

25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO.: 59-189

DIVISION "B"

INDUSTRIAL PIPE, INC.,

v.

PLAQUEMINES PARISH COUNCIL, WILLIAM H. NUNGESSER, In His Official Capacity
as Parish President, and PERCY V. GRIFFIN, KEITH HINKLEY, KIRK LEPINE,
DR. STUART J. GUEY, JR., ANTHONY BURAS, BURGHART TURNER,
JEFF EDGECOMBE, BYRON MARINOVICH, and MARLA COOPER,
In Their Respective Official Capacities as Parish Council Members.

FILED: _____

DEPUTY CLERK

POST-TRIAL BRIEF

On Behalf of Intervenors

Oakville Community Action Group,

Louisiana Environmental Action Network, and Gloria Mayfield

Submitted October 24, 2012, by:

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MAY IT PLEASE THE COURT:

Intervenors Oakville Community Action Group, Louisiana Environmental Action Network, and Gloria Mayfield submit this post-trial brief in opposition to Industrial Pipe, Inc.'s application for a Coastal Use Permit to expand its construction and demolition debris/woodwaste landfill into 8.3 acres of wetlands.

Introduction

Industrial Pipe's application must fail for three reasons, each of which independently requires denial of the Coastal Use Permit: (1) The requested expansion would violate zoning laws; (2) Industrial Pipe failed to carry its burden of showing that the expansion is consistent with mandatory state guidelines or with the Parish's Coastal Zone Management Program; and (3) the application fails to meet the standard for approval under the "public trust" provision of the Louisiana Constitution, article IX, § 1.

First, Plaquemines Parish zoning laws prohibit the proposed use. Industrial Pipe seeks a Coastal Use Permit to expand its landfill into 8.3 acres of wetlands located within the Flood Plain zoning district. But Parish zoning laws provide that "no building or land shall . . . be used or occupied . . . unless in conformity with the regulations herein specified for the district in which it is located." Plaquemines Parish, La., Code of Ordinances, Zoning, app. B, § V.1 (2012). That ordinance also limits the Flood Plain zoning district to fourteen uses—none of which includes use as a landfill for waste of any kind unless Plaquemines Parish Council approves such use. *Id.* § VI. M. There is no evidence that the Council has given this approval to Industrial Pipe. Moreover, because Parish zoning ordinances list the storage of garbage and waste products within a special category of "environmental impact uses," approval of such use requires "special review . . . and comments from the [Parish] building official and the environment review committee." *Id.* § L.2. None of this took place. Industrial Pipe's proposed expansion into the 8.3 acres at issue here would be a new use of the area—a use that, to date, a U.S. Army Corps of Engineers "Cease & Desist Order" and the Federal Clean Water Act have prohibited. Hence, there can be no colorable claim of grandfathering or prescription.

Second, Industrial Pipe failed to show that its proposed use is “consistent with the state program and the approved local programs.” La. Rev. Stat. § 49:214.30.C(3). State guidelines “serve as criteria for granting . . . coastal use permit.” La. R.S. § 214.27.B (2); La. Admin. Code tit. 43 pt. I § .723.C.8.a (“[Coastal use p]ermits shall be issued only for those uses which are consistent with the guidelines . . .”). For example, Industrial Pipe failed to show that there are “no feasible and practical alternative locations” for waste disposal that comply with the state guideline that “disposal facilities shall be avoided in wetlands to the maximum extent practicable.”¹ In fact, Industrial Pipe failed to offer any credible evidence on this issue, submitting only an outdated real estate survey prepared in 2003 by a paid consultant who did not testify. Industrial Pipe also failed to show that any benefits resulting from its proposed disposal in wetlands “would clearly outweigh the adverse impacts” to the environment and the community.²

Further, Industrial Pipe failed to show that its proposed use is consistent with Plaquemines Parish’s Coastal Zone Management Program. La. Rev. Stat. § 49:214.30.C(3) (“[C]oastal use permit decisions must be consistent with . . . local programs”). Plaquemines Parish’s local Coastal Zone Management Program (PP CZMP) “[p]rohibit[s] development of wetland areas for non-wetland dependent uses” in the management unit at issue. Intervenors’ Ex. 1, at 6-136. Industrial Pipe’s proposed landfill expansion clearly does not depend on wetlands. *See* Ltr. from Industrial Pipe’s Consultant (URS) to A. Kimble, Pl.’s Ex. P020, at 6, Sept. 28, 2010 (admitting that “waste disposal is typically not a water-dependent activity”). Further, Industrial Pipe’s attempt to offset wetlands destruction by paying for mitigation *outside the Parish* fails to meet requirements of the Parish program, which “discourages dredge and fill operations in wetlands and water bodies unless . . . the detrimental impacts are offset through creation of wetland on-site or

¹ The guideline of La. Admin. Code tit. 43, pt. I, § 715(A) (2011) mandates that disposal facilities “be avoided in wetlands to the maximum extent practicable.” The word “practicable” is synonymous “feasible,” that is, “capable of being used” or “capable of being put into practice or of being done or accomplished.” *Webster’s Collegiate Dictionary* (11th ed. 2012). Where it is not feasible to avoid disposal in wetlands, the guideline of La. Admin. Code tit. 43, pt. I, § 701(H) (2011) requires, *inter alia*, proof that “there are no feasible and practical alternative locations.”

² La. Admin. Code tit. 43, pt. I, § 701(H)(1) (imposing, *inter alia*, a burden of proof on applicants unable able to meet the “maximum extent practicable” guideline that “the benefits resulting from the proposed use *clearly outweigh* the adverse impacts”—a burden thus imposed on disposal facilities because § 715(A) requires that the location and operation of disposal facilities “be avoided in wetlands to the maximum extent practicable.”).

within the parish, preferable in the same [environmental management unit].” Intervenors’ Ex. 1, at 6-137 (emphasis added).

Third, under the Louisiana Constitution article IX, § 1, a permit for disposal in wetlands may be only issue if Industrial Pipe proves “that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.” *Save Ourselves, Inc. v. La. Env’tl. Control Comm’n*, 452 So. 2d 1152, 1157 (La. 1984). This requires proof that: “1) [T]he potential and real adverse environmental effects . . . have been avoided to the maximum extent possible; 2) a cost benefit analysis . . . demonstrate[s] that the latter outweighs the former; and (3) there are [no] alternative sites or mitigating measures which would offer more protection . . . without unduly curtailing non-environmental benefits.” *In re Rubicon, Inc.*, 95-0108 (La. App. 1 Cir. 2/14/96); 670 So. 2d 475, 483. Here, failed to offer a competent witness to testify about a cost-benefit analysis, offering only an outdated 2001 analysis of a “transfer station” performed by a paid consultant who did not testify and thus did not face cross-examination. In light of the severe impacts to the community due to landfill operations (which have made this facility a national symbol of environmental injustice), the clear weight of the evidence is that the impacts to the environment and surrounding community outweigh any of the proposed expansion’s benefits. Further, Louisiana case law establishes that to prove a lack of more protective alternatives, an applicant cannot arbitrarily limit its alternatives analysis to a single parish, as Industrial Pipe did here.³

Factual Background

At testified to by Mr. Alan Green, the Industrial Pipe landfill operates directly next to the Oakville community, where there are approximately 68 homes. Satellite image of Industrial Pipe/Oakville Area, Intervenors’ Ex. 28. As a result, Oakville residents (such as Mr. Green and Mr. Erroll Ragas) and other area residents (such as Mr. Michael Vestuto) endure odors, dust, fire

³ *In re Browning-Ferris Indus. Petit Bois Landfill*, 93-2050 (La. App. 1 Cir. 6/23/95); 657 So. 2d 633, 638 (“BFI’s site survey should have gone outside the boundaries of Calcasieu Parish.”); *In re Am. Waste & Pollution Control*, 633 So. 2d 188, 196 (La. Ct. App. 1st 1993) (rejecting an alternatives analysis due to “failure of the applicant and DEQ to investigate sites outside the Cade area and to include within the evaluation of the sites pertinent geologic data”), *aff’d*, 93-3163 (La. 9/15/94); 642 So. 2d 1258.

smoke, noise, vibrations, and threats of pollution from the landfill. Industrial Pipe's proposed expansion would extend those impacts into the future.

