has noted:

> Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, *to adapt their rules and practices to the Nation's needs in a volatile, changing economy*. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

American Trucking Ass'ns v. Atchison, T. & S. F. Ry. Co., 387 U.S. 397, 416 (1967) (emphasis added).

D. The First Circuit erroneously applied the constitution and a law of this state and the decision will significantly affect the public interest, meriting review under La. Sup. Ct. R. X, § 1(a)(4).

Louisiana's Constitution recognizes the administrative agency's appropriate role, under La. Const. art. IX § 1, as the "primary public trustee of natural resources and the environment." See, e.g., Save Ourselves, Inc. v. La Env'l Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984). Here, by treating DEQ as if it were a "lower court" and denying the executive agency the authority to modify a decade-old permit decision to account for changed circumstances and standards, the First Circuit erroneously applied La. Const. art. IX § 1 and ran afoul of the separation of powers this Court recognized in Hoag v. State, 04-0857 (La. 12/1/04), 889 So.2d 1019, 1022 ("[T]he judicial branch is prohibited from infringing upon the inherent powers of the legislative and executive branches."). Judge Guidry, in dissent, recognized that "any attempt by the judiciary to limit the scope of DEQ's review of a permit application would impermissibly infringe on DEQ's constitutional mandate to act as public trustee in making any determination relative to the granting or denying of permits. Guidry, J. dissenting, Exh. B at 5.

Denying DEQ the authority to ensure that its permit decisions conform to the law, and to changed circumstances, impairs the public interest because DEQ implements laws that the Legislature has enacted to protect public health and welfare. Although the First Circuit stressed that this was to be for "non-hazardous" waste, Exh. A at 2, solid waste landfills still pose significant risks to the environment. Indeed, EPA has noted that solid waste landfills can be every bit as dangerous to public health and welfare as hazardous waste landfills. 56 Fed. Reg. 50978, 50982 (Oct. 9, 1991) ("[D]ata available to the [EPA] . . . do not provide strong support for distinguishing the health and environmental threats posed by" municipal landfills when contrasted with hazardous waste landfills.).

E. The First Circuit so far departed from proper judicial proceedings as to call for an exercise of this Court's supervisory authority under La. Sup. Ct. R. X, § 1(a)(5).

The First Circuit's decision in this proceeding defies a well-established safeguard of both fairness and efficiency that requires any party filing a motion to serve copies of that motion on all adverse parties in the proceeding. Following the Nineteenth Judicial District Court's December 15th, 2005 judgment denying Belle a writ of mandamus, Belle purported to file a Motion for New Trial. Belle, however, decided not to serve a copy of that motion on the Petitioners, an adverse party to the proceeding who had filed the original petition in the matter. The Louisiana Code of Civil Procedure is clear, however, that "every pleading subsequent to the original petition shall be served on the adverse party." La. Code Civ. Proc. art. 1312. This Court has dismissed a writ of certiorari as void because a realtor had failed to serve a copy on an adverse party, holding "there is no middle ground. . . . since, by reason of realtor's failure to comply with the requirements of the rule, its application was not properly presented to the court for its consideration." Wilson Sporting Goods Co. v. Alwes, 16 So. 2d 217, 219 (La. 1943).

STATEMENT OF THE CASE

A. The Nature of the Case

This is an administrative law case concerning judicial limits on the authority of an executive agency to consider current legal standards and changed factual circumstances with respect to aspects of a prior agency decision that a court did not reverse on judicial review. It is well settled that "[a]s a general rule, the doctrine of *stare decisis* is not applicable to the decisions of administrative agencies." [1] The question here is whether executive agencies become bound to those aspects of a prior determination that survive review under the "arbitrary and capricious standard" of La. Rev. Stat. § 49:964(G)(5), and if consequently—even a decade later—the administrative agency then lacks the authority to continue to enforce its legislative policy in consideration of current legal standards and changed circumstances.

B. Summary of Prior Proceedings

1. Permit application and initial appeal

[1] Kidd v. Bd. of Trustees Retirement System of La., 294 So.2d 265, 271 (La. App. 1 Cir. 1974), writ denied, 301 So.2d 46 (La.1974) ("Administrative agencies are not bound by prior determinations . . . .").

