

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1236

**IN THE MATTER OF LOUISIANA DEPARTMENT OF
ENVIRONMENTAL QUALITY PERMITTING DECISION:
TIMBER BRANCH II SEWAGE TREATMENT PLANT (AI 51671)**

Judgment Rendered: March 25, 2011

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C577799

The Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Jaw Welch Jr. concurs without reasons.

GAIDRY, J.

Appellants filed a petition for judicial review of a decision by the Louisiana Department of Environmental Quality (“DEQ”) to issue a water discharge permit to Southeastern Louisiana Water and Sewer Company (“SELA”) for the Timber Branch II sewage treatment facility. Finding no grounds upon which the administrative decision may be reversed exist in this case, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On April 30, 2009, Kelly Fitzmaurice, Loretto O’Reilly, Hazel Sinclair, the Gulf Restoration Network, and the Louisiana Environmental Action Network (collectively, “Appellants”), filed a petition for judicial review of the DEQ’s April 1, 2009 decision to issue a water discharge permit to SELA, asserting in their petition that DEQ’s decision was made in violation of constitutional and statutory provisions, was made upon unlawful procedure, was arbitrary and capricious, was not supported or sustainable by a preponderance of the evidence, and threatened Appellants’ health, safety, and welfare.

Appellants allege that the permit issued to SELA by DEQ allows the facility to discharge 700,000 gallons per day of treated sewage into the Timber Branch, which is a tributary of the Tchefuncte River. Because the Tchefuncte River and its tributaries are classified as Outstanding Natural Resource Waters (“ONRW”), Appellants allege that discharge into those waters cannot be allowed without a showing that the discharges will not degrade the water quality. Appellants allege that DEQ granted the permit without a showing that the discharges would not contribute to the violation of water quality standards.

After a hearing, the district court found no justification for reversing DEQ's decision and dismissed the Appellants' petition for judicial review. This appeal followed, in which Appellants raise the following assignments of error:

1. The DEQ's decision failing to determine whether discharges from Timber Branch II would degrade water quality in Timber Branch was in violation of proper procedure, arbitrary and capricious, and an abuse of discretion.
2. The DEQ's decision that Timber Branch II would not degrade water quality in the Tchefuncte River was in violation of proper procedure, arbitrary and capricious, an abuse of discretion, and unsupported by a preponderance of evidence in the record.
3. The DEQ's decision failing to accurately reflect or consider the decision by the Louisiana Department of Wildlife and Fisheries (LDWF) to only permit Phase I of Timber Branch II and finding that no alternative projects would offer more protection to the environment without unduly curtailing non-environmental benefits violated Article IX, Section 1 of the Louisiana Constitution.

DISCUSSION

In *Dow Chemical Co. La. Operations Complex Cellulose and Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications and Emission v. Reduction Credits*, 03-2278 pp. 5-8 (La.App. 1 Cir. 9/17/04), 885 So.2d 5, 9-10, *writ denied*, 04-3005 (La. 2/18/05), 896 So.2d 34, we discussed the appropriate standard of review for DEQ permitting decisions:

Under Louisiana law, the DEQ has a constitutional duty to act as the trustee of the environment. The Supreme Court has interpreted this constitutional mandate to impose a "rule of reasonableness," which requires the 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.

In rendering a decision, the DEQ is required to: (1) make basic findings, as supported by the evidence, (2) make ultimate findings, which flow from the basic findings, and (3) to articulate a rational connection between the facts found and the order issued. This circuit has held that . . . the DEQ's written

findings of fact and reasons for decision must address 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 demonstrates that the latter outweighs the former; (3) there are 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.

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

When reviewing an administrative final decision in an adjudication proceeding, the district court functions as an appellate court. The Nineteenth Judicial District Court is vested with exclusive jurisdiction to review final permit actions, final enforcement actions, or declaratory rulings made by the DEQ. LSA-R.S. 30:2050.21(A). Any party aggrieved by a final judgment or interlocutory order or ruling of the Nineteenth Judicial District Court may appeal or seek review to this court. LSA-R.S. 30:2050.31.

A reviewing court may affirm the decision of the agency or remand the case for further proceedings. LSA-R.S. 49:964(G). 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 or 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.

