

LOUISIANA ENVIRONMENTAL
ACTION NETWORK, ET AL

: NUMBER 662222 SECTION 27

: 19TH JUDICIAL DISTRICT COURT

VS.

: PARISH OF EAST BATON ROUGE

RICHARD P. IEYOUB, IN HIS
OFFICIAL CAPACITY AS
COMMISSIONER OF CONSERVATION
AND ASST. SECRETARY OF THE LA.
DEPT. OF NATURAL RESOURCES

: STATE OF LOUISIANA

RULING

THIS MATTER CAME ON FOR HEARING ON A JUDICIAL REVIEW FILED BY LOUISIANA ENVIRONMENTAL ACTION NETWORK (LEAN), CONCERNED CITIZENS OF BELLE RIVER, HAZEL CAVALIER AND ATCHAFALAYA BASKINKEEPER. AFTER ARGUMENT OF THE PARTIES, THE MATTER WAS TAKEN UNDER ADVISEMENT.

PLAINTIFFS' COMPLAINT PERTAINS TO THE APPROVAL OF A PERMIT APPLIED FOR BY FAS, INC. FOR CONSTRUCTION OF A NEW TRANSFER STATION FOR COMMERCIAL OIL AND GAS EXPLORATION AND PRODUCTION (E&P) WASTE IN ST. MARTIN PARISH. THE PERMIT AT ISSUE IN THIS CASE WAS APPROVED IN 2017. THIS WAS FAS' SECOND PERMIT APPROVED BY DNR ALLOWING FAS TO RELOCATE ITS TRANSFER STATION AND THIS IS PLAINTIFFS' SECOND PETITION FOR JUDICIAL REVIEW REGARDING THIS TRANSFER STATION.

FAS SUBMITTED AN APPLICATION IN 2014 TO RELOCATE THE E&P TRANSFER WASTE STATION THAT IT OWNS AND OPERATES IN BELLE RIVER, LA. THE CURRENT FACILITY IS APPROXIMATELY 1.5 MILES FROM THE NEW PROPOSED LOCATION. DNR APPROVED THE REQUEST IN 2015. THE PLAINTIFFS FILED A TIMELY PETITION FOR JUDICIAL REVIEW ALLEGING THAT THE ORDER VIOLATED LOUISIANA LAW. DNR PREVAILED WHEN THE DISTRICT COURT JUDGE PRESIDING OVER THAT JUDICIAL REVIEW AFFIRMED THE APPROVAL OF THE PERMIT WITHOUT REASONS. ON APPEAL TO THE FIRST CIRCUIT COURT OF APPEAL, PLAINTIFFS ASSERTED THE 3 ALLEGATIONS THAT WERE SET FORTH IN THEIR PETITION FOR JUDICIAL REVIEW ALONG WITH A FOURTH ISSUE I.E. THAT THE DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT VIOLATED DNR'S FLOOD PROTECTION REGULATION PERTAINING TO TRANSFER STATIONS

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LOCATED IN A FLOOD ZONE.

UPON REVIEW, THE COURT REVERSED THE FINDING OF THE DISTRICT COURT, VACATED THE 2015 ORDER AND REMANDED THE MATTER BACK TO DNR "FOR RECONSIDATION OF THIS MATTER IN LIGHT OF THIS DECISION." THE COURT FOUND THAT THE "SUBJECT PERMIT IS BEYOND THE SCOPE OF WHAT WAS REQUESTED AND, THEREFORE, WAS ISSUED IN VIOLATION OF LAWFUL PROCEDURE." THE REMAINING ISSUES ON REVIEW WERE PRETERMINED BY THE COURT. AN APPLICATION FOR REHEARING FILED BY DNR WAS DENIED.

SHORTLY THEREAFTER, DNR ISSUED A NEW ORDER APPROVING THE APPLICATION A SECOND TIME. THE ONLY CHANGES TO THE NEW ORDER INVOLVED A REQUIREMENT THAT FAS CEASE OPERATIONS AT THE OLD STATION BEFORE OPERATING THE NEW ONE WHICH COMPLIED WITH THE INSTRUCTIONS FROM THE FIRST CIRCUIT COURT OF APPEAL'S RULING.