Intervenors' witness Mr. Green, president of the Oakville Community Action Group, testified that he lives in Oakville, as did his parents and grandparents. Satellite image of Industrial Pipe/Oakville Area with Circle Indicating Mr. Green's House, Intervenors' Ex. 32 (showing landfill and Oakville community with circle that Mr. Green drew around his house). Indeed, as testified to by Mr. Green, his family is deeply rooted in the history of Oakville. He testified that his great-grandfather, Leon Sarpy, developed the original plan for the Oakville community in 1869. *See also* Pl.'s Ex. P075. Mr. Green also testified that African-Americans from the nearby Sarah and Live Oak plantations were among the community's first residents. And in 1874, the residents founded the Saint Peter Baptist Church of Oakville. Intervenors' Ex. 30.

Around 1985, Industrial Pipe began its landfill operations next to Oakville as testified to by Mr. Kenneth Stewart. Mr. Green testified that he regularly smells noxious odors coming from the Industrial Pipe landfill, including rotten egg and decomposing trash odors. Mr. Green testified that he has complained multiple times to the LDEQ about the offensive odors, but neither Industrial Pipe nor LDEQ have remedied the problem. Mr. Green also testified that he regularly hears the bulldozers and dump trucks that operate at the landfill, and that he feels their vibrations from inside his home and when lying in bed. In addition to odors, noise, and vibrations, Mr. Green told the Court that he is concerned about the impact of pollution and fires from the landfill on the Oakville community.

The 8.3 acres of wetlands at issue are bottomland hardwoods located within the Naomi Environmental Management Unit [EMU], as testified to by Ms. Albertine Kimble, and are part of "a very narrow band of bottomland hardwood-baldcypress forest" still present in that EMU. PP CZMP, Intervenors' Ex. 1, at 6-131 (describing habitat); *See also* U.S. Army Corps of Engineers/LDEQ Quality, Joint Public Notice, Pl.'s Ex. P021, at 4, July, 16, 2002. Mr. Green testified that he is concerned for the cypress trees in the area and is hoping that the ecosystem is protected. *See* Photo of Mr. Green in Front of Cypress Tree Behind Oakville Baseball Field, Intervenors' Ex. 34; Aerial Photo of Wetlands, Pl.'s Exs. P015 & P017 (showing that wetlands at

issue are within the cypress forest contiguous to the cypress forest behind the Oakville baseball field); Aerial Photo of 8.3 Acres, Intervenors' Ex. 3 (showing cypress forest at issue in relation to cypress forest on Oakville land).

Another member of the Oakville community, Mr. Ragas, testified that the landfill is directly behind his home, which is approximately 50 feet from a landfill cell. *See* Satellite Photo of Industrial Pipe/Oakville Area, Intervenors' Ex. 36 (showing landfill and Oakville community with circle that Mr. Ragas drew around his house). Mr. Ragas testified about odors, noise, and vibrations from the landfill. He smells bad odors from the landfill every other day and cannot be outside when the odors are bad. Mr. Ragas also testified that strong vibrations from heavy machinery operating on the landfill cause his home to shake.

During Hurricane Isaac, Mr. Ragas testified that floodwaters in the Oakville area rose to at least 3.5 to 4 feet. *See* Intervenors' Exs. 23-25 & 27 (showing flood waters at northwest end of Oakville community that borders Industrial Pipe's property). Mr. Ragas testified that these flood waters covered the ditch that separates Oakville properties from the Industrial Pipe facility. Mr. Ragas also testified that he could see that Industrial Pipe's property had flooded. Flooding of the landfill poses a clear risk of contamination of the surrounding community.

Mr. Vestuto testified that he is a resident of the Cedar Grove community, which is approximately 1,500 feet north of the Industrial Pipe facility. *Satellite Photo of Industrial Pipe/Oakville Area, Intervenors' Ex. 35* (showing the landfill and surrounding area with a circle that Mr. Vestuto drew around his house). Mr. Vestuto testified that he was concerned about the landfill expanding into local wetlands. He stressed that wetlands are an important part of ecology and that they should be preserved, not abused. Mr. Vestuto stated that he periodically smells noxious odors from the landfill and that smoke and ash from a fire at the landfill in 2006 kept him from going outside for weeks.

The evidence shows that landfill fires are a major threat to the community. In April 2011, a community member reported a fire at the landfill that "ha[d] been burning for days" and expressed "concern[s] about the toxic chemicals in the air from the fire." Louisiana Department of Environmental Quality (LDEQ) Incident Report, Intervenors' Ex. 2, Apr. 8, 2011 (noting in

complaint that “[t]he Industrial Pipe Landfill has been burning for days”). In addition, Industrial Pipe’s owner, Mr. Stewart, admitted to a “large fire” at the landfill in 2007. And LDEQ documented a “fire started in woodpiles at the [Industrial Pipe landfill] on March 9, 2006, and continued through April 13, 2006.” LDEQ Resp. to Comments, Pl.’s Ex. P077, at 2-3. The agency explained that “[t]he woodwaste accumulated on site began to compost and caught fire,” which “was not unusual . . . due to the large volumes of woodwaste accumulated at the various sites throughout the Katrina-affected area.” *Id.* Mr. Hans Christenson testified that the Industrial Pipe landfill is currently accepting waste from Hurricane Isaac. Therefore, the potential exists for the Industrial Pipe landfill to accumulate large volumes of woodwaste from Isaac-affected areas, which could begin to compost and catch fire—an occurrence that LDEQ has explained is “not unusual.” *Id.*

A Coastal Use Permit allowing the facility to expand will prolong the landfill’s harmful impacts on the surrounding community. Dump trucks and barges will deliver an additional 245,000 cubic yards of construction and demolition debris to the facility for disposal in wetlands. Joint Permit Application, Pl.’s Ex. P038, at 5. The added debris will continue to threaten the health of the aquatic environment, and the community will continue to live with noxious odors, noise, vibrations, and the threat of fires from the landfill.

Standard of Review

Industrial Pipe elected under the State and Local Coastal Zone Management Act, La. Rev. Stat. § 49:214.35.F, to pursue a “trial de novo” on its Coastal Use Permit application. In a “trial de novo” of a Coastal Use Permit proceeding, the “court makes its own factual finds, exercises its own discretion and *substitutes* its own judgment for that of the administrative agency.” *Pardue v. Stephens*, 558 So. 2d 1149, 1161 (La. Ct. App. 1st 1989) (reviewing district court’s determination in a trial de novo on a Coastal Use Permit application). “At a trial de novo the whole case is retried as if there had been no prior trial whatever had been had.” *Id.* at 1159.

In this de novo review, the court applies a preponderance of the evidence standard as to some factors and a “clear” standard as to others. Industrial Pipe must show by a preponderance of

the evidence that its proposed landfill expansion is “consistent with the guidelines, the state program, and affected approved local programs.” La. Admin. Code tit. 43 pt. I § 723.C.8.a (2011) (“[Coastal use p]ermits shall be issued only for those uses which are consistent with the guidelines, the state program, and affected approved local programs).” But because Industrial Pipe is proposing to locate its disposal facility expansion in wetlands, it has the additional burden of meeting a “clear” standard of proof that benefits resulting from the proposed landfill expansion “would clearly outweigh the adverse impacts.” La. Admin. Code tit. 43, pt. I, § 701(H) (providing, *inter alia*, for such “clear” proof whenever a guideline modified by the term “maximum extent practicable” is not complied with); La. Admin. Code tit. 43, pt. I, § 715(A) (mandating that “disposal facilities shall be avoided in wetlands to the maximum extent practicable.”).

