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## In Re American Waste: A Clumsy Expansion of the Right to Litigate Environmental Issues

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# CASENOTES

## **IN RE AMERICAN WASTE: A CLUMSY EXPANSION OF THE RIGHT TO LITIGATE ENVIRONMENTAL ISSUES**

In November 1987, American Waste and Pollution Control Company (American Waste) submitted to the Louisiana Department of Environmental Quality (DEQ)<sup>1</sup> a permit application<sup>2</sup> for a solid waste<sup>3</sup> landfill.<sup>4</sup> The proposed facility, Cade II<sup>5</sup>, would have served a tri-parish area, replacing another landfill that was scheduled for closing.<sup>6</sup> Many local citizens opposed Cade II, alleging that

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1. DEQ is "the primary agency in the state concerned with environmental protection." LA. REV. STAT. ANN. § 30:2011(A)(1) (West Supp. 1995). The department has the power to grant or deny environmental permits. *Id.* § 30:2011(D)(2).

2. Louisiana environmental regulations prohibit new solid waste landfills from being constructed or operated without a permit. LA. ADMIN. CODE tit. 33, § VII.315.E (1994).

3. Solid waste includes garbage and other discarded materials, but does not include such items as sewage, special nuclear material, or hazardous waste. LA. REV. STAT. ANN. § 30:2153(1)(a) (West Supp. 1995). Typically, the composition of solid waste is: 35.6% paper; 20.1% yard waste; 9% rubber, leather, textiles, and wood; 8.9% food waste; 8.9% metals; 8.4% glass; 7.3% plastics; and 1.8% miscellaneous inorganic wastes. Gerald L. Walter, Jr., *Solid Waste Management*, in LOUISIANA ENVIRONMENTAL HANDBOOK, 8-1, 8-2 (Roger Stetter et al. eds., 1994).

4. *In re American Waste & Pollution Control Co.*, 642 So. 2d 1258, 1260 (La. 1994). Under Louisiana law, "'Sanitary landfill' means a controlled area of land upon which non-hazardous solid waste is deposited in such a manner that protects the environment with no on-site burning of wastes, and so located, contoured, and drained that it will not constitute a source of water pollution." LA. REV. STAT. ANN. § 30:2153(7) (West 1989).

5. The proposed facility was to be located near Cade, Louisiana. Cade I was a prior proposal for a solid waste landfill, for which American Waste was denied a construction permit. *American Waste*, 642 So. 2d at 1260.

6. *In re American Waste & Pollution Control Co.*, 581 So. 2d 738, 742-43 app. (La. App. 1st Cir. 1991), cited in *American Waste*, 642 So. 2d at 1261. During much of the 1980s, the New Iberia Landfill served the Parishes of Iberia, St. Martin, and Lafayette, exclusive of the City of Lafayette. *American Waste*, 581 So. 2d at 742 app. However, DEQ set a closing date of April 30, 1990 for the New Iberia Landfill. *Id.* at 742-43 app. The scheduled closing

the landfill would threaten the Chicot Aquifer, a major source of drinking water for southwest Louisiana.<sup>7</sup>

Over the next few years, DEQ evaluated the permit application and held two public hearings on the Cade II proposal.<sup>8</sup> After DEQ completed its file, all DEQ department heads reported that they had no technical objections to granting the permit.<sup>9</sup> On January 9, 1992, Judge Redmann, as DEQ Secretary *pro tempore*,<sup>10</sup> granted American Waste a permit to construct and operate the proposed Cade II facility.<sup>11</sup> War on Waste<sup>12</sup> and the Acadiana Chapter of the National Audubon Society (collectively, "WOW"), filed an appeal to the First Circuit Court of Appeal.<sup>13</sup>

For legal standing, WOW relied on Louisiana Revised Statute section 30:2024(C),<sup>14</sup> which provides that "[a]ny person aggrieved by a final decision or order of the [DEQ] may appeal therefrom to the Court of Appeal, First Circuit. . . ."<sup>15</sup> American Waste filed a motion to dismiss the appeal,<sup>16</sup> arguing that WOW had no right to appeal under section 30:2024(C) because the grant of the Cade II permit was not a "decision or order" as those terms are defined by the Administrative Procedures Act<sup>17</sup> (APA).<sup>18</sup> Under the APA's

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prompted local authorities to negotiate with American Waste for construction of a replacement landfill. *Id.* at 743 app.

