



TULANE LAW SCHOOL

TULANE ENVIRONMENTAL LAW CLINIC

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By email to: [wq.standards@la.gov](mailto:wq.standards@la.gov)

Amanda Vincent

Louisiana Department of Environmental Quality

Office of Environmental Assessment

Water Planning and Assessment Division

**RE: Comments on LDEQ's Louisiana Water Quality Trading Guidance Draft, 1712Pot1**

Dear Ms. Vincent:

Please consider the following comments on the Louisiana Department of Environmental Quality's (LDEQ's) Water Quality Trading Guidance Draft ("draft guidance" or "Guidance"). The Tulane Environmental Law Clinic submits these comments on behalf of the GreenARMY, the Louisiana Environmental Action Network, Mr. Willie Fontenot, and Mr. Oneil Couvillion (collectively, "commenters"). Due to the lack of detail in most aspects of the draft, the commenters rely on LDEQ's assurance at the January 23, 2018, stakeholder meeting, through Ms. Vincent, that LDEQ's water quality trading program will be available again for comment during the rulemaking process and that the program will need the approval of the U.S. Environmental Protection Agency (EPA).

### **SUMMARY**

Plainly stated, what a water quality trading program allows is for a facility to violate its permit limits so long as another facility or nonpoint pollutant source cleans up its act enough to cover the violation. While both EPA and LDEQ present justifications for this practice, some of which claim to achieve a greater good, this basic fact is not disputable. Understanding this fact is key to understanding why Louisiana should be very reticent to implement such a program – which many have termed a "pay to pollute" program. LDEQ must only promulgate such a program if it can point to demonstrated success in other states with trading programs and, even then, only after implementing very tight rules that eliminate the significant potential for such a program to lead to worse water quality in the impaired and healthy waters that the LDEQ would allow sources to trade in. Further, given the large margin of error inherent in such programs and the damage which can result from such error, LDEQ should exempt certain types of facilities from participation in the program until it has been in place long enough to demonstrate success. Sewage treatment facilities, facilities that discharge into Outstanding Natural Resource Waters, and facilities with a history of violating their permits should not be allowed to participate.

In its public notice announcing the development of a water quality trading program for Louisiana, the LDEQ stated that the purpose of the trading program is "to reduce discharges of pollutants into waters of the state." 43 La. Reg. 2651 (Dec. 20, 2017). The commenters are not

aware of any state or regional water quality trading program in the country which has demonstrated consistent achievement of this goal, and request that LDEQ identify demonstrably successful programs from those in place and isolate their essential components, making this information available to the public. One thing is clear: this theoretically successful water quality trading program between point and nonpoint sources must be carefully crafted, be sufficiently detailed and designed to ensure pollution *reduction* rather than an even trade, delineate situations where trading will not be allowed because failure would result in degradation of the receiving waters, clearly establish baselines and credit thresholds, require verification of nonpoint reductions before those credits are available for sale, not allow banking of credits over the long term, and include appropriate agency funding and oversight. The EPA and Environmental Law and Policy Center outline some broad qualities of successful trading programs, notably clear, transparent documentation available to the public and sound scientific considerations when calculating credit ratios and baselines, each of which the LDEQ's draft guidance fails to provide. See EPA, *Water Quality Trading Keys to Success* (June 2007); ELPC, "Building a Water Quality Trading Program: Options & Considerations, Environmental Community Focus Summary," p. 3 (June 2015), available at <http://willamettepartnership.org/wp-content/uploads/2015/05/Sector-Summaries-Environmental-Final1.pdf>.<sup>1</sup> Additionally, the National Network on Water Quality Trading produced detailed guidance on point-nonpoint source trading; LDEQ itself claims that its draft guidance "follows" that guidance. Willamette Partnership, World Resources Institute, and the National Network on Water Quality Trading, 2015, *Building a Water Quality Trading Program: Options and Considerations*. <http://willamettepartnership.org/wp-content/uploads/2015/06/BuildingaWQTPProgram-NNWQT.pdf> (hereinafter "National Network Guidance"); see also LDEQ Guidance at 2. However, LDEQ's draft guidance does not follow the National Network Guidance in numerous important ways. LDEQ must explain any departure from the National Network Guidance which introduces additional uncertainty, risk, and leniency in the program.