Statutory Background

Louisiana enacted the State and Local Coastal Resources Management Act in 1978 “to protect, develop, and, where feasible, restore or enhance the resources of the state’s coastal zone.” La. Rev. Stat. § 49:214.22(1) (2012). The Act requires anyone seeking to build a project that will significantly impact coastal waters to obtain a coastal use permit from the Louisiana Department of Natural Resources (DNR), or from the local parish government, *i.e.*, Plaquemines Parish. *See* La. Rev. Stat. § 49:214.30(A). The Act mandates that every “coastal use permit decision must be consistent with the state program and approved local programs for affected parishes and must represent an appropriate balancing of social, environmental and economic factors.” La. Rev. Stat. § 49:214.30(C)(3). The Coastal Use Permit regulations mandate that “[coastal use p]ermits shall be issued *only* for those uses which are *consistent with the guidelines, the state program, and affected approved local programs*. La. Admin. Code tit. 43 pt. I § .723.C.8.a (emphasis added). Pursuant to the Act, DNR promulgated the guidelines, La. Admin Code tit. 43, pt. I, §§ 701-719, mandating that “all applicable guidelines must be complied with.” *Id.* § 701.A. The guidelines under section 701 “applicable to all uses”—the title to the section is “Guidelines Applicable to All Uses.” Further, section 701.F provides a list of factors the decision-making body must consider

in evaluating permit applications. These factors include:

1. type, nature, and location of use;
2. elevation, soil, and water conditions and flood and storm hazard characteristics of site;
3. techniques and materials used in construction, operation, and maintenance of use;
4. existing drainage patterns and water regimes of surrounding area including flow, circulation, quality, quantity, and salinity; and impacts on them;
5. availability of feasible alternative sites or methods of implementing the use;
6. designation of the area for certain uses as part of a local program;
7. economic need for use and extent of impacts of use on economy of locality;
8. extent of resulting public and private benefits;
9. extent of coastal water dependency of the use;
10. existence of necessary infrastructure to support the use and public costs resulting from use;
11. extent of impacts on existing and traditional uses of the area and on future uses for which the area is suited;
12. proximity to and extent of impacts on important natural features such as beaches, barrier islands, tidal passes, wildlife and aquatic habitats, and forest lands;
13. the extent to which regional, state, and national interests are served including the national interest in resources and the siting of facilities in the coastal zone as identified in the coastal resources program;
14. proximity to, and extent of impacts on, special areas, particular areas, or other areas of particular concern of the state program or local programs;
15. likelihood of, and extent of impacts of, resulting secondary impacts and cumulative impacts;
16. proximity to and extent of impacts on public lands or works, or historic, recreational, or cultural resources;
17. extent of impacts on navigation, fishing, public access, and recreational opportunities;
18. extent of compatibility with natural and cultural setting;
19. extent of long term benefits or adverse impacts.

Id. § 701.F.

In addition, section 701.H applies when triggered by other guidelines in which the term “maximum extent practicable” appears—therefore, the specific guideline for the disposal of wastes triggers section 701.H.⁴ Section 701.H.1 provides that for guidelines “in which the

⁴ “The location and operation of waste storage, treatment, and disposal facilities shall be avoided in wetlands to the *maximum extent practicable*, and best practical techniques shall be used to minimize adverse impacts which may result from such use. *Id.* § 715.A (emphasis added).

modifier ‘maximum extent practicable’ is used, the proposed use is in compliance with the guideline if the standard modified by the term is complied with.” *Id.* at § 701.H.1. The guideline goes on to say that “[i]f the modified standard is not complied with,” the permit may only issue if the proposed use meets **all** of the following tests: (1) “[T]he benefits resulting from the proposed use would clearly outweigh the adverse impacts resulting from noncompliance with the modified standard;” (2) “there are no feasible and practical alternative locations, methods, or practices for the use that are in compliance with the modified standard;” **and** (3) the use meets one of the following three criteria: “a. significant public benefits will result from the use, or b. the use would serve important regional, state, or national interests, including the national interest in resources and the siting of facilities in the coastal zone identified in the coastal resources program, or; c. the use is coastal water dependent.” *Id.*

The Act further declares that coastal use permits “shall be in addition to any[] other permit or approval required or established pursuant to any other constitutional provision or statute.” La. Rev. Stat. § 49:214.23(3). The decision-making body, therefore, has a duty to perform an independent assessment of a coastal use permit application, consistent with the Act’s unique purpose “[t]o protect, develop and ,where feasible, restore or enhance the resources of the state’s coastal zone.” La. Rev. Stat. § 49:214.22(1).

In addition to complying with the State and Local Coastal Resources Management Act, any issuance of a coastal use permit must conform to article IX, § 1 of the Louisiana Constitution, which provides that “The natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.” Compliance with the “public trustee” duties created by this provision require that a coastal use permit issue *only* upon proof that: “1) adverse environmental effects . . . have been avoided to the maximum extent possible; 2) a cost benefit analysis . . . demonstrate[s] that the latter outweighs the former; and 3) there are [no] alternatives sites or mitigating measures which would offer more protection . . . without unduly curtailing non-environmental benefits.” *See In re Rubicon, Inc.*, 95-0108 (La. App. 1 Cir. 2/14/96); 670 So. 2d 475, 483.

Argument

I. Industrial Pipe’s Proposed Landfill Expansion Violates Parish Zoning Laws.

A. **Parish Zoning Laws Prohibit the Use of Flood Plain Property as a Landfill without Parish Approval that Industrial Pipe has Failed to Receive.**

The 8.3 acres of wetlands at issue in Industrial Pipe’s Coastal Use Permit is in the Flood Plain Zoning District as testified to by Mr. Mike Metcalf. *See also* Parish Zoning Map, Pl.’s Ex. P002; Pl.’s Ex. P015 (showing areas at issue outlined in red). No party disputes this fact.

Parish zoning laws make clear that “no building or land shall . . . be used or occupied . . . unless in conformity with the regulations herein specified for the district in which it is located.” Plaquemines Parish, La., Code of Ordinances, Zoning, app. B, § V.1 (2012). And the zoning ordinances mandate that “[t]he use of property . . . in the FP—Flood Plain District shall be limited” to an enumerated list of fourteen uses: a landfill is not one of them. Zoning § VI.M.1-1(a).⁵ This provision further states that commercial and industrial uses that are not listed may be permitted in the Flood Plain zoning district “subject to the approval of the council.” *Id.* § VI.M.1(b). Thus, a landfill is not a permitted use in a Flood Plain zoning district without specific Plaquemines Parish Council approval.

Industrial Pipe has failed to obtain “the approval of the council” to use the 8.3 acres as a landfill. Moreover, there was no “review and comments from the building official and the environment review committee”⁶ for this “environmental impact use”⁷ as required by section L.2

⁵ These 14 uses include: “(1) Any use permitted in the RS-1, RS-2, R-1A, R-1AA, R-1AB, R-1B, R-1C, Single-Family Residential Districts and the R-2 Two-Family Residential District. (2) Farming and the keeping of agricultural livestock when in compliance with the parish sanitary code. (3) Public recreation. (4) Fishing and/or hunting preserves or lodges. (5) Camps, subject to applicable state and parish requirements. (6) Boat house and boat docks. (7) Boat repairs and shipyards. (8) Marinas or yacht clubs. (9) Oil field services and supply companies. (10) Warehouses. (11) Trapping and associated light industries. (12) Mineral extraction and development of natural resources upon obtaining a parish permit. (13) Marine services. (14) Ice making plant.” *Id.*

⁶ “[T]he environment review committee [] will consist of the following: (a) Safety department—Department supervisor; (b) Engineering and public works—Department supervisor; (c) Drainage and levees—Department supervisor; (d) Sewerage and Water—Department supervisor; (e) Solid Waste—Department supervisor; (f) Port Authority—Department supervisor; (g) Planning, permits and zoning—Department supervisor; (h) Health department—Department supervisor; (i) Legal department—Department supervisor and other expertise that may be necessary.” *Id.*

⁷ Parish zoning laws describe “environmental impact uses” as those which: “[H]ave accompanying hazards, such as fire, explosion, noise, vibration, dust or emission of smoke, odors or toxic gases, or

of the Parish zoning ordinances. *See id.* § L.2 (permitting the use of I-3 land for “(80) Rendering and storage of dead animals, offal, garbage and waste products” “only after special review procedures”).⁸

Furthermore, the landfill expansion project does not qualify as a nonconforming use because the proposed use is not a *lawful* landfill that has existed continuously on this 8.3 acres of property prior to September 3, 1975. *Id.* Ord. No. 142 (“The Comprehensive Zoning Ordinance of Plaquemines Parish, Louisiana,” being Ordinance Number 142, adopted on September 3, 1975.”). Indeed, Industrial Pipe’s president Mr. Stewart has admitted that at least 5 of the 8.3 acres are located on property that did not have any landfilling activity on it when Industrial Pipe purchased the land sometime after 1985. *See* Solid Waste Permit Application, Land Ownership Documentation, Pl.’s Ex. P075, at 313-363 (showing property transactions and descriptions). And the remaining area at issue in this proceeding is “undisturbed” forested bottomland hardwood swamp.

