

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

IN THE MATTER OF: *
*
LOUISIANA GENERATING, LLC *
BIG CAJUN I POWER PLANT AIR *
PERMITTING DECISIONS: *
2260-00007-V0; PSD-LA-660(M-1); *
2260-00007-1V1 *

PETITION FOR JUDICIAL REVIEW

1. This is an appeal by Sierra Club, the Louisiana Environmental Action Network (“LEAN”), the Alliance for Affordable Energy (the “Alliance”), and Mr. O’Neil Couvillion from a final permitting action of the Louisiana Department of Environmental Quality (“LDEQ”). Specifically, it is an appeal of the LDEQ decision, postmarked January 23, 2008, granting Part 70 Operating Permit 2260-00007-V0; Prevention of Significant Deterioration Permit PSD-LA-660(M-1); and Acid Rain Permit 2260-00007-1V1, which authorize Louisiana Generating, LLC Big Cajun I Power Plant (the “Plant”) (AI No. 11917) to emit pollutants into the air of the state of Louisiana.

PARTIES

2. Sierra Club, LEAN, the Alliance and Mr. Couvillion are persons aggrieved by LDEQ’s final decision in this matter.

3. Sierra Club is a national advocacy group and one of the oldest conservation groups in the country. Sierra Club has over 700,000 members nationally and approximately 4,000 members in the state of Louisiana. Sierra Club’s primary purpose is to preserve and protect the natural environment of Louisiana and the nation.

4. LDEQ’s permit decision allows emissions of air pollutants from Big Cajun that will impair Sierra Club's interest in fostering vibrant, healthy communities with clean water and air.

5. The Alliance is a non-profit, public interest, membership organization that serves Louisiana's 1.8 million electric and gas rate payers by promoting citizen participation in the

decision-making process, conducting community education campaigns on energy issues, and helping citizens and businesses become more energy efficient.

6. LDEQ's permit decision allows emissions of air pollutants from Big Cajun that will directly harm the Alliance's interest in creating environmentally responsible, community-based energy policies for Louisiana and the nation.

7. LEAN is a nonprofit corporation whose purpose is to preserve and protect Louisiana's land, air, water, and other natural resources, and to protect its members and other residents of the state from threats of pollution. LEAN is based in Baton Rouge, Louisiana, an area that has never achieved the minimum requirements for healthful air under the Clean Air Act and continues to fall short of those standards.

8. LDEQ's permit decision allows emissions of air pollutants from Big Cajun into the air of Pointe Coupee Parish, less than 20 miles from Baton Rouge and approximately 5 miles from the Baton Rouge non-attainment area. These emissions will directly harm LEAN's members who live, work, own property and recreate in the Baton Rouge non-attainment area.

8. Members of Sierra Club, LEAN, and the Alliance live near or in and enjoy the environment of New Roads, Pointe Coupee Parish, and the Baton Rouge area, and are concerned about the impacts of pollutants on the community. The activities authorized by the permit at issue will, if carried out, impair Sierra Club, LEAN, and Alliance members' use and enjoyment of these areas. Further, the activities authorized by the permit will, if carried out, exacerbate the problem of global warming, injuring Sierra Club, LEAN, and Alliance members by degrading the environment of Louisiana and the United States and by increasing the risk of catastrophic storms and coastal loss in the southeastern United States, including southeastern Louisiana.

9. Mr. O'Neil Couvillion is an individual member of LEAN who lives and recreates in the state of Louisiana. He has a real and actual interest in this matter because he is concerned about the health, safety, and environmental risks and impacts associated with air emissions from the Big Cajun I Power Plant. Specifically, Mr. Couvillion suffers an increased risk of asthma and other respiratory illnesses as a direct result of exposure to air pollution-induced smog. Big Cajun emissions will contribute to air pollution that impairs Mr. Couvillion's enjoyment of Louisiana's environmental resources. Mr. Couvillion also fishes in waters of the state and his

enjoyment of this activity is impaired by the waters' pollution from air emissions such as mercury. Also, as a resident of a state that is especially vulnerable to global warming, Mr. Couvillion suffers an increased risk of injury to his person and his property by catastrophic storms as a result of the Plant's increased emissions of greenhouse gases.