An imperfect water quality trading program – like the one identified in LDEQ's draft – will almost surely result in a failure to improve water quality, and will likely also result in multiple violations of the Clean Water Act (CWA); some will cause irreversible degradation of Louisiana waters. The LDEQ's draft guidance contains multiple serious deficiencies and issues, the most glaring of which is the lack of clarity as to numerous important factors on how the program will be run. LDEQ's draft is also inconsistent in numerous ways with the U.S. Environmental Protection Agency's (EPA's) Water Quality Trading Policy, and those

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<sup>1</sup> The EPA released water quality trading program guidance, a "Water Quality Trading Keys to Success" poster, and a "Toolkit for Permit Writers," all to discuss how water quality trading programs ideally should be organized and implemented. See EPA, *Water Quality Trading Policy*, 68 Fed. Reg. 1608 (Jan. 13, 2003); EPA, *Water Quality Trading Toolkit for Permit Writers* (June 2009), available at <https://www3.epa.gov/npdes/pubs/wqtradingtoolkit.pdf>; EPA, *Water Quality Trading Keys to Success* (June 2007). These represent the floor for the components of a water quality trading program, below which no water quality trading program should go, so LDEQ must spend more time with each of these documents to ensure that its water quality trading program, at a minimum, complies with EPA guidance and meets EPA's policy goals.

inconsistencies will result in violation of state and federal antidegradation laws.<sup>2</sup> Overall the LDEQ's water quality trading program, as proposed, is unacceptable.

### **SPECIFIC COMMENTS**

#### **I. THE PROPOSED TRADING OF POLLUTANTS IN DIFFERENT WATERSHEDS VIOLATES THE ANTI-DEGRADATION POLICY IN THE CLEAN WATER ACT.**

The purpose of state-implemented water quality trading programs, according to EPA guidance, is “to achieve water quality improvements at reduced costs.” EPA, *Water Quality Trading Policy*, 68 Fed. Reg. 1608, 1609 (Jan. 13, 2003) (hereinafter “EPA Guidance”). LDEQ articulates the same purpose: “to reduce discharges of pollutants into waters of the state.” 43 La. Reg. 2651 (Dec. 20, 2017). In achieving this purpose, EPA insists that water quality trading programs comply with the Clean Water Act. EPA Guidance at 1610 (“Water quality trading and other market-based programs must be consistent with the CWA.”). This includes the antidegradation policy. The EPA’s guidance document specifically states “Trading should be consistent with applicable water quality standards, including a state’s and tribe’s antidegradation policy...” *Id.* at 1611.

EPA antidegradation regulations define three tiers of antidegradation protection. Tier 1 antidegradation protection requires that “Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1). *See also* La. Admin. Code (LAC) pt. IX, sec. 1109(A)(1). Tier 2 protection requires that “Where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected . . . .” 40 C.F.R. § 131.12(a)(2). *See also* LAC IX.1109(A)(1). Tier 3 protection requires that “Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.” 40 C.F.R. § 131.12(a)(3). *See also* LAC IX.1109(A)(2). Thus, antidegradation requires that existing uses be maintained in impaired waters, that high quality waters be maintained at their high quality, and that Outstanding Natural Resource Waters not be degraded. LDEQ’s draft guidance would allow trading in all three tiers of waters, which does not comply with the CWA. Guidance at Section 1.2, pp. 7-8.

In order to ensure that trading programs do not violate the antidegradation provisions, EPA requires trades to occur in the same watershed or within a designated TMDL area. When describing “trading areas,” EPA states: “All water quality trading should occur within a watershed or a defined area for which a TMDL has been approved.” EPA Guidance at 1610. Thus, building even more protection and certainty into this requirement, Wisconsin’s water quality trading program provides: “In order to conform to the requirements of the federal Clean

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<sup>2</sup> Certain aspects of the EPA water quality trading guidance themselves arguably violate the Clean Water Act. Therefore, LDEQ’s program may violate the Clean Water Act even where it relies on aspects of the EPA’s guidance, and LDEQ must avoid adopting rules which run afoul of the Clean Water Act.

Water Act and EPA, the credit user and generator must discharge, either directly or indirectly, to the same waterbody.” WDNR, *A Water Quality Trading How To Manual*, p. 15 (Sept. 9, 2003) (attached as Exhibit A). This is how water quality trading programs need to operate in order to comply with EPA guidance and with antidegradation laws, and to truly improve water quality.

In fact, Wisconsin’s requirement that trading occur within the same waterbody, even apparently in TMDL waters, corrects a deficiency in EPA’s Guidance as well as trading programs in other states, as it may be problematic and lead to violations of the Clean Water Act for trading to be allowed anywhere within a TMDL area. Discussing Oregon’s provision allowing trades to occur throughout the entirety of an area covered by a TMDL, Northwest Environmental Advocates (NWEA) stated the following in comments to EPA: “Such an interpretation does not ensure any actual environmental benefit because it makes the false assumption that restoration of riparian vegetation [by nonpoint sources selling credits] has the same impact on uses regardless of where the restoration is performed in a basin or subbasin.” July 17, 2014, NWEA letter to EPA, attached as Exhibit B.

