cc: Herman Robinson
Chuck Brown
Dennis Broadwater

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

DEC 29 2004

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LA. DEPT. OF ENV. QUALITY
LEGAL AFFAIRS DIVISION

ENVIRONMENTAL QUALITY
JAN 03 2005
OFFICE OF THE SECRETARY

Mike D. McDaniel, Ph.D.
Secretary
Louisiana Department of Environmental Quality
P.O. Box 4301
Baton Rouge, LA 70821-4301

Dear Dr. McDaniel:

I am pleased to inform you that the U.S. Environmental Protection Agency (EPA) Region 6 has approved your agency's revised Louisiana Pollutant Discharge Elimination System (LPDES) program. With this letter, I am transmitting the signed Memorandum of Agreement (MOA), a copy of the signed Federal Register notice approving revisions to the LPDES program, and a document entitled "Crosswalk Between Petition Allegations and Finding and/or Action Taken." In approving the LPDES program, we are denying a petition submitted by several environmental groups to withdraw Louisiana Department of Environmental Quality's (LDEQ) LPDES program.

I want to congratulate you and your agency on your hard work and continuing commitment to improvements in the State's water permitting and enforcement programs. EPA Region 6 is pleased to be Louisiana's partner in finding new and better ways to protect public health and the environment.

Sincerely yours,

Richard E. Greene
Regional Administrator

Enclosures (3)

# NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

# MEMORANDUM OF AGREEMENT

# BETWEEN THE

# LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

# AND THE

# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**REVISION 1**
April 28, 2004

Please Note: The official version of this document is maintained in the LDEQ Topic File Room (Galvez Building Room 028). Members of the public can request access to topic file material in the LDEQ Public Records Center (Galvez Building Room 127). Copies, whether in electronic or printed form, are not official and should be verified for currency against the official document. The Control Header of the document will be used for comparison to the official document.

**Document Review and Revision Record**

Note: Actions older than 5 years may be removed from this record

| Approval Date | Revision No. | Record of Activity |
|---|---|---|
| 08/26/96 | 0 | Initial document approved. |
| | 1 | Revisions throughout document to reflect organizational changes due to reengineering of agency. |
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## Section I. General

### I.A Purpose

This Memorandum of Agreement (Agreement/MOA) establishes responsibilities and procedures pursuant to 40 CFR Part 123 and defines the manner in which the National Pollutant Discharge Elimination System (NPDES) program will be administered by the State of Louisiana through the Louisiana Department of Environmental Quality (LDEQ) as the Louisiana Pollutant Discharge Elimination System (LPDES) program, as reviewed and authorized by Region 6 and the Administrator of the United States Environmental Protection Agency (EPA).

### I.B Partnership

The LDEQ Secretary and the EPA Regional Administrator hereby agree to maintain a high level of cooperation and coordination in a partnership to assure successful and effective administration of the LPDES program. If requested by either party, but at least semi-annually, meetings between LDEQ and EPA will be scheduled to review specific operating procedures, resolve problems, or discuss material concerns involving the administration of the LPDES program. In addition, this MOA shall be reviewed jointly at least annually and either LDEQ or the EPA may initiate program revisions in accordance with 40 CFR §123.62.

### I.C Responsibilities

In this partnership, EPA will provide to the LDEQ technical and other assistance on a continuing basis, including interpretation and implementation of Federal regulations, policies, and guidelines on permitting and enforcement matters. The LDEQ has primary responsibility for implementing the LPDES program in Louisiana in accordance with this MOA, sections 301, 302, 303, 306, 307, 308, 402, 403, and 405 of the Federal Clean Water Act (CWA), 33

U.S.C. §1251, et seq., applicable state legal authority, the applicable requirements of 40 CFR Parts 122-125 and any other applicable federal regulations, the Multi-Media/Multi-year Enforcement Memorandum of Understanding (MOU) and the annual State program grant. The LDEQ has the primary responsibility to establish LPDES program priorities with consideration of EPA Region 6 and national NPDES goals, and objectives.

