

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1822

HARRELSON MATERIALS MANAGEMENT, INC.

VERSUS

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY IN  
THE MATTER OF MIKEEBO, INC. TYPE III  
CONSTRUCTION/DEMOLITION DEBRIS AND WOODWASTE  
FACILITY D-017-12376/AI#117009/PER20030001/P-0381

*DATE OF JUDGMENT:* **JUN 20 2007**

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
(NUMBER 537,777 DIV. "N" SEC: 27), PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

THE HONORABLE DONALD JOHNSON, JUDGE

\* \* \* \* \*

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**BEFORE: KUHN, GAIDRY, AND WELCH, JJ.**

**Disposition: AFFIRMED.**

**KUHN, J.**

Petitioner-appellant, Harrelson Materials Management, Inc. (“HMM”), claims the trial court erred in affirming the Louisiana Department of Environmental Quality’s September 22, 2005 decision to issue a solid waste permit to Mikeebo, Inc. After a complete review of both the trial court record and the administrative record, we find no error and affirm the trial court’s judgment.

### **I. PROCEDURAL AND FACTUAL BACKGROUND**

On September 17, 2003, Mikeebo Inc. (“Mikeebo”) filed an application for a Type III Construction and Demolition (“C&D”) Debris Landfill Permit with the Louisiana Department of Environmental Quality (“DEQ”). The Mikeebo facility (“the facility”) is located approximately ten miles northwest of Shreveport, Louisiana. Mikeebo’s solid waste disposal application described the facility property as encompassing 80 acres of land and projected that 52.6 acres would be used for disposal of residential and commercial C&D debris and woodwastes.<sup>1</sup> The application included an engineering drawing, reflecting four phases or sections of the facility and explained, “[The facility] is to be constructed and filled in multiple Phases,” and “each active area will be filled prior to placement of waste in the successive area.”

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<sup>1</sup> Mikeebo’s application described the waste accepted for disposal at the site to include construction and demolition debris, woodwastes, and yardwastes. The sources of this waste include land clearing operations; municipal, commercial, and residential demolition and construction sites; and lawn, yard, and tree maintenance services. The application further listed the receipt or disposal of hazardous waste, liquid waste, infectious waste, residential waste, industrial waste, commercial waste, and friable asbestos as “prohibited/prevented” activities. Additionally, the application stated, “No disposal of putrescible solid waste will be conducted at the facility.” The application further provided, “The maximum quantity of waste that will be accepted per year is 490,000 cubic yards (140,000 wet tons).”

HMM, who owns and operates a C&D landfill located in Shreveport, filed comments with DEQ opposing Mikeebo's permit application. DEQ performed a technical review of Mikeebo's application, conducted a field inspection of the facility site, held a public hearing, received comments from the public, and resolved various notices of deficiency issued to Mikeebo. On September 22, 2005, DEQ granted Mikeebo's application (Standard Permit Number P-0381, Site Number D-017-12376), which authorizes "operation of the Facility ... in accordance with the representations made in the permit application."<sup>2</sup> DEQ issued its detailed basis for decision and notified Mikeebo, HMM, and other interested parties of the permit action.

Thereafter, HMM filed a timely petition for judicial review, challenging DEQ's decision to grant the permit application.<sup>3</sup> HMM claims DEQ has failed to mandate Mikeebo's compliance with the appropriate regulatory standards for a Type III waste disposal facility and that DEQ has failed to properly discharge its obligations as set forth in La. R.S. 30:2014(A) and in *Save Ourselves, Inc. v. La. Envtl. Control Comm'n*, 452 So.2d 1152 (La. 1984). Mikeebo intervened in this matter, praying for the denial of HMM's demands. After the parties argued the

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<sup>2</sup> The permit further states, in pertinent part, "No modification to the site, facility, process or disposal method or operation may be effected without prior approval of the Assistant Secretary of Environmental Services [of DEQ] in accordance with [Louisiana Administrative Code] 33:VII.517A."

<sup>3</sup> As a business that services the same general market as Mikeebo, HMM is an aggrieved party pursuant to La. R.S. 30:2050.21. This statute also provides, in pertinent part, "A petition for review must be filed in the district court within thirty days after notice of the action or ruling being appealed has been given. The district court shall grant the petition for review." By letter dated October 4, 2005, DEQ notified HMM that it had issued the permit to Mikeebo, and HMM filed its petition on November 3, 2005.

matter, the district court signed a May 18, 2006 judgment that affirmed the DEQ's issuance of the permit.

