NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1194

IN THE MATTER OF: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY PERMITTING DECISION: REGARDING STATE (SYNTHETIC MINOR SOURCE) PERMIT NO. 2560-00292-00 TO PETROPLEX INTERNATIONAL, L.L.C.

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 582,187, Section 23
Honorable William A. Morvant, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered March 25, 2011

PARRO, J.

Community Strength, Inc. (Community Strength) sought judicial review in the district court, pursuant to LSA-R.S. 30:2050.21(A), of a final permit action of the Louisiana Department of Environmental Quality (DEQ), granting state (synthetic minor source) permit number 2560-00292-00 to Petroplex International, L.L.C. (Petroplex). By judgment dated March 5, 2010, the district court affirmed the action and decision of DEQ, and Community Strength has appealed that judgment. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2008, Petroplex submitted a permit application and an emission inventory questionnaire to DEQ, along with a request for expedited permit processing, seeking permission to construct and operate a new, full-service marine and land terminal on the west bank of the Mississippi River in St. James Parish, near Vacherie. According to the permit application, the Petroplex facility was intended to be a land-based tank farm storage facility in which certain petroleum liquid commodities[1] would be stored, and perhaps blended, in above-ground storage tanks until further distribution to commerce. The purpose of the facility was to provide a stable stock of petroleum liquid commodities to serve local and regional refiners and distributors. According to the application, the need for additional storage for local refineries became more pronounced after Hurricane Katrina, when many oil refineries were unable to obtain the petroleum stock necessary to maintain the gasoline supply. Nothing in the application itself suggests that anything was to be manufactured or refined at the Petroplex facility, and this issue does not appear to be disputed between the parties.

After submitting the original permit application, Petroplex submitted additional information to DEQ, as requested, on October 1, 2008, November 10, 2008, December 5, 2008, and January 26, 2009. In addition, between February 17 and February 19,

[1] The facility was expected to store, blend, and distribute gasoline, light crude oil, heavy crude oil, ethanol, light petroleum distillates, mid petroleum distillates, heavy residual oils, vegetable oil, and bio-diesel.

2009, notices requesting public comment on the proposed permit and the accompanying Environmental Assessment Statement (EAS) and informing the public of the time and location of a public hearing were published in various newspapers in the area, as well as in the DEQ mailout. [2, 3]

After reviewing the permit application, the EAS, and all additional information submitted by Petroplex, as well as the public comments and other information obtained at the public hearing, DEQ issued a minor source permit to Petroplex in July 2009, authorizing the construction and operation of the tank farm. Concurrently with the permit, DEQ also issued a basis for its decision and a response to the significant public comments it had received prior to, and during, the public hearing.

In September 2009, Community Strength filed a petition for judicial review of DEQ's final permit action, pursuant to LSA-R.S. 30:2050.21(A), seeking judicial review of DEQ's decision to issue the permit to Petroplex and requesting that the district court vacate DEQ's action in granting the permit to Petroplex. After reviewing the entire administrative record, the district court noted that it found Community Strength's allegations to be short on factual support. Accordingly, the district court signed a judgment affirming the action and decision of DEQ in approving and issuing the minor source permit to Petroplex. Community Strength has appealed. Petroplex has answered the appeal, seeking to recover attorney fees and costs it incurred in defending what it contends is a frivolous appeal.

STANDARD OF REVIEW

Under Louisiana law, DEQ has a constitutional duty to act as the trustee of the environment. In re Shintech, Inc., 00-1984 (La. App. 1st Cir. 2/15/02), 814 So.2d 20, 25, writ denied, 02-0742 (La. 5/10/02), 815 So.2d 845. In Save Ourselves, Inc. v.

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[2] Notices were published as follows: (1) in *The Advocate*, Baton Rouge, East Baton Rouge Parish, on February 19, 2009; (2) in *The News-Examiner*, Lutcher, St. James Parish, on February 19, 2009; (3) in *The Enterprise*, Vacherie, St. James Parish, on February 18, 2009; and (4) in the DEQ mailout on February 17, 2009.

