SUPREME COURT

STATE OF LOUISIANA

No. 2009-CC-314

LOUISIANA ENVIRONMENTAL ACTION NETWORK, ET AL.

V.

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

ON SUPERVISORY WRIT APPLICATION FOR REVIEW OF DECISION OF THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL UPHOLDING DECISION OF THE 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, HONORABLE TIMOTHY KELLEY, DISTRICT JUDGE, DIVISION F.
No. 560,711

A CIVIL PROCEEDING

OPPOSITION BRIEF OF RESPONDENTS, LOUISIANA ENVIRONMENTAL ACTION NETWORK, CITIZENS FOR A STRONG NEW ORLEANS EAST, GREEN ZONE TASK FORCE, AND FATHER VAN LUKENGUYEN IN RESPONSE TO WRIT APPLICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Constitutional Provisions

State Statutes and Regulations

State Cases

STATEMENT OF THE CASE

Petitioner Waste Management of Louisiana, L.L.C. ("Waste Management") challenges the Louisiana First Circuit Court of Appeal's decision which—by denying a Waste Management writ application—upholds the fundamental principle of Louisiana law that citizens "may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property."[1] Waste Management's writ application challenged the 19th Judicial District Court's rejection of Waste Management's assertion that Louisiana courts have no jurisdiction to hear challenges by aggrieved members of the public to formal administrative findings that, as a matter of law, are generally "conclusive with respect to water quality considerations" that underlie the U.S. Army Corps of Engineers' issuance of a permit for destruction of the state's wetlands. 33 C.F.R. § 320.4(d). The formal administrative finding at issue here is a water quality certification that the Louisiana Department of Environmental Quality (LDEQ) granted to Waste Management after notice and comment rulemaking. This certification is an integral part of an ongoing permitting process that LDEQ and the U.S. Army Corps of Engineers (the "Corps") are conducting jointly for Waste Management's now closed Chef Menteur hurricane debris landfill (hereinafter "Chef Menteur" or "Chef landfill").

STATEMENT OF FACTS

Prior to its 2006 authorization for use as a construction and demolition debris (C&D) landfill, the Chef Menteur site was an unlined pit, often filled with water, that sat adjacent to sensitive wetland habitat in the Bayou Sauvage National Wildlife Refuge (Pet. ¶1). After Hurricane Katrina, the LDEQ authorized Waste Management to dump hurricane debris waste from flooded homes in an unlined landfill it constructed at Chef Menteur (Pet. ¶¶2, 42). Although LDEQ designated Chef Menteur as a C&D landfill, it authorized Waste Management to accept wastes that are specifically excluded from such landfills under state regulations, such as furniture, carpet, painted or treated lumber, and

[1] Ralph v. City of New Orleans, 2006-0153 (La. 5/5/06), 928 So.2d 537, 538 (emphasis added) (quoting Stewart v. Stanley, 199 La. 146, 159, 5 So.2d 531, 535 (La. 1941).

"household hazardous waste...where segregation is not practicable" (Pet. ¶¶ 16-19).[2] However, as a C&D landfill, the Chef Menteur landfill does not have the additional safeguards present in municipal solid waste landfills to protect public health and the environment surrounding the landfill, such as a liner, leachate-collection system, and groundwater monitoring system (Pet. ¶31). Several experts, both local and national, have cautioned that the materials contained in the Chef Menteur landfill pose serious risks to the environment, including risk of contamination of ground and surface waters, and risk to the health of the surrounding communities.

One expert, Dr. John Pardue, Director of the L.S.U. Louisiana Water Resources Research Institute, warned that the materials contained in the Chef landfill could discharge arsenic and other toxic pollutants into the groundwater system (Pet. ¶¶21, 22). Additionally, Dr. Paul Kemp, a sedimentary geologist and hydrologist from the L.S.U. School of the Coast and Environment, concluded that the Chef Menteur site has a relatively high potential for leachate transmissibility into groundwater (Pet. ¶32). Furthermore, the U.S. Fish and Wildlife Service, commenting on Waste Management's application for water quality certification and §404 permit warned: "Given the...age of many of the buildings to be demolished and deposited in the proposed landfill, we believe that the delivery of materials containing numerous environmental contaminants, such as lead-based paint, asbestos, creosote, arsenic-based wood treatment chemicals, various petroleum products, and a variety of pesticides and household cleaning chemicals would be unavoidable."[3] Further, "[p]lacement of such materials in an un-lined landfill, particularly within coastal wetlands, could potentially result in leaching and resulting persistent contamination of ground water [and] surface water..."[4]

Rather than consider these warnings, and without so much as a reply to the issues they raised, LDEQ issued Waste Management a water quality certification, declaring that the discharges from the Chef Menteur landfill would not violate state water quality standards at any time, now or in the future. (Pet. ¶¶54-56, 69). This directly contradicts not only expert opinion, but also the results of water sampling conducted by the LDEQ.

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[2] LDEQ, Fifth Amended Declaration of Emergency and Administrative Order § 2(d) at p.7 (Mar. 31, 2006), http://www.deq.louisiana.gov/portal/portals/0/news/pdf/fifthammendeddeclarationofemergencyandadministrativeorder331.pdf.

[3] Letter of U.S. Fish and Wildlife Service to U.S. Army Corps of Engineers (May 19, 2006)(emphasis added)(Admin. Rec. at 0174-0177); *see also* Pet ¶46.

[4] *Id.*

The LDEQ conducted water quality sampling at Chef Menteur on September 24, 2007, ***one day*** before issuing the water quality certification. Rather than wait for the sampling results, which were directly relevant to the water quality certification before it, the LDEQ sent these samples to the laboratory for analysis three days ***after*** issuing the certification. The LDEQ received the results on October 11, 2007, which revealed that pollutants in the wastewater at Chef Menteur exceeded water quality standards in all sampled locations, exceeding the legal limits by as much as four times for Total Suspended Solids and three times the limits for Total Organic Carbon.[5] Worse, Waste Management's split samples from the same date showed that arsenic is already beginning to appear in landfill wastewater.[6] The LDEQ had therefore issued the water quality certification assuring that no water quality standards would be violated at the Chef Menteur site, when its own sampling taken the day before revealed multiple exceedances and the beginnings of arsenic contamination.

Additionally, in direct violation of one of the 1st Circuit's directives in In re Rubicon, 95-0108 (La. App. 1 Cir. 2/14/96); 670 So.2d 475, the LDEQ did not respond to a ***single one*** of the Respondents' numerous comments on this application, including comments referencing and attaching the expert opinions discussed above (Pet. ¶62). To date, LDEQ has never directly refuted or addressed the expert opinions of Dr. Pardue, Dr. Kemp, or the U.S. Fish & Wildlife Service in any proceeding related to this landfill.

Respondents live, work, recreate, and garden in the areas near the Chef Menteur site (Pet. ¶¶7-10). LDEQ's erroneous conclusion that the Chef Menteur construction, operation and closure will not violate state water quality standards directly affects Respondents because it approves activities that pose a serious risk of contamination of these waters (Pet. ¶¶11, 59, 61). Respondents are also aggrieved by LDEQ's failure in its decision to respond to any of their comments and by its lack of a reasonable basis for declaring the landfill to be unconditionally safe for public health and surrounding waterways (Pet. ¶¶62, 67-69).

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[5] LDEQ report available on LDEQ Electronic Data Management System, Document Number 36483115, dated 9-24-07 *available at:* http://edms.deq.louisiana.gov/app/doc/fndocdownload.aspx?plopt=niodx&doc=36483115.

[6] Excerpt of Waste Management report available on LDEQ Electronic Data Management System.

PROCEDURAL HISTORY

State and federal law require that, before any activity is allowed in a wetland area, or a "water of the United States," which will result in the discharge of dredged or fill material into navigable waters, the applicant must apply for and obtain both a water quality certification from the state environmental authority (under §401 of the Clean Water Act) and a federal permit from the U.S. Army Corps of Engineers ("Corps") (under §404 of the Clean Water Act).[7] A state certification is the only safeguard for ensuring that "dredge and fill" permits do not cause dangerous water pollution. See 33 C.F.R. § 320.4(d) (state certifications are generally "conclusive with respect to water quality considerations").[8] Moreover, the requirement for state-issued water quality certifications is the State of Louisiana's primary opportunity to protect its wetlands, which are fragile and essential state resources. Therefore, judicial review of such state certification is Louisiana residents' only mechanism for ensuring that their property and health is not put at risk by U.S. Army Corps of Engineers' issuance of "dredge and fill" permits on the basis of arbitrary or capricious state water quality certifications.