Industrial Pipe submitted a letter from the Parish stating that a landfill in Venice, Louisiana that is located in the Flood Plain Zoning District “is a permitted use in this district and does not violate any existing parish land-use requirements.” Ltr. from Michael Metcalf, City Building Official, to Tidewater Landfill, LCC, Pl.’s Ex. P136. But this letter cannot repeal or otherwise change zoning laws that are clear on their face. Even if a landfill in Venice has acquired a non-conforming use, whether by prescription or through some other mechanism, the status of non-conforming use did not somehow spread to Industrial Pipe’s 8.3 acres. *See* Zoning § VII(4) (“No nonconforming use shall be extended to displace a conforming use.”). Indeed, a nonconforming use must “be viewed narrowly and have all doubts resolved against continuation or expansion of the non-conformity in order to preserve the property rights of the adjacent property owners.” *See, e.g., Elysian Fields, Inc. v. St. Martin*, 600 So. 2d 69, 73 (La. Ct. App. 4 1992).

other hazards to public health, safety or welfare or which cannot be designed and constructed without appreciable expense to conform to high performance standards with respect to the emission of objectionable influences and which normally generate a considerable amount of vehicular traffic” *Id.*

⁸ Other “environmental impact uses” include “(53) [j]unkyards, open or enclosed storage of junk” and “(82) [s]and and/or gravel pits.” *Id.*

B. The 1982 Council Resolution Does Not Grant Industrial Pipe Permission to Expand its Landfill.

Industrial Pipe introduced a 1982 Plaquemines Parish Council Resolution granting a construction permit to Oakville Landfill, Inc. for a landfill outside the Parish's hurricane protection levee on property owned by Joseph and Michael Badalamenti, which was bounded to the south by "the Village of Oakville" and to the north by property owned by "Lincoln Washington." Pl.'s Ex. P001; Pl.'s Ex. P024, at 2 (showing former Badalamenti and Washington properties). First, this resolution grants a construction permit to Oakville Landfill, Inc., not to Industrial Pipe, Inc. Furthermore, Industrial Pipe presented no evidence that it acquired that construction permit as a successor to Oakville Landfill, Inc. In fact, Defendants' exhibits D23 and D24 show just the opposite. These exhibits show the corporations are separate and distinct. Furthermore, Defendants' other exhibits show the Oakville Landfill, Inc. was ordered to close its landfill. *See Cease and Desist Orders, Def.'s Exs. D6-D8, March 31, 1994*).⁹

C. Industrial Pipe Failed to Show Prescription.

There is no colorable issue of prescription in this case. The U.S. Army Corps of Engineers issued a Cease and Desist Order against "Kennett Stewart d/b/a Industrial Pipe, Inc." for "unauthorized mechanical land clearing and deposition of fill" without a permit in violation of the Clean Water Act. Pl.'s Ex. P62, April 23, 2002. The Order, which is still in effect, is for the 5 acres of illegal fill that is in the areas designated as the "Pre-Filled Landfill" areas in Industrial Pipe's Coastal Use Permit application. Pl.'s Ex. Po28, at 4. According to the trial testimony of Industrial Pipe's owner Mr. Stewart, the illegal filling of the 5 acres ceased after the Army Corps Order, and the remaining area at issue in this proceeding is "undisturbed" and has never been filled. *Id.*

⁹ Further, the 1982 resolution concerned only the parcel south of the "Lincoln Washington" property—i.e., the former Badalamenti property where the three "undisturbed" acres exist. Plaintiff's Ex. P001; Plaintiff's Ex. P024, at 2 (showing former Badalamenti). Five of the 8.3 acres are located on the Lincoln Washington Property and the parcel to the north, the Clausen property, which were not purchased by Mr. Stewart until after 1985. *See Plaintiff's Ex. P24, at 2* (showing Lincoln and Clausen properties); Solid Waste Permit Application, Land Ownership Documentation, Pl.'s Ex. P075, at 313-363 (showing property transactions and descriptions).

Further, it is beyond dispute that a nonconforming use must be a lawful use, except for that use's nonconformance with zoning regulations. Zoning § III.66 (defining nonconforming use as “[a] structure or land lawfully occupied by a use that does not conform to the regulations of the district in which it is situated.”). Industrial Pipe's use of part of its land for illegal dumping was not only unlawful under the Clean Water Act, but it was also interrupted by an Army Corps Cease and Desist Order and by Industrial Pipe's subsequent compliance with that order. Therefore, the prescriptive period could not have continued to run (if it had started at all, which it did not). *See id.* § VII.8 (“Once changed to a conforming use, no building or land shall be permitted to revert to a nonconforming use.”); *City of New Orleans v. Howard*, 406 So. 2d 718, 720 (La. Ct. App. 4th 1981) (“[I]n view of defendant's own admission that he ceased operations for two or three days after he was brought to court in 1975, we are satisfied that the statute of limitations was interrupted and a new prescriptive period could not begin to run without another written notice being given to the City).

II. Industrial Pipe Failed to Meet its Burden of Proof Necessary for Obtaining a Coastal Use Permit.

The State and Local Coastal Resources Management Act mandates that “coastal use permit decision[s] must be consistent with the state program and the approved local programs.” La. Rev. Stat. § 49:214.30.C (3).

A. Industrial Pipe Failed to Show that its Landfill Expansion is Consistent with State Guidelines.

Industrial Pipe's application fails to meet the state regulatory guidelines. The Department of Natural Resources' regulations, codified at La. Admin. Code tit. 43 part I, Chapter 7, “serve as criteria for the granting, conditioning, denying, revoking, or modifying of coastal use permits.” La. Admin. Code § 49:214.27(B). Under these DNR regulations, such “permits shall be issued only for those uses which are consistent with” those guidelines. Industrial Pipe's application fails to meet this standard because Industrial Pipe failed to avoid storing, treating and disposing of waste in wetlands, failed to adopt technological methods to avoid releasing pollution, failed to demonstrate that the benefits of its proposal clearly outweigh the harms that will result, and failed to show that

issuance of a permit would be appropriate under the factors listed in La. Admin. Code tit. 43, part I, § 701(F).

1. Industrial Pipe has not proven that it has avoided storing, treating and disposing of waste in wetlands.

Industrial Pipe must avoid siting its waste facilities in wetlands. Under La. Admin. Code tit. 43, part I, § 715(A), “the location and operation of waste storage, treatment, and disposal facilities shall be avoided in wetlands to the maximum extent practicable.” Industrial Pipe’s expansion into its wetland acreage does not avoid locating a waste facility in wetlands to the maximum extent practicable. *See Webster's Third New International Dictionary* 1780 (1961) (“Practicable” means “feasible,” that is, “possible to practice or perform” or “capable of being put into practice, done, or accomplished.”). Indeed, it is beyond dispute that the 8.3 acres at issue are in wetlands.

2. Industrial Pipe has not proven that it is using technology “to prevent the movement of leachate away from the facility” or avoid “releasing pollutants” as required by La. Admin. Code tit. 43, part I, § 715(C)-(D).