## I.D Scope of Authorization

The LPDES program applies to CWA section 402 individual permits, general permits, stormwater permits, and pretreatment activities covering discharges of pollutants to waters of the United States within the jurisdiction of LDEQ. It does not include the sewage sludge use and disposal program as outlined in 40 CFR Part 503.

## I.E Additional Agreements

The strategies and priorities for issuance, compliance monitoring and enforcement of LPDES permits, as established in this MOA, may be set forth in more detail in the annual State program grant and the MOU. This MOA, the annual State program grant, the MOU, and any other state/EPA agreement(s) regarding the LPDES program shall be consistent. However, this MOA shall override any other state/EPA agreement(s) as required by 40 CFR §123.24(c).

## I.F Withdrawal

The EPA may withdraw its approval and authority for the LPDES program from the LDEQ in any manner specified by federal law or regulation.

## Section II. Program Responsibilities

### II.A LDEQ Responsibilities

In accordance with the priorities and procedures established in this Agreement and the annual State program grant, the LDEQ will:

**II.A.1** Develop and maintain the legal authority (including state regulations and statutes) and the resources required to carry out all aspects of the LPDES program;

**II.A.2** Process in a timely manner and propose to issue, reissue, modify, or deny all LPDES permits. LDEQ will require that all Louisiana facilities subject to LPDES requirements apply for and receive an LPDES permit. Permit applications of major dischargers and new source dischargers shall normally receive first priority in all LPDES activities, depending on water quality and public health considerations;

**II.A.3** Comprehensively evaluate and assess compliance with all enforcement documents including permits, regulations, administrative orders, consent agreements, consent orders and court orders which deal with all applicable issues including compliance schedules, effluent limitations, operation and maintenance, pretreatment and storm water as well as other conditions in LPDES permits as outlined in Section IV of this Agreement;

**II.A.4** Maintain a vigorous enforcement program for LPDES permits, unauthorized discharges, and pretreatment violations by taking timely and appropriate actions in accordance with the Clean Water Act, all applicable state and federal laws and regulations, and LDEQ's Enforcement Action Standard Operating Procedure;

**II.A.5** Maintain adequate public files for each permittee at the central office (which must be accessible to EPA for audit purposes). Such files must, at a minimum, include copies of all of the following documents within the possession of LDEQ:

- permit applications
- draft permits
- proposed permits
- issued permits
- public notices and fact sheets (as applicable)
- all comments received during the public comment period
- responses to comments
- discharge monitoring reports for three (3) years
- all inspection reports
- all enforcement actions
- construction reports
- toxicity reports
- pretreatment program reports
- requests for appeals, evidentiary hearings, stays of permit and/or specific permit conditions, and other legal documentation
- all compliance and noncompliance documents
- approved POTW pretreatment program documents
- approved storm water program documents
- other pertinent information and correspondence
- appeals and stays of enforcement actions
- penalty worksheet for penalty actions

- justification memos for settlement agreements

All of the above-listed documents pertaining to the LPDES program will be made available to the public in accordance with LDEQ Policy 005-90, La. R.S. 30:2030 and 30:2074 (D), and the Louisiana Public Records Law (La. R.S. 44:1-41);

LDEQ will remain in compliance with federal right to know statutes and Louisiana public records law, while protecting sensitive information.

Material containing security procedures, criminal intelligence information pertaining to terrorist-related activity, or threat or vulnerability assessments created, collected, or obtained in the prevention of terrorist-related activity, including but not limited to physical security information, proprietary information, operational plans, and the analysis of such information, or internal security information is not required to be disclosed under an exemption in the Louisiana Public Records Law (La. R.S. 44:3.1).

Although the exempted material is not regarded as public record, there is no prohibition from releasing the material. LDEQ will consider the merits of each request on a case-by-case basis while striving to achieve balance between the public's right to know, security issues, and applicable federal and state statutes.