[3] As an applicant for a minor source permit, Petroplex was not required to submit an EAS to DEQ, nor was a public hearing required pursuant to the provisions of LSA-R.S. 30:2018(E)(2). However, DEQ requested that Petroplex submit an EAS in connection with its application, and Petroplex participated in a public hearing on March 27, 2009, at which both oral and written comments were received.

Louisiana Environmental Control Commission, 452 So.2d 1152, 1157 (La. 1984), the Louisiana Supreme Court interpreted this constitutional mandate to impose a "rule of reasonableness," which requires DEQ to determine, before granting approval of any proposed action affecting the environment, that adverse environmental impacts have been minimized or avoided as much as possible, consistently with the public welfare. However, considerable weight is afforded to an administrative agency's construction of a statutory scheme that it is entrusted to administer. Calcasieu League for Environmental Action Now v. Thompson, 93-1978 (La. App. 1st Cir. 7/14/95), 661 So.2d 143, 149, writ denied, 95-2495 (La. 12/15/95), 664 So.2d 459.

Louisiana Revised Statute 30:2050.21 sets forth the procedure for judicial review of a final permit action of DEQ and establishes that the judicial review provisions of the Administrative Procedure Act, including its standard of review, are applicable to DEQ proceedings. See LSA-R.S. 30:2050.21(F); LSA-R.S. 30:2050.28. Judicial review is conducted by the court without a jury and is confined to the record. LSA-R.S. 49:964(F).

Pursuant to LSA-R.S. 49:964(G), a reviewing court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify an agency decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) not supported and sustainable by a preponderance of the evidence as determined by the reviewing court.

Based upon the arguments of Community Strength both to the district court and to this court, it appears that Community Strength is attempting to demonstrate that DEQ's decision to grant the permit to Petroplex was either arbitrary and capricious or characterized by an abuse of discretion, or that it was not supported and sustainable by

a preponderance of the evidence. Pursuant to the standard of review applicable to such allegations, an appellate court should not reverse a substantive decision of DEQ on its merits, unless it can be shown that the decision was arbitrary or that DEQ clearly gave insufficient weight to environmental protection in balancing the costs and benefits of the proposed action. See In re Shintech, 814 So.2d at 26. However, if the decision was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the court's responsibility to reverse. Save Ourselves, Inc., 452 So.2d at 1159. The test for determining whether an action was arbitrary or capricious is whether the action taken was "without reason." Calcasieu League for Environmental Action Now, 661 So.2d at 150.

DISCUSSION

In its first assignment of error, Community Strength contends that DEQ should have required full minimization of air emissions from the proposed Petroplex facility, including the use of Best Available Control Technology (BACT) and Lowest Achievable Emission Rate (LAER), because the proposed facility is very close to being a major source of air emissions. This argument is flawed from the outset in that the proposed Petroplex facility is, in fact, a minor source of air emissions, and as such the requirements of BACT and LAER are simply inapplicable.[4] Indeed, Community Strength's own argument recognizes the proposed Petroplex facility's status as a minor source of air emissions, as their argument states that the proposed facility is *close* to being a major source of air emissions. However, nothing in the statutes or regulations concerning major sources of air emissions mandates a facility to conform to the standards required to obtain a major source permit simply because the facility is *close* to being a major source of air emissions.

Whether a proposed facility is a major source of air emissions is determined by

[4] LAER would be applicable if the facility were to be located in a nonattainment area, as defined by 42 USCA § 7407(d)(1)(A)(i). See also LAC 33:III.504. However, it is uncontested that St. James Parish is in an attainment area; therefore, LAER is inapplicable under that criterion.

criteria set forth by regulation. Pursuant to LAC 33:III.502(A),[5] whether a proposed facility is a major source is determined by the facility's potential to emit certain pollutants and whether that potential to emit such pollutants exceeds certain thresholds. If the facility's potential to emit these pollutants exceeds such thresholds, the facility is a major source; if the facility's potential to so emit is below these thresholds, it is a minor source. With regard to certain regulated air pollutants, any stationary source that directly emits, or has the potential to emit, 100 tons per year of such air pollutants is considered to be a major source of air emissions. DEQ's basis for decision listed the emissions of certain air pollutants from the proposed operation of the Petroplex facility. Specifically, the basis for decision listed the levels of emissions, in tons per year, for volatile organic compounds (VOCs) at 93.83, for carbon monoxide (CO) at 76.86, for nitrogen oxides (NO_x) at 55.52, for particulate matter (PM_{10}) at 7.30, and for sulfur dioxide (SO_2) at 0.99.

