

April 10, 2002

Via Certified Mail, Return Receipt Requested, No: 70993400000213396235

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

Via Certified Mail, Return Receipt Requested, No: 70993400000213396266

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

Re: **Petition for an Independent Audit and Full Accounting of the State of Louisiana's Emission Reduction Credits Banking System**

Dear Ms. Whitman and Mr. Cooke:

The Louisiana Environmental Action Network ("LEAN"), Alliance for Affordable Energy, Alliance Against Waste and Action to Restore the Environment ("AWARE"), Caring Parents of Geismar, Concerned Citizens of Livingston Parish, Concerned Citizens of Iberville Parish, Louisiana Bucket Brigade, Louisiana Communities United, Louisiana Democracy Project, Louisiana Labor Neighbor, Myrtle Grove Community, and North Baton Rouge Environmental Association (collectively "the Petitioners") respectfully petition the U.S. Environmental Protection Agency ("EPA") for a thorough *audit and accounting* of Louisiana's Emission Reduction Credits Banking System ("the Air Pollution Bank").

The Louisiana Department of Environmental Quality ("LDEQ") administers the Air Pollution Bank. LDEQ uses the bank to allow pollution increases in communities in which the air already violates health protection standards, and to allow companies to avoid installing state-of-the-art pollution controls. The bank (1) has an inadequate database, (2) has transacted

business in illegal emission reduction “credits,” which do not represent voluntary emission reductions meeting minimum Clean Air Act criteria, and, (3) has engaged in illegal double-counting of emission reduction credits. These problems cast a taint of illegality on numerous Clean Air Act permits that LDEQ has issued. This taint can only be removed, and the bank's customers – the public – can only be made whole by an full and independent EPA audit and accounting of LDEQ's Air Pollution Bank.

Summary of Petition

LDEQ has used its Air Pollution Bank to approve many permits that increase public exposure to dangerous air pollutants. For example, for each ton of increased volatile organic compound emissions that LDEQ has approved in communities where the air fails to meet federal health protection standards, LDEQ has been *legally required* to ensure that there was an offsetting reduction of more than a ton of similar pollution. LDEQ has avoided requiring actual offsets by using its Air Pollution Bank to generate “paper” offsets. Specifically, LDEQ has used the bank to assert that pollution offsets have been achieved by claiming to withdraw emission reduction credits from the Air Pollution Bank. LDEQ has also used credits from its Air Pollution Bank to allow companies to avoid installing state-of-the-art emission control technology in communities where the air has already been degraded below safe levels set by EPA.¹

By law, credits in the Air Pollution Bank must represent voluntary emission reductions – over and above legally required reductions. As explained below, however, credits in LDEQ's Air Pollution Bank do *not* meet this standard. Indeed, the bank lacks integrity or any basis for a claim of credibility with the public. To ensure protection of public health, respect for the rule of law, and to restore integrity to Clean Air Act administration in Louisiana, the public must be provided with actual emission reductions to compensate for each and every ton of emission reductions that LDEQ purported to provide – but nonetheless failed to deliver – through its discredited Air Pollution Bank.

The following serious problems plague LDEQ's Air Pollution Bank, creating a situation in which existing LDEQ Clean Air Act permits fail to assure adequate protection for public health or comply with the minimum requirements of the Clean Air Act:

- LDEQ *lacks a coherent database* for keeping track of credits. Specifically, EPA found on October 9, 2000, “it is difficult to access data documenting the amount of valid CAA offset credits in Louisiana's bank and there are insufficiencies in the banking database.”² LDEQ has failed to correct this deficiency and still

¹The state-of-the-art standard that companies avoid with credits from the bank is known as “Lowest Achievable Emission Rate” or “LAER.” Companies avoid these controls by using pollution offsets and employing a lesser standard of control known as “BACT.”

² Joint Motion for Voluntary Remand at 4, ¶ 8, LEAN v. U.S. EPA, 99-60570 (5th Cir. October 9, 2000) (hereinafter “Joint Motion”) (*Attached as Exhibit A*).

neglects its duty to keep track of emission reduction credits. For example, on February 19, 2002, LDEQ published notice of its intent to “bank” emission reduction credits for ExxonMobil's reduction of 157.91 tons of volatile organic compounds from retiring 22 tanks at the Maryland Tank Farm.³ LDEQ's insufficient database apparently failed to alert LDEQ to the fact that ExxonMobil had already used exactly the same 157.91 tons to offset other pollution increases related to its Tier 2 Low Sulfur Gas project.⁴