**II.A.6** Maintain an effective program to carry out the pretreatment responsibilities outlined in Section V of this Agreement;

**II.A.7** Cooperate in a partnership with EPA in the administration of the LPDES program;

**II.A.8** Submit to the Regional Administrator the information described in Section VI of this Agreement, the annual State program grant, and applicable portions of 40 CFR Part 123. Additionally, the LDEQ shall submit specific information and allow EPA access to files necessary for evaluating LDEQ's administration of the LPDES program;

**II.A.9** Assess and collect penalties for non-compliance in accordance with state laws and regulations, federal NPDES requirements and the CWA;

**II.A.10** Timely input of LPDES permit and enforcement WENDB data into the National Permit Compliance System (PCS) for all Majors, 92-500 Minors and Significant Minors (Significant Minors shall be identified as those minor facilities appropriately identified and mutually agreed upon by both EPA and LDEQ and included in the Annual State Program Grant);

**II.A.11** Review biomonitoring reports from permittees where biomonitoring requirements are applicable. LDEQ will require and oversee Toxicity Reduction Evaluations (TREs) for those facilities with biomonitoring conditions in LPDES permits and which demonstrate persistent lethality. LDEQ will enforce toxicity limitations to protect water quality. LDEQ will transmit a copy of the final report to EPA and will expeditiously reopen the LPDES permit to incorporate toxicity limits and compliance schedules as appropriate at the conclusion of the TRE.

**II.A.12** Require POTW Pretreatment Programs to be modified if it is determined they are no longer able to meet the General Pretreatment Regulations (40 CFR 403). Also, LDEQ

will require that Technically Based Local Limits (TBLLs) are reassessed when the LPDES permit is reissued for any of the POTWs. LDEQ will review and respond to both Pretreatment Program modifications and TBLLs in a timely manner.

**II.A.13** LDEQ will bear in mind EPA policies and guidance documents and draw on those policies and guidance documents in its operation of all aspects of the LPDES program.

## II.B EPA Responsibilities

**II.B.1** EPA commits to funding the LDEQ to the maximum extent possible to support its LPDES activities. It is recognized that it is the State's responsibility after program approval to run and manage the LPDES program with or without the assistance of Federal funding.

**II.B.2** EPA will provide technical support and assistance to the LDEQ in the following areas:

**II.B.2.a** Interpretations of Effluent Limitation Guidelines (ELG) regulations;

**II.B.2.b** Development of technology-based effluent requirements and related "best management practices," which include the use of "best professional judgment";

**II.B.2.c** General technical assistance in processing permit applications;

**II.B.2.d** Use of the PCS system and BEN and ABEL systems; and

**II.B.2.e** Training for program staff. Program staff includes permit writers, managers, administrative and technical staff, and inspection and enforcement staff.

**II.B.3** EPA will ensure that the LDEQ is kept fully informed and up to date concerning:

**II.B.3.a** EPA contractor reports; draft and final EPA development documents; and draft, proposed, and final ELG regulations for various industry categories;

**II.B.3.b** Draft and final settlement agreements between EPA and litigants which concern the interpretation or modification of ELG regulations for various industry categories;

**II.B.3.c** Draft, proposed, and final versions of EPA regulations, technical guidances, and procedures which pertain to implementation of the LPDES program and water quality planning program.

**II.B.3.d** Copies of administrative orders, settlement agreements and court decisions involving EPA's NPDES, pretreatment, storm water and sewage sludge programs, general permits and implementing regulations in Louisiana.

**II.B.4** EPA will provide LDEQ with the opportunity for meaningful involvement as a partner in program development activities and program initiatives. EPA will keep LDEQ informed of development of NPDES, pretreatment, storm water and sewage sludge program policy statements, strategies, and related guidance, and provide for input by the LDEQ when appropriate.

**II.B.5** As outlined in Section VII of this Agreement, EPA will oversee the administration of the LPDES program on a continuous basis for consistency with the CWA, this agreement, the annual State program grant, and all applicable federal regulations (including EPA guidances and policies). EPA will, as a part of its assessment, consider among other things, review of permit packages (including permits and fact sheets), reports, and enforcement actions submitted by the LDEQ and may also consider comments from permittees, the public, and federal and local agencies concerning the LDEQ's administration of the LPDES program. Any such comments considered by EPA will be brought to the attention of the LDEQ by written correspondence if the commenting party has not previously communicated this comment to the LDEQ. Any information obtained or used by the LDEQ under the LPDES program shall be available to EPA. If the information has been submitted to the LDEQ under a claim of confidentiality, the LDEQ shall inform EPA of that claim. Claims of confidentiality shall be treated by EPA in accordance with applicable federal and state statutes and regulations in accordance with 40 CFR Part 2, Subpart B, and 40 CFR 122.7.

