19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

IN THE MATTER OF:

NATURAL RESOURCES RECOVERY, INC.	*	
TYPE III CONSTRUCTION AND	*	DOCKET NO. 446, 408
DEMOLITION DEBRIS/WOODWASTE	*	
LANDFILL AND RESOURCE RECOVERY	*	
AND SEPARATION FACILITY PERMIT	*	DIVISION "H"
	*	
PROCEEDINGS UNDER THE LOUISIANA	*	
ENVIRONMENTAL QUALITY ACT	*	
LA. R.S. 30:2001 ET. SEQ.	*	

* * * * * * * * * * * * *

BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

MAY IT PLEASE THE COURT:

Appellants Louisiana Environmental Action Network, North Baton Rouge Environmental Association, and Steering Committee to Stop Natural Resources Recovery, Inc., through undersigned counsel, respectfully submit this Brief in Support of their Petition for Judicial Review of the Department of Environmental Quality's ("DEQ") decision to grant a solid waste permit to Natural Resources Recovery, Inc. ("NRRI") to operate a construction and demolition debris and woodwaste Landfill and recycling facility in Alsen, Louisiana.

I. INTRODUCTION

The Department of Environmental Quality (DEQ) through its Secretary, J. Dale Givens, violated the Louisiana Constitution and failed in its duty as a public trustee by granting Natural Resources Recovery, Inc.'s (NRRI) application to construct and operate a construction and demolition debris landfill in Alsen, Louisiana. The DEQ had ample notice of substantial public concerns and objections from both state and local governmental bodies and citizens' groups over the location of this facility so near to a community already overburdened by extremely high pollution without the requisite constitutional analysis. Despite this notice, the DEQ granted the application with 1) no showing that DEQ complied with its constitutionally and statutorily mandated analyses and 2) no public notice and input on the mandatory constitutional analysis that was untimely submitted by NRRI and relied upon by DEQ in approving the permit.

The DEQ violated the Louisiana Constitution and the federal Constitution by failing to protect and preserve the procedural due process rights of the citizens to full and meaningful involvement in this contested environmental permitting matter. Specifically, the DEQ failed to give public notice of NRRI's untimely submission of vital, constitutionally required information on the very last day of the public comment period. The DEQ further failed to provide an additional public comment period on this vital information, thus preventing the citizens most affected by yet another landfill in their community from commenting on this essential analysis.

The DEQ further violated its constitutional and statutory duties by failing to document and explain its decision in a manner that would facilitate judicial review, as required by the Louisiana Supreme Court and the Louisiana First Circuit Court of Appeals. Specifically the DEQ failed to articulate specific factual findings, failed to draw a rational connection between the facts found and the order issued, and failed to present a reasoned record of its decision regarding its mandatory statewide solid waste capacity determination and its use of this determination in evaluating NRRI's application, as required by La. R.S. 30:2179, In the Matter of Rubicon, 95-0108 (La. App. 1st Cir. 1996), 670 So.2d 475 and In the Matter of Cadence Environmental Energy, Inc., 97-1374 (La.App. 1 Cir. 6/29/98), 714 So.2d 936).

By excluding citizens from meaningful participation in the permitting process in not providing for public notice and comment on fundamental constitutional considerations, and in failing to provide an adequate record of decision to demonstrate to this Court its full compliance with the Louisiana Waste Capacity Statute, the DEQ has violated its constitutional and statutory obligations and its decision should be reversed.

Appellants have been forced to wait for more than two and a half years to have an impartial court address these fundamental constitutional and statutory violations. While Appellants have had to wait, NRRI has constructed and been continuously operating this landfill, forcing members of Appellant groups to endure the heavy truck traffic, noise, dust, vibrations, trash and odors that irrefutably have come with this facility, as they do with all waste facilities. Many of these citizens live and own homes and property immediately adjacent to the landfill, attend the St. John's Church immediately adjacent to the landfill, send their children to the Church's day care facility immediately adjacent to

the landfill, and share the roads with the steady stream of heavy dump trucks going directly through their community to and from the landfill.

