

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2009 CA 2259**

**LOUISIANA ENVIRONMENTAL ACTION NETWORK,  
CITIZENS FOR A STRONG NEW ORLEANS EAST,  
THE GREEN ZONE TASK FORCE,  
AND FATHER VAN LUKENGUYEN**

**VERSUS**

**LOUISIANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY**



Judgment Rendered: JUN 25 2010

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On Appeal from the 19th Judicial District Court  
In and For the Parish of East Baton Rouge  
Trial Court No. 560,711

Honorable Timothy Kelley, Judge Presiding

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**BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.**

*Whipple, J. dissents, for reasons assigned -  
Welch, J., concurs with reasons. 4*

**HUGHES, J.**

This appeal involves the issuance of a water quality certification by the Louisiana Department of Environmental Quality (the LDEQ) for a project known as the Chef Menteur Landfill. Louisiana Environmental Action Network, Citizens for a Strong New Orleans East, The Green Zone Task Force, and Father Van Lukenguyen (hereinafter collectively referred to as LEAN) oppose the issuance of the certification. Waste Management, L.L.C. (Waste Management), the applicant for the certification, intervened in the lawsuit. For the following reasons, we affirm the LDEQ's decision.

**FACTS AND PROCEDURAL HISTORY**

Following the devastation of Hurricane Katrina, the New Orleans area was littered with massive amounts of debris. To expedite removal and disposal efforts, both the United States Army Corps of Engineers (the Corps) and the LDEQ issued emergency authorizations to Waste Management for the construction and operation of the Chef Menteur Landfill (Chef Landfill.) Under these emergency authorizations, the Chef Landfill was to be operated as an "Enhanced Construction and Demolition (C&D) Landfill" to receive the hurricane-generated C&D debris associated with demolition activities in the area in and around Orleans Parish and particularly in the Ninth Ward area. As part of its emergency authorization, the Corps required that Waste Management complete the traditional permitting process to obtain the necessary federal permit for the site's operation, in accordance with Section 404 of the Clean Water Act, 33 USCA 1344, and in the interim, to comply with all the requirements of a permitted facility. As such, the only deviation from the normal permitting process for this site was that public notice and the

opportunity to comment were provided for after, rather than before, the LDEQ's decision to issue a water quality certification, which was a prerequisite to the issuance of the federal 404 permit.

The Chef Landfill conducted operations from approximately April 2006 until August 2006. During its operation, the landfill generated waste water and storm water and, as authorized, discharged these waters off-site into the Maxent Canal, a man-made canal adjacent to the facility which empties into the Intercoastal Waterway. After disposal operations ceased, an interim cover of more than two feet of low permeability soil was placed over the waste. In approximately February 2007, closure of the site commenced.

The construction, operation, and closure of the Chef Landfill necessitated Waste Management's applications for various authorizations, permits, and/or certifications, including the initial emergency authorizations, a federal 404 permit, a water quality certification from the LDEQ, and a Louisiana Pollutant Discharge Elimination System (LPDES) permit from the LDEQ.

#### **1. The Emergency Authorizations**

The Chef Landfill initially operated under the emergency authorizations issued by both the Corps and the LDEQ. The emergency authorizations allowed for the immediate use of the Chef Landfill for disaster cleanup. Two of the LEAN plaintiffs opposed the issuance of these authorizations and filed suit against the Corps in the United States District Court for the Eastern District of Louisiana asking for a declaration that the authorizations violated the Clean Water Act and the National Environmental Policy Act. After a hearing, the court denied the

injunctive relief sought by the plaintiffs. Subsequently, the action was dismissed per LEAN's request.

## **2. The 404 Permit**

In the normal course of events, in order for an operation such as the Chef Landfill to commence, application must first be made for a 404 permit, pursuant to 33 USCA § 1344.<sup>1</sup> The emergency authorizations issued by the Corps and the LDEQ maintained this requirement even though activity at the site was already underway. In May of 2009 the Army Corps of Engineers issued the 404 permit.

## **3. The LDEQ Water Quality Certification**

As a prerequisite to obtaining the 404 permit, pursuant to 33 USCA § 1341, Waste Management was required to obtain a water quality certification from the LDEQ.<sup>2</sup> A certification is defined in Volume 14 of the Louisiana Administrative Code in Title 33, Part IX, § 107 as follows:

Certification--approval by the administrative authority that any activity which may result in any discharge into or potential change of the waters of the state and as such requires application for a federal permit, will comply with the applicable provisions of Sections 301 (Effluent Limitations), 303 (Water Quality Standards and Implementation Plans), 306 (National Standards of Performance) and 307 (Toxic and Pretreatment Effluent

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<sup>1</sup> 33 USCA § 1344, in pertinent part, provides that:

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

<sup>2</sup> 33 USCA § 1341, in pertinent part, provides that:

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

Standards) of the Federal Water Pollution Control Act (FWPCA) as amended.