In October 1994, Belle applied to DEQ for a permit to construct a solid waste landfill. DEQ granted the permit in October of 1997. The Petitioner, APPEAL, filed the original petition in this case with the Louisiana Nineteenth Judicial District Court on September 22, 1997, challenging DEQ's decision to grant Belle a permit to build and operate a landfill in the Plaintiff's community because, among other things, Belle did not comply with La. Rev. Stat. § 30:2157. That statute requires solid waste permit applicants to include a certification from the local fire department that the department is able respond to emergency situations that could occur at the proposed solid waste facility. On September 14, 1998, the district court reversed and remanded DEQ's decision, ruling DEQ could not approve the permit application because Belle failed to comply with the emergency response statute. In the Matter of Belle Co., LLC, No. 442,943 (La. 19th Dist. Ct. Sep. 14, 1998). On June 27, 2001, the First Circuit affirmed the district court's ruling. In re Belle Co., LLC, No. 00-0504 (La. App. 1 Cir. 6/27/01); 809 So. 2d 225.

2. Proceedings on remand

Now back before DEQ, Belle submitted an emergency response plan to DEQ in an attempt to satisfy the emergency response requirement. DEQ then held two public hearings and established a public comment period on Belle's application. In the meantime, the information that Belle had submitted about whether the site was a wetland according to the U.S. Army Corps of Engineers[2] ("the Corps") expired by its own terms. (*See* Exh. C stating "this approved jurisdictional determination is valid for a period of 5 years . . . unless new information warrants revision prior to the expiration date."). Moreover, on January 8, 2004, the Corps (the federal agency with jurisdiction over wetlands) notified DEQ that "[i]nformation and signatures obtained from recent maps, aerial photography, and/or local soil surveys . . . are indicative of the occurrence of wetland areas subject to Corps' jurisdiction." (Exh. D). The Corps also informed the agency that it had "informed Mr. Charles Hartman of the Belle Company of [the Corps'] findings by letter dated January 16, 2003." Id.

[2] The Corps is the federal agency with jurisdiction over wetlands under the Federal Clean Water Act. See 33 U.S.C. § 1344(a) & (d) (delegating authority to "the Secretary," defined as "the Secretary of the Army, acting through the Chief of Engineers."

After receiving this information from the Corps, DEQ asked Belle to provide, among other things, a current Corps' determination as to the existence of wetlands at the proposed site, as required by La Admin. Code tit. 33, pt. VII, § 521.A.1.e.ii, as well as a letter from Assumption Parish stating the proposed landfill would not violate land-use regulations, as required by La Admin. Code tit. 33, pt. VII, § 519.N.

3. Mandamus filing

Next, Belle filed a writ of mandamus before the Nineteenth Judicial District Court on September 22, 2005. Importantly, Belle filed this writ under the *same case and caption* that the Petitioner had filed on September 22, 1997, to challenge DEQ's original decision to grant the permit. Thus, the original petition in this case was filed not by Belle, but by the Petitioner who—having filed in opposition to DEQ's issuance of a permit to Belle—was a party adverse to Belle.

On December 15, 2005, the 19th JDC denied Belle's mandamus petition, deciding that "[t]he agency, being an executive branch agency, is charged with the protection of the public as well as of the environment," and consequently the law requires DEQ "to act as stewards, responsible stewards." Tr. of Oral Argument and Reasons for Jud. at 13 (Exh. E), *In the Matter of Belle Co., LLC*, No. 442,943 (La. 19th Dist. Ct. Nov. 14, 2005). The court concluded that because "in stewardship there is discretion," and "mandamus only lies where there is no discretion," the writ for mandamus would not be granted. *Id*. The district court instead ordered "the agency to provide a decision, one way or the other, on [Belle's] application within five days of receiving the certificates from the federal agencies involved" (*i.e.*, the Corps). *Id*.

4. Untimely Motion for New Trial

Next, on December 28, 2005, Belle purported to file a Motion for New Trial. Belle, however, declined to serve copies of that Motion on the Petitioner—an adverse party below. On March 27, 2006, the 19th JDC denied Belle's Motion for New Trial. On April 19, 2006, Belle filed its Motion for Appeal to the First Circuit.

