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A Tale of Two Bayous: Bayou Bridge and Bayou Canard

Joseph v. Secretary, La. Dep't of Nat. Res., No. 38,163, 23rd Jud'l Dist. Ct., St. James Parish.

In a case centered around the state Coastal Use Permit (permit) granted by the Louisiana Department of Natural Resources (LDNR) for the Bayou Bridge Pipeline, the 23rd JDC recently found that that LDNR was arbitrary and capricious in granting the permit for the pipeline project. This case was initiated by a petition for judicial review under La. R.S. 49:214.35, which argued that LDNR failed to apply its own Coastal Use Guidelines in granting the permit and that LDNR violated its

duty as the public trustee when it failed to consider the impacts that pipeline project would have on the people of St. James.

In reviewing an application for a permit, LDNR must apply its Coastal Use Guidelines found at 43 La. Admin. Code Pt. I. 701-719. Not all guidelines are necessarily implicated by every permit application, but the agency is responsible for determining which guidelines are applicable. Two particular guidelines, § 711(A) and § 719(K) — (K. Effective environmental protection and emergency or contingency plans shall be developed and complied with for all mineral operations) — were flagged by the plaintiffs as improperly ignored by LDNR. It is undisputed that LDNR did not apply those two guidelines, but the question raised by the plaintiffs was whether the facts of the permit application necessitated consideration under those guidelines.

In its permit decision, LDNR reasoned that § 711(A), which relates to surface alterations, did not apply because the more specific § 719(K), which covers oil, gas and mineral activity, applied. However, when reviewing the permit application

under § 719(K), LDNR then determined that it too had no applicability. According to the court, the determination that § 719 did not apply upheld the justification for not applying § 711. The court determined instead that both guidelines should have been applied and that the permit application should be reviewed for its impacts as a surface alteration to the coastal zone (§ 711) and as an activity that is directly involved in the exploration, production and refining of oil, gas and materials (§ 719). In light of LDNR's decision not to apply these two guidelines, the court determined, pursuant to La. R.S. 49:964(G)(5) of the Louisiana Administrative Procedures Act, that LDNR was arbitrary and capricious and remanded the case to the agency for further consideration. The court also ordered LDNR to "require Bayou Bridge Pipeline, LLC, to develop effective environmental protection and emergency or contingency plans relative to evacuation in the event of a spill or other disaster . . . prior to the issues of [a new] permit."

LDNR appealed the district court's ruling on May 22, 2018, to the Louisiana 5th Circuit Court of Appeal.

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Bayou Canard, Inc. v. State, through Coastal Protection & Restoration Auth., 17-1067 (La. App. 1 Cir. 5/14/18), ___ So.3d ____.

In *Bayou Canard*, the Louisiana 1st Circuit overturned a decision by the 19th Judicial District Court, which had ruled in favor of an oyster company's challenge to the Coastal Protection and Restoration Authority's (CPRA) interpretation of the Oyster Lease Acquisition and Compensation Program (OLACP), La. R.S. 56:432.1, which allows CPRA to acquire state-issued oyster leases in the footprint of coastal projects prior to undertaking the construction.

Unlike previous cases testing the limits of the state's shield from suits by oyster leaseholders who challenge coastal restoration activities, (*see, Avenal v. State*, 03-3521 (La. 10/19/04), 886 So. 2d 1085), this suit did not stem from physical harm to the leased property. Rather, Bayou Canard was challenging CPRA's methodology in determining the value of the lease acreage acquired through the program. Bayou Canard challenged CPRA's application of the so-called "harvest efficiency ratio," which resulted in a significant reduction in the value of the acquisitions. Bayou Canard argued (successfully at the 19th JDC) that CPRA's uniform application of the ratio amounted to a formal "rule" and CPRA was required to follow proper rulemaking procedures under the Louisiana Administrative Procedure Act (LAPA), La. R.S. 49:951, *et seq.*, which it did not. Bayou Canard successfully sought summary judgment to declare the state's informal rulemaking invalid.

On appeal, the 1st Circuit declined to overturn the district court's decision that CPRA adopted a rule without proper LAPA promulgation. However, the court quickly moved to the state's third assignment of error, which asserted that under the terms of the oyster lease agreements, Bayou Canard never had a right to bring the suit in the first place. On this point, the court handed CPRA a sweeping victory. In short, the court ruled that the language of the oyster leases in question (which are materially similar to all state-issued oyster leases), which contain two indemnity clauses related to coastal restoration, bars "all claims against CPRA by an oyster lessee resulting

from a coastal restoration project, which includes the claims brought by Bayou Canard herein."

The 1st Circuit found that "[t]his lawsuit results from a coastal restoration project." And "[t]he language of the lease eliminates any right *whatsoever* of Bayou Canard to make any claims against CPRA as a result of the Shell Island West Restoration Project." The court relied on *Avenal v. State*, which related to physical damage caused by the Caernarvon Freshwater Diversion, thereby significantly extending the interpretation of the immunities and limitations of liability contained in state-issued oyster leases in favor of coastal restoration and protection.

Bayou Canard sought writs to the Louisiana Supreme Court on June 13, 2018.

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Divorce

McCalmont v. McCalmont, 17-0644 (La. App. 3 Cir. 12/28/17), 236 So.3d 640.

Ms. McCalmont initially filed a petition for an article 102 divorce. Mr. McCalmont did not file any responsive pleadings. She then filed an amending and supplemental petition for divorce, seeking a divorce on the grounds of adultery, but not pleading any alternative grounds for divorce in that second petition. Mr. McCalmont moved to terminate the community regime retroactive to the date of the filing of the initial petition on the basis of the parties living separate and apart the required time. The court made the termination effective as of the date of the second petition. The court of appeal affirmed, finding that after the amendment of

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