FIRST CIRCUIT
COURT OF APPEAL
STATE OF LOUISIANA

Civil Case No. 2002/CA/2377

JUANITA STEWART AND
LOUISIANA ENVIRONMENTAL ACTION NETWORK
V.
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

ON APPEAL FROM
THE NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE

THE HONORABLE JUDGE KELLY PRESIDING
CASE NUMBER 488,025, DIVISION "F"

ORIGINAL APPELLATE BRIEF ON BEHALF OF APPELLANTS, JUANITA STEWART AND LOUISIANA ENVIRONMENTAL ACTION NETWORK

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LIST OF ACRONYMS

CAA	Clean Air Act
DCR	District Court Record
LDEQ	Louisiana Department of Environmental Quality
ERC	Emission Reduction Credit
EPA	Environmental Protection Agency
LAC	Louisiana Administrative Code
LEAN	Louisiana Environmental Action Network
SIP	State Implementation Plan
SEP	Supplemental Environmental Project
VOCs	Volatile Organic Compounds

JURISDICTION

This Court has jurisdiction to review the final decisions of the Nineteenth Judicial District Court pursuant to La. C.C.P. Art. 2083 and La. R.S. 30:2050.31.

STATEMENT OF CASE

On June 27, 2001, the Louisiana Department of Environmental Quality ("LDEQ") published public notice (DCR Vol. 1, p. 191)[1] of its intent to grant a modification to Georgia-Pacific Corporation's existing State Air Pollutants Emission Operating Permit ("State permit").[2] The State permit authorizes emission of air pollutants from Georgia-Pacific's Port Hudson Facility in Zachary, East Baton Rouge Parish. LDEQ's proposal was to legalize Georgia-Pacific's emissions of Volatile Organic Compounds ("VOCs") at levels exceeding Georgia-Pacific's prior permit limit by more than two thousand percent. Thus, LDEQ proposed to increase Georgia-Pacific's emissions limit from 102.8 to 2,368.94 tons per year -- an increase of 2,266.14 tons per year. (DCR Vol. 1, p. 191).

VOC pollution is a precursor to ozone – an air pollutant that is regulated because of its serious impacts on public health and welfare. Indeed, "[i]nhaling even low levels of ozone can trigger a variety of health problems including chest pains, coughing, nausea, throat irritation, and congestion. It also can worsen bronchitis and asthma. Exposure to ozone can also reduce lung capacity in healthy adults." 66 Fed. Reg. 36,913, 36,914 (July 16, 2001). The emissions at issue are in an area that has *never* attained the minimum health protection standard for ozone pollution and, in fact, has missed the federal deadline for meeting that health protection standard. 66 Fed. Reg. 23,646 (May 9, 2001).

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[1] The District Court Record is cited as "DCR."

[2] State permits are issued under a State Implementation Program ("SIP") approved by the U.S. Environmental Protection agency ("EPA"). 42 C.F.R § 7410.

Juanita Stewart and the Louisiana Environmental Action Network[3] ("LEAN") submitted comments on LDEQ's June 27, 2001 proposal, alerting LDEQ to its failure to comply with state permitting requirements for this major modification. (DCR Vol. 1, pp. 194-97). Nonetheless, on or about August 20, 2001, LDEQ approved Georgia-Pacific's proposed permit modification (the "State permitting decision"). (DCR Vol. 1, p. 199). The State permitting decision legalized the additional 2,266.14 tons per year of previously illegal emissions. (DCR Vol. 1, p. 201). A settlement agreement between LDEQ and Georgia-Pacific, however, reduced the effect of that increase by about 40 percent. Thus, the final effect of LDEQ's August 2001 State permitting decision has been the addition of more than 1,300 excess tons of VOCs annually to already polluted air – all without any assessment of the environmental and public health effects of such an increase, in violation of Louisiana Constitution, art. IX §1.

