

SAVE LAKE PEIGNEUR, INC., ET AL

16TH JUDICIAL DISTRICT COURT

VS. DOCKET NO. 122358

PARISH OF IBERIA

SECRETARY, LOUISIANA DEPARTMENT
OF NATURAL RESOURCES

STATE OF LOUISIANA

REASONS FOR JUDGMENT

This matter came before the Court on Plaintiff Save Lake Peigneur's Action for judicial review of an administrative order issued by the Louisiana Department of Natural Resources, Office of Coastal Management. The Petition for Judicial Review alleges that a Coastal Use Permit was wrongfully issued by the Department of Natural Resources, Office of Coastal Management to the Jefferson Island Storage & Hub, LLC. This permit was issued for a project to create two new natural gas storage caverns in the Jefferson Island salt dome underneath Lake Peigneur.

Plaintiff Save Lake Peigneur, Inc. is a non-profit corporation comprised of members domiciled in Louisiana who live on and around Lake Peigneur. In its Petition for Judicial Review, Save Lake Peigneur sets forth that it is organized exclusively for charitable, scientific, and educational purposes and to protect citizens and environment by providing a forum for service and public action.

The chronological background of the case is as follows. On September 5, 2012, Jefferson Island Storage applied to the DNR for approval to construct two new natural gas caverns by dredging, solution mining, and injecting natural gas in the Jefferson Island salt dome underneath Lake Peigneur. On December 11, 2012, the DNR issued a Public Notice requesting comments on Jefferson Island Storage's Coastal Use Permit (CUP) application. The DNR held a Public Hearing on February 20, 2013 to hear oral comments regarding the permit application. Various citizens and local authorities expressed opposition to the application. Save Lake Peigneur submits that the objections to the project were based on its potential to cause numerous negative impacts, some catastrophic, including irreversible contamination of Lake Peigneur or the underlying Chicot Aquifer from either natural gas, arsenic, or saltwater and the potential for explosions and loss of life from increased mining activities in and around the Jefferson Island salt dome. Save Lake Peigneur sets forth in its Petition that paramount among residents' concerns was the failure of any agency to conduct a comprehensive Environmental Impact Statement of the Project and the ongoing natural gas stage operations in the lake, which would assess the effects of all the Project's potential hazards and thoroughly assess the stability of the Jefferson Island dome.

On March 7, 2013, the OCM granted Jefferson Island Storage a Coastal Use Permit. In response to the issuance of the permit, Save Lake Peigneur filed the present Petition for Judicial Review; Jefferson Island Storage intervened.

Plaintiff Save Lake Peigneur seeks reversal of the OCM decision and to have the Coastal Use Permit vacated.

STANDARD OF REVIEW

This action is an action for judicial review pursuant to La. R.S. 40:214.35, which provides that judicial review may be instituted by the filing of a petition in the district court of the parish in which the proposed use is to be situated, and that "judicial review shall otherwise be pursuant to the Louisiana Administrative Procedure act..." La. R.S. 40:214.35(F) and (F). With respect to the standard of review for judicial reviews of administration adjudications, the LAPA provides that:

The court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of 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 evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of facts by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of this rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observations of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

La. R.S. 49:964(G)

The general principle for the standard of review when reviewing the findings of an administrative agency is that, if the evidence, as reasonably interpreted, supports the agency's determinations, then the agency's decisions are accorded great weight and will not be reversed or modified in the absence of a clear showing that the administrative action was arbitrary or capricious. Summers vs. Sutton, 428 So.2d 1121 (La. App. 1 Cir. 1983).

DISCUSSION

Plaintiff Save Lake Peigneur submits that the Louisiana DNR, Office of Coastal Management (OCM) violated the Louisiana Constitution and its own guidelines by issuing a Coastal Use Permit to Jefferson Island Storage and Hub, LLC without considering the potential adverse environmental impacts of the project as a whole and not considering public safety. The permit was wrongfully issued and ignored significant potential risks. Plaintiffs submit that the record reflects that DNR did not make the required and explicit findings that the project is located where the "public safety would not be unreasonably endangered" and "on lands which have foundation conditions sufficiently stable to support the use."

Defendants submit that OCM properly interpreted its guidelines consistent with the respective statutory authority and jurisdiction of OCM and the Office of Conservation. OCM analyzed those aspects of the proposed expansion project that fall within its jurisdiction and properly refrained from addressing the aspects of the project that are statutorily committed to the commissioners' jurisdiction. Further, the agency expressly conditioned the commencement of the CUP actions on the granting of the Class III permit by the Commissioner who will ensure that all the issues without the commissioner's jurisdiction, including public safety, are addressed and authorized. Further, defendants submit that while the conclusory findings of the decision may not reflect that all mandatory findings were made by the administrative decision, it is clear from a review of the decision that all criteria were considered and addressed.

The Court has reviewed the transcript of the hearing, the parties' memorandum and supporting documentation. Upon review, the court finds in favor of Plaintiff Save Lake Peigneur. The Court agrees with plaintiff that the law requires that OCM follow the guidelines more specifically and make actual findings as to whether the public would be endangered unreasonably and whether the foundation condition supports the use.

The majority of defendants' argument in opposition to plaintiff's position focuses on the roles and jurisdictions of the OCM and the Office of Conservation which are both divisions of DNR. They argue that OCM plays a small role in the permitting process, that being the dredging, and the Office of Conservation is wholly in charge of every major aspect of the decision making process. Defendants submit that the Office of Conservation will analyze the Coastal Use Guidelines themselves, in addition to every other issue before the office of Coastal Management.

