

Gossen v. Welsh, Not Reported in So.3d (2016)

2015-0852 (La.App. 1 Cir. 6/2/16)

2016 WL 3143952

UNPUBLISHED OPINION. CHECK COURT RULES  
BEFORE CITING.

NOT DESIGNATED FOR PUBLICATION

Court of Appeal of Louisiana,  
First Circuit.

Gilbert and Florence GOSSEN, Donald Gossen,  
Wilma Subra, and H & J Gossen Properties, L.L.C.

v.

James H. WELSH, Commissioner of the Office of  
Conservation, Louisiana Department of Natural  
Resources, and LA Tank–Branch, L.L.C.

No. 2015 CA 0852.

June 2, 2016.

On Appeal from the Nineteenth Judicial District Court, In  
and for the Parish of East Baton Rouge, State of  
Louisiana, No. 618246, The Honorable Janice Clark,  
Judge Presiding.

#### Attorneys and Law Firms

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Plaintiffs/Appellants Gilbert and Florence Gossen,  
Donald Gossen, Wilma Subra & H & J Gossen Properties,  
L.L.C.

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Tank–Branch, L.L.C.

Before GUIDRY, HOLDRIDGE, and CHUTZ, JJ.

#### Opinion

HOLDRIDGE, J.

\*1 Plaintiffs-appellants, Gilbert and Florence Gossen,  
Donald Gossen, Wilma Subra, and H & J Properties,

L.L.C., appeal a district court judgment on their petition  
for judicial review affirming the decision to uphold an  
operating permit issued in favor of defendants-appellees,  
LA Tank–Branch, L.L.C. (LA Tank), the State of  
Louisiana, Department of Natural Resources, Office of  
Conservation, and James H. Welsh in his capacity as the  
Commissioner of Conservation (Commissioner).<sup>1</sup> For the  
following reasons, we affirm.

#### FACTS AND PROCEDURAL HISTORY

On September 21, 2011, LA Tank submitted an  
application to the Commissioner, seeking a permit to  
construct and operate a new commercial facility in Acadia  
Parish. The proposed facility was a commercial, non-  
hazardous, Class II,<sup>2</sup> deep-well injection waste disposal  
facility for the disposal of exploration and production  
waste fluids. (R. 1385) LA Tank also submitted its  
“Response to IT Questions” in support of its application.<sup>3</sup>

Thereafter, LA Tank published the appropriate notice of  
intent to the Commissioner to file an application for a  
permit to locate, construct, and operate its facility. *See* La.  
Admin. Code, tit. 43, pt. XIX, § 507(A)(2). The  
Commissioner gave public notice on May 20, 2012, and  
conducted a public hearing on July 12, 2012, concerning  
LA Tank’s permit application. During the public hearing,  
participating members of the public were allowed to  
submit questions and voice their concerns regarding LA  
Tank’s permit application.<sup>4</sup> The main issue raised in the  
public comments was the existence of several alleged  
private water wells within 1,000 feet of the proposed  
facility, which would be a violation of La. Admin. Code,  
tit. 43, pt. XIX, § 507(A)(1).<sup>5</sup> In response to these  
comments, the Commissioner conducted a field  
inspection in an attempt to locate all existing water wells  
within a¼ mile radius of the proposed location of the  
facility. The inspection revealed that only one private  
active well, the Hilman G. Nolan, Sr. Well (Nolan Well),  
was less than 1,000 feet from the proposed facility  
location.

After considering all of the evidence, including the permit  
application, IT analysis, and public comments, the  
Commissioner issued Order No. ENV 2012–03 CFB  
(permit order) on November 15, 2012, which approved  
the construction and operation of the disposal facility. The

Gossen v. Welsh, Not Reported in So.3d (2016)

2015-0852 (La.App. 1 Cir. 6/2/16)

permit order contained regulations with which LA Tank had to comply before construction could commence, specifically addressing the presence of the Nolan Well stating, "LA Tank shall not commence construction of the facility ... until ... documentation is provided pertaining to clarification on LAC 43:XIX.507.A.1, and an updated LAC 43:XIX.519.C.10 topographic map [is] provided." The Commissioner also attached as an exhibit to the permit order "Response to Comments," which addressed the issues raised in the testimony and written complaints by plaintiffs and other community members.

\*2 Following the Commissioner's issuance of the permit order on January 9, 2013, plaintiffs filed a petition seeking judicial review pursuant to La. R.S. 30:12. In the petition, plaintiffs alleged that the Commissioner's issuance of the permit order was: (1) in violation of constitutional or statutory provisions; (2) made upon unlawful procedure; (3) arbitrary or capricious or characterized by abuse of discretion; and (4) in violation of La. Const. Art. IX, § 1. On a joint motion of the parties, the district court signed a consent order on July 26, 2013, which authorized LA Tank to present additional evidence regarding its permit application, including but not limited to such evidence concerning the "IT Questions." The consent order also gave plaintiffs sixty days to file any written comments relating to LA Tank's supplemental filing thereafter, and ordered the Commissioner to consider the supplemented record and any written comments filed by plaintiffs.

Pursuant to the consent order and the regulations imposed by the Commissioner in the permit order, LA Tank submitted documentation that the acreage of the proposed facility was reduced from 14.46 to 14.35 acres," which demonstrated that the proposed site complied with La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1). However, plaintiffs submitted additional comments, which alleged that the proposed site was still non-compliant with La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1) regardless of the reduction in acreage. The additional comments evidenced a new water well, the H & J Gossen Properties Well, located within 1,000 feet of the proposed facility.

After considering the supplemental submissions of LA Tank and plaintiffs, the Commissioner issued supplemental conservation Order No. ENV 2012-03 CFB (permit order), on August 29, 2014, which affirmed the prior permit order. Like the original permit order, the supplemental permit order included a regulation that LA Tank could not commence construction until

documentation was provided to the Commissioner pertaining to La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1).

On January 5, 2015, plaintiffs sought review of the decision of the Commissioner to the district court alleging that the permit order should be vacated. Following a hearing, the district court took the matter under advisement. A judgment was signed on April, 8, 2015, which affirmed the original and supplemental permit orders. In its oral reasons for judgment, the district court stated "the Commissioner has acted properly and reasonably within his constitutional statutory authority in granting the permit at bar ... he has given due consideration to the regulations governing this procedure and this permit. Moreover, the Court finds that the Commissioner was not arbitrary or capricious[.]" From this judgment, plaintiffs now appeal.

#### ASSIGNMENTS OF ERROR

On appeal, plaintiffs contend that the district court erred in granting LA Tank's permit order based on the following:

\*3 1. The approval of the application has prejudiced substantial rights of the [plaintiffs] because the decision to grant the permit is "in violation of constitutional or statutory provisions." La. [R.S.] 30:12(B)(5)(a).

2. The approval of the application has prejudiced substantial rights of the [plaintiffs] because the decision "is made upon unlawful procedure." La. [R.S.] 30:12(B)(5)(c).

3. The approval of the application has prejudiced substantial rights of the [plaintiffs] because the decision is "arbitrary or capricious, or characterized by abuse of discretion [ ... ]." La. [R.S.] 30:12(B)(5)(e).

4. The approval of the application has prejudiced substantial rights of the [plaintiffs] because the decision to grant the permit is manifestly erroneous in view of the entire record including the supplemental addition to the record.

5. The approval of the application has prejudiced

Gossen v. Welsh, Not Reported in So.3d (2016)

2015-0852 (La.App. 1 Cir. 6/2/16)

substantial rights of the [plaintiffs] because its approval of the application to construct and operate the disposal facility is a violation of the duty incumbent on the Department as a public trustee under Article IX, [§ ] 1 of the Louisiana Constitution.

### STANDARD OF REVIEW

The standard of judicial review of an order of the Commissioner is set forth in detail in La. R.S. 30:12, which provides that any person who is aggrieved by a ruling of the Commissioner may seek judicial review. *See* La. R.S. 30:12(A)(1). The statute further provides that such review shall be conducted by the court without a jury and shall be confined to the record. La. R.S. 30:12(B)(4). The district court may affirm the agency decision or remand the case for further proceedings; or may reverse or modify the decision if substantial rights of an appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. La. R.S. 30:12(B)(5).

Thereafter, if a party is dissatisfied with the judgment of the district court following judicial review, the party may appeal the judgment to the appropriate appellate court. *See* La. R.S. 30:12(D) and 30:15. On appeal, the Commissioner's findings of fact are entitled to great weight and, unless manifestly erroneous or clearly wrong, should not be reversed. Furthermore, the reviewing court must apply the arbitrariness test, and the party challenging the Commissioner's decision must make a clear showing that the administrative action was arbitrary and capricious. *Six C Properties, LLC v. Welsh*, 10–1913 (La.App. 1 Cir. 5/26/11), 68 So.3d 609, 612, *writ granted*, 11–1353 (La.11/14/11), 75 So.3d 440.

\*4 When reviewing an administrative final decision, the district court functions as an appellate court. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate

circuit court of appeal. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. Thus, an appellate court reviewing an administrative agency reviews the findings and decisions of the administrative agency and not the decision of the district court. *Holmes v. La. State Bd. of Nursing*, 13–2154 (La.App. 1 Cir. 8/5/14), 156 So.3d 183, 187, *writ denied*, 14–1886 (La.11/14/14), 152 So.3d 885.

### VALIDITY OF THE COMMISSIONER'S ORDER

As the first three assignments of error raised by plaintiffs are related to the application of La. R.S. 30:12(B)(5), we consider the three issues together. To prevail under La. R.S. 30:12(B)(5), plaintiffs must show that their "substantial rights ... have been prejudiced" in one of the six enumerated ways. First, plaintiffs contend that their rights were substantially prejudiced by the Commissioner approving LA Tank's permit application because it was in violation of La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1). Plaintiffs allege that the Commissioner disregarded the administrative regulation when approving LA Tank's permit application because at the time of approval, three private water wells were located within 1,000 feet of LA Tank's proposed facility.

In contrast, LA Tank contends that the Commissioner ensured compliance with La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1) when approving its permit application by including a regulation in both permit orders, which provided that LA Tank shall not commence construction of the proposed facility until documentation was provided to the Commissioner that the facility, as constructed and operated, would not be located within 1,000 feet of any private water well.

Based upon the foregoing, we agree with LA Tank's position that the Commissioner ensured compliance with the governing administrative regulations when granting the permit order by not allowing construction of the proposed facility until LA Tank complied with La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1). Plaintiffs' argument that the location of various water wells prohibit compliance with this specific regulation has no merit as LA Tank still has not commenced construction on the

Gossen v. Welsh, Not Reported in So.3d (2016)

2015-0852 (La.App. 1 Cir. 6/2/16)

proposed facility. Thus, the applicable regulation governing the location criteria for commercial facilities has not been violated as the Commissioner will not permit LA Tank to begin construction on the proposed facility until such evidence is presented to him that shows compliance with La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1). In sum, the permit order inherently complies with La. Admin. Code, tit. 43, pt. XIX, § 507(A)(1).

\*5 Moreover, after notice and hearing, because the Commissioner has the authority to make *any* reasonable rule, regulation, and/or order that is necessary to properly administer and enforce the Conservation Law, including the location, design, and operation of non-hazardous waste disposal facilities, we find that the regulation implemented by the Commissioner in both the original and supplemental permit orders was valid. *See* La. R.S. 30:4(1)(7). Therefore, plaintiffs' first assignment of error has no merit as they failed to allege facts showing that their substantial rights were prejudiced.

In their second and third assignments of error, plaintiffs contend that the Commissioner's decision was made upon unlawful procedure and was arbitrary or capricious or characterized by an abuse of discretion. Plaintiffs contend that the Commissioner failed to consider their supplemental submissions because the findings in the supplemental permit order were the same as the original permit order, as were the public comment responses. Plaintiffs further contend that this casts doubt on the integrity of the process and causes them to question whether the Commissioner sufficiently considered the supplemental material offered by plaintiffs.

We must determine whether the Commissioner's decision to grant both the original and supplemental permit orders under the administrative regulations was arbitrary or capricious, or characterized by an abuse of discretion pursuant to La. R.S. 30:12(B)(5). The test for determining whether an action was arbitrary or capricious is whether the action taken was "without reason." *Calcasieu League for Envtl. Action Now v. Thompson*, 93-1978 (La.App. 1 Cir. 7/14/95), 661 So.2d 143, 150, *writ denied*, 95-2495 (La.12/15/95), 664 So.2d 459.

After a thorough review of the record, we find that the Commissioner gave sufficient consideration to plaintiffs' interest before approving LA Tank's permit order. Plaintiffs were given notice, a full hearing, and an opportunity to present additional evidence in support of LA Tank's request after the original permit order was

approved. We find that plaintiffs' interest was fully presented to the Commissioner, made part of the record, and that there is no showing that the substantial rights of plaintiffs were in any way prejudiced by such an oversight. Thus, plaintiffs' second assignment of error has no merit.

Additionally, plaintiffs contend that the Commissioner was arbitrary or capricious in failing to consider alternate locations for the proposed facility and failing to consider potential environmental costs to the public. Plaintiffs further contend that LA Tank's search for alternative sites was flawed because it was limited to one site.

LA Tank argues that the site-selection process was not flawed because four other sites were considered in depth, three of which were environmentally suited for the proposed project. LA Tank further contends that the site in Acadia Parish was ultimately chosen because it offered the highest degree of protection to the environment as evidenced in its IT responses. Moreover, after considering the record as a whole, the Commissioner stated in his supplemental order that he confirmed the site in Acadia Parish because "the environment, public health and safety will be protected and [the] potential impacts, if any, will be minimized in that no waste will be disposed of at the surface of the site and that the appropriate safeguards, such as containment areas, will be in place prior to the operation of the facility." Thus, the Commissioner approved the site because LA Tank provided evidence that there were no alternative sites that offered more protection to the environment than the proposed facility site without unduly curtailing non-environmental benefits.

\*6 We find that LA Tank and the Commissioner were not arbitrary or capricious in failing to consider alternative locations during the site-selection process. After much effort in locating a suitable location, LA Tank ultimately chose the proposed location in Acadia Parish because it met all of the legal and regulatory requirements pursuant to La. R.S. 30:12. The proposed facility was considered suitable because it was the most environmentally protective and plausible site of the alternative sites considered. After an analysis of the alternative sites, the Commissioner was able to make an informed determination that the site proposed by LA Tank afforded the best balance of environmental costs versus economic, technical, and social benefits. *See Matter of Browning-Ferris Indus. Petit Bois Landfill*, 93-2050 (La.App. 1 Cir. 6/23/95), 657 So.2d 633, 638, *writs denied*, 95-2127, 95-2155 (La.11/27/95) 662. So.2d 742. Therefore, we

Gossen v. Welsh, Not Reported in So.3d (2016)

2015-0852 (La.App. 1 Cir. 6/2/16)

conclude that the Commissioner has given due consideration to the administrative regulations governing this procedure and permit, and he had a reasonable basis to approve LA Tank's proposed facility location. Thus, plaintiffs' third assignment of error has no merit.

Alternatively, plaintiffs' fourth assignment of error asserts that the Commissioner's decision to approve LA Tank's permit order was manifestly erroneous in view of the entire record. Under the manifest error standard, a court of appeal may not simply substitute its own view of the evidence for that of the factfinder, nor may it disturb the factfinder's findings of fact so long as it is reasonable. *See Indus. Pipe, Inc. v. Plaquemines Par. Council*, 13–1345 (La.App. 4 Cir. 5/21/14), 139 So.3d 1168, 1170, *writ denied*, 14–1653 (La.10/31/14), 152 So.3d 158.

After an examination of the record in its entirety, we believe that the Commissioner's decision was not manifestly erroneous or clearly wrong. The record before us demonstrates that the Commissioner complied with all administrative regulations when issuing LA Tank's permit order and no substantial rights of the plaintiffs have been prejudiced. Accordingly, plaintiffs' fourth assignment of error lacks merit.

Finally, plaintiffs' fifth assignment of error contends that the Commissioner violated his public trustee duty under La. Const. art. IX, § 1 when approving LA Tank's permit application by failing to perform an environmental assessment prior to issuing the permit orders. Our constitution requires environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. art. IX, § 1. The Louisiana Supreme Court has held that this duty is a "rule of reasonableness," which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social, and other factors. *Save Ourselves*, 452 So.2d at 1157.