Public Notices ran in The Advocate and The Times-Picayune on March 24 and March 25, 2006. The LDEQ issued a “Response to Comments” after its receipt of public comments and on September 25, 2007 the LDEQ issued the water quality certification, including its written “Rationale for Decision.” The water quality certification represented a finding by the LDEQ that the project, as planned, would not violate the state’s water quality standards.

#### **4. The LPDES Permit**

In order to commence final closure and post-closure activities at the Chef site, Waste Management filed with the LDEQ a Louisiana Pollutant Discharge Elimination System (LPDES) permit application.

A permit is defined in Volume 14 of the Louisiana Administrative Code in Title 33, Part IX, Section 107 as follows:

Permit--written authorization issued by the administrative authority to discharge, emit or dispose of liquid, gaseous, semi-solid or solid waste or reusable materials, or radioactive material from, or at, a site or facility, including all conditions set forth therein.

After a public hearing and an opportunity for public comment, the LPDES permit was issued on August 28, 2008 and included discharge limitations and monitoring requirements.

The LEAN plaintiffs also opposed the LDEQ’s decision to issue the LPDES permit. Waste Management also intervened in that suit. The district court affirmed the LDEQ’s decision. LEAN then appealed, arguing that the LDEQ’s action was in violation of its constitutional duties, and that the LDEQ’s decision not to include stricter monitoring requirements or groundwater monitoring was arbitrary, capricious, and not

supported by the evidence. This court affirmed the LDEQ's decision. **Louisiana Environmental Action Network; Citizens for a Strong New Orleans East; The Sierra Club, Delta Chapter; and Father Van Lukenguyen v. The Louisiana Department of Environmental Quality**, 2009-1244 (La. App. 1 Cir. 2/08/10) (unpublished) (2010 WL 431500) (LEAN 1).

### **ASSIGNMENTS OF ERROR**

This appeal is a challenge only to the LDEQ's issuance of the water quality certification, which decision was upheld by the 19<sup>th</sup> Judicial District Court. In this appeal, LEAN makes the following assignments of error:

1. The trial court erred in finding that the LDEQ decision issuing a water quality certification to Waste Management for construction, operation, and closure of the Chef landfill was not in violation of proper procedure, arbitrary and capricious, an abuse of discretion, and unsupported by a preponderance of evidence in the record.
2. The trial court erred in finding that the LDEQ decision issuing a water quality certification to Waste Management for construction, operation, and closure of the Chef landfill did not violat[e] its Constitutional duties under Article IX, Section 1, of the Louisiana Constitution.

### **ANALYSIS**

The arguments urged by LEAN in this appeal are identical to those urged by LEAN in its appeal of the issuance of the LPDES permit, which this court previously affirmed. In particular, LEAN again argues the possibility of leaching from the facility, the failure of the LDEQ to respond to all public comments, and the failure of the LDEQ to impose certain monitoring requirements at the facility. In **LEAN I**, this court found no merit to LEAN's arguments. Specifically, this court held that

the LDEQ's decision to issue the LPDES permit was supported by the evidence, based on sound factual conclusions, and was not arbitrary, capricious, or characterized by an abuse of discretion.

We have carefully reviewed the evidence before us in this record. Moreover, we are mindful of the distinction between the LPDES permit and the water quality certification: the permit authorizes an actual discharge while the certification merely stands for the proposition that the planned activity will not violate water quality standards. While LEAN asserts that the Chef Landfill was used for the disposal of unauthorized items, the evidence establishes that a multi-level screening process was in effect to guard against this contingency. At the point of generation, trained crews inspected the debris and oversaw the loading of debris to identify and remove unauthorized items. Upon arrival at the landfill site, incoming loads of debris were inspected by spotters on inspection towers. Spotters on the ground and heavy equipment operators at the working face also inspected incoming debris as it was unloaded at the landfill and moved into the working face for final disposal. White goods and putrescible wastes were segregated for disposal at a permitted Type II facility. The LDEQ thus concluded that the waste disposed of at the Chef Landfill would conform to the type of waste authorized by the LDEQ and the Corps, and would not pose a threat to the environment.

With regards to LEAN's argument that groundwater monitoring should have been required due to the fact that the Type III Chef Landfill is unlined, the record establishes that after consideration, the LDEQ determined that the landfill's natural clay bottom actually provided a better barrier than a recompacted clay liner, which would have been required beneath a landfill that was approved for the disposal of more

hazardous wastes, such as a Class I or Class II facility. Water samples were taken on March 26, 2006, resulting in a finding that no water quality violations had occurred. Further, the LDEQ determined, based upon the data available, that any groundwater usage in the area around the Chef Landfill was highly unlikely due to an excessive salt content.

The district court concluded that the decision by the LDEQ to issue the water quality certification at issue was supported by a preponderance of the evidence and was not arbitrary or capricious. Based on the record before us, we agree.

We also agree with the district court that the LDEQ satisfied its duty to respond to all reasonable public comments. A review of the comments and responses indicates that although the LDEQ may have consolidated some of the related issues, it provided support for each of the major issues or categories of concerns raised by the comments.

### **CONCLUSION**

For the reasons stated herein, the district court judgment is affirmed. All costs of this appeal are assessed against the LEAN plaintiffs.

**AFFIRMED.**

LOUISIANA ENVIRONMENTAL  
NETWORK, CITIZENS FOR A  
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 WHIPPLE, J., dissenting.

I respectfully dissent from the majority opinion herein.

Louisiana Constitution Article IX, § 1 provides as follows:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

In keeping with this constitutional mandate, it is well established that the Department of Environmental Quality has the duty to act as the primary public trustee of the environment, and shall consider and follow the will and intent of the Louisiana Constitution and Louisiana Statutory law. LSA-R.S. 30:2014(A)(4). Moreover, in adopting the Louisiana Environmental Quality Act, the legislature specifically determined that the “maintenance of a healthful and safe environment for the people of Louisiana is a matter of critical state concern.” LSA-R.S. 30:2002(1).

Even assuming *arguendo* that the LDEQ satisfied its constitutional mandate in **subsequently** issuing the Louisiana Pollutant Discharge Elimination System Permit to commence final closure and post-closure activities at the Chef Menteur Landfill, as determined by another panel of this Court in Louisiana Environmental Action Network, Citizens for a Strong New Orleans East, The Sierra Club, Delta Chapter, and Father Van Lukenguyen v. The Louisiana Department of Environmental Quality, 2009-1244 (La. App. 1<sup>st</sup> Cir. 2/8/10)

(unpublished), the record herein reflects that the LDEQ failed to fulfill its mandate in issuing the initial water quality certification at issue in the instant appeal, which is a prerequisite to the U.S. Army Corps of Engineers' issuance of a permit to Waste Management to commence the Chef Menteur Landfill operation pursuant to §404 of the Clean Water Act. Moreover, the record shows that in regard to the water quality certification issuance, the LDEQ utterly failed to impose monitoring requirements necessary to ensure that the state water quality standards were not violated thereafter and also failed to project future variations in the nature of the discharge. See Louisiana Administrative Code, Title 33, Part IX, Section 1507. Additionally, upon review of the record herein, I further agree with the appellants that at the time the LDEQ issued the water quality certification, there was insufficient evidence to conclude that no threats were posed to water quality. Indeed, how can one sample be sufficient?

As noted in the majority's opinion, the water quality certification, issued by the LDEQ on September 25, 2007, essentially certified the LDEQ's determination that the landfill project would not violate the state's water quality standards. Based on the evidence set forward in the record, I find the LDEQ erred in this determination. Moreover, in rendering its decision to issue the water quality certification, the LDEQ further derogated from its mandatory duty to respond to appellants' reasonable public comments herein. See In re: Matter of Rubicon, Inc., 95-0108 (La. App. 1<sup>st</sup> Cir. 2/14/96), 670 So. 2d 475, 483.

Although I recognize that due to the exigent circumstances, emergency authorizations are allowed for the commencement and immediate use of the landfill project, these authorizations do not relieve or discharge the LDEQ of its duty to serve as a steward of the environment. To that extent, the LDEQ is and should be held accountable at each and every stage of these proceedings. As these and other recent events in Louisiana demonstrate, if the courts and our justice

system fail to hold the LDEQ accountable, who will? Because I find the LDEQ's decision to issue the water quality certification was not supported and sustainable by a preponderance of evidence, see LSA-R.S. 49:964(G)(6), I would reverse the decision of the district court.

For these reasons, I must respectfully dissent.

**LOUISIANA ENVIRONMENTAL  
ACTION NETWORK, CITIZENS FOR A  
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**WELCH, J., CONCURRING.**

 Based on the administrative record before us and this court's recent decision in **Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality**, 2009-1244 (La. App. 1<sup>st</sup> Cir. 2/8/10)(unpublished), I respectfully concur in the result.