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The "IT Decision"

An Evaluation of its Factual, Judicial and Legislative History and A Consideration of its Future

By Al Robert, Jr.

The Louisiana Supreme Court decision in *Save Ourselves, Inc.*¹ v. *Louisiana Environmental Control Commission*² was handed down almost twenty years ago. Commonly referred to as the "IT Decision" (or "IT Case"), the case was appealed to the Louisiana Supreme Court by a group of citizens who organized Save Ourselves, Inc. (Save Ourselves) to challenge IT Corporation's (IT Corp.) plans to construct the "World's Largest Hazardous Waste Disposal Facility"³ in their community.⁴ Save Ourselves originally intervened in the state permit process and challenged the decision of the Environmental Control Commission (ECC) to grant environmental permits to IT Corp. The Louisiana Supreme Court eventually remanded the decision to grant the permits back to the ECC and outlined several areas for further consideration.

These considerations included several site-specific concerns and also more general concerns that the court developed using constitutional and statutory framework analyses. These general concerns, which eventually evolved into the "IT Requirements" and are also referred to as the "IT Questions," included "whether the agency considered alternate projects, alternate sites or mitigation measures, or whether it made any attempt to quantify environmental costs and

weigh them against social and economic benefits of the project."⁵ These concerns are commonly referred to as part of the public trust doctrine⁶ and are the source of many concerns and criticisms regarding the "IT Requirements." The requirements now constitute a substantive part of the environmental permitting process in Louisiana.

The "IT Decision" has been described as an infamous,⁷ wide-ranging,⁸ landmark decision⁹ that judicially imposes extra-legislative will on the state.¹⁰ Further, the decision's legacy in administrative, judicial and statutory law and the subsequent development of the "IT Requirements" have been sharply criticized as overly burdensome and confusing law¹¹ that provides justification for result-oriented decisions.¹² Although the decision has received significant treatment and commentary, little has been provided about the factual circumstances that ultimately led to the decision and its evolution into the modern-day "IT Requirements." This paper considers the factual, judicial and legislative history of the "IT Requirements" and also addresses concerns regarding its future.

Part I provides an overview of the substantive history of the battle between the IT Corp. and Save Ourselves

and the subsequent proceedings that ultimately denied IT Corp. its operating permits. Part II affords a brief analysis of the decision and its foundation and also provides insight into the reasoning of the Louisiana Supreme Court. Additionally, Part II summarizes the substantial body of law that has expanded, supplemented, and interpreted the "IT Decision." Part III examines common industry criticisms of the "IT Decision" and provides insights and alternative viewpoints. Finally, Part IV considers the lessons learned from the "IT Decision" and provides suggestions as to how the regulated community can minimize the likelihood that the "IT Requirements" will substantially impact or retard future permit activities, with an emphasis on grassroots facility development.

Part I: Case History and Analysis

IT Corp.'s plans to expand its operations outside of California became "one of Louisiana's biggest political headaches and one of the hottest controversies in which the state found itself [from 1979 to 1981]."¹³ Unwittingly caught in a firestorm of Louisiana politics and local opposition, IT Corp. fought to permit its proposed facility for nearly ten years before finally abandoning its plans for the multi million dollar facility.¹⁴ An IT

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Corp. Vice-President remarked in early 1981, a full eight years before the company would finally decide not to build the facility, "We expected some opposition, of course, but we didn't realize that people in Louisiana don't trust their state officials. We certainly did not anticipate that having state approval of our plans would be an automatic strike against us."¹⁵ Clearly expressing the frustrations the company was experiencing with Louisiana politics, he added, "It is certainly not like this in California."¹⁶ The aggravation expressed by IT Corp. was understandable considering that Louisiana had invited the company into Louisiana to help the state handle its mounting hazardous waste problems, which were only becoming apparent in the late 1970's.¹⁷

South Louisiana communities and the media began to recognize the serious problems associated with hazardous waste management when a young man met his death at an unlicensed waste disposal site in Bayou Sorrel in July 1978 as he was dumping hazardous waste and was overcome by toxic fumes.¹⁸ At the same time, Love Canal was receiving national media attention, further highlighting Louisiana's own growing hazardous waste problems.¹⁹ "The outcry of the public concerning the dangers and perils caused by the many hazardous waste dumps in the State of Louisiana had reached a crescendo dictating action by responsible public officials."²⁰ Accordingly, then Governor Edwards sent Natural Resource Deputy Secretary Jim Hutchinson to a national hazardous waste conference in an effort to locate a solution.²¹ At the conference, Hutchinson met representatives of the IT Corp. and a relationship was formed. Unbeknownst to all at the time, the meeting was the birth of a decade long relationship between IT Corp. and Louisiana that would prove to result in a tortuous experience for both the company and local residents as IT Corp. tried to help Louisiana manage its growing hazardous waste problems. Furthermore, Louisiana's burgeoning relationship with IT Corp. was to become a cata-

lyst for the establishment of a genuine grassroots environmental movement in south Louisiana.

There were several distinct chapters that led IT Corp. to the decision to abandon its plans for construction of the "World's Largest Hazardous Waste Plant."²² These included: (1) the IT Corp. feasibility study; (2) the ECC adjudicatory hearings; (3) Save Ourselves appeal to the Louisiana courts; (4) remand to the ECC and the Louisiana Department of Environmental Quality (DEQ); and (5) the State Ethics Board hearings and appeals. Before these chapters of the project are considered individually, it would be appropriate to consider the background and history of both IT Corp. and the Louisiana environmental regulatory climate prior to 1979.

IT Corp. was originally formed as a partnership in 1975 under the name of Industrial Tank.²³ It was created through a merger of a waste clean-up, treatment, storage and disposal company (which originally operated under the name Industrial Tank) and a marine service company (which operated as William H. Hutchinson²⁴ and Sons), both in California.²⁵ Industrial Tank first earned industry recognition for its clean up of the Los Angeles Harbor following the explosion of the S.S. Sansinea.²⁶ As the company's services continued to grow, it changed its name to IT Corp. in 1977 and gained business success by operating several hazardous waste disposal sites throughout California.²⁷ In 1978, the company was recognized as a leader in the treatment and disposal of hazardous wastes.²⁸

At the same time, in response to the public outcry regarding Louisiana's hazardous waste issues, the 1978 Legislature passed Act 334, which was the State's initial effort to confront the problems associated with hazardous waste management.²⁹ As required by Act 344, and within the confines of the Louisiana Administrative Procedures Act (LAPA), the Department of Natural Resources (DNR) promulgated a comprehensive *Hazardous*

Waste Management Plan to govern the treatment, storage, and disposal of hazardous waste in Louisiana.³⁰ DNR's plan outlined the procedures necessary for industry to apply for hazardous waste permits and the review processes for such permits.³¹ Next, the 1979 Legislature passed Act 449, which created the ECC and gave it the authority to conduct adjudicatory hearings and to issue or deny hazardous waste permits.³² The ECC was the precursor to the modern-day Department of Environmental Quality (DEQ) and was comprised of seven representatives. These representatives included the agency head, or his appointed representative, from the following Louisiana executive departments: (1) Agriculture³³; (2) Commerce and Industry; (3) Culture, Recreation and Tourism; (4) Health and Human Resources; (5) Natural Resources; (6) Transportation and Development; and (7) Wildlife and Fisheries. Once the IT Corp.'s application was certified complete by DNR, the ECC was the primary governmental entity responsible for reviewing the application and issuing or denying the permits.³⁴ Nonetheless, before IT Corp. ever decided to expand into Louisiana, it was hired by the state to conduct a feasibility study to evaluate and determine the best methods and strategies for solving Louisiana's growing hazardous waste problems.

1—Feasibility Study

Presumably in an effort to quickly address the growing hazardous waste problems of the state, DNR attempted to obtain a sole-source contract with IT Corp. to conduct a proposed feasibility study to determine the best methods for addressing the state's growing hazardous waste problems. Accordingly, House Concurrent Resolution No. 79, which would have suspended applicable provisions of the public bid law and the professional services contract law so as to authorize DNR to enter into a sole-source contract with IT Corp., was introduced to the 1979 Louisiana Legislature.³⁵ The resolution failed and DNR subsequently released a request for pro-

posals for the feasibility study.³⁶ Although IT Corp. submitted the second-highest bid, it was still awarded the contract to investigate the best available methods for handling Louisiana's hazardous waste.³⁷ It is also relevant to note that IT Corp. sub-contracted with Research Associates of Louisiana, Inc. (Research Associates) for the project, which also had a current contract with DNR to develop the State's *Hazardous Waste Management Plan*.³⁸

IT Corp. completed its 292-page study,³⁹ titled *Model Regional Hazardous Waste Recovery and Disposal Facility for Louisiana*, in less than sixty days and submitted it to the state in September 1979.⁴⁰ The report estimated that the industrial corridor between Baton Rouge and New Orleans produced approximately 50 million gallons of hazardous waste annually and also predicted the waste stream would likely increase to 80 million gallons per year within two years.⁴¹ The study considered two primary options for handling the growing amounts of hazardous wastes—(1) individual on-site processing by each generator or (2) a single regionally coordinated facility.⁴² IT Corp. concluded that on-site processing was undesirable because the increased demand for space would “compete with demands for plant expansion” and would adversely affect the local economy and environment.⁴³ Accordingly, the study recommended a regionally coordinated waste treatment facility and evaluated three possible sites.⁴⁴ The study further considered options regarding transportation, treatment, storage, and disposal of the hazardous wastes. In conclusion, the study recommended a 1000-acre site in Burnside, Louisiana, whereby equipment and physical structures would utilize 50 to 60 acres of the tract, landfarming would make use of 300 acres and the remaining acreage would provide a buffer zone for the facility.⁴⁵

IT Corp. obviously had confidence in its report because it purchased an option on the proposed site within one week of submitting the study.⁴⁶ Shortly thereafter, in Octo-

ber 1979, then-Governor Edwards announced the intent of IT Corp. to build the largest chemical waste treatment complex in the world.⁴⁷ Within twenty-four hours, the announcement unleashed a torrent of criticism, largely originating from Ascension Parish politicians, who were angry that they had not been informed about the proposed project, and from residents who feared that hazardous wastes would be shipped into their backyards.⁴⁸ At that point, IT Corp. began defending accusations that the site would become a dumping ground for the nation's hazardous waste as it prepared to make the proposed facility a reality.⁴⁹

2—ECC Adjudicatory Hearings

Six months later, after gaining support from the Ascension Parish Police Jury,⁵⁰ but still lacking broad popular support, IT Corp. submitted its hazardous waste permit application to the Louisiana Department of Natural Resources (DNR) and the application was accepted as complete in May 1980.⁵¹ The permit process required that public hearings be conducted and the first was held in Ascension Parish in July 1980. Over 500 residents attended the hearing and many spoke passionately against the proposed facility.⁵² Inexplicably, “members of the hearing panel and representatives of [IT Corp.], said citizen opinion about the plant probably would have little impact upon a state decision on whether to grant a construction and operation permit.”⁵³ Shortly thereafter, the project lost the support of the Ascension Parish Police Jury. The ECC's adjudicatory hearing on IT Corp.'s permit applications began a month later, in September 1980.