- LDEQ has *allowed polluting companies to bank credits that are illegal* under federal law. Specifically, EPA has determined in a formal order that for LDEQ to legally rely on “banked” emission reduction credits (a/k/a “ERCs”) under the federal Clean Air Act, LDEQ “must certify the ERCs as surplus [i.e., as not representing reductions otherwise required by law] at the time the credits are used.”⁵ In contrast, LDEQ has admitted that it “has not been [LDEQ's] practice to perform such a review.”⁶
- LDEQ illegally *counted some reductions twice* by allowing facilities to “bank” credits for emission reductions that had already been taken into account when establishing the baseline levels provided to EPA by LDEQ as part of LDEQ's federally required “state implementation plan.”⁷ In other words, having already used emission reductions to demonstrate to EPA that it was moving toward attainment of health-protection standards, LDEQ has turned around and used those same reductions to justify illegal pollution increases that undercut efforts to attain minimum health protection standards.

³ Public Notice from February 19, 2002 announcing request for public comment on request to bank emissions reductions of 157.91 tons of volatile organic compounds (*Attached as Exhibit B*).

⁴ Public Notice from December 12, 2001 announcing the public hearing and request for public comment on Proposed Part 70 and Prevention of Significant Deterioration (PSD) air permits and environmental assessment statement (*Attached as Exhibit C*).

⁵ EPA, Order Responding to Petitioner's Request that the Administrator Object to the Issuance of a State Operating Permit [For Borden Chemicals, Inc.], at 19, ¶ 2, http://www.epa.gov/rgytgrnj/programs/artd/air/title5/petitiondb/petitions/borden_response1999.pdf [hereinafter “EPA Order”] (*Excerpted in Pertinent Parts as Exhibit D*).

⁶ Letter from Bliss Higgins, Assistant Secretary of LDEQ, to Carl Edlund, EPA Region VI (October 5, 2000), at 2, attached to Joint Motion, *supra* note 2.

⁷ EPA Order, *supra* n. 5, at 20, 25-28.

Like a financial bank, an Air Pollution Bank can serve the public *only* if it is based on credible accounting principles, tracked through a coherent database, and meets at least the minimum criteria set by federal law. When abnormalities are discovered in a financial bank, honest bankers respond with a thorough accounting and an independent audit. This is necessary to ensure that the bank's customers are "made whole" – that any money that was unlawfully taken from them is restored to their accounts. It is equally important that customers of an Air Pollution Bank – the public – be made whole following revelations of an inadequate database, illegal credits, and double-counting.

An Air Pollution Bank protects public health – which is at least as important as the economic assets at issue when a financial bank is audited. Members of the public deserve restitution for every ton of air pollution that LDEQ allowed to be added to communities where the air violates minimum health protection standards. Each and every ton of excess pollution resulting from one of LDEQ's bogus emission reduction credits must be identified and replaced with an actual reduction in emissions.

It has now been more than one and a half years since LDEQ admitted to a federal court that its implementation of the bank violates federal policy and since EPA informed the federal court of its finding that LDEQ's Air Pollution Bank uses an inadequate database. It has also been well over a year since EPA issued a formal order identifying LDEQ's use of illegal credits, and double-counting in its bank. The public, however, has still not been made whole. There has been *no* accounting. LDEQ and its constituents in the regulated community must be held accountable for justifying excess pollution – that exacerbates avoidable health threats to Louisiana residents – based on bogus and illegal emission reduction credits.

The Petitioners, therefore, respectfully request that EPA take the following immediate steps:

- EPA must evaluate all Louisiana Air Quality permits granted since 1990⁸ and determine whether each and every emissions reduction credit used in obtaining each of those permits is valid or invalid. In other words, there must be a full audit of the bank and an accounting of how many tons of excess pollution LDEQ's permits have allowed to be released in Louisiana communities without valid offsets.
- For each Louisiana Air Quality permit based in whole or in part on invalid credits, EPA must determine how many excess tons of pollution have been emitted over how many years.

⁸ EPA's audit of the Louisiana Banking System must ensure that no emission reduction credits were banked or used based on reductions taken prior to December 31, 1989. Louisiana regulations prohibited banking of reductions made prior to 1990. L.A.C. 33:III.607.D.

- EPA must determine how many valid emission reduction credits, if any, remain in LDEQ's Air Pollution Bank.
- EPA must determine how many valid emission credits from the Air Pollution Bank must be used to make the public whole from years of excess emissions from LDEQ's previous use of invalid credits.
- For any shortfall in the number of valid emissions reductions credits available in the Air Pollution Bank and the number of such credits required to compensate the public for excess emissions, EPA must either (1) reopen and rescind all permits issued using invalid credits, or (2) reopen those illegally issued permits for Non-attainment New Source Review.

