

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 CA 1181

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

Judgment rendered June 2, 2017.

* * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C644048
Honorable Donald R. Johnson, Judge

* * * * *

ADAM BABICH
MACHELLE HALL
LISA W. JORDAN
NEW ORLEANS, LA

ATTORNEYS FOR
PLAINTIFFS-APPELLANTS
SAVE OUR HILLS, INC., LOUISIANA
ENVIRONMENTAL ACTION
NETWORK, AND O'NEIL COUVILLION

RUBEN GARCIA
NEW ORLEANS, LA

STUDENT ATTORNEY FOR
PLAINTIFF-APPELLANT
O'NEIL COUVILLION

COURTNEY J. BURDETTE
CHARLOTTE M. GOUDEAU
HERMAN ROBINSON
BATON ROUGE, LA

ATTORNEYS FOR
DEFENDANT-APPELLEE
THE LOUISIANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

ANDREW J. HARRISON, JR.
MADELINE AHLGREN MELANSON
BATON ROUGE, LA

ATTORNEYS FOR
INTERVENOR-APPELLEE
SOUTHERN AGGREGATES, LLC

* * * * *

BEFORE: PETTIGREW, McDONALD, AND PENZATO, JJ.

J.R.B.
JMM
akp

PETTIGREW, J.

Appellants challenge the district court's March 15, 2016 judgment, which dismissed their petition for judicial review, with prejudice, based on a lack of subject matter jurisdiction. For the reasons that follow, we dismiss this appeal as moot.

FACTS AND PROCEDURAL HISTORY

On May 29, 2014, Southern Aggregates, LLC ("Southern Aggregates") applied to the U.S. Army Corps of Engineers ("Corps") for a Clean Water Act Section 404, 33 U.S.C. § 1344, federal permit ("CWA permit"), which would authorize it to excavate wetlands, discharge fill material, and perform construction as part of a proposed sand and gravel operation in Livingston Parish. Prior to issuance of a CWA permit, an opinion from the Louisiana Department of Environmental Quality ("LDEQ") must first be obtained to determine whether the proposed project will violate applicable water quality standards. Once LDEQ expresses its opinion that water quality standards will not be violated, and following the Corps' review of the permit application, the Corps may issue the CWA permit.

Herein, following public notice and a joint public hearing between LDEQ and the Corps, LDEQ issued a water quality certification¹ to Southern Aggregates on October 26, 2015. Along with the certification, LDEQ published a "RATIONALE FOR DECISION" and "RESPONSES TO COMMENTS SUMMARY," detailing its findings regarding the project. LDEQ concluded that "the project as proposed will not violate Louisiana's Water Quality

¹ The procedures for issuance of a water quality certification are set forth, in pertinent part, in 33 LAC Pt IX, § 1507(F)(3) as follows:

3. Conditions for Certification

a. If, after review of the application and any comments, publication of public notices, public hearing if applicable, expiration of the required periods for public comment, and receipt of proofs of publication, it is determined that the proposed project will not violate State Water Quality Standards, is in accordance with an approved Water Quality Management Plan, or applicable state water laws, rules, or regulations, the administrative authority will issue a letter of no objection with a statement of water quality certification to the applicant and forward a copy of the certification to the applicable federal agency.

b. The letter of certification will include any stipulations or conditions necessary to ensure compliance with state Water Quality Standards, approved Water Quality Management Plans, or applicable state water laws, rules, or regulations.

Standards and will comply with Louisiana's Water Management Plan and all applicable state water laws, rules and regulations."

In response, on December 8, 2015, appellants, Save Our Hills, Inc., Louisiana Environmental Action Network,² and O'Neil Couvillion (collectively "appellants"), filed a Petition for Judicial Review in the Nineteenth Judicial District Court, asking the district court to vacate the LDEQ water quality certification and stay the effectiveness of the certification pending final resolution on appeal. Appellants argued that LDEQ failed in its duty to act as the public trustee by not conducting a cost/benefit analysis regarding the proposed project. Appellants further asserted that LDEQ failed to respond to reasonable, significant public comments regarding the project and that the certification was arbitrary and capricious.