PLAINTIFFS FILED THIS PETITION FOR JUDICIAL REVIEW OF THE NEW 2017 ORDER. IN THIS REQUEST TO OVERTURN THE GRANTING OF THE PERMIT, PLAINTIFFS ARGUE THAT THE DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO MEET ITS OWN FLOOD AND SPILL PROTECTION REGULATIONS ALONG WITH ITS PUBLIC TRUST DUTY TO PROVIDE A "FULL AND CAREFUL" ANALYSIS OF ENVIRONMENTAL IMPACTS AND "ACTIVE AND AFFIRMATIVE PROTECTION" FOR THE RIGHTS OF THE PUBLIC.

LA. R.S. 49:964(A) ALLOWS THE PLAINTIFFS THE RIGHT TO CHALLENGE THE FINAL DECISION OF DEQ. IT PROVIDES THAT A REVIEWING COURT MAY REVERSE OR MODIFY AN AGENCY DECISION IF SUBSTANTIAL RIGHTS OF THE APPELLANT HAVE BEEN PREJUDICED BECAUSE THE ADMINISTRATIVE DECISION IS EITHER 1) IN VIOLATION OF A CONSTITUTIONAL OR STATUTORY PROVISIONS 2) MADE UPON UNLAWFUL PROCEDURE 3) ARBITRARY OR CAPRICIOUS OR 4) NOT SUPPORTED AND SUSTAINABLE BY A PREPONDERANCE OF THE EVIDENCE AS DETERMINED BY THE REVIEWING COURT. THE COURT HAS THE AUTHORITY TO CONFIRM, REVERSE OR MODIFY THE LDEQ'S DECISION AS A MATTER OF FACT OF LAW OR TO REMAND IT BACK TO DNR.

UNDER DNR'S REGULATIONS AN E&P WASTE TRANSFER STATION "MAY NOT

BE LOCATED" IN A FLOOD ZONE "UNLESS ADEQUATE LEVEES ARE CONSTRUCTED TO AT LEAST ONE FOOT ABOVE THE 100-YEAR FLOOD ELEVATION . . . AND ABLE TO WITHSTAND THE VELOCITY OF THE 100 YEAR FLOOD." (LAC 43.XIX.507.A.5)

THE COURT NOTES THAT ITS REVIEW OF THE RECORD SHOWS THAT BOTH THE EXISTING TRANSFER STATION AND THE PROPOSED TRANSFER STATION ARE LOCATED IN A RURAL AREA OF ST. MARTIN PARISH. HOWEVER, THE CURRENT EXISTING STATION IS ON A MUCH WIDER HIGHWAY IN AN INDUSTRIAL AREA. THE NEW STATION WOULD BE LOCATED IN A RESIDENTIALLY ZONED AREA OF A NARROWER HIGHWAY KNOWN AS THE LEVEE HIGHWAY. NUMEROUS HOMES AND DRIVEWAYS ARE LOCATED WITHIN ONE MILE OF THE PROPOSED TRANSFER STATION ALONG WITH A PUBLIC BOAT LAUNCH THAT GIVES ACCESS TO THE ATCHAFALAYA BASIN. THE CLOSEST HOME IS 700 FEET AWAY. IT IS UNDISPUTED THAT THE PROPOSED LOCATION IS IN A FLOOD ZONE WHERE THE 100 YEAR FLOOD ELEVATION IS 14.2 FEET.

DNR REGULATION LAC 43. XIX.507.1.5, CITED ABOVE, SETS FORTH THE REQUIREMENT FOR ADEQUATE LEVEES WITH REGARD TO THE TO THE 100 YEAR FLOOD ELEVATION. IT REQUIRES THAT THE LEVEES ARE ABLE TO WITHSTAND THE VELOCITY OF THE 100 YEAR FLOOD. PLAINTIFFS ARGUE THAT THE RECORD CONTAINS NO INFORMATION AS TO WHETHER THE CONTAINMENT WALLS AROUND THE STORAGE TANKS WOULD ACCOMPLISH THIS. THERE IS NO DOCUMENTATION IN THE RECORD AS TO WHAT THE VELOCITY OF SUCH A FLOOD WOULD BE OR HOW THICK THE WALLS WOULD HAVE TO BE TO WITHSTAND IT. IN RESPONSE TO THIS, DNR ARGUES THAT IT CANNOT BE DETERMINED THAT THIS REQUIREMENT IS MET UNTIL AFTER THE CONSTRUCTION IS COMPLETED. HOWEVER, AS NOTED BY PLAINTIFFS, THE 2017 ORDER STATES THAT THE PERMIT APPLICATION PROVIDES FOR ADEQUATE RETAINING WALLS AROUND ALL THE STORAGE TANKS TO PROVIDE SUFFICIENT CAPACITY TO RETAIN THE CONTENTS OF EACH STORAGE TANK. THE PERMIT DOES NOT STATE THAT THIS CANNOT BE DETERMINED UNTIL AFTER THE CONSTRUCTION IS COMPLETED.

SECTION 509 FURTHER PROVIDES THAT COMMERCIAL TRANSFER STATIONS SHALL BE DESIGNED AND CONSTRUCTED IN A MANNER THAT IT IS PROTECTIVE

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OF PUBLIC HEALTH, SAFETY, WELFARE OR THE ENVIRONMENT. PLAINTIFFS NOTE THAT FAS TRUCKS WOULD BE FORCED TO TRAVEL THROUGH THIS RESIDENTIAL AREA DAILY WHERE THERE ARE PEDESTRIANS, DRIVEWAYS AND SCHOOL BUS STOPS IN ADDITION TO VEHICLES TRAVELING TO THE PUBLIC BOAT LAUNCH. IT NOTES THAT THE POTENTIAL FOR ACCIDENTS INVOLVING TRUCKS CARRYING HAZARDOUS WASTE IS GREAT. THUS, IT CLAIMS THAT DNR FAILED TO MEET ITS PUBLIC TRUST DUTY WHEN IT FAILED TO GIVE "FULL AND CAREFUL" CONSIDERATION TO THE ENVIRONMENTAL, SOCIAL AND ECONOMIC IMPACTS OF THE RE-ROUTING OF THE TRUCKS TO THIS HIGHWAY.

THE COURT HAS REVIEWED THE ADMINISTRATIVE RECORD OF THIS CASE, ALONG WITH THE LAW AND ARGUMENT OF COUNSEL OF RECORD. IT HAS DETERMINED THAT THE REQUIREMENTS OF 507.A.5 WERE NOT DOCUMENTED BY FAS. THEREFORE, DNR FAILED TO REQUIRE COMPLIANCE WITH ITS FLOOD AND RELATED SPILL PROTECTIONS PRIOR TO THE ISSUANCE OF THE PERMIT. ADDITIONALLY, DNR FAILED TO MEET ITS PUBLIC TRUST DUTIES BY DISREGARDING THE ENVIRONMENTAL, SOCIAL AND ECONOMIC IMPACTS THAT THE FAS' TRUCKS WOULD HAVE ON THIS RESIDENTIAL AREA.

THEREFORE, PER LA. R.S. 30:12B, THIS COURT FINDS THAT DNR'S DECISION WAS ARBITRARY AND CAPRICIOUS, MADE UPON LAWFUL PROCEDURE AND BASED ON ERROR OF LAW.

JUDGMENT TO BE SIGNED ACCORDINGLY.

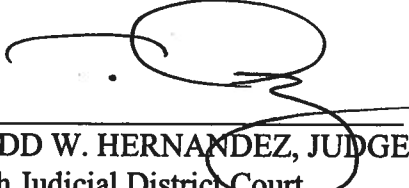
SIGNED THIS 31ST DAY OF JULY, 2018

I hereby certify that on this day a copy of the written reasons for Judgment was mailed by me, with sufficient postage affixed to.

Done and signed on

July 31 2018
Wendy White
Deputy Clerk of Court

Elizabeth DeCaderon, Jonathan Rice


TODD W. HERNANDEZ, JUDGE
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

FILED
July 31 2018
Wendy White
DEPUTY CLERK OF COURT