In the case of the Chef Menteur landfill, both the LDEQ and the Corps allowed Waste Management to construct and begin operating the landfill without first obtaining a §401/404 permit (Pet. ¶¶2, 41, 43). Initially, in April 2006 when the landfill began operations, the LDEQ issued a letter waiving this requirement, though it made clear that Waste Management would eventually have to apply for and obtain this authorization. (Pet. ¶41).

Waste Management did not apply for the §401/404 permit until the City of New Orleans had, by issuing a cease and desist order, required the landfill to stop accepting waste (Pet. ¶48). The LDEQ and the Corps publicly noticed the application on February 9, 2007, about six months after the site had stopped accepting waste (Pet. ¶49). LDEQ accepted comments on the proposed certification until March 11, 2007. LDEQ issued its §401 certification on September 24, 2007 (Pet. ¶54). To date, the Corps has yet to issue a

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[7] 33 U.S.C. §§1341(a)(1) and §1344(a), respectively.

[8] The state certifications are conclusive unless EPA, in its discretion, intervenes to "advise[ ] [the Corps] of other water quality aspects to be taken into consideration." 33 C.F.R. § 320.4(d)

§404 permit to Waste Management authorizing the construction, operation and closure of the landfill.

ISSUE PRESENTED

This Court should not exercise its discretionary jurisdiction to grant Waste Management's writ application because the case involves no significant unresolved issue of law warranting this Court's intervention nor does it represent an erroneous application of laws which would cause material injustice or affect the public interest. The Court of Appeal's and 19th Judicial District Court decisions that allow Respondents the right to appeal in this case are consistent with time-honored principles of Louisiana law, already confirmed by this Court in established jurisprudence, that the right of judicial review is presumed to exist and that such review is necessary to the validity of administrative proceedings under our legal system and traditions. Therefore, no significant issue of law exists for this Court to resolve.

Further, Judge Kelley correctly denied Waste Management's Exception of No Right of Action and correctly concluded that Louisiana law grants citizens the right to appeal an LDEQ grant of a water quality certification to an applicant. In sum, denial of Waste Management's writ application, rather than granting it, promotes justice and the public interest.

INTRODUCTION

In its writ application, Waste Management attempts to have this Court establish, for the first time in Louisiana, that affected citizens have no right to appeal an LDEQ grant of a water quality certification for a proposed project in jurisdictional wetlands. For at least 20 years, citizens have been allowed judicial review of water quality certifications, and courts have found merit in many of the challenges. To establish this extraordinary denial of judicial process, Waste Management must show an exception to a fundamental principle of Louisiana law. Specifically, Louisiana courts have consistently held that citizens, i.e., taxpayers, "may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property." Ralph v. City of New Orleans, 2006-0153 (La.

5/5/06), 928 So.2d 537, 538 (emphasis added) (quoting Stewart v. Stanley, 199 La. 146, 159, 5 So.2d 531, 535 (La. 1941).

Waste Management bases its argument for an extraordinary exception to courts' authority to review final agency action by touting so-called "clear" statutory language over legislative intent. In this case, however, there is no clear statutory language denying citizens the right to seek judicial review of final LDEQ decisions regarding water quality certifications. Instead, Waste Management attempts to cobble together an argument based on the "generally prevailing meaning" of the term "permit," which it derives in large part from LDEQ's regulatory definition of permit and an outdated dictionary definition. (Waste Management admits that the terms "permit" and "permit action" are not defined in the Louisiana Environmental Quality Act.) Thus, Waste Management's argument rests on the spurious proposition that the LDEQ, by regulation, has created an exception to the jurisdiction of Louisiana courts, but Waste Management nowhere establishes that the Legislature has purported to authorize LDEQ to restrict the traditional scope of the judiciary's jurisdiction. Cf. Whitman v. American Trucking Associations, 531 U.S. 457, 468 (2001) (requiring, as to fundamental issues, that a legislative "textual commitment [of authority] must be a clear one [because] Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes.").

However, even if Respondents did not have a right of action under the Environmental Quality Act, the trial court's denial of the Exception would still have been correct because the right of action clearly exists under the Louisiana Administrative Procedure Act's judicial review provisions. The LDEQ's issuance of the water quality certification is a "final decision or order in an adjudication proceeding" because the LDEQ has issued its final determination. This certification is the final step for the state as part of the federal Clean Water Act §401/404 permitting process.

Contrary to Waste Management's allegations, a water quality certification does authorize an activity that affects the Respondents' health, safety, and environmental interests because without it, Waste Management could not proceed. Waste Management must obtain a state water quality certification assuring that its activities will comply with all state water quality requirements prior to receiving a federal §404 permit under the

Clean Water Act. Sections 401 and 404 of the Clean Water Act set up a system whereby both state and federal authority is necessary before "dredge and fill" activities in waters of the United States can proceed. Louisiana citizens cannot protect their right to lawful analysis of water quality in the federal system alone, because the state certification is generally "conclusive with respect to water quality considerations." 33 C.F.R. § 320.4(d). Thus, the legal considerations for evaluating a state water quality certification are entirely different than those for issuing a federal §404 permit. This water quality certification represents necessary state involvement to ensure that state water quality standards are met by Waste Management's request to dredge and fill in waters of the United States, and this case is the only opportunity Respondents have for review of whether state law was violated by this significant determination. It is the LDEQ's constitutional responsibility, not the Corps,' to ensure that such actions will not violate water quality standards for the state, and this Court must ensure that LDEQ upholds this duty by allowing meaningful review of its decision. See Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984) (La. Const. art. IX, § 1 creates "a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.").

No Louisiana court has ever held that affected citizens have no right to appeal an LDEQ grant of a water quality certification, unconditional or conditional. To hold otherwise would mean that the LDEQ could act illegally when issuing a water quality certification, and know that its decision is insulated from review by the judiciary. There is no better way to ensure that water quality certifications issued by LDEQ become rubber stamps rather than considered, protective agency decisions. State law does not provide for this outcome, and Waste Management's writ should be denied.

ARGUMENT

I. EXISTING JURISPRUDENCE ALREADY ESTABLISHES CITIZENS' RIGHT TO JUDICIAL REVIEW OF AGENCY ACTIONS.

One of this Court's writ grant considerations is that "[a] court of appeal has decided, or sanctioned a lower court's decision of, a significant issue of law which has not been, but should be, resolved by this court." Rules of the Supreme Court of

Louisiana, Rule X, Section 1(a)(2). Waste Management identifies this consideration as one that weighs in favor of this Court granting its writ application.[9] However, this Court has repeatedly affirmed the established right under Louisiana law that entitles citizens to judicial review of challenged agency action. The Respondents' challenge to the water quality certification illegally issued by the LDEQ to Waste Management in this matter fits squarely under this Constitutional and jurisprudentially-established right. Therefore, this Court should not grant Waste Management's writ application on the basis that a significant issue of law needs to be resolved.

Furthermore, the right of citizens to challenge specifically an LDEQ grant of a water quality certification has been established by both the 19th Judicial District Court and by the 1st Circuit Court of Appeal in a number of cases. Therefore, when Waste Management, in its writ, seeks to have this Court declare that this right does not exist, it attempts to remove a right Louisiana citizens have had for over two decades. This Court need not, and should not, grant Waste Management's writ in order to close the courthouse doors to such a challenge and insulate LDEQ water quality certification decisions from judicial oversight.

A. This Court Has Firmly Established the Primacy of Citizens' Right to Challenge Illegal Agency Action.

This Court has unequivocally established the right of citizens to judicial review of agency action, and the "resolution" suggested by Waste Management with its writ application is to permanently remove that right in the area of citizen appeals of LDEQ water quality certifications. This writ grant consideration weighs in favor of denial of the application, thus allowing citizens to maintain this firmly-established right.