Appellants' community is already home to two Superfund hazardous waste sites, several sites of suspected contamination, the old city dump and the new city dump. While this appeal has been pending, yet another company has filed yet another permit application with DEQ seeking to construct and operate yet another solid waste facility just up the road from NRRI's facility.[1]

Appellants are genuinely concerned that the DEQ's conduct in granting NRRI's permit, where the most basic procedural requirements for adequate citizen participation and constitutional and statutory compliance were not adhered to, will, without judicial censure, continue unabated.

Appellants therefore respectfully submit that it is essential to the health and well being of the citizens of Alsen that this Honorable Court fully address and remedy DEQ's violations of law in this case, and instruct DEQ, the primary public trustee of our state's environment, to fully comply with its constitutional and statutory mandates or face the appropriate consequences.

II. FACTS

On November 3, 1995, NRRI submitted an application with the Solid Waste Division of the DEQ to construct and operate a Type III Construction and Demolition Debris/Woodwaste Landfill and Resource and Recovery and Separation Facility ("Solid Waste permit") in East Baton Rouge Parish, immediately adjacent to the 150-year-old, African American community of Alsen.

The permitting process for proposed construction and demolition and debris landfill is controlled by the Louisiana Regulatory Code, LAC 33: VII.513. Subsection B.2 of section 513, entitled "Submittal of Permit Applications" requires an application for a permit to operate a construction and demolition debris landfill to complete Parts I, II, and III of a Solid Waste permit application before the application will be considered complete. Parts I and II pertain to various application form and site characteristic procedures to be followed by the application. Part III of the Solid Waste application, contained in LAC 33:V.523, is entitled "Additional Supplementary Information," and

[1] *See* attached Exhibit "A," Public Notice of Acceptance of Louisiana Land Systems, Inc. Permit Application for a Type I, Type II, and Type III Solid Waste Landfill, dated January 28, 2000.

requires all solid waste permit applications to contain a complete analysis of the potential and real adverse environmental effects of the proposed landfill, a cost-benefit analysis, alternative projects and facilities which would offer more protection to the environment, and mitigation measures which would lessen the environmental impact of the proposed landfill. This analysis is mandated for all DEQ permitting decisions by Article IX, Section 1 of the Louisiana Constitution; by the Louisiana Supreme Court in Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So.2d 1152 (La. 1984) (also known as the "IT" decision); by the Louisiana legislature in La. Rev. Stat. 30: 2014.3.A; and by DEQ in LAC 33:VII.523.A-E. A Solid Waste permit application must contain this analysis before it can be considered technically complete. Id.

In addition to the "IT" analysis, the DEQ is also required by La. Rev. Stat. 30: 2179 (B) to make a capacity "determination" prior to issuing a solid waste permit to ensure that the permit would not result in an increase in the state's disposal capacity in excess of fifteen percent greater than the total necessary permitted capacity of Louisiana as determined by the DEQ Secretary.

On April 19, 1996, after receipt of NRRI's Solid Waste permit application, the DEQ published a public notice that it had completed its review of the application and deemed it technically complete and acceptable for public review and comment. Administrative Record p. 0273.[2] On May 23, 1996, Appellants submitted a public records request. Admin. Rec. 0284-0285. The DEQ responded in a letter dated July 16, 1996 in which it stated, "a copy of the permit application and **all** other records associated with the above-referenced facility are available for review at [the DEQ's] office." (emphasis added). Attached Exhibit B; See also Admin. Rec. 0636-0637. Appellants obtained a copy of the permit application and all other documents submitted to the DEQ through July 16, 1996. At this time, the DEQ had not completed an "IT" analysis for the solid waste permit.[3]

The original public comment period on the proposed Solid Waste permit was from May 9, 1996 through June 7, 1996. Subsequently, on June 28, 1996, at the request

