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September 17, 2002

Via Certified Mail No 7099 3400 0014 9003 6036:

Christine Whitman, EPA Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Via Certified Mail No 7099 3400 0014 9003 6043:

Greg Cooke, Regional Administrator
Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas TX 75202

Re: Second Supplement to Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Louisiana

Dear Ms. Whitman and Mr. Cooke:

More than eleven months ago, on October 9, 2001, eleven organizations¹ filed a petition formally requesting that the Environmental Protection Agency ("EPA") withdraw the Louisiana Department of Environmental Quality's ("LDEQ") delegated authority to administer the National Pollution Discharge Elimination System ("NPDES") in the State of Louisiana. In the October 9 petition and subsequent amendments, the Citizen Groups have established that:

¹ These citizen groups are: Louisiana Environmental Action Network, Louisiana Audubon Council, Gulf Restoration Network, Association of Community Organizations for Reform Now, Lake Ponchartrain Basin Foundation, CFACT, Lake Maurepas Society, Concerned Citizens of Livingston Parish, St. John Citizens for Environmental Justice, Louisiana Communities United, Concerned Citizens of Iberville Parish.

- Louisiana's legal authority no longer meets the requirements for delegation.²
- The operation of the state program fails to comply with the requirements of delegation because LDEQ has failed to issue timely and adequate permits and failed to comply with the public participation requirements of its NPDES delegation.³
- The State's enforcement program fails to comply with the requirements of delegation because LDEQ fails to act on permit violations; fails to seek adequate enforcement penalties or to collect administrative fines when they are imposed; and fails to inspect and monitor activities subject to regulation.⁴
- The State fails to abide by the terms of its Memorandum of Agreement ("MOA") with EPA.⁵

Thus, under EPA's criteria for withdrawing state programs, 40 C.F.R. § 123.63, EPA must withdraw LDEQ's authority to administer the program. Accordingly, these Citizen Groups request that the EPA promptly respond in writing, as required by 40 C.F.R. § 123.64, and commence withdrawal proceedings immediately, including setting a public hearing.

In addition, this letter provides further evidence that LDEQ is not administering the Louisiana Pollution Discharge Elimination System ("LPDES") in accordance with the Clean Water Act's requirements. First, in March 2002, the State of Louisiana's Legislative Auditor issued a report setting forth the systemic inability of LDEQ to administer delegated programs. State of Louisiana Legislative Auditor, Performance Review (Mar. 2002) available at <http://www.la.state.la.us/perform/DEQ02.pdf>. Second, EPA's own oversight documents, file reviews and audits from 1997 to 2001, establish LDEQ's dismal enforcement record and highlight LDEQ's continuous failure to properly enforce the LPDES. These documents, which are incorporated by reference, establish that LDEQ cannot administer the LPDES in a manner that is consistent with EPA's required enforcement procedures.

² See Letter from Elizabeth Teel, Tulane Environmental Law Clinic, to Paulette Johnsey, EPA (Dec. 19, 2001) ("December 19 Letter"), pp. 1-2.

³ See October 19, 2001 Petition for Withdrawal at 6-13; December 19 Letter at 2-4.

⁴ See October 19, 2001 Petition for Withdrawal at 13-24; December 19 Letter at 4-6; *infra*, pp. 4-9.

⁵ See October 19, 2001 Petition for Withdrawal at 13-19; *infra*, pp. 4-9.

I. EPA MUST RESPOND IN WRITING TO THE CITIZENS GROUPS' PETITION AND IMMEDIATELY INSTITUTE WITHDRAWAL PROCEEDINGS.

The Clean Water Act mandates that EPA revoke a state's delegated authority to implement the NPDES when the Administrator finds that the state's program is not in accordance with the Act's requirements.⁶ Pursuant to EPA regulations, the public may submit a petition for withdrawal of a state's delegated authority to administer the NPDES program, to which EPA must respond in writing. 40 C.F.R. § 123.64(b)(1).

The Citizens' Groups original petition and subsequent amendments establish that LDEQ's authority to implement the LPDES must be withdrawn because LDEQ fails to administer the program in accordance with the Clean Water Act, EPA regulations, and the MOA. See 40 C.F.R. § 123.64 (setting forth criteria for program withdrawal). Therefore, EPA should immediately respond to the Citizen Groups' Petition for Withdrawal by commencing withdrawal proceedings, including setting a time for a public hearing. 40 C.F.R. § 123.64(1).⁷

II. A RECENT LEGISLATIVE AUDITOR'S REPORT REVEALS SERIOUS DEFECTS WITH LDEQ'S ADMINISTRATION OF THE LPDES PROGRAM.

In March 2002, the Legislative Auditor for the State of Louisiana released a Performance Audit of LDEQ. This Audit confirmed what many already knew--that LDEQ has serious problems administering the programs under its control, including the LPDES. The findings include the following:

⁶ CWA § 402(c)(3) states in full:

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

⁷ The state must then admit or deny these allegations in a written answer within thirty days. *Id.* If, after the public hearing, EPA determines that a state program is inadequate, EPA must notify that state and allow 90 days for the state to take corrective action. 33 U.S.C. § 1342(c)(3). If the state fails to take corrective action, then EPA "shall withdraw" its earlier approval of the state's program. *Id.* EPA's withdrawal must be made public and be in writing. *Id.*

- LDEQ cannot easily provide accurate information about whom it regulates.
- LDEQ has not issued 66% of the water permits it committed to EPA to issue; in addition many facilities are operating under expired permits.
- Sixty-nine percent of major water facility permits and 73% of solid waste facility permits are expired.
- Twenty-six percent of the required self-monitoring reports in [the] sample for water and 22% of the required reports for air in our sample were not submitted to LDEQ or could not be located at LDEQ.
- Eighty percent of the formal water enforcement actions in [the] sample were issued over 150 days after the violation occurred.
- LDEQ has not collected nearly \$4.5 million or 75% of the monetary penalties assessed in fiscal years 1999, 2000, 2001.
- One-third of complaints sampled [] were not handled within five days from when LDEQ received the complaint.
- Some complaints in [the] sample appeared to involve a violation; however, no enforcement action was issued.
- Many vital documents could not be located, were misfiled in physical files or were indexed incorrectly in electronic files. March 2002 Performance Audit, Executive Summary.

The Performance Audit paints an especially bleak picture with respect to LDEQ's enforcement. For the sample studied by the Legislative Auditor, 31% of inspection violations for minor permits and 38% of monitoring violations received no enforcement action. *Id.* at 19, 22. When LDEQ did take enforcement action, 80% of the time it was over 150 days after the violation occurred. *Id.* at 19, 23-24. In addition, even if a facility had more than one enforcement action for the same or similar violation, LDEQ did not escalate enforcement for 57% of the cases. *Id.* at 19, 26. Finally, when LDEQ did take enforcement actions, it failed to collect the penalty 58% of the time. *Id.* at 19, 29.

Clearly, LDEQ's problems are widespread and systemic. Under these circumstances, EPA must fulfill its oversight duty and withdraw LDEQ's authority to administer the LPDES program.

III. Based on EPA's Own Audits and Reviews, LDEQ's Enforcement of the LPDES Has Violated Statutory and Regulatory Requirements.

Under 40 C.F.R. § 123.24, EPA and LDEQ entered into a MOA in 1996 that establishes policies, responsibilities, and procedures with respect to LDEQ's administration of the LPDES program. EPA, LDEQ, Memorandum of Agreement, Section XI (1996). In the MOA, LDEQ pledged to develop and maintain adequate legal authority to carry out the LPDES program, to assume priority in enforcing the NPDES program (including penalty assessment and collection), to ensure compliance with the NPDES program, and to maintain adequate public records and permit files. MOA, Section II.A. Part of EPA's responsibility under the MOA is to conduct audits of LDEQ

files in order to determine whether LDEQ is adequately following MOA procedures, i.e. to determine whether LDEQ is properly administering the LPDES enforcement program. MOA, Section I.B, Section VII.A.3.

The Citizen Groups are now amending their original petition to include findings from EPA's audits and program reviews from 1997 through 2001, which demonstrate that LDEQ is not adequately administering the LPDES enforcement program in accordance with the MOA. LDEQ has displayed and continues to display egregious deficiencies in all areas of its enforcement program, including enforcement activity, data management, records management, compliance monitoring, inspections and penalties. Consequently, under 40 C.F.R. §123.63 (4), LDEQ has failed to comply with the MOA and therefore satisfies the criteria for withdrawal of its LPDES program.

A. EPA Reviews of the LDEQ's Administration of the LPDES Program Have Consistently Revealed Serious Deficiencies in LDEQ Records Management.