The Louisiana Constitution establishes the right of citizens to judicial process. Article 1, Section 22, of the Louisiana Constitution provides: "All courts shall be open, and every person shall have an adequate remedy by due process of law . . . ." This Court has stressed the importance of this provision and its primacy in addressing challenges to citizens' right to judicial review of agency action. In Bowen v. Doyal, 253 So. 2d 200 (La. 1971), involving a challenge to a citizen's right to judicial review of an agency decision, this Court stated: "[E]ven in the absence of [ ] statutory authority, the right of judicial review of administrative proceedings is presumed to exist. Generally, the

[9] Waste Management Writ Application at 1 (hereinafter "WM Writ").

availability of judicial review is necessary to the validity of such proceedings under our legal system and our traditions." *Id.* at 203. Later in that same decision, after citing the Constitutional provision, the Court continued:

> [W]ith the presumption that all administrative determinations are reviewable by the court and a conviction that judicial review may even be necessary in the face of legislative attempt to deny it, in the absence of constitutional restrictions we must not only favor but preserve the right of review. The mandate of Article 1, Section 6, is of overriding concern as we consider the matter before us, which on its face presents a legal dispute between an individual and an administrative body.

Bowen at 204.

More recently, in a case involving citizens' right to judicial review of an LDEQ decision in particular, this Court again decided in favor of judicial review. In In re American Waste and Pollution Control Co., 93-3163 (La. 9/15/94); 642 So. 2d 1258, this Court adopted an interpretation of ambiguous statutory language regarding "final decision or order" in the Environmental Quality Act's (EQA's) judicial review provision in favor of citizens. In rejecting American Waste's interpretation, this Court stated:

> This interpretation frustrates the legislative goal of authorizing aggrieved parties judicial review of agency abuses in [the existing EQA judicial review provision] and would deny citizens judicial review of environmental decisions which may have an immediate and sustained impact on their health and property. This Court has previously recognized that the legislature enacted laws to respect the right of private citizens to litigate environmental matters.

American Waste at 1265.

Stressing not only the broad nature of a determination as to subject matter jurisdiction but also the broad nature of citizens' right of action, this Court has previously held that a "taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties ***in any unauthorized mode which would... unjustly burden the taxpayer or his property***." Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board, 586 So.2d 1354, 1357 (La. 1991) (citing Stewart v. Stanley, 5 So. 2d 531 (La. 1941))(emphasis added).[10] The size of the interest at issue is of no consequence to a determination of one's entitlement to judicial review.[11] Also, in Robinson v. Ieyoub, 1997-2204 (La. App. 1 Cir. 12/28/98); 727 So.2d 579, the 1st Circuit upheld the right of taxpayers to obtain judicial review of

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[10] Waste Management's Exception was to Respondents' Right of Action, but the court considered it to also be a challenge to subject matter jurisdiction pursuant to a request of Waste Management counsel at oral argument. *See* WM Writ, Appendix B.

[11] *Id.* at 1357-1358; see also Meredith v. Ieyoub, 96-1110 (La. 9/9/97), 700 So.2d 478, 480 ("plaintiffs are afforded a right of action upon a mere showing of an interest, however small and indeterminable").

the grant of an ad valorem tax exemption by the Louisiana Board of Commerce and Industry despite the absence of a specific statutory right to judicial review. The court found that "the right to judicial scrutiny exists when there is a claim of a deprivation of a constitutionally protected right, an assertion that an agency exceeded constitutional authority, or an allegation that the action of an administrative agency exceeded its legislative grant of authority." *Id.* at p. 3, 727 So. 2d at 581. The court further held that "Our jurisprudence recognizes the right of a taxpayer to enjoin unlawful action by a public body." *Id.*

In the instant case, respondents live, work, recreate, and garden in the areas near the Chef Menteur site, and therefore have a valid interest in the quality of the water in and around the Chef site (Pet. ¶¶7-10). Additionally, this Court in Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So.2d 1152, 1156-57 (La. 1984), held that "the Natural Resources article of the 1974 Constitution imposes a duty of environmental protection on all state agencies and officials," s*ee* La Const. art IX § 1, and that "the [predecessor to the DEQ] . . . has been designated to act as the primary public trustee of natural resources and the environment." This Court went on to explain that "the regulatory scheme provided by Constitution and statute mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties." Save Ourselves at 1159.

In this case, the LDEQ violated its Constitutional duty as public trustee of the environment in numerous ways, including not responding to a single of Respondents' comments and issuing the water quality certification without waiting for the results of the water quality sampling it had conducted the day before, which showed exceedances of water quality standards.[12] The review of water quality certifications constitutes Louisiana citizens' only opportunity for review of water quality impacts of "dredge and fill" permits, as the Corps does not review water quality impacts. Respondents' liberty and property will be unjustly affected by the LDEQ's illegal grant of the water quality certification, and thus are entitled to judicial review to prevent LDEQ from transcending

[12] The results revealed that pollutants in the wastewater at Chef Menteur exceeded water quality standards in all sample locations, exceeding limits by as much as four times for Total Suspended Solids and three times the limits for Total Organic Carbon. It also showed that arsenic was beginning to show up in landfill wastewater. LDEQ report available on DEQ Electronic Data management sytem, Document Number 368483115, dated 9-24-07 *available at*: http://wwwedms.deq.louisiana.gov/app/doc/fndocdownload.aspx?plopt=niodx&doc=36483115

its lawful powers to their detriment. The lower court's finding that the 19th Judicial District Court has jurisdiction over these appeals promotes the long-standing Louisiana principle that citizens are entitled to judicial review of illegal agency actions.

B. Citizens' Right to Judicial Review of LDEQ-Issued Water Quality Certifications Has Been Accepted by the Courts for Decades.

Not only has this Court firmly established the right of citizens to judicial review of agency actions in general, but Louisiana courts have consistently allowed citizens the right to judicial review of water quality certifications in particular.[13] In at least seven situations, citizens have challenged LDEQ water quality certifications in state court. They are as follows: 1) Mayor and Council of Morgan City v. Ascension Parish Police Jury, 468 So. 2d 1291 (La. App. 1 Cir. 1985) (court upheld district court's nullification of water quality certification); 2) Mayor and Council of Morgan City v. Louisiana Department of Environmental Quality, 525 So. 2d 235 (La. App. 1 Cir. 1988)(transferring citizen appeal of water quality certification to district court); 3) Mayor and Council of Morgan City v. Louisiana Department of Environmental Quality, 604 So. 2d 144 (La. App. 1 Cir. 1992)(affirming trial court's reversal of issuance of water quality certification); 4) In re West Pearl River Navigation Project, 94-2260 (La. App. 1 Cir. 6/23/95); 657 So. 2d 640 (reversing LDEQ grant of water quality certification in response to citizen group challenge); 5) Save Our Wetlands, Inc., v. Department of Environmental Quality, 2000-2809 (La. App. 1 Cir. 2/15/02); 812 So. 2d 746 (affirming trial court's dismissal of plaintiff's suit as untimely filed but recognizing citizen plaintiff's right to appeal the unconditional water quality certification under the provisions of La. R.S. §30:2050.21; see page 749 of opinion); 6) Mills v. Louisiana Department of Environmental Quality, No. 486,412 (19th Jud. Dist., June 6, 2002)(reversing water quality certification based on citizen challenge); 7) Save Our Wetlands, Inc., v. Louisiana Department of Environmental Quality, No. 502,183 (19th Jud. Dist., September 17, 2003)(affirming DEQ grant of water quality certification against citizen challenge); 8) O'Reilly v. Louisiana Department of Environmental Quality, No. 509,564 (19th Jud.

[13] In Respondents' view, the issue of whether a water quality certification is conditional or unconditional is not relevant to the issue of judicial review, though it may be relevant for purposes of whether a party is statutorily-entitled to an adjudicatory hearing. Therefore, Respondents do not use the "conditional" or "unconditional" terminology.

Dist., March 5, 2004)(vacating water quality certification in response to citizen challenge).

In all of these cases, LDEQ acknowledged the jurisdiction of the court and did not challenge the citizens' right to judicial review.

