NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1950

IN THE MATTER OF: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT DECISION RE: HARRELSON MATERIALS MANAGEMENT, INC. TYPE III CONTRUCTION AND DEMOLITION DEBRIS/WOODWASTE LANDFILL PERMIT (D-017-2688/PER 19950001/P-0392, AGENCY INTEREST #28118

Judgment Rendered: June 10, 2011

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 585242

The Honorable Todd W. Hernandez, Judge Presiding

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Elizabeth Livingston de Calderon Erin F. McCarthy (Student Attorney) New Orleans, Louisiana	Counsel for Plaintiffs/Appellants Middie Farrow, Thelma Humphrey, and the Louisiana Environmental Action Network
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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The Louisiana Environmental Action Network (LEAN) and two other interested parties appeal a judgment on their petition for judicial review, affirming the decision of the Louisiana Department of Environmental Quality (DEQ) issuing a permit to operate a solid waste landfill to Harrelson Materials Management, Inc. (Harrelson). For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

This matter concerns a solid waste landfill facility in the City of Shreveport in Caddo Parish, situated just south of Interstate Highway 220 and near the unincorporated Cooper Road community. The site first began to be used as a solid waste landfill by Chandler Brothers, Inc. (Chandler Brothers), in the late 1980s.[1]

In order to comply with revisions of the Federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, DEQ substantially revised its rules and regulations for solid waste facilities in February 1993. Effective February 20, 1993, persons who processed or disposed of solid waste were required to secure appropriate administrative permits to do so from DEQ.[2]

On March 19, 1993, Chandler Brothers notified DEQ that it operated the landfill facility and that it would upgrade the facility to conform to DEQ's regulations. On February 1, 1994, DEQ issued an Order to Upgrade, having the effect of a temporary permit pending submission by Chandler

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[1] According to the administrative record, Chandler Brothers evidently first submitted an operational plan for the site to DEQ in December 1987.

[2] *See* Louisiana Administrative Code, Title 33, Chapter VII, § 509(B)(1)(c) (LAC 33:VII.509(B)(1)(c)) ("Temporary permits that may have been issued in the form of . . . orders to upgrade . . . may remain in effect until otherwise determined by the administrative authority [the Secretary of DEQ or other appropriate designee].")

Brothers of an application for a standard permit. On January 1, 1995, Chandler Brothers submitted an application for a Standard Type III Construction and Demolition (C & D) landfill permit.[3] In its application, the total area of the existing facility was described as 29.86 acres.

On October 26, 1998, the Metropolitan Planning Commission of Shreveport/Caddo Parish (the Planning Commission) stated in a letter that three residential zoning classifications were applicable to different sections of the subject property, but confirmed that Chandler Brothers had obtained "a non-conforming right to operate a landfill at the subject location," by virtue of prescription under La. R.S. 9:5625.

Sometime in 2002, Harrelson began to negotiate the acquisition of Chandler Brothers, including the subject property and the landfill facility. DEQ was placed on notice of the proposed transfer of ownership. In a letter to DEQ on November 26, 2002, Harrelson confirmed its proposed acquisition and its assumption of liability for all existing conditions and violations relating to the temporary permit of the Order to Upgrade. On December 13, 2002, DEQ approved the transfer of ownership of the subject property and its landfill facility to Harrelson. Revisions to the permit application were submitted shortly thereafter, on December 20, 2002.

The application review process continued with Harrelson designated as applicant in place of Chandler Brothers. On August 19, 2004, in response to a request for further information from DEQ, Harrelson submitted responses and additional revisions to the permit application. In its revised application, Harrelson described the total area for which the permit was

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[3] A "Type III Facility" is defined as "a facility used for disposing or processing of construction/demolition debris or woodwaste, composting organic waste to produce a usable material, or separating recyclable wastes (e.g., *a construction/demolition-debris or woodwaste landfill*, separation facility, or composting facility)." LAC 33:VII.115(A) (Emphasis added). *See also* LAC 33:VII.405(A)(5).

sought as consisting of approximately 75 acres, an expansion from the original landfill area of 29.86 acres. The permit application, with the revised total area, was again revised, updated, and re-submitted to DEQ on June 3, 2005.

