



Tulane Environmental Law Clinic

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**By Email to: [deidra.johnson@la.gov](mailto:deidra.johnson@la.gov)**

Ms. Deidra Johnson

Attorney Supervisor, Office of the Secretary

Legal Division

Louisiana Department of Environmental Quality

Re: Proposed Regulation WQ088 - Revisions to  
Antidegradation Provisions of La. Water Quality Standards

Dear Ms. Johnson:

On behalf of the Gulf Restoration Network (GRN), we submit the following comments on the above-referenced regulatory changes. We urge the Louisiana Department of Environmental Quality (LDEQ) to withdraw this rulemaking. LDEQ is obligated to develop Antidegradation Implementation Procedures, which it apparently has yet to do. The last available information on the development of these EPA-mandated procedures was on November 11, 2011, when EPA commented that LDEQ's April 27, 2011, draft proposal for Antidegradation Implementation Procedures remained flawed. LDEQ's EDMS system contains nothing after this EPA letter, so LDEQ apparently has yet to develop acceptable implementation procedures.

The currently-proposed regulatory revisions are to key components of Louisiana's Antidegradation program. Both the implementation procedures and these proposed rule revisions should be promulgated through rulemaking, and should be promulgated together. The rulemaking changes and the implementation procedures are integrally connected, and cannot be understood separately from one another. Further, both the rule changes and the last available version of the implementation procedures are significantly flawed, such that use of these rules and procedures cannot assure that water quality will be restored and maintained in Louisiana's waterbodies.

**I. THE RULEMAKING CHANGES TO TIER 3 ANTIDEGRADATION PROVISIONS LOWER PROTECTIONS FOR OUTSTANDING NATURAL RESOURCE WATERBODIES SUCH THAT THEY DO NOT COMPLY WITH CLEAN WATER ACT MANDATES.**

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LDEQ's rule revisions propose major changes to Louisiana's Tier 3 policy and implementation procedures. These revisions do not "enhance and protect" waters of the State, as LDEQ suggests in its notice. Instead, the Tier 3 revisions would significantly lower protection offered Tier 3 waterbodies, in many respects lowering them to such an extent that they violate federal law.

**A. LDEQ's Proposed Removal of the Tier 3 Degradation Definition Will Result in It Applying An Illegal Degradation Definition.**

It is important to begin with a clear understanding of what EPA considers Tier 3 protection. EPA regulations at 40 C.F.R. § 131.12(a)(3) instruct States as to what their antidegradation provisions must achieve. With respect to Tier 3 waters, they provide: "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."

EPA guidance elaborates on this designated high-level protection as follows: "EPA interprets this provision to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs. The only exception to this prohibition, as discussed in the preamble to the Water Quality Standards Regulation (48 F.R. 51402), permits States to allow some limited activities that result in temporary and short-term changes in the water quality of ONRW."<sup>1</sup>

As part of its proposed changes, LDEQ plans to remove the definition of "degradation" from the Tier 3 implementation rules and replace it with a new definition that is applicable to all water quality standards. Currently, the Tier 3 rules define "degradation" as "a statistically significant difference at the 90 percent confidence interval from existing physical, chemical, and biological conditions."<sup>2</sup> Therefore, essentially LDEQ may not approve a proposed discharge into an Outstanding Natural Resource Water if it will cause any detectable change in water quality, in accordance with statistical standards. This is consistent with EPA regulations and guidance, and, applied correctly, adequately protects these special waterbodies. However, in its proposed changes, LDEQ would remove that definition from the Tier 3 provisions and replace it with a general definition of degradation applicable for all waterbodies as: "a lowering of water quality, as demonstrated by data analysis, water quality models, or other scientifically defensible method."<sup>3</sup> Though this definition is new, it appears to be an attempt to codify LDEQ's frequent practice of avoiding mandatory Tier 3 antidegradation analyses in violation of EPA's regulations and guidance.