LDEQ’s proposal, however, would even violate the EPA Guidance, as it allows trading *basin*-wide – meaning *outside of* the same watershed and far outside of the same waterbody – and even between different basins, which would almost certainly violate antidegradation. LDEQ’s proposal defines “trading areas” as “within the same hydrological basin,” and also provides that “trading between basins may be allowable in specific situations where the science supports it.” Guidance at Section 2.3, p. 13. Allowing water quality trading between different watersheds, and even between different basins, will almost surely cause degradation of the waters with the increased pollution. The addition of pollution in one waterbody is not offset by reduced pollution in another waterbody in an entirely different watershed. Water quality may be improved in one watershed, while being degraded in another; when this happens, the CWA’s anti-degradation provision is violated in the waterbody receiving the increased pollution. Allowing trading between different water basins is even more problematic; basins are massive areas, consisting of numerous different watersheds. Evidencing this, though Louisiana contains hundreds of waterbodies, there are only twelve basins in the state. Sept. 9, 2014, LDEQ Water Quality Management Plan, Volume 4, at 2. *See also* LDEQ Map of Louisiana River Basins, attached as Exhibit C.

LDEQ attempts to reconcile this serious deficiency by stating that the program’s “point of concern” is the Gulf of Mexico, implying that as long as the Gulf is not degraded, the CWA’s antidegradation provision is met. *Id.* This “end justifies the means” concept violates the antidegradation policy of the Clean Water Act, however, because the policy protects all waters in the state, not just the Gulf of Mexico. Even assuming this rationale had any basis in science (which LDEQ has not provided), it is not permissible to degrade the water quality of the waterbody receiving the pollution so long as everything ultimately evens out in the Gulf. Further, beyond antidegradation, it is likely that across-basin trades will also lead to the violations of water quality criteria in the waterbody receiving the increased pollutants from the point source. Trading should be allowed only within the same waterbody, but certainly not outside the same watershed. LDEQ must revise its guidance to comply with EPA guidance and antidegradation laws.

## **II. TRADING OF TEMPERATURE POLLUTION IN WATER QUALITY TRADING PROGRAMS RAISES ENVIRONMENTAL CONCERNS.**

The LDEQ's proposal includes temperature as a pollutant that can be traded through this program. Guidance at Section 2.4, p. 13. LDEQ has provided no justification for including temperature as a pollutant appropriate for trading. Though LDEQ states that its inclusion of temperature "is consistent with the 2003 EPA Trading Policy," in its trading guidance, the EPA specifically supports the trading of nutrients and other sediment loads but does not include temperature. EPA, *Water Quality Trading Policy*, 68 Fed. Reg. 1608, 1610 (Jan. 13, 2003). While EPA stated that other unlisted pollutants may also be approved for trading on a case-by-case basis, LDEQ must justify its general inclusion in the trading program. *Id.* Again, particularly given that LDEQ proposes to allow trades between sources in different watersheds, it is unclear how increasing temperature pollution in one watershed can be offset by reducing temperature in another. Temperature trading could further lead to additional environmental issues and is difficult to properly administer. See NWEA, *Temperature Pollution*, <https://www.northwestenvironmentaladvocates.org/newblog/issues/water/temperature-pollution/>. Indeed, for too long thermal pollution in Louisiana has not received the focus it requires and has resulted in extensive negative impacts on receiving water bodies. Until LDEQ demonstrates that it has an effective method of addressing thermal pollution that does not exclusively rely on trading, LDEQ should not include temperature in the pollutants eligible for trading. The National Network Guidance states: "Ultimately, each state agency will need to support and defend its decisions regarding which pollutants are appropriate for trading and the characteristics that may better support trading for that particular pollutant." National Network Guidance at 42. LDEQ has not done that, and must outline how it would address the issues associated with thermal trading and present a workable solution.

## **III. LDEQ PROVIDES NO CLEAR DEFINITION OF BASELINES, WHICH ARE CRITICAL TO ENSURE TRADING LEADS TO POLLUTANT REDUCTIONS, DOES NOT DEGRADE THE RECEIVING WATERS, AND DOES NOT VIOLATE ANTIDEGRADATION.**

The proposed water quality trading program can occur in impaired waters (both those which already have a TMDL and those which are "pre-TMDL"), as well as waters which are not impaired (and therefore do not have a TMDL). LDEQ, *Louisiana Water Quality Trading Guidance Draft*, p. 8 (Dec. 20, 2017).