On November 8, 2006, Dr. Chuck Brown, DEQ's assistant secretary of its Office of Environmental Services, sent a "notice of deficiency" letter to Harrelson, requesting "further explanation" of the basis and the extent of the non-conforming use.[4] On December 8, 2006, Harrelson's attorney responded, advising Dr. Brown that the extent of its non-conforming use to operate a landfill under the local zoning restrictions was the subject of litigation instituted by the City of Shreveport and that a denial of Harrelson's application for re-zoning its entire 75.825-acre tract was in turn the basis for separate litigation instituted by Harrelson against the City of Shreveport. Harrelson's attorney emphasized, however, that the City of Shreveport did not dispute the existence of a non-conforming use in favor of Harrelson as to the 29.86-acre tract described in the Planning Commission's 1998 letter.

On December 29, 2006, Dr. Brown sent another "notice of deficiency" letter to Harrelson, acknowledging its attorney's December 8 letter relating to the zoning dispute regarding the entire 75.825-acre tract, but requesting proof of resolution of that dispute within 30 days so that DEQ could "reach a decision on the permit application first submitted on January 1, 1995." He further advised Harrelson that in the event that the zoning dispute was not resolved within 30 days, Harrelson could submit an addendum to its permit application, limiting the scope of the application "to

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[4] A "notice of deficiency" relates to a deficiency in the required information in a permit application that is otherwise "acceptable for technical review." *See* LAC 33:VII.513(E)(2). Under its regulations, DEQ is required to inform an applicant of any such deficiencies, and the applicant must correct the deficiencies within a reasonable time set by DEQ. *Id.*

the original tract covered under the [1998] non-conforming use authorization."

On February 28, 2007, Dr. Brown wrote to Harrelson, notifying it that its permit application for the 75.825-acre tract was denied and enclosing its written Basis for Decision. In its Basis for Decision, DEQ described its decision as based "solely on the lack of proper zoning." In another letter of the same date, Dr. Brown advised Harrelson that the 1994 Order to Upgrade was rescinded. A third letter of that date enclosed an Order to Close.

Harrelson submitted a permit application addendum to DEQ on April 2, 2007, referencing the "notice of deficiency" letter of December 29, 2006, and limiting the scope of its application to the 29.86-acre tract of the original landfill facility.[5] In a followup letter dated May 24, 2007, Harrelson's attorney confirmed to DEQ's attorney that the permit application addendum contemplated landfill waste located only within the boundary of the 1998 non-conforming use authorization. On May 31, 2007, Dr. Brown confirmed by letter that the February 28, 2007 Order to Close was rescinded, and a second letter of that date enclosed a new Order to Upgrade, based upon the permit application addendum.

On December 11, 2007, DEQ determined that Harrelson's permit application addendum, the final version of its permit application, was technically complete. Appropriate notice of that determination, requesting public comment, was published in local newspapers and mailed to concerned citizens. The public hearing was held on February 21, 2008, and the public comment period ended on April 29, 2008.

On October 23, 2009, DEQ issued a Standard Type III Permit, bearing Permit Number P-0392, to Harrelson. Both the permit and DEQ's cover

[5] The final geographic area or "footprint" for the landfill was actually limited to 28.9 acres.

letter submitting it to Harrelson stated that Harrelson was required to comply with Executive Order No. BJ 2009-7, requiring submittal of written documentation of compliance with local zoning and land use restrictions before DEQ would issue an Order to Commence Operations. The permit also provided that it expired on October 23, 2014, and was subject to certain specified conditions. According to DEQ's Basis for Decision, the term of the permit was limited to five years, rather than the usual ten years, based upon Harrelson's history relating to compliance with environmental laws and regulations, as well as that of Chandler Brothers.

On December 9, 2009, LEAN, Middie A. Farrow, and Thelma Humphrey filed a petition for judicial review in the 19th Judicial District Court for the Parish of East Baton Rouge. They alleged, among other things, that DEQ violated its own regulations and a standing executive order of the governor by issuing the permit without obtaining documentation of the facility's current compliance with local zoning requirements; that DEQ failed to consider or even mention another permitted C & D landfill, the Mikeebo facility, as an alternative site or project; that it failed to consider closure of Harrelson's site as an alternative; and that DEQ failed to properly respond to all significant public comments regarding the permit application.