Thus, since at least 1985, courts have allowed citizens to challenge LDEQ issuance of water quality certifications; many of the water quality certifications challenged by citizens were invalidated by the courts. In fact, no Louisiana court has ever held that affected citizens have no right to appeal an LDEQ grant of a water quality certification, unconditional or conditional. This Court should not act to remove this long-established and presumed right by granting Waste Management's writ application.

II. THE LOWER COURT DECISIONS DO NOT ERRONEOUSLY INTERPRET OR APPLY THE LAW SUCH THAT MATERIAL INJUSTICE WILL RESULT OR THE PUBLIC INTEREST WILL BE AFFECTED.

This Court should not exercise its discretionary jurisdiction to grant Waste Management's writ application because the case involves no erroneous application of laws such that material injustice results or the public interest suffers. The lower court decisions challenged by Waste Management, finding that citizens have the right to challenge LDEQ grants of water quality certifications, will not cause material injustice or significantly affect the public interest, even if ultimately deemed legally deficient. In fact, the lower court decisions are in accord with the interests of justice.

Waste Management argues that the decisions of the 19th Judicial District Court and 1st Circuit Court of Appeal are "likely to have a significant effect on the public interest." WM Writ at 1. However, Waste Management does not explain what the effect on the public interest would be or why it would be significant. Likely, this omission stems from the fact that the public interest in this matter weighs strongly in favor of denial of Waste Management's writ application, not granting it. Further, the lower court decisions properly applied the law.

A. The Lower Court Decisions Will Not Cause Material Injustice or Significantly Affect the Public Interest.

The public interest is not served by overturning the 19th Judicial District Court opinion, and that of the 1st Circuit which upheld it, as alleged by Waste Management. Rather, the result sought by Waste Management, to have this Court declare that citizens

do not have the right to appeal water quality certification grants, would severely injure the public interest. As discussed in detail earlier, this Court has emphasized numerous times the importance to the public of the ability to challenge illegal agency actions that affect them. Waste Management attempts to have this right eviscerated, while maintaining its own right, and the right of other permit applicants, to appeal. Waste Management argues that it has the right to appeal unfavorable water quality certification decision, but citizens do not. No interpretation of "public interest" could deem that this result promotes it.

B. The Lower Court Decisions Do Not Erroneously Interpret or Apply the Law.

Judge Kelley correctly denied Waste Management's Exception of No Right of Action because the trial court has jurisdiction over Respondents' appeal of this water quality certification under La. R.S. §30:2050.21(A) of the Louisiana Environmental Quality Act. The trial court also has jurisdiction under La. R.S. §49:964(A) of the Louisiana Administrative Procedure Act.

Respondents are aggrieved persons with the right to judicial review of an LDEQ grant of a water quality certification under the provisions of La. R.S. §30:2050.21(A). This statute provides: "An aggrieved person may appeal devolutively a final permit action, a final enforcement action, or a declaratory ruling only to the Nineteenth Judicial District Court." *Id.* Read in light of the long-standing presumption in favor of judicial review, La. R.S. §30:2050.21(A)'s term "permit action" includes a water quality certification. Indeed, such a certification is a final agency action with respect to a permit.

1. Water Quality Certifications Are Permit Actions Under La. R.S. §30:2050.21(A).

In its writ application, Waste Management argues that Judge Kelley erred in basing his decision on legislative intent because it argues the plain language of the judicial review statute clearly prohibits citizens from obtaining judicial review of water quality certifications. Waste Management is wrong. To begin, nowhere in the Louisiana Environmental Quality Act is judicial review of water quality certifications, either conditional or unconditional, expressly discussed. Further, the term "permit action" is not defined in the judicial review provisions of the Environmental Quality Act. Indeed, this term is not defined anywhere in the Environmental Quality Act. Nor is the term

"permit" defined in the Environmental Quality Act.[14] Thus, Waste Management's lengthy discussion about how unambiguous laws must be interpreted on their face is irrelevant. Waste Management's oxymoronic theory that La. R.S. §30:2050.21(A) "unambiguously omits" unconditional water quality certifications from the district court's appellate review does not qualify as clear statutory language.[15]

Waste Management notes that this Court recognizes that "Dictionaries are a valuable source for determining the 'common and approved usage' of words." WM Writ at 6. However, Waste Management then goes on to cite a definition of "permit" from an outdated 1983 version of Black's Law Dictionary (Abridged 5th ed. 1983).

Black's Law Dictionary (Pocket 1st ed. 1996) currently defines "permit" as "a certificate evidencing permission; a license." Thus a certificate is equated with a permit, and vice versa. Perhaps more telling is the definition of "certificate" as "a document certifying the bearer's status or ***authorization*** to act in a specified way." Black's Law Dictionary (Pocket 1st ed. 1996)(emphasis added). These two definitions demonstrate that a "certificate" is indeed another word for "permit," and thus a grant of a water quality "certification" is a "permit" action.

Waste Management also relies heavily on the 1st Circuit case of Mayor and Council of Morgan City v. LDEQ, 525 So. 2d 235 (La. App. 1 Cir. 1988), to support its argument that an unconditional water quality certification is not a permit action under the provisions of La. R.S. §30:2050.21(A). Waste Management's reliance upon Mayor is misplaced for several reasons. First, while the court in Mayor did find that a water quality certification was not a "permit action," it was in an entirely different legal context which is not applicable to the issue at hand.

Mayor involved a completely different statutory provision in the Environmental Quality Act that has since been repealed, not §30:2050.21(A). The court in Mayor was interpreting the term "permit action" as it appeared in the then-existing La. R.S. §30:1072(A). Mayor at 237-238. This statutory provision had nothing to do with judicial review of a water quality certification decision. Rather, it provided for finality, requests

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[14] Waste Management uses the definition of "permit" provided in the LDEQ regulations to promote its argument, but this is not statutory language. WM Writ at 7. Nor is judicial review covered in regulations. Additionally, given the extensive use of the word "permit" in the permitting section of the regulations, its utility to define the term as it appears in the Environmental Quality Act is highly questionable.

[15] WM Writ at 12.

for adjudicatory hearings and reviews by the 1st Circuit of denials of these hearings. La. R.S. §30:2074(A). As cited in Mayor, La. R.S. §30:1072(A) provided:

> Any enforcement or permit action shall be effective upon issuance unless a later date is specified therein. Such action shall be final and shall not be subject to further review unless, no later than twenty days after the notice of the action is served by certified mail or by hand upon the respondent, he files with the secretary a request for hearing. Upon timely filing of the request, the secretary shall either grant the relief requested or forward the request to the court of appeal.

Mayor at 237 (quoting La. R.S. §30:1072(A)). Hence, unlike in the judicial review provisions of La. R.S. §30:2050.21(A), the term "permit action" as interpreted in Mayor did not relate to judicial review of the water quality certification decision. Rather, it related to the issue of adjudicatory hearings. *Id.* at 237, 238.

Second, the legal issue in Mayor was not whether aggrieved citizens had a right to appeal or seek judicial review of a water quality certification in the 19th Judicial District Court. Rather, the issue was whether the 1st Circuit had jurisdiction over aggrieved citizens' appeal of the LDEQ Secretary's denial of the citizens' request for an adjudicatory hearing. *Id.* at 238 (holding that "DEQ was not required to forward appellants' request for hearing to this court pursuant to section 1072(A)").

Finally, the 1st Circuit never ruled in Mayor the way Waste Management would have this Court rule in this matter. It did not reject the aggrieved citizens' right to appeal the water quality certification; to the contrary, it transferred the case for review before the 19th Judicial District Court after ruling that the 1st Circuit was not the proper forum for that challenge. *Id.* at 238.

A later decision by the 1st Circuit on a citizen challenge to a grant of a water quality certification supports that the Mayor decision was intended to be limited to its facts and the specific statutory provision before it. In Save Our Wetlands, Inc. v. DEQ, 2000-2809 (La. App. 1 Cir. 2/15/02); 812 So. 2d 746, decided after the passage of the current judicial review provisions of La. R.S. §30:2050.21(A), the 1st Circuit indicated that water quality certifications fall under the term "final permit actions" contained in La. R.S. §30:2050.21(A). There the 1st Circuit reviewed the timeliness of a challenge to a water quality certification filed by a citizen group. In determining the applicable time limitation, it found: "***Pursuant to La. R.S. 30:2050.21*** A SOWL had a right to appeal the DEQ action to the 19th JDC 'within thirty days after notice of the action . . . being

appealed has been given'." *Id.* at 5, 812 So. 2d at 749 (emphasis added). Thus in this recent case, the 1st Circuit has found that water quality certifications fall under the judicial review provisions of La. R.S. §30:2050.21(A).