On September 21, 2001, the Petitioners filed a timely Petition for Review in the Nineteenth Judicial District Court challenging the legality of the State permitting decision. (DCR Vol. 2, pp. 227-31). The Petitioners raised LDEQ's failure to carry out its responsibilities as a public trustee under Louisiana Constitution art. IX §1. (DCR Vol. 2, pp. 229-30). In *Save Ourselves, Inc. v. the Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984), the Louisiana Supreme Court held that as public trustee, LDEQ has a constitutional duty to analyze environmental impacts of agency decisions in "contested case[s] involving complex issues." *See also In the Matter of Rubicon, Inc.*, 95-0108 (La.

[3] LEAN is an incorporated, non-profit community organization that serves as an umbrella organization for environmental and citizen groups. LEAN was organized for the purpose of preserving the state's natural resources and protecting the organization's members and other residents of Louisiana from threats of pollution. LEAN members breathe air in and around East Baton Rouge Parish and are injured by the state's failure to attain national health-based standards. Ms. Juanita Stewart is a LEAN member and resident of East Baton Rouge Parish and is injured by the state's failure to attain national health-based standards.

App. 1 Cir. 2/14/96), 670 So. 2d 475, 489. In addition, the Petitioners raised LDEQ's failure to require Georgia-Pacific to submit an environmental analysis under La. Rev. Stat. § 30:2018(A). (DCR Vol. 2, pp. 229-30).

On October 16, 2001, the court granted Georgia-Pacific leave to intervene in the action as defendants. (DCR Vol. 2, p. 238).

On January 25, 2002, LDEQ issued to Georgia-Pacific a consolidated federal air emission permit ("Part 70 permit") under Title V of the Clean Air Act, 42 U.S.C. § 7661. (DCR Vol. 2, p. 339). Part 70 permits are federally mandated and serve to gather all applicable federally required air emission limitations, work practice standards, monitoring, record keeping, and reporting requirements for a facility into one document. 42 U.S.C. § 7661. The Petitioners filed an administrative Clean Air Act Petition with EPA pursuant to 42 U.S.C. § 7661d(b)(2), asking EPA to veto the January 25, 2001 Part 70 permit as failing to meet minimum federal Clean Air Act standards. That Clean Air Act Petition is currently pending before EPA. Subsequently, Georgia-Pacific moved the Nineteenth Judicial District Court to dismiss the Petition for Review, arguing that the Part 70 permit rendered the case moot. (DCR Vol. 2, pp. 281-82.) Georgia-Pacific argued erroneously that the Part 70 permit superseded and voided the State permitting decision. (DCR Vol. 2, pp. 286-91).

ACTION OF THE TRIAL COURT

On April 18, 2002, the Nineteenth Judicial District Court granted Georgia-Pacific's Motion to Dismiss and dismissed the Petition for Review as moot. (DCR Vol. 3, p. 596). On May 3, 2002, the Petitioners filed a Motion for a New Trial, (DCR Vol. 3 p. 603) and a Memorandum in Support. (DCR Vol. 3, pp. 607-32). On June 19, 2002, the Nineteenth Judicial District Court denied the Petitioners' Motion for a New Trial. (DCR Vol. 3, pp. 649-50).

ASSIGNMENT OF ERROR

The State permitting decision established new emission limits for Georgia-Pacific's Zachary, Louisiana facility, thereby legalizing an increase of 2,266.14 tons per year of VOCs in an area that does not meet federal health protection standards for ozone. The State permitting decision still has practical effects on the Petitioners because it results in an emissions increase of more than 1,300 tons of VOCs per year. Further, based on the language and purpose of the Clean Air Act, Part 70 permits do not supersede state permits. Finally, the Georgia-Pacific's Part 70 permit is still in play legally. If EPA grants a pending petition to veto that Part 70 permit under 42 U.S.C. § 7661d(b), only the State permit will remain in effect. Therefore, the trial court erred by finding that this case is moot.