However, the Louisiana Supreme Court in Save Ourselves, Inc. et al. vs. Louisiana Environmental Control Commission, 452 So.2d 1152, (La. S.Ct. 1984) makes it clear when an environmental impact analysis must be done. The Court stated that an agency is required *before* granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistent with the public welfare. *Id.* at 1157. Therefore, the key issue is not which office should handle which part of the analysis but instead whether that analysis had been completed before granting the coastal use permit which proposed action would affect the environment.

The Court agrees with Plaintiff that OCM failed to make the required findings in the Coastal Use Guidelines and that the OCM failed to meet the standard required by their constitutional duty as public trustee. The Louisiana Legislature made clear that the Coastal Use Guideline findings are mandatory. The OCM may not issue a coastal use permit without making the required findings under the guidelines. La. R.S., Title 49, Section 214(B)(2) says, "The adopted guidelines shall serve as criteria for the granting of coastal use permits." Guideline 701(A) says, "the guidelines must be read in their entirety. All applicable guidelines must be complied with." These guidelines are not optional and are essential to the granting of the coastal use permit.

Section 711 of the guidelines requires OCM to make a determination of whether a project that creates surface alterations in the coastal zone is suitable for use and this requires that certain conditions be met and mandatory findings be met. The decision does not reflect that the mandatory findings were made. Specifically, there are no findings that the project will take place "on lands which have foundation conditions sufficiently stable to support the use," or "where the public safety would not be unreasonably endangered." The Decision made the finding that "the vicinity has a tradition of use for similar habitation or development" but there is no finding of public safety or stability of the foundation conditions.

Defendants argue that CLECO v. Louisiana Public Service Commission, 437 So.2d 278 (La. 1983) supports their position that the agency's administrative decision does not need to make specific findings in order for the grant of the permit to be upheld. However, the Court finds that the CLECO case actually supports the argument of plaintiff. The CLECO court states that "although we may uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned, such as when the findings and reason are necessarily implied by the record, we will not support a finding from the evidence or a reasonable basis for the Commission's action that the

Commission has not found or given.” Id. In the case before us, the “agency’s path” cannot be reasonably discerned and the findings cannot be easily implied from the record. This Court is in the position as a court for judicial review; it is not in the position to supply a finding from the evidence that DNR has not found or given in its decision.

Further, the Court notes that the Louisiana Supreme Court heard the Save Ourselves case after the Cleco Case, and the Court clearly states in that “for purposes of judicial review, and in order to assure that the agency has acted reasonably in accordance with law, in a contested case involving complex issues, the agency is required to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings; and it must articulate a rational connection between the facts found and the order issued. Save Ourselves, Inc. et al vs. Louisiana Environmental Control Commission, 452 So.2d 1152, (La. S.Ct. 1984).

Further, the Court finds applicable the case of Pardue v. Stephens, 558 So.2d 1149 (La. App. 1 Cir. 1989). In that case, the Court reversed a decision on a Coastal Use Permit for failure to make mandatory guideline findings. The Court stated that reasons for judgment given in the decision did not show how it complied with the analytical process required by the guidelines so the Court was unable to give the findings the usual deference attributed to them. Additionally, the Pardue Court noted that it is the decision maker’s duty to make the findings required by the Guidelines before it issues a Coastal Use Permit; the statute provides that they serve as mandatory criteria. La. R.S. 49:214.27(B)(2). It is not the public’s job to provide evidence that the Guidelines are not met. Save Ourselves, 452 So.2d at 1157.

In our case, the Court finds the same; that is that the OCM did not comply with the mandatory guidelines and make the mandatory findings and did not show how it complied with the analytical process. It is not for this Court to search the record for statements which can be construed as an implication or an inference of a finding by the OCM which ensures that the OCM found that the public safety would not be unreasonably endangered and the project would take place on land with a stable foundation. Conversely, the record is devoid of many considerations that the OCM should have taken into account. Such as the implication of the bubbling in the lake and possible contamination of the Chicot Aquifer, the possible collapse of the salt dome caverns, the concern for the possibility of an explosion in the lake, etc.

Therefore, the Court finds that OCM did not make the mandatory findings under the Coastal Use Guidelines.

Further, in addition to its statutory obligation to follow the Coastal use Guidelines when deciding on a Coastal Use Permit application, the OCM, as an agency permitting an action affecting the environment, has a Constitutional duty as well. The duty derives from the agency's role as a public trustee over the environment for the welfare of the citizens, under Article IX, Section 1 of the Louisiana Constitution. Save Ourselves, Inc. et al vs. Louisiana Environmental Control Commission, 452 So.2d 1152, (La. S.Ct. 1984). That Court specifically found in reversing the decision of the Louisiana Environmental Control Commission that "it appears that the agency may have erred by assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates". Id. at 1160. In our case, the OCM not only violated the Coastal Use Guidelines but breached its constitutional duty when it issued the Coastal Use Permit without considering the potential and real adverse environmental impacts of the Project.

For the above reasons, the court finds in favor of plaintiff Save Lake Poigneur and against defendants OCM and intervenor Jefferson Island Storage and Hub, I.I.C. The Court finds that the OCM breached its duty of public trustee and did not follow the guidelines by making the required mandatory findings. The Court finds that based upon the record, the action of the agency in granting the CUP was not supported and sustainable by a preponderance of evidence and therefore, in accordance with La. R.S. 49:964, the case is remanded for further proceedings.

A judgment will be prepared by Plaintiff and submitted to Defendants for approval and forwarded to the Court for signature.

So ordered, this 23 day of September, 2014 at New Iberia, Iberia, Parish, Louisiana.



KEITH R. J. COMEAUX
DISTRICT JUDGE

Please serve all parties.