**II.B.6** EPA will review and comment on draft permits, proposed permits, variance requests, pretreatment program actions and any future LPDES program modification in a timely manner in accordance with this MOA.

## II.C Jurisdiction Over Permits

**II.C.1** The LDEQ has primary responsibility for enforcement of LPDES permits and general permits for those defined facilities within the scope of its jurisdiction, along with the conduct of state inspections and receipt of self-monitoring reports for all facilities not

under the enforcement lead of EPA.

**II.C.1.a** Upon the Regional Administrator's approval of the LDEQ's LPDES program, EPA will retain jurisdiction over permittees as stated below.

**II.C.1.b** Enforcement lead over permittees that have been retained by EPA until final resolution has been achieved. This resolution can be accomplished either by the permittee complying with the requirements of the enforcement action or by LDEQ replacing EPA's Administrative Order with an equivalent or an updated State enforcement action. The issuance of an LDEQ enforcement action shall only occur after both EPA and LDEQ agree that such an action is appropriate. Within 45 days of permittee compliance with or resolution of the EPA action or LDEQ has finalized an enforcement action, the EPA action that constrained the transfer of enforcement responsibilities shall be closed and the file, and primary enforcement lead, shall be transferred to LDEQ.

**II.C.2** The State of Louisiana does not seek (as defined in 18 U.S.C. §1151) primacy over Indian Country in Louisiana. Therefore, the U.S. EPA will retain authority to administer the NPDES program in Indian Country in Louisiana. LDEQ also does not seek the CWA 503 sludge program.

## Section III. Permit Review and Issuance

### III.A LDEQ Responsibilities

The LDEQ is responsible for expeditiously drafting, providing public notice for, issuing or denying, modifying, reissuing, and terminating permits in accordance with Section VI below,

applicable provisions of 40 CFR Parts 122-125, 129, and 133, and any other applicable state or federal regulations.

**III.B. Transfer of Permit Responsibility and Files**

**III.B.1** Upon assumption of the NPDES program by LDEQ:

**III.B.1.a** For facilities with valid NPDES permits only, the existing NPDES permit shall become LPDES permits with an expiration date consistent with that originally designated;

**III.B.1.b** For facilities with valid NPDES and Louisiana Water Discharge Permit System (LWDPS) permits, the NPDES permit shall become the LPDES permit and both the LPDES and LWDPS permits will remain in effect and be enforceable until such time as the LWDPS permit is modified and reissued as an LPDES permit or the LWDPS permit expires or is reissued as an LPDES permit;

**III.B.1.c** For facilities with valid LWDPS permits only, the LWDPS permit shall remain in effect and be enforceable until such time as it is modified and reissued as an LPDES permit or the LWDPS permit expires or is reissued as an LPDES permit; and

**III.B.1.d** For facilities for which an extension has been authorized by EPA under the NPDES program, such extension shall become enforceable under the LPDES program, and any valid NPDES permit applications for such facilities which have been submitted in a timely manner in accordance with 40 CFR §122.6 (a)

and (b) and §122.41 (b) shall become LPDES permit applications upon the effective date of LPDES program assumption.

## III.C Application Review and Permit Development

### III.C.1 Receipt of New Permit Applications by the LDEQ

The LDEQ shall be responsible for the administrative review of all LPDES permit applications. Within thirty (30) working days of a complete permit application determination, the LDEQ will enter all mutually agreed upon Water Enforcement National Data Base (WENDB) information into EPA's National Permit Compliance System (PCS). LDEQ will enter WENDB data elements identified in Enforcement division's Permit Compliance Unit (PCU) Standard Operating Procedure (SOP).