ISSUES FOR REVIEW

Issue One: Whether the Nineteenth Judicial District Court erred in finding that the Part 70 permit, issued about five months after the State permit, rendered the Petitioners' challenge to the State permitting decision moot when the disputed decision legalized emissions that continue to threaten the Petitioners' health and welfare. *Louisiana Envtl. Action Network v. Louisiana Dep't of Envtl. Quality,* 488,025 (La. Nineteenth Jud. Dist. 4/18/02), Transcript of Oral Reasons for Judgment at 2 & 3 (DCR Vol. 3, pp. 599-600).

Issue Two: Whether the Nineteenth Judicial District Court erred in finding that the Part 70 permit superceded the State permitting decision when EPA has repeatedly clarified that Part 70 permits do not supercede state permitting decisions but simply incorporate emissions limits from those decisions. *Louisiana Envtl. Action Network v. Louisiana Dep't of Envtl. Quality,* 488,025 (La. Nineteenth Jud.

Dist. 4/18/02), Transcript of Oral Reasons for Judgment at 3. (DCR Vol. 3, p. 600)).

Issue Three: Whether the Nineteenth Judicial District Court erred in basing its ruling on speculation about whether the Petitioners' Clean Air Act Petition to EPA, pursuant to 42 U.S.C. § 7661d(b)(2), would persuade EPA to veto Georgia-Pacific's Part 70 permit. *Louisiana Envtl. Action Network v. Louisiana Dep't of Envtl. Quality,* 488,025 (La. Nineteenth Jud. Dist. 4/18/02, Transcript of Oral Reasons for Judgment at 3 (DCR Vol. 3, p. 600).

ARGUMENT

SUMMARY

On September 21, 2001, Juanita Stewart and LEAN filed suit against LDEQ, challenging LDEQ's August 2001 State permitting decision to legalize Georgia-Pacific's annual release of over 2000% more VOC emissions than allowed under Georgia-Pacific's prior permit. (DCR Vol. 2, pp. 227-31). LDEQ had issued its decision without the analyses required under the Louisiana Constitution and by statute. Despite LDEQ's clear violations of law, the Nineteenth Judicial District Court dismissed the Petitioners' action as moot because LDEQ issued a Part 70 permit to Georgia-Pacific about five months later, in January 2002. (DCR Vol. 3, pp. 599-600). The Nineteenth Judicial District Court made legal and factual errors in dismissing the Petitioners' case on the grounds of mootness.

An issue is only "moot" when a judgment or decree on that issue has been "deprived of practical significance" or "made abstract or purely academic." *Perschall v. State,* 96-0322 (La.7/1/97), 697 So. 2d 240, *In re Natural Resources Recovery, Inc.*, 98-2917 p. 5 (La. App. 1 Cir. 2/18/00) 752 So. 2d 369, 372, *writ denied*, 00-0806 (La. 5/26/00). The doctrine of mootness reflects the fact that a

"justiciable controversy" must remain at all times during the adjudication of a case. *Cat's Meow, Inc. v. City of New Orleans Through Dept. of Finance,* 1998-0601, 720 So. 2d 1186 (La. 1998). A "justiciable controversy" is "an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character." *Id.* at 1193.

This action is a "justiciable controversy" because the Petitioners' challenge to the State permitting decision is "an existing actual and substantial dispute." The State permitting decision is *the* final agency action by which LDEQ legalized an increase of more than 2,200 tons per year of VOC emissions (later reduced to a still substantial increase of more than 1,300 tons per year) without any analysis of the environmental effects of that increase. The increase occurs in an area that is already in "serious non-attainment" of federally mandated health protection standards for ozone in ambient air.[4] The requisite personal interest exists with each breath that the Petitioners take. The harm of a major increase in VOC emissions has not been alleviated because LDEQ's illegal decision has not been set aside – nor did LDEQ make that decision a second time. Instead, along with other prior LDEQ decisions, the State permitting decision was merely incorporated into a second, federally mandated document -- the Part 70 permit. Issuance of the Part 70 permit did not include an environmental and public health assessment of LDEQ's decision to legalize Georgia-Pacific' excess emissions, since that decision had already been made (without the required assessments) about five months earlier, in the State permitting decision. It is clear, therefore, that the State permitting decision, not the Part 70 permit, resulted in the Petitioners' injury.