If an applicant cannot avoid wetlands, it must design and manage its waste facility with sufficient technology to withstand adverse conditions and control leachate. La. Admin. Code tit. 43, part I, § 715(C)-(D) require facilities to “be designed and built to withstand all expectable adverse conditions without releasing pollutants,” and “be designed and constructed using best practical techniques to prevent leaching, control leachate production, and prevent the movement of leachate away from the facility.” Dr. Goh (URS) testified the landfill cells will be excavated to a depth of 15 feet, and the water table at the 8.3 acre area is higher than 15 feet deep. Therefore deposited waste will be in contact with the local groundwater. Industrial Pipe has admitted that no liner nor any other system to prevent leaching will be used in the expansion into the wetlands.¹⁰

¹⁰ Dr. Goh testified that, ordinarily, Type III landfills like Industrial Pipe’s should not leach, so DEQ does not ordinarily require them to have liners. But the situation here is not ordinary; instead, Industrial Pipe is proposing to put waste directly into the water table. DNR’s regulations, including La. Admin. Code tit. 43, part I, § 715, require more scrutiny and care when an applicant proposes putting waste in wetlands than the DEQ “ordinarily” requires of other landfills. Otherwise, § 715(C)-(D) would be wholly redundant of the DEQ regulations. *But see Katie Realty, Ltd. v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0588 (La. 10/16/12); *So. 3d* (2012 WL 4901067) (“Every word, sentence, or provision in a law is presumed to be intended to serve some useful purpose, that some effect is given to each such provision, and that no unnecessary words or provisions were employed.”) (emphasis added) (citing *Colvin v. Louisiana Patient's Compensation*

Clearly, therefore, Industrial Pipe’s proposed expansion could not “prevent the movement of leachate away from the facility” as required by La. Admin. Code tit. 43, part I, § 715(D) and would “releas[e] pollutants” in violation of § 715(C). For this reason alone, Industrial Pipe’s permit application must be denied.

3. Industrial Pipe failed to prove that the landfill expansion’s benefits “would clearly outweigh the adverse impacts” as required by La. Admin. Code tit. 43, § 701(H).

Because Industrial Pipe cannot prove that it has avoided disposing of waste in wetlands, it must prove that the benefits of its proposed expansion *clearly* outweigh the harms under an analysis that includes the factors listed in La. Admin. Code tit. 43, part I, § 701(F). La. Admin. Code tit. 43, part I, § 701(H). But Industrial Pipe cannot meet this burden, particularly given *1*) Industrial Pipe’s failure (discussed below) to show that a permit would be appropriate under the § 701(F) factors, and *2*) the significant harm that expanding the landfill would impose on the Oakville community, as discussed above.

4. Industrial Pipe failed to prove that the permit should issue under the factors of La. Admin. Code tit. 43, part I, § 701(F).
 - a. *Because Industrial Pipe’s expansion violates zoning and would result in waste disposal in wetlands, the permit must be denied under the factor set forth at La. Admin Code. tit. 43, § 701(F)(1) (“Type, nature, and location of use”).*

As discussed above, Industrial Pipe’s proposed use violates parish zoning and would violate the policies against non-water dependent uses and the waste disposal in wetlands. Industrial Pipe has argued, however, that by obtaining a DEQ permit, Industrial Pipe somehow also qualified for a permit under the DNR coastal program guidelines. But Scott Guilliam, DEQ Administrator of the Waste Permits Division, testified that DEQ does not determine whether the DNR’s guidelines have been met when considering a solid waste permit, and the existence of a DEQ solid waste permit has no relation to whether a facility has complied with DNR guidelines.

Fund Oversight Bd., 06–1104, p. 6 (La.1/17/07); 947 So. 2d 15). Furthermore, this particular Type III landfill has leached offsite into the Parish ditch next to Oakville, including in February and March 2010. Intervenors’ Ex. 4, LDEQ Inspections April 12, 2010/ March 7, 2010; Intervenors’ Ex. 5 at 12-18 LDEQ Inspections Photos April 12, 2010/ March 7, 2010; Testimony of Timothy Schotsch regarding Ex. 5.

Industrial Pipe's contrary assumption that DNR's regulatory standards are wholly redundant of DEQ's regulations is contrary to established legal principles. *See Katie Realty, Ltd. v. Louisiana Citizens Prop. Ins. Corp.*, 2012-C-0588 (La. 10/16/12); *_So. 3d_* (2012 WL 4901067) (holding that "courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless and surplusage if a construction giving force to and preserving all words can legitimately be found").

b. Because Industrial Pipe's expansion would exacerbate flood hazards, the permit must be denied under the factor set forth at La. Admin. Code. tit. 43, § 701(F)(2) ("Elevation, Soil, and water conditions and flood and storm hazard characteristics of the site").

Industrial Pipe failed to provide this Court with evidence of elevations and water conditions for the site. But from the testimony of Mr. Erroll Ragas, whose property abuts the Industrial Pipe landfill facility, it is clear that the ditch separating Oakville from the Industrial Pipe landfill was completely under water during Hurricane Isaac. Mr. Ragas further testified that he could see floodwater on the Industrial Pipe facility up to the "hill." He testified that he took the photographs, which depict this flooding when the water was *lower* than the flood's peak height. Isaac-Ragas Flooding Photographs, Intervenors' Ex. 23-27. Mr. Ragas also testified that flood waters in the Oakville area rose at least 3.5 to 4 feet. Because the planned landfill expansion involves *15-foot deep* waste cells in low lying, wetland areas, issuance of the permit would increase the risk that pollution will spread from flooded waste disposal areas.

Dr. Goh and Timothy Schotsch testified that Industrial Pipe drains its wastewater into a retention pond, described by Dr. Goh as "outfall 003," and identified by Schotsch in flyover photo map of the back of the landfill – Schotsch circled the pond, Intervenors' Ex. 50, and flyover photo map of back of landfill – Schotsch circled wetland areas and pond, Intervenors' Ex. 51. Industrial Pipe failed to establish that it had safeguards in place to keep this pool from flooding. Further, Schotsch testified that liquid waste seeped offsite into the Parish ditch on Oakville's northern border in Spring 2010, through porous layers in a former roadbed. He identified related photos and an associated LDEQ report of this incident. Intervenors' Ex. 4, LDEQ Inspections, April 12, 2010/ March 7, 2010; Intervenors' Ex. 5 at 12-18 LDEQ Inspection Photos, April 12, 2010/ March

7, 2010, (supplemental electronic copy on flash drive, identified photos at pp. 12-18). In response, Industrial Pipe deepened and re-graded the toe ditch, which drains into the retention pond along with the rest of Industrial Pipe’s wastewater, and packed clay around the Parish ditch leak areas. Intervenors’ Ex. 4, at 4 &10. According to LDEQ, “[t]he facility *believes that if the water level in the toe drainage ditch remains lower than the brick road bed layer then there should be no seepage.*” Intervenors’ Ex. 4, at 5 (emphasis added). Given the weather events that are routine for Plaquemines Parish, however, a “solution” that depends on water levels remaining low is no solution at all.

Because Industrial Pipe failed to offer competent evidence as to elevation, and failed to offer a credible plan to prevent harm to the community and environment from the spread of pollution via flooding, its permit application must be denied.

- c. Industrial Pipe’s “Techniques and materials used in construction, operation, and maintenance of use” (La. Admin Code. tit. 43, § 701(F)(3)) are insufficient under the guidelines.*

As discussed above (Argument II.A.2.), Industrial Pipe has not proven that it is using sufficient methods and technology to withstand foreseeable adverse conditions and to control leachate as required under La. Admin. Code tit. 43, part I, § 715(C)-(D).