### III.C.2 Permit Development

A draft permit will be prepared in accordance with applicable federal and state laws and regulations and this MOA. The effluent limitations will be developed in accordance with state and federal standards and limitations including effluent guidelines, water quality standards, standards of performance, toxic effluent standards or prohibitions, best management practices, pretreatment standards, and Louisiana's Water Quality Management Plan under sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 of the CWA.

## III.D Permit Reissuance

All expiring permits shall be reissued as close as possible to their expiration dates. In no event will permits which have been administratively continued beyond an expiration date, be modified. The LDEQ may use the flexibility allowed in EPA's Permitting for

Environmental Results Initiative (August 15, 2003) to account for and to prioritize those facilities that remain in the backlog. DEQ plans to utilize the approved Permit Issuance Strategy as its guide for permit issuance, and will update/revise the strategy yearly to reflect ongoing permit issuance goals.

## III.E EPA Review of Preliminary Draft Permits and Major Permit Modifications

(See Page 19, Figure 1, EPA/LDEQ Permit Review Process Flow Chart). The preliminary draft permit is a copy of the draft permit before it is sent to the applicant or public noticed.

### III.E.1 Consultation with Federal and State Agencies

#### III.E.1.a Consultation with EPA

Except as provided in III.K, LDEQ shall consult with the EPA Regional Administrator before issuing public notice of a draft permit to ensure the permit will comply with federal guidelines and requirements. The LDEQ shall transmit to the EPA Regional Administrator appropriate portions of working documents in connection with the consultation.

#### III.E.1.b Coordination with other Federal and State Agencies

LDEQ intends to provide appropriate protection for endangered species and historic sites. LDEQ understands that this coordination may not be required as a condition of NPDES authorization. To this end, LDEQ will provide the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the State Historic Preservation Officer with the opportunity to comment on state-drafted LPDES permits and/or applications in accordance with any

agreements with these agencies, as previously referenced. LDEQ will address and attempt to resolve any issues raised by these agencies. In the event that agreement is not reached on any issue raised by these agencies, LDEQ shall notify EPA in writing prior to permit issuance. Upon receiving such notification, EPA will have 30 days to provide an objection to the permit in question in accordance with 40 CFR § 123.44. EPA will object only on the basis of grounds set forth at 40 CFR § 123. 44 ( c ).

III.E.1.c **Coordination with Agencies with Fish, Shellfish, and Wildlife Jurisdiction**