[4] EPA has declared East Baton Rouge Parish a "serious non-attainment area" for ozone. http://www.deq.state.la.us/evaluation/ozone/statuso3.htm.

The Nineteenth Judicial District Court misinterpreted the relationship between the State permitting decision and the subsequent Part 70 permit. Supersession of the State permitting decision is inconsistent with the structure and purpose of the Clean Air Act because a Part 70 permit incorporates the requirements from other permitting decisions, but does not create new obligations, with limited exceptions not applicable here.[5] Therefore, the State permitting decision has not been superseded and is still of practical significance. This reading of the Clean Air Act has been repeatedly endorsed by EPA, the agency that Congress charged with implementing the statute.[6]

I. THE NINETEENTH JUDICIAL DISTRICT COURT ERRED IN FINDING THAT THIS CASE IS MOOT WHEN THE DISPUTED PERMITTING DECISION CONTINUES TO THREATEN THE PETITIONERS' HEALTH AND WELFARE.

LDEQ's duty of compliance with its constitutional and statutory duties is neither an abstract nor an academic issue. Moreover, the dispute at issue here falls squarely within an exception to the mootness doctrine. This exception applies when secondary or "collateral" injury survives after the plaintiff's primary injury has been resolved. *See Sibron v. New York*, 392 U.S. 40, 53, 88 S. Ct. 1889, 1897 (1968). In *Cat's Meow*, the Louisiana Supreme Court recognized that courts cannot, consistent with the interests of justice, allow every change that results in "technical mootness" to deprive them of jurisdiction. *Cat's Meow*, 720 So. 2d at 1194. To the contrary: "the court should consider the nature of the case and

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[5] For example, Part 70 permits must have sufficient monitoring to ensure compliance and therefore may include new monitoring requirements. 40 C.F.R. § 70.6(c)(1).

[6] Letter from John S. Seitz, Director, Office of Air Quality Planning & Standards, Environmental Protection Agency, to Robert Hodanabosi & Charles Lagges, State and Territorial Air Pollution Program Administrators/ Association of Local Air Pollution Control Officials 4 (May 20, 1999), *at* http://www.epa.gov/ttn/oarpg/t5/memoranda/hodan7.pdf, [hereinafter "EPA Interpretation"]; *see also* approval and promulgation of State Implementation

determine whether the curative changes leave unresolved collateral consequences." *Id.* Even if the State permit could be considered "technically moot," which the Petitioners do not concede, that leaves unabated the Petitioner's "collateral" injury--the legalization of more than 1,300 extra tons per year of VOCs in an area that already violates health protection standards.

The Nineteenth Judicial District Court erred in finding the Petition for Review moot because it is the State permitting decision that legalized the increase in VOCs that continues to injure the Petitioners. The Part 70 permit merely incorporates LDEQ's prior decision. Until LDEQ issued the State permitting decision, Georgia-Pacific was entitled to emit only 102.8 tons per year of VOCs into the surrounding air. (DCR Vol. 1, p. 46). In actuality, Georgia-Pacific was ***illegally*** emitting about 2,200 additional tons per year of VOCs. (DCR Vol. 1, p. 215). Whether these emissions were known, or unknown, Georgia-Pacific was in serious violation of its State permit.