[2] Hereinafter the record will be cited as "Admin. Rec." followed by the page number.
[3] NRRI submitted a cursory, non-responsive, two page "IT" analysis with its water permit application. This document is brief and fails to meet the basic standards set forth by the Save Ourselves mandate. In fact, the answers to three of the five questions are identical. More importantly, the DEQ did not use this analysis as a basis for its decision. Rather, the DEQ used the analysis that was submitted by NRRI on the last day of the comment period, July 29, 1996. See DEQ Basis for Decision, Admin. Rec. 1263-1304.

of concerned Alsen citizens, a public hearing was held to allow them to comment on the proposed landfill. Opponents of the landfill who spoke at the public hearing included State Representative Melvin "Kip" Holden, Senator Wilson Fields, Councilman Thomas Woods, and numerous members of the community of Alsen, including Appellants. In compliance with LAC 33:VII.513.F.7, which provides that "comments received by the Solid Waste Division until the close of business thirty (30) days after the date of a public hearing will be reviewed by the Solid Waste Division," the final public comment period on the Solid Waste permit ended on July 29, 1996.

Appellants submitted written comments to DEQ during the comment periods, citing numerous inadequacies with NRRI's Solid Waste permit application. Notably, NRRI's "Environmental Impact" section on its water permit application was grossly deficient in detailing critical questions of environmental impact. On the last day of the comment period, July 29, 1996, NRRI submitted a thirty-seven page "IT" analysis. Admin. Rec. 0642-0679. Appellants were not notified of the DEQ's acceptance of this document nor were they given any opportunity to review and comment it.

On December 10, 1997, well over a year after the close of the public comment period and without any further notification of the public or interested parties, including Appellants, DEQ Secretary J. Dale Givens granted NRRI's application for a Solid Waste landfill permit.

II. JUDICIAL STANDARD OF REVIEW

La. Rev. Stat. 30: 2050.21 (A) applies when a court is asked to review a final decision by the Department of Environmental Quality. Under this statute, the court must apply the standard of review set forth in La. Rev. Stat. 49:964 (G) of Louisiana Administrative Procedures Act ("LAPA") which states that a court may reverse, modify, affirm, or remand the DEQ's 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 statutory authority of the agency;
3. made upon lawful 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 evidence as determined by the reviewing Court.

In application of this rule, the Court shall make its own determinations and conclusions of fact by a preponderance of the evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. La. Rev. Stat. 49: 964 (G). In addition, under the Louisiana Constitution art. IX § 1, reviewing courts must ensure that final agency decisions that affect the environment comport with applicable constitutional, statutory, and regulatory requirements. In the Matter of Rubicon, Inc., 95-0108, 670 So.2d 475, 481 (La. App. 1st Cir. 2/14/96).

III. ARGUMENT

A. DEQ'S DECISION VIOLATED PROCEDURAL DUE PROCESS REQUIREMENTS BECAUSE DEQ FAILED TO GIVE APPELLANTS' PROPER NOTICE AND AN OPPORTUNITY TO COMMENT ON DEQ'S CONSTITUTIONALLY MANDATED "IT" ANALYSIS

1. DEQ MUST PROVIDE INTEREST PARTIES WITH NOTICE AND AN OPPORTUNITY TO COMMENT ON PERMIT APPLICATIONS

A fundamental concept in both the federal and state constitutions is informed citizen participation in the government's decision making process. Under the Louisiana and the federal constitutions, procedural due process requirements guarantee citizens the right to be informed and the right to participate in those decisions that affect their health and property interests. La. Const. art. 1 § 2; U.S.Const. amend. XIV. State laws and agency regulations implement constitutional due process rights by providing citizens with mechanisms for ensuring that their voices are heard in decisions to authorize the release of pollutants into Louisiana's environment, including solid waste permitting decisions. The Louisiana Environmental Quality Act, La. Rev. Stat. 30:2001 et seq. ("LEQA") controls DEQ's permitting authority and mandates public notice and comment periods for interested citizens. La. R.S. 30:2011 (D) (2), LAC 33: VII.513 (A) (1).