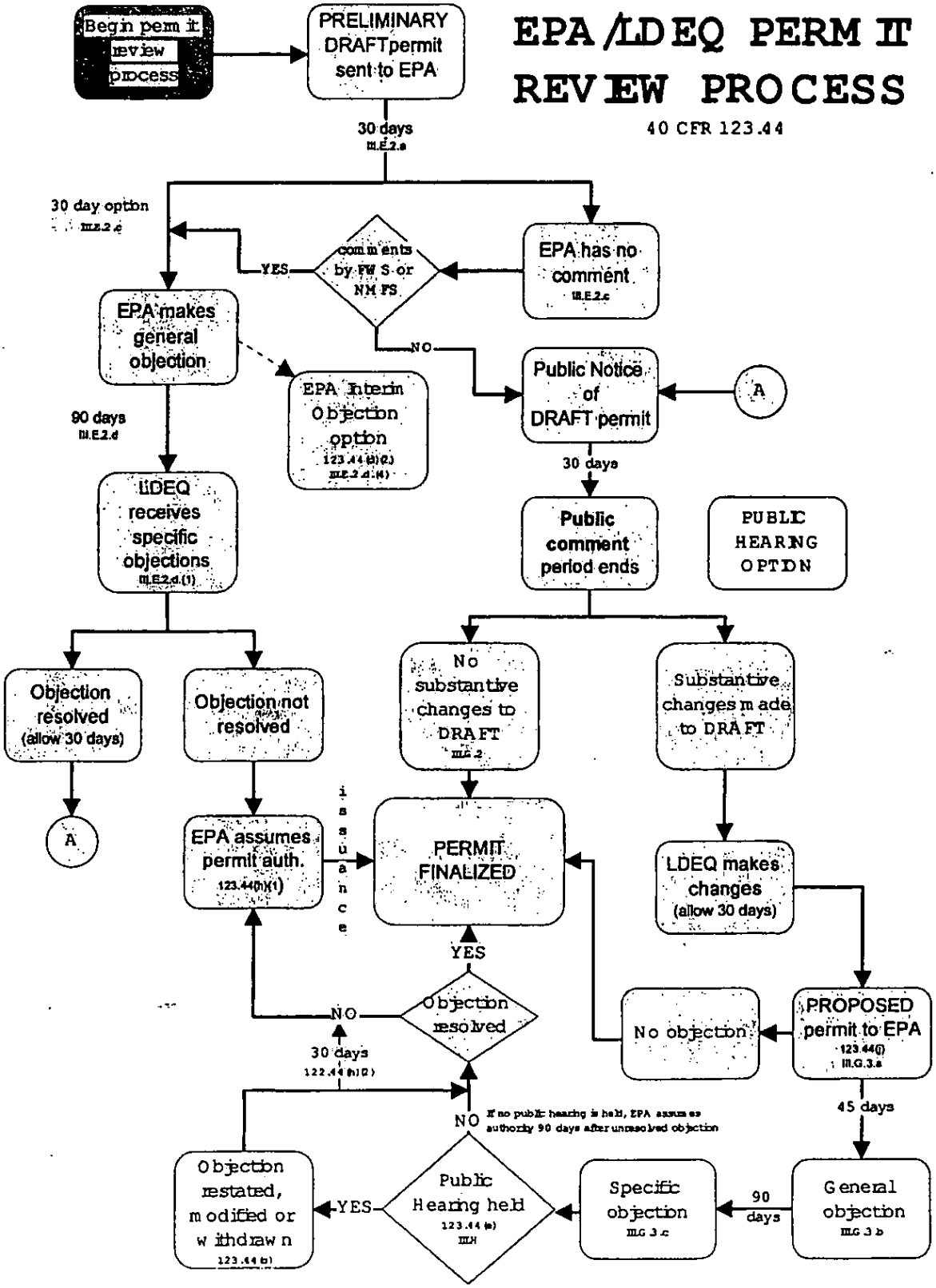
LDEQ intends to coordinate with the appropriate agency having jurisdiction over fish, shellfish, and wildlife, either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service in accordance with any Memorandum of Understanding or other agreement between the LDEQ and these agencies.

LDEQ must fulfill its obligations under 40 CFR § 124.59 regarding comments provided in writing from the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other state and federal agency with jurisdiction over fish, wildlife, or public health.

III.E.1.d **Coordination with Agency with Historic Preservation Jurisdiction**

LDEQ intends to coordinate with the State Historic Preservation Officer in accordance with any Memorandum of Understanding or other agreement between the LDEQ and the State Historic Preservation Officer.

**Figure 1**


EPA/LDEQ PERMIT REVIEW PROCESS
40 CFR 123.44
Begin permit review process
PRELIMINARY DRAFT permit sent to EPA
30 days
III.E.2.a
30 day option
III.E.2.e
comments by FWS or NMFS
YES
EPA has no comment
III.E.2.c
EPA makes general objection
NO
Public Notice of DRAFT permit
A
EPA Interim Objection option
123.44(d)(2)
III.E.2.d.(4)
90 days
III.E.2.d
LDEQ receives specific objections
III.E.2.d.(1)
30 days
Public comment period ends
PUBLIC HEARING OPTION
Objection resolved
(allow 30 days)
Objection not resolved
No substantive changes to DRAFT
III.E.2
Substantive changes made to DRAFT
A
EPA assumes permit auth.
123.44(h)(1)
issuance
PERMIT FINALIZED
LDEQ makes changes
(allow 30 days)
YES
Objection resolved
NO
30 days
122.44(h)(2)
No objection
PROPOSED permit to EPA
123.44(j)
III.G.3.a
45 days
If no public hearing is held, EPA assumes authority 90 days after unresolved objection
NO
Objection restated, modified or withdrawn
123.44(h)
YES
Public Hearing held
123.44(e)
III.H
Specific objection
III.G.3.c
90 days
General objection
III.G.3.b