For those waters that do have a TMDL, LDEQ states that TMDL number will be the baseline used to determine the absolute limit of pollution that can be in the waters. *Id.* at 9. However, with regard to waters that are pre-TMDL as well as unimpaired high quality waters, the LDEQ does not specifically state how it will calculate the baselines or even that it will calculate the baseline for the source that will buy the credits and increase its pollution. With regard to pre-TMDL impaired waters, the draft guidance states, "LDEQ will consider whether the proposed WQT plan will lead to direct environmental benefit relevant to the conditions for which the water body is impaired." *Id.* at 8. It is not clear how LDEQ can do this if the trade will

occur between different waterbodies or even between different watersheds, and it is not clear how LDEQ can do this without clearly defining the baseline, but if LDEQ intends to impose a requirement that there be a direct benefit to the impaired waterbody relevant to the impairment conditions before trading will be allowed, it should clearly state this. As described by NWEA in the comments referenced earlier, allowing trading throughout a TMDL area can lead to significant problems. *See supra* p. 4. When discussing existing discharges in impaired pre-TMDL waters, LDEQ appears to discuss a baseline when it provides that “[t]he source involved should conduct an analysis of pollutant loadings similar to LDEQ TMDL development process,” but it does not clearly define this as the baseline. *Id.* LDEQ is even more vague when discussing the baseline for new dischargers into pre-TMDL waters, stating only what should happen “if” there is a pollutant load allocation and that the discharge cannot violate water quality criteria. *Id.* Thus LDEQ does not appear to plan to require a pollutant load allocation for new dischargers into pre-TMDL waters, and, if not, it is entirely unclear what will serve as the baseline.

With regard to waters that are not “impaired”- meaning not on the 303(d) list - LDEQ simply repeats the EPA guidance document’s vague language that “existing state and local requirements and current conditions for nonpoint sources define the baseline for generating credits.” *Id.*; EPA, *Water Quality Trading Policy*, 68 Fed. Reg. 1608, 1610 (Jan. 13, 2003). LDEQ then states that it “will consider a point source permit the regulatory instrument for trade.” *Id.* at 8. Further, LDEQ uses the same unclear language when describing the calculation of baselines for nonpoint sources. *See id.* at 16. The baselines for pre-TMDL and unimpaired waters need to be clearer and more specific to ensure the smooth operation of Louisiana’s water quality trading program. They must also be defined in a way to ensure that any trade will result in reduction of pollution and not just an even trade.

A water quality based effluent limitation (WQBEL) could be used to determine the baseline in waterbodies without a TMDL. This concept is mentioned in the draft guidance, but LDEQ does not state definitively that it will use a WQBEL to determine the baseline. *See id.* at 8. The Wisconsin program states that a general baseline is sufficient preliminarily, but needs to be more detailed and specific for individual trades. WDNR, *A Water Quality Trading How To Manual*, p. 33 (Sept. 9, 2003). The EPA’s “Toolkit for Permit Writers” provides more detail on how water quality trading programs should be implemented and operated. In this Toolkit, EPA emphasizes the importance of the baseline, and states, “The baseline level of control should never be less than an existing practice.” EPA, *Water Quality Trading Toolkit for Permit Writers*, p. 6 (June 2009). The National Network also provides guidance on baselines, stating, “The trading baseline should be set in a manner that considers whether the credit-generating activities go beyond those that are already required by law, existing abatement requirements derived from a TMDL or other water quality goal, and/or required by the trading program itself.” National Network Guidance at 54. The National Network further clarifies this language, explaining that for those waterbodies that do not have a TMDL, the baseline must go above the existing regulatory requirements, or the trading program must set its own site-specific baselines. *Id.* at 54-55. Overall, LDEQ needs to clarify exactly what the baseline will be for these unimpaired waters and pre-TMDL waters, to ensure the proper functioning of the trading program. At the very least it must describe in greater detail than how it will determine the baseline. The baseline is essential to the water quality trading program, because it is the only way DEQ and the public can track whether the credit is

accurate and whether pollution reduction is actually occurring. Without clarity as to this number, the program cannot be improperly implemented and operated, and violations of the Clean Water Act cannot be accurately detected.