In challenging the facility's status as a minor source of air emissions, Community Strength has focused solely on the levels of VOCs potentially emitted by the facility each year. As the basis for decision demonstrates, the Petroplex facility is expected to emit 93.83 tons per year of VOCs, which is clearly below the 100 ton-per-year threshold for major source status. Therefore, under this criterion, the Petroplex facility is a minor source of air emissions and is not subject to the enhanced requirements necessary for obtaining a major source permit.

Pursuant to LAC 33:III.5103, a major source is also defined as "any stationary source ... of air pollutants that emits, or has the potential to emit, in the aggregate, 10 tons per year or more of any toxic air pollutant listed in LAC 33:III.5112, Table 51.1 or 25 tons per year or more of any combination of toxic air pollutants listed in LAC 33:III.5112, Table 51.1." According to DEQ's basis for decision, the toxic air pollutants that fall within this category and would be emitted per year by the proposed Petroplex facility total 8.80 tons per year, well below the aggregate 25 tons-per-year threshold.

[5] See also LAC 33:III.509(B) (definition of Major Stationary Source) and 42 USC § 7412.

Therefore, the Petroplex facility qualifies as a minor source of air emissions under this criterion as well.

Community Strength also contends in its brief to this court that DEQ was arbitrary and capricious in granting the permit to Petroplex without properly evaluating Petroplex's calculations of the above air emissions, which could have resulted in the reclassification of the facility as a major source. Community Strength does not specify what problems allegedly existed with the calculations, but it insists that the Environmental Protection Agency (EPA) advised DEQ of its concern that Petroplex's calculations may have been so flawed that the facility might have needed to apply for an air permit as a major source. Community Strength contends that DEQ failed to respond to any of the EPA's concerns in this matter.

This argument appears to be without any foundation. After a complete review of the record, the district court stated:

> [Community Strength] also contends that [DEQ] failed to respond to the EPA concerns about the potential to emit and how monitoring requirements should have been addressed. The record in this case reflects that [DEQ] responded in detail to all of the EPA comments. [DEQ] sent the EPA the emissions estimates and the methodology that was used to calculate those estimates. The record also reflects it added conditions to the air permit in light of the EPA comments. And I realize this is a disputed point, but the EPA did not follow up, did not come back with more responses or indicate that in any way it was not satisfied with the responses. What was probably more troubling to the Court is, as I read through the brief, [Community Strength] makes an erroneous assertion that the EPA felt the calculations were, and they used the term, flawed. And I can assure you, I've read through every page of this record, cited or not cited. I started first with what y'all pointed me out to in the briefs, and then I went back, and, although there was a lot of duplication in the record, I read through all of the documents contained therein. The EPA never said or even insinuated that the calculations were flawed in any way. They only wanted the estimates and the methodology employed, which were provided to them by [DEQ]. The only party to use the term flawed in connection with those calculations was [Community Strength], and to assert otherwise, in addition to being misleading, it's simply factually incorrect[,] and it's not supported by the record.

After a thorough review of the record, we also find no basis in fact for this allegation by Community Strength. DEQ responded to every comment or request for information from the EPA, and at no point did the EPA characterize the calculations as flawed. Rather, the EPA merely noted that emissions from otherwise insignificant

activities might be significant for Petroplex, because its VOC emissions are close to the major source threshold. DEQ responded by making certain changes in the permit requirements and by providing the EPA with Petroplex's emissions estimates and the methodology used to calculate them. There is nothing in the record to suggest that DEQ did not respond to all of the EPA's comments, nor is there anything to suggest that the EPA was not satisfied with DEQ's responses to its comments.

Community Strength has offered no evidence to demonstrate that Petroplex's calculations were flawed. Moreover, it has offered no evidence that DEQ failed to perform an independent review of the calculations and instead merely relied on the statements offered by Petroplex, as Community Strength suggests. Rather, Community Strength simply relies on its allegations, with no foundation, that DEQ failed to perform an independent inquiry prior to issuing the minor source permit to Petroplex. Accordingly, this argument is also without merit.

In its second assignment of error,[6] Community Strength argues that DEQ erred in granting the permit to Petroplex, when the Petroplex EAS was allegedly nearly identical to the EAS submitted for a different project, which allegedly demonstrated a lack of rigorous evaluation of the environmental risks by DEQ. During the public comment period, one person noted:

> The Petroplex EAS submitted to [DEQ] in November 2008[,] is very similar and in large part word for word the same as the information submitted to [DEQ] by Safeland Storage, LLC [Safeland] for its Angelina Tank Farm facility. Since the two documents are almost identical, a large part of the deficiencies and inadequate information indentified in the Safeland response are also deficiencies and inadequacies in the Petroplex EAS. Thus, I wish to submit Tulane's comments submitted ... regarding the [Safeland] facility. I request that [DEQ] review, evaluate[,] and use the

[6] Community Strength listed four assignments of error at the beginning of its brief: (1) DEQ should have required full minimization of air emissions from the proposed Petroplex facility, because the EAS shows that the facility is very close to being a major source of air emissions; (2) DEQ erred in failing to properly evaluate whether the potential and real adverse environmental effects of the proposed facility have been avoided to the maximum extent possible; (3) DEQ erred in failing to properly evaluate whether the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate that the latter outweighed the former; and (4) DEQ erred in failing to evaluate whether there were alternative sites that would offer more protection to the environment than the proposed site without unduly curtailing non-environmental benefits. However, other than the first assignment of error, Community Strength did not argue these assignments of error in the body of the brief. Therefore, we will discuss the remaining assignments of error actually briefed by Community Strength. See Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4.

> Tulane comments as they relate to both the [Safeland] and Petroplex facilities as the basis for denial of the Petroplex permit.

In response, DEQ stated that it was seeking comments concerning the initial minor source air permit for the proposed Petroplex facility and that it would "not consider, compare, review, evaluate, or respond to comments prepared and submitted regarding another facility's proposed permit[,] as they may or may not relate to the proposed permit for which it has requested public comments." According to DEQ, it evaluates all permit applications individually, and it did not rely on the Safeland EAS, or on comments made about the Safeland EAS, in evaluating the Petroplex application or EAS.

As is clear by the comment noted above, the person commenting sought to have DEQ consider and respond to public comments that had been previously submitted in opposition to the permit application for the Safeland facility, an entirely different facility than the proposed Petroplex facility, for which DEQ was seeking comment. Community Strength has offered no authority for the proposition that DEQ must consider such comments, and the district court properly concluded that there was no basis in law for this proposition. Likewise, Community Strength has offered no authority for the proposition that DEQ must compare an EAS prepared for one facility when evaluating an EAS prepared for an entirely different permit application. Furthermore, a review of the Safeland EAS demonstrates that while there are some similarities to the Petroplex EAS in the language it uses, particularly in the site selection process, the Petroplex EAS and the Safeland EAS contain different discussions in most of their substantive findings.

Community Strength also argues, for the first time on appeal to this court, that DEQ erred by not considering, as an alternative design, that the Petroplex facility could have been designed as a facility with slightly higher capacity. This would then have required it to operate as a major source, employing BACT and LAER technology. According to Community Strength, such an alternative design allegedly would have caused the facility to have lower air emissions. Community Strength raises this argument in its brief with no evidentiary support and with no record reference to where

it was allegedly proposed before, other than a reference to the part of DEQ's basis for decision demonstrating that no such alternative design was considered. However, Community Strength is precluded from raising this argument before this court for the first time by LSA-R.S. 30:2014.3, which provides, in pertinent part:

> B. The applicant and any person who may become a party to an administrative or judicial proceeding to review the secretary's decision on an application must raise all reasonably ascertainable issues and submit all reasonably available evidence supporting his position on the permit application prior to the issuance of the final decision by the [DEQ] so that the evidence may be made a part of the administrative record for the application.
>
> C. No evidence shall be admissible by any party to an administrative or judicial proceeding to review the secretary's decision on the application that was not submitted to the [DEQ] prior to issuance of a final decision or made a part of the administrative record for the application, unless good cause is shown for the failure to submit it. No issues shall be raised by any party that were not submitted to the [DEQ] prior to issuance of a final decision or made a part of the administrative record for the application unless good cause is shown for the failure to submit them. Good cause includes the case where the party seeking to raise new issues or introduce new evidence shows that it could not reasonably have ascertained the issues or made the evidence available within the time established for public comment by the [DEQ], or that it could not have reasonably anticipated the relevance or materiality of the evidence or issues sought to be introduced.