Louisiana courts have consistently recognized the importance of procedural due process rights and have struck down the DEQ's decisions that that fail to fully protect these rights. For instance, the First Circuit Court of Appeals vacated a DEQ permit because the Secretary considered information in his decision that he did not "officially

notice," pursuant to La. R.S. 49: 955 (G) of the Louisiana Administrative Procedure Act ("LAPA"). Mayor and Council of Morgan City v. Louisiana Dept. of Environmental Quality, No. 91 CA 0531, 604 So.2d 144 (La. App. 1st Cir. 1992). In remanding the issuance of another DEQ permit, the Louisiana Supreme Court has further articulated the importance of the notice and comment requirement in the DEQ permitting process by stating that "[t]his legislatively authorized participation of the public achieves two goals, public input in substantive environmental matters and 'a safeguard against abuses in the administrative process.'" In the Matter of American Waste and Pollution Control Company, 93-3163 (LA. 9/15/94), 654 So.2d 1258, 1263, citing Concerned Citizens v. Lake Charles Refining, 387 So.2d 1330, 1333 (La. App. 1 Cir.), *writ denied* 392 So.2d 693 (La. 1980).

Substantial support in constitutional law and jurisprudence dictate that denying Appellants adequate notice and an opportunity to comment on permit applications that directly affect their health and property interests violates their constitutional due process rights under federal and state law.

2. DEQ MUST PROVIDE NOTICE OF THE CONSTITUTIONALLY-MANDATED "IT" ANALYSIS IN ORDER TO MEET THE MOST BASIC REQUIREMENTS OF PROCEDURAL DUE PROCESS

The Louisiana Supreme Court has held that the DEQ, "before granting approval of a proposed action affecting the environment, is required to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 83-1480, 452 So.2d 1152 at 1157 (La. 1984). The agency must further perform "a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." Id. Finally, the agency must consider whether "alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits." Id. This constitutionally required "systematic . . . evaluation" is often referred to as the "IT" decision, or the "IT" analysis. In the Matter of Rubicon, Inc., 95-0108, 670 So.2d 475 at 482 (La. App. 1st Cir. 1996).

Companion Judges of this Honorable Court's in the 19th Judicial District Court have consistently vacated and remanded permitting decisions of the DEQ's fellow agency

charged with decisions affecting the environment, the Department of Natural Resources ("DNR"), based upon identical violations of citizens' due process rights: defective notice and no comment period for the constitutionally-mandated "IT" analysis.[4] For example, in Lake Peigneur Preservation v. Herbert Thompson, 409,139 (Div. A, 19th Judicial Dist. Ct. 1/17/97), the Honorable Robert Downing vacated drilling permits for two Brine extraction wells because the DNR had failed to do an "IT" analysis and had failed to provide public notice and an opportunity to comment on the mandated analysis to interested parties. In his amended oral reasons for judgment, Judge Downing held that:

> In any future proceedings where the proposed project has the potential to significantly affect the environment, the Department of Natural Resources is instructed to consider the Save Ourselves/IT questions, make findings of fact on the three questions required by IT, to make specific findings to what extent they considered the IT questions, and **provide a public comment period after the IT questions have been answered**. (emphasis added).
>
> (See Amended Oral Reasons for Judgment, attached as Exhibit C).

Most recently, the Honorable Michael Caldwell, in In the Matter of Growth Resources, 445,019 (Division I, 19th Judical Dist. Ct., 7/10/00), vacated a waste facility permit issued by the Department of Natural Resources, in part, because the DNR did not give affected citizens notice and an opportunity to comment on the "IT" analysis submitted by the permit applicant after the original public notice. Growth Resources submitted the "IT" analysis in the middle of the comment period. However, Judge Downing held that this untimely submission failed to satisfy basic notice and comment requirements of citizens' procedural due process rights. In his oral reasons for Judgment, Judge Caldwell stated:

> …[F]irst is the due process argument, and the fact that the "IT" response was **not** part of the application that was filed, and notice of its supplementation of the application by the filing of the "IT" response was **not** given to the public or made available to the public in Terrebonne Parish. While that may not be a technical violation of the statute, **I find that it violates the spirit of the due process requirement in this case**. (emphasis added).