5. First Circuit proceedings

On June 19, 2006, Petitioner APPEAL moved to dismiss Belle's Appeal to the First Circuit as untimely. The Petitioner argued that because Belle had failed to serve its Motion for a New Trial on APPEAL, an adverse party, that Motion was void and ineffective to extend the

delay for filing a motion to appeal. On September 5, 2006, the First Circuit denied the Petitioner's Motion to Dismiss without explanation. Exh. F. Next, the First Circuit held oral argument on the merits on February 15, 2007 and again on December 12, 2007. The First Circuit issued its ruling on the merits on December 28, 2007, over a dissent by Judge Guidry.

ASSIGNMENT OF ERRORS

Assumption Parish People's Environmental Action League ("APPEAL") assigns the following errors:

1. The First Circuit overreached its authority when it denied an executive agency authority to implement current law and respond to changed circumstances following a judicial remand. The First Circuit held erroneously that once a court remanded a DEQ permit, "DEQ did not have authority . . . to consider issues other than the one for which the case was remanded." Exh. A at 12. The First Circuit ignored case law recognizing that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." Int'l Paper, Inc. v. Bridges, 07- 42,023 (La. App. 2 Cir. 4/4/07); 954 So.2d 321, 328-29, writ granted 07-1151 (La. 9/21/07), 964 So. 2d 319 (emphasis added); Fed. Commc'n Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 145 (1940) (same); see also Kidd v Bd. of Trustees Retirement System of La., 294 So. 2d 265, 271 (La. App. 1 Cir. 1974) writ denied, 301 So.2d 46 (La.1974) (quoting 73 C.J.S. Verbo, Public Admin. Bodies and Procedure § 147). Instead, the First Circuit supported its holding by citing two cases that have nothing to do with administrative law. In so doing, the First Circuit equated the relationship between "administrative bodies and the courts to the relationship between lower and upper courts," which caused it "to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process." 309 U.S. at 145; see also Hoag v. State, 04-0857 (La. 12/1/04), 889 So.2d 1019, 1022 ("[T]he judicial branch is prohibited from infringing upon the inherent powers of the legislative and executive branches."). The First Circuit's decision in this regard conflicts with a decision of the U.S. Supreme Court.

2. The First Circuit's ruling that "DEQ did not have authority . . . to consider issues other than the one for which the case was remanded," Exh. A at 12, is inconsistent with other decisions of Louisiana courts. This is because the Courts have consistently recognized that "[w]hile the courts may take prior determinations into consideration, an administrative agency is not bound by its own prior determinations." Int'l Paper, Inc. v. Bridges, 07- 42,023 (La. App. 2 Cir. 4/4/07); 954 So.2d 321, 328-29, writ granted 07-1151 (La. 9/21/07), 964 So.2d 319; Kidd v Bd. of Trustees Retirement System of La., 294 So. 2d 265, 271 (La. App. 1 Cir. 1974), writ denied, 301 So.2d 46 (La.1974) ("Administrative agencies are not bound by prior determinations . . . ."). The First Circuit provided no coherent reason—and there can be none—to apply a different standard to portions of a prior administrative determination that have survived judicial review under an "arbitrary and capricious standard," which is the standard applicable to review of DEQ permits. La. Rev. Stat. § 49:964(G)(5). The First Circuit's decision in this regard conflicts with a decision of another Louisiana court of appeal.