7. *American Waste*, 642 So. 2d at 1260.

8. *Id.* at 1260-61. Acting within its statutory discretion, *id.* at 1265, DEQ did not hold any adjudicative hearings. *Id.* at 1264. The public hearings were required by DEQ rules. Rules of Procedure, Louisiana Environmental Control Commission, Rule 5.1(B).

9. *American Waste*, 581 So. 2d at 743.

10. *American Waste*, 642 So. 2d at 1261. Then Secretary Templet was recused on motion by American Waste. *American Waste*, 581 So. 2d at 740. This recusal was upheld by the First Circuit. *Id.* at 742.

11. *American Waste*, 642 So. 2d at 1261.

12. War on Waste is a nonprofit, unincorporated association. *Id.*

13. *Id.*

14. *Id.* at 1263.

15. *Id.*; see LA. REV. STAT. ANN. § 30:2024(C) (West 1989).

16. *American Waste*, 642 So. 2d at 1261.

17. Louisiana's APA is contained in Title 49 of the Revised Statutes. See LA. REV. STAT. ANN. § 49:950 et. seq. (West 1989 and Supp. 1995). The Louisiana APA was originally enacted in 1966 and became effective in 1967. Robert Force & Lawrence Griffith, *The Louisiana Administrative Procedure Act*, 42 LA. L. REV. 1227, 1227 n.1 (1982). The APA provides general procedural rules for administrative agencies. *American Waste*, 642 So. 2d at 1264. Because the APA definition of "agency" includes any department that has authority to make regulations, LA. REV. STAT. ANN. § 49:951(2) (West 1989), the DEQ meets the APA definition of "agency." See LA. REV. STAT. ANN. § 30:2011(D)(1) (West 1989) (statute granting DEQ authority to make regulations).

18. *American Waste*, 642 So. 2d at 1263. At one point, the supreme court suggested that American Waste based its appeal on an assertion that WOW was not an aggrieved

definitions, an agency action is a “decision or order” only if a hearing is required by “constitution or statute.”<sup>19</sup>

The First Circuit determined that WOW did have a right to appeal under 30:2024(C).<sup>20</sup> The court reasoned that by alleging a threat to drinking water, WOW was asserting a property right for which due process required a hearing.<sup>21</sup> Concluding that a hearing was required by “constitution or statute,” the court held that the DEQ action was a “decision or order” as defined by the APA and therefore WOW had standing to appeal under 30:2024(C).<sup>22</sup> On the merits, the First Circuit vacated the order granting the permit and remanded the application to DEQ for further proceedings.<sup>23</sup>

On application by American Waste,<sup>24</sup> the Louisiana Supreme Court granted writs to review the matter.<sup>25</sup> In a five to two decision,<sup>26</sup> the Louisiana Supreme Court *held* that the APA definition of “decision or order” does not apply to Louisiana Revised Statute 30:2024(C) and that DEQ’s grant of the solid waste landfill permit was a “decision or order” appealable under 30:2024(C).<sup>27</sup> *In re*

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party. *Id.* at 1261. Actually, American Waste’s primary argument supporting dismissal was that the DEQ action was not a “decision or order.” *See id.* at 1263-64. This is made clear by the legal analysis in the noted case, *id.* at 1263-64, as well as the discussion of standing in the First Circuit’s opinion, *In re American Waste & Pollution Control Co.*, 633 So. 2d 188, 189-90 n.2 (La. App. 1st Cir. 1993), *aff’d on other grounds*, 642 So. 2d at 1258 (La. 1994). In addition, American Waste argued that the case should be dismissed because WOW had not exhausted its administrative remedies, Brief for Applicant at 10-11, *American Waste*, 642 So. 2d at 1258, and because the permit appeal was not a civil matter constitutionally within the appellate court’s subject matter jurisdiction. *American Waste*, 642 So. 2d at 1266.

19. LA. REV. STAT. ANN. § 49:951(3) (West 1987).

20. *American Waste*, 633 So. 2d at 189-90 and n.2.

21. *Id.* at 190 n.2.

