

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

IN THE MATTER OF:	*	
LOUISIANA DEPARTMENT OF	*	No. 644048
ENVIRONMENTAL QUALITY	*	Sec. 26
PERMITTING DECISION:	*	
WATER QUALITY CERTIFICATION	*	
WQC 140708-02	*	

PETITION FOR JUDICIAL REVIEW

1. Petitioners Save Our Hills, Inc., Louisiana Environmental Action Network (LEAN), and Mr. O’Neil Couvillion respectfully appeal from the Louisiana Department of Environmental Quality’s (LDEQ’s) decision to issue a Water Quality Certification, WQC 140708-02, to Southern Aggregates L.L.C. to construct a sand and gravel mine, directly adjacent to the Oak Hills Subdivision, a +224 residential subdivision. The water quality certification was issued on October 26, 2015. The proposed project would be located at 37662 Highway 16 in Denham Springs, Livingston Parish, Louisiana.

INTRODUCTION

2. The Louisiana Constitution mandates that LDEQ serve as the public trustee of natural resources and the environment. The U.S. Army Corps of Engineers may not issue a Clean Water Act Section 404 permit to dredge or fill wetlands if LDEQ denies the applicant a water quality certification. 33 U.S.C. § 1341(a); La. Rev. Stat. § 30:2074(A)(3). Certifications “will include any stipulations or conditions necessary to ensure compliance” with water quality standards. La. Admin. Code tit. 33, pt. IX, § 1507(F)(3)(b). This is the only involvement LDEQ has in the Section 404 permitting process and as such it is the only opportunity the agency has to act as the public trustee to protect Louisiana’s residents and wetlands from federal authorization of ill-considered projects. LDEQ failed to discharge its duty as the public trustee when it issued this water quality certification.

3. A subdivision of more than two hundred and twenty-four (224) homes is directly adjacent to the the site of the proposed project. Currently, this idyllic area is non-industrial and the residents of the community enjoy the peace and quiet the area offers.

4. Residents who wish to move away from the mining operation will be financially burdened. Property values will decrease dramatically. The noise, dust, and truck traffic affiliated with the project will deter potential buyers.

5. LDEQ restricted its analysis to a “determination of whether the placement of fill material will result in a violation of state water quality standards.” *See, e.g.*, LDEQ Response to Comments Summary at 6 (Response to Comment 9). The law, however, requires LDEQ to discharge its duty as public trustee “before granting approval of proposed action affecting the environment.” *See Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1157 (La. 1984). This includes the duty to give “full and careful consideration” to “environmental costs and benefits” and “economic, social and other factors.” *Id.* The public trustee 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.* Finally, the trustee must determine whether “adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.” *Id.* LDEQ failed entirely to conduct these analyses.

PARTIES

6. Save Our Hills, Inc. is non-profit corporation organized under the laws of the State of Louisiana. Save Our Hills’s purpose is to serve the interests of the residents living in and near the Oak Hills subdivision. More than 224 homes are located in the subdivision. The site of the proposed project is located directly adjacent to this community.

7. The members of Save Our Hills are directly affected by LDEQ’s decision. The strip mining operations will increase noise, dust, and traffic in the neighborhood – disturbing the community and imposing hazardous living conditions. Additionally, the project entails the dredge and fill of 12.91 acres of wetlands which will increase the risk of flooding in the area.

8. LEAN is a non-profit corporation organized under the laws of the State of Louisiana. LEAN serves as an umbrella organization for environmental and citizen groups. LEAN’s

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 has members state-wide, including members who live, work, or recreate in Livingston Parish. LEAN's members include residents of the Oak Hills subdivision who will be adversely affected by the proposed project.

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 lives in Livingston Parish and visits the Oak Hills subdivision and will be adversely affected by the proposed project.

10. Save Our Hills, LEAN, and Mr. Couvillion are aggrieved persons.

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

JURISDICTION AND VENUE

12. Jurisdiction and venue are proper in this Court, and Save Our Hills has the right to bring this action pursuant to La. Rev. Stat. § 30:2050.21.A.

BACKGROUND

13. Federal review by the U.S. Army Corps of Engineers does not relieve LDEQ of its independent duty to examine the environmental impacts of Southern Aggregates' proposed project. This decision is the only opportunity in the wetlands "dredge and fill" permitting process for the state to weigh in on the proposed project, and it is at this stage of the process that LDEQ has the opportunity to ensure protection of Louisiana residents as the public trustee.