Adequate record management is essential in enforcing permit requirements. To that end, MOA Section IV.B.1 requires that "LDEQ shall conduct timely and substantive reviews and keep complete records of all written material relating to the compliance status of LPDES permittees" However, EPA's general findings through its audits and reviews reveal serious deficiencies in LDEQ's LPDES records management.

Since 1997, EPA audits and reviews demonstrate LDEQ's pattern of inadequate record management. EPA identified numerous missing documents and incorrect filings for LPDES records as early as January 1997 in its NPDES Quarterly Enforcement Meeting and Mid-Year Program Audit – FY 1997 ("1/97 Audit"). General findings included missing non-compliance reports for numerous violations, incorrect or incomplete data in violation summary logs, and incorrectly coded and/or missing discharge monitoring reports, among other deficiencies. 1/97 Audit at 4-7.

LDEQ did not correct the problems with records management in time for the next EPA audit, titled the Louisiana Multi-Media Enforcement Program Review conducted in October of 1997. ("10/97 Review"). In its review, EPA found that:

Records management practices and procedures for the Louisiana Pollutant Discharge Elimination System (LPDES) program were not in accordance with the approved Enforcement Management System (EMS) manual. *Specifically, documents were missing from the files, there was an excessive backlog of filing material (10-15 feet of material), original documents were not consistently in date sequence order, and documents were not consistently marked to facilitate accurate filing.* Id. at 3 (emphasis added).

EPA did, however, recognize that LDEQ's Office of Water Resources "was in the process of a significant file reconstruction project begun October 1996" *Id.* The project involved over \$290,000 in staff time and material. Subsequent EPA reviews, however, reveal that LDEQ's record management system is still flawed.

In EPA's 1998 November Review, EPA commented, "some original documents were not located in the official files," and "discharge monitoring reports (DMR) continue to be randomly placed in the file." Louisiana LPDES Enforcement Program Review conducted on November 16-18, 1998 ("11/98 Review") at 4. The same deficiencies surfaced in EPA's subsequent reviews where many of the official files had at least one pertinent document missing: Louisiana LPDES Enforcement Program Review July 1999 ("7/99 Review") at 5, (eight of the nineteen official files audited had at least one pertinent document missing); Louisiana LPDES Enforcement Program Review February 29-March 2, 2000 ("2/00 Review") at 4, (four out of the seven); Louisiana LPDES Enforcement Program Review August 29-August 31 2000 ("8/00 Review") at 4, (two out of five). Additionally, EPA's most recent audit includes a "Summary of LDEQ Audits" that identifies LDEQ deficiencies by activity and audit date. Under "Records Management," EPA noted serious deficiencies in **seven out of the last eight audits, including the 11/01 Audit**. Louisiana LPDES End of the Year Audit for 2001 ("2001 Audit") at 63.⁸

EPA's reviews speak for themselves. However, it is important to note that the deficiencies in records management found as early as 1997 are uniform in character. In other words, LDEQ has made the same mistakes and displayed the same ineptitude year after year despite repeated prodding from EPA to correct the mistakes.

B. EPA Reviews of LDEQ's LPDES Program Reveal that LDEQ Has Produced an Ineffective Compliance Monitoring Program.

The Clean Water Act requires that permittees submit Discharge Monitoring Reports ("DMRs"), which set forth the permit limits for pollutants discharged as well as testing results for those pollutants. 33 U.S.C. § 1318(a)(A). DMRs are thus crucial to determining the types and amounts of pollutants that enter Louisiana's waters and ensuring that permittees are complying with their limits. To ensure that permittees

⁸ The Citizen Groups strongly contest that LDEQ has ever had sufficient records management. Notwithstanding the lack of records management deficiencies in the 3/01 Audit, the 3/01 Audit is a far more cursory treatment of the LDEQ files selected for review when compared to other years. As an example, out of seventeen violators of LPDES reporting requirements in the Bogue Falaya River area investigated by the Louisiana Environmental Action Network, thirteen of those violators were lacking Discharge Monitoring Reports, many of which should have been on file during the time of the 3/01 Audit. It is therefore clear that a "lack of deficiencies" in records management for the 3/01 Audit is not accurate. Additionally, public records access has been abysmal for the entire time period between the signing of the MOA and the present.

submit DMRs as required, Section IV.B. of the MOA provides that: “The LDEQ shall operate a timely and effective compliance system monitoring program including the input of appropriate data into the Permit Compliance System (PCS) for the purpose of determining compliance with permit conditions and pretreatment requirements.” However, LDEQ’s treatment of DMRs clearly demonstrates LDEQ’s failure to implement an effective records management system even with respect to the most critical records.

As early as the 1/97 Audit, EPA found that in many cases DMRs were either not in LDEQ’s file, incorrectly coded, or not found in the correct places. See generally “Concerns of File Review,” 1/97 Audit at 5-8. A close look at the most recent audit reveals that, after almost five years, these same problems continue. Under “Records Management,” EPA found that DMRs were missing for thirteen out of the twenty-three facilities with record keeping deficiencies. 2001 Audit at 8-10.

As a result of LDEQ’s persistent deficiencies in records management, EPA has continuously recommended better record keeping procedures. With respect to DMRs specifically, EPA has either recommended that LDEQ improve its treatment of those records or noted the deficiency in DMR records **every year**.

- In 1997 EPA recommended, “To improve data quality...[q]uality control of DMR data which is incomplete or deficient in PCS should be completed” 10/97 Review at 15.
- In 1998 EPA said, “. . . discharge monitoring reports continue to be randomly placed in the file. Further, there were some documents listed on the Violation Summary Logs (VSL) which were not located in the file which includes some **missing DMRs**.” 11/98 Review at 4 (emphasis added).
- In 1999 EPA noted, “Original documents could not be located in the official records, even though the [VSL] indicated receipt of said documents, i.e. DMRs...” 7/99 Review at 5.
- In 2000 EPA found that “the seven files that were audited contained all the pertinent documents except for four files that had at least one pertinent document missing from the files. Examples include . . . Town of Boyce (**six DMRs missing** . . .).” EPA went on to recommend better procedures to deal with the correct input and retention of DMR data. 2/00 Review at 4 (emphasis added).
- Again in 2000, EPA found “. . .two files that had at least one pertinent document missing from the files...and Monsanto had two yearly DMRs missing.” EPA recommended yet again that LDEQ “[u]tilize PCS computer printouts showing DMR effluent and non reporting violations...to ensure timely and appropriate enforcement action.” Id. at 9.
- In 2001, EPA recommended “. . .timely input of DMR data, receipt of compliance schedule event responses, etc. into PCS so facility status is correct.” 2001 Audit at 19.

C. EPA Reviews of LDEQ's LPDES Program Reveal LDEQ's Consistent Deficiencies in the Areas of Enforcement Activity and Penalty Assessment.

LDEQ has agreed under the MOA that it will enforce and assess penalties to encourage compliance with the LPDES. MOA, Section IV.A ("LDEQ agrees to maintain a vigorous enforcement program, including a compliance assessment of dischargers, and to take timely and appropriate enforcement actions where such action is warranted. Discharges endangering public health shall receive immediate and paramount attention."). Furthermore, under Section II.A.9, the MOA requires LDEQ to assess penalties in accordance with the CWA. These two enforcement aspects are perhaps the cornerstones of the LPDES program. However, these areas, which are essential to an effective LPDES program, are the most egregious deficiencies reported by the EPA.

Since 1997 and every year thereafter, EPA has reported consistent deficiencies in LDEQ's enforcement activity. EPA reported in their 1997 audit that of the 14 files audited, "enforcement actions have not been initiated in all cases since the program was assumed." 1/97 Audit at 3. In the October 1997 Review, LDEQ showed improvements but still did not enforce its LPDES program up to EPA standards. Of the files audited, 77% of the facilities had at least one effluent exceedance. 10/97 Review at 5. However, LDEQ took enforcement action only 60% of the time. *Id.* Further, even when LDEQ took enforcement action, LDEQ made some errors in those actions. For example, LDEQ issued three Compliance Orders for effluent violations omitted certain violations from the Order. *Id.*

EPA's November 1998 Review noted a few unsatisfactory inspections with no enforcement actions even though both Dow Chemical and ARCO Chemical had spills during that time. 11/98 Review at 4-5. EPA's July 1999 Review repeats these same findings and also found that the total number of formal enforcement actions had significantly dropped, from 307 in 1998 to 256 in 1999. 7/99 Review at 5. EPA's February 2000 Review again found non-compliant facilities where LDEQ had failed to take enforcement actions. EPA also commented that the 1998 Dow Chemical spill, the same as reported in the 1998 review, still had no action noted in its file. 2/00 Review at 3, 6.