HMM has appealed, urging DEQ did not conduct the required IT cost-benefit analysis of the entire landfill project proposed by Mikeebo and that the trial court erred by affirming DEQ's defective permit decision. HMM asserts the permit decision is defective because DEQ failed to fulfill its constitutional and statutory obligation to ensure that the permit was protective of human health and the environment. HMM seeks to have the permit decision reversed and the permit vacated.

## II. ANALYSIS

Article 9, § 1 of the Louisiana Constitution sets forth the public policy of protecting our natural resources and environment:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic 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.

In the "IT Decision," *Save Ourselves*, 452 So.2d at 1157, the Louisiana Supreme Court interpreted this constitutional mandate to impose a "rule of reasonableness," requiring DEQ to determine, before granting approval of any proposed action affecting the environment, that adverse environmental impacts have been minimized or avoided as much as possible, consistently with the public welfare. The Court also set forth a number of factors to be considered by DEQ when conducting an IT cost-benefit analysis to determine whether to grant or deny a permit for a proposed facility. *Id.* In *Matter of Rubicon, Inc.*, 95-0108, p. 12

(La.App. 1st Cir. 2/14/96), 670 So.2d 475, 483, this court condensed the *Save Ourselves* IT considerations into three categories:

[A]ny written finding of facts and reasons for decision [by DEQ] must satisfy the issues of whether: 1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible; 2) a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and 3) 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.

When DEQ makes permit decisions, the *Save Ourselves* decision and subsequent case law, laws interpreting those decisions, and the rules and regulations adopted by DEQ in accordance with those decisions may be used to implement the public trustee issues. La. R.S. 30:2014.3A. Pursuant to the Louisiana Solid Waste Management and Resource Recovery Law, La. R.S. 30:2151 et seq., the legislature has recognized that “the disposal and utilization of solid waste is a matter of vital concern to all citizens of this state, and that the safety and welfare of the people of Louisiana require efficient and **reasonable** regulation of solid waste disposal practices as well as a coordinated statewide resource recovery and management program.” (Emphasis added.) La. R.S. 30:2152.<sup>4</sup> DEQ is the primary agency in the state concerned with environmental protection and regulation and has jurisdiction over the regulation of solid waste

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<sup>4</sup> Within the meaning of the Louisiana Solid Waste Management and Resource Recovery Law, “resource management” means the process by which solid waste is collected, transported, stored, separated, processed, or disposed of in any other way, according to an orderly, purposeful, and planned program. La. R.S. 30:2153(2).

disposal. La. R.S. 30:2011A. DEQ's secretary has the power to grant or deny permits.<sup>5</sup> La. R.S. 30:2011D(2).

### A. Standard of Review

In *Oakville Cmty. Action Group v. La. Dep't of Env'tl. Quality*, 05-1365, p. 15 (La. App. 1st Cir. 5/5/06), 935 So.2d 175, 183, this court set forth the applicable standard for our appellate review:

Louisiana Revised Statute 30:2050.21 sets forth the procedure for judicial review of a final permit decision of the [DEQ]. Judicial review provisions of the Administrative Procedure Act and its standard of review are applicable to [DEQ] proceedings. LSA-R.S. 30:2050.21(F)....

When reviewing an administrative final decision in an adjudication proceeding, the district court functions as an appellate court. The Nineteenth Judicial District Court is vested with exclusive jurisdiction to review final permit actions, final enforcement actions, or declaratory rulings made by the [DEQ]. LSA-R.S. 30:2050.21(A). Any party aggrieved by a final judgment or interlocutory order or ruling of the Nineteenth Judicial District Court may appeal or seek review to this court. LSA-R.S. 30:2050.31

A reviewing court may affirm the decision of the agency or remand the case for further proceedings. LSA-R.S. 49:964(G). The court may reverse or modify an agency 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 unlawful procedure; (4) affected by other error of law; (5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) not supported and sustainable by a preponderance of the evidence as determined by the reviewing court.