14. There are alternative projects which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits. Southern Aggregates could expand operations at one or multiple current sites. According to the website maintained by VantaCore, Southern Aggregates' parent company, Southern Aggregates has "extensive reserves which will last over 27 years at the current production rates." *See* VantaCore, Operations: Southern Aggregates, <http://www.vantacore.com/operations.php> (last visited November 20, 2015).

15. On January 1, 2015, LDEQ issued a public notice on the water quality certification for Southern Aggregates' proposed project. The public notice invited comments to be submitted on or before April 21, 2015.

16. Save our Hills, LEAN, and Mr. O'Neil Couvillion submitted timely comments during the public comment period opposing issuance of the water quality certification.

17. In their comments, Save Our Hills, LEAN, and Mr. O'Neil Couvillion raised all reasonably ascertainable issues and submitted all reasonable available evidence supporting their position.

DETAILED ALLEGATIONS

(LDEQ Failed to Act as the Public Trustee)

18. LDEQ is constitutionally mandated to protect, conserve, and replenish "[t]he natural resources of the state, including . . . water . . . insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. Art. IX § 1.

19. LDEQ is the public trustee with the duty to protect Louisiana's environment pursuant to La. Rev. Stat. § 30.2014(A)(4).

20. LDEQ's duty as a 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. 23 at 1157.

21. LDEQ failed to determine that the proposed project's adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.

22. In acting as the public trustee, LDEQ must conduct a cost/benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project and determine whether the latter outweighs the former. *In the Matter of Rubicon*, 670 So.2d 475, 483 (La. Ct. App. 1996).

23. LDEQ failed to conduct a cost/benefit analysis regarding the proposed project and failed to determine whether the proposed project's benefits outweigh its costs.

24. The environmental, economic and social costs of the proposed project outweigh the project's potential social and economic benefits.

25. 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.* 670 So. 2d 475, 483.

26. LDEQ failed to evaluate alternatives to the proposed project.

(LDEQ’s certification is arbitrary and capricious)

27. In finding that the proposed project will not violate state water quality, LDEQ based its decision on Southern Aggregates’ assertion that it would implement best management practices (BMPs). But LDEQ did not condition its certification on compliance with BMPs. *See, e.g.,* LDEQ Response to Comments Summary at 3 (Response to Comment 4).

28. In finding that the proposed project will not violate state water quality, LDEQ stated “implementation of good housekeeping and proper maintenance practices is critical” but did not condition certification on the implementation of good housekeeping and proper maintenance. *See, e.g.,* LDEQ Response to Comments Summary at 7(V).

29. LDEQ did not create enforceable permit conditions to ensure that the proposed project will not degrade state water quality.

(LDEQ Failed to Respond to Reasonable, Significant Comments)

30. LDEQ’s decision must respond to all reasonable public comments. *In re Rubicon, Inc.* 670 So. 2d 475, 483.

31. The Petitioners commented that “The record lacks LDEQ’s analysis under Louisiana Constitution, art. 9, § 1” and requested “an opportunity to comment on LDEQ’s Public Trustee Analysis.” *Save Our Hills, Louisiana Environmental Action Network and Mr. Oneil Couvillion, Southern Aggregates Water Quality Certification Comments* at 13.

32. The Petitioners commented that “Because of the already impaired state of the Amite River, a scientifically valid, quantitative analysis would be needed to support any conclusion that the project would not further degrade the river” and that the “record lacks scientifically valid, quantitative analysis and is inadequate to support certification of this project.” *Id.* at 5.

33. The Petitioners’ comments noted that trucks were a likely source of dust. *Id.* at 4 & 8 (incorporating Affidavit Of Lynn Dupre)

34. The Petitioners commented that the project would cause property values to plummet and that “the operation’s noise, dust, and traffic ... will cost a community of +224 residences eight years of disturbance and hazardous living conditions.” *Id.* at 8.

35. In their comments, the petitioners’ asked LDEQ to condition this Water Quality Certification on compliance with, inter alia, *best* management practices. *Id.* at 14-15.

36. LDEQ failed to respond to the comments noted in the five paragraphs above and failed to respond to other reasonable, significant comments.

ASSIGNMENTS OF ERROR

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

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

39. LDEQ’s failure to conduct an analysis of costs and benefits violates the agency’s public trustee duty under Article IX § 1 of the Louisiana Constitution.

40. LDEQ’s determination that the project will not violate state water quality standards is arbitrary and capricious.

41. LDEQ violated its duty to include in its certification “conditions necessary to ensure compliance” with water quality standards. La. Admin. Code tit. 33, pt. IX, § 1507(F)(3)(b).