The Petitioners request that EPA formally respond to this Petition in writing by notifying the State of Louisiana that their administration of the Air Pollution Bank is being audited for practices in violation of the Clean Air Act and state laws. 42 U.S.C. §7503(c) (1994); L.A.C. 33:III 504.F.10 and 623.B.1. Further, the Petitioners ask EPA to issue an immediate "freeze order" to LDEQ prohibiting LDEQ from dispensing any emission reduction credits in the Air Pollution Bank until the audit is complete and all deficiencies are reported to the public and fully remedied. 42 U.S.C. §7413(a)(2), Clean Air Act §113(a)(2).

Petitioners

The Petitioners are non-profit, public-interest corporations and non-profit, public-interest community organizations with a demonstrated interest in and commitment to 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. The members of these groups reside, work, and recreate in the State of Louisiana, including the Baton Rouge nonattainment area. LDEQ's illegal implementation of its Air Pollution Bank has denied Petitioners' members the mandatory safeguards provided for by the federal Clean Air Act and prolonged their exposure to air that violates minimum health-protection standards.

Background

The U.S. Congress enacted the federal Clean Air Act to protect all U.S. residents from unhealthy air. Clean Air Act §§101-617, 42 U.S.C. §§7401-7671q. The Act is binding on LDEQ as "the supreme Law of the Land." U.S. Const. art. VI. Further, L.A.C.33:III.504.D.1 requires "compliance with all applicable state and federal emission limitations and standards, [and] the Federal Clean Air Act."

Congress delegated to EPA a federal oversight duty that requires EPA to evaluate and take action to remedy deficiencies in state run air programs. Clean Air Act §113(a)(2), §502(i), 42 U.S.C. §7413(a)(2), §7661a(i). In fact, EPA retains the authority to review, approve, disapprove, and withdraw the overall Title V permit program, Clean Air Act §502(d), 42 U.S.C. 7611a(d), as well as each individual permit issued by the state. Clean Air Act §505(b), 42 U.S.C.

§7611a(b). Each permit issued by the state is subject to modification, termination, or revocation upon an EPA determination that cause exists to do so. Clean Air Act §502(b)(5)(D), § 505(e), 42 U.S.C. §7611a(b)(5)(D), § 7661d(e); 40 C.F.R. §70.7(f).

EPA has delegated implementation of the Clean Air Act to the State of Louisiana, which – in turn – relies on LDEQ to administer and enforce Clean Air requirements. LDEQ has failed, however, to achieve attainment of minimum federal health-protection standards for ozone pollution in the five-parish Baton Rouge area. Because air in the Baton Rouge area fails to meet federal standards, increased pollution in this area is generally allowed *only* if increases are offset by emission reductions that go beyond existing legal requirements. Clean Air Act §173(c), 42 U.S.C. §7503(c)(1)(A).

Emission reductions may be used to offset new pollution only if those reductions are completely voluntary. EPA, *General Preamble for Future Proposed Rulemakings*, 57 Fed. Reg. 13,508 (Apr. 16, 1992) (hereinafter "EPA General Preamble"). An emission reduction is bankable as an emission reduction credit, therefore, only where it represents a real reduction in air pollution that is over and above reductions already required by law. Clean Air Act §173(c), 42 U.S.C. §7503(c). Further, even voluntary reductions may be banked *only* if they are "real, permanent, and enforceable." EPA General Preamble, 57 Fed. Reg. at 13,509 (Apr. 16, 1992). Credits that meet this standard are known as "surplus" credits.

Under state and federal law, credits must be "surplus" both when they go into an Air Pollution Bank *and* when they are withdrawn from the bank for use in offsetting a pollution increase. Clean Air Act §173(c), 42 U.S.C. §7503(c), L.A.C. 33:III.504.D.1. In other words, even reductions that were voluntary when made cease to qualify as "surplus" after changes in the law make those reductions mandatory. LDEQ, however, has failed to meet this standard with respect to its Air Pollution Bank.

Petition for an Audit and Full Accounting

This Petition raises and documents three major objections to LDEQ's Air Pollution Bank: (1) LDEQ's banking database is inadequate and fails to provide LDEQ and the public with sufficient information to ensure that credits are used only once, and not double counted; (2) LDEQ has authorized use of many credits that were not "surplus" when generated and "surplus" when used to offset new pollution, rendering them illegal under the Act; and (3) LDEQ has unlawfully double counted emission reductions by using the emission reductions to win EPA approval of its plan to move toward attainment of health protection standards and then using those *same* reductions to generate credits to allow pollution increases.