When LDEQ and Georgia-Pacific "discovered" these emissions, LDEQ modified Georgia-Pacific's permit and legalized 2,266.14 extra tons per year of VOC emissions – taking final agency action that changed the "baseline" from which further emission reductions or increases would be evaluated. Under state law, however, before making such a major decision LDEQ must review the environmental effects of the proposal. *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984). In *Save Ourselves,* the Louisiana Supreme Court interpreted the Louisiana Constitution, art. IX §1, to require public trustees, such as LDEQ, to carefully assess environmental impacts and determine whether adverse environmental impacts have been minimized or avoided as much as possible consistent with public welfare. *Id.*

Plans; Michigan, 64 Fed. Reg. 61046, 61048 (Nov. 9, 1999). (DCR Vol. 3, pp. 609-10).

In disregard of this constitutional duty, LDEQ issued the State permitting decision without an environmental analysis of the significant increase in allowable emissions. LDEQ also failed to require Georgia-Pacific to do an environmental assessment pursuant to La. R.S. 30:2018(A). Because neither of these mandatory environmental studies has ever been conducted, the public has had no opportunity to comment on the results.

The record reflects that a settlement agreement between Georgia-Pacific and LDEQ required Georgia-Pacific to reduce VOC emissions from its new baseline of 2,368.94 tons per year to 854 tons per year. (DCR Vol. 1, pp. 1-20). But next, the settlement agreement gave Georgia-Pacific the right to put almost half of the reduced tons of VOCs back into the air, by allowing Georgia-Pacific to claim "Emission Reduction Credits" for half of the reduction from the baseline of 2,368.94 (set in the State permitting decision) to 854 tons. (DCR Vol. 1, pp. 8, 201). Emission Reduction Credits are used as regulatory "offsets" that justify emission increases.[7] The ultimate consequence of LDEQ's August 2001 State permitting decision, in conjunction with the settlement agreement, was therefore to increase Georgia-Pacific's right to release VOCs from 102.8 tons per year to more than 1,300 tons per year – all in an area that already violates health protection standards and all without constitutionally mandated analyses. (DCR Vol. 1 p. 8.)

The "more than 1,300 ton" figure above accounts for Georgia Pacific's emission limit increase from 102.8 to 854 tons per year (which LDEQ treated as a "reduction" from the baseline of 2,368.94 tons per year established by the August 2001 State permitting decision), as well as Georgia Pacific's emission reduction credits for more than 700 tons per year of VOCs (based on that same so-called "reduction") – which credits were used to offset new pollution according to a 1.2 to

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[7] La. Admin. Code 33:III; Chapter 6, Regulations on Control of Emissions Through the Use of Emission Reduction Credits Banking.

1 ratio.[8] The increase of more than 1,300 tons per year depends entirely on LDEQ's August 2001 decision, which legalized Georgia Pacific's excess emissions, changing Georgia Pacific's baseline emissions from 102.8 to 2,368.94 tons per year. Thus, it was LDEQ's State permitting decision that caused the Petitioners' ongoing injury.

If LDEQ had fulfilled its responsibilities under the Louisiana Constitution and studied the environmental effects and analyzed alternatives, Georgia-Pacific should not have been allowed to increase its baseline emissions of VOCs from 102.8 to 2,368.94 tons per year. Emission control technologies to reduce VOC emissions were clearly available at the time LDEQ made the State permitting decision, since Georgia-Pacific reduced its emissions within months of the modification. However, LDEQ conducted no analysis and simply blessed the increased emissions without regard for its constitutional duties as public trustee. The resulting increase in allowable VOC emissions still threatens the Petitioners' health and welfare. Thus, the trial court should have addressed the merits of the Petitioners' claims and required LDEQ to comply with the law.

II. THE NINETEENTH JUDICIAL DISTRICT COURT ERRED IN FINDING THAT THE PART 70 PERMIT SUPERSEDES THE STATE PERMIT.

A. The Trial Court's Legal Conclusion that Part 70 Permits Supersede State Permits is Inconsistent with the Federal Clean Air Act.