(See Amended Oral Reasons for Judgment, attached as Exhibit D).

The case involves an identical due process violation: the agency's failure to give notice of and an opportunity to comment on the mandated "IT" analysis. The "IT"

[4] The standard applied to the DEQ by this Honorable Court should be higher than the standard applied to the DNR in previous 19th Judicial Court decisions. The Louisiana Constitution "imposes a duty of

information for NRRI's solid waste permit was submitted untimely on the last day of the comment period, July 29, 1996. Admin. Rec. 0642 – 0679. This was long after the DEQ had provided notice in which they stated that NRRI's solid waste permit application was complete. Admin. Rec. 0273 – 0275. In fact, Appellants made a good faith effort to obtain all documents and sent a public information request for all documents that had been filed into the record during the comment period. Admin. Rec. 0284-0285. On July 16, 1996, the DEQ responded and stated that **all** documents were available for review. Admin. Rec. 0636-0637, (Also attached as Exhibit B).

The public did not receive notice and an opportunity to comment on the constitutionally-mandated "IT" analysis despite a good faith effort to obtain all documentation related to NRRI's solid waste permit application. Jurisprudence establishes that the DEQ must provide citizens with notice and an opportunity to comment on the "IT" analysis in order to meet the most basic procedural due process requirements. In this case, the DEQ failed to give Appellants notice and an opportunity to comment on the "IT" analysis. Therefore, NRRI's permit should be vacated.

B. THE DEQ'S DECISION VIOLATES LOUISIANA'S WASTE CAPACITY STATUTE, LA. R.S. 30:2179, BECAUSE THE DEQ FAILED TO EVALUATE WHETHER GRANTING NRRI"S PERMIT APPLICATION WOULD CAUSE THE TOTAL PERMITTED CAPACITY TO BE EXCEEDED BY MORE THAN FIFTEEN PERCENT.

1. THE DEQ FAILED TO EVALUATE NRRI'S PERMIT APPLICATION IN LIGHT OF THE CAPACITY DETERMINATION REQUIRED BY La. R.S. 30:2179(B)(4).

Louisiana Revised Statute 30:2179, also known as the "Waste Capacity Statute" or "the 115% Rule" generally prohibits the DEQ from issuing solid waste permits that will increase the state's management or disposal capacity in excess of fifteen (15) percent greater than the necessary total permitted capacity of the state as determined by the secretary of the DEQ. In particular, La. R.S. 30:2179(B)(1) imposes the following mandatory duty on the DEQ:

> Upon determining the volume and types of solid … waste generated, reduced, transported, managed, recycled, disposed of or otherwise handled within Louisiana, and upon determining the capacity necessary for Louisiana to safely and judiciously reduce transport, manage, recycle, or dispose of these wastes, the **secretary shall determine the total permitted capacity necessary to manage or dispose of solid … waste in Louisiana.** (Emphasis added).

---

environmental protection on *all* state agencies." Save Ourselves at 1156. However, the DEQ, not the DNR, is held to a higher standard because it is in fact the "**primary** public trustee" of Louisiana's environment.

Further along in La. R.S. 30:2179, paragraph 4 of subsection (B) explicitly states that the Secretary of the DEQ:

> **[S]hall not issue any permits** … for the handling, treatment, destruction, and disposal of solid … waste which would increase the total permitted capacity of Louisiana to manage or dispose of such waste in an amount in excess of fifteen percent greater than the necessary total permitted capacity of this state as determined by the secretary pursuant to Paragraph 1 of this Subsection.[5] (Emphasis added)

The plain language of La. R.S. 30:2179(B)(1) and (4) thus mandate that the DEQ, when reviewing solid waste permit applications, must have 1) made a capacity determination (hereinafter "determination") regarding the total permitted disposal capacity necessary in the state, and 2) base its decision to grant a solid waste permit application on this determination. The statute explicitly prohibits the DEQ from issuing a permit which will cause the total permitted solid waste disposal capacity of the state to exceed the determination by greater than fifteen percent. Therefore, the DEQ cannot grant a solid waste permit until it makes a finding, based upon the capacity determination, that the new permit will not exceed the necessary capacity of the state by more than fifteen percent. There is no such finding in the Administrative Record before this Honorable Court.