3. The First Circuit's ruling that "DEQ did not have authority . . . to consider issues other than the one for which the case was remanded," Exh. A at 12, is inconsistent with DEQ's constitutional duty to comply with the law and to protect the public. See, e.g., Save Ourselves, Inc. v. La Env'l Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (recognizing a regulatory agency's duty, under La. Const. art. IX § 1, to act as the "primary public trustee of natural resources and the environment."). Indeed, in this case the First Circuit's ruling would result in DEQ issuing a permit that violates La Admin. Code tit. 33, pt.VII, § 521.A.1. f. which requires permittees to provide a "wetlands demonstration, if applicable, as provided in LAC 33:VII.709.A.4." La Admin. Code tit. 33, pt.VII, § 709.A.4 provides (with limited exceptions) that landfill units "shall not be located in wetlands." Here, it is beyond dispute that Belle's August 23, 2000 wetlands documentation has expired on its face. (Exh. C "this approved jurisdictional determination is valid for a period of 5 years . . . unless new information warrants revision prior to the expiration date."). Moreover, on January 8, 2004, the U.S. Army Corps of Engineers ("the Corps", the federal agency with jurisdiction over wetlands) notified DEQ that "[i]nformation and signatures obtained from recent maps, aerial photography, and/or local soil surveys . . . are indicative of the occurrence of wetland areas subject to Corps' jurisdiction." Exh. D. The Corps informed Belle of its revised determination "by letter dated January 16, 2003" Id. Accordingly, DEQ has every reason for concern that Belle's proposed facility is located in wetlands. Moreover, the First Circuit's ruling creates a perverse incentive for regulated entities to file deficient permit applications to "lock in" outdated standards and gain a competitive advantage over companies that must comply with modern standards. In this regard, the First Circuit has erroneously interpreted a law of this state and its decision will significantly affect the public interest. Moreover, because the First Circuit has, in effect, denied DEQ authority to adapt to "a volatile, changing economy," American Trucking Ass'ns v. Atchison, T. & S. F. Ry. Co., 387 U.S. 397, 416 (1967), the ruling below raises an important issue of administrative law that this Court has not yet resolved, but should resolve.

4. The First Circuit erred by failing to dismiss Belle Co. L.L.C.'s ("Belle") appeal as untimely since Belle filed its appeal 121 days after the district court judgment—rather than the 67 days allowed by La. Code Civ. Proc. Arts. 1974 and 2087. Belle's Motion for a New Trial before the trial court could not interrupt the delay for appeal because Belle failed to serve that motion on the Petitioner, an adverse party which filed the original petition in the district court case below. The Code of Civil Procedure provides: "every pleading subsequent to the original petition shall be served on the adverse party." La. Code Civ. Proc. art. 1312. Moreover, this Court has ruled that it must treat a writ not served upon an adverse party as void, *i.e.*, "not properly presented to the court for its consideration." Wilson Sporting Goods Co. v. Alwes, 16 So. 2d 217, 219 (La. 1943). Here, therefore, Belle's Motion to Dismiss was defective and could not interrupt Belle's 67-day delay for filing an appeal. Accordingly, the First Circuit erred in denying, without explanation, the Petitioner's Motion to Dismiss since the First Circuit had no jurisdiction to address the merits of Belle's untimely appeal pursuant to La. Code Civ. Proc. art. 2162. The First Circuit in this regard has so far departed from proper judicial proceedings as to call for an exercise of this Court's supervisory authority.

SUMMARY OF ARGUMENT

The First Circuit erred in ordering the district court is issue a mandamus to DEQ with instructions to the executive agency to render a final decision on Belle's application for a landfill

permit without consideration of any "issues other than the one for which the case was remanded" more than 10 years ago. In effect, the First Circuit ordered that DEQ put blinders on and issue Belle a permit that the agency *knows* will violate the law. Thus, the First Circuit's decision "impermissibly infringe[s] on DEQ's constitutional mandate to act as public trustee in making [a] determination relative to the granting or denying of permits." Guidry, J. dissenting, Exh. B at 5.

The First Circuit failed even to acknowledge the administrative law authority on point, including conflicting decisions of the U.S. Supreme Court and Louisiana appellate courts.[3] Instead, the First Circuit cited two cases that relate to the actions of a lower court on remand. But in the context of administrative law, the U.S. Supreme Court has warned that to conform "the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process." Fed. Commc'n Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 145 (1940). Here, the First Circuit ignored the U.S. Supreme Court's warning and issued a decision that is inconsistent with the separation of powers recognized in Hoag v. State, 04-0857 (La. 12/1/04), 889 So.2d 1019, 1022 ("[T]he judicial branch is prohibited from infringing upon the inherent powers of the legislative and executive branches."). The appellate court's decision is also inconsistent with the public trust doctrine of La. Const. art. IX § 1. See, e.g., Save Ourselves, Inc. v. La Env'l Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (recognizing the duty of an executive agency to act as the "primary public trustee of natural resources and the environment").