42. LDEQ made its decision upon unlawful procedure because the agency failed to provide responses to reasonable and significant public comments.

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

DESIGNATION OF RECORD FOR APPEAL

44. 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,

Save Our Hills Inc.'s comments regarding permits made on behalf of itself, LEAN, and Mr. O'Neil Couvillion, any other public comments, and LDEQ's responses to public comments.

REQUEST FOR STAY

45. Pursuant to Title 30, Section 2050.22(B) of the Louisiana Revised Statutes, after a petition for review of an LDEQ permit has been filed, this Court may order a stay of the permit "with appropriate terms," pending final resolution of the appeal after notice to the department and the permittee and an opportunity for a hearing on the requested stay. La. Rev. Stat.

§ 30:2050.22(B)

46. The Petitioners have provided notice to the department and the permittee of their request for a stay by providing them with a copy of this Petition via certified mail, and via formal service.

47. The U.S. Army Corps of Engineers cannot issue a Clean Water Act Section 404 permit unless and until LDEQ issues a water quality certification. After LDEQ issues a water quality certification, the decision to grant or deny a Section 404 permit rests solely with the U.S. Army Corps of Engineers. Thus, once the U.S. Army Corps of Engineers issues a CWA Section 404 permit, LDEQ will not be able to perform its public trustee duty effectively. This Court should stay LDEQ's certification to ensure that LDEQ's opportunity and duty to ensure protection of Louisiana residents is not mooted by intervening action by the U.S. Army Corps of Engineers, based on an unlawful certification.

48. A stay of LDEQ's decision is necessary to prevent irreparable harm to petitioners and the environment. Petitioners' members' quality of life will be devastated due to noise, dust and truck traffic associated with the project. "Environmental injury, by its nature, can seldom be adequately remedied by money damages." *See Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987).

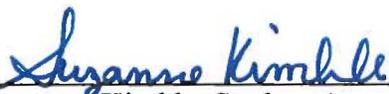
49. Any temporary inconvenience from a stay is minimal in comparison to the harm the project will cause to the environment, and neighboring community.

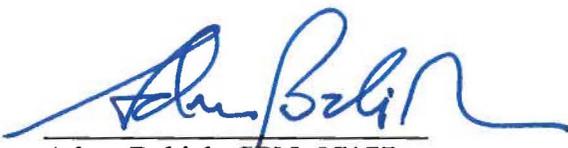
PRAYER FOR RELIEF

WHEREFORE, Petitioners Save Our Hills Inc., LEAN, and Mr. O'Neil Couvillion respectfully request that this Court:

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

Respectfully submitted this 24rd day of November, 2015.


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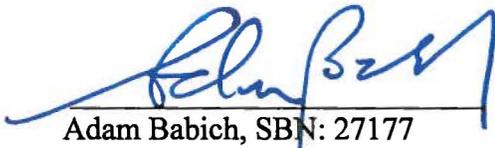

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*On behalf of all Petitioners and as
Supervising Attorney for Suzanne Kimble's
representation of O'Neil Couvillion*

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

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

Respectfully submitted November 24, 2015.

TULANE ENVIRONMENTAL LAW CLINIC


Adam Babich, SBN: 27177

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

IN THE MATTER OF: *
LOUISIANA DEPARTMENT OF *
ENVIRONMENTAL QUALITY *
PERMITTING DECISION: *
WATER QUALITY CERTIFICATION *
WQC 140708-02 *
*

ORDER

The Court received the Petition for Judicial Review appealing the Louisiana Department of Environmental Quality’s Water Quality Certification, WQC 140708-02, that Save Our Hills, Inc. and Louisiana Environmental Action Network filed with this Court on November 24, 2015.

The record designated by Save Our Hills, Inc. and the Louisiana Environmental Action Network shall be compiled and forwarded to the Nineteenth Judicial District Court, and the appeal shall be returnable to the 19th Judicial District Court on or before the ____ day of _____ (“within sixty days after service of the petition on the department, or within further time allowed by the court” La. Rev. Stat. § 30:2050.21).

Additionally, the Court shall hold a hearing on Petitioners request for a stay on ____ day of _____,

Baton Rouge, Louisiana, this ____ day of _____.

DISTRICT JUDGE
NINETEENTH JUDICIAL DISTRICT COURT

Please Serve:

Peggy Hatch, Secretary
Louisiana Department of Environmental Quality
602 N. Fifth Street, Galvez Building
Baton Rouge, Louisiana 70802

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