The ECC hearings were continually interrupted by claims of impropriety⁵⁴ and lasted for more than three months.⁵⁵ “The Commission convened to consider [the] applications over 18 times; spent approximately 150 hours hearing testimony (approximately 5,000 pages); received over 80 exhibits offered by IT Corp. and 32 exhibits offered by others.”⁵⁶ Not all of the ECC commissioners

were present for the presentation of evidence due to the extended time period of the hearings, so they often sent alternates in their place.⁵⁷ Nonetheless, considering modern-day standards, where it often takes several years for DEQ to review a hazardous waste application and issue a permit, the fact that IT Corp. received its permits (air, water, and waste) less than a year after filing the application is indicative of the nature of the state's emerging environmental program during that time.

The hearings were also directly impacted by world and national events. Specifically, a hazardous waste incinerator explosion in Europe raised questions and concerns regarding IT Corp.'s proposed treatment technologies.⁵⁸ But more importantly, the looming November 1980 deadline set by the United States Environmental Protection Agency (EPA) became a critical issue to IT Corp. Unless the company's permits were issued prior to the deadline, it would be required to obtain a federal Resource Conservation and Recovery Act (RCRA) permit in addition to its state permits, potentially delaying the project as much as a year.⁵⁹ Ultimately, the ECC issued IT Corp. a “pre-construction activity” permit in an effort to establish the proposed project as an existing facility. The permit was essentially useless, as IT Corp. was eventually required to apply for a RCRA permit, which was granted.⁶⁰ A month later, the ECC issued its final decision to award the state permits in a 6-1 vote, rejecting then Governor Treen's offer to finance a more detailed study of the proposed project site.⁶¹

The ECC adopted nearly 200 findings throughout the course of the hearings.⁶² With the exception of only a few, these findings supported the ECC's decision to issue permits to IT Corp. Not surprisingly, those findings that failed to support the ECC's decision became the focus of Save Ourselves' appeal in the judicial proceedings.

3—The Louisiana Courts

The scope of this paper does not permit a comprehensive consideration of the multiple lawsuits and issues that were litigated regarding the consideration and issuance of the IT Corp. permits. Although petitioners raised many issues, such as alleged conflicts of interest, the ECC's capacity to render a final permit decision, the insufficiency of IT Corp.'s permit applications upon filing, procedural errors made during the ECC hearings, and the propriety of the permit issuance, only those issues that were ultimately relevant to the Louisiana Supreme Court are considered here.⁶³ As indicated, the ECC made few findings that failed to support its final decision to issue the hazardous waste permit. These included the following:

Three aquifers identified as the water table aquifer, the shallow aquifer and the Gonzales aquifer lie under the proposed site.

The shallow aquifer is hydrologically connected to the Mississippi River.

The water table aquifer is hydrologically connected to the Mississippi River.

The shallow aquifer and the water table aquifer exhibit evidence of surface contamination.

The source of the surface contamination of the shallow and water table aquifers has not been identified by the applicant.⁶⁴

Further, Section 8.3.4(A) of the *Hazardous Waste Management Plan*, which regulated the consideration and issuance of the state's permits, required that "sites utilized [for hazardous waste treatment, storage or disposal] shall be isolated from adjoining land and from subsurface and surface waters naturally, or by created barriers."⁶⁵ Although evidence was presented by IT Corp. that engineered controls (i.e., an impermeable clay liner and a slurry wall)⁶⁶ that would be used to isolate

the stored and treated hazardous wastes, the ECC failed to adopt any findings that indicated the three aquifers and the Mississippi River (surface water) would be isolated by the engineered barriers.⁶⁷ Accordingly, the court battles, especially in the Louisiana Supreme Court, focused on the ECC's decision to grant the permits in light of the incompatibility of these findings, as well as the standard of review that should be afforded its decision.

In both the 19th Judicial District Court and the First Circuit Court of Appeal, IT Corp. argued that the "manifest error" (or an even stricter) level of review was applicable, pursuant to the LAPA.⁶⁸ This argument proved persuasive to the lower courts. Although both courts noted the inconsistencies between the findings of fact and the ECC's final decision, they were compelled to uphold issuance of the permits because of the deference the ECC's decision was afforded by the LAPA. This is evidenced by Judge Ponder's concurrence at the First Circuit Court of Appeal: "Despite my fears [regarding the permit process] I have concluded that under the structures of appellate review of all decisions in general, and of administrative decisions in particular, a negative vote would constitute a substitution of my judgment for that of the commissioners . . ."⁶⁹

The Louisiana Supreme Court believed, however, that the evidence warranted that the case should be remanded to the ECC so that it could reconcile its decision with its findings. It stated: "This court has held that for the purposes of judicial review, and in order to assure that the agency has acted reasonably in accordance with the law, in a contested case involving complex issues, the agency . . . must articulate a rational connection between the facts found and the order issued."⁷⁰ Further, the court added: "The [ECC] did not assign reasons for its decision, and its factual findings do not sufficiently illumine its decision-making process."⁷¹ If the decision had simply supported this holding, it would have

quickly faded into the sea of jurisprudence. Instead, because of Justice Dennis' discussion of the ECC's constitutional mandate and the importance of the public trust, the "IT Decision" has become an integral part of Louisiana environmental law. Before this landmark decision of the Louisiana Supreme Court is fully considered, the remainder of the IT Corp. case history is addressed.

4—Remand to ECC/DEQ

As there were no procedures or protocols for remand to the ECC, which had since been subsumed by the new DEQ,⁷² the rehearing issue was novel. Accordingly, IT Corp. and Save Ourselves disagreed as to whether additional hearings should be held to determine if the IT Corp. permit application complied with the requirements and considerations outlined by the Louisiana Supreme Court.⁷³ After receiving briefs submitted by the parties and an unexplained two-year delay, DEQ Secretary Pat Norton made it clear that DEQ was taking its mandate from the Louisiana Supreme Court seriously. She stated: "To me, it's a whole new ball game at this point."⁷⁴ Nonetheless, as the permit hearings were scheduled to begin in April 1986, the scope of review was limited to updating the existing record—and did not require an in-depth review of the concerns outlined by the Louisiana Supreme Court.⁷⁵ The first half of the remand hearings were held before an administrative law judge who determined that IT Corp. should combine its state application, federal applications, transcripts of the ECC hearings and other documents into one new document—to be considered Part II of the IT permitting process.⁷⁶ The consolidation was ordered because of the differences that existed between IT Corp.'s current proposal and the proposal it presented to DNR in 1980.⁷⁷

Upon submittal of the Part II⁷⁸ Application nearly two years later, DEQ issued a notice of seventy-five deficiencies to be addressed by IT Corp. As a new hearing officer was appointed midway through the re-

hearing, he commented: "This is a case like no other. I think we're making jurisprudence here."⁷⁹ Amid a host of other occurrences (e.g. IT Corp.'s plans to sell the site and its permits, claims that the originally issued permits had expired, intervention by the State Attorney General's office⁸⁰ and further claims of conflicts of interest, etc.), the hearings ended with a recommendation that DEQ Secretary Paul Templet "terminate for cause IT Corp.'s permit and return the company's reformatted permit."⁸¹ Accordingly, IT Corp.'s state permits were revoked and IT Corp. decided to abandon the project.⁸²

5—Ethics Commission Investigation

In addition to the legal battles regarding the permits, IT Corp. was also embroiled in a bitter dispute with the State Ethics Commission regarding the timing of its purchase of the acreage for the proposed facility and its contract with Research Associates regarding the feasibility study the two companies prepared for the state. The dispute arose out of a fourteen-month investigation conducted by the State Ethics Commission that brought IT Corp. before the Louisiana Supreme Court for the second time in a year, where it argued that it should not be considered an employee subject to the state ethics code and thereby subject to the jurisdiction of the Ethics Commission.

Specifically, IT Corp. asserted that it should not be subject to the state ethics code because it was a private corporation that contracted with the state. The courts disagreed and the Louisiana Supreme Court affirmed the decisions of the lower courts upholding fines against IT Corp. and Research Associates. The defense raised by IT Corp. regarding its purchase of the proposed site within a week of submitting its feasibility study to the State was not successful:

The testimony of [the IT Corp. President] that he did not contemplate recommending to IT Corp. the execution of the option

agreement or even the acquisition of the proposed tract of land until *after* September 21, 1979—when he read the feasibility study for the first time—and yet somehow prior to September 25, 1979—is unacceptable to the point of being ludicrous.⁸³

Nevertheless, IT Corp. did prevail on one issue. The Louisiana Supreme Court found that the Ethics Commission did not have the power to void the contract or to order that the fee paid to IT Corp. be returned to the state. The victory was soured, however, because the Ethics Commission filed a civil suit and eventually recovered the entire fee, plus legal interest.⁸⁴

There can be little argument that IT Corp.'s experience in Louisiana was very costly and anything but pleasant—for both IT Corp. and the citizens who tenaciously fought the construction of the facility for ten years. Although the company ultimately failed to construct its proposed facility, it did go on to reach commercial success across the United States, largely as a hazardous waste remediation company.⁸⁵ Coincidentally, IT Corp., which changed its name to the IT Group in the 1990s, was recently purchased by the Louisiana-based Shaw Group and now finds its corporate headquarters in Baton Rouge, just a few miles north of the location where it had hoped to revolutionize the world's management of hazardous waste. Instead of transforming the world's ideas regarding hazardous waste management, IT Corp. transformed Louisiana's environmental law.

Part II: The "IT Decision" and its Progeny

In remanding the decision to grant the permits to the ECC, the Louisiana Supreme Court recognized that the case raised "issues intersecting the State Constitution's Natural Resource Article and the Louisiana Hazardous Waste Control Law."⁸⁶ Specifically, it noted that Article IX, Section I of the Louisiana Constitution of 1974, pro-

vides: "The natural resources of the state . . . and the healthful . . . quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." Further, the court cited Part VII of the Environmental Affairs Act,⁸⁷ which required the development of hazardous waste regulations that "assure safe treatment, storage and disposal [of hazardous waste] *without substantial risk to the environment*, water supplies, air, and human health."⁸⁸ In explaining its decision to remand, the Court noted that it was unclear whether the ECC complied with the duties outlined in these constitutional and statutory mandates. In explaining the application of the mandate, the court cited substantially from a case that had been decided over ten years previous in the United States Court of Appeals, Federal Circuit (See *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commn.*, 449 F.2d 1109 (U.S. App. D.C. 1971)). *Calvert Cliffs'* held that the federal courts had the power to require agencies to comply with the mandate of the National Environmental Policy Act (NEPA).⁸⁹

How the *Calvert Cliffs'* decision became central to the Louisiana Supreme Court decision is puzzling because it was not argued in either the applicants' or respondents' briefs. Nonetheless, the author of the *Calvert Cliffs'* opinion was the Honorable J. Skelly Wright. Judge Wright served as a judge in the Eastern District of Louisiana from 1950 until 1962, when he began serving on the Court of Appeals in the District of Columbia Circuit, which establishes a minor Louisiana connection to *Calvert Cliffs*.⁹⁰ Regardless of how Justice Dennis became aware of the *Calvert Cliffs'* case, he used it to illustrate how the ECC should interpret its constitutional and statutory mandates to "see that the environment would be protected to the fullest extent possible consistent with the health, safety and welfare of the people."⁹¹

In *Calvert Cliffs*, a citizens group challenged the rulemaking process of the federal Atomic Energy Commission, claiming that the Commission failed to comply with the congressional mandates included in NEPA.⁹² NEPA, which was cast in terms of a general mandate with a broad delegation of authority to require that administrative agencies consider the “values of environmental preservation in their spheres of activity,”⁹³ specifically requires consideration of direct and indirect effects of a project, potential interference with other activities, energy and resource requirements, conservation and restoration potential, preservation of urban, historic and cultural quality, and ways to minimize potential environmental damage.⁹⁴ These considerations, although not identical, are substantially similar to Louisiana’s “IT Requirements.”

“In fact, most of the key IT Requirement statements that appear in *Save Ourselves* are direct quotes from *Calvert Cliffs*.”⁹⁵ Considering just one of many examples, Judge Wright noted that: “Environmental amenities will often be in conflict with economic and technical considerations. To consider the former along with the latter must involve a balancing process.”⁹⁶ This same language appears verbatim in Justice Dennis’ opinion.¹⁶⁵ Although Justice Dennis did not reference the first line of the *Calvert Cliffs*’ opinion, “These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment,” it would certainly have been relevant.⁹⁷ Although not quite a flood, there has been a substantial amount of litigation that has expanded and refined the impact of the “IT Decision” on those agencies responsible for protecting Louisiana’s environment. The following section provides a consideration of Louisiana cases that have interpreted and further expanded the “IT Decision”.

The Progeny of *Save Ourselves v. The ECC*

Commentators have pointed out that the modern day IT Requirements do not necessarily parallel the language of the Louisiana Supreme Court in *Save Ourselves*.⁹⁸ Although the language originating from *Calvert Cliffs*’ was certainly the primary factor in DEQ’s decision to revoke the IT Corp. permits, DEQ did not apply the “IT Requirements” as they are known today to their consideration of the IT Corp. Part II Application on remand. Instead, the modern day “IT Requirements” evolved from subsequent case law.

One of the first cases challenged in the Louisiana Court of Appeals subsequent to the issuance of the Louisiana Supreme Court’s “IT Decision” was *Blackett v. Louisiana Dept. of Environmental Quality*.⁹⁹ Accordingly, *Blackett* was the first reported case where the First Circuit presented the mandate of the Louisiana Supreme Court as having five distinct questions that departments must consider when issuing a permit:

- (1) Have the potential and real adverse environmental effects of the proposed facility been avoided to the maximum extent possible?
- (2) Does a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate that the later outweighs the former?
- (3) Are there alternative projects which would offer more protection to the environment than the proposed facility without unduly curtailing non-environmental benefits?
- (4) Are there alternative sites which would offer more protection to the environment than the proposed facility site without unduly curtailing non-environmental benefits?

- (5) Are there mitigating measures which would offer more protection to the environment, than the facility as proposed, without unduly curtailing non-environmental benefits?

In the fifteen years since *Blackett* was decided, Louisiana courts have applied the constitutional and statutory mandate discussed in the “IT Decision” to most, if not all, functions performed by the DEQ, including: (1) permit issuance for hazardous waste treatment¹⁰⁰ and storage,¹⁰¹ solid waste disposal,¹⁰² water discharges¹⁰³ and air emissions;¹⁰⁴ (2) permit variances;¹⁰⁵ (3) permit exemptions;¹⁰⁶ (4) settlement agreements;¹⁰⁷ and (5) licensing actions.¹⁰⁸ Additionally, courts have not limited consideration of the “IT Requirements” to permitting activities, indicating that the requirements might also be applicable to operational activities of the regulated community.¹⁰⁹ The “IT Decision” has also been found to apply to other agencies that are responsible for environmental functions.¹¹⁰ Furthermore, these cases have required additional administrative requirements from DEQ that are not found in either the “IT Decision” or other applicable rules and regulations.¹¹¹

For example, the Louisiana First Circuit Court of Appeals decision in *In re Rubicon*, requires DEQ to develop a written “Basis for Decision” (BFD) for all actions that are appealed to the judicial system. Specifically, the court suggested that each BFD include: (1) a general recitation of the facts as presented by all sides; (2) a basic finding of facts as supported by the record; (3) a response to all reasonable public comments; (4) a conclusion or conclusions on all issues raised which rationally support the order issued; and (5) any and all other matters which rationally support the DEQ’s decision.¹¹² The court also indicated that the BFD should fully consider the “IT Requirements.” This decision also consolidated the last three (of the five) questions of the “IT Requirements”

into a single consideration: whether “there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.”¹¹³

The ever-expanding nature and applicability of the “IT Decision,” resulting from judiciary interpretation, raised numerous complaints from business and industry. These complaints eventually resulted in the passage of legislation aimed at limiting the increased burdens placed on DEQ and, incidentally, the regulated community—especially smaller facilities. In 1997, the Louisiana Legislature passed Act 1006, which requires the preparation of an “Environmental Assessment Statement”¹¹⁴ for new permits or major modifications of existing permits.¹¹⁵ The statute specifically exempts most other actions (e.g., minor modifications, applications for minor source permits, construction permits, remediation activities, etc.) from the environmental assessment requirements.¹¹⁶ The statute also legislatively adopts the constitutional and statutory mandate set forth in *Save Ourselves* and indicates that subsequent case law interpreting the “IT Decision” may be used to implement the “public trustee” requirements.¹¹⁷ The regulated community has raised numerous criticisms as a result of the legislative adoption of the “IT Decision” jurisprudence.

Part III: Criticisms of the “IT Decision”

Criticism of the “IT Decision” and its subsequent judicial and legislative history has been substantial. Many commentators have raised concerns regarding the (1) unnecessary import of the common law into Louisiana jurisprudence;¹¹⁸ (2) the confusion resulting from the adoption of the judicial history into a statute;¹¹⁹ (3) the lack of guidance available from DEQ;¹²⁰ (4) the overly burdensome nature of the requirements;¹²¹ and (5) the public’s impact on DEQ deci-

sions.¹²² Accordingly, the following section addresses these concerns with alternate viewpoints that are supported by recent cases regarding the IT Questions/Environmental Assessments, a recent DEQ IT Guidance Document and the work of other commentators in the field.

1—The “IT Decision” Imported Common Law into Louisiana

One commentator has argued that it is “open to interpretation as to whether the [“IT Decision”] creates a public trust doctrine in the common-law sense or whether the term ‘public trust’ is used as a general policy statement.”¹²³ Although the argument has been rendered moot by the Louisiana Legislature’s statutory adoption of the “IT Requirements,” it is instructive to consider the actual “IT Decision” and some Louisiana constitutional history. Justice Dennis was a delegate to the 1973 Constitutional Convention and voted for the proposal that made the Natural Resources Article a general policy statement rather than a self-executing constitutional right.¹²⁴ It has also been noted that Justice Dennis’ use of the word “mandate”¹²⁵ and his references to applicable environmental statutes and regulations “is a recognition that the constitutional provision is not self executing and is a nonenforceable policy statement addressed to the legislature.”¹²⁶ Rather than trying to import the common law public trust into Louisiana—a concern of which he was clearly aware—Justice Dennis was only preventing the courts from becoming a rubber stamp that blindly approved the recommendations and decisions of those State agencies charged with protecting Louisiana’s environment.¹²⁷

As already indicated, both the district and appellate courts had concerns regarding the ECC’s failure to reconcile its findings with its ultimate decision to grant the IT Corp. permits, but rather than remanding for a more complete report, the courts deferred to the ECC.¹²⁸ If the Louisiana Supreme Court had affirmed these decisions, it would have effectively

stripped Louisiana courts of the ability to ever question a decision of the ECC, DEQ or any other administrative agency for that matter, regardless of how incompetently the agency had exercised its duties. In fact, in support of the notion that this decision strengthened the capacity of administrative agencies, rather than lessened the deference afforded their decisions, the Louisiana Supreme Court has since cited the “IT Decision” for the proposition that administrative action should only be disturbed when arbitrary, capricious or characterized by an abuse of discretion.¹²⁹ Furthermore, the “IT Decision” is also cited for authority that that courts will not supply or assume findings of fact when the challenged agency does not provide a reasoned basis for its action in the record.¹³⁰ Accordingly, it should be concluded that the Louisiana Supreme Court did not intend to import the common law public trust into Louisiana. Instead, it was referenced as a metaphor to illustrate the duties imposed on the ECC by its constitutional and statutory mandates. If such a criticism were accepted, it would strengthen arguments that the last section of the Environmental Assessments Statute, La. R.S. 30:2018(H), is a “savings” clause,¹³¹ which is contrary to the legislative intent.

2—The Public Trust was Legislatively Adopted

It has been argued that the inclusion of the purported “savings clause” in the statutes only serves to preserve the very case law that the statute was attempting to limit and creates a “bewildering wonderland of confusion.”¹³² A careful reading of the statute reveals that such arguments are misplaced and unwarranted. La. R.S. 30:2018(H) provides that:

Nothing in this section shall relieve permit applicants or the department from the public trustee requirements set forth in Article IX, Section 1 of the Constitution of Louisiana and by the Supreme Court of Louisiana in *Save Ourselves v. Louisiana Environmental*

Control Commission, 452 So.2d 1152 (La. 1984). Subsequent case law and laws interpreting said decisions and the rules and regulations adopted by the department in accordance with those decisions *may* be used to implement these requirements (emphasis added).