22. *Id.*

23. *Id.* at 197. The First Circuit concluded that DEQ did not establish for the record that it had properly evaluated alternative sites and balanced the benefits and risks of the proposed landfill. *Id.* at 194-95.

24. See Brief for Applicant at 10-11, *American Waste*, 642 So. 2d 1258 (La. 1994).

25. *American Waste*, 642 So. 2d at 1261.

26. Justice Watson wrote for the court. *Id.* at 1260. Justices Marcus and Kimball dissented and assigned reasons. *Id.* at 1266. Justice Shortess, sitting *pro tempore* for Justice Dennis, was not on the panel. *Id.* at 1260 n.1.

27. *Id.* at 1265. In addition to interpreting 30:2024(C), the court explicitly rejected American Waste’s contention that the appellate court lacked subject matter jurisdiction to hear an appeal from the DEQ. *Id.* at 1266. The court did not discuss American Waste’s argument that WOW lacked standing for failure to exhaust its administrative remedies, *see supra* note 18, but by upholding WOW’s standing the court implicitly rejected that argument. The supreme court noted that the appropriate standard of review gives deference to DEQ determinations, *id.* at 1265, but nonetheless affirmed the First Circuit’s ruling vacating DEQ’s grant of the Cade II permit and remanding the matter to DEQ. *Id.* at 1266.

*American Waste and Pollution Control Co.*, 642 So. 2d 1258, 1265 (La. 1994).

The Louisiana Constitution of 1974 mandates that "the environment shall be protected,<sup>28</sup> conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."<sup>29</sup> Although some delegates to the 1973 Constitutional Convention proposed giving private citizens a constitutional right to bring suit on environmental matters, the convention rejected those proposals and kept environmental protection within the province of the legislature.<sup>30</sup>

In 1983,<sup>31</sup> acting pursuant to its constitutional mandate, the legislature created the Department of Environmental Quality.<sup>32</sup> The legislature made the DEQ the "primary agency" with responsibility for protecting the environment<sup>33</sup> and gave the DEQ the power to adopt environmental regulations<sup>34</sup> and to grant or deny

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28. Prior to 1921, the Louisiana Constitution did not expressly authorize governmental action to protect the environment. Charles S. McCowan, Jr., *The Evolution of Environmental Law in Louisiana*, 52 LA. L. REV. 907 (1992). However, the Civil Code authorized local regulation of smoke and odors, *id.* n.2, and Louisiana courts would sometimes grant to government, *id.* at 908, or private individuals, *id.* at 909, injunctive relief from environmental nuisances.

In contrast to earlier constitutions, the Constitution of 1921 explicitly provided for environmental protection, directing the legislature to conserve the "natural resources" of the state. LA. CONST. OF 1921, art. VI, § 1. Still, Louisiana had few controls on wastes until the mid-1970's. Roger Stetter, et al., *Environmental Law Fundamentals*, in LOUISIANA ENVIRONMENTAL HANDBOOK, 2-1, 2-4 (Roger Stetter, et al., eds. 1994).

29. LA. CONST. art. IX, § 1. The constitutional mandate to protect the environment was interpreted in a 1984 landmark decision, *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984), cited in *American Waste*, 642 So. 2d at 1262. *Save Ourselves* determined that the constitutional standard does not establish environmental protection as an exclusive goal, but that it does require environmental costs to be balanced against economic, social, and other factors. *Save Ourselves*, 452 So. 2d at 1157. The case is also known as the "IT decision," see, e.g., *American Waste*, 633 So. 2d at 193 n.4, because the case involved IT corporation. *Save Ourselves*, 452 So. 2d at 1154. The case established a governmental responsibility toward the environment that has become known as the "public trust doctrine." McCowan, *supra* note 28, at 918.

30. *In re American Waste & Pollution Control Co.*, 588 So. 2d 367, 372 (La. 1991), cited in *American Waste*, 642 So. 2d at 1262.

31. In 1983, legislators introduced more bills dealing with environmental matters than in any previous year. Charles S. McCowan, Jr. & Maureen N. Harbourt, *Update of Louisiana Environmental Laws and Regulations*, 31 LA. BAR J. 168, 172 (1983).

32. DEQ became the successor to the Office of Environmental Affairs, an agency which had been located within the Department of Natural Resources. McCowan, *supra* note 28, at 913-15.