Thereafter, Southern Aggregates and LDEQ each filed declinatory exceptions raising the objection of lack of subject matter jurisdiction and peremptory exceptions raising the objection of no cause of action, arguing that a water quality certification is not an appealable action under the Louisiana Environmental Quality Act nor otherwise subject to judicial review. The petition came for hearing on March 2, 2016, at which time the district court agreed that it did not have subject matter jurisdiction and, thus, sustained Southern Aggregates and LDEQ's exceptions. The district court stated, in pertinent part, as follows:

All right. All right. I'm prepared to rule on the merits of the exception. Regardless of what decision this section of this court of the 19th declares here this afternoon, the purposes of being certain about predictability – these matters will arise and continue to arise, so the clarity of the law needs to be certain. We need to be able to predict what the outcome, one way or the other is, on either a permit action, a permit, or a certification.

It seems to me that depending upon whatever characterization or whatever language is used dictates the remedy and the process to achieve a remedy. That shouldn't be the case. Shouldn't rest upon the particular word or language, but nonetheless it seems as if sometimes

² The Louisiana Environmental Action Network is a non-profit corporation, serving as a statewide network of environmental and citizen member groups, that works to preserve, protect, and improve the state's land, air, water, and other natural resources, with the purpose of protecting its members and other residents of Louisiana from threats of pollution. **City of Baton Rouge v. Louisiana Dept. of Environmental Quality**, 2014-1485, p. 4 n.4 (La. App. 1 Cir. 4/28/15), 172 So.3d 13, 16 n.4.

we use the word permit, permit action, its [sic] synonymous or not.

Considering the limited jurisdiction that arises in this area. I'm an appellate court, I'm not an original court with original jurisdiction. My jurisdiction over the parties here is limited to an appeal process. So the subject matter jurisdiction is one of the appellate court reviewing the law and deciding whether or not I deem I have subject matter jurisdiction.

The exception for lack of subject matter authority jurisdiction is sustained. Having sustained that exception, the no cause exception is mooted.

The district court signed a judgment in accordance with its findings on March 15, 2016. On April 8, 2016, appellants filed a motion for devolutive appeal, which was granted on April 11, 2016.³ During this period, however, the Corps issued the CWA permit to Southern Aggregates. Subsequently, on September 30, 2016, Southern Aggregates filed a Motion to Dismiss for Mootness in this court, in which it argued that the instant appeal should be dismissed as moot as "it has commenced and excavated wetlands in accordance with the terms of the federal CWA Section 404 Permit."

DISCUSSION

It is well-settled in the jurisprudence of this state that courts will not decide abstract, hypothetical or moot controversies or render advisory opinions with respect to such controversies. As a general rule, an issue is moot when a judgment or decree on that issue has been "deprived of practical significance" or "made abstract or purely academic." A case is moot when a rendered judgment or decree can serve no useful purpose and give no practical relief or effort. If the case is moot, then "there is no subject matter on which the judgment of the court can operate." **Shepherd v. Schedler**, 2015-1750, p. 13 (La. 1/27/16), 209 So.3d 752, 764-765 (citing **Cat's Meow, Inc. v. City of New Orleans, Dept. of Finance**, 98-0601, p. 8 (La. 10/20/98), 720 So.2d 1186, 1193. The doctrine of mootness is recognition that judicial rulings that seek to prohibit certain activities should be susceptible of implementation. When the occurrence has happened, the ruling cannot "reach back in time" and right

³ Because of our decision to dismiss appellants' appeal as moot, we do not reach the merits of the issues raised by appellants therein.

the wrong done. **In re Natural Resources Recovery, Inc.**, 98-2917, p. 6 (La. App. 1 Cir. 2/18/00), 752 So.2d 369, 373, writs denied, 2000-0806, 2000-0836 (La. 5/26/00), 762 So.2d 1104, 1105.