1. LDEQ's Air Pollution Bank lacks an adequate database to track credits.

More than a year and a half ago, EPA reported to a federal court that "it is difficult to access data documenting the amount of valid CAA offset credits" and "there are insufficiencies in the banking database." Joint Motion, *supra* note 2, 4, ¶ 8. As managed by LDEQ, the Air

Pollution Bank comprises a confusing array of documents and numbers that manifest uncertainty as to what is, and is not, in the bank.

LDEQ itself often does not know what is or is not in the Bank. For example, on March 15, 2000, LDEQ submitted to the 19th Judicial District Court a document entitled "VOC Emissions Reduction Credits Banked in The Baton Rouge Ozone Nonattainment Area As of March 13, 2000," which revealed LDEQ's lack of record-keeping. Barry Brooks of LDEQ certified the list as being a true copy of the books, records, papers, or other documents that were in the custody of LDEQ and as being a reflection of the data known by LDEQ as of that date. According to LDEQ, 6,787.2 emission reduction credits were available for use as offsets or netting, including 4,051.7 listed credits for Dow Chemical Company.⁹ However, in the Louisiana emission reduction credits database, dated one day before LDEQ's submission of this document to the court, there were no Dow Chemical Company credits listed.¹⁰

To provide another example: On February 19, 2002 LDEQ published notice of its proposal to grant ExxonMobil's request to bank emission reductions of 157.91 tons of volatile organic compounds (VOCs) for use as offsets in the future. These VOC reductions were the result of retiring 22 tanks at the Maryland Tank Farm.¹¹ All of the credits ExxonMobil seeks to certify have been used before. ExxonMobil previously used *exactly the same* 157.91 tons to net out of Non-Attainment New Source Review for its Tier 2 Low Sulfur Gas project. Either LDEQ's records were inadequate to alert LDEQ to this attempt to use credits twice, or LDEQ chose not to share its information about the use of these credits with the public.

2. LDEQ has allowed use of many credits that were not "surplus" when used to offset new pollution, rendering them illegal under the Act.

The Act requires that emission reduction credits be surplus both at the time they are generated and the time they are used to offset new pollution. Clean Air Act §173, 42 U.S.C. §7503. EPA has explained in a formal order that it *only* "approved Louisiana's permitting and banking regulations (L.A.C. 33:III.504.F and 623.B.1) on the basis that the regulations required

⁹ "VOC Emissions Reductions Credits Banked in The Baton Rouge Ozone Nonattainment Area As of March 13, 2000," submitted in North Baton Rouge Environmental Association v. Louisiana Department of Environmental Quality, No. 456,658 (19th Judicial District) (*Attached as Exhibit E*).

¹⁰ Print out from the database dated March 13, 2000 (*Attached as Exhibit F*).

¹¹ Twenty-two tanks at the Maryland Tank Farm were allegedly retired from February 28, 1999 to December 31, 1999. According to the Analysis of Validity, 5 have been retained for potential use by the City-Parish and 17 were demolished. To date, there is no paperwork certifying that this has taken place, nor is it reflected in their permit.

that ERCs be surplus at the time of use as offsets."¹² EPA made its understanding express in a federal register notice, but LDEQ nonetheless failed to conform to EPA policy or to notify EPA that it did not intend to implement the bank in accord with EPA's understandings.

EPA has explained that under Clean Air Act §173(c), "LDEQ must certify the ERC as surplus at the time the credits are used." EPA Order, *supra* note 5, at 19, ¶ 2. Further, as EPA has explained, each banked emission reduction credit (a/k/a "ERC") "must be reduced in quantity at the time of its use to account for any emission reduction requirements adopted since the generation of that ERC." Joint Motion, *supra* note 2, at 3-4, ¶ 7. As EPA has pointed out, this requirement "helps ensure that emission reductions required under current law are not undermined by the use of outdated offsets that were placed in a bank before the emission control requirements became effective." EPA Order, *supra* note 5, at 21, ¶ 1.

