

Administrative & Judicial Challenges to Environmental Permits

Greg L. Johnson

LISKOW&LEWIS

Outline

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- Challenges to Corps Permits
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LDEQ Permits

Louisiana Public Trust Doctrine

- Public trust doctrine enshrined in 1974 Louisiana Constitution, which “commands ... protection” of natural resources, including air & water, “insofar as possible and consistent with health, safety and welfare of the people.”
 - *Save Ourselves v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984) (IT Decision) (citing La. Const. art. IX §1)



Louisiana Public Trust Doctrine

- **IT Decision:** Constitutional mandate imposes a “rule of reasonableness,” requiring LDEQ to determine, before granting approval of action affecting the environment, that adverse environmental impacts have been minimized/avoided as much as possible consistent with public welfare.
- **IT Requirements:** LDEQ’s written reasons for decision must consider whether
 - Adverse environmental effects of proposed project have been avoided to maximum extent possible
 - Cost-benefit analysis of environmental impact costs vs. social & economic benefits demonstrates latter outweighs former
 - There are no alternative projects, sites, or mitigating measures which would offer more protection to environment without unduly curtailing non-environmental benefits



Environmental Assessment Statement

- To help LDEQ discharge public trust obligations, applicant for new **hazardous waste, solid waste, water, or air permit** or **major modification** of such permit shall submit an **Environmental Assessment Statement (EAS)** as part of permit application [La. R.S. § 30:2018.A]
- Not required to submit EAS:
 - Applicant for minor modification, minor variance, or administrative amendment to a permit
 - Applicant for a minor source of air emissions, hazardous wastes or solid wastes, or for facility or activity which is not a major facility for water discharges [La. R.S. § 30:2018.E]

Public Notice & Comment

- **Public notice & comment is often required** prior to issuance of a final permit. For example:
 - Louisiana Pollutant Discharge Elimination System (LPDES): LDEQ shall provide notice draft permit has been prepared & allow **at least 30 days** for public comment [LAC 33:IX.3113.B]
 - Air:
 - For application for a **Part 70 source**, public notice shall be provided prior to issuance of initial permit, permit renewal, or permit revision to incorporate significant modification [LAC 33:III.531.A.2]. LDEQ shall allow **at least 30 days** for public comment. [LAC 33:III.531.A.3.C].
 - A public participation timeframe of **no less than 30 days** for synthetic minor source permit [La. Guidance for Air Permitting Actions p. 58]
 - Public notice & comment period for Prevention of Significant Deterioration construction permit. [LAC 33:III.509.Q]
 - Hazardous Waste TSD Permit: Public notice of draft permit shall allow **at least 45 days** for public comment [LAC 33:V.715]

Public Hearings



■ Public hearing

- LPDES Example: LDEQ shall hold a public hearing whenever, on the basis of requests, there is significant public interest in draft permit, or at LDEQ's discretion whenever, for instance, hearing might "clarify" an issue [LAC 33:IX.3117]

■ Response to Comments

- At time final permit decision is issued, LDEQ shall issue response to "significant comments" [LPDES - LAC 33:IX.3125; Hazardous Waste LAC 33:V.707]

Judicial Challenges

- Once permit decision becomes final, third party may judicially appeal decision **within 30 days**
 - La. R.S. 30:2050.21: An “**aggrieved person**” may appeal devolutively a final permit action to Nineteenth Judicial District Court by filing petition for review within 30 days after notice has been given
 - “Aggrieved person” defined broadly to include any “natural or juridical person who has a real and actual interest that is or may be adversely affected” [La. R.S. § 30:2004(17)]
 - Environmental groups, residents, competitors can be aggrieved
 - Filing of appeal does not stay final permit action. But LDEQ may grant, or court may order, a stay with “appropriate terms.” [La. R.S. § 30:2050.22]

Judicial Challenges

- The court may reverse or modify permit decision if substantial rights of appellant have been prejudiced because agency findings/decisions are:
 - In violation of constitutional or statutory provisions;
 - In excess of statutory authority of the agency;
 - Made upon unlawful procedure;
 - Affected by other error of law;
 - Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
 - Not supported & sustainable by preponderance of evidence [La. R.S. § 49:964.G].
- Standard of review affords considerable deference to the agency (LDEQ)