- d. Industrial Pipe failed to carry its burden imposed by the factor set forth at La. Admin. Code. tit. 43, § 701(F)(5) (“availability of feasible alternative sites or methods of implementing the use”).*

Industrial Pipe failed to offer any credible evidence on the “availability of feasible alternative sites” for its landfill expansion project. The word “available” means “present or ready for immediate use.” Merriam-Webster.com 2011, <http://www.merriam-webster.com> (last visited Oct. 21, 2012). A real estate survey that is almost a decade old cannot provide evidence of whether alternative sites are presently available, and therefore the Court should not consider it. *See also In the Matter of Browning-Ferris Industries Petit Bois Landfill*, 93-2050 (La. App. 1 Cir. 6/23/95); 657 So. 2d 633, 637-38 (rejecting an unduly limited alternatives study that a former DEQ secretary had rejected as “recycle[ed]” and noting that “it was conceded that the alternative sites utilized by BFI in connection with its application in this matter were essentially the same as those

included in a 1987 study”).

Specifically, Industrial Pipe’s real estate survey does not fulfill its burden of proof. Type III Permit Application for Industrial Pipe to LDEQ, drafted by URS, Pl.’s Ex. 75, at 466. This report by Belinda Hazel, dated January 23, 2003, is inadequate because it does not look for sites outside of Plaquemines Parish, it is almost a decade old and has not been updated. Further, Industrial Pipe was unwilling or unable to call this witness to explain her report, provide support for her findings, and to be cross-examined. *Id.*

Indeed, Industrial Pipe admits that the “the facility service area will be unlimited” and that “sources of waste disposed of at the facility include customers primarily located in Plaquemines, Jefferson, Orleans, and St Bernard Parish.” *Id.* at 368, ¶ 6. Hans Christensen testified that Industrial Pipe has received waste from as far away as Illinois. Nonetheless, Industrial Pipe arbitrarily restricted the scope of its evidence about alternative sites to Plaquemines Parish. The scope of this search thus is arbitrary and inadequate according to the Louisiana appellate courts that have decided the issue. *See In the Matter of Browning-Ferris Industries Petit Bois Landfill*, 93-2050 (La. App. 1 Cir. 6/23/95); 657 So. 2d at 639 (“[I]t appears inherently unreasonable...to limit consideration of alternative sites to arbitrary geographical boundaries where the potential benefits and risks of the proposed facility will impact a multi-parish, if not a multi-state region.”); *Matter of Am. Waste & Pollution Control*, 633 So. 2d 188, 196 (La. App. 1 Cir.1993) (rejecting an alternatives analysis due to “failure of the applicant and DEQ to investigate sites outside the Cade area and to include within the evaluation of the sites pertinent geologic data”), *aff’d*, 93-3163 (La. 9/15/94); 642 So. 2d 1258.

Further, the Court should not consider the testimony of Mr. Christensen or Parish President Billy Nungesser who told the Court that they were “not aware” of any suitable alternative sites in Plaquemines Parish. Neither witness is qualified as an expert to offer this opinion, nor did either witness present any data to back up his claim.

- e. *Industrial Pipe's expansion is inconsistent with the "Designation of the area for certain uses as part of [the] local program. La. Admin Code. tit. 43, § 701(F)(6).*

As discussed in more detail below (Argument II.C.), Industrial Pipe's proposed use of the 8.3 acres of wetlands is not consistent with Plaquemines Parish's Local Coastal Zone Management Program, which designates these wetland acres as part of the Naomi Environmental Management Unit. This program identifies objectives, goals, and priorities of use for such management units within the Parish, which include maintaining and promoting the conservation and protection of these wetlands. Interveners' Ex. 1, at 1-1 – 1-6.

- f. *Industrial Pipe presented no competent testimony about the factor set forth at La. Admin Code. tit. 43, § 701(F)(7) ("economic need for use and extent of impacts of use on economy of locality").*

Industrial Pipe failed to call a competent expert to testify about economic needs and impacts of the proposed landfill expansion on the local economy. Instead, Industrial Pipe relied on the lay testimony of Mr. Nungesser and Mr. Christensen to provide opinions on these subjects. Since neither Mr. Nungesser nor Mr. Christensen is an expert qualified to opine on the economic benefits or local need of the landfill, their testimony should be given no weight. Neither witness produced any reliable data or figures to back up their claims. Moreover, Hans Christiansen owns the company that operates the landfill and therefore has a financial interest in the landfill's expansion.

Industrial Pipe was unwilling or unable to call Dr. Richardson, who Industrial Pipe paid to prepare an economic analysis in July, 2001. See Pl.'s Ex. 75 at 390. This study is more than a decade old and is outdated. Further, the study's analysis does not concern the specific 8.3 acres at issue in this case. Instead, Dr. Richardson prepared this study when Industrial Pipe sought to build a recycling facility at the landfill site. *Id.* According to Mr. Christensen, Riverside Recycling has no plans to operate the recycling center. It has been closed since Katrina. Therefore, Dr. Richardson's report is irrelevant to this proceeding. Because it is wholly unsupported by testimony and inapplicable on its face, Dr. Richardson's report should be given no weight.

Letters from local business owners are similarly entitled to no weight. *See* Support Letter Pinnacle Waste, Pl.’s Ex. 51, July 21, 2011; Support Letter N.O. Iron Works, Pl.’s Ex. 52, July 22, 2011; Support Letter C&J Welding & Fab, Pl.’s Ex. 54, July 22, 2011; Support Letter Couvillion, Pl.’s Ex. 55, July 22, 2011; Support Letter Pro Iron & Metals, Pl.’s Ex. 56, July 21, 2011; Support Letter Leon Duplessis & Sons, Pl.’s Ex. 57, July 20, 2011; Support Letter Riverside Metals, Pl.’s Ex. 58, July 25, 2011. Industrial Pipe was unwilling or unable to call the authors, except for Mr. Schotsch, to testify in court and be subject to cross-examination. Furthermore, all of the letters (except for P58 which has a different introduction) are short, conclusory, three-paragraph form letters with the same first and last paragraphs. And four of the letters came from businesses owned by Kennett Stewart (president of Industrial Pipe or managed by his operators, or located on his property. Mr. Stewart testified that he owns Riverside Metals, LLC, Pl.’s Ex. 58, and it has the same address as Industrial Pipe; the letter from Pinnacle Waste Inc., Pl.’s Ex. 52, is signed by “Timothy J. Schotsch, General Manager” and has the same address as Industrial Pipe; Kenny Stewart testified that he owns the land where Leon Duplessis & Sons operates their sandpit, Pl.’s Ex. 58; and Pro Iron & Metals, LLC has the same address as Industrial Pipe, Pl.’s Ex. 56. These other businesses are tenants of Industrial Pipe. Without any support from any witness with an address different from that of the applicant, these letters are entitled to no weight.

g. Industrial Pipe’s proposed expansion is not dependent on coastal water uses and thus is inconsistent with the factor set forth at La. Admin Code. tit. 43, § 701(F)(9).

The Industrial Pipe landfill is not a coastal water dependent use. Under La. Admin. Code tit. 43, part I, § 700, a use is coastal water dependent when it “must be carried out on, in or adjacent to coastal water areas or wetlands because the use requires access to the water body or wetland or requires the consumption, harvesting or other direct use of coastal resources, or requires the use of coastal water in the manufacturing or transportation of goods.” Hans Christensen testified that Industrial Pipe receives waste by truck. Its permit modification which adds barge delivery merely “provides an alternate method of transportation and delivery of debris to the landfill” to the truck method. Plaintiff’s Ex. P125, P125.002, DEQ Resp. to Cmmts, Cmmt. 1. Therefore, Industrial

Pipe's landfill is not a use that "must be carried out on, in or adjacent to coastal water areas or wetlands" because it can receive waste by either truck (land-based method) *or* barge (water-based method).

h. Industrial Pipe's expansion is close to, and will harm "important natural features such as ... wildlife and aquatic habitats, and forestlands." La. Admin Code. tit. 43, § 701(F)(12).