**IV. THE RATIO OF TRADING UNITS SHOULD LEAD TO IMPROVED WATER QUALITY RATHER THAN JUST ACCOUNTING FOR THE UNCERTAINTY FACTOR.**

The LDEQ states nothing about the formula that will be used to determine trading unit ratios. *Id.* at 19. The public should be able to comment on LDEQ's proposed ratio, as it is essential for two aspects of the program. First, the ratio must properly account for the uncertainty in calculations of nonpoint source credits. The EPA guidance document states that it supports the use of greater than 1:1 ratios to compensate for nonpoint source uncertainty. EPA, *Water Quality Trading Policy*, 68 Fed. Reg. 1608, 1612 (Jan. 13, 2003). Second, and of equal importance, as EPA's guidance sets out, a vital objective of the water quality trading program is to improve water quality. *Id.* at 1609. Therefore, the program Louisiana implements must use trading unit ratios greater than 1:1, and the ratios should not simply account for uncertainty – as LDEQ describes its ratio's purpose – but must also include an increase in the ratio over and above what covers the uncertainty factor which will lead to improved water quality. *Id.* at 1609. If equal ratios are used or if the ratio merely accounts for uncertainty, water quality will simply stay the same. If ratios of 2:1 or greater are used, then water quality may actually be improved, complying with a fundamental objective of the program. Additionally, the improvement of water quality further ensures compliance with the CWA. Wisconsin's program again provides a distinct formula as to calculating trade ratios to ensure water quality improvement: "Trade Ratio = Delivery + Downstream + Equivalency + Uncertainty – Habitat Adjustment : 1. WDNR, *A Water Quality Trading How To Manual*, p. 14 (Sept. 9, 2003). "The assumptions underlying the chosen ratios should be carefully documented in a transparent manner." National Network Guidance at 79. As proposed, LDEQ's draft does not adequately outline how it will determine trading ratios. Therefore, LDEQ must define a fixed formula for trade ratios that guarantees water quality improvement; without doing so, the program neglects one of its fundamental purposes.

**V. POINT SOURCES AND NON-POINT SOURCES THAT HAVE HISTORICALLY BEEN NON-COMPLIANT WITH THEIR LPDES PERMITS SHOULD NOT BE PERMITTED TO PARTICIPATE IN WATER QUALITY TRADING.**

The LDEQ does not mention the issue of compliance history in its water quality trading proposal; however, it is critical that sources which have been noncompliant with their LPDES permits not be permitted to participate in this program. The EPA recommends consideration of compliance history when determining eligibility of sources who wish to participate in the water quality trading program. EPA, *Water Quality Trading Policy*, 68 Fed. Reg. 1608, 1612 (Jan. 13, 2003). LDEQ should consider permit noncompliance a bar from this program. If sources have not complied with their LPDES permits in the past, they should not have the chance to benefit from a "pay to pollute" program. Point sources permitted to use this program should show a

strong history of compliance with their LPDES permits in order to ensure compliance with the largely self-regulated trading program and to not reward historically poor conduct.

## **VI. SEWAGE TREATMENT PLANTS SHOULD NOT BE ABLE TO PARTICIPATE IN THE PROGRAM.**

Uncertainty is inherent in even the best-crafted water quality trading program. And, fifteen years after EPA promulgated its water quality trading guidance, commenters are aware of no state which has demonstrated consistent success with such a program achieving overall improvement in water quality. Given these factors, LDEQ should prohibit certain facilities from participation in the program. Sewage treatment plants, particularly Publically Owned Treatment Works, should not be allowed to sell or buy credits. These facilities typically have limited capacity to react quickly to pollutant loading problems due to funding restrictions, difficulties in reliable maintenance, and high potential for damage to the receiving waters when they fail. Further, they are subject to overflow and bypass events during heavy rainfall events and total inundation during flood events in Louisiana. If allowed to buy credits and thereby violate their WQBELs, if the credit runs out, fails, or proves unreliable, it could be years or even decades before the facility can meet its WQBELs, and water quality in the receiving stream will likely be degraded, perhaps irreversibly.

Similarly, sewage treatment plants should not be allowed to sell credits, particularly when the credits are based on the plant discharging less pollution than what its permit allows. Such credits are often false, particularly for lagoon systems where it has been decades since EPA has updated the outdated equivalent to secondary treatment standards. These systems can do much better than equivalent to secondary (or worse state-determined) treatment, and EPA and states must update the technology standards to reflect what is actually being achieved today before credits should be available. Also, where a sewage treatment plant is using wetland assimilation to meet its WQBEL, this margin should not be available for sale due to the demonstrated problems with these systems, which often are not evidenced for several years.