The trial court conducted a hearing on May 24, 2010. At the conclusion of the hearing, the trial court took the matter under advisement. It issued its written ruling and findings of fact on June 30, 2010, concluding that DEQ's administrative decision issuing the permit was correct, and that "1) [DEQ] obtained all proper zoning documentation prior to issuance of the permit[;] 2) [DEQ] considered Harrelson's complete compliance history in making its permitting decision[;] 3) [DEQ] considered Mikeebo's landfill[;]

and 4) that [DEQ] responded to all reasonable comments." Its judgment affirming DEQ's decision was signed on August 17, 2010.

Appellants then instituted this appeal.

ASSIGNMENTS OF ERROR

Appellants frame their assignments of error in this appeal as follows:

> I. [DEQ's] decision to rely on a 1998 letter to determine that Harrelson . . . complied with local zoning requirements at the time of its 2007 solid waste permit application was in violation of statutory provisions and proper procedure, arbitrary and capricious, an abuse of discretion, and unsupported by a preponderance of evidence in the record.
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> II. [DEQ's] decision to exclude from its consideration of alternative sites and projects the alternative of disposal in a nearby landfill that accepts the same "Construction and Debris [*sic*]" as the Harrelson Landfill was arbitrary and capricious, an abuse of discretion, and in violation of Article IX, Section 1 of the Louisiana Constitution and statutory provisions.
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> III. [DEQ's] failure to respond to [appellants'] reasonable public comments concerning ***a)*** Harrelson Landfill's non-compliance with local zoning requirements and ***b)*** the availability of an alternative landfill of the same kind located in the same city as Harrelson Landfill was in violation of Article IX, Section 1 of the Louisiana Constitution.

DISCUSSION

Article 9, § 1 of the Louisiana Constitution mandates that our state's natural resources and environment be protected "insofar as possible and consistent with the health, safety, and welfare of the people." In *Save Ourselves, Inc. v. La. Envtl. Control Comm'n*, 452 So.2d 1152, 1157 (La. 1984), often referred to as the "IT decision" (derived from IT Corporation, the holder of the hazardous waste disposal permit at issue in that case), the Louisiana Supreme Court interpreted that constitutional mandate as "a rule of reasonableness" requiring DEQ "to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently

with the public welfare." The court in *Save Ourselves* explained that in fulfilling its constitutionally-mandated duty, as implemented by legislation, DEQ must conduct a considered "balancing process" of weighing costs and benefits from both an environmental standpoint and an economic and social standpoint. *Id.*

The "IT issues" first articulated in *Save Ourselves* have subsequently been condensed into three categories. Any written finding of facts and reasons for decision by DEQ must address and satisfy the issues of whether: (1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible; (2) the social and economic benefits of the project outweigh the environmental impact costs, balanced under a cost-benefit analysis; and (3) there are alternative projects or 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. *In re Rubicon, Inc.*, 95-0108, p. 12 (La. App. 1st Cir. 2/14/96), 670 So.2d 475, 483.

Standard of Judicial Review of DEQ Permit Decisions

Louisiana Revised Statutes 30:2050.21(A) authorizes an "aggrieved person" to seek judicial review of a final permit decision of DEQ by appeal to the 19th Judicial District Court for the Parish of East Baton Rouge. The provisions of La. R.S. 49:964(C), (F), and (G), part of the Louisiana Administrative Procedure Act, are applicable in such an appeal. La. R.S. 30:2050.21(F).

The standard of judicial review of an administrative agency decision is set forth in La. R.S. 49:964(G):

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been

> prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional or statutory provisions;
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> (2) In excess of the statutory authority of the agency;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
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> (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

Louisiana Revised Statutes 49:964(G) makes the trial court reviewing an administrative decision a factfinder who weighs the evidence and makes its own conclusions of fact by a preponderance of the evidence. *Dobrowolski v. La. State Employees' Ret. Sys.*, 01-2912, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 454, 457. Louisiana Revised Statutes 49:964(F) expressly confines the trial court's review of the agency decision to the record of the administrative proceeding, but La. R.S. 49:964(E) authorizes the trial court to order that "additional evidence be taken before the agency." *Id.*, 01-2912 at pp. 4-5, 845 So.2d at 457. Likewise, in appeals of DEQ actions, La. R.S. 30:2050.21(E) provides that the trial court may order that additional information not previously presented, for good cause, be taken before DEQ, and DEQ is permitted to modify its findings and decision accordingly and shall file the information and any modifications with the trial court.