33. LA. REV. STAT. ANN. § 30:2011(A)(1) (West Supp. 1995).

34. *Id.* § 30:2011(D)(1) (West 1989).

permits.<sup>35</sup> The DEQ was given significant discretion, including the authority to issue solid waste landfill permits without the necessity of an adjudicatory hearing.<sup>36</sup> However, the department's discretion is not unlimited.<sup>37</sup> The Louisiana Environmental Quality Act<sup>38</sup> (LEQA) provides both substantive<sup>39</sup> and procedural guidelines.<sup>40</sup> Procedural provisions include the LEQA requirements that DEQ give notice and a hearing before assessing civil penalties,<sup>41</sup> before modifying a permit for cause,<sup>42</sup> and within fifteen days of issuing an emergency cease and desist order.<sup>43</sup> The LEQA also provides for appeals.<sup>44</sup>

Section 30:2024(C) provides that “[a]ny person aggrieved<sup>45</sup> by a final<sup>46</sup> decision or order of the [DEQ] may appeal therefrom to the Court of Appeal, First Circuit . . . .”<sup>47</sup> Because the right to appeal depends upon the existence of a “final decision or order,” the meaning of that phrase becomes important.<sup>48</sup> However, Section 30:2024(C) does not define the term, and, in interpreting the right to appeal, the First Circuit produced two inconsistent lines of cases.<sup>49</sup>

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35. *Id.* § 30:2011(D)(2) (West Supp. 1995).

36. *American Waste*, 642 So. 2d at 1265.

37. *See infra* notes 40-44 and accompanying text.

38. Title 30, Subtitle II of the Louisiana Revised Statutes (§ 30:2001 et. seq.) is known as the Louisiana Environmental Quality Act. *See* LA. REV. STAT. ANN. § 30:2001 (West 1989).

39. *See, e.g.*, LA. REV. STAT. ANN. § 30:2156 (West 1989) (limiting liability of landowners for removal of solid wastes).

40. *See, e.g.*, LA. REV. STAT. ANN. § 30:2019(A) (West 1989) (providing that adoption, amendment, or repeal of rules shall be in accordance with the APA).

41. LA. REV. STAT. ANN. § 30:2025(E)(4) (West 1989).

42. *Id.* § 30:2023(B)(2) (West Supp. 1995).

43. *Id.* § 30:2025(C)(1) (West 1989). Also, due process would require a hearing if a person has a property or liberty interest at stake. *Delta Bank & Trust Co. v. Lassiter*, 383 So. 2d 330, 334 (La. 1980), *cited in American Waste*, 642 So. 2d at 1263.

44. LA. REV. STAT. ANN. § 30:2024(C) (West 1989).

45. A person is aggrieved if he has a real and actual interest that is adversely affected by a DEQ action. *In re BASF Corp. Chem. Div.*, 533 So. 2d 971, 973 (La. App. 1st Cir. 1988); *see also* LA. CODE CIV. PROC. ANN. art. 681 (West 1960).

46. A “final judgment” is a judgment that determines the merits of a controversy. LA. CODE CIV. PROC. ANN. art. 1841 (West 1990). In *In re Marine Shale Processors, Inc.*, the issue was whether a DEQ action was final. 563 So. 2d 278, 281-82 (La. App. 1st Cir. 1990), *cited in American Waste*, 642 So. 2d at 1263. The court cited Louisiana Code of Civil Procedure article 1841, *id.* at 281, and also noted that federal courts have determined finality of agency action based in part on whether judicial review would disrupt the “orderly process of adjudication.” *Id.* at 282.

47. LA. REV. STAT. ANN. § 30:2024(C) (West 1989).

48. *See infra* notes 49-95 and accompanying text.

49. *American Waste*, 642 So. 2d at 1263.