Although jurisdiction may exist at the outset, it may abate if the case becomes moot while the case is proceeding. **Tobin v. Jindal**, 2011-0838, p. 5 (La. App. 1 Cir. 2/10/12), 91 So.3d 317, 321. The controversy must normally exist at every stage of the proceeding, including the appellate stages. *Id.*

Pursuant to 33 U.S.C. 1341(a)(1) "[a]ny applicant for a Federal license or permit to conduct any activity including ... discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate" A water quality certification, as issued by LDEQ, is not a license or permit but merely a preliminary requirement that must be met in order to obtain a federal license or permit. **Mayor and Council of Morgan City v. Louisiana Dept. of Environmental Quality**, 525 So.2d 235, 238 (La. App. 1 Cir. 1988). A water quality certificate is an approval by LDEQ that any activity that may result in any discharge into or potential change of the waters of the state will comply with state water quality standards. **Louisiana Environmental Action Network v. Louisiana Dept. of Environmental Quality**, 2009-1244 (La. App. 1 Cir. 2/8/10), 2010 WL 431500 at 3, n.10 (unpublished).

Southern Aggregates contends that "[o]nce a CWA Section 404 [p]ermit [is issued], the water quality certification has no effect, because the certification is not a permit. ... Once a party receives its federal CWA Section 404 [p]ermit, the project moves forward under the aegis of the federal permit. The project is never conducted pursuant to a water quality certification." As such, Southern Aggregates avers "[t]here is no relief available from either the Nineteenth Judicial District Court or this Court; therefore, this matter should be dismissed." Southern Aggregates continues its argument, noting that appellants, in their petition for judicial review, acknowledge the potential for mootness once there is action by the Corps:

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

Appellants counter, arguing that Southern Aggregates provides "no support in the record or elsewhere that it will moot this case because it has already 'performed work'... [and the] project at issue, however, is projected to last at least eight years" Moreover, appellants note that the Corps "may reevaluate the circumstances and conditions of any permit ... at the request of the permittee, or a third party ... and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest." 33 C.F.R. § 325.7. Citing this provision, appellants aver that "[t]hus the Corps clearly has authority to revisit its permit in light of a remand of a water quality certification. Therefore, changes to the certification that may arise from the Court's decision may result in revocation or changes to the [CWA] permit. This would provide a practical impact for [appellants] and this case is far from moot."

Appellants further argue that exceptions to the mootness doctrine have been recognized. In particular, and as applicable to the instant case, appellants note that a court should consider whether there is any reasonable expectation that the complained-of conduct will recur. See **Cat's Meow, Inc.**, 98-0601 at 9-12, 720 So.2d at 1194-1196. Appellants assert that a finding of mootness is precluded when: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. **City of Baton Rouge/Parish of East Baton Rouge v. Myers**, 2013-2011, p. 20 (La. 5/7/14), 145 So.3d 320, 337.

Appellants maintain that if the Corps' action in issuing the CWA permit is deemed to moot review of the underlying state water quality certification, the issue on appeal may never be resolved. They further argue that LDEQ would be incentivized to issue

unconditional water quality certifications to avoid judicial review entirely. We find no merit to this argument. Although we are cognizant of the district court's concern for clarity below, we find this exception to the mootness doctrine does not apply to the facts and circumstances herein.

We have thoroughly reviewed the record in this matter and agree with Southern Aggregates' position that this appeal is moot. Although appellants argue that the district court's judgment should be vacated and remanded such that the district court can review the water quality certification issued by LDEQ to Southern Aggregates, such an exercise would have no practical effect as the CWA permit has since been issued by the Corps. It is unclear what relief, if any, would result from a judgment by this court. Simply stated, this appeal presents no justiciable controversy and is now moot given the Corps' action in issuing the CWA permit to Southern Aggregates. We note, however, that appellants are not without recourse. The decision of the Corps to grant a CWA permit under 33 U.S.C. § 1344 is reviewable in federal court under the standards set forth in the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* See **City of Shoreacres v. Waterworth**, 420 F.3d 440, 445 (5th Cir. 2005).

CONCLUSION

For the above and foregoing reasons, we grant the motion to dismiss appellants' appeal as moot and issue this memorandum opinion in compliance with Uniform Rules, Courts of Appeal, Rule 2-16.1(B). All costs associated with this appeal are assessed against appellants, Save Our Hills, Inc., Louisiana Environmental Action Network, and O'Neil Couvillion.

MOTION GRANTED; APPEAL DISMISSED.