10. LDEQ is an agency of the State of Louisiana with the power to sue and be sued; LDEQ made the final permit action in this matter.

JURISDICTION AND VENUE

11. Jurisdiction and venue are proper in this Court pursuant to La. Rev. Stat. § 30:2050.21.A.

DETAILED ALLEGATIONS

12. On May 31, 2007, LDEQ issued a public notice on the proposed operating permit; acid rain permit; and prevention of significant deterioration permit. The public notice invited comments to be submitted on or before July 16, 2007.

13. The permits allow the Plant to emit a large quantity of air pollution including without limitation oxides of nitrogen ("NOx") (a category that includes a criteria pollutant and precursors for ozone formation), sulfur dioxide (SO₂), particulate matter, mercury, and other hazardous air pollutants approximately five miles from the Baton Rouge ozone non-attainment area, worsening air quality (including visibility) and jeopardizing public health in a community that already fails to meet the national health protection standard for ozone pollution.

14. The permits also allow the Plant to substantially increase its emissions of carbon dioxide (CO₂), a pollutant that causes global warming. Southern Louisiana is particularly vulnerable to global warming because of the rise in sea level and the increased and stronger hurricanes that will result from a warmer earth.

15. Sierra Club, LEAN, the Alliance, and Mr. Couvillion submitted timely comments to LDEQ during the public comment period opposing issuance of the permits.

16. The Louisiana Constitution mandates that "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved and replenished insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. art. IX § 1.

17. The Louisiana Supreme Court ruled that the Constitution “imposes a duty of environmental protection on all state agencies,” through their role as public trustees of the environment. Save Ourselves, Inc. v. La. Env’tl. Control Comm’n, 452 So. 2d 1152, 1156 (La. 1984).

18. LDEQ is the public trustee with the duty to protect Louisiana’s air pursuant to La. Rev. Stat. § 30:2014.A.4.

19. LDEQ’s duty as public trustee requires that “before granting approval of proposed action affecting the environment,” LDEQ must “determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.” Save Ourselves, 452 So. 2d at 1157.

20. Through its failure to ensure that adverse environmental impacts have been minimized or avoided as much as possible, LDEQ has erred as a matter of law and has violated its public trustee duty.

21. In refusing to take into account the Plant’s impact on global warming through its increased emissions of greenhouse gases, despite the fact that Louisiana stands to be especially harmed by such climate disruption, LDEQ has failed to ensure the minimization or avoidance of adverse environmental impacts.

22. In issuing the permit, LDEQ failed to ensure that allowable emissions from the Big Cajun facility will not cause or contribute to the violation of any ambient air quality standard in any air quality control region, or any applicable maximum allowable increase over the baseline concentration in any area.

23. In using outdated models to evaluate the likelihood that increased emissions from the Big Cajun facility will cause or contribute to violations of national health protection standards, LDEQ has failed to ensure the minimization or avoidance of adverse environmental impacts.

24. In declining to limit emissions of mercury—a neurotoxin that can be dangerous to human health in very small amounts—to the lowest feasible amount, LDEQ has failed to ensure the minimization or avoidance of adverse environmental impacts.

25. By failing to limit mercury emissions to a “maximum achievable control technology” standard, LDEQ has violated the Clean Air Act and the Louisiana Environmental Quality Act.

26. In issuing the permits before most major equipment pieces have been selected (including the boiler and the sulfur dioxide scrubber), LDEQ has failed to ensure the minimization or avoidance of adverse environmental impacts.

27. In failing to require proper monitoring of particulate matter, LDEQ has failed to ensure the minimization or avoidance of adverse environmental impacts.

28. As part of its public trustee duty, Louisiana law requires LDEQ to evaluate whether there are “alternative projects...which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits.” In re Rubicon, Inc., 95-0108 (La. App. 1 Cir. 2/14/96), 670 So. 2d 475, 483.