One line of cases was headed by *In re Carline Tank Services, Inc.*<sup>50</sup> In *Carline*, the First Circuit determined that the APA's definition of "decision or order"<sup>51</sup> applies to 30:2024(C).<sup>52</sup> The court relied on the APA's stipulation that the Act applies to all agencies unless expressly excepted by legislation<sup>53</sup> and that no statute either supplies an alternative definition of "decision or order" or excludes the APA's definition of "decision or order" from applying to Louisiana Revised Statute Section 30:2024(C).<sup>54</sup>

For additional support of its conclusion that the APA definitions apply to section 30:2024(C), the *Carline* court cited the *Save Ourselves* decision.<sup>55</sup> In *Save Ourselves*, the meaning of "decision or order" was not an issue, but the supreme court did discuss appeals of DEQ decisions.<sup>56</sup> The supreme court noted that 30:2024(C) excludes the application of two sections<sup>57</sup> of the APA that direct appeals to the district court and instead section 30:2024(C) provides that DEQ decisions are to be appealed to the First Circuit.<sup>58</sup> The supreme court concluded that the altered venue for appeals was the only reason that application of the two APA sections was excluded.<sup>59</sup> From that supreme court explanation, the First Circuit inferred that other provisions of the APA would apply,<sup>60</sup> including the APA definitions found in section 49:951, a section whose application was not expressly excluded, section 49:951.<sup>61</sup> Section 49:951(3) states that "[d]ecision' or 'order' means the whole or any part of the final disposition . . . of any agency, in any matter other than rulemaking, required by constitution or statute to be

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50. *In re Carline Tank Serv., Inc.*, 626 So. 2d 358 (La. App. 1st Cir. 1993), cited in *American Waste*, 642 So. 2d at 1263.

51. See *infra* note 63 and accompanying text.

52. *Carline*, 626 So. 2d at 362-63. See also *In re Carline Tank Serv., Inc.*, 627 So. 2d 669, 669-70 (La. App. 1st Cir. 1993) (denying rehearing and explaining the original holding in more detail), cited in *American Waste*, 642 So. 2d at 1263.

53. LA. REV. STAT. ANN. § 49:966(B) (West 1987); *Carline*, 626 So. 2d at 362.

54. *Carline*, 626 So. 2d at 362-63. Commentators have also interpreted the APA as having a broad coverage, stating for example that all state agencies "which promulgate rules or make decisions . . . are subject to the [APA] unless they are part of the legislature, the judiciary, . . . or unless expressly exempted from the [APA]." Robert Force & Lawrence Griffith, *The Louisiana Administrative Procedure Act*, 42 LA. L. REV. 1227, 1231 (1982).

55. *Carline*, 626 So. 2d at 363 n.7.

56. *Save Ourselves*, 452 So. 2d at 1158.

57. See LA. REV. STAT. ANN. §§ 49:962 and 49:964 (West 1989 and Supp. 1995).

58. *Save Ourselves*, 452 So. 2d at 1158; see LA. REV. STAT. ANN. § 30:2024(C) (West 1989).

59. *Save Ourselves*, 452 So. 2d at 1158.

60. *Carline*, 626 So. 2d at 363 n.7.

61. See LA. REV. STAT. ANN. § 49:951 (West 1987 and Supp. 1995).

determined on the record after notice and opportunity for an agency hearing . . . .”<sup>62</sup> Thus, if section 49:951(3) applies to section 30:2024(C), then the right to appeal DEQ actions depends upon the existence of some statutory or constitutional requirement for a hearing.<sup>63</sup> That reasoning was applied in *Carline*.<sup>64</sup>

In *Carline*, the DEQ granted an air emissions permit for a barge cleaning operation.<sup>65</sup> A competitor<sup>66</sup> of the company that received the permit appealed the DEQ action, claiming standing under 30:2024(C).<sup>67</sup> The court, however, noted that no statutory or constitutional provision mandates a hearing before an air permit is granted.<sup>68</sup> Further, the court determined that the competitor was not asserting a property or liberty interest such that due process required a hearing for the specific case.<sup>69</sup> Thus, no hearing was required at all.<sup>70</sup> The First Circuit held that because a hearing was not required, the DEQ action was not a decision or order, and the competitor could not appeal under 30:2024(C).<sup>71</sup>

In *In re Industrial Pipe*, the First Circuit applied the *Carline* reasoning in dismissing an environmental group’s appeal of a DEQ action granting a solid waste permit.<sup>72</sup> The *Carline* reasoning was applied yet again by the First Circuit in *American Waste*.<sup>73</sup>

Thus, under *Carline* and its progeny, an aggrieved party could appeal a DEQ action to the First Circuit when a statute or constitutional provision created a general requirement for an adjudicative hearing or when due process required a hearing.<sup>74</sup> However, when an initial hearing was not required, section 30:2024(C) could not be used to bring an appeal.<sup>75</sup>

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62. *Id.* § 49:951(3) (West 1987).