**1. *LDEQ's Proposed Definition of Degradation Would Codify Its Current Practice of Not Performing Mandatory Tier 3 Analyses.***

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<sup>1</sup> EPA Water Quality Standards Handbook § 4.7 (2d. ed. Aug. 1994).

<sup>2</sup> La. Admin. Code tit. 33, pt. IX, § 1119.C.4.

<sup>3</sup> Proposed Changes at La. Admin. Code tit. 33, pt. IX, § 1105.

While on its face this new definition appears innocuous, in fact, changing the definition of degradation from “a statistically significant difference” in water quality conditions to “a lowering” of water quality gives LDEQ free reign to continue its current illegal implementation of Tier 3 standards wherein it does not conduct the required statistical analysis or any valid scientific analysis. LDEQ’s practice, now a proposed codification, allows it to repeatedly permit discharges in Outstanding Natural Resource Waters.

LDEQ currently uses pre-set values for what constitutes degradation. These values invite disregard of a particular waterbody’s individual features and requirements in favor of an apparently random “one size fits all” degradation definition. Thus, in permit proceedings involving a discharge from a sewage treatment plant into an Outstanding Natural Resource Water in St. Tammany Parish (the Soap and Tallow Branch and the Tchefuncte River), LDEQ used its pre-set values to determine that the discharge would not degrade the receiving waterbodies. LDEQ stated:

“[N]o degradation” will require that the concentration of dissolved oxygen must not be reduced by more than a statistically significant difference at the 90% confidence interval. In practice, this interval is difficult to estimate, and resource, time, and data requirements for such determinations would be generally prohibitive. Therefore, an acceptable alternative criterion allows a reduction of no more than 0.5 mg/L relative to the conditions existing at the time of designation of the scenic stream. Based on experience in post-survey instrument comparison, this value is roughly equal to a confidence interval for instrument repeatability in DO measurement, and therefore represents a minimum confidence interval.<sup>4</sup>

This practice of using pre-set values allows LDEQ to permit discharges into Outstanding Natural Resource Waters. In fact, in another permit proceeding, LDEQ stated that applying its pre-set degradation value would allow it to permit no less than four sewage treatment plant discharges into the Timber Branch and Tchefuncte River, Outstanding Natural Resource Waters.<sup>5</sup> Thus, removing the current definition represents an attempt to legitimate its illegal practice of failing to perform Tier 3 antidegradation analyses because they are “difficult” and resource intensive. LDEQ does not seem to understand that discharges into Tier 3 waters are supposed to be difficult to justify. Its replacement of a pre-set value, that appears never to be exceeded, makes it easy for LDEQ to allow discharges into Outstanding Natural Resource Waters, which should involve “no new or increased discharges to ONRWs.” EPA Water Quality Standards Handbook § 4.7 (2d. ed. Aug. 1994).

Further, LDEQ has used the above .5 mg/l practice as a way to ignore other pollutants. There are many other pollutants than ones that use up dissolved oxygen, and controlling for dissolved oxygen cannot be used as a surrogate for controlling for other pollutants.

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<sup>4</sup> December 5, 2007, Statement of Basis, Goodbee Regional Sewage Treatment Plant (attached as Exhibit 1). Though LDEQ later issued a revised decision for discharge into a waterbody that was not designated as an ONRW, the revision was prompted by the Louisiana Department of Wildlife and Fisheries’ instructions to the discharger, not LDEQ’s.

<sup>5</sup> April 2, 2009, Statement of Basis, Timber Branch II Sewage Treatment Plant, pp. 10-11 (attached as Exhibit 2).

2. ***LDEQ's Proposed Definition of Degradation Will Lead to Inadequate Protections for Tier 3 Waters When Considered In Conjunction With LDEQ's Proposed Antidegradation Implementation Policy.***

Additionally, when the regulatory definitions are read in conjunction with LDEQ's last proposed antidegradation implementation procedures, numerous ways for evading full Tier 3 protections arise. First, unlike the Tier 3 regulatory language, LDEQ's proposed antidegradation implementation procedures only prohibit approval of a discharge into a Tier 3 waterbody when that proposed discharge is "likely" to cause degradation of the water quality.<sup>6</sup> The introduction of the word "likely" injects another loophole for unwarranted discretionary exceptions to the prohibitions.