The statute only mandates the adoption of the requirements outlined in the Louisiana Constitution and the "IT Decision"—the decision's subsequent judicial history is only referenced as guidance material to be used when implementing the constitutional and statutory mandate outlined by the "IT Decision." This interpretation supports the legislative intent, evident in the remainder of the statute, to limit the applicability of the "IT Requirements"/Environmental Assessment to those instances defined by the legislature. Remember that the "IT Decision" did not specifically outline the "IT Requirements" or define the scope of their application. As previously discussed, subsequent case law—which is now limited to discretionary guidance—provided for the definition and expansive application of the modern day "IT Requirements".

Accordingly, statutory interpretation supports the argument that: (1) the "IT Decision" and the Constitution only mandate a "rule of reasonableness" to ensure that the environment is protected to the fullest extent possible, they do not outline the "IT Requirements" and the scope of their application [that has been accomplished by its subsequent judicial history]; (2) the statute outlines the requirements for an environmental assessment [essentially replacing the "IT Requirements" previously defined by the courts subsequent to the "IT Decision"] and defines the scope of its applicability; and (3) the statute indicates that the subsequent judicial history *may* be utilized to further implement its requirements. Accordingly, the "rule of reasonableness" asserted by the Louisiana Supreme Court in the "IT Decision" is most likely the proper standard to be applied today. Recent

decisions regarding these issues indicate that this "rule of reasonableness" is being followed. Further, subsequent to the adoption of this legislation, DEQ has developed a guidance document to address complaints about the lack of written guidance available for complying with the "IT Requirements"/Environmental Assessments (hereafter referred to as "IT Requirements").

3—DEQ Provides No Guidance Regarding Applicability of the "IT Requirements"

A common complaint regarding the "IT Requirements" is that there is "a lack of specific written guidance on applying [them] with practical limitations [resulting] in inconsistent, apparently arbitrary and logically unsound decisions."¹³³ As a result of the recent issuance of DEQ's *Guidance Document for the "IT Requirements" and the "Basis For Decision"*,¹³⁴ such complaints have been rendered moot. This comprehensive document addresses a substantial number of the uncertainties regarding the applicability of the "IT Requirements". Specifically, it provides guidance regarding those situations where an IT response and review are required and/or advisable; it also provides suggested responses; and details the DEQ procedures used to review IT responses. Perhaps the most useful section of the document outlines those situations where the preparation of an IT response is advisable.

First, in Section 3.0, the guidance document outlines those situations when an IT response is an absolute requirement (i.e., when the permit application is for a new permit or a major modification of an existing permit authorizing the treatment, storage or disposal of hazardous wastes, disposal of solid wastes, discharge of water pollutants constituting a major source, and discharge of air emissions constituting a major source).¹³⁵ The document then outlines those instances where it "may be advisable for the permit applicant to submit an IT response and for the LDEQ to effect an IT review."¹³⁶ These include:

- (1) a proposed facility that will predictably generate 'a contested case involving complex issues;' or
- (2) a proposed facility that will be located in an area with an existing history of significant public interest; or
- (3) a proposed facility owned by a company with an existing history of significant public interest; or
- (4) a proposed facility involving a project with an existing history of significant public interest.¹³⁷

Furthermore, the document provides guidance for one of the most often cited concerns regarding the "IT Requirements", the alternatives sites analysis.¹³⁸ The document recommends the following considerations: (1) identify the environmental, economic, business and other siting criteria utilized to identify potential sites; (2) describe the brokerage/consulting firms and processes involved in the siting search; (3) describe the filtering process that resulted in selecting the final site; and (4) consider the remaining alternative sites in comparative form.¹³⁹ This is essentially the same process that has been utilized successfully in several cases and it represents the intent of the constitutional and statutory mandate that was outlined by the Louisiana Supreme Court. In order to further illustrate the applicability of this process, it will be used to illustrate the next common criticism of the "IT Requirements," which is that the requirements are overly burdensome and fail to correspond with the associated environmental risks.

4—The "IT Requirements" are Overly Burdensome

A comparison of two cases where alternative sites have been challenged offers some insight into the idea that the "IT Requirements" are overly burdensome. One of the cases most often cited to illustrate the supposed

oppressive burden of the alternative sites analysis is *Matter of American Waste and Pollution Control Co.*¹⁴⁰ This case concerned the permitting of a solid waste landfill that was proposed to serve a three-parish area around Lafayette.¹⁴¹ After a contentious permit process that involved substantial public input, the court remanded the decision to grant the permit back to DEQ, finding that the alternative sites analysis had not been satisfied because the scope of alternative sites considered had been limited to the immediate service area.¹⁴² The court noted that other sites available outside of the service area were environmentally better suited for the project. Further, as only 25 to 35 percent of the disposed wastes would originate from the three-parish service area, the company should have considered a larger geographic area for its alternative sites.¹⁴³ Compare this decision with a more recent decision concerning the construction of a grass roots chemical production facility.

In *In re Shintech, Inc.*,¹⁴⁴ a local community challenged the construction of a chemical plant that proposed to share resources with an existing facility in the area. The alternative sites study was limited in geographic scope to the area surrounding the existing facility and the appellants' complained that the site study was fundamentally flawed because of the restriction.¹⁴⁵ In finding that the study was adequate, the court accepted that DEQ reasonably determined that any adverse environmental impacts had been minimized or avoided as much as possible consistent with the public welfare without requiring a more expansive alternative sites analysis. This result was especially noteworthy because the facilities were both located within an area of the state designated as non-attainment for air quality by EPA.

Shintech prevailed in the case by distinguishing itself from *American Waste* and other cases requiring a more expansive alternatives sites analysis because it followed a process very similar to the one recommended by

DEQ and was able to prove that all of the sites it considered were suitable when considering *only* environmental factors (emphasis added).¹⁴⁶ This contrasts with the circumstances of *American Waste*, in which the chosen site was not environmentally ideal and the court was not persuaded that the majority of the waste stream entering the facility was going to originate in the three-parish service area claimed by the applicant. Furthermore, in *American Waste*, the court questioned the true motives of the facility: "What actually happened was that [the applicant] picked this site with the tri-parish service area in mind and then they got greedy and decided they wanted a super landfill to take garbage from the whole State."¹⁴⁷ Discounting the incendiary nature of the court's statement, this statement offers a critical insight into the permit process; when a permit action is challenged in court, the "IT Requirements" are more likely to be a failure point when they appear to have been "backed into" after a decision was made based on other non-environmental factors.

It has been argued that "the absence of a finding for an adverse environmental impact should eliminate the need for a full-blown IT analysis."¹⁴⁸ This argument fails to acknowledge the very nature and intent of the "IT Requirements." The constitutional and statutory construction of the "IT Decision" mandates that environmental factors should be a primary concern when decisions are made that have the potential to impact the environment. In a proper application, the "IT Requirements" should be considered in the very initial stages of a proposed project. Such consideration requires that business partners responsible for developing a business plan or feasibility study coordinate their efforts with environmental staff or consultants. If a court is convinced that an applicant seriously considered the "IT Requirements" when it developed its project, it is much more likely to prevail on a showing that the environmental impact costs have been avoided to the fullest extent possible and that they do not outweigh the so-

cial and economic benefits of the proposed activity. This is true because a good faith consideration of these elements, in combination with other business and economic drivers, will identify the site that best accommodates and minimizes potential environmental effects while maximizing expected economic benefits.

Since the "IT Requirements" apply only in limited situations that already require the type of business planning and feasibility studies just discussed (i.e., major permit applications and modifications), arguments that these factors place significant burdens on proposed projects are rather unpersuasive because the "IT Requirements" can be considered along with the economic drivers of the proposed project. In comparison, if the "IT Requirements" were only found to apply after a finding of "no environmental impact" was made, their consideration would require the duplication of previous efforts that might be unnecessarily biased by the results previously obtained—potentially leading to a result similar to *American Waste*. Applied in the proposed manner, the "IT Requirements" are not burdensome environmental requirements, but simply additional factors to be considered in a business plan or feasibility study. These insights are also relevant to the final issue addressed in this comment, that the public has too much impact in the permit process.

5—The Public Exerts Too Much Influence on DEQ Decisions

All of the criticisms previously outlined often combine to support a greater criticism that application of the "IT Requirements" provides "an unclear, sliding-scale standard to the DEQ to grant or deny permits, varying with the amount of public pressure on the agency."¹⁴⁹ Such comments are usually accompanied by complaints that politics should be taken out of the environmental process if progress is to be made in its protection.¹⁵⁰ Although many of the criticisms asserted against the "IT Re-

quirements" can be understood and justified when considering previous inconsistent applications of the doctrine, suggestions that the public has too much impact on DEQ decisions are laughable. In fact, EPA has criticized DEQ for failing to solicit and engage more public input.¹⁵¹

Nonetheless, the assertion that permit grants or modifications are more likely to be denied when there is substantial public involvement and opposition is factually based. Such permit denials are explained as a result of the intense scrutiny that facilities experience when public opposition is encountered. Typically, when there is little or no opposition to a permit application or modification, the process between the applicant and DEQ is largely cooperative.¹⁵² But in those instances where public opposition is present, the permit process becomes adversarial, resulting in a more thorough and exacting application of regulatory requirements. Accordingly, when a facility and agency are challenged to comply with such an immense body of law, the opportunity for both making and finding errors and omissions increases substantially. As a result, the public's involvement often encourages the consideration of factors that might have otherwise gone unchallenged by DEQ, thereby delaying, and in some cases, derailing an applicant's permit attempts.

When the public gets involved, the burden on the applicant and DEQ to comprehensively address all of the substantive, procedural, and public comments in the administrative record is increased. Accordingly, the DEQ Guidance Document offers some critical advice for applicants addressing "IT Requirements": "The permit applicant should view its response to the "IT Requirements" as the best opportunity to document for the DEQ, but more importantly the public, its reasons supporting the proposed facility."¹⁵³ Provided that an applicant properly considers the "IT Requirements" and complies with all other applicable requirements, it

should be confident in its chances to prevail in a judicial review.