The role of a reviewing court of DEQ decisions is explicitly stated by the Louisiana First Circuit Court of Appeals in In the Matter of Rubicon, Inc., No. 95 CA 0108, 670 So.2d 475 (La. App. 1 Cir. 2/14/96). The DEQ is required to make basic findings based on evidence and must subsequently articulate a rationale connection between the facts found and the order issued. Id. at 482. The DEQ is accorded some discretion in making the basic findings and rationale connection. However, when there is no evidence in the record to support DEQ's decision, the Court's duty is clear. As the First Circuit stated in Rubicon:

> True, this court will uphold a decision of less than ideal clarity if the DEQ's reasoning can be easily discernable on the record. But where the decision of the DEQ does not comport in the slightest with the mandate of Save Ourselves and American Waste, there is no "less than ideal clarity" to uphold.[6]

[5] In the Matter of Marine Shale, 566 So.2d 994, 997 (La. App. 1st Cir. 1990). In Shale, the Court held that the use of the term "shall" places a mandatory duty on the DEQ when used in the Louisiana Environmental Quality Act.

[6] Id. at 482 quoting Save Ourselves at 1158-59. In Save Ourselves, the court remanded Department of Natural Resources' decision to issue a permit to allow construction and operation of a hazardous waste disposal facility because the record was silent on the issue of whether the agency considered alternate projects, alternate sites, or mitigation measures. In American Waste, the court remanded a DEQ decision to issue a solid waste permit because the DEQ did not list its basic findings or articulate a rational connection between the factual findings and the order issued.

In the present case, the DEQ's Basis for Decision document fails to even acknowledge the statutory directive of the Waste Capacity Statute, much less comply with its unambiguous mandate.[7] The absence any information addressing the capacity determination on the record makes it impossible to determine whether the DEQ considered its duty under the Waste Capacity Statute. Therefore, the DEQ's reasoning on this mandatory analysis cannot easily be discerned from the record. Instead, just like in Rubicon, there is less than clear ideal clarity to be upheld because the DEQ's decision does not comport in the slightest with the mandate of Save Ourselves and American Waste. Even assuming, *arguendo*, that this Court agreed to look beyond the decision document to search the Administrative Record for evidence that the DEQ met this statutory mandate, such evidence cannot be found.[8]

In short, the Administrative Record is completely devoid of any information that indicates whether the DEQ performed its mandated capacity determination, much less, whether the DEQ evaluated whether granting NRRI's permit application would cause the total permitted disposal capacity of the state to be exceeded by greater than fifteen percent and based its decision on this evaluation. Therefore, the DEQ's decision to issue NRRI a solid waste permit without abiding by the statutory mandates of La. R.S. 30:2179 is clearly "in violation of constitutional and statutory provisions" and must consequently be reversed. La. R.S. 49:964(G)(1); Save Ourselves, 452 So.2d at 1158-59.

2. THE LOUISIANA FIRST CIRCUIT COURT OF APPEALS HAS RULED THAT A DEQ DECISION THAT FAILS TO COMPLY WITH THE WASTE CAPACITY STATUTE VIOLATES THE LOUISIANA CONSTITUTION AND MUST BE VACATED

The Louisiana First Circuit Court of Appeals has previously vacated a DEQ waste permit on identical statutory and constitutional grounds. In In the Matter of Cadence Environmental Energy Inc., No. 97 CA 1374, 714 So.2d 936 (La. App. 1 Cir. 6/29/98) *writ denied*, 98-2012, 98-2017 (La. 11/16/98), the Louisiana First Circuit Court of Appeals reaffirmed the DEQ's responsibilities when it summarized the Louisiana Supreme Court's holding in Save Ourselves. The DEQ is required to use a systematic, interdisciplinary approach to evaluation of each waste project or facility. Id at 937. Essentially, the DEQ must make requisite basic findings supported by evidence as well as articulate a rationale connection between the facts found and the order issued. Id at 937.