In fact, in this decision, the court referred to the water quality certification as a "final permit action." The court stated that the appellant was not attempting to nullify a judgment of the court; rather it was attempting to have the court nullify a "final permit action of a department of the executive branch." *Id.* at 5-6, 812 So. 2d at 748. Thus, 1st Circuit jurisprudence does not establish that water quality certifications are not permit actions for purposes of citizen right to judicial review, and Mayor does not stand for that proposition. Rather, conversely from Waste Management's argument, 1st Circuit precedent establishes water quality certifications as final permit actions under La. R.S. §30:2050.21(A).

2. *La. R.S. §30:2074(A)(3) Bears No Relevance to the Judicial Review Provisions of La. R.S. §30:2050.21(A).*

Waste Management commits similar error in its attempt to integrate La. R.S. §30:2074(A)(3), regarding powers and duties of the department, into the judicial review provisions of La. R.S. §30:2050.21. Waste Management cannot reasonably assert that §30:2074(A)(3) contains the criteria for what constitutes a "permit action" for purposes of La. R.S. §30:2050.21(A). There are several reasons why Waste Management's argument on this issue does not pass legal muster.

First, La. R.S. §30:2074(A)(3) does not speak to the right of citizens to appeal an unconditional grant of a water quality certification. Rather, it merely provides that the applicant for a water quality certification has the right to an adjudicatory hearing on conditions placed on the certification and that conditional certifications and certification denials are considered permit actions. *Id.* at subpara. (A)(3). Such an unremarkable proposition should not be read to remove, by negative implication, an entire category of final agency action from the oversight of the judiciary. See Flowers, Inc. v. Rausch, 364 So.2d 928, 933 (La. 1978) (noting that "[i]t strains credulity" to argue that a statute "could by mere negative implication" obliterate a "long-standing and firmly entrenched" principle).

Second, when the provisions of La. R.S. §30:2074(A)(3) were passed in 1991, La. R.S. §30:2050.21 did not even exist. Thus, Waste Management's attempt to have this

Court put the two provisions side-by-side and conclude that the former defines "permit actions" for the latter is misguided. At the time La. R.S. §30:2074(A)(3) was passed, the term "permit action" appeared in La. R.S. §30:2024(A), which read substantially the same as its predecessor, La. R.S. §30:1072(A), the statute discussed in Mayor.[16] Thus the term "permit action," as it existed when §30:2074(A)(3) was passed, was not used in the context of judicial review or appeals. Rather, it appeared, as it did in Mayor, only in the context of a request for an adjudicatory hearing and appeals of Secretarial denials of those requests.

Third, La. R.S. §30:2074(A)(3) appears in the part of the Environmental Quality Act governing powers and duties of the Secretary, a far cry from judicial review. Indeed, Waste Management provides no evidence that the legislature has attempted to grant the Secretary power, by regulation, to define the scope of judicial review.

Last, the legislative history does not support an interpretation that the legislature sought, in this provision concerning the powers and duties of the Secretary, to reach into the judicial review provisions and remove citizen appeals of water quality certifications from its purview. The minutes of the House Natural Resources Committee and Senate Committee on Health and Welfare, discussing the 1991 amendment of La. R.S. §30:2074(A)(3) by House Bill No. 840, indicate that §30:2074(A)(3) only addresses the obligation of the Secretary to a permit applicant, by requiring him to "notify an applicant for certification under the water control law of any proposed alterations to or denial of the license or permit [and] to provide a hearing."[17] The legislative history is completely devoid of text demonstrating intent to impact aggrieved citizens. The amended provision cannot be reasonably interpreted otherwise.[18]

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[16] In 1991, La. R.S. §30:2024(A) read as follows: "Any enforcement or permit action shall be effective upon issuance unless a later date is specified therein. Such action shall be final and shall not be subject to further review unless, no later than twenty days after the notice of the action is served by certified mail or by hand upon the respondent, he files with the secretary a request for hearing. Upon timely filing of the request, the secretary shall either grant or deny the request within twenty days. If the request for hearing is granted, the issues raised in the request shall be resolved by an adjudicatory hearing before a hearing officer. Any appeal from a final decision of the secretary shall be in accordance with the provisions of R.S. 30:2024(C). If the request for hearing is denied, the respondent shall be entitled to file an application for de novo review of the secretary's action in the Nineteenth Judicial District Court for the parish of East Baton Rouge. See Act 197, House Bill No. 1706, Regular Session 1990.

[17] House Natural Resources Committee, 1991 Regular Session, May 22, 1991; Senate Committee on Health and Welfare, June 12, 1991 (Minutes attached as Exhibits A and B, respectively).

[18] See HLS 91-1689, Regular Session, 1991, House Bill No. 840, at 3 (distinguishing between the former law regarding the obligations of the DEQ secretary and the 1991 proposed additions requiring the secretary to provide notification and an automatic hearing for all proposed alterations and proposed certification denials).

Waste Management also propounds a connected argument in its writ application. It argues that when the legislature passed La. R.S. §30.2050.21(A), it intended to remove water quality certification grants from judicial review. It arrives at this unlikely conclusion by arguing that, because the legislature is presumed to be aware of all existing laws on the same subject, it knew of Mayor and of La. R.S. §30:2074(A)(3) and therefore knew when it chose the term "final permit action" that it was excluding water quality certifications from judicial review. This argument is flawed, and begs the question. For Waste Management's argument to be correct, one must first assume that its interpretation of La. R.S. §30:2074(A)(3) is correct, but, as proven earlier, it is not. Surely the legislature was aware of its own intent when it passed the revisions to La. R.S. §30:2074(A)(3). As stated earlier, the legislative history reflects that the legislature did not have citizens in mind at all when it passed those provisions. Rather, in specifying that water quality certification denials and conditional grants are permit actions for all purposes, it was attempting to ensure that permit applicants would be entitled to an adjudicatory hearing upon receiving an unfavorable water quality certification decision.

Thus, when it passed La. R.S. §30:2050.21(A), the legislature did not intentionally select the term "permit action" so as to exclude water quality certification grants. As far as it being aware of the Mayor case, the same issue exists. Mayor's statement that water quality certifications were not "permit actions" was not applied to a statute dealing with citizens' right to judicial review, but rather to a statute dealing with citizens' right to go to the 1st Circuit to appeal the denial of an adjudicatory hearing.

3. Jurisdiction Exists Under Article 964 of the Louisiana Administrative Procedure Act.

Even if this Court feels that the Environmental Quality Act does not authorize challenges to water quality certifications, jurisdiction in the 19th Judicial District Court would still be proper under the Louisiana Administrative Procedure Act (APA), and the court would have correctly denied the exception. Waste Management argues that the judicial review provisions of the APA do not apply here.

Waste Management's arguments on this issue are internally inconsistent. It attempts to argue both that La. R.S. §30:2050.21 does not apply to the issuance of an unconditional water quality certification, and also that La. R.S. §30:2050.21 should be the "exclusive means of obtaining judicial review" for such water quality certifications.

WM Writ at 14, fn. 22 (quoting Metro Riverboat Associates, Inc. v. The Louisiana Gaming Control Board, 797 So. 2d 656 (La. 2001)). Waste Management cannot have it both ways. While "[i]n the event of [a] conflict" between the provisions of the Louisiana Environmental Quality Act (EQA) and the Louisiana Administrative Procedure Act (APA), the provisions of the EQA would prevail, if the EQA "does not expressly or impliedly provide for a particular situation," the APA is applicable. La. R.S. §30:2050.28. Thus, if this Court finds that the LDEQ's issuance of a water quality certification is a permit action reviewable under La. R.S. §30:2050.21, then the provisions of that section of the EQA are the means of review. However, if this Court finds that La. R.S. §30:2050.21 does not apply to the issuance of unconditional water quality certifications, then there is no "conflict," and the judicial review provisions of the APA do apply.