The manifest error test of LSA-R.S. 49:964(G)(6) was previously used in reviewing the facts as found by the agency, as opposed to the arbitrariness test used in reviewing conclusions and exercises of agency discretion. We note that Acts 1997, No. 128 § 1, effective June 12, 1997, amended paragraph G(6) to make the trial court a fact finder who weighs the evidence and makes its own conclusions of fact by a preponderance of the evidence.

On review, an appellate court should not reverse a substantive decision of the 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. However, if the decision was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the courts' responsibility to reverse. The test for determining whether an action was arbitrary or capricious is whether the action taken was "without reason."
(Citations omitted).

DEQ's April 1, 2009 "Basis for Decision," for the issuance of the SELA permit states that DEQ conducted a review of SELA's permit application and issued a draft permit on August 6, 2007, provided public notice of a comment period, and accepted comments. SELA submitted additional information regarding the construction of an "effluent reduction habitat area" on August 4, 2008, in response to LDWF's concerns regarding a discharge into an ONRW. DEQ's Basis for Decision stated that while the effluent reduction area satisfied LDWF's concerns, it did not change any of the conditions related to DEQ's issuance of the discharge permit.

DEQ stated that in evaluating the permit and making its decision, it specifically considered the factors set forth in the jurisprudence; *i.e.*, whether the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible, whether 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 whether there are alternative projects or sites or mitigating measures which would offer more environmental protection than the proposed project without unduly curtailing non-environmental benefits. DEQ ultimately concluded that the potential real and adverse environmental effects of the project had been avoided to the maximum extent possible and noted that the permit requires that the discharges be controlled to meet or

exceed the requirements of all applicable regulations and defined permit conditions. Next, DEQ stated that it balanced the environmental impact costs against the social and economic benefits of the project and concluded that the social and economic benefits outweigh any adverse environmental impact. Here, they noted that the permit would serve in the St. Tammany Parish regionalization plans and would not only allow for the discharge of treated sanitary wastewater for several already-approved developments in the area, but would also allow for two existing sewage treatment plants to be taken offline. Finally, DEQ found that there were no alternative projects, sites, or mitigating measures which would offer more protection to the environment without unduly curtailing the non-environmental benefits. DEQ's Basis for Decision also contained their detailed factual findings used in making the permitting decision.

Appellants argue that DEQ did not consider whether SELA's sewage treatment facility would degrade water quality in the Timber Branch. In making this argument, Appellants assert that the effect on the Timber Branch should have been evaluated separately from the Tchefuncte River. However, the Timber Branch is an ONRW by virtue of its status as a tributary of the Tchefuncte River. Subsegment 040801, which includes the Tchefuncte River and its tributaries, is classified as an ONRW. La Admin. Code tit. 33, pt. IX, § 1123. Appellants cite no authority for their argument that DEQ is required to analyze specific locations within a subsegment for degradation in performing its analysis. Further, as this court stated in *Dow, supra*, considerable weight is afforded to an administrative agency's construction of a statutory scheme that it is entrusted to administer. We find no error in the methods used by DEQ in making its determination.

Appellants also dispute the propriety of the analysis DEQ relied on in its determination that the discharge would not degrade water quality in the Tchefuncte River. However, Appellants do not point to any statutory requirements that DEQ perform its analysis differently, and as stated previously, considerable weight is afforded to DEQ's construction of the statutory scheme it is entitled to administer. DEQ followed the procedures it had in place in determining that the discharge would not degrade the Tchefuncte River, and based on a review of the record, its conclusion is reasonable and supported by the evidence.

Finally, Appellants allege that DEQ's cost-benefit analysis violated the Constitution. However, a review of the record reveals that the constitutional requirements for DEQ's decision-making process set forth above were complied with in this case. Appellants' issues seem to be with the analytical methods chosen by DEQ in performing its analysis, not with the analysis itself. And, as stated above, DEQ's construction of the statutory scheme that it is entrusted to administer is afforded considerable weight. We find no error in DEQ's analysis.

A review of DEQ's Basis for Decision confirms that their permitting action was not taken "without reason." DEQ's balance of costs and benefits was not arbitrary, nor did it give insufficient weight to environmental protection. Therefore, their decision should be affirmed.

CONCLUSION

The judgment appealed from is affirmed. Costs of this appeal are assessed to Appellants.

AFFIRMED.