[7] Admin. Rec. 1267 - 1287

The First Circuit summarized and the importance of detailing such findings and articulating the reasoning when it quoted the longstanding Louisiana Supreme Court jurisprudence:

> It is only by detailing its reasoning does the DEQ uphold its position as public trustee and justify the discretion with which it is entrusted by constitutional and statutory authority in a contested environmental matter.[9]

In Cadence, the First Circuit reversed a decision of the 19th Judicial District Court, Honorable Judge Downing presiding, to uphold a DEQ permit issued to a waste company. The First Circuit held that the record did not contain either the factual findings or a rational connection between the findings and the order issued, including, in particular, evidence regarding the Waste Capacity Statute. Id. at 938. Specifically, the First Circuit held that "[i]n particular, we note the absence of any evidence which would support DEQ's compliance with La. R.S. 30:2179(B)(4)…" Id. at 938. In addition to the statutory obligation, the Court also recognized that the discretion accorded to the DEQ in the permitting context imposes a constitutional obligation on the agency. Id. at 937. As a result of the absence of the capacity determination and the ensuing evaluation, the First Circuit held that the DEQ's decision "falls far short of the mandates set forth in Save Ourselves and In the Matter of American Waste and Pollution Control." Id. at 937.

Here, just like in Cadence, the record fails to contain any factual findings regarding the Waste Capacity Statute mandate, much less a rational connection between the facts and the order issued addressing the capacity issue.[10] Similarly, in both cases the Secretary of the DEQ incorporated into the decision the factual findings and conclusions of law contained in the Basis for Decision document.[11] Here, as there, the DEQ failed to make the requisite capacity determination and subsequent evaluation of the total permitted capacity prior to issuing the permit violating its statutory obligation. Likewise, the lack of any information in the record regarding the capacity issue demonstrates that the DEQ's decision to grant NRRI's permit application is a violation of its constitutional duties under Save Ourselves and Rubicon. Therefore, in comport with the First Circuit's ruling in Cadence, NRRI's final permit should be vacated.

---

[8] Admin. Rec. 1263 - 1304

[9] See Id. at 937 quoting In the Matter of American Waste and Pollution Control Co., No. 92 CA 1018, 633 So.2d 188, 194.

[10] Admin. Rec. 1263-1304

[11] Admin. Rec. 1279. The facility in Cadence was a hazardous waste disposal landfill, as opposed to the present solid waste landfill facility. However, the type of waste at issue is completely irrelevant for

V. CONCLUSION

DEQ violated Appellant's due process rights because it did not provide the constitutionally-mandated "IT" analysis on which it based its decision, for public notice and comment.

The questions and answers required by the "IT" analysis are mandated because DEQ's permitting decision affects the health and property interests of citizens located within the vicinity of NRRI's landfill. Appellants not only needed this information, they were entitled to it under law. Consequently, since the DEQ failed to properly notify interested parties of the constitutionally-mandated "IT" analysis, this Honorable Court should vacate the Secretary's decision to grant NRRI's permit.

Additionally, the DEQ's decision to grant NRRI's permit application violates the Louisiana Constitution and Louisiana's Waste Capacity Statute, La. R.S. 30:2179, because the DEQ failed to make a capacity determination and then because DEQ's decision was issued in violation of constitutional and statutory mandates, and is unsupported by any evidence in the record, Appellants respectfully request that this Honorable Court vacate NRRI's permit.

Respectfully Submitted,

Valerie M. Briggs
Student Attorney

Leonardo J. Caraballo
Student Attorney

Elizabeth Teel (Bar #21389)
Supervising Attorney
Tulane Environmental Law Clinic
6329 Freret Street, Suite 130
New Orleans, Louisiana 70118
(504) 865-5789

purposes of La. R.S. 30:2179(B) because the statute requires the DEQ to make a statewide capacity determination and base permitting decisions upon the determination for both solid and hazardous waste.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record, by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this 15th day of October, 2000.

_____

Valerie Briggs