Judicial Challenges

- **Judicial review confined to administrative record [La. R.S. § 49:964.F]**



- Permit applicant & any person who challenges permit “must raise all reasonably ascertainable issues and submit all reasonable available evidence” prior to issuance of final permit so evidence may be part of administrative record [La. R.S. § 30:2014.3.B]
- No evidence shall be admissible that was not submitted to LDEQ prior to issuance of final decision, unless there is **good cause** (e.g., party could not reasonably have ascertained the issues or made the evidence available within time for public comments) [La. R.S. § 30:2014.3; see also La. R.S. § 30:2050.21.E]

Louisiana Permit Challenge Cases

Harrelson Materials v. LDEQ

- 2007 WL 1765563 (La. App. 1 Cir. 6/20/07) – Permit Upheld
- Harrelson challenged LDEQ's decision to issue a solid waste permit to its competitor, Mikeebo.
- Harrelson argued LDEQ failed to fulfill its public trust obligations because it conducted inadequate environmental assessment based on incomplete/misleading information and failed to consider all environmental impacts.
- Louisiana First Circuit concluded record failed to show that LDEQ acted arbitrarily or failed to give sufficient weight to environmental concerns. Affirmed 19th JDC decision upholding permit.

In re American Waste & Pollution Control

- 633 So. 2d 188 (La. App. 1 Cir. 1993) (Permit Vacated)
- Citizens' group challenged permit for solid waste facility; court vacated permit.
- LDEQ failed to properly evaluate alternative sites to determine comparative environmental impact
 - Alternative sites analysis had been improperly limited to three parishes, even though majority of waste would come from outside those parishes
 - LDEQ failed to properly consider selected site's risk to aquifer

In re Shintech

- 814 So.2d 20 (La. App. 1 Cir. 2002) (Permit Upheld)
 - Environmental groups/residents challenged construction of chemical plant to be sited near existing facility that would provide feedstock; they argued plant's site selection process was flawed because only looked at sites near existing facility
 - Court upheld permit; alternatives sites analysis may be limited to specific geographical area that is suitable for the project



In re Air Permits for South Louisiana Methanol

- C660709 (19th JDC Oral Hearing 2/9/18) (permit upheld)
 - LEAN & residents challenged LDEQ's issuance of **modified** Title V/PSD air permits to South Louisiana Methanol in 2017 for construction & operation of methanol plant in St. James Parish
 - Challengers argued LDEQ was required to consider alternative sites before modifying permits
 - 19th JDC held that question of whether LDEQ did a sufficient alternate site analysis in 2013 – when initial permits were issued – was *res judicata* and no longer subject to challenge. Challengers offered insufficient evidence to show there was any difference between the initial and modified permits that justified a new alternative sites analysis.

South Louisiana
Methanol

Title V Air Permit – EPA Review

- For Title V initial permits, permit renewals, and significant modifications, EPA has a **45-day review period** [LAC 33:III.533.C].



- If EPA does not object to permit, any person may, within 60 days after expiration of EPA's 45-day review period, petition EPA to object. [LAC 33:III.533.E; 42 USC § 7661d(b)]
 - Petitions shall be based on objections raised with “**reasonable specificity**” during public comment period, unless impracticable.
 - Such petitions do not stay effectiveness of permit if permit issued after end of 45-day review period.
- CAA requires EPA to grant or deny petition **within 60 days** after petition filed [42 USC § 7661d(b)(2)]
- EPA must object if petitioner demonstrates permit not in compliance with CAA requirements [42 USC 7661d(b)(2)]

Title V Air Permit – EPA Review

- If EPA denies petition to object, petitioner can obtain judicial review in the U.S. Court of Appeals for the appropriate circuit. 42 USC § 7661d(b)(2) (“Any denial ... shall be subject to judicial review under section 7607”); 42 USC § 7607(b)(1).
 - *Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir. 2006) (remanding case to EPA for further consideration based on Georgia agency’s failure to use mailing list for public notification during comment period for permit).
- If EPA fails to act on the petition within its 60-day deadline, petitioner can file suit in district court to compel EPA to perform that nondiscretionary duty. 42 USC § 7604(a).
 - *Sierra Club v. Pruitt*, 280 F. Supp. 3d 1 (D.D.C. 2017) (after EPA missed statutory deadline to respond to petition, court ordered EPA to respond by new deadline)