Second, the antidegradation implementation procedures do not definitively require a permit applicant to provide the necessary data to determine degradation "as demonstrated" by one of the described methods. Under the "Demonstration of Degradation" section, the procedures state that: "If no data is available to demonstrate whether degradation is likely to occur, the permit applicant *may* be required to collect and submit water quality data."<sup>7</sup> This appears to leave LDEQ discretion to forego Tier 3 review in situations where data is not already available to determine whether degradation may occur.

Third, the antidegradation implementation procedures later essentially negate the requirement that a permit applicant prove the discharge will not degrade water quality by inviting use of pre-set values that LDEQ sets for what constitutes degradation. These values invite disregard of a particular waterbody's individual features and requirements in favor of an apparently random "one size fits all" degradation definition. So, for example, if dissolved oxygen is the parameter of concern, the procedures state that any degradation of less than .2 mg/L is, by definition, not degradation.

The previous regulatory language, where the definition of degradation is clearly defined within the Tier 3 regulation, offers better protection to Tier 3 waterbodies than use of definitions linked to the problematic antidegradation implementation procedures and should remain.

**B. The Addition of "New or Increased" Language Results in Less Protection for Outstanding Natural Resource Waters.**

In its changes to the Tier 3, or Outstanding Natural Resource Waters, implementation language, LDEQ proposes to add language to the first sentence. The first sentence currently reads: "If a wastewater discharge or activity is proposed for an outstanding natural resource water body, as defined by this Chapter, the administrative authority shall not approve that

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<sup>6</sup> May 2010 Draft Antidegradation Implementation Procedures ("May 2010 Draft") at pp. 13-14 (attached as Exhibit 3).

<sup>7</sup> Exhibit 3 at 14 (emphasis added).

activity if it will cause degradation of these waters.”<sup>8</sup> The proposal would change the sentence to read: “If a new or increased wastewater discharge ~~or activity~~ is proposed . . . .” Thus, LDEQ attempts to limit the situations where it must disapprove activities which will cause degradation to only new or increased discharge situations.

This change violates federal antidegradation law because of the way LDEQ interprets “increased.” The addition of this language will mean that no permit renewals will need to undergo Tier 3 review, even those where loadings are increased and degradation is likely. This violates federal law and policy. Second, this language attempts to codify LDEQ’s long-standing refusal to conduct Tier 3 antidegradation analyses in accordance with its promulgated regulations.

***1. LDEQ’s Proposed Limitation of Tier 3 Requirements to “Increased” Discharges Will Result in Most Increased Discharges Evading Tier 3 Review.***

LDEQ’s proposed language change will allow it to forego Tier 3 review on a significant portion of renewed LPDES permits, even where they actually increase the loadings into the receiving waterbody. LDEQ interprets “increased” to cover only those reissued permits where the permit limits are being increased.

This was demonstrated in LDEQ’s permitting decision and subsequent litigation on the Penn Mills Lakes Wastewater Treatment Plant 2009 permit reissuance.<sup>9</sup> Penn Mills Lakes is a subdivision in St. Tammany Parish. Its wastewater treatment plant discharges into the Horse Branch creek, which discharges into the Tchefuncte River, an Outstanding Natural Resource Water. In 2009, Penn Mills applied for a permit renewal. In its application, Penn Mills informed LDEQ that the homes serviced by the plant would increase from the current 365 homes to 474 homes.<sup>10</sup> For this reason, it estimated that its existing wastewater flow would increase from .057 MGD (million gallons per day) to .19 MGD.<sup>11</sup> This represents an “increase” in any sense of the word and surely in terms of the potential to degrade the receiving waterbody from current physical, chemical, and biological conditions.

However, LDEQ did not perform a Tier 3 Antidegradation analysis on this permit reissuance. It reasoned that: “The LDEQ reviewed discharge monitoring reports from the Penn Mill Lakes STP submitted for the past two years and determined that renewing the permit would not result in any increase in discharge into Subsegment 040801 of the Tchefuncte River, as the renewal permit did not include any change or *increase* in discharge limits. As such, the LDEQ found that there would be no change to the present discharge into the Tchefuncte River and no degradation of its waters.”<sup>12</sup> Thus, because the permit limits did not change, LDEQ ignored the

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<sup>8</sup> La. Admin. Code tit. 33, pt. IX, § 1119.C.4.

<sup>9</sup> Exhibits 4-6.

<sup>10</sup> Exhibit 7 at p. 5 of 23.

<sup>11</sup> Exhibit 7 at p. 8 of 23.

<sup>12</sup> Exhibit 8 at p. 3 (emphasis added).

fact that the plant would be discharging more pollutants than it previously discharged (though not more pollutants than it had previously been *allowed* to discharge).

Therefore, LDEQ's proposed language change, considered in conjunction with its interpretation of "increased," means that any renewed permit which involves an actual increase in discharge but which does not require an increase in the permit limits, will not be reviewed for Tier 3 compliance.

***2. LDEQ's Proposed Language Change, In Conjunction With Its Removal of the Tier 3 Degradation Definition, Attempts to Legalize Its Practice Of Routinely Allowing New and Increased Discharges Into Outstanding Natural Resource Waters.***

LDEQ has a history of permitting discharges into Tier 3 waterbodies. As mentioned above, with both the Goodbee and Timber Branch II wastewater treatment plants, LDEQ proposed to issue those permits allowing discharges into ONRWs. Again, in the case of the Vanguard biodiesel facility in Grant Parish, LDEQ permitted the discharge into Little River and Big Creek, both ONRWs.<sup>13</sup> In the case of RTD Beverages, LDEQ proposed to permit a discharge into the Soap and Tallow Branch, an ONRW, with no antidegradation analysis whatsoever.<sup>14</sup> Regarding the case of RTD Beverages, LDEQ sought to permit such discharges without providing any evidence that pollutants from the discharges would not cause a degradation with 90 percent statistical confidence as required by Louisiana law. The only evidence they gave was that they used Best Professional Judgement (BPJ). According to the NPDES Permit Writers Manual, permit writers "should provide the NPDES permit applicant and the public a transparent, reproducible, and defensible description of how the BPJ limitations will comply with the [Clean Water Act] and EPA regulations."<sup>15</sup> Yet, the draft permit package did not include any pertinent data upon which BPJ could be used with any confidence.

However, when LDEQ permitted an existing wastewater discharge into an ONRW in the case of the Penn Mills Lakes sewage treatment plant, the Gulf Restoration Network, Little Tchefuncte River Association, and Mr. Matthew Allen sued LDEQ to force it to apply its regulation restricting discharges into ONRWs. The Nineteenth Judicial District Court held that LDEQ had violated the law when it failed to conduct a degradation analysis and when it failed to determine that no reasonable alternatives existed to the discharge.<sup>16</sup> LDEQ's rule changes proposed herein appear to be an attempt to avoid being held to the "no degradation" standard by the courts.

LDEQ also leaves the door open for degradation in cases that do not directly discharge into ONRWs, but into their tributaries. LDEQ is required to protect downstream uses under the Clean Water Act, but offers no requirements for the dischargers to look at downstream impacts to

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<sup>13</sup> Exhibit 9.

<sup>14</sup> Exhibit 10.

<sup>15</sup> US EPA, Office of Wastewater Management, NPDES Permit Writers Manual, September 2010, Page 5-48.

<sup>16</sup> Exhibits 5-6.

ONRWs. This should be required under any Tier 3 implementation procedures. LDEQ currently dismisses dischargers into tributaries of ONRWs as potential sources of degradation. Just this past month a Draft Permit for Air Liquide Large Industries U.S. LP/Norco ASU Plant was noticed.<sup>17</sup> This discharge is into an ONRW tributary. Specifically they are requesting a permit to discharge into Engineers Canal, which flows into Bayou Labranche, an ONRW. LDEQ makes the claim that “this designated use is applicable only if the discharge is directly into the named waterbody and not into a tributary or distributary of the waterbody . . . .” While the ONRW requirements only apply to the ambient water quality of the designated waterbody, LDEQ still cannot allow any degradation of the ONRW, even if it comes from upstream. LDEQ claims that “based on the limitations imposed and the distance from Bayou Labrance, the discharge is not expected to cause any degradation to the ONRW,” but offers no evidence to support these claims.

### ***3. The Revised Language Opens the Door for Illegal Polluters to Continue to Pollute in ONRWs.***

In § 1119.C.3 in the proposed rule change, LDEQ proposes to change the existing language in order to allow unpermitted dischargers of pollutants to continue to pollute ONRWs. LDEQ explicitly stated that an “unpermitted discharge may be permitted if the discharge existed before the designation as an outstanding natural resource water body. Additionally an existing unpermitted discharge of treated sanitary wastewater may also be permitted if no reasonable alternative discharge location is available.” So, if somebody was polluting an ONRW illegally before the ONRW’s designation, they may be permitted to continue to pollute. This is inconsistent with existing state and federal antidegradation policies.

EPA appears to be concerned with this change as well, stating “that EPA regards the ONRW designation as the highest level of water quality protection and interprets it to mean no allowance of new or increased discharges into the water body. EPA does not agree that allowing a permanent new or increased load to an ONRW is consistent with the antidegradation regulations.”<sup>18</sup>

### **C. LDEQ’s Removal of Natural and Scenic Rivers From De Facto Designation as Outstanding Natural Resource Waters Is An Illegal Downgrade.**

LDEQ’s proposed regulations could allow it to remove existing protections for Natural and Scenic Rivers. The current regulations provide that “no degradation shall be allowed in high-quality waters that constitute outstanding natural resource waters, such as waters in the Louisiana Natural and Scenic Rivers System.” Thus, for many years all Louisiana waterbodies which constitute Scenic Streams have been entitled to the highest protection as Tier 3 Outstanding Natural Resource Waters.

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<sup>17</sup> Exhibit 12

Now, however, LDEQ appears to be attempting to remove protections already enjoyed by these Scenic Streams. LDEQ's proposed regulations would change the above-quoted language to: "[N]o degradation shall be allowed in high-quality waters that constitute outstanding natural resource waters . . . Waters included in the Louisiana Natural and Scenic Rivers System, under the administration of the Louisiana Department of Wildlife and Fisheries, will be *considered* by the department for designation as outstanding natural resource waters." La. Admin. Code tit. 33, pt. IX, § 1109.A.2 (emphasis added).

All scenic streams are already ONRWs under the existing regulations. What LDEQ appears to be doing here is illegally downgrading all scenic streams not listed in section 1123 from ONRW status to Tier 2 or Tier 1 status by changing the rules. For example, waters such as the Ouachita River (from the north bank of Bayou Bartholomew at its intersection with the Ouachita River to the Arkansas state line) and Bayou Chinchuba (from the West Causeway approach south to Lake Pontchartrain) will no longer be considered ONRWs, as they are not in section 1123 as ONRWs.<sup>19</sup> However, LDEQ cannot downgrade waters without a Use Attainability Analysis. 40 CFR § 131.10 provides that states may only "remove a designated use which is *not* an existing use, as defined in § 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible" based on factors therein listed. Such an action, of course, would free these waterbodies from the "no discharge" restriction. Additionally, this could lead to violations of antibacksliding requirements in permitting. Thus, if LDEQ is attempting to, in effect, remove waterbodies already designated as Scenic Streams by the Louisiana Department of Wildlife and Fisheries from qualification as ONRWs, this is illegal. These waterbodies are already ONRWs pursuant to the existing language.