EPA has found that LDEQ is failing to follow required procedures. In the 2001 Audit, EPA states:

LDEQ cannot implement the LPDES enforcement program in a manner consistent with current program documents. One example is that program documents (EMS, Chapter 10) indicate that the enforcement section will, 'within thirty days of identification of any violation...have determined the appropriate response and any action will have been documented.' LDEQ is not complying with this procedure, and while EPA may be willing to discuss alternatives, it must hold LDEQ accountable to the currently approved procedures. 2001 Audit at 19.

The 2001 Audit provides ten examples of the LDEQ's disregard of procedures, including: (1) two reports from inspections of the Allen Canning facility cited fish kills but LDEQ failed to issue a formal enforcement action, *id.* at 3; (2) a two-year delay between permit violations that resulted in a fish kill at the Dow facility and LDEQ assessing a penalty, *id.* at 4; (3) effluent and nonreporting violations by the Village of Eastwood with no appropriate enforcement action, *id.* at 3; (4) "chronic violations of pH from March 2001 through September 2001 . . . and fecal violations in July 2001" by the Vidalia facility with no enforcement action taken by LDEQ, *id.* at 4.

LDEQ's failure to assess penalties also has been consistent since at least 1997. In EPA's 2001 Audit, EPA states that "LDEQ must escalate timely enforcement action consistent with the Enforcement Management System (EMS) where there is evidence of continuing noncompliance. This escalation should rise to the level of Penalty Assessments when there is compelling evidence of actual or potential environmental harm, i.e. fish kills, continued noncompliance for several years, etc." 2001 Audit at 19.

EPA cited the Crowley facility and the Dow facility as examples of LDEQ's failure to comply with the EMS. EPA targeted Crowley and Dow for review due to LDEQ's commitment to assess penalties for Crowley's "chronic noncompliance with effluent limitations" and Dow's "spill which resulted in a fish kill." *Id.* at 17. EPA found that LDEQ's settlement with Crowley, which allowed Crowley to avoid paying a penalty and also receive Beneficial Environmental Project credits, was unacceptable and LDEQ's failure to assess a penalty was "inconsistent with the letter and spirit of the CWA Penalty policy..." *Id.* at 17-18.⁹ EPA also found that LDEQ's failure to assess Dow a penalty after two and a half years did not constitute "timely action." *Id.*

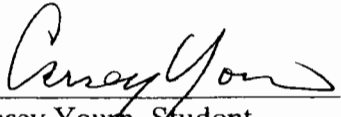
IV. CONCLUSION

Based on LDEQ's inadequate administration of the LPDES enforcement program, the Citizen Groups request that EPA immediately notify the State of Louisiana of its ongoing violations of the Clean Water Act and initiate withdrawal proceedings of the State of Louisiana's LPDES program.


⁹ The Legislative Auditor also criticized LDEQ's use of Beneficial Environmental Projects, stating that "Many negotiated settlements and beneficial environmental projects (BEPs) do not appear to effectively penalize facilities that commit violations. We found several cases where the facility appeared to have benefited in some ways from the project. For example, facilities often paid a lower penalty, settled on projects that were already completed by the facility, or did projects that involved upgrades to their own facility." March 2002 Performance Audit at 29.

Prepared by:

Respectfully submitted on Petitioners' behalf by:



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101-044
1st Supplement
2/22/02

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February 22, 2002

Via Certified Mail, Return Receipt Requested, No: 7001 1940 0006 1515 6424

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Re: Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Louisiana

Dear Ms. Whitman and Mr. Cooke:

We are writing on behalf of the eleven organizations that petitioned the Environmental Protection Agency on October 9, 2001 to update our Petition for Withdrawal of the National Pollutant Discharge Elimination System Program delegation from the State of Louisiana and to initiate proceedings to withdraw the delegation of the program from the Louisiana Department of Environmental Quality. These Citizen Groups wish to include additional information about the Louisiana Department of Environmental Quality's administration of the National Pollutant Discharge Elimination System Program based upon new information provided by the Environmental Protection Agency and our review of the relevant laws.

A Program of Tulane University School of Law

I. The Louisiana Department of Environmental Quality Failed to Notify the Environmental Protection Agency of a Modification to Its Authority to Administer the National Pollutant Discharge Elimination System.

A. The Louisiana Department of Environmental Quality Does Not Have Adequate Authority to Administer the National Pollutant Discharge Elimination System Program.

Pursuant to Clean Water Act § 402, the Environmental Protection Agency (EPA) is directed to delegate its primary enforcement authority (the authority to maintain the National Pollutant Discharge Elimination System (NPDES) program) to an individual state requesting such delegation provided that the state demonstrates to EPA that it has “adequate authority” to enforce the requirements of the Act. 33 U.S.C. §1342(b) (1994). To demonstrate this, the Clean Water Act states that “such State shall submit a statement from the attorney general ... that the laws of such State ... provide adequate authority to carry out the described program.” *Id.* Louisiana submitted this statement to the EPA on October 31, 1995. Attorney General’s Statement Permitting Authority at www.deq.state.la.us/permits/npdes/ag-perm.htm. In this statement, the Attorney General represented to EPA that all “[a]dministrative matters are heard by an administrative tribunal in accordance with La. R.S. 30:2011(D)(5), La. R.S. 30:2024, La. R.S. 30:2025(E)(4), and (E)(6).” *Id.* at 21. These statutes provided the Secretary of the LDEQ with the ability to conduct administrative hearings and the power to delegate this responsibility to LDEQ hearing officers. Thus, LDEQ hearing officers conducted all adjudicatory hearings requested by the secretary of the LDEQ. See also La. Rev. Stat. 30:2050.14-18. These LDEQ adjudications were governed by the procedural rules of La. Admin. Code tit. 33, §1, the Louisiana Environmental Quality Act, La. Rev. Stat. 30:2011 et seq., and the Administrative Procedure Act, La. Rev. Stat. 49:950 et seq.

Under that process, all parties to an administrative hearing had a right to request the secretary of LDEQ to review any decision made by a LDEQ hearing officer. La. Rev. Stat. 30:2024. The EPA, after determining that the Louisiana Department of Environmental Quality (LDEQ) had adequate authority to carry out the NPDES program, including the administrative appeals process, granted NPDES permitting authority to LDEQ on September 11, 1996. Final Approval of the Louisiana Pollutant Discharge Elimination System Under CWA, 61 Fed. Reg. 47932, September 11, 1996. The LDEQ, however, knew its representation to the EPA was not accurate months before the EPA's approval but failed to revise its administrative appeals process or notify the EPA.

Immediately following the EPA's approval, the LDEQ did **not** have adequate authority to manage the administrative appeals process and thus could not properly carry out the NPDES program. On June 21, 1995, the Louisiana legislature approved Act No. 739, S.B. No. 636. This Act enacted La. Rev. Stat. 36:53(I), which created a "Division of Administrative Law" in the Department of Civil Service to commence on October 1, 1996. This Act also provided the procedural rules for the operation of the newly created Division of Administrative Law. See La. Rev. Stat. §§49:991-999. The purpose of this Division was to handle all adjudications of "any board, commission, department, or agency of the executive branch of state government." La. Rev. Stat. 49:992(D)(1). This new law completely altered the LDEQ's administrative hearings process. Furthermore, in an adjudication by the Division, the decision of the administrative law judge is final "and the agency shall have no authority to override such decision." La. Rev. Stat. 49:992(B)(2). This change in the administrative appeals process removed LDEQ's

authority to properly carry out the NPDES program and the EPA must withdraw the delegation of the NPDES program from Louisiana.

B. The Louisiana Department of Environmental Quality Did Not Report the Change in Its Statutory Authority.

Additionally, the LDEQ failed in its duty to report this significant change in its statutory authority to the EPA. According to 40 C.F.R. § 123.62(a), “[t]he state **shall** keep EPA fully informed of any **proposed** modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities.” (emphasis added). The elimination of administrative appeals from the LDEQ was a modification of the LDEQ’s basic statutory authority, its forms, and its procedures. The LDEQ was aware of this impending change to the administrative process, referring to it on its website in the NPDES Program Description, Section VIII. Permitting, Administrative, and Judicial Review Procedures: Specific Administrative Procedures. See www.deq.state.la.us/permits/npdes/pd-8.htm. Yet, the LDEQ failed to inform the EPA of this change and went forward and obtained approval of its NPDES program. Thus, less than a month after the EPA granted NPDES permitting authority to the LDEQ, the administrative appeals process significantly changed and the LDEQ did not properly notify the EPA of this change.