The 8.3 acres of wetlands at issue are bottomland hardwood wetlands. Wetlands Determination: Corps letter to Kenny Stewart dated 03/01/2002 enclosing Joint Public Notice dated 07/16/2002. Pl.'s Ex. 21, at 4. The Plaquemines Local Coastal Zone Management Program concludes that a "unique ecological feature" of the Naomi Environmental Management Unit is the large area of bottomland hardwood in the northern portion of the parish. Intervener's Ex. 1, at 6-131.¹¹ The U.S. Army Corp of Engineers found, during an environmental assessment performed in 1983 that destroying these wetlands would cause environmental impacts including loss of habitat for wildlife and negative effects on water quality. 1983 CUP Application Denial, Intervenors' Ex. 22 at 29. The Corps also found that these wetlands provide habitat to numerous wading birds, reptiles, and amphibians, and provide feeding and resting habitat for wintering migratory waterfowl. *Id.* at 30. Further, the bottomland hardwood swamp "provides nutrients and detritus that are transported to the lower part of the basin via numerous waterways. *Id.* These materials provide the basis for a food chain/web which makes the basin the most productive seafood harvesting area in Louisiana." *Id.* at 33.

Industrial Pipe has not shown that the effects of destroying these wetlands today would be any different. Indeed, Industrial Pipe's officers testified that part of the 8.3 acres at issue is untouched. Therefore the weight of the evidence is that the proposed expansion would harm important natural features, including aquatic habitats and forestlands and must be denied under the factor set forth in La. Admin Code. tit. 43, § 701(F)(12).

¹¹ "The Naomi EMU, located in the northwestern part of Plaquemines Parish west of the Mississippi River, encompasses approximately 11 ,200 ac. The EMU is defined on the north, east, and south by the back flood protection levees along the Plaquemines Area EMU. The western perimeter of the EMU is the Jefferson Parish - Plaquemines Parish boundary line and a short reach of Bayou Barataria." *Id.* See also *id.* at pdf p. 336 (map of Parish EMUs).

- i. *Industrial Pipe's expansion would be close to, and will harm "historic, recreational, [and] cultural resources." La. Admin Code. tit. 43, § 701(F)(16).*

Allen Green, president of the Oakville Community Action Group, testified that there are at least six sites with historic, recreational and cultural value to the citizens of Oakville at risk in this proceeding: the Oakville cemetery, the [church] and bell, the "bowl" where slaves washed clothes and socialized, the Sarpy homestead, the ball park and playground, and the historic and archaeological value of the Oakville community itself. Moreover, Mr. Green testified that no one from Industrial Pipe or URS ever even asked him about any cultural resources in Oakville. Industrial Pipe offered a 1989 letter from the State Archaeologist's office, but that letter is of no value, because it is more than 12 years old, and Industrial Pipe was unwilling or unable to produce any witness to even explain what this letter means. Type III General Permit Application, Pl.'s Ex. 9 at 73, August 14, 2001 (letter from Leslie P. Tassin to Ned A. Cole stating that there are no "historical" or "cultural" sites within 1000 ft. of the permit area). How did the State Archaeologist's Office reach the conclusion expressed in the letter? Did anyone from the State Archaeologist's Office even survey the area? The letter cannot excuse Industrial Pipe from its burden of assessing impacts to cultural resources, including historical and recreational features in the Oakville community, which is adjacent to the landfill.

Plaquemines Parish has declared that "through the use of permits, implementation of the coastal zone management program and cooperation with DNR, the coastal zone management program shall: ... (2) [p]rotect, preserve, restore and enhance the coastal zone and wetlands as a habitat for wildlife, an aquatic resource, an aesthetic resource, a parish, state and national resource, and a *historic cultural resource*." Plaquemines Parish Code of Ordinances, Part II, Ch. 18, Art. IV, § 18-56(a) (emphasis added). Thus the 8.3 acres themselves are an historic and cultural resource under the local program.

B. Industrial Pipe cannot meet its burden by relying on conclusory opinions contained in documentary evidence unsupported by testimony.

Industrial Pipe introduced a large volume of documentary evidence that consists primarily of the paid-for opinions of Industrial Pipe consultants whom Industrial Pipe was

unwilling to expose to cross-examination. Because these opinions lack foundation in testimony and are not from a governmental, unbiased source, they are entitled to no weight. For example, Dr. Goh, of URS, was qualified as an expert in hydrology and soil sciences, and URS is a paid consultant employed by Industrial Pipe. Any opinion evidence created by URS, other than that relating to hydrology and soil sciences, should be given no weight because Industrial Pipe was unwilling or unable to call expert witnesses to support such opinions.

A table illustrating some of the unsupported opinion evidence contained in documents in the record is provided below:

Ex. #	Witness	Document Title	Comments
P9	Goh	Type III General Permit Application	Dr. Goh was accepted as an expert in hydrology and soil sciences only. The portions of this document not pertaining to those fields should be given no weight. They were composed by URS, consultants paid by Industrial Pipe for the purpose of a DEQ solid waste permit. No witness testified to the contents of these documents and Industrial Pipe was unwilling or unable to produce a witness to stand behind them.
P23	Kimble	Discussion of Alternatives and Minimization of Impacts: URS letter by David Eley to Corps	This document was prepared by URS and paid for by Industrial Pipe. No witness testified to the contents of this document and Industrial Pipe was unwilling or unable to produce a witness to stand behind it.
P51	Kimble	Support Letter Pinnacle Waste	Letter from Pinnacle Waste purporting to show support for the granting of Industrial Pipe's CUP. No witness testified about or faced cross-examination about the contents of this document.
P52	Kimble	Support Letter N.O. Irons Works	Letter from New Orleans Iron Works purporting to show support for the granting of Industrial Pipe's CUP. No witness testified about or faced cross-examination about the contents of this document.
P54	Kimble	Support Letter C&J Welding.	Letter from C&J Welding purporting to show support for the granting of Industrial Pipe's CUP. No witness testified about or faced cross-examination about the contents of this document.

Ex. #	Witness	Document Title	Comments
P55	Kimble	Support Letter Couvillion	Letter from Couvillion purporting to show support for the granting of Industrial Pipe's CUP. No witness testified about or faced cross-examination about the contents of this document.
P56	Kimble	Support Letter Pro Iron Metals	Letter from Pro Iron Metals purporting to show support for the granting of Industrial Pipe's CUP. No witness testified about or faced cross-examination about the contents of this document.
P57	Kimble	Support Letter Leon Duplessis and Sons	Letter from Leon Duplessis and Sons, Inc. purporting to show support for the granting of Industrial Pipe's CUP. No witness testified about or faced cross-examination about the contents of this document.
P58	Kimble	Support Letter Riverside Metals	Letter from Riverside Metals purporting to show support for the granting of Industrial Pipe's CUP. No witness testified about or faced cross-examination about the contents of this document. This business is located on the same property as Industrial Pipe's Facility, and it is owned by Kenny Stewart.
P75	Goh	Type III Permit Application for Industrial Pipe to LDEQ, drafted by URS	Dr. Goh was accepted as an expert in hydrology and soil sciences only. The portions of this document not pertaining to those fields should be given no weight. They were composed by URS, consultants paid by Industrial Pipe for the purpose of a DEQ solid waste permit. No witness testified to the contents of these documents and Industrial Pipe was unwilling or unable to produce a witness to stand behind them.
P94	Kimble	Letter from Stephen Weigand to Albertine Kimble	Industrial Pipe's lawyer wrote this letter about the zoning status of the Industrial Pipe property. No witness testified to the contents of this document and Industrial Pipe was unwilling or unable to produce a witness to stand behind it.
P115	Goh	Original CUP application	Dr. Goh was accepted as an expert in hydrology and soil sciences only. The portions of this document not pertaining to those fields should be given no weight. They were composed by URS, consultants paid by Industrial Pipe for the purpose of a DEQ solid waste permit. No witness testified to the contents of these documents and Industrial Pipe was unwilling or unable to produce a witness to stand behind them.