On review, an appellate court should not reverse a substantive decision of DEQ on its merits, unless it can be shown that the actual balance of costs and

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<sup>5</sup> DEQ's secretary also has the power to delegate this authority to the appropriate assistant secretary when deemed appropriate. La. R.S. 30:2011D(3).

benefits that was struck was arbitrary or clearly gave insufficient weight to environmental protection. *Dow Chem. Co. La. Operations Complex Cellulose and Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications and Emission v. Reduction Credits*, 03-2278, p. 8 (La. App. 1st Cir. 9/17/04), 885 So.2d 5, 10, *writ denied*, 04-3005 (La. 2/18/05), 896 So.2d 34. However, if the decision was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the courts' responsibility to reverse. *Save Ourselves*, 452 So.2d at 1159. 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*, 93-1978, p. 12 (La. App. 1st Cir. 7/14/95), 661 So.2d 143, 150.

## **2. Adequacy of DEQ's Environmental Assessment**

Generally, HMM urges that DEQ failed to conduct a reasoned and balanced analysis of Mikeebo's permit application and contends that the resulting permit is not protective of the environment. HMM asserts that DEQ failed to fulfill its *Save Ourselves* obligations because it conducted an inadequate environmental assessment based on incomplete and misleading information, and it failed to consider all environmental impacts from the facility.

More specifically, HMM asserts that DEQ: 1) failed to demonstrate that the social and economic benefits of the Mikeebo facility outweigh the environmental impact costs; 2) based its conclusions about the potential adverse effects of the facility upon incorrect facts regarding the nature of the land to be used as a landfill and upon incorrect demographic information regarding the surrounding community; 3) failed to adequately assess the impact of the facility on the local

roads and on the nearby Louisiana Wildlife and Fisheries Soda Lake Wildlife Management Area (“Soda Lake WMA”); 4) failed to require Mikeebo to perform adequate soil testing to ensure that the facility soils are appropriate and adequate for waste disposal; 5) failed to ensure that water resources are protected; 6) failed to properly consider alternative projects, alternative sites, and mitigating measures that would provide more protection to the environment; and 7) considered only the immediate “front-end” environmental impacts of the facility while disregarding environmental impacts that might result from waste disposal in future phases of the project.

**a. Nature of the Facility Land**

HMM asserts that DEQ was confused about the nature of the Mikeebo site, particularly the size of the borrow pit located at the facility site. It suggests that DEQ based several parts of its IT analysis on a presumption that the existing borrow pit comprised all or a large part of the proposed 52.6-acre disposal area, when the pit is only two to three acres in size. HMM further suggests that DEQ’s analysis regarding adverse environmental impacts, cost/benefit comparison, possible alternative sites, and mitigating measures are all undermined by the presumption of beneficial impacts from filling the borrow pit. In support of its argument, HMM references contour maps provided by Mikeebo in its permit application, which reflect that the borrow pit comprises only a portion of one of the four phases of the disposal area and comprises no more than twenty percent of the total disposal area.

Even if DEQ did not have information regarding the exact size of the borrow pit, the contour maps included within Mikeebo’s application provided



information to DEQ regarding the approximate size of the borrow pit in relation to the rest of the facility. In addition to these maps, the administrative record establishes that prior to issuing the permit, DEQ's field inspector conducted an inspection on July 13, 2005, and noted in his field interview form, "The phase 1 area is an old borrow pit." Moreover, Mikeebo's permit application, which included geological test results from soil borings within the borrow pit and the contour maps revealing the location of the borrow pit and designating the various phases of the facility, indicated to DEQ that the initial waste disposal site was to be in and around the previously excavated borrow pit.<sup>6</sup> Accordingly, we find no merit in HHM's unfounded assertion that DEQ's technical analysis of the permit application was based on an assumption that the borrow pit was 52.6 acres in size. We also do not find merit in HHM's assertion that the initial site of waste disposal was to be solely in the borrow pit rather than within the same phase in which the borrow pit was located.

#### **b. Adequacy of Soil Suitability Testing**

HMM complains that "Mikeebo took only three soil samples from one location on the proposed disposal area, while [a 1994 DEQ Groundwater Interpretation Document] requires at least 6 samples over this 52.6 acre disposal area." HMM asserts that DEQ has issued a non-phased permit authorizing solid waste disposal on the entire 52.6-acre tract, without requiring any additional or

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<sup>6</sup> Admittedly, some confusion arose from an inadvertent mislabeling or improper referencing of the pertinent phases involved. DEQ referred to the initial disposal area ("the borrow pit area") as Phase 1 in its July 12, 2004 notice of deficiencies, although the contour maps revealed that the borrow pit area was actually located within an area labeled as Phase 2. After the permit was issued, DEQ issued a February 6, 2006 minor modification for the purpose of re-designating the area previously referred to as Phase 2 as Phase 1A, based on revised drawings submitted by Mikeebo, reflecting that the borrow pit is within Phase 1A.

future soil testing.<sup>7</sup> While DEQ takes the position that the impact of future expansions and the verification of soil suitability will be addressed by its review of “major modifications” to the facility, HMM argues that DEQ cannot rely on uncertain future permit modifications to fulfill its IT analysis obligation.