63. *See supra* note 51 and accompanying text; *see also supra* note 47 and accompanying text.

64. *Carline*, 626 So. 2d at 363.

65. *Id.* at 359.

66. *Id.* at 363.

67. *Id.* The competitor alleged that DEQ made several errors, including a failure to follow its own rules. *Id.* at 359-60.

68. *Carline*, 626 So. 2d at 363.

69. *Id.* at 363-64.

70. *Id.* at 363.

71. *Id.*

72. *In re Industrial Pipe, Inc.*, 626 So. 2d 364 (La. App. 1st Cir. 1993), *cited in American Waste*, 642 So. 2d at 1263.

73. *American Waste*, 633 So. 2d at 189-90 n.2. However, the court determined that WOW could appeal because due process required a hearing. *Id.*

74. *Carline*, 626 So. 2d at 363-64.

75. *Id.*

The other line of cases was headed by *In re Marine Shale Processors, Inc.*,<sup>76</sup> which was decided before *Carline*.<sup>77</sup> *Marine Shale* held that the DEQ's denial of a permit variance was a "final order or decision" appealable under 30:2024(C),<sup>78</sup> even though no statute or constitutional provision requires a hearing before a requested permit variance is denied.<sup>79</sup> However, the court only addressed whether the DEQ action was "final."<sup>80</sup> Apparently, the parties did not question the meaning of "decision or order."<sup>81</sup> Thus, the absence of a legal requirement for a hearing was not discussed.<sup>82</sup>

In *In re Recovery I*,<sup>83</sup> the First Circuit used *Marine Shale* as authority for allowing an environmental group to appeal a settlement agreement<sup>84</sup> between the City of Shreveport, DEQ, and a private company,<sup>85</sup> even though no statute or constitutional provision required a hearing.<sup>86</sup> However, in holding that the challenged DEQ action was a "final decision or order," the *Recovery I* court, like the *Marine Shale* court, focused on the issue of finality.<sup>87</sup> The court did not address the absence of a requirement for a hearing.<sup>88</sup> Neither did the court mention or attempt to distinguish *Carline*,<sup>89</sup> which had been decided by a different First Circuit panel approximately ten weeks earlier.<sup>90</sup>

Thus, under *Marine Shale* and its progeny, aggrieved persons could use section 30:2024(C) to provide standing to appeal DEQ

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76. *In re Marine Shale Processors, Inc.*, 563 So. 2d at 278.

77. *Carline* was decided in 1993, 626 So. 2d at 358, while *Marine Shale* was decided in 1990, 563 So. 2d at 278.

78. *Marine Shale*, 563 So. 2d at 282.

79. See LA. REV. STAT. ANN. § 30:2014 (West 1989 and West Supp. 1995). See also *Carline*, 627 So. 2d at 672 (implicitly treating *Marine Shale* as involving a DEQ action where no hearing was required).

80. *Carline*, 627 So. 2d at 672; see *Marine Shale*, 563 So. 2d at 281-82.

81. *Carline*, 627 So. 2d at 672-73 n.9.

82. *Id.*

83. *In re Recovery I, Inc.*, 622 So. 2d 272 (La. App. 1st Cir. 1993), writ denied, 629 So. 2d 383 (La. 1994), cited in *American Waste*, 642 So. 2d at 1263.

84. *Recovery I*, 622 So. 2d at 275.

85. *Id.* at 273.

86. LA. REV. STAT. ANN. § 30:2025(H) (West 1989 and West Supp. 1995). See also *Carline*, 627 So. 2d at 672 n.9 (implicitly treating *Recovery I* as involving a DEQ action where no hearing was required).

87. *Carline*, 627 So. 2d at 672 n.9. See also *Recovery I*, 622 So. 2d at 275.

88. *Carline*, 627 So. 2d at 672 n.9. See also *Recovery I*, 622 So. 2d at 275.