La. R.S. §30:2050.28 also provides that "[t]he provisions of this Chapter are supplementary to those of the Administrative Procedure Act . . . ." Therefore, if Waste Management were correct that water quality certifications were not "permit actions" under La. R.S. §30:2050.21(A), then the APA would apply.

The APA expressly provides for judicial review of "final agency action." La. R.S. §40:964(G). In the Mayor case, the 1st Circuit found that the water quality certification at issue in that case was not a permit action under the applicable provisions of the Environmental Quality Act which existed at the time. *Id.* at 238. Therefore, once it declined to find jurisdiction at the 1st Circuit level under those provisions, it transferred the case to the 19th JDC under the APA's judicial review provisions. *Id.* This shows that jurisdiction for judicial review can exist under the APA where it does not exist under the EQA.

The APA provides that "a person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review . . . ." La. R.S. §49:964(A)(1). Respondents fulfill all the requirements of this jurisdictional grant, as they are aggrieved persons challenging "a final decision . . . in an adjudication proceeding."

i. The LDEQ's Issuance of the Water Quality Certification is a Final Decision or Order in an Adjudication Proceeding.

First, the LDEQ's water quality certification is a "final decision" by the LDEQ because the LDEQ has issued its final determination of water quality certification, and no

further action is required by it. This certification is the final step for the state as part of the federal Clean Water Act §401/404 permitting process. Next, "adjudication" is defined as the "agency process for the formulation of a decision or order." La. R.S. §49:951(1). The LDEQ has issued detailed regulations establishing the procedures and substantive requirements for the issuance of a water quality certification. La. Admin. Code tit. 33.IX.1507. In this case, the LDEQ issued a public notice, in conjunction with the Corps, announcing Waste Management's application for a Clean Water Act §401 state water quality certification and a Clean Water Act §404 federal permit. The LDEQ received comments on the proposed application and issued the water quality certification on September 24, 2007. As part of the certification, the LDEQ issued a joint response to comments (though not including Respondents' comments) and a rationale for decision. This procedure reflects an established "agency process for the formulation of a decision," as required under La. R.S. §49:951(1); as such, the issuance of the water quality certification qualifies as an adjudication proceeding.

ii. Respondents Are Covered Under the APA's "Decision or Order" Language.

In In re Carline Tank Services, Inc., 627 So. 2d 669 (La. App. 1 Cir. 1993)(on denial of rehearing), the 1st Circuit recognized that appeals from LDEQ determinations are authorized under the APA only in instances where the action complained of is 'a final decision or order' as defined by this Court in Delta Bank & Trust Co. v. Lassiter, 383 So. 2d 330 (La. 1980). This Court held in Delta Bank that to be "a final decision or order" under the APA, a statute or the Constitution must require notice and opportunity for a hearing. 383 So. 2d at 333. The Delta Bank Court explicitly recognized the right to a hearing under the Due Process clauses of the United States Constitution[19] and the Louisiana Constitution[20] if "the claimant [can] show the existence of some property or liberty interest which has been adversely affected by state action." *Id.* at 334. Here, the Respondents alleged sufficient health, liberty and property interests to require a hearing under the federal and Louisiana due process clauses (Pet. ¶¶7-11, 28-29).

[19] U.S. Const. amend XIV ("[N]or shall any State deprive any person of life liberty or property without due process of the law . . . .").
[20] La. Const. art. I, § 2 ("No person shall be deprived of life, liberty, or property, except by due process of law.").

In In re Carline, the 1st Circuit re-emphasized a broad interpretation of the right to a hearing associated with constitutional rights as recognized in Delta Bank. The court restated its original opinion that "any allegation in any pleading by any citizen suggesting that their health, property or liberty interests would be affected by a final decision or order of the secretary is a sufficient pleading to put before appellate courts a constitutional right." 627 So. 2d at 673. It further elaborated that "citizens who are affected by decisions of the secretary should be given broad standing to sue" so as "to protect the health and welfare of the citizens of our state and to carry out the mandate of the environmental act." *Id.*

The court found that no due process-implicating property rights were at issue in In re Carline because the petitioner in that case was a competitor of the permitted entity rather than citizens who would be individually impacted by the agency decision. The court agreed with the reasoning of Delta Bank that a "competitor does not have a constitutional right to be free from competition." *Id.*

In contrast, Respondents in this case are Louisiana citizens whose health, property, and liberty interests are affected by the issuance of this water quality certification. Respondents are exactly the "citizens" the court in In re Carline affirmed should have "broad standing to sue." *See id.* Respondents live and work in the area surrounding Chef Menteur landfill and use the waters of the Maxent Canal, into which the Chef Menteur landfill discharges. Pollution from Chef Menteur directly affects Respondents' ability to live their lives in a healthy manner, affecting their interests in health, property, and liberty. Therefore, Respondents have sufficiently pled that their interests would be affected to afford them a right to a hearing under the due process clauses of the U.S. Constitution and the Louisiana Constitution. See In re Carline, 627 So. 2d at 673. As such, the issuance of the water quality certification is "a final decision or order" under the APA because notice and opportunity for a hearing is constitutionally required, fulfilling the mandate of Delta Bank.

Furthermore, Respondents not only are aggrieved parties for the reasons listed supra, but also as beneficiaries of the public trust of a healthy environment as guaranteed by the Louisiana Constitution. La. Const. art IX, § 1. *See* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984). The LDEQ has a

duty, as trustee of this public trust, to ensure that the Louisiana environment is "protected, conserved, and replenished." *Id.* The LDEQ has failed in this duty by certifying that Chef Menteur will not violate water quality standards when evidence already shows violations, and as such, Respondents are aggrieved parties under the APA.

Waste Management argues that Respondents must show the existence of a property or liberty interest which has been adversely affected by the water quality certification grant, and that they have been deprived of a right. WM Writ at 15-16. It argues Respondents cannot show that they have been adversely affected by the decision to grant the water quality certification because the certification does not actually authorize anything, and that it must still go to the Corps to obtain a permit under Section 404 of the Clean Water Act, which decision it says Respondents can appeal. However, Waste Management grossly understates the import of the water quality certification by the LDEQ.

A water quality certification is final agency action by the LDEQ, certifying that a proposed "dredge and fill" permit will not cause violations of Louisiana's water quality standards. In issuing a final "dredge and fill" permit, the Corps relies on the state's certification and does not perform an independent review. Corps regulations governing dredge and fill permit procedures provide: "[State] certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Clean Water Act will be considered ***conclusive*** with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration." 33 C.F.R. § 320.4(d) (emphasis added).

Thus, Louisiana citizens depend on lawful LDEQ action to protect their health and their property from pollution caused by "dredge and fill" permits. If the LDEQ fails to consider relevant facts, or otherwise issues an arbitrary and capricious or unlawful certification, access to Louisiana courts is the public's only recourse.

Additionally, whether one calls it a permit, a certificate, an approval, or merely a decision, a water quality certification is a necessary prerequisite to Waste Management

obtaining the authority to go forward with its proposed action.[21] According to the Clean Water Act, "No [federal 404] license or permit shall be granted if certification has been denied by the State . . . ." 33 U.S.C. §1341(a)(1). Respondents allege that the LDEQ's granting of the certification was improper and illegal, and that the proper, legal decision would have been to deny the certification. Had the certification been denied, Waste Management could not have proceeded to the Corps for its §404 permit.[22]

The serious nature of a water quality certification decision and the important role that the state agency plays in the §401/404 certification process is highlighted both by EPA guidance and the LDEQ's own regulations governing water quality certifications. In guidance, EPA states that:

> EPA would like to work with the States to ensure that their authority under Section 401 . . . reflects the State role at the forefront in administering water quality programs . . . While the federal Section 404 program addresses many discharges into wetlands and other federal agencies have environmental review programs which benefit wetlands, these do not substitute for a State's responsibilities under Section 401. . . A State's authority under Section 401 includes consideration of a broad range of chemical, physical, and biological impacts.