HMM argues that DEQ has focused its IT cost-benefit analysis on only the initial phase of the project’s permit action, deferring consideration of environmental impacts in later phases; it urges this “piecemeal” approach considers only the immediate “front-end” environmental impacts of the landfill and violates DEQ’s public trustee obligations. HMM further contends that the delay of the full analysis of environmental impacts is an unreasonable interpretation of *Save Ourselves*.

Louisiana Administrative Code 33:VII.521.D.2 sets forth the geological information that an applicant must submit in a permit application for a Type III construction/demolition debris and woodwaste facility:

- a) general description of the soils provided by a qualified professional (a geotechnical engineer, soil scientist, or geologist) along with a description of the method used to determine soil characteristics; and
- b) logs of all known soil borings taken on the facility ....

Based on such information, a Type III landfill permit applicant must demonstrate that the facility has “natural stable soils of low permeability” that provide a barrier to prevent surface spills from penetrating groundwater aquifers or other water-bearing stratum. Louisiana Administrative Code 33:VII.719.D. This regulation

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<sup>7</sup> HMM complains that the only soil samples taken were from the two-to-three acre borrow pit and that samples were neither taken from any part of the remaining six to seven acres in that same disposal phase nor from the remaining 50 acres of disposal area authorized by the permit.

does not require any specific number of borings for any given acreage to establish compliance.

Mikeebo's permit application included a description of the landfill soils and the methods used to determine soil characteristics. It is undisputed that Mikeebo's permit application was prepared and submitted by qualified professionals and that the application included detailed laboratory test results regarding the soil borings performed in the initial waste disposal area of the borrow pit. DEQ has determined these soil borings establish the presence of clay soil of appropriate permeability and thickness in the initial disposal area. Thus, DEQ found Mikeebo complied with the geologic requirements of Section 519.D. Further, based on the soil sampling already provided by Mikeebo, DEQ concluded that as long as Mikeebo operates within the initial 9.2 acre waste disposal cell (the phase that includes the borrow pit), Mikeebo is in compliance with its 1994 Groundwater Interpretation Document requiring, "a minimum of 3 borings and at least 1 boring for every 8 acres of regulated unit(s) to a minimum depth of 5 feet below the lowest point of excavation."<sup>8</sup>

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<sup>8</sup> We note the 1994 Groundwater Interpretation Document states, "THIS DOCUMENT IS DESIGNED TO HELP FACILITIES UNDERSTAND THE LOUISIANA SOLID WASTE REGULATIONS AND MUST BE USED IN CONJUNCTION WITH THE REGULATIONS. HOWEVER, THIS DOCUMENT DOES NOT SUPERCEDE THE LOUISIANA SOLID WASTE REGULATIONS." Thus, Mikeebo is required to comply with the pertinent solid waste regulations, and this interpretation document simply provides guidance.

While HMM complains that Mikeebo was not required to conduct sampling throughout the initial 9.2 acres of the initial disposal phase or cell, we conclude that the regulations did not require Mikeebo to submit soil borings from outside the contour of the borrow pit. Further, we conclude the Department reasonably concluded, based on the testing performed, that the soil from within the borrow pit was generally characteristic of the soil throughout the initial disposal cell.

The permit issued to Mikeebo provides, “The operation of the Facility shall be in accordance with the representations made in the permit application ....” The permit application states, “The active Phase will be completed and the corresponding area filled and provided with interim cover before waste will be accepted in the subsequent area.” DEQ has concluded that each time Mikeebo completes a disposal cell or phase and contemplates the development of another one, Mikeebo is required to submit an application for a modification of the standard permit. Louisiana Administrative Code 33:VII.517.A. An applicant seeking a major modification of an existing permit authorizing the disposal of solid wastes is required to submit an environmental assessment statement as part of the application. La. R.S. 30:2018. Such statement shall be used to satisfy the public trustee requirements of La. Const. Art. IX, Section 1. Also, DEQ may, and if requested, shall, conduct a separate public hearing on the environmental assessment statement. La. R.S. 30:2018C. In considering such a request, DEQ shall rely on its applicable rules and regulations to determine whether the modification is considered as major or minor. La. R.S. 30:2018G.