## III.E.2 Individual Permits

### III.E.2.a Transmittal of Preliminary Draft

EPA will review in a timely manner all preliminary draft permits in the categories listed in this paragraph rather than draft permits as provided for in 40 CFR §123.44(j). Thirty days prior to issuance of a public notice of a permit action, the LDEQ shall send the EPA one copy of the public notice, the application, the preliminary draft permit, and the fact sheet (if applicable) for each facility. If the permit is for a new source under CWA section 306, the facility will be so identified.

(i) Discharges into the territorial sea or contiguous zone except for Oil and Gas permits that are consistent with EPA guidelines or general permits;

(ii) Discharges which may affect the waters of another state or have known interstate concerns;

(iii) Discharges proposed to be regulated by (master) general permits ("Master" general permit is the general permit under which coverage is extended to qualifying facilities. The facilities provide documentation via a notice of intent (NOI) that their activities meet qualifications established for coverage under the general permit);

(iv) Discharges from any discharger classified as a major source;

(v) Discharges from municipal separate storm sewer systems;

(vi) Permits authorizing sanitary sewer overflows; and

(vii) Any permits with known Endangered Species Act or National Historic Preservation Act concerns.

**III.E.2.b** **EPA Review**

Upon receipt of the preliminary draft permit and the other information specified above, EPA shall have 30 days to review, comment upon, object to, submit its approval, or make recommendations with respect to the preliminary draft permit in accordance with 40 CFR §123.44.

**III.E.2.c** **EPA Review Without Objection**

If no comments are made to the LDEQ within 30 days of receipt, and EPA has not requested an additional 30 days to review the preliminary draft permit, the LDEQ may proceed with the issuance of the public notice. If no comments have been received by the close of the public comment period regarding any draft permit, the LDEQ may assume EPA declines further review of the issuance of the LPDES permit.

**III.E.2.d** **EPA Review With Objections**

Within 30 days after receipt of a preliminary draft permit, if EPA objects to the preliminary draft permit, EPA shall notify the LDEQ of its objection. This notice shall set forth in writing the general nature of the objection.

**III.E.2.d (1)** The EPA shall send a copy of any comment, objection or recommendation to the permit applicant.

**III.E.2.d (2)** Within 90 days following receipt of a preliminary draft permit to which EPA has objected and has filed a general objection, the EPA shall set forth in writing and transmit to the LDEQ:

(i) A statement of the reasons for the objections including the section of the CWA or regulations that support the objection, and

(ii) The actions that must be taken by the LDEQ to eliminate the objection.

**III.E.2.d (3)** If the initial permit information supplied by the LDEQ is inadequate to determine whether the preliminary draft permit meets the guidelines and requirements of the CWA, EPA may file an "interim objection" under 40 CFR §123.44(d) and request the LDEQ transmit the complete record (or portion thereof) of the LDEQ permit proceedings. The full period for EPA review shall commence upon receipt of the requested information.

## III.F General Permits

EPA shall have 90 days from the date of receipt of a preliminary draft (master) general permit to comment upon, object to, or make recommendations with respect to the preliminary draft general permit in accordance with 40 CFR §123.43 and §123.44. If EPA

fails to provide an objection to a preliminary draft general permit within 90 days from the receipt of the preliminary draft general permit, EPA shall be deemed to have waived its right to object to the permit terms and conditions. The Directors of the Water Quality Protection Division and the Compliance Assurance and Enforcement Division may comment, object to, or make recommendations with respect to any preliminary draft general permit on EPA's behalf.

**III.G Comments in Response to Public Notices**

**III.G.1** LDEQ shall provide EPA copies of any and all significant comments presented in writing pursuant to the public notice of a draft permit and a summary of any significant comments presented at any hearing on any draft permits previously submitted to EPA for review or requested by EPA.