On review, an appellate court should not reverse a substantive decision of DEQ on its merits, unless it can be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental protection. *In re Dow Chem. Co. La. Operations Complex Cellulose & Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications & Emission v. Reduction Credits*, 03-2278, p. 8 (La. App. 1st Cir. 9/17/04), 885 So.2d 5, 10, *writ denied*, 04-3005 (La. 2/18/05), 896 So.2d 34. The test for determining whether an agency action was arbitrary or capricious is whether the action taken was "without reason." *Id.*

Determination of Compliance with Local Zoning Regulations

The legislature has expressly directed the secretary of DEQ, in addition to his other duties, to "adopt by regulation a system for the registration and permitting of all solid waste disposal facilities within the state." La. R.S. 30:2154(B)(2)(a). DEQ's regulations relating to solid waste disposal facilities, including Type III landfills, are set forth in the Louisiana Administrative Code, Title 33, Chapter VII, §§ 101, *et seq.* A reviewing court should afford considerable weight to an administrative agency's interpretation of its rules and regulations adopted under a statutory scheme that the agency is entrusted to administer, and its construction and interpretation of the regulations it promulgates are entitled to deference and should stand unless they are found to be arbitrary, capricious, or manifestly contrary to its rules and regulations. *In re Recovery I, Inc.*, 93-0441 (La. App. 1st Cir. 4/8/94), 635 So.2d 690, 696, *writ denied*, 94-1232 (La. 7/1/94), 639 So.2d 1169.

LAC 33:VII.509(G)(3) provides:

> The applicant shall provide appropriate documentation to the Office of Environmental Services that the proposed use does not violate zoning or other land-use regulations that exist *at the time of the submittal of the standard permit application.*

(Emphasis added.) Similarly, the standard permit application form requires the applicant to provide "the zoning of the facility that exists *at the time of the submittal of the standard permit application*" and to "note the zone classification and zoning authority, and include a zoning affidavit or other documentation stating that the proposed use does not violate existing land-use requirements." LAC 33:VII.519(A)(13).

After Harrelson submitted its permit application addendum on April 2, 2007, DEQ's subsequent Order to Upgrade specifically directed Harrelson to submit "six bound copies of the permit application *using the original submitted application* and incorporating all previously accepted revisions." (Emphasis added.) The Order to Upgrade stated that the permit application so submitted would "serve as the final copy for review for technical completeness," and that such final copy "shall only include the original footprint of the facility that is covered under the October 26, 1998, non-conforming use authorization issued by the . . . Planning Commission." In its revised application submitted in response to the "reissued" Order to Upgrade, Harrelson complied with that directive and emphasized that "[t]he original permit application was submitted in 1995 on behalf of the previous landfill owner [Chandler Brothers]."

The record contains limited information relating to the exact substance of the zoning dispute between Harrelson and the City of Shreveport in 2006 and 2007. In its Basis for Decision relating to the February 28, 2007 denial of Harrelson's permit application for the expanded 75.825-acre tract, DEQ observed that "[o]n May 31, 2006, a meeting

between [DEQ] personnel and the City of Shreveport was conducted to discuss Harrelson's zoning issue." DEQ's denial of the permit application was based "solely on the lack of proper zoning," without further explanation. However, later correspondence between DEQ and Harrelson confirms that the dispute related to Harrelson's unsuccessful efforts to re-zone its entire 75.825-acre tract for industrial landfill use and to the issue of whether waste was being improperly disposed outside of the boundaries of the authorized non-conforming use area of 29.86 acres.

A use that lawfully existed prior to the enactment of a zoning ordinance and that continues after the effective date of the ordinance, although it does not comply with use restrictions for the area in which it is situated, is commonly referred to as a non-conforming use. *Redfearn v. Creppel*, 455 So.2d 1356, 1358 (La. 1984). However, a non-conforming use of property already subject to zoning can also be acquired by prescription. *See* La. R.S. 9:5625(B). The permitted continuation of a non-conforming use is designed to avoid the hardship, injustice, and doubtful constitutionality of compelling the immediate removal of such an existing use. *Redfearn*, 455 So.2d at 1358-59. The preservation of a non-conforming use of zoned property protects only the right to continue the use of the same quality or character as existed before adoption of a zoning ordinance or, as here, as acquired by prescription of any action to enforce compliance. *See Redfearn v. Creppel*, 436 So.2d 1210, 1215 (La. App. 4th Cir. 1983), *affirmed in part and reversed in part*, 455 So.2d 1356 (La. 1984). Generally, the non-conforming use cannot be expanded into any other section of the property. *Id.*

There is nothing in the record that demonstrates that the City of Shreveport or its Planning Commission disputed the continuing validity of

the non-conforming use of the 29.86-acre tract described in the Planning Commission's 1998 letter, that Harrelson lost any vested right in that non-conforming use, or that such use was otherwise lost due to zoning changes prior to the issuance of the permit at issue.[6] The foregoing characterization of the current status of the non-conforming use of the 29.86-acre tract is supported by DEQ's acceptance of the 1998 letter as proper proof of zoning compliance, particularly in light of the fact that DEQ's own personnel independently confirmed the actual nature of the zoning dispute in their meeting with the City of Shreveport in 2006.

Finally, appellants argue that DEQ's permit decision was flawed because it failed to respond to LEAN's public comment addressing the issue of whether Harrelson's operation of a rock or concrete crusher on its facility violated local zoning regulations. We disagree. As emphasized by DEQ, appellants have not shown that the "process" or activity of crushing concrete, as opposed to its mere use or disposal onsite, is governed by DEQ's solid waste regulations applicable to a Type III C & D landfill. Reinforced and unreinforced concrete, "when processed or disposed of in an environmentally sound manner," is "not subject to the permitting requirements or processing or disposal standards" of DEQ's regulations. LAC 33:VII.303(A)(5).

Based upon our review of the record before us, appellants have failed to prove that the subject property fails to comply with local zoning

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[6] In their appellate brief, appellants quote a "Petition for Declaratory Judgment and Permanent Injunction" filed on August 8, 2006, in a civil action entitled *City of Shreveport v. Harrelson Materials Mgmt., Inc.*, in the 1st Judicial District Court for the Parish of Caddo as authority for their contention that Harrelson's operations on the 28.9-acre tract "violate and exceed limitations of any nonconforming use which may have been established upon a portion of the landfill site . . . exactly as such nonconforming use existed at the time of its establishment." The petition is not in the record before us, and in three footnotes appellants cite only a link to an Internet website of Tulane University, asking us to take judicial notice of the petition as purportedly published on the website. We conclude that such judicial notice is inappropriate under these circumstances and decline to do so. *See* La. C.E. arts. 201, 202.

regulations or land use restrictions, or that DEQ violated its own regulations in relying upon the continuing validity of the contents of the 1998 letter of the Planning Commission. DEQ's findings of fact on this issue are supported by a preponderance of the evidence, are not arbitrary, capricious, or characterized by an abuse of discretion, and were not made upon unlawful procedure or other error of law. This assignment of error has no merit.

Analysis of Alternate Sites and Projects

The "IT issues" were subsequently codified in 1997 as part of La. R.S. 30:2018, which provides that an applicant for a permit must submit an environmental assessment statement (EAS), addressing those issues, as part of the permit application. In line with the foregoing statutory requirements, LAC 33:VII.523(A) requires that an applicant for a solid waste facility permit include discussion of the "IT issues" (the EAS) as "additional supplementary information" in the permit application.

Mikeebo, Inc. (Mikeebo) was issued a Type III C & D landfill permit on September 22, 2005, and operates a landfill facility located approximately ten miles northwest of Shreveport. *Harrelson Materials Mgmt., Inc., v. La. Dep't of Envtl. Quality*, 06-1822, p. 1 (La. App. 1st Cir. 6/20/07) (unpublished opinion). Mikeebo applied for its permit on September 17, 2003. Its application was opposed by Harrelson on various grounds. *Id.*

The original permit application of Chandler Brothers submitted in January 1995 included an EAS addressing the "IT issues." As to the issue of alternate projects or sites, Chandler Brothers emphasized that "[b]ecause of the *existing condition and location* of the site, an alternative project with a higher cost-benefit ratio and lower environmental impact would be difficult to achieve." The EAS was supplemented again in 2000 by Chandler

Brothers in response to a "notice of deficiency" letter. It is undisputed that the Mikeebo landfill was not in existence at either time, and therefore could not have been considered a viable alternative site for purposes of an "IT issues" analysis.

The DEQ solid waste regulations make a clear distinction between "existing" and "proposed" or "new" facilities. *See, e.g.*, LAC 33:VII.403; LAC 33:VII.405; LAC 33.VII.509; and LAC 33.VII.513(B)(2)(a), (c). Louisiana Administrative Code 33:VII.115 defines an "existing facility" as one "that receives solid waste or that exists or is being constructed on February 20, 1993, that does or will store, process, or dispose of solid wastes." Existing facilities are in turn classified for either "upgrade" or "closure," depending upon their compliance with the applicable administrative standards, with emphasis upon the potential for pollution, the danger to health, safety considerations, wetlands protection, and the threat to endangered species. LAC 33:VII.403. Only those existing facilities classified for upgrading may apply for a standard permit for continued operation. LAC 33:VII.509(C)(1).

Harrelson's landfill was in operation since at least 1989, if not before, and was thus an existing facility for purposes of DEQ solid waste regulations, as DEQ expressly noted in its Basis of Decision. DEQ took account of the fact that "the existing site [was] located in an established area used for landfill operations." In the "IT Analysis" section of its Basis for Decision, DEQ observed that "[b]ecause this is a permit issued to an existing facility, the concept of alternate sites is not directly applicable." Similarly, it ultimately concluded that "this facility is an existing facility which is protective of the environment and therefore, the traditional alternative sites

analysis, which is part of the 'IT' Requirements, is not applicable."[7] DEQ's administrative classification of Harrelson's facility as an "existing facility" and its conclusion that the "traditional" alternate geographic sites analysis was not applicable under the circumstances are entitled to considerable weight and deference. *See In re Recovery I*, 93-0441, 635 So.2d at 697.

Further, the mere fact that DEQ did not expressly mention the Mikeebo facility by name certainly does not compel a conclusion that DEQ was unaware of it or ignored its existence in its consideration of Harrelson's application. *See, e.g., In re La. Dep't of Envtl Quality Decision re Petroplex Int'l, L.L.C.*, 10-1194, pp. 7-8 (La. App. 1st Cir. 3/25/11) (unpublished opinion). The record demonstrates that the existence of the Mikeebo landfill and its operation since 2005 were in fact placed before DEQ for its consideration in evaluating Harrelson's permit application.

On April 29, 2008, LEAN sent a comments letter to DEQ during the public comments phase of the permit application proceeding. In its letter, LEAN acknowledged that the original 1995 permit application addressed the "IT issues," but objected to Harrelson's 2007 permit application addendum as being based upon outdated information, including zoning issues and an absence of any consideration of the Mikeebo landfill. LEAN repeatedly claimed that the Mikeebo landfill eliminated the need and benefit of Harrelson's facility, although it acknowledged the *de facto* operation of

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[7] DEQ's conclusion in that regard is consistent with its own standing procedures and regulations, as well as instructive documents provided for the guidance of permit applicants. For example, on February 15, 2002, DEQ attached its then-current "guidance document" to a "notice of deficiency" letter to Chandler Brothers. The "guidance document," dated May 22, 2001, set out detailed suggestions to assist a permit applicant in preparing its "IT response" in its application. It suggested that the applicant describe its overall site selection procedure, including the "[s]iting criteria utilized" and the "[w]innowing process that resulted in the final site selection." Such information would arguably not be applicable or relevant where the site was an existing site already actually used as a landfill. The "guidance document" specifically suggested that "if the proposed facility is, for example, a modification to an *existing facility* and no other sites were considered," the applicant should "state that *a traditional alternative sites consideration was not applicable* because: . . . ." (Emphasis added.)