DEQ classifies the proposed future modification, i.e., the disposal of waste in a new cell or phase of the facility, as a “major modification.” A “major modification” is defined as “any change in a site, facility, process or disposal method, or operation which substantially deviates from the permit or **tends to substantially increase the impact of the site, facility, process or disposal method, or operation on the environment.**” (Emphasis added). Louisiana Administrative Code 33:VII.115. The district court properly afforded deference to DEQ’s classification of the proposed future modifications of the facility. A state

agency is charged with interpreting its own rules and regulations and great deference must be given to the agency's interpretation. *Oakville Cmty. Action Group*, 05-1365 at pp. 20-21, 935 So.2d at 186. Likewise, we find DEQ's interpretation in this instance is not arbitrary and capricious.

We further find that DEQ need not speculate about all conceivable impacts of future waste disposal. It is appropriate that DEQ considers environmental consequences from the disposal in the initial phase and engages in a more detailed environmental review at a later point when, **and if**, such action becomes necessary. Our legislature has recognized the problems of solid waste management caused by the economic and population growth of our state and the resulting need for increased industrial production and related commercial operations, which have "resulted in a rising tide of unwanted and discarded materials."<sup>9</sup> La. R.S. 30:2038. HMM's restrictive interpretation of the applicable DEQ regulations disregards the problems of the present based on environmental impacts that may never arise. In this instance, the administrative record contains correspondence from DEQ, informing Mikeebo that it will be required to perform additional soil borings if it ultimately seeks authorization to conduct waste disposal in other phases of the facility.

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<sup>9</sup> Mikeebo's permit application references that its facility location is "near a portion of Caddo Parish experiencing rapid growth. This facility fits local needs by providing contractors with a cost-effective way to manage C&D debris and woodwastes generated during site clearing and construction."

### **c. Protection of Water Resources**

HMM argues that DEQ has failed to ensure that nearby surface water resources will be protected from contamination. The facility site naturally drains into two unnamed creeks that in turn flow into Twelve Mile Bayou, located approximately 1,750 feet away from the facility. HMM references oppositions to this drainage from the City of Shreveport and the Pine Hill Water Works District, which expressed concerns regarding water quality during the public comment period.

In its responses to the public hearing comments, Mikeebo addressed those concerns as follows:

Site surface drainage at Mikeebo landfill is downsloped to the east and northeast where two unnamed creeks flow approximately 1,750 feet to Twelve Mile Bayou. A small pond located approximately 300 feet from the facility will be isolated from facility operations by the installation of Sediment Basin 1 and the associated spillway which will direct facility surface runoff to bypass the pond ....

The disposal areas will be graded so that storm water flows either east toward Sediment Basin 1 or west to Sediment Basin 2 .... Water will then flow through the permitted outfall points to the unnamed creeks flowing north to Twelve Mile Bayou. Outside of the disposal area the site will be graded so that storm water flows in a controlled manner to the unnamed creeks.

The nature of construction and demolition debris material minimizes the chance for impact to surface water. The permitted outfalls will be monitored and reported to DEQ on a regular basis.

The facility will result in an aesthetic improvement to the existing open borrow pit and eroding ravine landscape (once the pit is filled and the site closed). Therefore, erosion of soil into Twelve Mile Bayou will be significantly reduced.

In its Basis for Decision, DEQ addressed the potential threat of groundwater contamination and determined that the initial disposal area had been “adequately

investigated and characterized by the installation of three soil borings.” It further stated that “two feet of silty clay will be placed over the waste during closure, and the run-off diversion system will be maintained and modified to prevent overflow of the landfill to adjoining areas.” DEQ also noted that the “nature of construction and demolition debris wastes is such that disposal of this material is generally less threatening to groundwater.”

With respect to the threat of surface water contamination, DEQ referenced the “benign wastes” that would be disposed of in the landfill:

C/D Landfills must accept only non-hazardous wastes generally considered not water-soluble, including but not limited to metal, concrete, brick, asphalt, roofing materials (shingles, sheet rock, plaster), or lumber from a construction or demolition project, but excluding asbestos-contaminated waste, white goods, furniture, trash, or treated lumber. These are benign wastes with a very low probability of causing environmental harm.