The potential for sewage treatment plants to be big players in a trading system is significant, so LDEQ should closely examine programs which have allowed their participation as credit purchasers or sellers and reveal its findings. Food and Water Watch's report on water quality trading highlights the Pennsylvania program, stating that Pennsylvania's largest sector source of nutrient credit is wastewater treatment plants. Food and Water Watch, *Water Quality Trading: Polluting Public Waterways for Private Gain*, p. 11 (Nov. 2015) (attached as Exhibit D). The report accurately describes the problem with allowing point sources, particularly wastewater treatment plants, to sell "headroom" as credit:

The notion that point source facilities can even generate credits runs counter to the fundamental premise of the Clean Water Act. The very first section of the Act states that the goal is to eliminate discharge of pollutants to our waterways. The CWA point source permitting system is designed to control discharges by imposing the greatest pollution controls that are economically feasible for each specific industry under regulation. These standards are continually ratcheted down through annual

review of the regulations and are revised to match changes in the regulated industry or in the available pollution control technologies. In short, point source facilities are required to be designed, operated and permitted in a manner that results in the least amount of discharge; there is no room for “headroom” in the permit. Allowing this headroom to be used to generate credits results in net increases of pollution to waterways, in direct contradiction of the goals of the CWA.

*Id.* at 12.

## **VII. WATER QUALITY TRADING DISCOURAGES TECHNOLOGICAL ADVANCEMENT BY POLLUTERS.**

Water quality trading programs are generally problematic due to their inherent disincentivization of technology innovation. This is because these programs give dischargers the choice to simply buy credits to generate pollution reduction, as opposed to implementing better technology practices to limit pollution. *See* National Network Guidance at 1. If polluters are able to merely “net out” their discharges using credits from other polluters, then there is no reason for them to use best available technologies to limit pollution. That incentive is placed fully on those polluters who wish to sell credits. This still poses a problem, however, because many sources regularly do not meet their water quality-based discharge limits as is (such as the wastewater treatment plants described above). Therefore, these sources will not be encouraged to implement better technologies because they already have the credits to sell with their current technology. The Food and Water Watch Report explains that this progression based on technological developments has been essential to limiting water pollution. *See id.* at 13 (“That technology-driven, source-by-source approach has brought many of our waterways from the brink of disaster in the 1960s to relatively good health today”). LDEQ should address this issue before proceeding with its water quality trading program.

## **VIII. THE GUIDANCE MUST CLEARLY PROVIDE FOR MORE TRANSPARENCY AND PUBLICALLY AVAILABLE INFORMATION REGARDING TRADING.**

The waters of the state belong to the people. *Save Ourselves, Inc., v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984) (“It is the well settled law of this country that a state holds title to land under navigable waters within its limits and that the title is held in trust for the people of the state that they may enjoy and use the waters free from obstruction or interference. A public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by . . . the 1974 Louisiana Constitution.”) (citing Art. IX, sec. 1) (internal citations omitted). Permit limitations and monitoring requirements under LPDES permits, as well as required Discharge Monitoring Reports (DMRs), provide a clear, accessible way for the public to know which pollutants the LDEQ is allowing point sources to discharge into their waters at what levels and whether a facility is meeting those limits and monitoring requirements. Similarly, properly-issued rationales for draft LPDES permits clearly describe the basis for the inclusion or exclusion of any water quality based effluent limitations (WQBELs).

If LDEQ implements a water quality trading program, it is essential, under its public trustee duty, that LDEQ ensure that all permits make clear what the facilities' limits are and what changes the credits it may buy will allow. As LDEQ admits: "Ultimately, the information included and referenced in a Louisiana Pollutant Discharge Elimination System (LPDES) permit will be the requirements a point source permittee needs to follow." Guidance at Introduction, p. 6. However, the Guidance's current provisions for what exactly must be reflected in an LPDES permit which will allow trading are vague. For instance, when describing the "Key Trading Provisions in an LPDES Permit," the Guidance provides: "A permit operating under this guidance should contain enough detail to demonstrate compliance with the CWA . . . ." Guidance at Section 1.3.1, p. 10. From the start, this vague description is insufficient. The list of LPDES components which follows is likewise vague. It includes "Permit effluent limits and potential trading obligations resulting from the WQBEL, technology limitations (TBELs), or other guidelines." *Id.* It is unclear what this means. For instance, if prior to promulgation of the Water Quality Trading Program a sewage treatment plant's permit included a WQBEL of 10 mg/L BOD monthly average, and upon renewal and promulgation of the Trading Program it will be allowed to violate this limit and buy credits to meet the limit, how will this be clearly reflected in the permit? If the permit limit is still reflected as 10 mg/L, will DMRs which reflect discharges of 12 mg/L BOD monthly average be violations? Or will one have to look at another document to figure out if the facility has bought credits to cover the extra 2 mg/L BOD? Will that document make it clear what, then, constitutes a violation? If, instead, the permit limit is reflected as 12 mg/L, accounting for trading credits, will the original WQBEL be clearly reflected in the permit documents? The public is entitled to know what the facility's trade is allowing it to circumvent, and the Guidance must clearly require this detailed information.