Harrelson's facility as a landfill for 14 years. In its letter, LEAN also characterized the purpose of the alternative sites analysis of the "IT issues" as follows:

> The purpose of the alternative site analysis is to give [DEQ] and the public the best chance to evaluate the costs and benefits of the chosen location to determine if it is indeed the best location for the landfill *before the applicant begins construction and operation.*

(Emphasis added.) We note that the foregoing statement does not in fact conflict with DEQ's position relating to the inapplicability of the traditional alternative sites analysis to an "existing facility" that does not otherwise pose an environmental impact outweighing social and economic benefit.

Significantly, our review of the administrative record confirms that Mikeebo itself opposed the issuance of a Standard Type III C & D permit to Harrelson on various grounds.[8] It is likewise telling that in its comments letter stating its objections to issuance of a permit to Harrelson, Mikeebo repeatedly cited portions of this court's decision in *Harrelson Materials Mgmt., supra.* In its letter, Mikeebo acknowledged the fact that Harrelson "has been operating for several years," but claimed that "[n]o real consideration was given to additional sites" or alternative projects by Harrelson. However, none of Mikeebo's objections presented in the administrative proceeding included any claim that DEQ specifically failed to consider the Mikeebo landfill as an alternative site or project obviating the need for issuance of a permit to Harrelson.

DEQ specifically referenced and responded to 15 issues raised by Mikeebo in its Public Comments Response Summary, forming part of its

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[8] In an undated letter received by DEQ on March 24, 2008, Duwain Taylor, writing on behalf of "Mikeebo Landfill," advised DEQ that "Mikeebo, Inc., also a landfill operator, opposes this permit until all requirements are met," and emphasized that "[t]he rules and regulations that applied to [Mikeebo] and all other C&D landfills should also apply to [Harrelson]."

Basis for Decision. The record supports DEQ's position and the trial court's finding that DEQ was in fact well aware of the existence and operation of Mikeebo's C & D landfill following the issuance of its permit in 2005. Again, however, there was no showing that Mikeebo's landfill or any other alternate landfill existed nearby prior to that time and at the time Harrelson's application was submitted (by Chandler Brothers), such that its existence was relevant as an alternate site or project for purposes of determining the utility of Harrelson's facility under an "IT analysis."

DEQ authorized Mikeebo to construct its new landfill in 2005, at the same time that Harrelson's facility was already existing and its permit application was under review (and Harrelson was seeking to expand). As perceptively and (as we conclude) correctly emphasized by DEQ, DEQ obviously concluded that another C & D landfill was necessary and appropriate to serve the Shreveport area's needs for solid waste disposal. As we did in *Harrelson*, in the context of review of Mikeebo's permit, we similarly conclude, in the present context of review of Harrelson's permit, that "DEQ was aware of other competitor landfill operations in Caddo Parish and, nonetheless, implicitly determined that another landfill was beneficial to the environment." *Harrelson*, 06-1822 at p. 10. We likewise conclude that the findings of DEQ and the trial court in that regard are supported by a preponderance of the evidence, and that DEQ's findings and decision are not arbitrary or capricious or characterized by an abuse of discretion.

Contrary to appellants' contentions, nothing in DEQ's regulations or procedures mandates the conclusion that DEQ's denial of Harrelson's revised permit application as to the 75.825-acre tract somehow barred its reconsideration of the permit application as it pertained to the original 29.86-acre tract. We further find no error in DEQ's administrative interpretation of

Harrelson's 2007 permit application addendum as a continuation of the 1995 permit application. Finally, we conclude that DEQ substantially responded to all reasonable public comments on the relevant issues presented by the permit application and review process. The record before us demonstrates that DEQ has complied with its constitutional mandate in considering Harrelson's permit application. Appellants' second and third assignments of error lack merit.

The judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiffs-appellants, the Louisiana Environmental Action Network, Middie A. Farrow, and Thelma Humphrey.

AFFIRMED.