In its final assignment of error, Community Strength argues in general terms that DEQ erred in failing to evaluate alleged deficiencies in the Petroplex EAS and that it relied on Petroplex's flawed statements and reasoning in response to the IT[7] questions in granting the minor source permit. The IT questions have been expressed as either five or three questions, but in either case, they require that any written finding of facts and reasons for decision provided by DEQ must 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) 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

[7] The reference to "IT" relates to the IT Corporation, which was the applicant in Save Ourselves, Inc., 452 So.2d 1152.

protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.[8] In re Belle Co., L.L.C., 00-0504 (La. App. 1st Cir. 6/27/01), 809 So.2d 225, 238; see also Save Ourselves, Inc., 452 So.2d at 1157.

Community Strength initially argues in its brief to this court that it was "nonsensical to issue a permit for a facility [whose] plan to reduce the environmental impact on the air is to comply with the permit that has no hard conditions." As noted by the district court, this was yet another misstatement of the record by Community Strength. The EAS gave very detailed descriptions of how the facility intended to handle the emissions it generated. In addition to the specific details provided, Petroplex noted that it intended not only to follow the requirements of the permit, but also the state and federal laws, as well as the regulations promulgated by DEQ and the EPA. Furthermore, both the EAS and DEQ's basis for decision noted that Petroplex intended to employ technology that was above and beyond that required by law, which would have a greater effect in reducing emissions.

Community Strength further argues that Petroplex and DEQ improperly failed to address the cumulative effects of air emissions from the proposed Petroplex facility and releases from other surrounding industrial facilities. Community Strength contends that a comment was made regarding this alleged failure at the public hearing and that DEQ failed to respond to the comment. As a preliminary matter, Community Strength is incorrect. DEQ did, in fact, respond to that specific comment. Furthermore, DEQ also responded to a different comment regarding the cumulative effects of air emissions in St. James Parish, including the effects of the additional emissions of the proposed Petroplex facility. As DEQ explained in its response, Petroplex performed air modeling of the proposed facility's emissions based on a protocol previously approved by DEQ. After this modeling was performed, it was discovered that the proposed facility's screen modeling results were lower than 7.5% of the Louisiana ambient air standard for each

[8] Petroplex was also required to address these issues in its EAS.

pollutant. Because of these results, further modeling, including that which would have addressed the cumulative impact of the proposed emissions along with those released by other facilities operating in the area, was not required.

Community Strength next argues that Petroplex failed to properly document a need for the facility. In support of this argument, Community Strength again points to various comments in opposition to the facility that allegedly call into question the need for the site. These comments address a letter submitted by Commissioner of Agriculture Mike Strain in support of the need for the project. In challenging this letter, Community Strength attempts to demonstrate that with the existence of the Safeland facility, there was no longer a need for the Petroplex facility. Thus, it points to comments that note that Commissioner Strain's letter makes no mention of the Safeland facility, which according to Community Strength, suggests that DEQ failed to do its due diligence in reviewing the EAS and permit application.

However, Community Strength simply ignores another letter in support of the facility in the record from James Richard "J.R." Owens, the global sourcing advisor for the Birla Carbon Division of Aditya Birla Management Corporation, Ltd. In this letter, Mr. Owens states his opinion that "notwithstanding the additional capacity to be provided by the Safeland facility, there is a significant need for the additional 10 million barrels of storage capacity for crude oil, refined products, and alternative fuels" to be provided by the Petroplex facility. Clearly, Mr. Owens was aware of the existence of the Safeland facility and still felt the need for the additional capacity that the Petroplex facility would provide.