EPA's Office of Water, Wetlands and 401 Certification: Opportunities and Guidelines for State and Eligible Indian Tribes, at 6 (April 1989). The factors that state agencies consider in their 401 water quality certification decisions are different and broader than those issues considered by the Corps in its §404 decision; the ability to challenge the latter in court does not substitute for the ability to challenge the former.

Interestingly, in this guidance, the EPA also remarked on judicial review of states' water quality certification decisions. It stated: "[A] state's decision to grant or deny certification is ordinarily subject to an administrative appeal, with review in the State courts designated for appeals of agency decisions." *Id.* at 8. Further, federal courts have weighed in likewise: "The proper forum to review the appropriateness of a state's

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[21] Waste Management notes in a footnote that federal regulations waives the requirement for a state water quality certification if the state does not act on the request for a period of time not to exceed a year. This provision is simply not relevant here because here the LDEQ did act on the application, and it is that action which Respondents are aggrieved by. Whether it is granted by action or deemed granted under operation of law by inaction, the water quality certification granting is still a prerequisite to a §404 permit. The 1st Circuit stated as much in Mayor. *Id.* at 238.

[22] Respondents note that numerous situations exist in environmental law where more than one permit, authorization, approval, etc., is required before a project can go forward. Projects can require permits on a local level, such as building permits or coastal use permits; state level, such as air or water permits; and federal level, such as a wetland or §404 permit. The fact that other approvals are also needed does not mean that affected parties cannot be aggrieved by the issuance of the first approval. Also, the terminology applied to the approval is not relevant to whether affected parties are aggrieved by it.

certification is the state court." Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1981).

Also, the LDEQ regulations on water quality certification decisions outline a decision-making process that is broad, and focused on compliance with state law. The regulations provide a broadly inclusive mandate for review of water quality certifications, dictating that applications be reviewed for "compliance with State Water Quality Standards . . . and applicable state water laws, rules, and regulations." La. Admin. Code 33.IX.1507.

CONCLUSION

This case does not present a situation where the Court should exercise its discretionary jurisdiction to reverse the decisions of the district and appellate courts. Rather, the lower court decisions promote the public interest and are not erroneous. The trial court correctly denied Waste Management's Exception of No Right of Action. The court has jurisdiction over Respondents' appeal, and Respondents have the right to appeal, under either the Environmental Quality Act's judicial review provision at La. R.S. 30:§2050.21(A) or under the Administrative Procedure Act at La. R.S. §49:964(A).

Waste Management provided no clear statutory law to overcome the strong presumption that Respondents are entitled to judicial review to challenge illegal agency action. Indeed, Waste Management provided no law whatsoever that stands for the proposition that affected citizens have no right to appeal a water quality certification. Instead, Waste Management tries to argue that La. R.S. §30:2074(A)(3), which has nothing to do with judicial review, somehow restricts the definition of "permit action" in the judicial review provisions of the EQA. This argument fails for a number of reasons, including the fact that the current judicial review provisions of the Environmental Quality Act did not even exist when the provisions of La R.S. §30:2050.21(A) were passed.

Additionally, water quality certifications are considered by the Corps to be conclusive determinations of whether water quality standards will be violated by the proposed project. Citizens rely on judicial review of water quality certifications in state court as their only means to ensure that water quality standards are not violated. If Waste Management's writ were granted, the LDEQ could act as illegally as it wants when issuing water quality certifications and be insulated from judicial review. Louisiana law

does not provide for this outcome, as recognized by the trial court. The writ should be denied.

Respectfully submitted,

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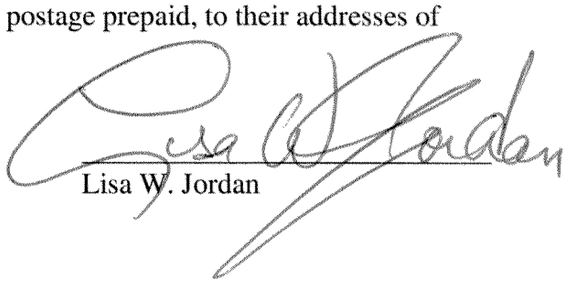
Fax: (504) 862-8721
Counsel for Respondents

Substantially Prepared By:
Jaimie Tuchman, Law Student

CERTIFICATE OF SERVICE

I certify that a copy of the above Opposition Brief has been provided to opposing counsel by placing the same in the U.S. Mail, postage prepaid, to their addresses of record this 24th day of March, 2008.



Lisa W. Jordan

EXHIBIT
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A

STATE OF LOUISIANA

COMMITTEE MEMBERS

Senator Gerry E. Hinton, D C
Chairman
Senator Joe McPherson,
Vice Chairman
Senator Diana Bajoie
Senator Cleo Fields
Senator Jon D. Johnson
Senator Ron Landry
Senator Richard Neeson

SENATE COMMITTEE ON
HEALTH AND WELFARE
P. O. Box 94183
Baton Rouge, Louisiana 70804

COMMITTEE S

Donnie D. Brou
Analyst

Camille Dens
Secretary

Committee Meeting Minutes

June 12, 1991

CALL TO ORDER

Senator Gerry Hinton, chairman of the Senate Health and Welfare Committee, called the meeting to order at 10:00AM, Wednesday, June 12, 1991, in Senate Committee Room F of the State Capitol in Baton Rouge, Louisiana. The committee secretary called the roll.

ROLL CALL

Members Present:

Senator Gerry Hinton, Chairman
Senator Joe McPherson, Vice-Chairman
Senator Diana Bajoie
Senator Cleo Fields
Senator Jon Johnson
Senator Ron Landry
Senator Richard Neeson

Staff Members Present

Jerry Guillot, Administrator
Research Services
Donnie Broussard, Analyst
Ann Brown, Researcher
Camille Denson, Secretary

Witnesses

Dr. Monica L. Monica
Orleans Parish Medical Society
New Orleans, LA

Dr. George Mowad
Oakdale, LA

Greg Bowser
La. Chemical Association

Marsha Broussard
La. Primary Care Association
Baton Rouge, LA

Witness Continued

Sandra Adams
La. Coalition for Maternal &
Infant Health
Baton Rouge, LA

Tony G. Sanders
La. District Attorney's Assoc.
Baton Rouge, LA

LEGISLATION CONSIDERED

Senate Bill No. 622

This bill was presented by Senator Saunders which requires charity hospitals to admit indigent patients transferred from other hospitals not owned or operated by the state. He asked someone to offer some amendments that he had which would provide that the bill would not conflict with federal law.

Senator Hinton stated that the amendments were offered by Senator Johnson. Senator Johnson move adoption of the amendments, there being no objection, the amendments were adopted.

Senator Saunders introduced Dr. George Mowad who spoke in support of this bill.

Senator Johnson moved this bill be reported with amendments, there being no objection, Senate Bill 622 was reported with amendments.

Senate Bill No. 804

This bill was presented by Senator Johnson which prohibits performance of laser surgery by other than licensed surgeons.

Senator Johnson introduce Dr. Monica L. Monica who spoke in support of this bill.

Senator Hinton stated he had amendments which would delete "and surgery" and insert ", dentistry, or podiatry". Senator Hinton moved adoption of the amendments, there being no objection, the amendment were adopted.

Senator Johnson moved that this bill be reported with amendments, there being no objection, Senate Bill 804 was reported with amendments.

House Bill No. 333

Representative LaBorde presented this bill which provides for the membership of the Louisiana State Board of Dentistry.

Senator Landry moved to report this bill favorably, there being no objection, House Bill No. 333 was reported favorably.

House Bill No. 1277

Representative LaBorde presented this bill which redesignates the state school residential facilities for mentally retarded and developmentally disabled persons as "developmental centers"

Senator Landry moved to report this bill favorably, there being no objection, House Bill No. 1277 was reported favorably.

House Bill No. 840

Greg Bowser with the Louisiana Chemical Association presented this bill which requires the secretary of DEQ to notify an applicant for certification under the water control law of any proposed alterations to or denial of the license or permit to provide a hearing.

Senator Landry moved to report this bill favorably, there being no objection, House Bill No. 804 was reported favorably.