**IX. LDEQ HAS NOT DEMONSTRATED THAT IT HAS THE RESOURCES TO EFFECTIVELY HANDLE A WATER QUALITY TRADING PROGRAM AND HAS A BAD TRACK RECORD OF MANAGING POLLUTANT CREDIT BANKING SYSTEMS.**

Proper oversight by LDEQ over water quality trading is essential, and this oversight requires significant resources. LDEQ has not addressed anywhere in its Guidance or in any other document where it will get the resources to run this program or even whether it believes it currently has those resources. Until LDEQ can demonstrate that it has the means to properly oversee this program, it must not promulgate it.

Further, in the past when LDEQ operated a banking system for air emissions, it demonstrated lax oversight and mismanagement of the program. *See* Exhibit E (Dec. 22, 2000, EPA Order re: Borden Chemical Formaldehyde Plant) and Exhibit F (Apr. 10, 2002, Tulane Environmental Law Clinic, Petition for Independent Audit and Full Accounting of State of Louisiana's Emission Reduction Credits Banking System. Before LDEQ operates a similar program for water, it should detail the shortcomings of the air banking system and explain how it will not repeat that failure with respect to water quality trading.

**X. LDEQ MUST PERFORM A PUBLIC TRUSTEE ANALYSIS  
ON ITS WATER QUALITY TRADING PROGRAM.**

Because LDEQ serves as public trustee of the environment for the people of Louisiana, it has a Constitutional duty to perform an environmental analysis on a water quality trading program before promulgating such a program. Article IX, section 1 of the Louisiana Constitution “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.” *Save Ourselves*, 452 So. 2d at 1157. Courts interpreting this duty have made clear that before approving action affecting the environment, like this Water Quality Trading Program, LDEQ must address five issues:

First, have the potential and real adverse environmental effects of the proposed facility been avoided to the maximum extent possible? Second, does a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate that the latter outweighs the former? Third, are there alternative projects which would offer more protection to the environment than the proposed facility without unduly curtailing non-environmental benefits? Fourth, are there alternative sites which would offer more protection to the environment than the proposed facility site without unduly curtailing non-environmental benefits? Fifth, are there mitigating measures which would offer more protection to the environment than the facility as proposed without unduly curtailing non-environmental benefits?

*In re Rubicon, Inc.*, 95-0108, p. 10 (La. App. 1 Cir. 2/14/96); 670 So. 2d 475, 482. LDEQ must complete this analysis before promulgating this Guidance, including before allowing any pilot project to use trading. In particular, the cost-benefit analysis which the Constitution requires should reflect that the benefits of such a program outweigh the costs and that the Guidance and rules are written in a way to avoid the adverse impacts to the maximum extent practicable.

**XI. LDEQ’S GUIDANCE MUST DETAIL HOW IT WILL  
MITIGATE AND AVOID DISPROPORTIONATE  
IMPACTS TO ENVIRONMENTAL JUSTICE COMMUNITIES.**

Water quality trading programs have the significant potential to disproportionately impact low-income communities of color, raising environmental justice concerns. As the National Network Guidance expressed:

Managers establishing WQT programs should also remain alert to environmental justice concerns. Environmental justice issues arise when the administration or enforcement of environmental laws concentrates harm disproportionately in populations of lower socioeconomic means and without meaningful access to governmental decision making. Two basic environmental justice concerns have been expressed by some: first, that localized impacts could inadvertently arise more

often in low income and minority communities; and second, that the economic advantages of trading will not be shared proportionately with landowners and farmers of lower socioeconomic means.

National Network Guidance at 47. As a result, the Guidance recommends: “Proper program development and enforcement should mitigate these concerns.” *Id.* at 48. LDEQ’s Guidance does nothing to address, mitigate, or avoid disproportionate impacts on low-income communities of color. Instead, LDEQ offers the empty assurance that: “LDEQ’s goal is that no segment of the population, regardless of race, color, national origin, or income, as a result of LDEQ policies, programs, and activities, suffers disproportionately from adverse human health or environmental effects.” LDEQ Guidance at 14. This is inadequate, and likewise violates LDEQ’s public trustee duty. LDEQ must put measures in place to avoid these impacts.