Judicial Review of Other Louisiana Approvals

LDEQ's Water Quality Certification (WQC)

- Section 401 Clean Water Act: Applicant for federal permit for activity which may result in any discharge into the navigable waters must provide state certification that activity will comply with state water quality standards.
- Judicial review somewhat uncertain
 - *Save Our Wetlands v. DEQ*, 812 So.2d 746 (La. App. 1 Cir. 2002): First Circuit held WQC can be appealed by filing petition for review under La. R.S. § 30:2050.21 within 30 days after notice of WQC was provided. There, petition untimely because filed after 30-day period.
 - In 2015, LEAN and others filed petition for review challenging a WQC in connection with Corps Section 404 permit to be issued to Southern Aggregates. LDEQ & Southern Aggregates argued 19th JDC lacked subject matter jurisdiction because WQC is not appealable. 19th JDC agreed it did not have subject matter jurisdiction. LEAN appealed, but First Circuit dismissed the appeal in 2017 as moot because Corps had already issued Section 404 permit. *In re LDEQ Permitting Decision WQC 140708-02*, 2017 WL 239524.

LDNR's Coastal Use Permit (CUP)

- Aggrieved parties may appeal CUP by filing petition in district court of parish in which proposed use is situated. La. R.S. § 49:214.30.D
- *Avoca v. DNR*, 2017 WL 4081624 (La. App. 1 Cir. 2017)
 - Levee district obtained CUP for flood control structure across Avoca Island
 - After submitting comments during comment period, landowner Avoca LLC filed petition for review
 - Avoca argued LDNR abused its discretion by, e.g., concluding flood control structure would provide a net value of tens of billions of dollars
 - Court examined record and explained basis for LDNR's estimate
 - Further, Avoca pointed to no evidence to refute LDNR's estimate
 - Absent such evidence, and given record, no abuse of discretion. CUP upheld.

Federal Permits

Permits Issued by US Army Corps of Engineers

■ Individual permits

- **Section 404** of the Clean Water Act (CWA) (33 U.S.C. § 1344(a))
 - Permit to discharge dredge and fill material in navigable waters.
- **Section 10** of the River and Harbors Act (RHA) (33 U.S.C. § 403)
 - Permit to authorize construction, excavation, and other work affecting the course location, condition, and capacity of navigable waters.
- Section 14 of the RHA (33 U.S.C. § 408) (commonly referred to as **Section 408**)
 - Permission to alter or occupy Corps civil work projects if the activity will not injure the public interest and will not impair the usefulness of the project.

■ General permits

- **Nationwide Permits** under Sections 404 and 10—for certain activities that have minimal impacts
- **Categorical Permissions** under Section 408—for “potential alterations that are similar in nature and that have similar impacts.”

National Environmental Policy Act (NEPA)

- Under NEPA, Corps must assess environmental effects of its proposed actions before issuing a permit. 42 U.S.C. § 4321 *et seq.*
- Unless project is categorically excluded, Corps develops an environmental assessment (EA) to determine whether to prepare an environmental impact statement (EIS) or a finding of no significant impact (FONSI).
 - Must include the environmental impact of the proposed action and alternatives. The EIS provides a more in-depth look at the environmental impact and alternative actions.
 - Categorical exclusions include, for example, fixed or floating small private piers and minor utility distribution and collection lines. 33 C.F.R. § 325.5(b)(2).
- “Most permits will normally require only an EA.” 33 C.F.R. § 230.7.

Notice, Comment, and Public Hearings

Notice, Comment, and Public Hearings

- Sections 404, 10, and 408 Permits/Permissions have similar public notice and comment requirements.
- Before issuing a permit, Corps must give public notice and allow for public comment on the application.
 - 33 C.F.R. § 325.2. Dep't of the Army, U.S. Army Corps of Engineers, EC 1165-2-220, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC § 408 (2018).
- The comment period is typically no more than 30 days.
- The Corps can also hold a public hearing, hearing written and oral statements from the applicant and other interested parties.