Senate Bill No. 614

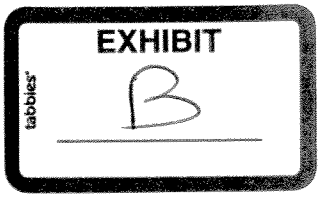
Senator Hinton presented this bill which provides for disclosure of certain health care information to the Louisiana Health Insurance Association.

Senator Landry moved to report this bill favorably, there being no objection, Senate Bill No. 614 was reported favorably.

House Bill No. 29

Senator Landry presented this bill which changes the termination date for the Department of Social Services.

Senator Landry moved to report this bill favorably, there being no objection, House Bill No. 29 was reported favorably.



House Natural Resources Committee

Minutes of Meeting
1991 Regular Session
May 22, 1991

I. CALL TO ORDER

Representative Randall E. Roach, Chairman of the House Natural Resources Committee, called the meeting to order at 9:35 a.m. in Committee Room 2 of the State Capitol in Baton Rouge, Louisiana.

II. ROLL CALL

MEMBERS PRESENT:

Representative Randall E. Roach, Chairman
Representative Sam H. Theriot Vice Chairman
Representative Harry. L. Benoit
Representative Charlie DeWitt
Representative John Glover
Representative Jessie Guidry
Representative Carl Gunter
Representative Melvin "Kip" Holden
Representative Melvin Irvin
Representative Chris John
Representative Clyde Kimball
Representative Kenneth Odinet
Representative Frank J. Patti
Representative John Siracusa
Representative Arthur W. Sour
Representative Warren Triche

MEMBERS ABSENT:

Representative Theodore M. Haik

III. STAFF MEMBERS PRESENT:

W. Wade Adams, Attorney
Carole M. Mosely, Attorney
Lisa Farrow, Secretary
Matt Ensminger, Clerk
Chris Peskew, Sergeant at Arms

IV. DISCUSSION OF LEGISLATION

House Bill No. 1799 by Representative Anding

Representative Anding presented House Bill No. 1799 which would provide for "future utilities" of oil and gas production. He read a letter from Mr. Cheshire, a constituent, which contained a statement that Statewide Order 29-B Section 192 A and F, was unfair. This is a rule within the Department of Natural Resources, office of conservation. Mr. Cheshire further noted in his letter that the rule is unfair to the small landowner and caters to "big oil." He said the rule should be repealed.

Mr. Jim Porter, President, Mid-Continent Oil and Gas Association, 333 Laurel Street, Baton Rouge, Louisiana 70801, (504) 387-3205, responded to Mr. Cheshire's letter stating that Mr. Cheshire's problem is not a future utility determination but is actually a unit problem.

Mr. Porter stated that Mid-Continent is opposed to the legislation because a future utility is there for anything that has an economic purpose. The future utility could be used for secondary or tertiary recovery in the future. He said a well could have a future utility value as an injection well in response to the produced water issue.

Representative Sour said the proposed bill is sweeping legislation. He said he could not support the bill.

Representative DeWitt asked if plugging wells causes a loss of income to the parish. Mr. Porter stated that a parish representative should properly address the question; however, he spoke to a parish representative who indicated the local government was concerned about the bill because of the possibility of loss of income.

Representative Roach stated that this legislation would change present law, and there would be an increase in plugging and abandoning wells.

Representative Anding urged support of the bill.

Representative Gunter moved to report House Bill No. 1799 favorably. Representative Sour made a substitute motion to defer action on House Bill No. 1799. There was objection to the substitute motion, and the secretary called the roll. Action was deferred on House Bill No. 1799 by a vote of 5 yeas and 4 nays. Those voting yea were Representatives Roach, Guidry, Kimball, Odinet, and Sour. Those voting nay were Representatives DeWitt, Gunter, Holden, and John.

House Bill No. 491 by Representative Roach

Representative Patt moved to adopt the amendment. There being no objection, the amendment was adopted by a vote of 12 yeas and 0 nays. Those voting yea were Representatives Sam Theriot, Benoit, DeWitt, Glover, Guidry, Holden, Kimball, Odinet, Patti, Siracusa, Sour, and Triche.

There was no further discussion or testimony on the bill.

Representative Patti moved to report House Concurrent Resolution No. 144 with amendments. There being no objection, House Concurrent Resolution No. 144 was reported with amendments by a vote of 12 yeas and 0 nays. Those voting yea were Representatives Sam Theriot, Benoit, DeWitt, Glover, Guidry, Holden, Kimball, Odinet, Patti, Siracusa, Sour, and Triche.

House Bill No. 705 by Representative Hand

Representative Hand requested that House Bill No. 705 be transferred to a study request resolution. House Bill No. 705 would prohibit granting mineral leases or issuance of drilling permits in Lake Pontchartrain and its waterbottoms. He said there are 29 operating wells in Lake Pontchartrain. Representative Hand stated that he feels the lake should be reserved for recreational uses but realizes there are commitments, leases, and permits that have previously been issued. He said he requests a study resolution to set up the proper financial requirements for solvency and insurance to ensure that operators act in a responsible manner.

Representative Sam Theriot asked who was to study the problem. Representative Hand said he was requesting the House Natural Resources Committee to perform the study.

There was no further discussion of the bill.

Representative Kimball moved to defer action on House Bill No. 705. There being no objection, action was deferred on House Bill No. 705 by a vote of 11 yeas and 0 nays. Those voting yea were Representatives Roach, Sam Theriot, Benoit, DeWitt, Glover, Guidry, Holden, Kimball, Odinet, Patti, Siracusa, Sour, and Triche.

House Bill No. 1534 by Representative Sam Theriot

Representative Sam Theriot presented House Bill No. 1534 which would provide relative to enforcement of the coastal zone management program. He moved to report House Bill No. 1534 without action so that he could withdraw the bill from the files of the house. There being no objection, House Bill No. 1534 was reported without action by a vote of 12 yeas and 0 nays. Those voting yea were Representatives Roach, Sam Theriot, Benoit, DeWitt, Glover, Guidry, Holden, Odinet, Patti, Siracusa, Sour, and Triche.

House Bill No. 840 by Representative DeWitt

Representative DeWitt presented House Bill No. 840 which would require the secretary of the Department of Environmental Quality to notify an applicant for certification under the water control law of any proposed alterations or denial of the license or permit and to provide for a hearing.

Representative DeWitt said the department does not oppose the bill.

There was no discussion or testimony.

Representative Benoit moved to report House Bill No. 840 favorably. There being no objection, House Bill No. 840 was reported favorably by a vote of 12 yeas and 0 nays. Those voting yea were Representatives Roach, Sam Theriot, Benoit, DeWitt, Glover, Guidry, Holden, Kimball, Odinet, Patti, Siracusa, Sour, and Triche.

House Bill No. 1396 by Representative Holden

Representative Holden presented House Bill No. 1396 which would repeal the automatic granting of a variance if the secretary of the Department of Environmental Quality fails to act within sixty days of receipt of a petition or request for variance.

Representative Holden offered amendments which Mr. Terry Ryder, Assistant Secretary, office of legal affairs and enforcement, Department of Environmental Quality, explained. He said the amendments add language providing for an automatic grant of a variance if the secretary fails to enter an order within sixty days after the final argument regarding the variance petition. Mr. Ryder stated that the Louisiana Chemical Association had no objection to the amendments.

Representative Holden moved to adopt the amendments. There being no objection, the amendments were adopted by a vote of 10 yeas and 0 nays. Those voting yea were Representatives Roach, Sam Theriot, Benoit, Glover, Guidry, Holden, Irvin, Kimball, Patti, and Sour.

There was no further discussion or testimony.

Representative Patti moved to report House Bill No. 1396 with amendments. There being no objection, House Bill No. 1396 was reported with amendments by a vote of 10 yeas and 0 nays. Those voting yea were Representatives Roach, Sam Theriot, Benoit, Glover, Guidry, Holden, Irvin, Kimball, Patti, and Sour.

House Concurrent Resolution No. 108 by Representative Holden

Representative Holden presented House Concurrent Resolution No. 108 which would request the Department of Environmental Quality to impose a moratorium on the incineration of radioactive waste at Rollins Environmental Services and other hazardous waste facilities.