The Nineteenth Judicial District Court ruled erroneously that "any judicial review of the August 2001 state permit has been rendered moot by it being rolled into or superseded by the Part 70 permit." (DCR Vol. 3, p. 600). This Nineteenth

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[8] The increase from 102.8 to 854 tons per year adds an extra 751.2 tons per year to the air. In addition, Georgia Pacific received emission reduction credits for half of its "reduction" from the new baseline of 2,368.94 to 854 (1,514.94 divided by 2) -- 757.47. Due to the 1.2 to 1 ratio, this added 631.22 extra tons per year of VOCs to the air. The sum of 631.22 and 751.2 is 1,382.42 tons per year – "more than 1,300 tons."

Judicial District Court's finding is based on a faulty interpretation of the Clean Air Act. Based on the structure of the Act, it is clear that Part 70 permits do not supersede prior permitting decisions. *See* EPA Interpretation, *supra* note 6.

Part 70 is designed to incorporate all of the requirements applicable to a facility into one permit – not to re-do all of those prior decisions.[9] In this case, LDEQ issued Georgia-Pacific a modified state operating permit in August 2001. About five months later, LDEQ issued a Part 70 permit. This practice would have made no sense if a Part 70 permit and a state operating permit were the same decision. If so, LDEQ would have issued only one permitting decision, instead of separately using its State permitting decision to create a new baseline emissions limit for incorporation into the Part 70 permit. Indeed, under the Clean Air Act's legislative scheme, state permits create the limitations and conditions incorporated into Part 70 permits.

LDEQ's decision to adopt a two stage process – first issuing an independent State permitting decision and then following up about five months later with a Part 70 permit, is consistent with EPA's interpretation of the Clean Air Act.[10] EPA has explained that "[state] permits may ***not*** be voided, superseded, or otherwise replaced by permits issued pursuant to Title V of the CAA Amendments of 1990 [*i.e.*, Part 70 permits]." EPA Interpretation, *supra* note 6, at 7 (emphasis added). "[A]ll terms and conditions of [State] permits must be independently enforceable

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[9] *See* Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) ("While title V generally does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be followed, especially with respect to determining compliance with underlying applicable requirements. The program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements of the Act. Currently, a source's obligations under the Act (ranging from emissions limits to monitoring, recordkeeping, and reporting requirements) are, in many cases, scattered among numerous provisions of the SIP or Federal regulations.")

[10] LDEQ took no position and submitted no briefing supporting Georgia-Pacific's flawed interpretation of the Clean Air Act.

under Title I of the CAA.... While [Part 70] permits must incorporate and record permit terms and conditions from [State] permits, [Part 70 permits] may ***not*** eliminate their independent enforceability and existence." *Id.* (emphasis added). While Title V permits may "state they 'subsume' or 'incorporate' SIP-approved permit terms and conditions..." such a statement "does not supersede, void, replace, or otherwise eliminate their independent legal existence. Regardless of terminology, to the extent that [Part 70] permits are used to accomplish the legal result of suppression, EPA believes that such use is improper." *Id.* The reasons EPA stated for its interpretation are fully applicable in this case.

First, SIP-approved permits "must remain in effect because they are the legal mechanism through which underlying requirements [e.g. LDEQ's legalization of Georgia-Pacific's previously illegal emissions]... become applicable, and remain applicable, to individual sources." *Id.*

Second, the "supersession of [State] permits poses additional problems that EPA believes are inconsistent with the structure and purpose of Title V and Title I of the Act." *Id.* State permits "impose continual operational requirements and restrictions upon a source's air pollution activities and accordingly, may not expire so long as the source operates, [Part 70] permits could expire or become unnecessary." *Id.* If the Part 70 permit "supersedes the source's [State] permit and then subsequently expires, neither the superseded [State] permit nor the expired [Part 70] permit would provide the legal authority to enforce the site-specific operational requirements and restrictions imposed upon the source...."*Id.*

Additionally, if Part 70 permits superseded SIP-approved permits, then EPA would not be able to reopen Part 70 permits or make corrections to such permits that failed to include all SIP-approved permit terms, or to make corrections upon permit renewal. *Id.*

