

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA ENVIRONMENTAL
ACTION NETWORK AND
THE SIERRA CLUB

CIVIL ACTION

VERSUS

NO. 06-4161

MICHAEL D. MCDANIEL,
IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE
LOUISIANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

SECTION "R" (2)

ORDER AND REASONS

Before the Court is plaintiffs' motion for reconsideration of the Court's September 5, 2007 order dismissing plaintiffs' lawsuit for lack of standing. For the following reasons, the Court DENIES plaintiffs' motion.

I. BACKGROUND

The factual background of this case is set forth in the Court's order dismissing this case for lack of standing. The Court found that plaintiffs failed to establish an injury in fact and therefore lacked standing. Plaintiffs now ask the Court to reconsider its ruling.

II. LEGAL STANDARDS

A. Motion for Reconsideration under Rule 59(e)

A district court has considerable discretion to grant or to deny a motion for reconsideration. See *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). A court's reconsideration of an earlier order is an extraordinary remedy, which should be granted sparingly. See *Fields v. Pool Offshore, Inc.*, No. Civ. A. 97-3170, 1998 WL 43217, at *2 (E.D. La. Feb. 3, 1998), *aff'd*, 182 F.3d 353 (5th Cir. 1999); *Bardwell v. George G. Sharp, Inc.*, Nos. Civ. A. 93-3590, 93-3591, 1995 WL 517120, at *1 (E.D. La. Aug. 30, 1995). The Fifth Circuit has held that a motion for reconsideration "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004). A Rule

59(e) motion "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* at 479 (quotation omitted). The Court must "strike the proper balance" between the need for finality and "the need to render just decisions on the basis of all the facts." *Edward H. Bohlin Co.*, 6 F.3d at 355. To succeed on a motion for reconsideration, a party must "'clearly establish either a manifest error of law or fact or must present newly discovered evidence.'" *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (quoting *Pioneer Natural Res. USA, Inc. v. Paper, Allied Indus., Chem. & Energy Workers Int'l Union Local 4-487*, 328 F.3d 818, 820 (5th Cir. 2003)).

B. Article III Standing

Under Article III, § 2 of the Constitution, federal judicial power is limited to justiciable cases or controversies. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (*Lujan II*). Standing is an "essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Therefore, a case is properly before a federal court only when the plaintiff has standing to sue. The Fifth Circuit strictly enforces the standing requirement as an essential element of subject matter

jurisdiction. See *Doe v. Tangipahoa Parish Sch. Bd.*, ___ F.3d ___, ___, 2007 WL 2122017, at *1 (5th Cir. July 25, 2007) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986)). Under Federal Rule of Civil Procedure 12(h)(3), “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.”

For an association to have Article III standing, it must demonstrate that its individual members have standing in their own right, that the interests represented are germane to the organization’s purpose, and that the relief sought does not require the participation of individual members. See *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). To show that individual members have standing, an organizational plaintiff must establish three distinct elements. First, individual members “must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan II*, 504 U.S. at 560 (internal quotations and citations omitted). Second, the harm must be “fairly traceable” to the defendant’s challenged conduct. *Id.*

Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotations omitted).

The party invoking federal jurisdiction - in this case the plaintiffs - bears the burden of establishing standing. Since the requirements of standing are essential elements of any claim, they must be "supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of proof required at the successive stages of the litigation." *Id.* On a motion for summary judgment, the plaintiff must set forth specific facts in the form of affidavits or other evidence that, when taken as true, establish these elements. *See id.*

III. DISCUSSION

Plaintiffs first argue that the Court's analysis was based, in part, on whether the controversy about the hurricane orders had become moot. Plaintiffs have misread the Court's order. The Court determined whether plaintiffs had standing at the commencement of the suit. The Court issued its decision on a motion for summary judgment and based its decision on the factual allegations of injury in the complaint and the record evidence.

Plaintiffs had the opportunity to point to record evidence that their members suffered an injury as a result of the hurricane orders.

The evidence that plaintiffs did point to was insufficient to establish injury. As the Court explained in its earlier order, "the submitted affidavits are problematic because the affiants do not state that they have personal knowledge that harmful pollution has occurred or is actually occurring at any facilities." (R. Doc. 89 at 11.) Plaintiffs submitted an affidavit of Allen Green about conditions at the Industrial Pipe Landfill. In that affidavit, Green stated that he could see a large stack of white goods assembled at the landfill. At oral argument on the parties' motions, however, LDEQ represented that the white goods of which Green complained were not in fact being disposed of at this landfill but were only staged there for removal and disposal elsewhere.¹ The Green affidavit represented

¹ See Oral Arg. Tr. Nov. 29, 2006 at 103-04.

Mr. Wright (plaintiffs' counsel): "I mean I'll accept that the white goods have been removed or at least the specific white goods that Mr. Green was concerned about have been removed, and I certainly wouldn't want to restrict our standing affidavit to only white goods."

The Court: "Is there anything else that -"

Mr. Buatt (LDEQ's counsel): "The white goods were never disposed of at that landfill, Your Honor, for which [Mr. Green] is complaining of. Those were staged there which are lawfully without the order allowed them to be staged for a certain period of time."

