



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Hazardous Waste Regulations: Louisiana Appellate Court Addresses Whether Verified Reclamation Variance Is Appealable

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The Court of Appeal of Louisiana (First Circuit) ("Court") issued a September 23rd opinion addressing a challenge to the Louisiana Department of Environmental Quality's ("LDEQ") granting of a Verified Reclamation Facility ("VRF") variance pursuant to the state's hazardous waste regulations. See *Louisiana Environmental Action Network, Inc. v. Louisiana Department of Environmental Quality*, 2020 WL 5667226.

The variance had been challenged in the District Court.

Thermaldyne, LLC ("Thermaldyne") submitted a request to LDEQ for a VRF variance. The Louisiana hazardous waste regulations include certain exclusions for to the definition of solid waste. For a waste to constitute a hazardous waste it must meet the definition of solid waste.

Section 105.D.1 provides a list of materials that may be excluded from regulation as solid waste. 105.D.1.y states that:

... hazardous secondary material that is generated and then transferred to a verified reclamation facility ("VRF") for the purpose of reclamation is not a solid waste if certain conditions are satisfied. One condition that must be satisfied in order for this exclusion to apply is that the hazardous secondary material generator must arrange for the transport of the hazardous secondary materials to a VRF.

A VRF is either:

1. A facility that has been granted a variance under LAC 33:V.105.O.2d; or
2. A reclamation facility where the management of hazardous secondary materials is addressed under a Resource Conservation and Recovery Act ("RCRA") Part B permit or interim status standards.

As a result, if a generator of hazardous secondary materials transports it to a facility that has been granted a variance under this provision for reclamation, it is not a solid waste. If not a solid waste, it is not a hazardous waste and, consequently, not subject to the Louisiana hazardous waste rules.

LDEQ, in considering Thermaldyne's request for a VRF variance, published a document titled:

Draft Decision Document to Grant a Variance From Classification as a Solid Waste for a Verified Reclamation Facility

Comments were received from a number of sources including LEAN.

LDEQ issued a final decision granting a VRF Conditional Exclusion and Variance from Classification as a Solid Waste.

The VRF variance is stated to allow the company to reclaim crude oil contained in oil-bearing hazardous secondary materials. It can then return the recovered oil back to petroleum refining facility production subject to certain conditions.

LEAN filed a document in District Court titled:

Petition for Judicial Review and Revocation of Final Permit Decisions

The District Court was asked to either vacate LDEQ's action approving the VRF variance as unlawful or remand the matter back to LDEQ with an order requiring it to hold a public hearing on the variance, conduct an IT analysis that fulfils public trustee obligations:

. . . and respond fully to the public comments on the VRF/Variance request.

LDEQ filed a declinatory exception of lack of subject matter jurisdiction and a peremptory exception of no cause of action as to the VRF variance petition and one addressing a minor air permit.

The District Court held that the VRF/variance was neither a permit nor a final action. As a result, it sustained LDEQ's exceptions of lack of subject matter jurisdiction, no cause of action, and no right of action.

LEAN appealed.

The two arguments LEAN put forth included:

1. The District Court erred in granting the exception of lack of subject matter jurisdiction because LDEQ's unlawful decision to issue Thermaldyne a variance in lieu of a typical hazardous waste permit is reviewable by the courts, and
2. The District Court erred in granting LDEQ's exception of no cause of action because the law affords a remedy for the agency's unlawful decision to issue a variance in lieu of a typical hazardous waste permit.

The Court notes that LEAN argues that even if the VRF/variance is not technically a permit, the LDEQ decision to issue it is still a final permit. The rationale is it exempts Thermaldyne from the requirement to obtain a hazardous waste permit.

The Court rejects this argument, stating:

If the legislature intended to confer appellate jurisdiction on the District Court in instances where no permit is required, it certainly could have done so by including such language in the statute.

LEAN subsequently argues that the District Court has appellate jurisdiction under the Administrative Procedure Act ("APA").

The Court rejects this argument stating that the APA's judicial review provisions are not intended to supersede specific provisions of other administrative acts, or to supersede the rights and remedies created under those acts. Cited is La. R.S. 49:964 which provides for judicial review of a final decision or order in an adjudicatory proceeding.

The Court concludes that unless the constitution or a statute requires a hearing and notice, an agency action is not an adjudication for purposes of judicial review under this provision. The regulations are noted to not require a hearing in the granting of a VRF variance. Instead, they are referenced as stating that a hearing may be held at the agency's discretion. Consequently, the Court held that there has not been a final decision or order issued in an adjudicatory proceeding and judicial review is not available.

The Court upholds the District Court and finds that it lacked subject matter jurisdiction.

A copy of the decision can be downloaded [here](#).