Part IV—Lessons Learned from the "IT Decision"

Two recent expansion projects that have been challenged in court by citizen groups offer some insight into the current status of the "IT Requirements" in Louisiana and also illustrate how crucial it is for the administrative record to be fully supported when a permit action is challenged. These cases also illustrate how a company's reputation and trustworthiness can be instrumental when it is trying to permit either a grassroots facility or the expansion of an existing facility. This concept can be considered as a different type of public trust—one where a company must develop the public's trust that the facility will be operated properly and ethically.

In *North Baton Rouge Environmental Association v. Louisiana Department of Environmental Quality*,¹⁵⁴ the Louisiana First Circuit Court of Appeals upheld the decision of DEQ to grant an operating permit for an expansion of the Exxon Baton Rouge Polyolefins Plant (Exxon). The facility was located in part of the non-attainment area for ozone pollution, which was an issue contested by the North Baton Rouge Environmental Association (NBREA) and Louisiana Environmental Action Network (LEAN). Among other issues, NBREA and LEAN also asserted that DEQ failed to comply with its constitutional duty as public trustee of the environment. In considering the balancing effect required by the "IT Decision," the district court noted: "Exxon itself has been one of those industries which has significantly reduced emissions. It has done little things, like paid people to be on jury duty, which we always appreciate. They've put money back in the community."¹⁵⁵ Both the district and appeal court concluded that DEQ was reasonable in finding that the balancing test weighed in the favor of Exxon and upheld the issuance of the operating permits.

The Exxon expansion encountered significant public opposition, yet DEQ was not pressured into denying the permits, nor were the courts pressured into remanding the permit actions. Exxon addressed the "IT Requirements" properly and made a conscious effort to establish its record as a positive member of the community.¹⁵⁶ More importantly, Exxon and DEQ successfully addressed all of the substantive environmental requirements applicable to the expansion. Nonetheless, the court still had to allow Exxon to supplement the record regarding its compliance history in order to make its final decision.¹⁵⁷ As the following case shows, when the judge has discretion to remand on a "technicality," the trustworthiness and public reputation of the applicant can often be a deciding factor in the case.

In the matter of: Waste Management of Louisiana, L.L.C., Woodside Landfill, Type I and II Solid Waste Landfill,¹⁵⁸ a DEQ decision to grant Waste Management of Louisiana, L.L.C. (Waste Management) a permit to vertically expand its landfill was remanded. In his decision, the district judge said the record didn't show DEQ had enough information to properly decide if Waste Management was prepared for emergencies and also noted that DEQ failed to address public concern that its employees accepted gratuities that tainted the permitting process.¹⁵⁹ Although the judge doubted that Waste Management was unprepared for emergencies, he noted: "[I]t does not appear in the record so that DEQ could make a decision."¹⁶⁰ In remanding the decision, the court did not allow DEQ or Waste Management to supplement the record to address the court's concerns—as was done in Exxon. Both the Exxon and Waste Management decisions highlight how important it is for a company to diligently work with DEQ to ensure that all applicable concerns are addressed prior to judicial review, because the absence of a single piece of information can be the difference between success and failure in the courts when a permit applicant encounters significant public opposition. The case also

highlights how perceived or actual mistakes and deceit can create substantial burdens for a permit applicant.

In circumstances that parallel the original "IT Case," citizens living near the Woodside Landfill successfully raised concerns regarding the propriety of the permit process and the ability of Waste Management to properly operate its existing facility. Specifically, allegations were raised regarding the acceptance of hazardous waste at the facility, which resulted in a criminal investigation into the operations by the EPA.¹⁶¹ Although nothing has ever resulted from the investigation, its mere existence raised concerns regarding the operation of the facility. Further, the allegations resulted in an investigation by the Louisiana Board of Ethics, which concluded with the issuance of fines against Waste Management and three DEQ employees.¹⁶² This type of conduct, and its related publicity, was harmful to Waste Management when the court reviewed the "IT Decision" balancing process and it also prevented the judge from giving the company the benefit of the doubt—as evidenced by the district court's decision not to allow the record to be supplemented and to remand the case for further inquiry.

The Exxon and Waste Management cases illustrate that the public's trust in a company can substantially affect the outcome of a judicial review. In Waste Management's case the questions of impropriety, whether well founded or not, allowed the court to remand the case for further consideration. This outcome emphasizes the importance of developing a complete and well-supported "IT Response." Although speculative, if the trustworthiness of DEQ and Waste Management had not been raised by citizen groups, it is possible to assume that the DEQ decision would have been afforded more deference and been affirmed—like Exxon. However, the fact that these concerns were raised, and made public by the citizens groups themselves, underscores how critical pub-

lic support can be for a proposed project.

It is possible to permit a proposed facility or expansion in the face of substantial public opposition, but it is not easy. Such results are not a flaw in the process that can be addressed by legislation or administrative actions; but are inherent in our democratic society and the adversarial nature of our judicial system. The fact that these cases introduce legal uncertainty into the environmental process is a consequence encountered in much of our law. Courts are designed to provide reasoned and personal justice tailored to each individual case. This is the function of law and avoids the harsh application and injustice that results from the legislation pronouncement of "bright line" rules and laws.

The "IT Decision" and its subsequent jurisprudence indicate that uncertainty is a part of Louisiana environmental law. Legislative attempts to address the uncertainty raised even more concerns among the regulated community. This comment has addressed many of these concerns. It is suggested that the regulated community can further reduce the uncertainty regarding the environmental permit process by engaging the public in projects from their inception. Such public involvement will allow companies to gauge the likelihood of public acceptance for their proposed projects and allow for public concerns to be addressed and implemented as the project progresses—thereby increasing the public's trust in a company. Public opposition is a part of the environmental landscape today. Rather than considering it an obstacle that must be overcome, the regulated community might find that collaborative efforts can result in positive gains in the community. Although these suggestions might be dismissed as impracticable and idealistic, consider the alternatives.

Failing to properly consider public reaction to a proposed project once it has already progressed significantly can pose significant problems. First,

if the public is concerned about the project, they immediately become defensive. Secondly, if they begin to raise issues that were not previously addressed, it has the potential to cause significant problems and to increase costs for either re-engineering or trying to back into "IT Requirements" to justify decisions already made. Efforts such as these are often apparent and might result in a facility having to abandon the entire project or start from scratch if they are unable to prevail in judicial proceedings. The potential for such results is minimal, but it happens, as illustrated by IT Corp. and American Waste. Alternatively, making efforts to evaluate and determine likely public reception to a proposed project can provide substantial benefits.

At the worst, a facility might commission a poll or public opinion survey and determine that a certain community poses too much of a risk to even propose a facility.¹⁶³ At best, a company can establish relationships with future neighbors that will prove beneficial throughout pending and future permit activities. These efforts require the education of the business community, including attorneys, to ensure that they are aware of the "IT Requirements." Efforts to include increased environmental awareness among the business community have made significant progress in the last decade, but improvements can still be made. A recent issue of the American Bar Association's *Business Law Today*¹⁶⁴ had an environmental law theme that outlined basic environmental concepts that business lawyers should be aware of—such as environmental emergencies, natural resource damage assessments, environmental insurance, citizen suits, etc. Accordingly, efforts to educate the business community about the "IT Requirements" and their potential impact on proposed projects would be timely and might prove to reduce much of the uncertainty and concerns regarding the "IT Decision" and its progeny. These are certainly some of the biggest lessons to be learned from the "IT Decision."

¹ The organization was actually named Save Ourselves, Inc. “because no one else would save us” and was commonly referred to by its acronym, SOS. *Old Plantation, Where Sugar Cane Grew, Would Sprout Toxic Waste Disposal Plant*, New York Times (December 14, 1980).

² 452 So.2d 1152 (La. 1984).

³ The facility was announced at a press conference by then Governor Edwards as the “Largest Hazardous Waste Plant in the World.” IT Corp. later began calling the facility the “Largest of its kind in the United States.”

⁴ My parents, especially my mother, were instrumental in fighting IT Corp.’s plans to construct this facility. At the time the plans were announced, I was four years old. In a fight that lasted almost ten years, many, many hours of my childhood were spent in meetings, public hearings, and courtrooms as my parents fought to protect my family’s home and my father’s restaurant, which bordered opposite corners of the proposed site. My mother largely preserved the information used to develop this paper. I am forever gracious for her relentless efforts.

⁵ 452 So.2d at 1160.

⁶ “The basic principle underlying the public trust doctrine is that ‘[t]here are things which belong to no one, and the use of which is common to all.’ Thus the government should act as a trustee, holding and preserving the land for the benefit of the public both today and for generations to come.” Greg Johnson, *Constitutional Environmental Protection In Louisiana: Losing the Reason in the Rule of Reasonableness*, 42 Loy. L. Rev. 97, 98 (1996).

⁷ Warren Byrd, *Environmental Law*, 43 La. B.J. 484 (1996).

⁸ Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 La. L. Rev. 1535 (1993).

⁹ Charles McCowan, *The Evolution of Environmental Law in Louisiana*, 52 La. L. Rev. 907 (1992).

¹⁰ Gerald Walter & Anne Crochet, *IT: An Industry Perspective*, 2 La. Env’tl. Law 2 (1995).

¹¹ Winston Day, *Advising Clients on Environmental Siting: A Wonderland to Behold*, 49 La. B.J. 20 (2001).

¹² See Johnson, *supra* note 6.

¹³ Stella Pitts, *Purified Wastes, or Poison Water? Disposal Plant Fighting Rages On*,

Times Picayune, Section I, Page 1, (March 1, 1981).

¹⁴ When the facility was first announced in October 1979 it was estimated to cost \$85 million. At the time the project was abandoned in June 1989, it was estimated to be a \$135 million project.

¹⁵ See Pitts, *supra* note 13.

¹⁶ See Pitts, *supra* note 13.

¹⁷ “Natural Resources Deputy Secretary . . . brought IT to Louisiana.” See Bookhardt, *infra* note 21.

¹⁸ *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So.2d 1127, 1127 (La. 1979)

¹⁹ “Ascension Parish already contains three of the most serious known abandoned waste disposal sites in Louisiana.” See Pitts, *supra* note 13.

²⁰ *Save Ourselves, Inc. v. La. Environmental Control Commn.*, Docket No. 243,970 Division “F”, Nineteenth Judicial District Court, East Baton Rouge Parish, LA (1982).

²¹ In an interview extolling “the wonders of I.T.” then-Secretary of DNR, Jim Hutchinson spoke candidly regarding his role in bringing IT Corp. to Louisiana. “In the characteristically offhand manner of the Edwards administration, he cheerfully acknowledges his role in selecting I.T. as the builder of the waste disposal plant. He says it all goes back to a conference on hazardous waste management he attended in San Francisco shortly after taking office. That was when he “found” the I.T. Corporation, on a guided tour of one of its hazardous waste handling facilities.” D. Eric Bookhardt, *A Magnet For Toxic Wastes*, Figaro Newsmagazine, Page 5-6 (March 17, 1980).