29. Rubicon makes it clear that “any written findings of fact and reasons for decision must satisfy” the alternatives inquiry noted above. Id.

30. LDEQ has erred as a matter of law by failing to consider lower-polluting plant designs.

31. LDEQ’s public comment response (the “Response”) states at page 10 that designs involving non-fossil fuel technologies “are not capable of economically satisfying the energy needs that the Big Cajun I Power Plant addresses” and demand side management “would not satisfy Louisiana’s long-term energy needs.” Such conclusory statements do not provide a sufficiently detailed analysis to ensure that they were considered fully, in violation of LDEQ’s public trustee duty.

32. Section 165(a)(4) of the Clean Air Act (“CAA”) prohibits the major modification of a regulated facility “unless...the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility.” 42 U.S.C. § 7475(a)(4); and see 42 U.S.C. § 7479(2)(C).

33. The requirement for conducting a Best Available Control Technology analysis is codified under Louisiana regulations at La. Admin. Code tit. 33, pt. III, § 509.

34. Under Louisiana law, BACT requires an emissions limit “based on the maximum degree of reduction for each pollutant subject to regulation” that the agency determines “is achievable...through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.” La. Admin. Code tit. 33, pt. III, § 509(B). See also CAA § 169(3), 42 U.S.C. § 7479(3).

35. LDEQ has erred as a matter of law by using an incorrect methodology to derive the Best Available Control Technology, in violation of the Clean Air Act and the Environmental Quality Act. LDEQ has failed to consider available methods that fall within the definition of Best Available Control Technology such as coal gasification and use of low sulfur coal.

36. LDEQ has erred as a matter of law by granting permits that contain more lenient emission limits than achievable by using the Best Available Control Technology, in violation of the Clean Air Act, the Environmental Quality Act, and LDEQ’s public trustee duty.

ASSIGNMENTS OF ERROR

37. LDEQ’s failure to consider environmental impacts violates the agency’s public trustee duty under Article IX, Section 1 of the Louisiana Constitution.

38. LDEQ’s failure to ensure the minimization or avoidance of environmental impacts violates the agency’s public trustee duty under Article IX, Section 1 of the Louisiana Constitution.

39. LDEQ’s failure to consider feasible project alternatives violates the agency’s public trustee duty under Article IX, Section 1 of the Louisiana Constitution.

40. LDEQ’s failure to “to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings” and to “articulate a rational connection between the facts found and the order issued” violates the agency’s public trustee duty under Article IX, Section 1 of the Louisiana Constitution. Save Ourselves, Inc. v. La. Env’tl. Control Comm’n, 452 So. 2d 1152, 1159 (La. 1984).

41. LDEQ’s failure to apply the correct methodology to determine Best Available Control Technology violates the Louisiana Environmental Quality Act and the Clean Air Act.

42. LDEQ's failure to set emissions limits in the permits consistent with Best Available Control Technology violates the Louisiana Environmental Quality Act and the Clean Air Act.

43. LDEQ's allowance of greater environmental impacts through its failure to set emissions limits in the permits consistent with Best Available Control Technology violates its public trustee duty under Article IX, Section 1 of the Louisiana Constitution.

44. By failing to limit mercury emissions to a "maximum achievable control technology" standard, LDEQ has violated the Clean Air Act and the Louisiana Environmental Quality Act, and Article IX, Section 1 of the Louisiana Constitution.

45. The permits are in violation of constitutional, statutory, or regulatory provisions, made in excess of statutory authority, made upon unlawful procedure, affected by error of law, arbitrary or capricious, or not supported and sustainable by a preponderance of evidence. La. Rev. Stat. § 49:964(G).