The First Circuit's ruling that "DEQ did not have authority . . . to consider issues other than the one for which the case was remanded," Exh. A at 12, conflicts with Louisiana appellate authority which recognizes that "[w]hile the courts may take prior determinations into

[3] The Petitioners discussed the applicable U.S. Supreme Court authority in their Briefs and raised conflicting Louisiana appellate authority in oral argument and in a December 7, 2007 notice of supplemental authority filed before the First Circuit.

consideration, an administrative agency is not bound by its own prior determinations."[4] That is, "[a]s a general rule, the doctrine of stare decisis is not applicable to the decisions of administrative agencies."[5] There is no coherent reason for a different rule to apply simply because a decade-old court decision found that portions of the prior administrative decision were "supported by [the agency's] factual findings and its articulation of a rational connection between the facts found and the permit issued." Exh. A at 2. In other words, a 10-year old court determination in DEQ's favor that "DEQ was found to have performed its duty as protector of the environment," id., cannot lawfully bar DEQ form exercising its discretion and duty to consider current standards and changed circumstances and prevent the agency from issuing permits that comply fully with the Louisiana Administrative Code. Moreover, the First Circuit's ruling creates a perverse incentive for potential permittees to file deficient permit applications to "lock in" outdated standards and gain a competitive advantage over companies that must comply with modern standards—just as Belle has sought to lock in 1997 standards and circumstances.

Finally, the First Circuit erred by failing to dismiss Belle's appeal as untimely since Belle filed its appeal 121 days after the district court judgment—rather than the 67 days allowed by La. Code Civ. Proc. arts. 1974 and 2087. Belle's Motion for a New Trial before the trial court could not interrupt the delay for appeal because Belle failed to serve that motion on the Petitioner, an adverse party which filed the original petition in the district court case below.

ARGUMENT

I. The First Circuit's order conforming "the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts . . . disregard[s] the traditional scope . . . of the judicial process" (to quote the U.S. Supreme Court) and violates separation of powers and La. Const. art. IX § 1.

The U.S. Supreme Court has carefully distinguished the "familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions

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[4] Int'l Paper, Inc. v. Bridges, 07- 42,023 (La. App. 2 Cir. 4/4/07), 954 So.2d 321, 328-29, writ granted 07-1151 (La. 9/21/07), 964 So. 2d 319; Kidd v Bd. of Trustees Retirement System of La., 294 So.2d 265, 271 (La. App. 1 Cir. 1974), writ denied, 301 So. 2d 46 (La.1974) ("Administrative agencies are not bound by prior determinations . . . .").

[5] 294 So. 2d at 271.

which the mandate has laid at rest" from the rule that applies when courts review the action of executive-branch administrative agencies. Fed. Commc'n Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 145 (1940). The Court explained that unless the "vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." Id. The Court explained that:

> On review the court may thus correct errors of law and on remand the [agency] is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to judicial review *does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge*.

Id. (emphasis added). Similarly, in In re Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968), the U.S. Supreme Court distinguished the functions of an administrative agency from that of a lower court, reasoning that "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." In American Trucking Ass'ns v. Atchison, T. & S. F. Ry. Co., 387 U.S. 397, 416 (1967), the U.S. Supreme Court noted that " [r]egulatory agencies do not establish rules of conduct to last forever," they are supposed "to adapt their rules and practices to the Nation's needs in a volatile, changing economy." Id. Thus, executive branch agencies are "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." Id.

To support its ruling that DEQ lacks authority to "consider issues other than the one for which the case was remanded," the First Circuit relied only on two cases, neither of which have anything to do with administrative law or the duties of an executive-branch administrative agency. Exh. A at 12 (citing City of Shreveport v. Kansas City Southern Railway Co., 193 La. 277, 190 So. 404 (1939), cert. denied, 308 U.S. 621 (1939) and MTU of North America, Inc. v. Raven Marine, Inc., 499 So. 2d 289 (La. App. 1st Cir. 1986), writs denied, 501 So. 2d 773 and 776 (La. 1987)).

II. The First Circuit's requirement that DEQ is bound by prior determinations upheld 10 years ago violates basic principles of Louisiana administrative law.

The First Circuit's ruling that "DEQ did not have authority . . . to consider issues other than the one for which the case was remanded," Exh. A at 12, conflicts with Louisiana appellate authority which recognizes that "[w]hile the courts may take prior determinations into consideration, an administrative agency is not bound by its own prior determinations." Int'l Paper, Inc. v. Bridges, 07- 42,023 (La. App. 2 Cir. 4/4/07), 954 So.2d 321, 328-29, writ granted 07-1151 (La. 9/21/07), 964 So.2d 319; Kidd v Bd. of Trustees Retirement System of La., 294 So.2d 265, 271 (La. App. 1 Cir. 1974), writ denied, 301 So.2d 46 (La.1974) ("Administrative agencies are not bound by prior determinations . . . ."). That is, "[a]s a general rule, the doctrine of stare decisis is not applicable to the decisions of administrative agencies." 294 So. 2d at 271.

There can be no valid reason for a different rule to apply simply because a decade-old court decision found that portions of the prior administrative decision were "supported by [the agency's] factual findings and its articulation of a rational connection between the facts found and the permit issued" and "DEQ was found to have performed its duty as protector of the environment." See Exh. A at 3. Instead, an agency must continue to perform its duty as "protector of the environment," even after a court has reviewed an agency's action. Under the deferential standard of La. Rev. Stat. § 49:964(G), courts that uphold agency action do not finally resolve underlying issues of fact and law—rather such rulings ensure that DEQ decisions are within the bounds of discretion provided by law. Judicial review of this nature is not intended to require an agency to "regulate the present and the future within the inflexible limits of yesterday." See American Trucking Ass'ns v. Atchison, T. & S. F. Ry. Co., 387 U.S. 397, 416 (1967).

III. The First Circuit's requirement that DEQ take final action on a permit without considering whether that permit will violate the law or endanger the public violates La. Const. art. IX § 1.

The upshot of the First Circuit's opinion is that it essentially requires DEQ to issue a permit that the agency knows will violate the law. This is because the Louisiana Administrative Code requires that DEQ base its decision on a permit record that includes "documentation from the appropriate state and federal agencies substantiating the . . . wetlands . . . and other sensitive ecologic areas within l,000 feet of the facility" and "[a] wetlands demonstration, if applicable, as

provided in LAC 33:VII.709.A.4." La Admin. Code tit. 33, pt. VII, § 521.A.1.e.ii & f. The Code also provides (with limited exceptions) that landfill units "shall not be located in wetlands." Id., tit. 33, pt.VII, § 709.A.4 (emphasis added). In addition, by law DEQ's record must contain "a zoning affidavit or other documentation stating that the proposed use does not violate existing land-use requirements." Id., tit. 33, pt. VII, § 519.N.

It is beyond dispute that the record of Belle's permit application fails to meet the requirements set forth in the Louisiana Administrative Code. Indeed, Belle's August 23, 2000 wetlands documentation has expired on its face. Exh. C (stating "this approved jurisdictional determination is valid for a period of 5 years . . . unless new information warrants revision prior to the expiration date."). And on January 8, 2004, the U.S. Army Corps of Engineers notified DEQ that "[i]nformation and signatures obtained from recent maps, aerial photography, and/or local soil surveys . . . are indicative of the occurrence of wetland areas subject to Corps' jurisdiction." Exh. D. The Corps notified Belle of this revised determination "by letter dated January 16, 2003." Id.

The changed circumstances with respect to the Corps' determination of wetlands are clearly relevant to DEQ's duty to apply the law and protect public health and the environment. Accordingly, the First Circuit's ruling that DEQ lacks authority to consider this information denies DEQ the ability to meet its obligations, as public trustee, to vindicate the constitutional right of Louisiana residents to a "healthful, scenic, historic, and esthetic quality of the environment . . . consistent with the health, safety, and welfare of the people." La. Const. art. IX, § 1. See Save Ourselves, Inc. v. La Env'l Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (recognizing the duty of an executive agency to act as "primary public trustee of natural resources and the environment").