89. See discussion in *Recovery I*, 622 So. 2d at 275.

90. *Recovery I* was decided on July 2, 1993, 622 So. 2d at 272, while *Carline* was decided on April 23, 1993, 626 So. 2d at 358.

actions if the actions were final.<sup>91</sup> The cases did not limit appeals to situations where an initial hearing was required, but neither did the cases discuss the issue squarely and hold that a person could appeal DEQ actions even if no hearing was required.<sup>92</sup>

Thus, two lines of cases were available when the supreme court heard the noted case. At stake was whether a party could appeal a DEQ action under section 30:2024(C) when no hearing was required.<sup>93</sup> The legal issue before the court was whether the APA's definition of "decision or order" applied to 30:2024(C).<sup>94</sup> The court held that the APA definition does not apply, but it did so without relying on *Marine Shale*.<sup>95</sup>

Using "[t]he rules of statutory interpretation,"<sup>96</sup> the court began with the proposition that courts should interpret a statute so as to give meaning to all of its provisions.<sup>97</sup> The court also stated that no statute or constitutional provision requires an adjudicatory hearing in any DEQ action.<sup>98</sup> Relying on its own assertion that DEQ hearings are always discretionary, the court reasoned that "the appeal provisions of Section 2024(C) would be meaningless" if the APA definition of "decision or order" was applied because then an appeal would never be authorized.<sup>99</sup>

In order to avoid rendering 30:2024(C) meaningless, the court reasoned that a definition other than that found in the APA should govern the phrase "decision or order" in 30:2024(C).<sup>100</sup> In resolving the noted case, the court concluded that the grant of the Cade II permit was a decision or order appealable under 30:2024(C).<sup>101</sup> The court did not, however, provide a definition of

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91. *Marine Shale*, 563 So. 2d at 282.

92. *Carlina*, 627 So. 2d at 672 n.9.

93. *American Waste*, 642 So. 2d at 1264.

94. *Id.* at 1260.

95. *Id.* at 1265.

96. *Id.* at 1264.

97. *Id.* at 1265.

98. *American Waste*, 642 So. 2d at 1265.

99. *Id.*

100. *Id.*

101. *Id.* The court also made other determinations in resolving the noted case. Probably the most important to future cases is the court's silence in the face of *American Waste's* argument that WOW lacked standing because WOW had failed to exhaust its administrative remedies. Thus, the noted case suggests that a person desiring to appeal under 30:2024(C) need not have exhausted all administrative remedies. The court's opinion mentions that persons with a substantial interest may intervene in DEQ determinations, *American Waste*, 642 So. 2d at 1265 (citing Louisiana Environmental Control Commission Rule 5.1(B)), but the opinion does not indicate that WOW intervened. *See id.* The opinion noted

“decision or order” for general use with 30:2024(C).<sup>102</sup> Thus, the noted case does not determine whether the matters appealable under 30:2024(C) will include all DEQ actions, only permit actions, or only some permit actions.<sup>103</sup>

Also, although the court’s suggestion that all DEQ hearings are discretionary was central to the majority’s reasoning, neither the majority nor the dissenters discussed the several situations where a DEQ hearing is required.<sup>104</sup> Instead, the dissenting justices focused their objections on the absence of statutory provisions excluding application of APA definitions to 30:2024(C) and on the rule that the APA applies to all agencies unless explicitly excepted.<sup>105</sup> Justice Kimball also expressed concern that appellate courts would find it difficult to handle appeals of cases in which no adjudication had occurred.<sup>106</sup>

The noted case is significant because it could greatly expand the rights of private citizens to litigate environmental issues. Before the noted case, the best legal precedent interpreting section 30:2024(C) was *Carline*, which held that a 30:2024(C) appeal was available only if an initial hearing was required constitutionally or statutorily.<sup>107</sup> Because many DEQ actions do not require a hearing, citizens unable to assert a property or liberty interest were often wholly dependent upon the DEQ and the political process to protect their interests. Now, the noted case suggests that any person aggrieved by a final DEQ action may have standing to appeal under section 30:2024(C).

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that an attorney representing “the Episcopal School of Acadiana and other concerned citizens” requested an adjudicatory hearing, *id.* at 1261, but the opinion does not indicate that WOW requested an adjudicatory hearing. *See id.*

102. *American Waste*, 642 So. 2d at 1265.