DESIGNATION OF RECORD FOR APPEAL

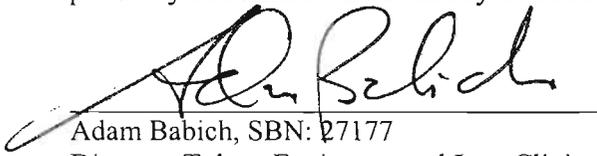
46. Petitioners designate the following as the record on appeal in this matter: the entire public record regarding the permits that exists as of the date of the filing of this Petition for Judicial Review, including but not limited to the proposed permits and application materials (including IT/EAS), the final permits, basis of decision, Sierra Club's comments regarding the permits made on behalf of itself, LEAN, and Mr. Couvillion, the Alliance's comments regarding the permits, any other public comments, and LDEQ's Responses to public comments.

PRAYER FOR RELIEF

WHEREFORE, Petitioners Sierra Club, LEAN, the Alliance, and Mr. Couvillion respectfully request that this Court:

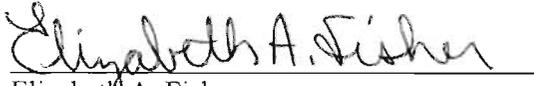
- a. Vacate the permits, and remand the matter to LDEQ;
- b. Stay the effectiveness of the permits pending final resolution of this appeal; and
- c. Award all other relief the Court finds proper.

Respectfully submitted this 19th day of February, 2008,



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*As Counsel for all Petitioners and as
Supervising Attorney with respect to the
Student Attorney's representation of Mr.
Couvillion*



Elizabeth A. Fisher
Student Attorney

As Counsel for Mr. O'Neil Couvillion



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*As Counsel for all Petitioners and as
Supervising Attorney with respect to the
Student Attorney's representation of Mr.
Couvillion*

SUPERVISING ATTORNEY'S INTRODUCTION OF STUDENT ATTORNEY AND
NOTICE OF APPROVAL OF STUDENT APPEARANCE

Undersigned counsel respectfully introduces student attorney Elizabeth A. Fisher to this Court pursuant to Rule XX. As the student attorney's supervising attorney, I approve of the student attorney's appearances in this case on behalf of Mr. O'Neil Couvillion only. Written consent of the applicable clients to an appearance by a student attorney in this matter is submitted with this pleading.

Respectfully submitted February 19th, 2008.

TULANE ENVIRONMENTAL LAW CLINIC



Corinne Van Dalen, SBN 21175

Please Serve:
Dr. Harold Leggett, Secretary
Louisiana Department of Environmental Quality
602 N. Fifth Street, Galvez Building
Baton Rouge, Louisiana 70802

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ORDER

The Court received the Petition for Judicial Review appealing the Louisiana Department of Environmental Quality's permits that Petitioners Sierra Club, LEAN, the Alliance, and Mr. O'Neil Couvillion filed with this Court on the 20th day of February, 2008.

The record designated by the Petitioners shall be compiled and forwarded to the Nineteenth Judicial District Court, and the appeal shall be returnable to the 19th Judicial Court on or before the ___ day of _____, 2008.

Additionally, the Court stays the effectiveness of the permits that are the subject of this appeal pending final resolution of this appeal.

Baton Rouge, Louisiana, this ___ day of _____, 2008.

DISTRICT JUDGE
NINETEENTH JUDICIAL DISTRICT COURT

CLIENT'S WRITTEN CONSENT FOR STUDENT ATTORNEY APPEARANCE

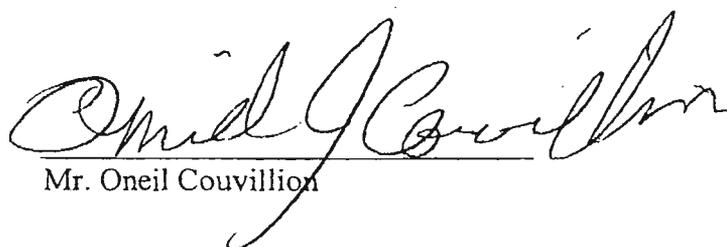
I hereby grant my consent for student attorneys from the Tulane Environmental Law Clinic to appear on my behalf in any matter in which the Tulane Environmental Law Clinic represents me, whether in Court or before an administrative tribunal.

Dated:

11/20/2001

[signed:]

[name:]


Mr. Oneil Couvillion