## **XII. LDEQ MUST IMPOSE A CAP ON WATER QUALITY TRADING IN EACH WATERSHED AND FOR EACH CREDIT PURCHASER.**

While LDEQ’s guidance provides that the TMDL provides a cap on the amount of pollution in impaired waters with a TMDL, LDEQ does not provide for a cap on trading in pre-TMDL impaired waters or unimpaired, healthy waters. LDEQ discusses a Watershed Trading Framework which it defines as a “[w]atershed-level document that contains the specific details of implementing a trade as it applies to multiple permittees trading within a watershed,” Guidance at 6, but does not prohibit unlimited multiple permittees to trade within a watershed or even within the same waterbody, and does not even require a watershed trading framework when multiple permittees trade within a watershed. *Id.* (stating that “[d]eveloping a watershed trading framework is not necessary to participate in Louisiana’s WQT Program.”).

A cap on the extent to which sources within the same waterbody can buy credit and pollute above their WQBEL is essential, and likely so is a cap on buyers within the same watershed and the same basin. It should go without saying that too much pollution dumped within the same waterbody over and above the water quality-based limits of each pose a high risk for degrading the waterbody and exceeding the criteria. LDEQ must include a cap.

## **XIII. WATER QUALITY TRADING SHOULD NOT BE ALLOWED IN OUTSTANDING NATURAL RESOURCE WATERS.**

Again, uncertainty and the potential for failure are givens in water quality trading programs. For this reason, the state’s highly protected scenic streams – which LDEQ designates as Outstanding Natural Resource Waters (ONRWs) – should not be subjected to pollution over the water quality-based limits based on reductions made in non-ONRW waters or even within the same ONRW. Most ONRWs are so designated because they are popular recreational waters which are heavily used by the public. LDEQ should not risk the quality of these waters by allowing a source to pay to pollute them.

EPA’s Guidance on this issue likely violates the Clean Water Act when it states that:

EPA does not believe that trades and trading programs will result in ‘lower water quality’ as that term is used in 40 CFR 131.12(a)(2), or that antidegradation review would be required under EPA’s regulations when the trades or trading programs achieve a *no net increase* of the pollutant traded and do not result in any impairment of designated uses.

EPA Guidance at 1611. Even more problematic language specific to Outstanding Natural Resource Waters appears immediately above, when EPA states “EPA recommends that state or tribal antidegradation policies include provisions for trading to occur without requiring antidegradation review for high quality waters.” Particularly for LDEQ’s program which would allow trading in ONRWs outside of the same waterbody and even potentially outside of the same watershed, and would not necessarily require a credit buyer to use credit from an upstream source, this EPA recommendation violates the Clean Water Act.

Even the National Network recognized this, stating:

U.S. EPA’s policy statements from 2003 on the interaction of trading and antidegradation, like other parts of the policy, have not been tested in federal court and could prove controversial in practice. WQT programs must, at a minimum, maintain and protect existing uses in impaired waters. In high quality waters, states cannot further degrade water quality unless found ‘necessary to accommodate important economic or social development’ in the area.

National Network Guidance at 52. LDEQ should address how it believes its program is in compliance with the Clean Water Act and “follows” the National Network Guidance on this issue. LDEQ must now allow trading in Outstanding Natural Resource Waters.

#### **XIV. CREDITS MUST BE REQUIRED TO BE USED AS THEY ARE GENERATED AND NONPOINT SOURCE REDUCTIONS MUST BE VERIFIED BEFORE THEY BECOME AVAILABLE FOR PURCHASE.**

LDEQ must require that credits generated by nonpoint sources, or point sources, be used as they are generated and not allowed to be “banked” and sold weeks, months, or years after they are generated. Such systems not vulnerable to lax accounting and recordkeeping, which similar LDEQ systems have suffered from in the past, but make verification and enforcement difficult if not impossible, on both the purchaser and generator’s sides. Similarly, before LDEQ allows nonpoint source “reductions” to be sold, it should require verification that the reduction is real and not temporary.

#### **CONCLUSION**

Water quality trading programs in general have not been demonstrated to successfully reduce pollution, eliminate the incentive to advance pollution control technology, and are rife with uncertainty, expense, and weaknesses. LDEQ’s proposal for a water quality trading is far too vague to allow for effective comment, but as is includes many problematic provisions and

provisions which outright violate the Clean Water Act. Accordingly, LDEQ should offer the public evidence of successful programs, an analysis of what works in those programs, and then provide a detailed trading program which is likely to succeed. Once LDEQ develops such a program, it must complete and publicize for comment a detailed public trustee analysis which ensures that the potential and real adverse impacts of such a program have been avoided to the maximum extent practicable, that the costs of such a program are outweighed by the benefits, and that it has addressed ways to mitigate any harm the program will cause. Louisiana is far from ready for water quality trading, and the program as is violates the Clean Water Act and Article IX, section 1 of the Louisiana Constitution.

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