These modifications to the Louisiana’s statutes prevent the LDEQ from adequately exercising its authority to administer the NPDES program. Because Louisiana fails to demonstrate sufficient ability and authority to carry out the NPDES program, the EPA must withdraw its approval of the Louisiana Pollutant Discharge Elimination System (“LPDES”) and to regain responsibility for the program.

II. The LPDES Permitting Process Is Of Unacceptably Poor Quality.

A. The LDEQ's backlog of expired permits violates the Clean Water Act by allowing facilities to operate with expired permits.

Petitioners have recently obtained the "2001 End of Year Review of Louisiana's Administration of the LPDES Permit Program" from the EPA. This report, which covers the time period of August 1, 2000 to July 31, 2001, not only validates the Petitioners' allegations, it in fact evidences that the situation is only getting worse. According to this End of Year Review by EPA Region VI, "LDEQ has not issued 20% of the universe of permits in any year since delegation of the program on August 27, 1996." The EPA collected this information from the Permits Compliance System (PCS), which established that "LDEQ issued 20 major individual permits and 115 minor permits as of August 1, 2001." End of Year Review at 3. According to the Review, the LDEQ had committed to issuing 90 major permits and 400 minor permits during the 2001 calendar year. The LDEQ did not even meet half of their commitment to the EPA for 2001.

Furthermore, the backlog of minor individual permits as of July 31, 2001 is 73.4%, which is significantly higher than the 10% reported in the 2001 Legislative Auditor's Report that Petitioners cited in their Withdrawal Petition. See End of Year Review at 3; State of Louisiana Legislative Auditor, Performance Audit of Water Quality in Louisiana at 18 (Jan. 5, 2001). By not issuing these permits, the LDEQ is allowing almost three-fourths of Louisiana's polluting facilities to operate with expired permits. This is a serious violation of the CWA and the EPA must institute proceedings to withdraw the delegation of the NPDES program from the LDEQ.

III. LDEQ Has Failed To Remedy Defects In Its Compliance Monitoring System.

A. LDEQ fails to provide accurate and accessible information on compliance status.

The LDEQ's problems with compliance monitoring, including the problems with record keeping practices and self-monitoring reports, are not new. In 1998, the EPA concluded that data found in the LDEQ's Permit Compliance System ("PCS") was neither accurate nor up to date.

Quality control procedures are not consistently being implemented to ensure violations are accurately reflected and data quality assured. No routing procedures are in place to establish timely input of permit limits into PCS for new, reissued or upgraded permits. There is inadequate quality control for non-receipt, incomplete, and/or deficient data in PCS.

EPA, Multimedia Enforcement Review Program, LPDES Program Review, 12 (1998)(hereinafter "Enforcement Review").¹ The 2001 End of Year Review states that permitting data is **still** not being input into PCS in a timely manner as required by the Memorandum of Agreement (MOA). End of Year Review at 4. Moreover, the LDEQ has not appointed a direct permits division contact person to coordinate PCS data entry for LPDES permits. End of Year Review at 4. LDEQ has known of these problems, and has been given ample time to fix them. However, LDEQ has allowed the problems to worsen.

In addition to the inaccurate information in the PCS, the LDEQ's new computer system leaves public records virtually inaccessible to the public. In regards to this ALPS imaging system used to scan all LPDES related files, the EPA has concerns with the ease with which specific documents can be accessed. End of Year Review at 4. As noted in the original petition for withdrawal, the database is large and it is difficult to know the

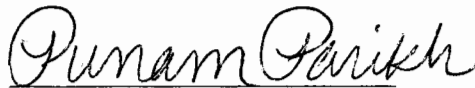
¹ EPA conducted this Review on October 20-24, 1997.

exact subject matter a file contains. The EPA stated that “[i]n order to review the needed documents, each electronic file must be opened.” End of Year Review at 4. The computer database does not allow searches for those most fundamental compliance documents: Discharge Monitoring Reports, Violation Summary Logs, non-compliance reports, and bypasses, which basically makes the data inaccessible to the general public. The LDEQ continues to fail to provide accurate and accessible information on compliance status. Therefore, the EPA must withdraw the delegation of the NPDES from LDEQ.

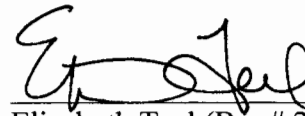
IV. Conclusion

Based on the foregoing, the Citizen Groups, request that the EPA take immediate action to notify the State of Louisiana of its ongoing violations of the Clean Water Act, and requests that the EPA withdraw its approval of Louisiana's Pollutant Discharge and Elimination System and take such other actions as are necessary and appropriate.

Respectfully Submitted,



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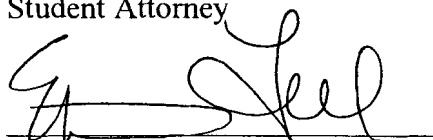
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Enclosed is a Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Louisiana on behalf of the Louisiana Environmental Action Network, Louisiana Audubon Council, Gulf Coast Restoration Network, Association of Community Organizations for Reform Now, Lake Ponchartrain Basin Foundation, CFACT, Lake Maurepas Society, Concerned Citizens of Livingston Parish, St. John Citizens for Environmental Justice, Louisiana Communities United, and Concerned Citizens of Iberville Parish. These Citizens Groups petition EPA to evaluate the Louisiana Department of Environmental Quality's administration of the National Pollutant Discharge Elimination System Program and to withdraw the delegation of the program from the Louisiana Department of Environmental Quality.



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PETITION FOR WITHDRAWAL OF THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM
DELEGATION FROM THE STATE OF LOUISIANA

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Louisiana Communities United
Concerned Citizens of Iberville Parish

**PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTION
DISCHARGE ELIMINATION SYSTEM PROGRAM OF THE STATE OF
LOUISIANA**

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PETITION FOR WITHDRAWAL OF THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM
DELEGATION FROM THE STATE OF LOUISIANA

The Louisiana Environmental Action Network ("LEAN"), the Louisiana Audubon Council, the Gulf Coast Restoration Network, the Association of Community Organizations for Reform Now ("ACORN"), the Lake Ponchartrain Basin Foundation, CFACT, the Lake Maurepas Society, the Concerned Citizens of Livingston Parish, the St. John Citizens for Environmental Justice, the Louisiana Communities United ("LCU") and the Concerned Citizens of Iberville Parish ("Citizen Groups"), through their undersigned counsel, hereby petition the United States Environmental Protection Agency ("EPA") to initiate formal proceedings regarding the State of Louisiana's violations of the Clean Water Act and its implementing regulations. The Citizen Groups request that EPA formally respond to this Petition in writing by notifying the State of Louisiana that it is not administering the permit program for discharges into the waters of Louisiana in accordance with the Clean Water Act and to conduct a public hearing regarding these violations. See 33 U.S.C. § 1342(c)(3) (1994). Because Louisiana fails to demonstrate sufficient ability and authority to carry out the National Pollutant Discharge Elimination System ("NPDES") program, LEAN further petitions EPA to withdraw its approval of the Louisiana Pollutant Discharge Elimination System ("LPDES") delegation and to assume administration and enforcement of the program. Id.

INTRODUCTION

More than five years ago, on September 11, 1996, EPA granted NPDES permitting authority to the Louisiana Department of Environmental Quality (“LDEQ”). Final Approval of the Louisiana Pollutant Discharge Elimination System Under CWA, 61 Fed. Reg. 47932 (September 11, 1996). This approval gave LDEQ the authority to administer the state’s water pollution program, the Louisiana Pollutant Discharge Elimination System (“LPDES”).

However, the waters of Louisiana remain overwhelmingly polluted due to LDEQ’s failure to properly administer the LPDES program. According to EPA’s data, 73% of all water bodies in Louisiana remain impaired, i.e., do not meet water quality standards and designated uses. EPA, Office of Water, Water Quality Inventory Report (2000). Seventy percent of surface water sources are impaired and 41% of water bodies are not supporting their designated use. Id. Also, Louisiana ranks second in the nation for releases of toxic chemicals to surface waters. EPA, Toxic Release Inventory (2000).

Various entities, including EPA and LEAN, have repeatedly notified LDEQ of its failures and shortcomings, and more than adequate time has been given to remedy the defects. However, LDEQ has failed to do so and has not made a concerted effort to change its practices. Since LDEQ has demonstrated its inability to administer the NPDES program effectively, the time has arrived for EPA to exercise its authority under Section 402(c)(3) of the Clean Water Act and withdraw NPDES authority from the LDEQ.

The most recent evaluation of LDEQ’s practices, conducted by the state’s own evaluator, the State of Louisiana Legislative Auditor, found that LDEQ fails to act in

accordance with the provisions of the CWA and in implementing regulations. See generally, State of Louisiana Legislative Auditor, Performance Audit of Water Quality in Louisiana, 2 (Jan. 5, 2001)(hereinafter "Audit")(attached as Exhibit A). The Legislative Auditor for the State of Louisiana is Daniel G. Kyle, Ph.D, CPA, CFE and his position is to offer a neutral evaluation of government performance. With the approval of the Legislative Audit Advisory Council, the Legislative Auditor conducted a performance audit of Louisiana's Water Quality Programs as part of the National State Auditors Association ("NSAA") 2000 joint performance audit on water quality. The results of the Audit offer irrefutable evidence that LDEQ lacks adequate authority to effectively administer a NPDES program. Specifically, the performance audit revealed that:

- LDEQ had failed to inspect 34% of major facilities and numerous minor facilities since 1996.
- 54% of major permits and 10% of minor permits were expired.
- LDEQ conducted **no** review of minor facilities' self-monitoring data, leaving these polluters largely unregulated.
- LDEQ's failure to identify violations, failure to collect penalties, and failure to issue timely enforcement actions all constitute ineffective enforcement.

Because of these and other deficiencies, LDEQ no longer demonstrates adequate authority to implement and enforce the NPDES program. Unless EPA initiates withdrawal proceedings, the mandates of the Clean Water Act will continue to be ignored and the waters of Louisiana will worsen.

LEGAL AUTHORITY

I. Statutory Framework and Regulatory Guidance for Withdrawal Procedures.

The Clean Water Act ("CWA") establishes water quality standards and limits the discharge of pollutants into the waters of the United States. The goal of the Act is to restore and maintain the integrity of the Nation's waters. 33 U.S.C. § 1251 (1994) (CWA § 101).

Pursuant to Clean Water Act § 402, the EPA shall delegate its primary enforcement authority (the authority to maintain the NPDES program) to a state requesting such delegation as long as the state demonstrates to EPA that it has "adequate authority" to enforce the requirements of the Act. 33 U.S.C. §1342(b) (1994). These requirements include:

- 1) Issuing permits that comply with all other sections of the CWA, that are for fixed terms not greater than five years and that can be terminated or modified for cause;
- 2) Issuing permits that comply with the inspection, monitoring, and entry requirements of the CWA;
- 3) Insuring that the public receives notice of each application for a permit and to provide an opportunity for public hearing before any ruling;
- 4) Insuring that the Administrator receives notice of each application for a permit;
- 5) Insuring that any other State, whose waters may be affected by the proposed permit, may submit written recommendations to the permitting State with respect to any permit application and if the recommendations are not accepted, the State is entitled to the reasons why they were not accepted;
- 6) Insuring that no permit will be issued if anchorage and navigation of any of the navigable waters would be substantially impaired; and
- 7) Abating violations of the permit or the permit program, including civil and criminal penalties.

See 33 U.S.C. §1342(b) (1994). LDEQ signed a Memorandum of Agreement ("MOA") with EPA that granted NPDES program authority to LDEQ, including NPDES individual

permits, general permits, and stormwater permits. EPA, LDEQ, Memorandum of Agreement, Section XI (1996). In the MOA, LDEQ pledged to develop and maintain adequate legal authority, to assume priority in enforcing the NPDES program (including penalty assessment and collection), to ensure compliance with the NPDES program, and to maintain adequate public records and permit files. MOA, Section II.A. In accordance with CWA § 402, the Louisiana Attorney General submitted a statement that the laws of Louisiana provided adequate authority to carry out the NPDES. State of Louisiana Attorney General, Attorney General's Statement Permitting Authority (Oct. 31, 1995). EPA granted primacy to LDEQ by signing the MOA in August 1996. Final Approval of the Louisiana Pollutant Discharge Elimination System Under CWA, 61 Fed. Reg. 47932 (September 11, 1996).

However, CWA § 402(c)(3) mandates that EPA revoke this delegated authority when the state's program is not in accordance with § 402.¹ EPA must respond in writing to a petition for withdrawal and may conduct informal investigations to determine whether cause exists to commence withdrawal proceedings. 40 C.F.R. §123.64(b)(1) (2000). If, after a public hearing, EPA determines that a state program is inadequate, EPA must notify that state and allow 90 days for the state to take corrective action. Then, if EPA still deems the program insufficient, EPA shall withdraw its earlier approval of

¹ CWA § 402(c)(3) states in full:

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

the state's program. 33 U.S.C. §1342(c)(3) (1994). EPA's withdrawal must be made public and in writing. Id.

To determine whether withdrawal procedures are appropriate, EPA evaluates three factors:

1. **Quality of the state's permitting process** – five relevant criteria:
 - a. State enabling statutes and regulations
 - b. Procedures for identifying point sources and the compilation and use of permit data
 - c. Technical quality of written permits
 - d. Whether permits are issued at a rate that causes backlog of expired permits
 - e. Assessment of publicly owned treatment works and pretreatment programs

2. **Sufficiency of the state's compliance monitoring** – four inquiries:
 - a. Whether a state receives self-monitoring reports from point sources and that state's record keeping practices
 - b. Whether a state's reporting system has accurate and accessible information on compliance status
 - c. Whether a state conducts thorough compliance inspections
 - d. Whether a state provides guidance to the regulated community

3. **Effectiveness of the state's enforcement response** – five considerations:
 - a. Timely, effective response that progresses "toward ultimate resolution and full physical compliance"
 - b. Use of penalties for deterrence purposes
 - c. Overall management including a clear vision for the program and involvement at each level of government
 - d. Total number of enforcement actions
 - e. Types of cases where enforcement has occurred

See, 40 C.F.R. §123.63(a)(1-3); EPA, Revised Policy Framework for State/EPA Enforcement Agreements, 8-11, 14, 17, 33-35 (1986); See also, EPA, National Guidance for Oversight of NPDES Programs, 7 (1987). In addition, EPA withdrawal is required when a state's program fails to comply with the terms of its MOA with EPA. 40 C.F.R. §123.63(a)(4) (2000). In 1998, EPA recognized that LDEQ was not complying with the

terms of the MOA by entering into an Environmental Performance Partnership Agreement with LDEQ to improve LDEQ's compliance and enforcement activities. EPA, LDEQ, Environmental Performance Partnership Agreement (February 18, 1998). In this agreement, LDEQ agreed to maintain the LPDES program as mandated in the original MOA. Id. This repetition of the MOA's requirements in the Partnership Agreement shows that LDEQ had still not complied with the MOA's requirements. In January 2001, almost three years after the Environmental Performance Partnership Agreement, the Legislative Auditor found that LDEQ still had not complied with the terms of the MOA. Audit at 2. As will be shown, LDEQ's administration of the LPDES fails to comply with the CWA's requirements and fails to comply with the terms in its MOA with EPA. Therefore, EPA must withdraw NPDES enforcement authority from LDEQ.

II. The LPDES Permitting Process Is Of Unacceptably Poor Quality.

The first major area that EPA must consider in determining whether to withdraw NPDES authority is the quality of the state's permitting process. Louisiana legislation sets forth a fairly comprehensive but complex permitting scheme. In practice, LDEQ often ignores this legislation and the federal law upon which it is based. The following fatal flaws in the LPDES permitting scheme justify withdrawal of LDEQ authority:

- A. the insufficient state enabling statutes and regulations that do not ensure meaningful public participation;
- B. the lax procedures for identifying point sources; and
- C. an enormous backlog of expired permits.

A. Louisiana's enabling statutes and regulations prevent full public participation in permit decisions.

Public participation in the permitting process and the ability to challenge permit actions is mandatory for the effective administration of the NPDES program. See Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 Fed. Reg. 20972-01(I)(2)(b) (May 8, 1996). Louisiana law requires that LDEQ provide the public with notification of permit applications, provide an opportunity for public comment, and provide written notification of the permit decision to commenting parties. La. Admin. Code tit. 33, §315 (2000). Currently, the permit applicant may appeal permit actions both administratively (adjudicatory hearing) and judicially (court review). La. Rev. Stat. Ann. §30:2024 (1999), La. Rev. Stat. Ann. §30:2050.21 (1999).

However, state law does not provide the **public** with any right to an adjudicatory review of permit decision. State law allows for LDEQ to grant public requests for such a hearing, but, upon information and belief, LDEQ has never exercised its discretion to do so. Moreover, state law does not provide the public with any right to notification of a request for an adjudicatory hearing by permit applicants. Nor does state law provide the public with a right to notification of the results of such a hearing. In practice then, the public never knows when a permit applicant challenges a LDEQ decision in an adjudicatory setting. Furthermore, without notice of these hearings, the public never has an opportunity to intervene in an adjudicatory proceeding. For these reasons alone, public participation is clearly inadequate in this vital area of the permitting process.

Both the former and current statutory framework for adjudicatory appeal of a NPDES permit decision prohibit adequate public participation. Prior to 1996, the law

governing adjudicatory appeals of DEQ permit decisions was La. Rev. Stat. Ann. §30:2024 (1999). In permit actions (as distinguished from enforcement actions), this statute conferred the right to adjudicatory review **only upon an applicant**. See La. Rev. Stat. Ann. §30:2024(A) (1999), see also Roger Stetter, ed., Louisiana Environmental Handbook, Sect. 4-17 (West Group, 2000). Aggrieved members of the general public had no right to adjudicatory review. Id., see also Stetter, Sect. 4-17, n. 65. Furthermore, aggrieved parties were at no time entitled to notification and were only able to intervene in adjudicatory appeals of enforcement actions and not permit actions, although this was not even a right of intervention. Id. By the denial of any notification and the denial of the right to participate in adjudicatory appeals of permit decisions, aggrieved parties could not be parties to the adjudication and were denied judicial review. See La. Code Civ. Proc. Ann. art. 2082, 2086 (2001). Thus, the statute severely abridged the public right of participation in permit decisions.

Matters only became worse for public participation in 1996 with the enactment of La. Rev. Stat. Ann. §49:992, which supersedes §30:2024 and §30:2050.11. See La. Rev. Stat. Ann. §49:992 (1999), Supersedure (refers to Supersedure Section preceding §49:991 which discusses supersedure of LDEQ administrative review). According to the

Louisiana Environmental Handbook:

La. Rev. Stat. Ann. §49:992(B), however, supersedes these provisions [§30:2024, §30:2050.11] and provides that all adjudications will be held before administrative law judges within the Department of Civil Service, Division of Administrative Law.

Stetter, Sect. 4-17, n. 71.

Once again, §49:992 fails to provide for any notification to the general public or those who filed comments regarding any proposed permit. Section 49:992 further exacerbates the problem by stating:

(B)(2) In an adjudication commenced by the division [of Administrative Law], the administrative law judge shall issue the final decision or order, whether or not on rehearing, **and the agency shall have no authority to override such decision or order.**

(3) Nothing in this Section shall affect the right to or manner of judicial appeal in any adjudication, irrespective of whether or not such adjudication is commenced by the division or by an agency. **However, no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this Chapter.**

La R.S. 49:992(B)(2)&(3) (emphasis added). Louisiana law thus prohibits the LDEQ from appealing an erroneous administrative decision that may be in violation of the Clean Water Act, or any other law, to a court of law.

Section 49:992 also prohibits all further judicial review of an adjudicatory decision by LDEQ, the public trustee. Essentially, this eliminates the authority of the primary public trustee to seek judicial review of administrative decisions that may fail to adequately protect the environment and the public. The Administrative Law Judge is not the public trustee of the environment. Under both statutes, permit applicants can effectively end-run further public participation by filing a request for an adjudicatory appeal. Moreover, applicants can eliminate the legal authority of the public trustee through adjudicatory appeal under §49:992. EPA has already spoken to such restrictive standing requirements and stated: “when citizens are denied the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation . . . may be severely

compromised.” Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 Fed. Reg. 20972-01(I)(2)(b) (May 8, 1996). Both statutory frameworks contradict the requisite public participation in permit decisions that the Clean Water Act mandates in §402(b)(3). Therefore, LDEQ cannot effectively administer the NPDES program and EPA must withdraw NPDES authority.

B. The procedures for identifying point sources are inadequate.

LDEQ’s procedures for identifying point sources discharging into the state’s waterways are seriously deficient. The most recent illustration of LDEQ’s shortcomings is the Pelts and Skins operation. Pelts and Skins, L.L.C. operates three alligator farms in Louisiana. The facility at 16551 Wardline Drive, in Covington, St. Tammany Parish, on Tiger Branch Creek is a 250-acre farm holding approximately 60,000 alligators. Pelts and Skins does not have a LPDES permit nor has ever applied to LDEQ for a permit. LDEQ has had repeated complaints about the smell and the color of the water emanating from the plant. LDEQ inspectors have visited the site many times since the beginning of January of 2000. The inspectors found the facility to be discharging untreated wastewater from three alligator barns into the Tiger Branch. It is quite obvious that LDEQ has been aware of the alligator farm and its discharges into the Tiger Branch but they have still not identified Pelts and Skins as a point source. Amazingly, one of LDEQ’s environmental coordinators, David Oge, is quoted in a Times Picayune article as saying that LDEQ did not even know of the 60,000 reptile farm which has been operating since 1986, until DEQ received a complaint that they were dumping waste. Charlie Chapple, Alligator farm is under fire; owners say problem is fixed, B-2, May 10, 2000. Despite numerous complaints, articles in the newspaper, and a pending lawsuit, LDEQ

has failed to identify this as a point source. LDEQ has ignored this operation by allowing the facility to discharge harmful waste into the Louisiana waters without a LPDES permit. LDEQ is not administering the NPDES program in compliance with the CWA and the EPA must withdraw LDEQ's authority.

C. LDEQ's backlog of expired permits violates the Clean Water Act by allowing facilities to operate with expired permits.

LDEQ's failure to address an enormous backlog of expired permits constitutes a serious violation of the Clean Water Act. Under the Clean Water Act, pollutant discharges into the waters of the United States without a NPDES permit are presumed illegal. See CWA § 301(a). To lawfully discharge, a person must possess a valid, non-expired NPDES permit. See CWA § 402.² Any facility operating under an expired permit violates the Clean Water Act and corresponding regulations.

Under 40 C.F.R. § 123.25, LDEQ must exercise authority regarding the duration of permits. In other words, LDEQ must not allow facilities with expired permits to operate. Even so, Louisiana regulations currently authorize a facility that submits an application at least 180 days before the permit expiration date to continue operating under an expired permit until LDEQ can reissue a permit. LAC 33:IX.2321. "However, these continuations may result in DEQ not reissuing permits for several years." Audit at 18. By allowing facilities to operate with expired permits, LDEQ allows facilities to operate under outdated or less stringent water quality standards.

Specifically, 54 percent of major water permits and 10 percent of minor permits were expired as of January 2001. Audit at 18. This confirms the findings of another recent survey of Louisiana's water quality program that revealed that 47 percent of major

² NPDES permits are effective up to five years. CWA § 402; 40 C.F.R. 122.46(a).

permits were expired as of January 18, 2000. Velma Smith, Friends of the Earth, Clean Water Report Card: Louisiana (March 12, 2000) <<http://www.foe.org/cleanwater/grades/louisiana.html>>. Facilities with expired permits continue to discharge pollutants into Louisiana waters. As these two independent evaluations establish, LDEQ has actually allowed the problem to worsen over time rather than improve.

Thus, LDEQ fails to properly exercise NPDES authority and allows the quality of Louisiana's water resources to depreciate unchecked. LDEQ's lack of authority is evidenced by their continued response to this problem. The Legislative Auditor's January 2001 report stated, "[a]ccording to DEQ staff, **the permit backlog is the result of DEQ receiving primacy for the National Pollutant Discharge Elimination System permit program from EPA in 1996.**" Audit at 19 (emphasis added). Over half a decade after receiving NPDES authority, LDEQ still blames its own incompetence on the federal government.

III. LDEQ Has Failed To Remedy Defects In Its Compliance Monitoring System.

The second major area that EPA must consider in whether to withdraw NPDES authority is the sufficiency of a state's compliance monitoring. An evaluation of LDEQ's Permit Compliance System ("PCS") reveals that LDEQ routinely violates provisions of its MOA with EPA and fails to fulfill its duties under the Clean Water Act. LDEQ fails to satisfy the compliance monitoring evaluation in at least four respects:

- A. insufficient record keeping practices as to self-monitoring reports;
- B. inaccurate and inaccessible information on compliance status;
- C. inadequate compliance inspections; and

D. lack of guidance to the regulated community.

A. LDEQ has insufficient record keeping practices as to self-monitoring reports.

According to the State Auditor, over 6,000 minor facilities discharge pollutants into Louisiana waters. Such a large number of minor facilities in Louisiana merit at least cursory examination by LDEQ. In fact, the Compliance Monitoring section of the MOA between EPA and Louisiana states, in no uncertain terms, that LDEQ must determine:

1. that self-monitoring reports are submitted,
2. that they are timely, complete, and accurate, and
3. that the permit conditions are met.

MOA, Section IV.B.1.a.

Put simply, LDEQ does not review self-monitoring data of minor facilities. The recent Legislative Audit states:

Since our file review showed that DEQ does not review the self-monitoring reports for minor facilities, DEQ does not know if or when violations of permit limitations occur. As a result, DEQ is not sufficiently ensuring that minor facilities do not violate their permit limits. This coupled with the fact that 10% of minor facilities may have never been inspected, shows that **these facilities are largely unregulated.**

Audit at 20 (emphasis added). In a review of 42 minor facilities' permit files, the State Auditor reveals that 21%, more than one in five, of required monitoring reports were **never even submitted.** Id. at 19 (emphasis added). Other states, including one with even more minor permits (Alabama has 8,000 minor permits), at least take the time to manually review all self-monitoring reports for all minor permits. Id.

As demonstrated, LDEQ has violated the express terms of the MOA contract by failing to determine whether self-monitoring reports are submitted, by failing to ensure the timeliness, completeness and accuracy of self-monitoring reports, and by failing to ensure that permit conditions are met. Therefore, EPA must revoke LDEQ's NPDES program authority. See 40 C.F.R. §123.63(4) (2000).

B. LDEQ fails to provide accurate and accessible information on compliance status.

LDEQ's problems with compliance monitoring, including the problems with record keeping practices and self-monitoring reports, are not new. In 1998, the EPA concluded that data found in LDEQ's Permit Compliance System ("PCS") was neither accurate nor up to date.

Quality control procedures are not consistently being implemented to ensure violations are accurately reflected and data quality assured. No routing procedures are in place to establish timely input of permit limits into PCS for new, reissued or upgraded permits. There is inadequate quality control for non-receipt, incomplete, and/or deficient data in PCS.

EPA, Multimedia Enforcement Review Program, LPDES Program Review, 12 (1998)(hereinafter "Enforcement Review").³ EPA also noted that deficiencies in compliance monitoring procedures resulted in untimely identification of violations. "The Violation Summary Logs (VSL) were not consistent and/or accurate. VSL's did not identify all violations, and did not include all noncompliance reports, inspection deficiencies, and enforcement actions taken." Id. LDEQ has known of these problems, and has been given ample time to fix them. However, LDEQ has allowed the problems to worsen.

³ EPA conducted this Review on October 20-24, 1997.

LDEQ is also deficient in its record keeping practices. In 1998, EPA notified LDEQ of serious problems with records management practices in the LPDES program:

Specifically, documents were missing from the files, there was an excessive backlog of filing material (**10-15 feet**), original documents were not consistently in the official file, documents were not consistently in date sequence order, documents were not consistently filed in appropriate sections of the files, and, documents were not consistently marked to facilitate accurate filing.

Enforcement Review, LPDES Program Review at 12. Despite EPA recommendations to eliminate the filing backlog, to prevent its reoccurrence, and to utilize standard filing practices, LDEQ has failed to do so. Id. at 15. According to a recent New York Times Regional Newspaper investigation:⁴

DEQ's public filing system is in a sorry state. A survey examined a random sample of 200 enforcement cases out of almost 15,000 from the past 12 years, and discovered that records for roughly a third of these cases **could not be found at all**.

Mike Slaughter, Ed., Polluter's Paradise?, N.Y. Times Regional Newspapers, Feb. 21-26, 2000 <<http://www.dailycomet.com/pollute.html>>(emphasis added).

Another problem with LDEQ's records management is the fact that LDEQ frequently never even uses the documents in their possession. Although LDEQ has accumulated more than 25 million pages of public documents and at least 250 databases, "much of this data simply piles up and is rarely looked at." Charles Lussier, Polluter's Paradise? Information Woes: No Overflow of DEQ News, N.Y. Times Regional Newspapers, Feb. 24, 2000 <<http://www.dailycomet.com/pollute4.html>>. Because of LDEQ's failure to remedy these problems, LDEQ is violating the MOA in which it pledged to maintain adequate public records. MOA, Section II.A.

With these abysmal records, it is extremely difficult for citizens to enforce the laws that LDEQ is ignoring. Many of the documents that are missing are the DMR's, VSL's and non-compliance reports. Without these documents, citizens do not have access to the data needed to enforce the laws. Even with technological changes, LDEQ's filing system does not allow the public adequate access to records. In numerous instances, documents are filed under the wrong permit number or are buried in the middle of voluminous documents that are in an unrelated file. LDEQ's new computer system not only fails to rectify this mismanagement, it in fact makes it more difficult to locate misfiled documents. The computer database does not allow searches for those most fundamental compliance documents: DMR's, VSL's, non-compliance reports, and bypasses, which basically makes the data inaccessible for the general public.

Since LDEQ has failed to remedy defects in its compliance monitoring system, it demonstrates a lack of authority to administer the NPDES program. Therefore, EPA must withdraw the NPDES delegation from LDEQ.

C. LDEQ fails to conduct adequate compliance inspections.

Inspection of facilities remains paramount to ensuring compliance with the Clean Water Act. See 40 C.F.R. §123.26 (2000). A state fulfills its delegated NPDES responsibility through periodic inspections of both major and minor facilities. According to 40 C.F.R. § 123.26(b), LDEQ must adopt and utilize inspection and surveillance procedures, independent of information provided by regulated persons, to determine compliance with program requirements. Under the inspection program, LDEQ must:

⁴ The N.Y. Times Regional Newspapers in Louisiana – Daily Comet (Thibodaux), The Courier (Houma), and Daily World (Opelousas) – spent seven months investigating the LDEQ. Their research produced a five-day series of articles.

1. make comprehensive surveys of all facilities and activities subject to LDEQ authority (§ 123.26(b)(1)); and
2. conduct periodic inspections of the facilities and activities subject to regulation (§ 123.26(b)(2)).

These inspections determine permittee compliance or non-compliance, verify information submitted by permittees, and ensure adequate sampling and monitoring by permittees. 40 C.F.R. §123.26(b)(2)(i-iii) (2000). Furthermore, LDEQ must conduct "investigatory inspections" in order to produce admissible evidence in enforcement proceedings or court actions. 40 C.F.R. §123.26(d) (2000).

Although La. Rev. Stat. Ann. §30:2012 requires LDEQ to inspect all major facilities at least once per year, LDEQ violated this law by failing to inspect 68 of 198 (34%) permitted major facilities at some time over the last five years. Audit at 16. Amazingly, LDEQ failed to inspect 15% of these 68 facilities on multiple occasions. Id. For example, LDEQ failed to inspect Borden Chemical, one of the largest chemical plants in Louisiana, for three consecutive years (1996-98). Id.

LDEQ's own policies require them to inspect minor facilities once every three years. Audit at 17. However, of the approximately 6,131 minor permits, the State Auditor found that over a nine-year period, from 1990 to 1999, LDEQ **never** inspected 10% of the facilities that required inspection. Id. Such inaction not only violates DEQ's own policies, but also means that the pollutant discharges of over 600 facilities go unchecked. As the State Auditor found, "While minor facilities do not pose the same risks as major facilities, the sheer number of these permits makes it important for DEQ to inspect them." Id.

Since LDEQ fails to exercise its inspection authority as required by the Clean Water Act, Federal Regulations, Louisiana statutes and its own policies, LDEQ ultimately fails in its compliance monitoring. As such, EPA must withdraw delegation of the NPDES program from LDEQ.

D. LDEQ fails to provide adequate guidance to the regulated community.

According to the New York Times Regional Newspapers investigation, LDEQ lacks the public relations and information technology to keep the regulated community informed. Charles Lussier, Polluter's Paradise? Lacking Its Own Spin, N.Y. Times Regional Newspapers, Feb. 24, 2001. LDEQ had no public relations director for almost two years. Id. LDEQ seldom publishes its informational magazine, *Louisiana Environmentalist*, and LDEQ "rarely issues press releases except to announce public meetings." Id. As the EPA inspector general stated in 1997 when pointing out LDEQ's shortcomings, "Without publicity, the regulated community and the general public may not become aware of enforcement actions taken and the consequences of noncompliance." See id. LDEQ is not providing adequate guidance to the regulated community and therefore, EPA should withdraw the delegation of the LPDES program from LDEQ.

IV. LDEQ Enforcement Is Ineffective.

The third major area that EPA must consider in determining whether to withdraw NPDES authority is the effectiveness of the state's enforcement. See, 40 C.F.R. §123.63(a)(1-3); EPA, Revised Policy Framework for State/EPA Enforcement Agreements, 8-11, 14, 17, 33-35 (1986). Effective enforcement is essential to the success

of a NPDES program. EPA regulations set forth standards and requirements for effective enforcement of state water quality programs. See 40 C.F.R. 123.27 (2000). Elements of effective enforcement, which LDEQ has failed to utilize, include:

- A. timely identification of violations so that full compliance can be achieved;
- B. deterrence of future non-compliance and violation;
- C. timely issuance of enforcement actions; and
- D. assessment and collection of penalties.

Id. Unfortunately, LDEQ enforcement continually falls short in each of these elements.

A. LDEQ fails to timely identify NPDES violations.

The Legislative Audit reveals that LDEQ fails to timely identify NPDES violations. The Auditor's random review of 42 minor facility permit files indicated 675 violations. Audit at 39. However, LDEQ never issued enforcement actions for 373 of those violations. Id. By failing to issue enforcement actions for over 55% of violations, LDEQ is clearly deficient in timely identifying violations. Most troubling is the fact that there were no indications that LDEQ ever even reviewed these files. Id. at 41. In turn, "DEQ may not know when violations occur." Id. According to EPA's own Enforcement Review of LDEQ conducted over 3 years ago:

Compliance monitoring procedures **do not result in timely identification of violations** prior to appearing on the QNCR. The Violation Summary Logs (VSL) were not consistent and/or accurate. VSLs **did not identify all violations**, and did not include all noncompliance reports, inspection deficiencies, and enforcement actions taken.

Enforcement Review, LPDES Program Review at 12.

Further evidence reveals that when LDEQ identified violations during inspections, it failed to even script a warning letter. EPA's own assessment of LDEQ in

1997 stated: "Unsatisfactory inspection deficiencies were not addressed by written correspondence **56 %** of the time." Enforcement Review, LPDES Program Review at 13 (emphasis added). Instead of fixing this well-documented problem, the Legislative Auditor's report establishes that LDEQ has allowed the problem to worsen significantly in the past three years, not improve. Of 76 total inspections in 1998 and 1999, 42 resulted in an unsatisfactory rating in one or more areas. Audit at 42. "However, 29 of these 42 inspections (**69%**) did not result in at least a warning letter." Id. (emphasis added).

By failing to inspect facilities and failing to address violations identified when LDEQ does inspect, LDEQ acts contrary to the mandates of the Clean Water Act and allows facilities to get away with violations without even having to respond. Therefore, EPA must withdraw NPDES program authority from LDEQ.

B. LDEQ's lack of enforcement fails to deter future non-compliance and violations.

Without enforcing the current laws, LDEQ fails to provide deterrence for future violations. The State Auditor concluded "that DEQ's choice of enforcement action did not deter subsequent noncompliance in 35% of minor facilities in our sample and 46% of major facilities." Audit at 43. Since DEQ neglected to review discharge monitoring reports, many violations continue undetected. In one case, LDEQ issued a compliance order when a facility had **four unauthorized discharges**. Id. (emphasis added). LDEQ issued that same facility an earlier compliance order, even though the facility had not submitted discharge monitoring reports in four years. Id. LDEQ's inaction on these violations can hardly be seen as deterrence. The Audit further recognizes the lack of deterrence that pervades throughout the entire LPDES program: "**DEQ has not taken**

any action on these violations because it does not know they exist." Id. (emphasis added). Therefore, EPA must no longer allow LDEQ to implement the NPDES program.

C. LDEQ fails to issue timely enforcement actions.

Although LDEQ's own policies state that LDEQ should determine appropriate responses to violations within 30 days of a violation, "DEQ took over a year to issue enforcement actions for 19% of minor facilities in our sample and 38% of major facilities in our sample." Audit at 43.

Importantly, the State Auditor is not the first to recognize timely enforcement as a serious problem in LDEQ's enforcement of the NPDES program. Media sources have frequently addressed LDEQ's lack of timely enforcement: "Enforcement actions routinely take months and sometimes years to be issued, and then many years to conclude, if at all." Mike Slaughter, Ed., Polluter's Paradise?, N.Y. Times Regional Newspapers, Feb. 21-26, 2000. <<http://www.dailycomet.com/pollute.html>>. In fact, a review of LDEQ's enforcement database turned up **at least 700 proposed compliance orders and penalties that were never even issued**, most of which are from the water division of LDEQ. Charles Lussier, Polluter's Paradise? State Habitually Tolerates Pollution For Years, N.Y. Times Regional Newspapers, Feb. 21, 2000 <<http://www.dailycomet.com/deqenforce.html>> (emphasis added). Most telling is LDEQ's own admission in the Audit that it should issue enforcement actions in a more timely fashion. Audit at 44.

D. LDEQ fails to assess and collect penalties.

Ignoring public health and environmental benefits that could come to the citizens of Louisiana, not to mention the benefits to its own coffers, LDEQ also fails to assess and collect penalties for violations of permits.

Of the almost 11,500 enforcement citations DEQ issued between July 1, 1987 and June 30 1999, **only 1 out of 10 resulted in penalties and only 6 out of 100 resulted in collected fines.**

Mike Slaughter, Ed., Polluter's Paradise? Slap on The Wrist (graphic), N.Y. Times

Regional Newspapers, Feb. 21, 2000 <<http://www.dailycomet.com/deqslap.html>>

(emphasis added). EPA's inspector general has already issued two separate and critical reports regarding LDEQ's failure to assess and collect penalties. EPA, Office of Inspector General, Improvements to Louisiana's Water Quality Standards, Monitoring, and Reporting Program Would Better Protect State Waters (Sept. 29, 2000), EPA, Office of Inspector General, Region 6's Enforcement & Compliance Assurance Program (1996), see also Charles Lussier, Polluter's Paradise? State Habitually Tolerates Pollution For Years, N.Y. Times Regional Newspapers, Feb. 21, 2000 <<http://www.dailycomet.com/deqenforce.html>>. It took almost a full three years after LDEQ gained NPDES authority for LDEQ to establish rules about how it calculated penalties. La. Admin. Code tit. 33, §705 (2000).

1. LDEQ's use of beneficial environmental projects violates CWA penalty requirements.

Rather than improving penalty assessment and collection, LDEQ allows violators of the Clean Water Act to negotiate "beneficial environmental projects" and to use the projects as subsequent tax write-offs. Charles Lussier, Polluter's Paradise? Replacing Fines With Projects, N.Y. Times Regional Newspapers, Feb. 22, 2000 <<http://www.daily>

comet.com/pollute2.html>. “The primary purpose of [a supplemental environmental project] ... is to encourage and obtain environmental and public health protection ... that may not otherwise have occurred without the settlement incentives.”⁵ EPA, EPA Supplemental Environmental Projects Policy (May 1, 1998)

<<http://es.epa.gov/oeca/sep/sepfinal.html>>. These “supplemental environmental projects” or SEP’s were designed to be a part of the settlement of an enforcement case **in addition to** penalties and **not as a replacement for** penalties. Id. LDEQ has negotiated supplemental environmental projects with facilities that include monetary donations to area universities and middle schools, enhanced training facilities at the Shreveport Fire Academy, and environmental restoration of areas damaged by Hurricane Andrew. All of these projects greatly reduced, if not eliminated, the penalties paid to LDEQ while not necessarily improving environmental and public health protection. Allowing polluters to benefit at the expense of the water quality of the State is antithetical to proper enforcement of the NPDES program. LDEQ’s practices are not in compliance with EPA’s policy on the use of supplemental environmental projects and this further shows LDEQ’s deficiency in collecting penalties.

Not surprisingly, the latest Legislative audit indicates that DEQ has yet to improve. In 1998 and 1999, LDEQ assessed 33 penalties totaling \$946,147. Audit at 44. However, **LDEQ never collected \$441,188 (47%) of these penalties.** Id. (emphasis added). By not collecting these penalties, DEQ is not receiving money it is owed for environmental violations, thereby depriving the citizens of Louisiana of effective environmental enforcement.

⁵ LDEQ refers to EPA’s supplemental environmental projects as “beneficial environmental projects” at the state level.

When evaluating all of the evidence regarding enforcement, it becomes glaringly apparent that LDEQ is not administering the LPDES program in accordance with provisions of the Clean Water Act. Therefore, EPA should withdraw LDEQ authority over this program.

Conclusion

Based on the foregoing, the Citizen Groups, request that the EPA take immediate action to notify the State of Louisiana of its ongoing violations of the Clean Water Act, and requests that the EPA withdraw its approval of Louisiana's Pollutant Discharge and Elimination System and take such other actions as are necessary and appropriate.

Dated: 10/9/01


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