\*7 The record before us provides that the Commissioner, on behalf of the Department of Natural Resources, complied with his constitutional mandate in considering LA Tank's permit application. Given the standard of review, absent a showing that the balance of costs and

benefits was arbitrary or that the Commissioner gave insufficient weight to environmental protection, we reject the argument that the Commissioner failed to comply with the applicable constitutional, statutory, or regulatory requirements in considering LA Tank's permit request.

Accordingly, based upon our review of the record, plaintiffs have failed to prove that the Commissioner acted arbitrarily and capriciously or failed to give sufficient weight to environmental concerns in balancing the costs and benefits of issuing the permit orders. Rather, the record demonstrates that the Commissioner reasonably determined that any adverse environmental impacts were minimized or avoided before issuing the permit orders. Additionally, the record does not demonstrate any failure of the Commissioner in his duties as a public trustee of our environment as contended by plaintiffs. Therefore, pursuant to La. R.S. 30:12(B)(5), we find no violation of constitutional or statutory provisions, no action in excess of the Commissioner's statutory authority, no unlawful procedure, and no error of law. Further, we find that the Commissioner's decision is not arbitrary or capricious or characterized by an abuse of discretion. We further conclude that the Commissioner's decision to approve LA Tank's permit application was not manifestly erroneous. *See Harrelson Materials Mgmt., Inc. v. La. Dep't of Env'tl. Quality*, 06–1822 (La.App. 1 Cir. 6/20/07) 2007 WL 1765563, at \*12 (unpublished opinion). Accordingly, we affirm the district court's judgment affirming the Commissioner's issuance of the permit orders.

## CONCLUSION

For the reasons assigned herein, the judgment of the district court upholding the decision of the Commissioner is affirmed. All costs of this appeal are to be borne by plaintiffs-appellants, Gilbert and Florence Gossen, Donald Gossen, Wilma Subra, and H & J Properties, L.L.C.

**AFFIRMED.**

**All Citations**

Not Reported in So.3d, 2016 WL 3143952, 2015-0852

Gossen v. Welsh, Not Reported in So.3d (2016)

2015-0852 (La.App. 1 Cir. 6/2/16)

(La.App. 1 Cir. 6/2/16)

Footnotes

- 1 The Commissioner is the head of the office of conservation of the Department of Natural Resources, and he is the assistant secretary for the office of conservation. See La. R.S. 30:3(1); La. R.S. 36:3(2), 357(A), and 806.
- 2 A Class II disposal well injects fluids, which are brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants, which are an integral part of production operations. La. Admin. Code, tit. 43, pt. XIX, § 403.
- 3 In *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So.2d 1152, 1156 (La.1984) (also referred to as the "IT Decision"), the Louisiana Supreme Court articulated a number of factors to be considered when employing a cost-benefit analysis of the environmental and non-environmental factors to demonstrate that issuance of a permit would be compatible with the constitutional and statutory standard of environmental protection. See *Matter of Browning-Ferris Indus. Petit Bois Landfill*, 93-2050 (La.App. 1 Cir. 6/23/95), 657 So.2d 633, 635, writs denied, 95-2127, 95-2155 (La.11/27/95), 663 So.2d 742.
- 4 See La. R.S. 30:4(C)(16)(b) and 4(I); La. Admin. Code, tit. 43, pt. XIX, § 409; La. Admin. Code, tit. 43, pt. XIX, §§ 519 and 529.
- 5 Title 43, Part XIX, § 507(A)(1) of the Louisiana Administrative Code provides that commercial facilities may not be located in any area within  $\frac{1}{4}$  mile of a public water supply water well or within 1,000 feet of a private water supply.
- 6 Plaintiffs assert that the reduced "foot-print" of the proposed facility was arbitrarily changed after the Commissioner approved the permit application. We find that LA Tank's reduction of the acreage of the proposed facility to be compliant with the permit order did not constitute a new and/or revised permit application. Since there was already a full public hearing on the tract that included the reduced acreage, a new public hearing was not required. Therefore, the Commissioner did not act arbitrarily and capriciously in failing to order a new public hearing for plaintiffs before issuing LA Tank's supplemental permit order.