²² *Supra* note 3.

²³ Shaw Environmental and Infrastructure, Inc., *The IT Group: A Commitment Built on Years*, <<http://www.theitgroup.com/75years/chapt1.asp>> (last accessed November 2002).

²⁴ No relation to Jim Hutchinson, who was DNR Deputy Secretary.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ “[IT Corp.] has been recommended by the federal Environmental Protection Agency as a leader in field of chemical waste disposal.” Stella Pitts, *Waste Plant Opposed by Ascension Group*, Times Picayune (October 18, 1979). In fact, DNR

Deputy Secretary “issued statements saying that the Environmental Protection Agency had recommended I.T. Corporation—statements he later had to withdraw. See Brookhardt, *supra* note 21.

²⁹ *Save Ourselves, Inc.*, Docket No. 243,970 Division “F”, Nineteenth Judicial District Court (1982)

³⁰ *Id.* at 2.

³¹ *Save Ourselves, Inc.*, Docket No. 243,970, Page 2, Division “F”, Nineteenth Judicial District Court (1982)

³² *Id.*

³³ Bob Odom was acting Commissioner at the time and also became a subject of controversy because he accepted campaign loans from the property owner who sold IT Corp. the land for its proposed facility. *Odom Got Loans from IT Site Owner*, Morning Advocate (October 2, 1980).

³⁴ *Save Ourselves, Inc.*, Docket No. 243,970, Page 2, Division “F”, Nineteenth Judicial District Court (1982)

³⁵ *IT Corp. v. Commn. on Ethics for Public Employees*, 464 So.2d 284, 286 (La. 1985).

³⁶ *IT Corp.*, 464 So.2d at 286.

³⁷ *Id.* at 287.

³⁸ *Id.*

³⁹ “The study was criticized . . . because the thick 280-page volume actually contained much less relevant information than might appear at first glance. It is printed on one side of the page only, triple spaced, and about half the material appears to be a rundown of various industry techniques for waste disposal that could have come right from a textbook. Section V, page 74, for instance, talks about the use of electro dialysis to produce drinking water from sea water, a method which, the study concludes, would be particularly useful ‘in Japan.’” See Brookhardt, *supra* note 21.

⁴⁰ *IT Corp.*, 464 So.2d 284.

⁴¹ *Supra*. See Stella Pitts, *Waste Plant Oppose by Ascension Group*.

⁴² Sonny Albarado, *Trucks, not Pipe, to Deliver Wastes*, Morning Advocate (October 29, 1979).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Sonny Albarado, *Trucks, not Pipe, to Deliver Wastes*, Morning Advocate (October 29, 1979).

⁴⁶ *IT Corp.*, 464 So.2d 284.

⁴⁷ Bill McMahan, *Big Waste Plant set at Burnside*, Morning Advocate (October 17, 1979).

⁴⁸ Sonny Albarado, *Waste Unit set on site for Airport*, Morning Advocate (October 18, 1979).

⁴⁹ "[Citizens] fear the size of the proposed complex site—1000 acres—and its accessibility to water, rail, and highway traffic will eventually make the rural Burnside area the nation's hazardous waste dumping ground." See Albarado, *supra* note 42.

⁵⁰ A contingent of local citizens, including political officials, visited IT Corp.'s California facilities to learn more about the IT Corp. operations. Sonny Albarado, *Area Group Still Opposes Waste Facility*, Morning Advocate (June 7, 1980).

⁵¹ May 19, 1980. Respondent's Supreme Court Brief, Page 36.

⁵² Sonny Albarado, *Opponents of Waste Plant Pit Emotions Against Rules*, Morning Advocate (August 1, 1980).

⁵³ Interestingly, the permit hearing tapes were lost, never transcribed and never recovered. Sonny Albarado, *IT Permit Hearing Tapes Still Missing After 4 Days*, Sunday Advocate (August 10, 1980).

⁵⁴ Save Ourselves, Inc. appealed several rulings of the ECC and sought recusal of various individuals involved in the ECC Hearings. After one of the suits was dismissed, Judge Roberts of the 19th Judicial District Court noted "Frankly, this Court is a little disturbed by the almost continuous, or universal, accusations leveled at any elected or public official if a decision is not rendered in accordance with that particular person's belief or desires; and, suggestions that elected officials would violate the functions of their office or the duties that they may have undertaken should not be made lightly and they are not taken by this Court lightly." See *Save Ourselves, Inc.*, Docket No. 243,970, Page 2, Division "F", Nineteenth Judicial District Court (1982) Oral Reasons for Judgment, pg. 2. Save Our Selves was not the only side seeking removal of Commission members, IT Corp. also sought to have a commissioner removed. *Waste Plant Official Questioned on European Incinerator Blast*, State Times, 9-B (October 10, 1980).

⁵⁵ *Save Ourselves, Inc.*, Docket No. 243,970, Page 2, Division "F", Nineteenth Judicial District Court (1982) Written Basis for Decision, pg. 1.

⁵⁶ May 19, 1980. Respondent's Supreme Court Brief, Page 8.

⁵⁷ This was a due process argument raised by Save Ourselves in the lower courts. The

argument failed because the record indicated that four of the commissioners were present for the duration of the hearings—constituting the quorum required for the ECC to make a valid decision under the applicable guidelines. The four commissioners present voted 3-1 to issue the permits. See *Save Ourselves, Inc.*, Docket No. 243,970, Page 2, Division "F", Nineteenth Judicial District Court (1982) Written Basis for Decision, pgs. 6-7.

⁵⁸ See State Times, *supra* note 54.

⁵⁹ Sonny Albarado, *IT Battling Nov. 19 Deadline for Permit*, Morning Advocate (October 30, 1980).

⁶⁰ The ECC's ability to issue the 'interim permit' was constrained by law (according to opinion of State Attorney General), but it nonetheless decided to issue the 'pre-construction' permit in an effort to help IT Corp. in its efforts with EPA. Steven Wheeler, *IT Receives OK to Begin 'Pre-Construction' Activity*, Morning Advocate (November 19, 1980).

⁶¹ Guy Coates, *Fischer Says Some Questions Still Unanswered About IT Site*, State Times (December 18, 1980).

⁶² May 19, 1980. Respondent's Supreme Court Brief, Page 19.

⁶³ See *Save Ourselves, Inc.*, Docket No. 243,970, Page 2, Division "F", Nineteenth Judicial District Court (1982) Written Basis for Decision, pgs. 6-7.

⁶⁴ *Id.*, pages 15-17.

⁶⁵ *Emphasis added.*

⁶⁶ Although the slurry wall was not made a condition of the permit.

⁶⁷ Conflicting expert testimony was provided regarding whether the site was naturally isolated from the aquifers and the Mississippi River. See *Save Ourselves, Inc.*, Docket No. 243,970, Page 2, Division "F", Nineteenth Judicial District Court (1982) Written Basis for Decision.

⁶⁸ Specifically, La. R.S. 49:964 G, which provided the following:

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 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 lawful procedure;

- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion; or

- (6) Manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by firsthand observation 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.

⁶⁹ *Save Ourselves, Inc. v. La. Environmental Control Comm.*, 430 So.2d 1114, 1121 (La. App. 1 Cir. 1983) (Ponder, J., concurring).
⁷⁰ *Save Ourselves, Inc.*, 452 So.2d at 1159 (*emphasis added*).

⁷¹ *Id.* at 1160.

⁷² The 1983 Louisiana Legislature passed Act 97, which divided responsibilities between DNR and a new DEQ and transferred the responsibilities of the ECC from DNR to DEQ. Accordingly, DEQ assumed the ECC's functions to accept, review and act upon permit applications. *Id.*

⁷³ Tim Talley, *Hearings on Plant May Reopen*, Morning Advocate (May 17, 1984).

⁷⁴ Tim Talley, *'New Game' Expected for IT Hearing*, Morning Advocate, 3-B (April 22, 1986).

⁷⁵ Tim Talley, *Environmentalists Cry Foul at Waste Facility Hearing*, State Times, 6-C (April 23, 1986).

⁷⁶ Tim Talley, *Permits Need to be Combined, Official Says*, Morning Advocate (May 16, 1986).

⁷⁷ Tim Talley, *New IT Permit Process May Take 9 Months*, Morning Advocate (May 17, 1986).

⁷⁸ Not to be confused with Part II of the present day DEQ hazardous waste permit application process.

⁷⁹ Tim Talley, *Cramer Named IT Hearing Officer*, Morning Advocate (April 28, 1987).

⁸⁰ The Attorney General's Office who originally defended issuance of the permits to IT Corp. in the judicial proceedings later intervened in its capacity as a public trustee in the remand hearings. See Tim Talley, *Guste Intervenes in IT Hearing*, Morning Advocate, 1-B (September 9, 1998).

⁸¹ Vicki Ferstel, *IT Site Foes Cheered by Finding*, Morning Advocate, Page 8A (February 23, 1989).

⁸² Over \$19,000,000 on land and engineering costs, not including legal fees had been spent to date. Tim Talley, *IT Corp. Permit Being Revoked by DEQ*, Morning Advocate, 1-B (May 10, 1989).

⁸³ *IT Corp. v. Commn. on Ethics for Public Employees*, 453 So.2d 251, 257 (La. App. 1 Cir. 1984) (emphasis in original).

⁸⁴ This case was also litigated extensively and was eventually denied review by the Louisiana Supreme Court.

⁸⁵ See Shaw Video, *supra* note 23.

⁸⁶ *Save Ourselves, Inc.*, 452 So.2d at 1152.

⁸⁷ La. R.S. 30:1051 et seq.

⁸⁸ *Save Ourselves, Inc.*, 452 So.2d at 1155 (emphasis in original).

⁸⁹ 42 U.S.C. §§ 4321-4370a.

⁹⁰ Thanks are offered to Dr. Lieux, of DEQ, for highlighting this connection. See Federal Judicial Center, *Judges of the United States Courts*, <http://air.fjc.gov/history/judges_frm.html> (last accessed November 2002).

⁹¹ *Save Ourselves, Inc.*, 452 So.2d at 1160.

⁹² Interestingly, La. R.S. 30:2018(D)5 exempts DEQ rulemaking from the "IT Requirements"/Environmental Assessment. Ironically, this limitation could pose problems to industry as the Total Maximum Daily Load (TMDL) program is implemented throughout Louisiana. The exemption will prevent any efforts to force DEQ to strengthen regulations governing non-point source pollution, which is a substantial load on many of the listed water bodies subject to the TMDL Program. For an example of more stringent non-point source regulations addressing these same concerns see the *Wisconsin Non-point Source Program Redesign Initiative*, <<http://www.dnr.state.wi.us/org/water/wm/nps/admrules.html>> (last accessed November 2002).

⁹³ *Calvert Cliffs'*, 449 F.2d at 1111-1112.

⁹⁴ 42 U.S.C. §§ 4321-4370a.

⁹⁵ Meredith H. Lieux, *Guidance Document for the "IT Requirements" and the "Basis for Decision"*, Revision No. 0, Page 8 (May 2001). Also see *Calvert Cliffs'*, 449 F.2d at 1114-1115.

⁹⁶ *Id.* at 1113.

⁹⁷ *Id.* at 1111.

⁹⁸ See McCowan, *supra* note 9, nn. 65: "DEQ seems to require that a showing by the applicant that "potential and real" effects have been avoided to the "maximum extent possible." The court, however, requires only that the agency determine that

"adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare (emphasis in original).

⁹⁹ 506 So.2d 749 (La. App. 1 Cir. 1987).

¹⁰⁰ *Save Ourselves, Inc.*, 452 So.2d 1152

¹⁰¹ *In re Cadence Environmental Energy, Inc.*, 714 So.2d 936 (La. App. 1 Cir. 1998).

¹⁰² *Blackett*, 506 So.2d 749.

¹⁰³ *In re Dravo Basic Materials Co.*, 604 So.2d 630 (La. App. 1 Cir. 1992).

¹⁰⁴ *In re Marine Shale Processors, Inc.*, 566 So.2d 994 (La. App. 1 Cir. 1990).

¹⁰⁵ *Id.*

¹⁰⁶ *In re Rubicon, Inc.*, 670 So.2d 475 (La. App. 1 Cir. 1996).

¹⁰⁷ *In re Recovery I, Inc.*, 635 So.2d 690 (La. App. 1 Cir. 1994).

¹⁰⁸ In a case challenging the issuance of a license to remove naturally occurring radioactive material from oilfield pipe, the court noted, "[We] must reverse if the decision was reached without individualized consideration and balancing of environmental factors." There was nothing to review but the license. *In re Berry Brothers General Contractors, Inc.*, No. 94-CA-700 (La. App. 1 Cir. 1995).

¹⁰⁹ *Matter of Natural Resources Recovery, Inc.*, 752 So.2d 369 (La. App. 1 Cir. 2000).

¹¹⁰ The "IT Decision" "does apply to the Department of Natural Resources." *Lake Peigneur Preservation v. Herbert Thompson*, Docket No. 409, 139 Division "A", Nineteenth Judicial District Court, East Baton Rouge Parish, LA (1997). The courts have also found the doctrine applicable to the Department of Wildlife and Fisheries. *Jurisch v. Jenkins*, 749 So.2d 597 (La. 1999).

¹¹¹ *In re Rubicon*, 670 So.2d 475.

¹¹² *In re Rubicon*, 670 So.2d 475.

¹¹³ *Id.*

¹¹⁴ The statute legislatively adopts the IT Questions at La. R.S. 30:2018(B) with new nomenclature.

¹¹⁵ La. R.S. 30:2018(A).

¹¹⁶ La. R.S. 30:2018(E).

¹¹⁷ La. R.S. 30:2018(H).

¹¹⁸ See Hargrave, *supra* note 8.

¹¹⁹ See Day, *supra* note 11.

¹²⁰ See Johnson, *supra* note 6.

¹²¹ See Johnson, *supra* note 6 and Keith Hall, *In re American Waste: A Clumsy Expansion of the Right to Litigate Environmental Issues*, 41 Loy. L. Rev. 353 (1995).

¹²² See Johnson, *supra* note 6 and Day, *supra* note 11.

¹²³ See Johnson, *supra* note 6, nn. 56.

¹²⁴ See Hargrave, *supra* note 8 at 1551.

¹²⁵ "The regulatory scheme provided by constitution and state mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties." *Save Ourselves, Inc.* 452 So.2d at 1159.

¹²⁶ See Hargrave, *supra* note 8 at 1552.

¹²⁷ See *Save Ourselves, Inc.*, 452 So.2d at 1161: "The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp. v. National Labor Relations Bd.*, 313 U.S. 177, 197. "What was said in that case is equally applicable here: 'We do not intend to enter the province that belongs to the board, nor do we do so. All we ask of the board is to give clear indication that it has exercised the discretion with which congress has empowered it. This is to affirm most emphatically the authority of the board.'"

¹²⁸ *Id.*

¹²⁹ See McCowan, *supra* note 9, nn. 70.

¹³⁰ See McCowan, *supra* note 9, nn. 71.

¹³¹ The clause declares that applicants are not absolved of the duty to comply with the judicial history of the "IT Decision".

¹³² See Day, *supra* note 11 at 23.

¹³³ See Johnson, *supra* note 6 at 119.

¹³⁴ See Lieux, *supra* note 95.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Lieux, *supra* note 95.

¹³⁸ The cases most often cited for this proposition is *Matter of American Waste and Pollution Control Co.*, 633 So.2d 188 (La. App. 1 Cir. 1993) and *Matter of Supplemental Fuels, Inc.*, 656 So.2d 29 (La. App. 1 Cir. 1995).

¹³⁹ See Lieux, *supra* note 95.

¹⁴⁰ *Matter of American Waste*, 633 So.2d 188.

¹⁴¹ *Id.*

¹⁴² *Matter of American Waste*, 633 So.2d 188.

¹⁴³ *Id.*

¹⁴⁴ *In re Shintech, Inc.*, 814 So.2d 20 (La. App. 1 Cir. 2002).

¹⁴⁵ *Id.* at 23.

¹⁴⁶ *Id.* at 30.

¹⁴⁷ *Matter of American Waste*, 633 So.2d at 196.

¹⁴⁸ See Johnson, *supra* note 6 at 120.

¹⁴⁹ See Johnson, *supra* note 6 at 119.

¹⁵⁰ *Id.* at 121.

¹⁵¹ EPA Inspector General Report.

¹⁵² A maxim that reflects this sentiment is often stated as: "DEQ has never met an

industry they didn't like."

¹⁵³ See Lieux, *supra* note 95.

¹⁵⁴ 805 So.2d 255 (La. App. 1 Cir. 2001).

¹⁵⁵ *Id.* at 263.

¹⁵⁶ The attorney for Exxon indicated that substantial information regarding Exxon's community activities were submitted into the administrative record to support DEQ's "IT Analysis."

¹⁵⁷ This allowance was permitted because it was characterized as a "technical delay." *North Baton Rouge Environmental Association*, 805 So.2d at 262.

¹⁵⁸ Docket No. 492, 277 Division "1", Nineteenth Judicial District Court, East Baton Rouge Parish, LA (2002).

¹⁵⁹ Mike Dunne, *Waste Management Loses Permit*, *The Advocate* (August 20, 2002).

¹⁶⁰ *Id.*

¹⁶¹ Bob Anderson, *EPA Investigates Livingston Landfill*, *The Advocate* (May 15, 2001).

¹⁶² Marsha Shuler, *Ethics Board Fines 3 DEQ Employees*, *The Advocate* (August 14, 2002).

¹⁶³ Although siting facilities such as landfills and hazardous waste treatment facilities will always encounter public opposition, these methods can still be used to minimize public opposition and to strategically consider plans for dealing with the opposition.

¹⁶⁴ *Business Law Today* (November/December 2002).

¹⁶⁵ *Id.* at 1152.

LDEQ Regulatory Additions and Amendments (October 2003 to March 2004)

Site Specific Criteria Adjustment for Bayou Chinchuba and Tchefuncte River Wetlands (LAC 33:IX.1123)

This final rule will establish a site-specific criteria for wetlands in the Bayou Chinchuba and Tchefuncte River watersheds, which are identified as naturally dystrophic water segments. These changes are based on a Use Attainability Analysis (UAA) which was conducted according to state and federal water quality regulations. The following criteria will apply: no more than 20% reduction in the total above-ground wetland productivity as measured by the tree shrub and/or marsh grass productivity.

Minerals Criteria Revision for Vermillion River, Bayou Teche, Bayou Courtableau and West Atchafalaya Borrow Pit Canal (LAC 33:IX.1123)

This final rule focuses on setting site-specific chlorides, sulfates and total dissolved solids criteria for Bayou Courtableau, West Atchafalaya Borrow Pit Canal, Bayou Teche and the Vermillion River.

Waste Tires Fee Reporting (LAC 33:VII.10519)

The final rule clarifies the standards and responsibilities of waste tire generators. Each dealer of passenger/light truck tires, medium truck tires or off-road tires will remit the fees received and fill out and submit the new form WTO2 to the Office of Manage-

ment and Finance, Financial Services Division, on or before the twentieth (20th) day of each month for the previous month's activity (including months in which no fees were collected).

Radioactive Material (LAC 33:XV.212, 320, 545, 590, 2504 and 2506)

The main purpose of this rule is to add a notification requirement to the licensing of radioactive material. A licensee shall notify the Office of Environmental Services, Permit Division in writing before making any change that would render the information for the license no longer accurate.

Building Enclosure Definition (LAC 33:III.2156)

The purpose of this final rule is to correct a federal reference cited in the definition of building enclosure (BE), as it is used in the air regulations, at LAC 33:III.2156. The corrected rule states, "(1) if a BE is to serve as a PTE or TTE, the appropriate requirements given in 40 CFR, Part 51, Appendix M, Method 204 must be met."

Public Notification of Contamination (LAC 33:I.101, 103, 105, 107 and 109)

This final rule establishes procedures for notifying those members of the public whom the LDEQ determines are likely to be adversely af-

ected by a release that poses a significant risk of adverse health effects. LDEQ shall issue notice of a release that poses a significant risk of adverse health effects to persons whom the Department reasonably determines are likely to be adversely affected by the release. The notification requirements apply to releases that occur on or after October 20, 2003, and exceed the applicable federal and state health and safety standards and pose a significant risk of adverse human health effects. The regulation defines "applicable federal or state health standard" as those health and/or safety standards promulgated under federal or state health or safety laws or other universally accepted health or safety standards that the Department, based on its knowledge and expertise, reasonably determines are applicable to a particular release and release site. Public notice will be provided in two circumstances: (1) the LDEQ becomes aware of information and determines that a release is likely to have significant off-site impact or (2) the LDEQ confirms off-site impact that exceeds applicable standards. The notice of release will contain the address of the release, description of the contaminant, corrective action efforts, any potential adverse health effects and contact names and numbers. The public notice shall be distributed by means reasonably calculated to reach those members of the public directly affected by the release.