EPA noted in its December 22, 2000 Order: "LDEQ has applied its regulations in a manner that does not comport with EPA's interpretation of the state's permitting and banking regulations regarding the applicability of a 'surplus when used' requirement."¹³ LDEQ has admitted that its administration of the Air Pollution Bank has not met the standard set by the Clean Air Act and articulated by EPA.¹⁴ Specifically, LDEQ admitted: "it has not been our practice to perform such a review," referring to "a review and adjustment of emission credits at the time of their use."¹⁵ LDEQ has "fully acknowledge[d] that these apparent inconsistencies between the State rule and Federal policy . . . must be resolved."¹⁶

LDEQ has continued to allow use of credits that are invalid because they represent emission reductions that were required by law. For example, LDEQ recently granted a Title V air permit to Georgia-Pacific Corporation, a paper mill in Zachary, Louisiana. In granting this permit, LDEQ allowed Georgia-Pacific to claim offsets for reductions made pursuant to a legally enforceable settlement agreement, entered into after Georgia-Pacific was found to be violating its air quality permit.¹⁷

¹² EPA's understanding of Louisiana regulations was consistent with section 173(c)(2) of the Act, which requires that "emissions reductions otherwise required by [the Act]" cannot be used as offsets.

¹³ EPA Order, *supra* note 5, at 19, n. 22.

¹⁴ Letter from Bliss Higgins, Assistant Secretary of DEQ, to Carl Edlund, EPA Region VI (October 5, 2000), at 2, attached to Joint Motion, *supra* note 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Under LDEQ's EPA approved state implementation plan, it was illegal for LDEQ to allow these reductions. LDEQ regulations define "surplus emission reductions" as those "that are voluntarily created . . . and have not been required by any . . . order." L.A.C. 33.III.605.F.

LDEQ's failure to properly administer the Air Pollution Bank has thus persisted throughout the life of the bank and has tainted the issuance of many Clean Air Act permits. Continued use of such tainted permits harms public health by permitting emissions to exceed the maximum allowed under federal law.

3. LDEQ has unlawfully double counted emission reduction credits.

EPA has explained that "States must keep careful records of all emissions reductions to ensure that the same reductions are not 'double-counted' or, more simply, used more than one time (i.e., reductions cannot be used for offsets and to meet the 15 percent rate of progress requirement)." EPA General Preamble, 57 Fed. Reg. at 13,509 (Apr. 16, 1992). LDEQ illegally counted reductions twice by approving the "banking" of credits for emission reductions that had already been taken into account when LDEQ established the baseline levels provided to EPA as part of LDEQ's federally required demonstration that its "state implementation plan" would lead to attainment of national standards.¹⁸ In other words, having already used emission reductions to demonstrate to EPA that it was moving toward attainment of health-protection standards, LDEQ has turned around and subverted its plan for attaining national standards by using those same reductions to justify illegal pollution increases.

Conclusion

Neither Louisiana residents nor members of the business community should be required to continue to live with the taint of, and excess pollution from, illegal permits issued pursuant to a discredited Air Pollution Bank. Until a full audit of the Air Pollution Bank is performed, neither EPA nor LDEQ have any way of determining how many, if any, valid credits remain in the bank. Until an audit and accounting is performed Louisiana residents and businesses will live under a cloud of tainted and illegal permits. Only after EPA conducts a complete audit and LDEQ remedies all deficiencies can Louisiana come into compliance with the Act and provide the public with real emission reductions to compensate for the illegal "paper" offsets that LDEQ provided through its Air Pollution Bank. EPA's audit and accounting must include at least the following minimum elements:

1. EPA must evaluate all Louisiana Air Quality permits granted since 1990 and determine whether each and every emissions reduction credit used in obtaining each of those permits is valid or invalid. In other words, there must be a full audit of the bank and an accounting of how many tons of excess pollution LDEQ's permits have allowed to be released in Louisiana communities without valid offsets.
2. For each Louisiana Air Quality permit based in whole or in part on invalid credits, EPA must determine how many excess tons of pollution have been emitted over how many years.

¹⁸ EPA Order, *supra* n. 5, at 20, 25-28.

3. EPA must determine how many valid emission reduction credits, if any, remain in LDEQ's Air Pollution Bank.
4. EPA must determine how many valid emission credits from the Air Pollution Bank must be used to make the public whole from years of excess emissions from LDEQ's previous use of invalid credits.
5. For any shortfall in the number of valid emissions reductions credits available in the Air Pollution Bank and the number of such credits required to compensate the public for excess emissions, EPA must either (1) reopen rescind all Title V permits issued using invalid credits, or (2) reopen those illegally issued permits for Non-attainment New Source Review.

While performing this audit and until all deficiencies are remedied EPA must issue a "freeze order" to prevent LDEQ from dispersing any emission reduction credits from its discredited Air Pollution Bank.

Dated: April 10, 2002

Prepared by:

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