DEQ further found that surface waters were adequately protected through the design of the facility, in that stormwater from waste disposal areas will be directed to settling ponds. Thereafter, discharges from the settling ponds into the creeks will be monitored through Louisiana Water Pollution Discharge Elimination System (“LPDES”) discharge points to the creeks. Otherwise, it found that surface contouring of the property would ensure that stormwater drainage from outside the disposal area would not enter the disposal area, and the run-off diversion system would prevent overflow from the landfill into adjoining areas.

DEQ also found that the closest public well to the facility is screened from 189-209 feet below the ground surface and that the “actual footprint of the landfill is well over 1,000 feet from the Mikeebo fenceline” nearest to that water well.

Thus the record supports DEQ's determination that the landfill has been designed to prevent any adverse impact upon water resources.<sup>10</sup>

#### **d. Impact of Facility on Local Roads**

HMM next urges that DEQ failed to adequately assess the impact of the facility on the local roads in the vicinity of the facility.

DEQ regulations require a permit applicant whose facility receives waste generated off-site to submit a letter from the appropriate agency stating, "the facility will not have a significant adverse impact on the traffic flow of area roadways and that the construction, maintenance, or proposed upgrading of such roads is adequate to withstand the weight of the vehicles." Louisiana Administrative Code 33:VII.521.A.1.b.

Mikeebo's permit application described its facility's impact on traffic flow and area roadways as follows:

Trucks and other vehicles approaching the entrance to [the facility] will be on a private crushed limestone/asphalt road and will not adversely impact area traffic flow. The private crushed limestone/asphalt road will be constructed to withstand the coming and going of standard dump trucks. Vehicles will enter and exit the private road from a straight section of Dixie Blanchard Road where visibility of oncoming traffic is very good. A letter from the Louisiana Department of Transportation and Development (LDOTD) stating that [the facility] will not have a significant adverse impact on area traffic and that all roads involved are adequate for the intended use is included [within the application].

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<sup>10</sup> Although Mikeebo's proposed design is protective of the environment, HMM asserts that DEQ "relies on the construction of 'two settling ponds' but does not explain when (or during what phase) those ponds will be constructed." Because the permit authorizes "operation of the Facility ... in accordance with the representations made in the permit application," any disposal prior to the construction of the run-off diversion system described in the permit application would be contrary to the permit terms. DEQ does not need to impose more specific construction dates.



The referenced letter, an April 4, 2003 letter from John G. Sanders, P.E., District Maintenance Engineer of the Louisiana Department of Transportation and Development (“DOTD”) to Christopher B. Coreil, Jr., Project Manager of Brown and Caldwell, states that Mikeebo’s facility “will not have significant adverse impact on the traffic flow on local **state highways**.<sup>11</sup> The area roadways and the construction, maintenance, or proposed upgrading of the affected roadways is adequate to withstand the weight of the proposed vehicles.”

Although DEQ accepted the DOTD letter as meeting the requirement set forth in Louisiana Administrative Code 33:VII.521.A.1.b, HMM urges that DEQ’s reliance on such a “conclusory, bare-bones letter from DOTD is insufficient ....” HMM contends that DEQ’s response to the concerns expressed by local residents (that the narrow, two-lane local road leading to the facility access road was unsuited for the traffic of heavy waste trucks) should have been based on DEQ’s independent analysis.

DEQ’s reliance on the determination made by DOTD was appropriate. State agencies are not required to duplicate work done by other state agencies. Because our state legislature has vested the responsibility for road adequacy, safety, and efficiency in DOTD (La. R.S. 36:501), it was not unreasonable for the DEQ to rely on DOTD’s findings.

#### **e. Demographic information**

HMM contends that Mikeebo provided outdated, incorrect, and misleading demographic data to DEQ; it argues that this information was meaningless in

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<sup>11</sup> Brown and Caldwell was the engineering firm who prepared Mikeebo’s application.