Decision on Issuance

- If permit is denied:
 - The applicant will be notified in writing of the reasons for the denial.
 - 33 C.F.R. § 325.2(a)(7); Dep't of the Army, U.S. Army Corps of Engineers, EC 1165-2-220, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC § 408 (2018).
 - The applicant (and “affected parties” but not the general public) can seek administrative review. *See* 33 C.F.R. § 331 *et seq.*

- If permit is approved:
 - The applicant will be notified and sent the terms of the permit/permission.
 - The applicant (and “affected parties” but not the general public) can seek administrative review. *See id.* § 331 *et seq.*
 - The general public would need to file a court action seeking judicial review to challenge permit.

Judicial Review

Administrative Procedure Act

- The Administrative Procedure Act (APA) allows an injured person to seek judicial review of final agency action.
- Sections 404, 10, and 408 permits/permissions are considered final agency actions.

Administrative Procedure Act

- An injured person is “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.” This includes:
 - An applicant (after exhausting administrative review).
 - A member of the public that suffered injury in fact which (1) is concrete and actual or imminent, (2) was caused by the agency action, and (3) can be redressed by a judicial decision. The person must have judicial standing.
 - This is a narrower group of people than those who can comment because only those actually injured can seek judicial review, but any interested party can comment.

Judicial Review under the APA

- A court will reverse a permitting decision only if Corp's actions, findings, and conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).
- Courts are typically highly deferential to agency's determinations if the agency acts within the scope of its authority, follows the correct procedural steps, and explains its reasoning.

Judicial Review of USACE Permits

Town of Abita Springs v. U.S. Army Corps of Engineers, 153 F. Supp. 3d 894 (E.D. La. 2015).

- The Corps issued a Section 404 permit to Helis, allowing it dredge and fill wetlands.
- Prior to issuing permit, the Corps had an extended public notice and comment period, held public hearings, and asked Helis to directly respond to certain public comments.
- Abita Springs filed suit alleging that the Corps violated the APA by not following the correct procedures and by relying on non-public information.
- The court found that the Corps gave proper public notice and relied on appropriate information, and its decision to issue the permit was not arbitrary, capricious, or otherwise not in accordance with law.



Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F. Supp. 3d 101 (D.D.C. 2017).

- The Corps issued Section 404 and 10 Permits and Section 408 Permission to build the Dakota Access Pipeline (DAPL) under the Missouri River.
- Tribes filed suit alleging the Corps violated the APA, CWA, and NEPA by not properly considering the environmental impact of DAPL.
- The Section 404 Permit/408 Permission were held deficient because the Corps did not fully consider the impacts on fishing, hunting, or environmental justice of a possible spill.
- The Section 10 Permit was sufficient because DAPL qualified under a nationwide general permit.
- In a subsequent ruling, the Court, instead of vacating the permits, gave the Corps time to supplement and correct its deficiencies.

Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers, 894 F.3d 692 (5th Cir. 2018).

- The Corps granted a Section 404 Permit and Section 408 Permission to complete the Bayou Bridge Pipeline.
- Atchafalaya Basinkeeper and other organizations brought an action against the Corps seeking a preliminary injunction based alleged violations of NEPA and the CWA.
- The district court granted the injunction and enjoined the completion of the pipeline, finding the Corps' analysis of mitigation methods and cumulative impacts inadequate.
- The Fifth Circuit disagreed, holding that decision to grant the permits was sufficient under the APA because it adequately considered the relevant concerns and explained its reasoning.

Observations on Judicial Review

Observations on Judicial Review

- Just because you get a permit from the agency does not mean that it can be defended in court.
- Permit applicants need to build a solid foundation for the permit during application process so that the administrative record is sufficient to survive challenge in court.

Observations on Judicial Review

- Permit applicants should assess level of public interest prior to submitting application.
- If permit will be of public interest, permit and application could be scrutinized and challenged.
- Multi-disciplinary approach:
 - Business
 - Technical
 - Legal
 - Social
 - Community Outreach

Observations on Judicial Review

- Once the permit is issued, it is difficult if not impossible to supplement the administrative record with necessary information.
 - Get the data in the record beforehand.
 - Take a remand to the agency to add needed information.
- Sometimes, the best way to survive a judicial challenge can be to reach out to interested parties in advance to ensure that the project addresses their concerns.

Greg L. Johnson
(504) 556-4115
gljohnson@liskow.com

LISKOW&LEWIS