Risk Evaluation/Corrective Action Program (LAC 33:I.1305 and 1307 and RECAP regulations)

The final rule promulgates changes to the applicability of RECAP standards found in Title I of the Louisiana Administrative Code, as well as amends the document entitled "Louisiana Department of Environmental Quality Risk Evaluation/Corrective Action Program ("RECAP")," dated October 20, 2003. The new RECAP documents are available for purchase from LDEQ's Office of Environmental Assessment, Environmental Planning Division.

Removal of Interim Fee Amounts for Fiscal Year 2002 - Fiscal Year 2003 (LAC 33:I.1409, 4707; III.223; V.5111, 5119, 5120, 5123, 5125, 5123 5137, 5139, 5141, 5143, 5145; VII.525, 527, 529; IX.1309, 1507; XI.3017, 1305; and XV.579 and Chapter 24, Appendix A)

The final rule removes obsolete language from the environmental fee tables throughout Title 33 of the Louisiana Administrative Code. These changes reflect previous rulemaking and legislative changes, which were effective July 1, 2003.

Cooling Water Intake Structures for New Facilities (LAC 33:IX.2522, 2523 and 2524)

In response to changes made at the federal level, LDEQ has made regulatory changes to delete the definition of "minimum ambient source water surface elevation," and to add language clarifying that decisions concerning various stressors and other adverse impacts on species passing through the hydraulic zone of influence will be based on information submitted by any fishery management agency(ies) or other relevant information.

Emissions Inventory, Toxics Emissions Reporting and Related Fee Methodology (LAC 33:III.211, 918, 919 and 5107)

The final rule affects the air quality fee system, emissions record keeping and annual reporting and emissions inventory requirements. Air toxic annual emissions fees will be based on actual annual emissions that occurred during the previous calendar year for major stationary sources. Furthermore, changes have been made to Section 919, Emissions Inventory, in order to correlate with recently promulgated federal consolidated Emissions Reporting Rule (67 FR 39602-39616, No. 111, 6/10/02). Additionally, PM 2.5 and ammonia are now required inventory pollutants. The final rule also requires additional inventory information on emissions, stack parameters, operating information, and process rate data. All reporting requirements for emissions inventory are due March 31.

Technical amendments clarify that in Section 919.A.1 and 2 the "nonattainment parishes" being referenced are "1-hour ozone nonattainment parishes." Furthermore, within the applicable parishes specified above a facility will be required to report the emission or the potential to emit 5 tpy of lead rather than 10 tpy.

Waste Tire Regulations (LAC 33:VII, 10505, 10519, 10525, 10527 and 10533)

The final rule adds the following definitions to the solid waste recycling regulations: adjustment tire, recall tire, used tire and used tire dealer. Furthermore, the standard fees also shall be collected upon replacement of all recall and adjustment tires. Generators, waste tire processors, waste tire collectors and collection centers all have additional record keeping requirements added by the new regulatory provisions. A technical amendment removed the proposed definition for eligible tire and reworded Section 10525.A.1. to clarify that processors can accept both program eligible and

ineligible tires, but can only be reimbursed from the Waste Tire Management Fund for eligible tires.

LPDES Water Quality Regulations Renumbered (LAC 33:Part IX)

This final rule does not change any of the text in the water quality regulations. The amendments renumber the Louisiana Pollutant Discharge Elimination System Provisions. The new 2004 edition of the regulations will contain the new numbering system.

Penalty Determination Methodology (LAC 33:I.705.G)

The final rule requires that a cash penalty be collected as part of a penalty assessment, unless it can be demonstrated and documented that the violator cannot pay the cash penalty.

Waste Tire Amendments (LAC 33:VII.10505, 10519, 10525, 10527 and 10533)

This emergency rule was deemed necessary by LDEQ in order to strengthen the regulations governing the proper disposal of waste tires processed in Louisiana. Improperly processed tires often create environmental and health related problems and pose a significant threat to the safety of the community, i.e., breeds mosquitoes. The emergency rule added recordkeeping and reporting requirements, new definitions and limited the acceptance of un-manifested tires. The rule was effective on September 12, 2003, and remained in effect until January 12, 2004.

Unauthorized Emissions Reporting Procedures (LAC 33:I.3931)

This emergency rule was renewed. The effective date was December 10, 2003, and the rule remained in effect for a maximum of 120 days, expiring on March 10, 2004. In order to collect additional information on the ozone conditions in the Baton Rouge nonattainment area, LDEQ is proposing a study similar to one conducted

in the Houston/Galveston areas. Facilities are to continue to follow the LAC 33:I Chapter 39 reporting protocols and, whenever possible, to utilize the new notification procedures. Reportable quantities for the following pollutants have been modified for specified parishes: acetaldehyde, butanes (all isomers except 1,3 butadiene), ethylene, propylene, toluene and selected highly reactive volatile organic compounds. (New notification forms at <http://www.deq.state.la.us/surveillance/irf/forms>).

Remediation of Sites with Contaminated Media (LAC 33:V.109. Hazardous Waste Definition)

This emergency rule took effect on December 8, 2003 and expired on March 8, 2004. The purpose of this emergency rule was to simplify the administrative requirements regarding

site remediation of contaminated media. The definition of hazardous waste was amended and environmental media was not considered to contain a hazardous waste when concentrations remaining in the media are below RECAP screening standards and the media no longer exhibited any of the characteristics of hazardous waste identified in LAC 33:V.903.

New or Revised Emissions Estimation Methodologies (LAC 33:III.501.C.11)

This emergency rule was effective on December 24, 2003, and expired on March 24, 2004. The emergency rule added C.11, which clarified that air emissions increases due solely to a change in AP-42 factors did not constitute violations of the air permit. However, changes in emission factors other than AP-42 factors were evaluated by the Department on a case-by-case basis for appropriate action.

Expedited Penalty Agreement (LAC 33:I.801, 803, 805 and 807)

In order to meet legislative mandates established in Act 1196 of the 2003 Regular Session, LDEQ has published an emergency rule creating an expedited penalty agreement program. This is a voluntary program under which the Department, at its discretion, may propose entering into an expedited penalty agreement with a regulated entity when one of the specific violations has been identified. The proposed regulations list the types of violations and expedited penalty amounts which have been selected for the program.

Recent Developments in Administrative Law: District Court Rules Division of Administrative Law Act Unconstitutional

The Division of Administrative Law Act (La. R.S. 49:991 et. seq.) established the Division of Administrative Law generally empowered to handle all adjudications required of any board, commission, department or agency of the Executive Branch of state government in accordance with the State Administrative Procedure Act. Decisions are rendered by Administrative Law Judges ("ALJ") appointed by the Division's Director, himself a Governor appointee. The Division is within the Department of State Civil Service and the ALJ's are in classified service.

Under the provisions of the Act, the ALJ issues the final decision or order which the agency cannot override. Moreover, the Act expressly precludes the state agency from seeking judicial review of an ALJ decision, effectively depriving the agency of any right to seek review of decisions adverse to the agency.

The constitutionality of the aforementioned provisions were successfully challenged by the Louisiana Commissioner of Insurance recently in the case of *J. Robert Wooley in his capacity as Commissioner of Insurance, State of Louisiana v. State Farm Fire and Casualty Insurance Company, Honorable Murphy J. Foster in his capacity as Governor of Louisiana, Anne Wise, in her capacity as Director of the Division of Administrative Law, and Allen Reynolds, in his capacity as Director of the Department of State Civil Service*, docket no. 502,311, Section 21, 19th Judicial District Court, East Baton Rouge Parish, Louisiana. This case began when the Commissioner of Insurance refused to approve a State Farm policy for use in Louisiana. State Farm sought review of the Commissioner's decision with the Division of Administrative Law. The ALJ ruled in State Farm's favor and ordered that the Department of Insurance approve the policy. In response, the Commissioner of Insurance filed a petition for judicial re-

view with the 19th Judicial District Court but that suit was dismissed based upon a peremptory exception of no right of action which dismissal was upheld on appeal. *See, James H. "Jim" Brown, Commissioner of Insurance v. State of Louisiana v. State Farm Fire and Casualty Company*, 804 So.2d 41 (La. App. 1st Cir. 2001).

The Commissioner of Insurance thereafter filed the instant suit against State Farm and the Division of Administrative Law's director, Anne Wise, claiming that the Administrative Law Act was unconstitutional and seeking declaratory and injunctive relief. After a hearing on the application for permanent injunction and a trial on the merits of the declaratory action, Judge Janice Clark, in a written judgment signed February 25, 2004, ruled that among other constitutional provisions, the Act violated:

1) Article II, separation of powers, Judge Clark finding that the Act impermissibly vests judicial power in executive branch employees;

2) Article V, Section 22, mandating an elected judiciary;

3) Article V, Section 16, vesting original jurisdiction in state district courts;

4) Article V, Section 1, providing that the judicial power of the state is to be vested in the Supreme Court, Courts of Appeal, District Courts and other courts as may be authorized by the constitution; and

5) Article V, Section 2, providing for the supervisory jurisdiction of the judicial branch.

Judge Clark granted judgment declaring that the Division of Administrative Law Act, (specifically Acts 1995, no. 739 and as subsequently amended by Acts 1999, no. 1332) was unconstitutional, null and void, and that any action taken pursuant to its provisions including the ALJ's ruling in question was likewise null and void and of no effect.

The court also granted permanent injunctive relief in favor of the Commissioner of Insurance, restraining, enjoining and prohibiting the defendants from "carrying out, implementing, enforcing, and/or utilizing the provisions of [the Act] as regards matters arising from the Office of the Commissioner of Insurance and/or the Louisiana Department of Insurance, insofar as the Division of Administrative Law is without authority to interpret laws governing the regulation of insurance, and further, is without authority to order the Commissioner and/

or the Department of Insurance to comply with its interpretations of law and/or public policy in that such decisions are to be made by persons who are accountable to the electorate, and in the final instance by the judicial department, which is the branch of government vested by Article II of the Louisiana Constitution with the power to declare what the law is."

State Farm and the Division of Administrative Law have taken devolutive and suspensive appeals respectively with the return date currently scheduled for April 15, 2004. Furthermore, several bills have been introduced in the current legislative session to address the Court's ruling. *See, i.e.,* H.B. 256 and S.B. 332 proposing a constitutional amendment providing for the creation of a system of administrative law.



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