B. Georgia-Pacific's Part 70 Permit is Still in Play Legally.

The trial court committed manifest error by basing its ruling on speculation that "there is no way the entirety of the Part 70 permit would be extinguished and declared a nullity [by EPA]." *Louisiana Envtl. Action Network v. Louisiana Dep't of Envtl. Quality*, 488,025 (La. 19th Jud. Dist. 4/18/02), Transcript of Oral Reasons for Judgment at 3 (DCR Vol. 3, p. 600). The Petitioners' Clean Air Act Petition to EPA (pursuant to 42 U.S.C. § 7661d(b)(2)) about the Part 70 permit requested an EPA veto in part because the permit lacked a Statement of Basis, which is a fundamental requirement of the Clean Air Act. *See* Public Comment Response Summary, Permit PSD-LA-528(M-1), Part 70 Operating Permit 0840-00010-VO (included in the Part 70 Operating Permit Administrative Record submitted by Georgia-Pacific in support of its Motion to Dismiss) at 8-9 (DCR. Vol. 3, pp. 584-85). This failure taints the public comment process underlying the permit as a whole. The trial court's factual finding was nothing more than unjustifiable speculation about EPA's response to the Petitioners' pending Clean Air Act Petition. To deny LEAN and Ms. Stewart a day in court based on an attempt at predicting future EPA action is manifest error.

EPA has the authority to veto Part 70 permits, 42 U.S.C. § 7661d(b), and it has done so in the past. For example, on August 12, 1999, EPA published in the *Federal Register* its veto of a Part 70 permit for Entergy Louisiana Inc.'s facility located in Monroe, Louisiana.[11] EPA determined that the Part 70 permit failed to assure compliance with the applicable requirements and objected to the issuance of the permit unless LDEQ revised the permit in accordance with EPA's Order.[12]

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[11] 64 Fed. Reg. 44,009 (Aug. 12, 1999); EPA's full decision is at http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions/entergy_decision1999.pdf.

[12] *Id.*

Because of the substantial flaws in the Part 70 permit, LDEQ could not and, as far as the undersigned counsel can determine, did not issue the permit.

If Part 70 permits superseded state operating permits, then facilities would be unable to operate when EPA exercised its authority and vetoed a Part 70 permit. EPA's veto authority, given to EPA by Congress, necessitates the conclusion that Part 70 permits do not supersede state operating permits. This is a programmatic question and the answer does not turn on whether EPA will veto any particular Part 70 permit. Whether Part 70 permits supersede state operating permits is a matter of law and should not be determined on a case-by-case basis as to EPA's eventual action.

Because the trial court's factual speculation is manifestly erroneous, it must be reversed.

CONCLUSION

LDEQ's August 2001 State permitting decision was final agency action that has continuing impacts on the health and welfare of residents of East Baton Rouge Parish, resulting in ongoing, extra emissions of more than 1,300 tons of VOCs per year in an area that already violates health protection standards. Juanita Stewart and LEAN timely challenged the State permitting decision based on LDEQ's failure to perform a constitutionally required analysis that *still* has never been performed. The underlying State permit is not superceded and, even if it were, the State permitting decision created "collateral consequences" by changing Georgia Pacific's baseline emissions limit used to justify emission reduction credits and, thus, to put extra VOCs into the air, preventing this case from being moot under *Cat's Meow, Inc. v. City of New Orleans Through Dept. of Finance,* 1998-0601, 720 So. 2d 1186, 1194 (La. 1998). For all these reasons, the Petition for Review is not moot. Juanita Stewart and LEAN respectfully request that this Court reverse

the trial court's dismissal of the Petition for Review and remand this case to the Nineteenth Judicial District Court for a decision on the merits.

Respectfully Submitted this
26th day of December, 2002,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served by mailing the same by U.S. mail, postage paid, and properly addressed on December 26, 2002 to:

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