. . .

the only allegation, based on personal knowledge as opposed to information and belief, that any harmful pollution had occurred at landfills covered by the hurricane orders. Plaintiffs, however, squarely retreated from this affidavit as a basis for their claim to standing.² Plaintiffs now submit the deposition testimony of Reverend Vien Nguyen, in which he states that he personally saw the presence of certain waste in the Chef Menteur landfill. But plaintiffs did not submit this evidence when the motion for summary judgment was before the Court. The only testimony of Reverend Nguyen before the Court was his deficient affidavit submitted by plaintiffs and an excerpt of his deposition submitted by LDEQ. A motion for reconsideration is not

The Court: "So are we scratching the standing allegations based on --- I'm looking at white goods; is that agreed to? Is that what you're saying?"

Mr. Buatt: "Are you stipulating to the position you espoused?"

Mr. Wright: "Your Honor, to determine standing and to review the Green declaration and affidavit, we don't need the white goods to establish standing. So, yes, essentially, without stipulating that what was going on there was in any way appropriate or legal. We agree that our standing does not rely on white goods and so you can skip the sentence which says white goods in reading that."

The Court: "Okay."

Mr. Babich (plaintiffs' counsel): "And, also, Your Honor, I believe in Mr. Green's deposition later on he states that the white goods were removed."

² See *id.*

the place to submit evidence that easily could have been presented at the earlier stages of this case.

In addition, plaintiffs acknowledged at oral argument that they did not know what activities were actually occurring at covered landfills. The following exchange took place between the Court and plaintiffs' counsel:

THE COURT: But my question is why didn't you sue the dumps?

MR WRIGHT: *Because we don't know what the dumps are doing.*³

Plaintiffs were unable to demonstrate they suffered from any harmful pollution that was actually occurring at covered landfills as a result of the hurricane orders. Accordingly, they failed to establish standing.

Plaintiffs also argue that they have standing because the hurricane orders increase their risk of harm. The cases on which plaintiffs rely for this argument are factually distinguishable and/or arose in dissimilar procedural and regulatory contexts. In *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Supreme Court held that Massachusetts had standing to challenge as an intervenor-plaintiff the EPA's rejection of a rulemaking petition to regulate greenhouse gas emissions from new motor vehicles because Massachusetts faced a well-documented increase in risk of

³ *Id.* at 19-20 (emphasis added).

harm to its territory due to an unabated increase in greenhouse gas emissions (e.g., receding coastline), occupied a special position in the federal system and was unable to mitigate the harmful effects of greenhouse gas buildup due to the nature of the problem and federalism constraints (e.g., the state's inability to enter a bilateral treaty with foreign governments), and had a procedural right to challenge the EPA's rejection of a rulemaking petition under the CAA, 42 U.S.C. § 7607(b)(1). *Massachusetts*, 127 S. Ct. 1454-58. *Nulankeyutomonon Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007), involved a challenge to the Bureau of Indian Affairs' issuance of a lease for the construction of a liquefied natural gas terminal on tribal lands without assessing the environmental impact of the proposed project. The First Circuit concluded that the plaintiff association had standing to challenge the agency action under National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6, and the Endangered Species Act, 16 U.S.C. §§ 1531-1544, all of which require an assessment of the impact on the environment of any federally licensed undertaking. Those statutes confer on interested parties the *procedural* right to have the licensing federal agency to "take notice" of potential increases in risks

of environmental harms resulting from a federally licensed project. *Nulankeyutomonen Nkihtaqmikon*, 503 F.3d at 28. The First Circuit explained that as result of the BIA's failure to assess the proposed project's environmental impact, even at the early planning stages, the "procedural injury alleged by Plaintiffs has already occurred." *Id.* (citing *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983)). In other words, the unconsidered threat of an increase in harm is the very injury against which NEPA and the other statutes guard. In *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004), the Ninth Circuit held that individual plaintiffs had standing to bring citizen suits under RCRA and the CAA against a county landfill operator and state regulatory agencies for alleged violations of RCRA and the CAA when the plaintiffs had presented evidence of actual, not merely feared, polluting activity and failure to follow federal laws that threatened an increase risk of harm that RCRA and the CAA were intended to minimize. The claims of LEAN and the Sierra Club do not arise in a regulatory context analogous to the situation in *Massachusetts*. Plaintiffs do not seek to vindicate procedural rights that protect against unexamined threats of increased risks similar to those at issue in *Nulankeyutomonen Nkihtaqmikon*. Nor have they alleged that landfills covered by the emergency orders

are actually operating in violation of federal law as was the case in *Covington*. Accordingly, those cases are inapposite to the question of plaintiffs' standing.

IV. CONCLUSION

Plaintiffs are not powerless to challenge the activities of the allegedly offending facilities. The citizen suit provisions of the CAA, CAA, and RCRA give them plenty of ammunition to contest the emergency orders in the context of a suit against the alleged polluters. If successful, such a suit would result in injunctive relief stopping the challenged activities. Regardless of the Court's respect for environmental laws, it cannot ignore the standing requirements in this circuit. The Court sees no purpose in issuing an order granting relief to plaintiffs that would be dead on arrival on appeal.

For the foregoing reasons, the Court DENIES plaintiffs' motion.

New Orleans, Louisiana, this 11th day of March 2008.

A handwritten signature in cursive script, reading "Sarah S. Vance", is written over a horizontal line.

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE