

January 24, 2002

*Via Hand Delivery*

Ms. Patsy Deaville

Regulation Development Section

Louisiana Department of Environmental Quality

Post Office Box 82178

Baton Rouge, Louisiana 70884-2178

Fax: (225) 765-0389

RE: Comments on Behalf of the Louisiana Environmental Action Network and Ms. Albertha Hasten on the Louisiana Department of Environmental Quality's proposed rule AQ211S: Substantive Changes to the Proposed Rule AQ211 Emission Reduction Credits Banking (LAC 33:III.Chapter 6) and Proposed Revisions to the Louisiana State Implementation Plan (SIP) (0112Pot1)

Dear Ms. Deaville:

Please consider the following comments on the Substantive Changes to the Proposed Emission Reduction Credits Banking system and Proposed Revisions to the Louisiana State Implementation Plan, submitted on behalf of the Louisiana Environmental Action Network ("LEAN") and Ms. Albertha Hasten who is a LEAN member and a resident of the Baton Rouge non-attainment area. LEAN is an incorporated, non-profit community organization which serves as an umbrella organization for environmental and citizen groups. LEAN was organized for the express purpose of preserving and protecting the state's land, air, water, and other natural resources, as well as protecting the organization's members and other residents of Louisiana from threats of pollution. LEAN members who work and live in the Baton Rouge area continue to suffer from breathing substandard air.

## **.I. PROCEDURAL COMMENTS**

**A. LDEQ cannot legally adopt AQ211S because the agency violated Louisiana's Administrative Procedure Act when it failed to issue a response to comments and submissions on AQ211, which form the basis of the current rulemaking.**

[See comments in I. B. below]

**B. LDEQ cannot legally adopt AQ211S because the agency violated Louisiana's Administrative Procedure Act, by denying the public access to the comments and submissions received on AQ211, which form the basis of the current rulemaking.**

Section 952(3) requires state agencies, such as LDEQ, engaging in rulemaking to make available for public inspection "all rules, preambles responses to comments and submissions . . . used by the agency in the discharge of its functions." In addition, when adopting a rule, LDEQ

must “issue a response to comments and submissions describing the principal reasons for and against adoption of any amendments or changes suggested in the written or oral comments and submissions.”<sup>1</sup>

Failure to promulgate a rule in accordance with the rulemaking requirements of Louisiana Administrative Procedure Act renders the rule statutorily invalid.<sup>2</sup>

The notice LDEQ provided for the substantive changes to Louisiana’s emissions banking rules (AQ211S) stated on its face that those changes were made “as a result of comments received during the public comment period” (on the first proposed emissions rule, AQ211). However, LDEQ has not issued a response to those comments nor made them available to the public. Without a complete record, it is impossible to determine whether the proposed substantive changes are indeed responsive to the comments received, and whether useful criticisms of the first proposed emissions rule (AQ211) have been incorporated or whether the changes are arbitrary.

On January 18, 2002, 6 days before the closing of the comment period, LDEQ agent Lucy Kraft stated by telephone that 7 commenters provided 105 comments on AQ211, but that no summary report had been completed for AQ211. After checking with Cheri Flory, Ms. Kraft further stated that it was LDEQ’s intention to submit a “cumulative summary report for AQ211 and AQ211S *after the comment period was over for AQ211S*. When asked whether the comments themselves were available for inspection, Ms. Kraft said they were not because they were still in the process of being summarized.

On January 19, 2002 Ms. Albertha Hasten submitted by fax a Public Records Act request for a list of the people who submitted comments, a summary of those comments or transcripts and copies of the comments received, and LDEQ’s response to the comments received. As of January 24, 2002 Ms. Hasten has received no response from LDEQ regarding her Public Records Act request. Ms. Hasten and LEAN’s right to provide meaningful comment on LDEQ’s proposal to change the emissions banking rules has been illegally hindered by LDEQ’s failure to make the record available to them.

LDEQ cannot adopt AQ211S because a rule promulgated in violation of Sections 952(3) and 953(A)(2)(b) of Louisiana Administrative Procedure Act would be statutorily invalid. Therefore Ms. Albertha Hasten and LEAN request that LDEQ provide the public with the complete record, and reopen the thirty-day comment period once the records are available.

**C. LDEQ cannot legally adopt AQ211S because the agency violated § 953(A)(1)(a) of Louisiana’s Administrative Procedure Act when it failed to include in its notice a statement of the terms or substance of the intended action or a description of the subjects involved.**

Section 953(A)(1)(a) of Louisiana Administrative Procedure Act requires that before a rule can be amended, adopted or repealed the agency must publish a notice of its intended action

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<sup>1</sup>LA R.S. 49:953(A)(2)(b).

<sup>2</sup>Liberty Mut. Ins. Co. v. Louisiana Ins. Rating Com’n., No.96 0793 (La.App. 1 Cir. Feb.14, 1997).

that states “either the terms or substance of the intended action or a description of the subjects and issues involved.”

In its notice published in the Louisiana Register on December 20, 2001 LDEQ does not provide the terms of the rule. LDEQ’s only description of the substance of the rule is the statement that “the department is seeking to incorporate substantive changes to the proposed amendments to the Air Quality regulations, LAC 33: III.Chapter 6.” The fact that the air quality regulations in question are the rules for emissions reduction credits banking is only discernable from the heading of the notice. There is no mention of even the topic of the proposed rule within the body of the notice. Further, the notice provides no “description of the subject and issues involved.” The only description provided, that the proposed changes are to “streamline and clarify,” is in conflict with the fact that the changes are, by LDEQ’s own admission, “substantive.”

In fact, through deletions and additions, AQ211S makes substantive changes to the state rules governing how emission reductions may be used to avoid non-attainment new source review (NNSR) in the Baton Rouge Ozone Non-Attainment Area. Many people who live with the substandard air quality in the Baton Area, *given adequate notice*, might have been interested in providing comments on substantive changes to a rule that has specific implications for their area and the quality of their air.

LDEQ cannot adopt AQ211S because a rule promulgated in violation of section 953(A)(1)(a) of Louisiana Administrative Procedure Act would be statutorily invalid. *See* Liberty Mut. Ins. Co. v. Louisiana Ins. Rating Com’n, App. 1 Cir. 1997, 96 0793 (La.App. 1 Cir. 2/14/97). Therefore Ms. Albertha Hasten and LEAN request that LDEQ provide the public with proper notice of the proposed rulemaking AQ211S and reopen the thirty-day comment period once that notice has been published.

**D. DEQ denied the public the right to meaningful participation in the notice and comment process by failing to provide a “reasonable opportunity to submit data, views and arguments,” pursuant to APA 953(A)(2)(a).**

[See comments in I. E. below]

In light of the comments in I.E., LDEQ cannot legally adopt AQ211S because a rule adopted in violation of Louisiana’s Administrative Procedure Act is statutorily invalid.

**E. DEQ’s refusal to grant a reasonable extension request based on the agency’s failure to provide a “reasonable opportunity to submit data, views and arguments,” pursuant to APA 953(A)(2)(a), was arbitrary and capricious.**

Under the Administrative Procedure Act Section 953(A)(2)(a), the State is obligated to provide the public a “reasonable opportunity to submit data, views and arguments.” This obligation was not fulfilled when LDEQ published notice of two related rule changes and revisions to the State Implementation Plan, AQ211S and AQ215S, on the same day and in the midst of the shortened weeks due to the holiday season. Both AQ211S and AQ215S, along with

the SIP Revision, which includes the recently promulgated AQ212 rule on interpollutant trading, and AQ218 (emissions trading in Calcasieu Parish) must be considered together to properly assess and consider their efficacy.

AQ211S and AQ215S are key components of the State Implementation Plan and are rules through which Louisiana participates in EPA's Open Market Trading Economic Incentive Program. The two proposed rules must be considered together because they represent the State's current approach to bringing the Baton Rouge Non-attainment area into compliance with the national air quality standards of the Clean Air Act. In addition, these two proposed rules considered along with AQ212 and AQ218 are a significant departure from LDEQ's previous approach to ozone attainment and represent substantial changes to Louisiana's SIP. Anyone interested in ozone attainment and the State Implementation Plan would likely want to comment on both rules. Providing only thirty days, much of which was during the December holidays, to comment on two related rules effectively reduced the comment time available to less than fifteen days per rule.

Accordingly, LEAN and Ms. Hasten requested a thirty-day extension of the comment period. On January 14, 2002, LDEQ rejected this request, further denying LEAN and Ms. Hasten a "reasonable opportunity to submit data views and arguments." In failing to grant an extension when the rules have already been given effect by emergency rulemaking, and given the holiday timing of the notice, was an abuse of discretion that can only be rectified by reopening this proposed rule for an additional comment period. Therefore LEAN and Ms. Hasten request that the comment period for AQ211S and AQ215S be reopened, once a complete record is issued and available to the public.

**F. AQ211S must not be adopted as written because it contains a number of provisions which are arbitrary and for which no rational basis exists in the record.**

1. The definition of "modeled parishes" consists of an arbitrary list of parishes with no rational basis in the record.

DEQ proposes a new way to calculate what qualifies as a bankable emission reduction that uses an emissions inventory from what it calls the "modeled parishes." What parishes are included for modeling is therefore central to the determination of whether a particular reduction can be banked. Without explanation, LDEQ provides a definition of "modeled parishes" that is simply a mystifying list of nine parishes. Five are the five non-attainment parishes.<sup>3</sup> The other four are attainment parishes<sup>4</sup> listed with no explanation for how or why they came to be included in the model. Further, in the previous proposed rule AQ211, three *other* attainment parishes<sup>5</sup> were included in this list and have been deleted from the current proposed rule without apparent reason. Disturbingly, the only hint at an explanation for the source of this list has been deleted.

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<sup>3</sup> East Baton Rouge, West Baton Rouge, East Feliciana, West Feliciana, and Livingston.

<sup>4</sup> Ascension, Iberville, Pointe Coupee and St. Helena.

<sup>5</sup> St. Charles, St. James, and St. John the Baptist.

2. The inclusion of Calcasieu Parish in the scope of AQ211S is arbitrary and has no basis in the record.

In addressing the applicability of the rule in §603(a), LDEQ allows minor sources from Calcasieu to submit “ERC applications for purposes of banking” while disallowing minor sources from other areas even though those areas, like Calcasieu Parish all share the designation of “attainment.” Such disparate treatment of similarly situated parishes suggests a lack of fairness, at worst, or arbitrariness, at best, which is not dispelled by any explanation in the record.

The suspicion of an unexplained motive is increased by the knowledge that Calcasieu Parish was the only other area in Louisiana besides the Baton Rouge non-attainment area to receive a NOx exemption five years ago. These areas, waived out of NOx requirements, represent a vast pool of potential NOx emissions reductions that could be used as offsets for future increases in VOC emissions in the Baton Rouge area under the latest proposed SIP revisions. With no explanation in a preamble or response to comments, the only discernable motive for LDEQ’s inclusion of Calcasieu Parish as an allowed source of banked emission credits is a desire to create the largest possible pool of permitted NOx emissions, and thereby increase the likelihood that new sources of VOC emissions in the Baton Rouge area will escape the rigors of Non-attainment New Source Review through emissions trading.

3. The choice of 1997 as the base year has no rational basis in the record.

Using 1997 in the definition of “base case inventory” as the year from which actual emissions were calculated without explanation is arbitrary. Without a comment summary or response to comments it is not possible to know why more recent data were not used or whether this base year is representative of emissions in this area.

## II. SUBSTANTIVE COMMENTS

**A. LDEQ must not adopt AQ215S because it is part of an illegal strategy that will allow facilities to end-run New Source Review and increase emissions of dangerous, volatile organic compounds in the Baton Rouge Nonattainment area.**

In 1994, the LDEQ applied for a NOx waiver under § 182(f) of the Clean Air Act. To obtain the waiver, LDEQ was required to demonstrate to EPA that reductions in NOx would not contribute to ozone attainment. LDEQ successfully defended its position that controlling NOx emissions would not contribute to attainment and that the key to ozone attainment was controlling VOCs. EPA approved NOx waivers for the Baton Rouge Area and Calcasieu Parish in 1996 and 1997.

Under the waiver, LDEQ granted numerous permits that required no Nonattainment New Source Review restrictions on processes, equipment, hours of operation or total allowable NOx emissions. For example, less than 9 months ago, in Agency Interest No. 1186, LDEQ granted

Entergy Gulf States, Inc. Louisiana Station 2 a permit to emit more than 285 tons per year of NOx in Baton Rouge -- a nonattainment area. Despite the fact that this source clearly qualified as "major," LDEQ declined to conduct a new source review, asserting that the facility was exempt under the NOx waiver. Further, it is beyond dispute that LDEQ has used the NOx waiver to permit untold tons of NOx emissions that would have been subject to much more stringent control but for LDEQ's representation that NOx was irrelevant to ozone control. The result has been a significant increase in the amount of permitted NOx emissions from facilities that were not required to install readily available and relatively inexpensive control technologies.

Now, having knowingly handed out permits with minimal regulation of NOx for years, LDEQ is proposing to allow industry to convert those under-regulated tons of NOx into a license to emit tons of VOCs without new source review and, thus, without state-of-the-art controls. The result of this change would be to impose tons of extra VOC emissions – which could be avoided if state-of-the-art technology were used – on already overburdened residents. LDEQ is proposing to authorize this damaging conduct in an area that already violates federal health protection standards for air pollution.

Regardless of LDEQ's and its industry constituents' motives, the effect of LDEQ's proposed interpollutant trading is to undermine new source review through adoption of inconsistent positions. Having either wrongfully or mistakenly avoided new source review for NOx by swearing to EPA that NOx is unrelated to the ozone problem, LDEQ has employed the same team of experts to swear to the opposite proposition to avoid new source review of VOCs (by trading the tons of excess NOx emissions for new VOC emissions). In effect, if LDEQ finalizes these interpollutant trading rules, it will have scammed EPA and Louisiana citizens and effectively abrogated the protections that Congress provided in the Clean Air Act. Even if LDEQ's inconsistent positions were adopted in good faith, LDEQ should not even attempt to adopt a scheme under which inconsistent theories of ozone formation would result in creation of loopholes in the law. See *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600-601 (9th Cir. 1996) (applying the doctrine of judicial estoppel to preclude a party from "playing fast and loose with the courts" by "gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position").

The likely result of these changes to Louisiana's State Implementation Plan, if adopted as proposed, is unacceptable. The bank for NOx (and thus VOC) emissions could be expected to swell with emission reduction credits as sources that were previously permitted for excessive emissions of NOx decided to install low-NOx burners or other easily installed controls that could and should have been required in the first instance and that were avoided by representations made by LDEQ to EPA that LDEQ now says were false. As a result of LDEQ's about-face, LDEQ's proposal would allow industry to avoid state-of-the-art controls and to pump VOCs into the air in greater quantities than ever in an area that *still* violates the primary health protection standard for ozone. LDEQ has proposed to accomplish this wrong by eliminating the unequivocal statement that "interpollutant trading, for example, using a NOx credit to offset a VOC emission is not allowed."<sup>6</sup>

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<sup>6</sup> AQ211S §601(A).

LDEQ has chosen to pursue this radical change in ozone attainment strategy in a manner that can only be described as "stealth rulemaking," by separately proposing and finalizing various parts of its revised offsetting scheme. Analyzed together, the effect of LDEQ's changes is to undermine new source review of major sources and modifications that will increase emissions of volatile organic compounds in already overburdened communities. By segmenting its proposed revisions and failing to acknowledge or discuss their combined effect, LDEQ has obfuscated the effect of the proposed rules, denying the public a full and fair opportunity to comment.

Because LDEQ's radical strategy will allow facilities to end-run New Source Review and increase emissions of dangerous, volatile organic compounds in the Baton Rouge Nonattainment area it must not be adopted.

**B. AQ211S violates EPA policy because it fails to correct the serious deficiencies in Louisiana's interpollutant trading strategy identified by the EPA.**

In its comments to LDEQ on a draft of AQ212, the Environmental Protection Agency identified four specific ways in which LDEQ's total interpollutant trading strategy, (of which AQ211S is a part) was insufficient.<sup>7</sup> Three of these were never properly addressed, either in AQ212 or AQ211S.

First, EPA noted that LDEQ had not provided the required technical basis, based on modeling of current emission sources, to support its NOx/VOC trading plan. The modeling must demonstrate that the program will actually reduce ambient ozone. Furthermore, because it would be rare that one 1 ton of NOx emitted to the atmosphere would have the same effect on ozone levels as 1 ton of VOC emitted to the atmosphere, modeling must be used to establish a "trading ratio." Specifically, LDEQ must establish exactly how much NOx emissions must be reduced to compensate for increased emissions of a given amount of VOC. This ratio may vary by area, even within the same nonattainment area, and may also vary by season. Nothing in the public record suggests that LDEQ has done any of the required modeling. The trading regulations reflected in AQ211S and AQ212 do not set any trading ratio nor offer any clue as to how one might be calculated.

Second, EPA required that there be an "approvable and replicable procedure" by which these trading ratios will be calculated in the future. LDEQ has not provided any such procedure.<sup>8</sup>

Third, EPA required that "the program should make sure that any trading that occurs is consistent with the attainment demonstration."<sup>9</sup> LDEQ has provided no procedures by which the consistency of trading with the attainment demonstration will be monitored, nor has it even committed to doing such monitoring. Until LDEQ has met *all* the requirements for interpollutant

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<sup>7</sup> Comments of Jole C. Luehrs, Chief of the Air Permits at EPA's Region VI office. Attached at Appendix A. The requirements mentioned here come directly from § 16.9 of the Guidance. AQ212 revised provisions of LAC 33.III.504, governing Nonattainment New Source Review procedures.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

trading, it cannot legally be allowed to conduct or sanction any such trades. Indeed, without these provisions, the entire scheme is fatally flawed.

**C. AQ211S will allow the banking of illegal NO<sub>x</sub> emission reduction credits because LDEQ has failed to promulgate a proper Reasonably Available Control Mechanism and Reasonably Available Control Technology regulations for NO<sub>x</sub>, as required by § 172(c)(1) of the Clean Air Act.**

Under the waiver mentioned above, Louisiana was exempted from the requirements of § 172(c)(1) of the Clean Air Act. Congress, in that section, required that all ozone attainment implementation plans like the one at issue must “provide for the implementation of all reasonably available control measures as expeditiously as practicable, *including such reductions in emissions from existing sources as may be obtained through the adoption, at a minimum, of reasonably available control technology...*” Nothing in any regulation comprising the revised State Implementation Plan delineates the Reasonably Available Control Technology for existing sources or sets-up a schedule requiring existing sources to install this technology. This is a direct violation of the Clean Air Act, and the revised plan may not legally take effect without these provisions.

Without requirements that existing sources install reasonably available control measures, industries will be able to generate bankable credits for process changes that should actually be required by the regulations that LDEQ has failed to promulgate. For example, any facility within the scope of AQ211S that holds a permit for NO<sub>x</sub> that it received during the 6 year waiver period would be able to install low NO<sub>x</sub> burners and bank the resulting NO<sub>x</sub> reductions. Once banked these reductions would be available as offsets for new sources of VOC emissions in the Baton Rouge area.

If LDEQ were truly serious about controlling NO<sub>x</sub>, it would have promulgated the necessary rules to ensure that existing sources rapidly adopt Reasonably Available Control Technology and would not allow emission reductions generated by the adoption to be used as offsets. Because of the illegal provisions mentioned here, as well as because of other problems, is fatally flawed and should be rejected.

**D. Louisiana’s Economic Incentive Program (trading program), including AQ211S, must not be adopted until LDEQ addresses the environmental justice concerns as required by EPA Guidance “Improving Air Quality with Economic Incentive Programs.”**

Despite clear EPA guidance, LDEQ has not considered the serious, negative, and disproportionate impact its NO<sub>x</sub>/VOC trading program will have on the poor and people of color. EPA’s guidance document, “Improving Air Quality with Economic Incentive Programs,” (“the Guidance”), governs the creation of economic incentive programs like the emission reduction credit system contemplated by LDEQ in its proposed SIP revision. Section 4.2(b) requires that all economic incentive programs that govern VOC’s, and that might disproportionately impact racial minorities and the poor, include consideration of the impact the

program might have on low-income and minorities communities. Section 16.2 of the Guidance provides specific requirements on how such impacts are to be minimized. Despite the fact that its NOx/VOC trading program will certainly result in increased VOC emissions and that these emissions will have a disproportionate effect on low-income communities and communities of color, LDEQ has entirely disregarded these provisions.

LDEQ's program will undoubtedly result in increased VOC emissions. Section 504(F)(1) provides that interpollutant trading will only work one way. NOx reductions may be traded for VOC increase, but not vice versa. The result is that each and every interpollutant trade *must* result in an increase in VOC emissions. Unfortunately, a number of volatile organic compounds are also hazardous air pollutants, meaning they are known or suspected human carcinogens and/or known or suspected reproductive toxins. Because of the way industry and communities lie so close together, these increased VOC emissions could easily have a severe and disproportionate impact on those living closest to major sources.

Far too often, communities that lie at the edge of industrial facilities, so-called "fenceline" communities, are peopled by the poor and by racial minorities. An EPA report concluded that blacks living within the Lower Mississippi River industrial corridor are 50% more likely than whites to live within one mile of a major source of pollution and 300% more likely to live close to certain types of large chemical plants.<sup>10</sup> Clearly, the physical burden imposed by polluting industries is not equitably distributed in Louisiana, and LDEQ entirely fails to take account of this fact.

In fact LDEQ, has not included any of the four specific steps EPA requires in the Guidance, when an economic incentive program will have a disproportionate impact on the poor and racial minorities. These are:

1. The program must consider various options for preventing and/or mitigating the adverse impacts of transactions involving Hazardous Air Pollutants. The final program must incorporate at least one of the concrete measures listed in the rule.
2. The program must insure that the public will have sufficient access to information to ensure a meaningful opportunity for public review and participation in trading decisions.
3. The program must insure public participation in designing, implementing and evaluating the emissions trading program.
4. The program must make provisions for periodic program evaluations to evaluate the impact of Hazardous Air Pollutants on local communities. The program must include criteria for assessing whether further measures are needed to mitigate negative impacts.<sup>11</sup>

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<sup>10</sup> John McQuaid, "Too Close for Comfort," New Orleans Times-Picayune, May 21, 2000 at J2.

<sup>11</sup> "Improving Air Quality with Economic Incentive Programs," EPA EPA-452/R-01-001, Jan, 2001 at § 16.2(b).

LDEQ has not incorporated any of these requirements into its proposed implementation plan. LDEQ should not be allowed to implement any part of the plan until it has properly incorporated environmental justice concerns.

**E. In AQ211S LDEQ has improperly deleted the clear language prohibiting major sources from banking (or otherwise using as offsets) emissions reductions resulting from actions taken pursuant to a compliance order, consent decree or other enforcement document.**

LDEQ has illegally modified the standards by which creditable emission reductions are identified. In order for an emission reduction to be used for any offsetting purpose, the emission reductions must be, among other things, surplus and enforceable. AQ211S improperly changes the definition of these terms in a way that suggests that major sources can now generate creditable emission reductions through compliance with court or administrative orders, consent decrees or other enforcement documents.

Specifically, the definition of surplus has been amended to delete references to “order” and “requirement” as part of the list of emission reduction that are not creditable. At the same time, the definition of enforceable has been amended to include “EPA-issued or department-issued enforcement instruments such as orders or settlement agreements” in its list of mechanisms by which an emission reduction can be rendered “enforceable” and therefore potentially usable as an offset. Under these new rules, an industrial violator who is caught can attempt to claim *credits* for any extra pollution controls that are required as a consequence of the violations, arguing that the resultant emissions are now considered “surplus” and have, through the enforcement document, been rendered “enforceable.”

Allowing major sources to generate credits by violating the Clean Air Act offends both the letter and the spirit of the Act. Section § 173(c)(2) prohibits the banking of credits for any emission reductions “otherwise required by this Chapter.” (“Chapter” refers to the entire Clean Air Act). One of the requirements of the chapter is that no major source may operate either without the proper permit or in violation of the terms of a permit.<sup>12</sup> It is difficult to imagine any action for which enforcement is necessary that would not fit in this category. Furthermore, the various forms and degrees of punishment are set out in the act, as is the authority to apply them. Therefore, *any* condition or requirement that serves to punish or to settle a violation is itself “otherwise required by the act” and may not be used as offsets. That LDEQ would allow violators the benefit of their illegal acts is further evidence that these regulations are designed to accommodate polluters rather than achieve compliance. LDEQ should restore the “order” and “requirement” language to the definition of surplus and remove the enforcement order language in the definition of enforceable.

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<sup>12</sup> Clean Air Act, § 502(a), 42 U.S.C. §7661(a).

**F. By eliminating the requirement that emission reductions be creditable under the definition of netting, LDEQ violates federal law.**

The proposed rule AQ211S amends the definition of “netting” to allow any emission reduction, whether creditable or not, to be used in netting. Previously the definition of netting required the use of emission reduction credits. Emission reduction credits are required to be surplus, enforceable, permanent, and quantifiable. By changing the definition of netting this rule proposes to allow emission reductions that are otherwise not creditable to be used for netting purposes.

Allowing the use of non-creditable emissions to be used in netting violates EPA policy on emission trading. Netting (as well as emission offsets, bubbles, and emission reduction banking) is a form of emission offsetting. In order to ensure compliance with the Clean Air Act, only reductions that qualify as emission reduction credits may be used in an emissions offset. LDEQ is now proposing to allow netting of emission reductions that do not qualify as emission reduction credits, in violation of EPA policy and the Clean Air Act. Under the proposed rule, a facility that is forced to make emission reductions because it is in violation of its permit could then use those emission reductions to “net out” of the control requirements of new source review for a proposed modification within the same facility. In other words it would be allowed to use these emission reductions as the basis for allowing more emissions. This is clearly not consistent with the EPA guidelines or the Act. The definition of netting in AQ211S violates 42 U.S.C. §7503(c) and therefore LDEQ must not adopt the proposed rule as written.

**G. AQ211S allows for trading of emission reduction credits between attainment and nonattainment areas in violation of § 173(c) of the Clean Air Act.**

The amendments to § 603(A) of Title 33, Part III of the Louisiana Administrative Code suggest that the emission offset, banking and trading rules contained in AQ211S might allow for the trading of emission reduction credits between attainment and nonattainment parishes, specifically between the 5 parishes of the Baton Rouge Ozone Nonattainment Area (Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge) and 5 ozone attainment parishes (Calcasieu, East Feliciana, Pointe Coupee, St. Helena, and West Feliciana). If so, this would be a direct violation of § 173(c)(1) of the Clean Air Act, which only allows trades between nonattainment areas and then only under certain strict conditions.<sup>13</sup> If it is LDEQ’s intent to allow such trading, it should rescind the rule immediately as contrary to federal law. If it is not LDEQ’s intent to allow such trading, it should clearly so state within the regulation.

**H. LDEQ Must Not Adopt AQ211S Because LDEQ Failed to Provide Assurances That it Has Adequate Personnel or Funding to Maintain the Program, in Violation of the Clean Air Act.**

Section 110(a)(2)(E)(i) of the Clean Air Act (CAA), governing state implementation plans, states that each plan shall provide necessary assurances that the State will have adequate

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<sup>13</sup> The Guidance does allow for trading of this kind in some situations, but not where, as here the trading is done to meet New Source Review requirements.

personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation.<sup>14</sup> Under the proposed rule, AQ211S, section 607(C)(4) requires the LDEQ to maintain a “total point source inventory” on an ongoing basis, in order to quantify baseline emissions for the modeled parishes. In order to comply with this requirement, LDEQ must have the total point source inventory available whenever someone applies for an emission credit. Without this inventory there is no way to quantify baseline emissions. As is pointed out in the Revisions to Baton Rouge Ozone Attainment SIP, “the Baton Rouge area contains emissions from over 15,000 point sources.” LDEQ did not previously base its quantification of baseline emissions on a total point source inventory. Now that it has, this inventory must be made available and up-to-date to ensure that each permit application is properly considered. The inability of LDEQ to maintain such records will prevent the agency from effectively enforcing the emission reduction program. Further, without a complete and well-maintained inventory of total point sources, the public will be prevented from effectively commenting on proposed permits

It is unrealistic to believe that the LDEQ has the resources to handle an ongoing inventory of this magnitude. On October 23 LDEQ Secretary Dale Givens cited lack of resources as such a problem that the agency needs more money “just to be able to tread water.”<sup>15</sup> In fact, LDEQ’s prior experiment with a record-keeping intensive scheme – the ERC banking systems – failed in part because of management difficulties, leading to what EPA found were “insufficiencies in the database.”<sup>16</sup> In that light it is especially disturbing that AQ211S contains no assurances that the agency will be in a position to provide the personnel or funding necessary to maintain a total point source inventory.. An up-to-date ongoing total point source inventory is necessary for compliance with these regulations. Because LDEQ cannot provide assurances that it has the personnel or funding to carry out the proposed plan, the AQ211S cannot be promulgated as it is written.

**I. AQ211S must not be adopted as written because it contains a number of provisions that seriously undermine the notification value of the proposed rule.**

LDEQ has seriously undermined the notification value of its proposed emissions banking rule by introducing undefined terms and eliminating language in a way that will lead to industry confusion and will cripple the public’s oversight ability. According to the Supreme Court, fundamental fairness demands that regulations be clear so that a person of common intelligence need not guess at the meaning and differ as to the application.<sup>17</sup> (cite check) AQ211S is rife with instances that violate this principle of fundamental fairness and accordingly must not be promulgated.

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<sup>14</sup> 42 USC §7410(a)(2)(E)(i).

<sup>15</sup> Mike Dunn, *DEQ chief says agency short on resources*, Advocate, Oct. 23, 2001.

<sup>16</sup> Joint Motion, Cas No. 99-60570 (5th Cir. Oct. 6, 2000)

<sup>17</sup> *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); accord, *Brennan v. OSHRC*, 505 F.2d 869, 872 (10<sup>th</sup> Cir. 1974)

1. Deletion of “order or requirement.”

In the definition of “surplus” LDEQ has deleted the words “order or requirement” creating unnecessary confusion, and reducing the clarity of a key term in the rule. In the rule as proposed as AQ211 “surplus” was defined as “emission reductions that . . . have not been required by any state or federal law, or regulation, *order or requirement*. . .” The language was clear and left industry and the public with no doubts about when a reduction is considered voluntary. The language clarified that emission reductions required by a consent order resulting from a settlement agreement between an errant facility and LDEQ would not meet the definition of surplus and could therefore not be banked. This deletion creates the potential for conflict and achieves no positive effect. In fact the deletion may cause members of the regulated community to wrongly infer that LDEQ’s removal “order or requirement” is a substantive change that increases their potential pool of bankable credits.

2. Use of undefined term.

LDEQ uses the acronym “EIS” in section 607(C)(1) of the proposed rule and provides no explanation for its meaning. The reader is left to scrutinize the grammatical structure of the sentence in order to determine that EIS does **not** refer to “environmental impact statement.” If such inattention to clarity is not a deliberate attempt to confuse, it is certainly the mark of excessive haste and severely undermines confidence in the rule as a whole.

3. Introduction of unnecessary uncertainty by use of a vague term.

In its proposed definition of “offset,” LDEQ introduces the term “significant” to modify “net increase in emissions of NO<sub>x</sub> or VOC” that are able to be offset by a “legally enforceable reduction.”

Significant is not defined elsewhere in the rule. To say that it is significant increases for which approved reductions can compensate suggests there are other, less significant increases that don’t need offsetting at all. The use of the vague term “significant” creates confusion in the regulated community and the public about when offsets will be an issue. Are they only to be used when a facility proposes a “significant net increase” in emissions? If so, how much of an increase is that?

## CONCLUSION

For all of the above reasons LEAN and Ms. Albertha Hasten request that:

1. LDEQ *not* adopt AQ211S because it is part of an illegal scheme that will not promote attainment of the ozone standards in the Baton Rouge nonattainment area.

2. LDEQ *not* adopt AQ211S as written because it contains numerous flaws.
3. LDEQ *not* adopt AQ211S because it would be statutorily invalid due to violations of the Louisiana Administrative Procedure Act.
4. In the alternative, LDEQ *reopen* the public comment period to allow interested persons a reasonable opportunity to submit comments as required by the Louisiana Administrative Procedure Act.
5. LDEQ only *reopen* the public comment period once the complete record is available to the public for review.

Respectfully submitted,

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**SUPERVISING ATTORNEY'S INTRODUCTION OF STUDENT ATTORNEY AND  
NOTICE OF APPROVAL OF STUDENT APPEARANCE**

Undersigned counsel respectfully introduces student attorney Ben DeMoux. As the student attorney's supervising attorney, I approve of the student attorney's appearance in this matter. Written consent of the applicable client(s) to an appearance by a student attorney in this matter has also been submitted.

Very truly yours,

TULANE ENVIRONMENTAL LAW CLINIC

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