Ex. #	Witness	Document Title	Comments
P124	Kimble	IP's response to 701 factors 07/15/11 letter to A. Kimble from URS	This letter was written by URS, consultants paid by Industrial Pipe, to Ms. Kimble. No witness testified to the contents of this document and Industrial Pipe was unwilling or unable to produce a witness to stand behind it.
P126	Kimble	IP's response to 701 factors 09/28/10 letter to A. Kimble from URS	Dr. Goh was accepted as an expert in hydrology and soil sciences only. The portions of this document not pertaining to those fields should be given no weight. They were composed by URS, consultants paid by Industrial Pipe for the purpose of a DEQ solid waste permit. No witness testified to the contents of these documents and Industrial Pipe was unwilling or unable to produce a witness to stand behind them.
P133	Kimble	1 st CUP Statement of Justification for Recommendation of CUP	No witness testified to the contents of this document and Industrial Pipe was unwilling or unable to produce a witness to stand behind it.

C. Industrial Pipe Failed to Show that its Landfill Expansion is Consistent with Plaquemines Parish's Coastal Zone Management Program.

Under La. Rev. Stat. § 49:214.30.C (3), coastal use permits must be “consistent with . . . local programs.” Industrial Pipe’s application fails to meet that standard because it proposes to dispose of waste in wetlands without providing mitigation within the Parish.

The Parish has declared that its Coastal Zone Management Program “shall: (1) [p]rotect, preserve, restore and enhance the coastal zone and wetlands as a natural storm barrier, flood control system, and water filtration system [and] (2) [p]rotect, preserve, restore and enhance the coastal zone and wetlands as a habitat for wildlife, an aquatic resource, an aesthetic resource, a parish, state and national resource, and a historic cultural resource.” Plaquemines Parish, La., Code of Ordinances, pt. II, ch. 18, art. IV, § 18-56(a) (2012).

Ms. Kimble, administrator of the Parish’s local Coastal Zone Management Program, confirmed in her testimony that the 8.3 acres of wetlands at issue in this proceeding are located within an area designated in the Parish’s Coastal Zone Management Program as the Naomi EMU. One of the Parish’s basic objectives for the Naomi EMU is to “[p]rohibit development of wetland

areas for non-wetland dependent uses.” PP CZMP, Intervenor’s Ex. 1, at 6-136. A landfill is clearly not a wetland dependent use. Indeed, the guidelines for making Coastal Use Permit decisions state that “disposal facilities shall be avoided in wetlands to the maximum extent practicable.” La. Admin. Code tit. 43 pt. I § 715.A. Industrial Pipe has not shown that it would be impracticable to dispose of waste in a non-wetland area. Therefore, Industrial Pipe’s landfill expansion project is inconsistent with the Parish’s program.

Moreover, the 8.3 acres of wetlands at issue are “bottomland hardwood wetlands.” U.S. Army Corps of Engineers/LDEQ Quality, Joint Public Notice, Pl.’s Ex. P021, at 4, July, 16, 2002. These wetlands and are within “a very narrow band of bottomland hardwood-baldcypress forest,” PP CZMP, Intervenor’s Ex. 1, at 6-131, which the Parish has determined is a “unique ecological feature.” *Id.* at 6-132-133. Both Ms. Kimble’s testimony and description of the location of the Naomi, the 8.5 acres at issue here within this EMU. *Id.* This area is also habitat for the American Bald Eagle, which, according to the Parish, “typically nests in baldcypress trees.” *Id.* at 2-62; 6-132 to 6-133. The Parish has also determined that the “[l]oss of forest habitat would . . . negatively impact potential availability of nesting sites for the Bald Eagle in the parish.” *Id.* at 2-41.

Industrial Pipe’s answer to the loss of this important and unique habitat is to pay a mitigation bank to plant bottomland hardwoods *in another parish*. This violates the Parish’s policy for the Naomi EMU to “[d]iscourage dredge and fill operations in wetlands and water bodies unless . . . the detrimental impacts are offset *through creation of wetland on-site or within the parish, preferable in the same EMU.*” *Id.* at 6-137 (emphasis added). Accordingly, Industrial Pipe’s permit application is inconsistent with the Parish’s Coastal Zone Management Program and must be denied under La. Rev. Stat. § 49:214.30.C (3).

III. This Permit Cannot Issue under the “Public Trust” Provision of Louisiana Constitution Article IX, § 1.

The Louisiana Supreme Court has explained that under La. Const. art. IX, § 1, “proposed action affecting the environment” may only be approved if “adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.” *Save*

Ourselves, Inc. v. La. Env'tl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984). The First Circuit has recognized that this public trustee duty extends to reviewing courts. *In re Rubicon, Inc.*, 95-0108 (La. App. 1 Cir. 2/14/96); 670 So. 2d 475, 481.

To merit a finding that “adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare,” Industrial Pipe must prove three things, none of which have been proven here:

1. the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible;
2. a cost-benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and
3. there are no alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.

In re Oil & Gas Exploration, Dev., & Prod. Facilities, Permit, 2010-1640, p. 4 (La. App. 1 Cir. 6/10/11); 70 So. 3d 101, 104. Industrial Pipe has filed entirely to meet that burden.

Here, the water table is less than 15 feet below the ground level and Industrial Pipe intends to dispose of waste 15 feet below the ground level (i.e., below the water table in the groundwater), as testified to by Dr. Goh. Industrial Pipe also plans to construct this area of the landfill without a liner to separate the waste from the environment and without a system to collect leachate or any seepage that could come from the waste. *Id.* As shown in LDEQ inspection reports, discharges have already “seeped” from the existing facility. *See* Interveners’ Exs. 4 & 5. Because Industrial Pipe is not going to use a liner or leachate collection system in proposed expansion, seepage occurring in the existing facility will also occur in the expanded acreage. Thus, Industrial Pipe’s failure to install a liner or leachate collection system show that it has failed to avoid the potential and real adverse environmental effects of siting this facility in a wetland to the maximum extent possible.

Furthermore, Industrial Pipe has not offered a competent witness to testify about a cost-benefit analysis, offering only an outdated 2001 analysis of a “transfer station” performed by a paid consultant who did not testify and thus did not face cross-examination. In light of the severe

impacts to the community has faced because of the landfill's operation, as shown through the testimony of Allen Green, Erroll Ragas, and Michael Vestuto, and the documented evidence of landfill fires and offsite landfill seepage, the clear weight of the evidence is that impacts to the environment and surrounding community outweigh any alleged benefits from the expansion.

Moreover, Industrial Pipe has failed to show that there are no alternative projects or alternative sites or mitigating measures that would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.

Industrial Pipe also failed to submit a credible or approvable analysis of alternative sites. Louisiana appellate courts have already clarified that the analysis of alternative sites cannot be arbitrarily limited to parish boundaries. *In re Browning-Ferris Indus. Petit Bois Landfill*, 93-2050 (La. App. 1 Cir. 6/23/95); 657 So. 2d 633, 638 (“BFI's site survey should have gone outside the boundaries of Calcasieu Parish”); *In re Am. Waste & Pollution Control Co.*, 633 So. 2d 188, 196 (La. Ct. App. 1st 1993) (rejecting an alternatives analysis due to “failure of the applicant and DEQ to investigate sites outside the Cade area and to include within the evaluation of the sites pertinent geologic data”), *aff'd*, 93-3163 (La. 9/15/94); 642 So. 2d 1258. Yet Industrial Pipe's testimony concerned only Plaquemines Parish.

Industrial Pipe's burden in this case was to submit an alternative site study that is sufficient to allow this Court “to fully consider and thereafter make an informed determination that the site proposed ... afforded the best balance of environmental costs versus economic, technical or social benefits.” *Matter of Browning-Ferris Indus.*, 657 So. 2d at 638. Industrial Pipe failed entirely to meet that burden and, as a result, its permit application must be denied.

Conclusion

Based on the foregoing, Oakville prays that the Court DENY Industrial Pipe's Coastal Use Permit application.

Respectfully submitted this 24th day of October,
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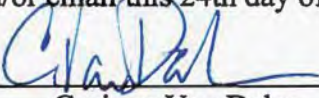


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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading on all counsel of record in these proceedings listed below by U.S. Mail, fax, and/or email this 24th day of October, 2012.



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