The Nineteenth Judicial District Court properly distinguished the functions of an agency, such as DEQ, from those of a lower court, holding:

> The agency, being an executive branch agency is charged with the protection of the public as well as the environment. And in discharge of that responsibility, they are required by the statutes and by the law to act as stewards, responsible stewards. But in stewardship there is discretion, and unless it's arbitrary and capricious and in excess of the statute, or if there is a plea or unconstitutionality or if there is arbitrariness, then this court's jurisdiction is limited as it sits in its appellate capacity.

Exh. E at 13. See also Guidry, J. dissenting, Exh. B at 5 ("any attempt by the judiciary to limit the scope of DEQ's review of a permit application would impermissibly infringe on DEQ's constitutional mandate to act as public trustee in making any determination relative to the granting or denying of permits.")

IV. The First Circuit's exercise of jurisdiction over the merits of Belle's untimely appeal departed from proper judicial proceedings and calls for exercise of this Court's supervisory authority.

Having filed its Petition for Writ of Mandamus in a case in which APPEAL filed the original petition, the law required Belle to serve APPEAL with its pleadings. The Louisiana Code mandates that "every pleading subsequent to the original petition ***shall be served on the adverse party*** …." La. Code Civ. Proc. art. 1312 (emphasis added). After the district court entered its judgment dismissing Belle's Petition for Writ of Mandamus, Belle failed to serve its Motion for New Trial on APPEAL, an opposing party to the proceeding before the Nineteenth Judicial District Court. The Louisiana Code, however, requires that "notice of the motion for new trial . . . must be served upon the opposing party." La. Code Civ. Proc. art. 1976. Because Belle failed to serve its purported Motion for New Trial, that Motion was ineffective in interrupting the delay for appeal and the First Circuit had no jurisdiction to reach the merits of the appeal. See Cush & Son Grocery v. City of Shreveport, 653 So.2d 242, 244 (La. App. 2 Cir. 1995) ("This appeal was . . . not timely perfected and we are without jurisdiction."); Bargas v. Land, 457 So.2d 1278, 1280 (La. App. 1 Cir. 1984) ("An untimely appeal raises jurisdictional defects, and an appeal may be dismissed at any time for lack of jurisdiction.").

La. Code Civ. Proc. art. 2087 allowed Belle to appeal the district court's December 15th, 2005 decision *only* within sixty days of the "expiration of the delay for applying for a new trial . . . as provided by Article 1974 . . . ." La. Code Civ. Proc. art. 2087. Pursuant to La. Code Civ. Proc. art. 1974, Belle's delay for applying for a new trial on its Petition expired on December 28, 2005. Therefore, February 27, 2006, or sixty days from the last day Belle could apply for a new trial on the Petition, is the last day Belle could file a petition for appeal. Belle did not file its Petition for Appeal until April 19, 2006—more than one month after its appeal delay had expired. Therefore, Belle did not perfect its appeal within the delay provided by law, and its appeal is therefore untimely under La. Code Civ. Proc. art. 2087.

This Court analyzed a similar situation in Wilson Sporting Goods Co. v. Alwes, 16 So. 2d 217 (La. 1943), and dismissed a writ of certiorari because a realtor had failed to serve an adverse party with a copy of the writ. In Wilson Sporting the realtor had argued that actual notice was sufficient, claiming that "he complied with Section 2 of Rule XIII by giving notice orally and in writing to the trial judge and to plaintiff's attorney of his intention to apply for the writs." 16 So. 2d at 218. This Court rejected that argument, however, by recalling and dismissing the writ. The Court ruled:

> "[T]here is no middle ground. Nor is there any room in this case for the exercise of the court's discretion, since, by reason of the realtor's failure to comply with the requirements of the rule, its application was not properly presented to the court for its consideration."

Id. Under this standard, the law required the First Circuit to dismiss Belle's appeal as untimely.

CONCLUSION

For all of the foregoing reasons, this Court should GRANT this Application for Writ of Certiorari, reverse the decision of the First Circuit and remand with instructions to reinstate the judgment of the trial court.

Respectfully submitted on January 28th, 2007,

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CERTIFICATION OF SERVICE

I certify that a legible copy of the foregoing has been served by U.S. mail, postage pre-paid and properly addressed, on January 28, 2008 to the Louisiana First Circuit Court of Appeal as well as all counsel of record listed below.

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