103. *See id.*

104. *Id.* at 1266-68. For situations where DEQ must hold a hearing, *see supra* notes 41-43 and accompanying text.

105. *American Waste*, 642 So. 2d at 1267-68.

106. *Id.* Dissenting in the noted case, Justice Kimball explained,

A cursory review of the ‘record’ in this case reveals the difficulty of a reviewing court in either forum having before it entire agency files containing self serving letters, opinions without opportunity for cross examination, handwritten notes from meetings, newspaper articles, affidavits and assertions of facts from attorneys and others and various other types of ‘evidence.’

*Id.*

107. *Carline*, 626 So. 2d at 363. Although *Marine Shale* and its progeny did not impose that limit, those cases had less value as precedent because they only addressed finality. *Carline*, 627 So. 2d at 672 n.9.

However, even if one welcomes an expanded right to challenge DEQ actions, the court's decision is problematic for several reasons. First, at least of academic interest, the court's reasoning was flawed. Second, the court did not define the new boundaries for the expanded right to appeal DEQ decisions. Finally, the decision will require the First Circuit to hear appeals in cases where no adjudicative record is available because no adjudication has occurred.

As mentioned earlier, the supreme court's reasoning was flawed. The court justified its holding on the rationale that the APA definition of "decision or order" would render section 30:2024(C) meaningless because adjudicatory hearings are always at the DEQ's discretion.<sup>108</sup> The Court overlooked, however, several situations where a statute or constitutional provision does require DEQ to hold an adjudicatory hearing.<sup>109</sup> By the APA's own terms, the APA applies to 30:2024(C). Further, the legislature's effort to exclude specific portions of the APA from application to 30:2024(C)<sup>110</sup> suggests a legislative understanding that other APA provisions do apply to 30:2024(C). Thus, the supreme court's rationale in the noted case seems less satisfactory than that of the First Circuit in *Carline*, where the court held that APA definitions do apply to 30:2024(C).<sup>111</sup>

The second problem with the noted case is the supreme court's failure to provide a definition of "decision or order" for use with 30:2024(C), thereby leaving the boundaries of the expanded right to appeal undefined. Uncertain boundaries of the new right will likely lead to wasteful litigation by parties whose cases fall outside the undefined boundaries.<sup>112</sup> Other persons may forego valid rights to appeal because they erroneously surmise that their cases fall beyond the unknown boundaries.

The final problem with the result in *American Waste* is that the First Circuit will be asked to hear appeals in cases where no

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108. *American Waste*, 642 So. 2d at 1265.

109. For situations where DEQ must hold a hearing, see *supra* notes 41-43 and accompanying text.

110. Sections 49:962 and 49:964 of the APA do not apply to DEQ decisions or orders. LA. REV. STAT. ANN. § 30:2024(C) (West 1989 and Supp. 1994).

111. *Carline*, 626 So. 2d at 362-63.

112. In *Carline*, the First Circuit stated that if a generic interpretation of "decision or order" replaced the APA definition that "chaos" would result. 627 So. 2d at 672. The court suggested that persons dissatisfied with trivial DEQ office decisions could appeal under 30:2024(C). *Id.* The supreme court might not approve such a result, but the noted case offered scant guidance as to just what DEQ actions will be appealable.

adjudicatory record is available because no trial or hearing has been held. Thus, the First Circuit will be asked to review cases in which it is difficult to apply typical judicial or appellate standards. In short, the noted case was poorly reasoned and will likely cause problems in the administration of Louisiana's courts and environmental laws. Because the decision turns on statutory interpretation and creates significant problems, the legislature can and should address this issue.

As a first step, the legislature should explicitly provide that the APA definition of "decision or order" applies to section 30:2024(C). Beyond that, at least two basic options are available. If the legislature believes the better public policy is to limit appeals of DEQ actions, then the legislature should stop after the first step. The result would restrict appeals to situations where an initial hearing was required by statute or constitution and would eliminate the problems associated with allowing appeals without a prior adjudication.

On the other hand, if the legislature wishes to give citizens a greater right to challenge DEQ actions, lawmakers should take a second step by providing citizens with a well-defined right to demand an adjudicative hearing from the DEQ. The result would give citizens an expanded right to litigate environmental issues, while eliminating the problems and uncertainties stemming from the noted case.

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