Federal regulations require that Outstanding Natural Resource Waters "shall be maintained and protected." 40 C.F.R. § 131.12(a)(3)). This language may do the opposite – allow discharges into Scenic Streams which are not allowed presently via their status as ONRWs. If, instead, LDEQ intends only to cover future designations of waterbodies as Scenic Streams, and is stating that those future designated waterbodies will not automatically qualify as ONRWs, it should include language clarifying this.

Connected with the above issue, in Section 1109(A)(2), LDEQ changes the "no degradation" rule to apply to waterbodies "designated as" ONRWs, where the current language applies the rule to waterbodies "that constitute" ONRWs. It is unclear what LDEQ intends with this change, but if it is intended to work with the above language to downgrade an entire category of scenic streams en masse (those not listed in section 1123), then it should be removed.

## **II. LDEQ MUST CORRECT EXISTING MISSTATEMENTS OF ANTIDegradation LAW IN THESE REGULATIONS.**

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<sup>18</sup> Exhibit 11.

<sup>19</sup> For a listing of Louisiana's Natural and Scenic Rivers, see [http://dnr.louisiana.gov/assets/docs/coastal/interagencyaff/nonpoint/forestry/page\\_45-49.pdf](http://dnr.louisiana.gov/assets/docs/coastal/interagencyaff/nonpoint/forestry/page_45-49.pdf).



In several places, LDEQ's regulatory language evidences a fundamental misunderstanding about antidegradation law. Thus, in Section 1119.C, the regulations state: "The basic principle of the policy is that water quality criteria specified in the standards shall not be exceeded and that designated uses will not be adversely impacted." This is NOT the definition of Antidegradation. Antidegradation policy requires that States: 1. Maintain designated and existing uses, 2. Keep clean waters clean (waters that are at or above their designated uses should not receive any more pollution unless socially or economically justified), and, 3. Not allow degradation in ONRWs and ecologically significant waters. Standard water quality regulations require that criteria must not be exceeded and designated uses must not be impaired; if this is all antidegradation meant, there would be no need for an antidegradation provision. Again, in 1119.C.2, LDEQ states that it must insure that discharges will not impair existing uses. However, Tier 2 requires that discharges into high quality waters should be prevented unless justified. LDEQ must correct this language to properly reflect antidegradation policy.

### **III. LDEQ MUST INCLUDE THE ANTIDegradation IMPLEMENTATION PROCEDURES IN THE REGULATIONS.**

At Section 1119.B.1, LDEQ references that the antidegradation implementation procedures "may be incorporated into the Water Quality Management Plan. . . ." This is inadequate. LDEQ must include the implementation procedures in its regulations, so that the provisions can be adequately enforced. LDEQ should have included all of its implementation procedures, including Tier 2, in these regulations. Because these regulations include not just policy but some implementation, and because implementation is where the rubber hits the road, all implementation provisions should be included here in the regulations. In fact, EPA itself expressed that it was confusing for LDEQ to separate antidegradation implementation procedures from these regulations. *See* Exhibit 11 (Nov. 10, 2011, letter from Jane Watson, EPA VI, to Melvin Mitchell, LDEQ).

### **CONCLUSION**

The proposed regulatory changes would undermine the purposes of antidegradation law and attempt to codify LDEQ's illegal antidegradation practices. The proposed regulatory changes should be withdrawn, as they are inconsistent with EPA regulations and guidance. Scenic streams, which are already automatically ONRWs under the existing regulations, and have been for years, cannot be downgraded en masse via a change in regulatory language. These regulations should be reissued with corrections and in conjunction with a rulemaking that includes the antidegradation implementation procedures for Tier 2 waterbodies.

Sincerely,

\_\_\_\_\_/s/ Lisa W. Jordan\_\_\_\_\_

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