DEQ's cost-benefit analysis. Although Mikeebo's application contained 1990 United States census data for the zip code area of the Mikeebo facility, the administrative record establishes that before DEQ issued the Mikeebo permit, HMM provided the 2000 United States census data to DEQ that reflected a higher population density than the information submitted by Mikeebo. Additionally, DEQ's basis for decision (Response 17 of its Response to All Significant Comments) demonstrates that it reviewed current demographic information upon which it commented therein:

At the time that the permit application was prepared, the only demographic information available was for 1990. Current demographic information has been reviewed. This information, in conjunction with information obtained from facility visits, indicates that there are approximately four schools and two major subdivisions that are located within a three-mile radius of the facility. An inspection by departmental staff was conducted and it was noted that the disposal site is approximately 1000 feet from the nearest adjacent property owner. The Department finds that there will be no negative impact to those located within this area.

Additionally, the administrative record reveals that Tammy Bryant, one of the speakers who attended the public hearing regarding the proposed facility, provided information addressing the number of housing units and the number of residents in the three-mile radius of the landfill. Ms. Bryant also informed DEQ about a subdivision located within 1,600 feet of the landfill.

After receiving the updated information, DEQ, in its basis for decision (Response 9 of its Response to All Significant Comments), responded to public hearing comments raising concern for the "quality of air, soil, noise, and water" for those living in the area of the landfill:<sup>12</sup>

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<sup>12</sup> DEQ's "Response to All Significant Comments" is part of its Basis for Decision.

The area is considered 15% residential within a 3-mile radius of the facility. An environmental assessment has been conducted and measures have been put in place to ensure that the Mikeebo facility will not cause an adverse affect on the residential or environmental surroundings.

Thus, a complete review of the administrative record belies HMM's assertions that the permit was issued based upon outdated information.

HMM also submits that DEQ dismissed concerns regarding environmental injustice without sufficient analysis.<sup>13</sup> We find no merit in this argument, finding that DEQ conducted an adequate analysis of the demographics and the potential impact on the community and determined there will be no adverse impact on those located within the vicinity of the landfill. Further, Mikeebo has complied with all pertinent solid waste regulations and applicable environmental laws. We conclude there is no disproportionate, adverse impact on minority residents in that area.

**f. Impact of Facility on Nearby Wildlife-Management Area**

The Mikeebo facility is located near the Soda Lake WMA. HMM complains that DEQ did not require Mikeebo to submit a "wildlife management plan" for the WMA; HMM asserts that a deer management plan that Mikeebo submitted for property adjacent to the Mikeebo site neither addressed the potential effects of the landfill on wildlife nor relates to the protection of any sensitive wildlife.

Louisiana Administrative Code 33:VII.521.A.1.e requires the applicant to submit information pertaining to various environmental characteristics, including wildlife-management areas that are within 1,000 feet of the facility perimeter. In

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<sup>13</sup> We note that although HMM raises the "environmental injustice" argument, it operates its own landfill within the same demographic area.

this instance, the Mikeebo facility is located approximately 2,500 feet from the Soda Lake WMA. Therefore, DEQ regulations did not require Mikeebo to submit a wildlife-management plan for the Soda Lake WMA. Further, according to an April 14, 2003 letter from Gary Lester, Coordinator of the Natural Heritage Program for the Louisiana Department of Wildlife & Fisheries (“DWF”), to Mr. Coreil of Brown and Caldwell, the DWF did not expect the facility to cause any negative impacts to the one known rare plant species at the Soda Lake WMA. The LDWF’s letter further indicated, “no other rare, threatened, or endangered species or critical habitats were found within the area of the captioned project that lies in Louisiana.”

**g. Alternative Projects, Alternative Sites, and Mitigating Measures**

Further, based on the foregoing alleged deficiencies in the permitting process raised by HMM, it asserts DEQ did not properly compare the environmental impacts of the Mikeebo facility with those associated with alternative sites. HMM also urges that DEQ “could not have properly considered whether mitigating measures would provide more protection to the environment.” HMM further suggests that DEQ failed to consider disposal of C&D wastes at an existing C&D landfill as an alternative to permitting the Mikeebo landfill.

DEQ’s thorough Basis for Decision supports its findings that there are no alternative projects, no alternative sites, and no other mitigating measures that would offer more protection to the environment than the proposed facility without unduly curtailing environmental benefits. (See the September 22, 2005 Basis for Decision.) We conclude the factual findings of DEQ in that regard are supported by a preponderance of the evidence, and DEQ’s findings are not arbitrary or

capricious or characterized by an abuse of discretion. Further, we note DEQ was aware of other competitor landfill operations in Caddo Parish and, nonetheless, implicitly determined that another landfill was beneficial to the environment. In its response to a public comment addressing the added burden of another landfill in the district, DEQ stated, “A sufficient number of sites were evaluated, but for various reasons were rejected.... [T]he fact that the Mikeebo site has been a functionless borrow pit for several years, and is located in the center of a wooded area, makes the location suitable.” The DEQ also noted, “The facility’s intent is to improve the site from its original state by filling the pit back to grade and ultimately placing a 24-inch silty clay cap, 6 inches of topsoil, and ground cover to reclaim useable site acreage.”<sup>14</sup> The trial court determined, based on DEQ’s proposed findings, that “the present site benefited the environment by resulting in the reclamation of the past borrow pit operations for useable acreage and removing the associated safety and water resource management issues.” The record contains no basis for finding that DEQ’s determination as to that issue was arbitrary or capricious or gave insufficient weight to environmental protection.

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<sup>14</sup> Mikeebo’s application stated, in pertinent part:

The current open pit status is a maintenance liability, safety hazard, and limits site use. [Mikeebo] is concerned about safety around the pit, controlling erosion, and removing pit rainwater. Development of the site as a C&D debris and woodwaste disposal facility will allow [Mikeebo] to fill the site back to grade, eliminating the maintenance, safety, and water management issues, while reclaiming useable site acreage.

#### **h. Other Environmental impacts of the Landfill**

HMM complains that DEQ has allowed Mikeebo to avoid environmental requirements at the “front-end” of the permit process. HMM complains that DEQ: 1) will allow the facility to be developed in phases; 2) did not require Mikeebo to conduct a cultural resources study; and 3) did not require Mikeebo to obtain a separate air permit for concrete crushing operations. As previously explained, when a new phase of waste disposal (*i.e.*, a major modification of the existing permit) is proposed, Mikeebo will be required to submit another full-scale environmental assessment pursuant to La. R.S. 30:2018. The administrative record establishes that although the Louisiana Department of Culture, Recreation & Tourism (“the DCRT”) had initially recommended that a Phase I cultural resources survey be conducted, after it received additional information from Mikeebo regarding the first disposal cell, the DCRT stated (in a March 24, 2005 letter to Brown and Caldwell) that the area did not need to be surveyed for impacts to cultural resources. Further, while DEQ has recognized that Mikeebo may need to secure an air permit should it seek a concrete crusher at the facility, DEQ has not yet required the air permit because Mikeebo does not currently plan to place a concrete crusher at the facility.

### **III. CONCLUSION**

Our constitution requires environmental protection “insofar as possible and consistent with the health, safety, and welfare of the people.” La. Const. art. IX, § 1. This 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 1156-1157.

The record before us demonstrates that DEQ has complied with its constitutional mandate in considering Mikeebo's permit application. Given our standard of review, absent a showing that the balance of costs and benefits that was struck was arbitrary or that DEQ gave insufficient weight to environmental protection, we decline to reverse DEQ's decision to issue the Mikeebo permit. Further, we conclude DEQ's findings of fact are amply supported by a preponderance of evidence in the record, and the issuance of the permit decision was amply supported by a detailed articulated basis for the decision. After reviewing the record and considering HMM's arguments, we find the record fails to demonstrate DEQ acted arbitrarily or failed to give sufficient weight to environmental concerns in balancing the costs and benefits of issuing the Mikeebo landfill permit. Rather, the record demonstrates that DEQ reasonably determined that any adverse environmental impacts had been minimized or avoided as much as possible consistent with the public welfare. *Dow Chem. Co. La. Operations Complex Cellulose and Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications and Emission*, 03-2278 at pp. 16-17; 885 So.2d at 15. The record does not establish an abdication of DEQ's constitutional duties as public trustee of our environment as contended by HMM.

Pursuant to La. R.S. 49:964(G), we find no violation of constitutional or statutory provisions, no action in excess of DEQ's statutory authority, no unlawful procedure, and no error of law. Further, we find that DEQ's action is not arbitrary or capricious or characterized by an abuse of discretion, and DEQ's actions are supported by a preponderance of the evidence. Thus, we conclude that HMM's substantial rights have not been affected, and it is not entitled to have the September 22, 2005 permit action reversed or modified. Accordingly, we affirm the trial court's May 18, 2006 judgment affirming DEQ's issuance of the permit. Appeal costs are assessed against HMM.

**AFFIRMED.**