As to the concerns about Commissioner Strain's letter, the fact that he did not mention the Safeland facility certainly did not mean he was unaware of it, and Community Strength has offered only speculation, with no evidence, to support the inference it suggests. Furthermore, Community Strength has offered no evidence to suggest that Commissioner Strain would not have supported the Petroplex facility if, in fact, he had been aware of the existence of the Safeland facility at the time he wrote

the letter at issue.

Finally, Community Strength contends that a public comment pointed out to DEQ that the site selection process used by Petroplex in its EAS was extremely flawed and was based on a manipulation of the site selection process. The comment at issue alleged that both Petroplex and Safeland used identical language in describing the site selection process, but that Petroplex added additional criteria at some point to manipulate the process into favoring the site ultimately chosen for the facility.

As noted above, DEQ reviews each application independently, so there would be no reason for DEQ to review the Safeland application or EAS while considering the Petroplex application or EAS. In addition, as the two facilities are both storage facilities with large storage capacities, which are attempting to target themselves to similar customers, it is not surprising that their site selection criteria would be similar or even identical in many ways. That alone does not make the site selection process flawed, and Community Strength once again offers no evidence to support its conclusory statements that this process was, in fact, flawed.

In making a decision, DEQ is required to make basic findings supported by the evidence and ultimate findings that flow rationally from the basic findings; it must also articulate a rational connection between the facts found and the order issued. In re American Waste & Pollution Control Co., 93-3163 (La. 9/15/94), 642 So.2d 1258, 1266; Save Ourselves, Inc., 452 So.2d at 1159. A decision in conformity with these mandates should contain: (1) a general recitation of the facts as presented by all sides; (2) a basic finding of facts as supported by the record; (3) a response to all reasonable public comments; (4) a conclusion or conclusions on all issues raised that rationally support the order issued; and (5) any and all other matters that rationally support DEQ's decision. In re Belle Co., L.L.C., 809 So.2d at 238; In re Rubicon, Inc., 95-0108 (La. App. 1st Cir. 2/14/96), 670 So.2d 475, 483. Additionally, as noted earlier, the written finding of facts and reasons for decision must 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) 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 Belle Co., L.L.C., 809 So.2d at 238; In re Rubicon, Inc., 670 So.2d at 483.

After a thorough review of the record, we find that DEQ's basis for decision sufficiently complies with the requirements above. Community Strength has offered nothing but allegations, with no factual basis, in opposition to DEQ's decision. Accordingly, we conclude that DEQ's decision is supported by its factual findings and its articulation of a rational connection between the facts found and the final permit action. In this respect, DEQ performed its duty as protector of the environment.

ANSWER TO APPEAL

Petroplex has answered the appeal, seeking damages, including attorney fees and costs it incurred in responding to and defending against this allegedly frivolous appeal. The imposition of damages for a frivolous appeal is regulated by LSA-C.C.P. art. 2164. The courts have been very reluctant to grant damages under this Article as it is penal in nature and must be strictly construed. Guarantee Systems Const. & Restoration, Inc. v. Anthony, 97-1877 (La. App. 1st Cir. 9/25/98), 728 So.2d 398, 405, writ denied, 98-2701 (La. 12/18/98), 734 So.2d 636. Although a successful appeal is by definition non-frivolous, the converse is not true because appeals are favored. Daisey v. Time Warner, 98-2199 (La. App. 1st Cir. 11/5/99), 761 So.2d 564, 569. In order to assess damages for a frivolous appeal, it must appear that the appeal was taken solely for delay or that appealing counsel does not sincerely believe in the view of the law he advocates. Guarantee Systems Const. & Restoration, Inc., 728 So.2d at 405.

Even though Community Strength's arguments failed to persuade this court, we conclude that the arguments made by the appellant were not brought in bad faith solely

for purposes of harassment or delay. We cannot say that appealing counsel did not sincerely believe in the position they advocated. Therefore, damages for frivolous appeal are not warranted.

CONCLUSION

For the foregoing reasons, the judgment of the district court affirming the final permit action and decision of the Louisiana Department of Environmental Quality in approving and issuing the minor source permit to Petroplex International, L.L.C. is affirmed. The request for damages for frivolous appeal by Petroplex International, L.L.C. is denied. All costs of this appeal are assessed to Community Strength, Inc.

AFFIRMED.