**III.G.2** The LDEQ may issue the permit without further review by EPA if (a) the permit to be finalized does not differ substantially from the draft permit defined in the public notice or is more stringent than the preliminary draft permit submitted to EPA in accordance with Section III.E.2.a of this MOA; (b) EPA has not objected to the draft permit; and (c) significant public comments have not been made.

**III.G.3 Proposed Permit**

**III.G.3.a** In all cases other than those specified in III.G.2, the LDEQ will send one copy of the proposed permit (a substantially modified draft permit) and the information used in developing it to EPA along with recommendations from any other affected state and any federal or state agencies, and copies of written comments and hearing records, including the response to comments prepared under 40 CFR §124.17 to EPA for review. Whenever the LDEQ prepares a

written explanation to an affected state explaining the reasons for rejecting any of its written recommendations, the LDEQ shall transmit a copy to the EPA Regional Administrator.

**III.G.3.b** EPA will, within 45 days after receipt of the proposed permit, notify the LDEQ and the permit applicant of any formal objections authorized under 402(d) of the CWA. This notification shall set forth in writing the general nature of the objection.

**III.G.3.c** Within ninety (90) days following receipt of the proposed permit to which EPA has objected, the EPA shall notify the LDEQ in writing with a detailed statement of the reasons for the objections and the actions that must be taken to eliminate the objections.

## III.H EPA Public Hearings

Within 90 days of receipt by LDEQ of an objection by EPA, the LDEQ may request that a public hearing be held by the EPA on the EPA objections to the draft or proposed permit. A public hearing shall be held in accordance with the procedures identified in 40 CFR §124.12(c) and (d) and public notice provided in accordance with 40 CFR §124.10 whenever requested by the LDEQ. A public hearing held by the EPA shall follow procedures outlined in 40 CFR §123 and §124.

## III.I EPA Assumes Permit Authority

If EPA's concerns are not satisfied within the time limits set forth in 40 CFR §123.44, LDEQ may not issue the permit and exclusive authority to issue the permit vests in EPA.

## III.J New Source Permits

In the case of development of draft permits for new sources, there shall be continuing coordination between the LDEQ and EPA throughout the permitting process. The coordination will include the LDEQ keeping EPA informed of important issues relating to the development of the permit and EPA assisting the LDEQ, when requested, in assessing the impact of the new sources on the environment.

## III.K Waiver of Permit Review by EPA

**III.K.1** At this time, EPA waives the right to comment on, or object to, the sufficiency of permit applications, draft permits, proposed permits, and final (issued) permits for all discharges or proposed discharges with the exception of the categories described below:

**III.K.1.a** Discharges into the territorial sea or contiguous zone;

**III.K.1.b** Discharges which may affect the waters of a state other than the one in which the discharge originates;

**III.K.1.c** Discharges proposed to be regulated by general permits;

**III.K.1.d** Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

**III.K.1.e** Discharges from municipal separate storm sewer systems;

**III.K.1.f** Discharges of uncontaminated cooling water with a daily average discharge

exceeding 500 million gallons per day;

**III.K.1.g** Discharges from any discharger classified as a major source or from any discharger within any of the 21 industrial categories listed in appendix A to 40 CFR part 122;

**III.K.1.h** Discharges from other sources with a daily average discharge exceeding 0.5 (one-half ) million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow;

**III.K.1.i** Any permits with known Endangered Species Act or National Historic Preservation Act concerns; and

**III.K.1.j** Permits authorizing sanitary sewer overflows.

**III.K.2** The foregoing does not include waiver of receipt of copies of all final permits issued, or any notices required under this Agreement.

**III.K.3** With respect to modifications or revocations and reissuances of permits, EPA waives the right to review any permit for which the right to review the original permit was waived (unless the modification would put the permit into one of the categories in paragraph III.K.1) or qualifies as a minor modification as defined in 40 CFR §122.63.

**III.K.4** EPA reserves the right to terminate the waivers in paragraphs III.K.1 and III.K.3 (in whole or in part) at any time. Any such termination shall be made in writing to the

LDEQ.

**III.K.5** The foregoing waiver shall not be construed to authorize the issuance of permits which do not comply with applicable provisions of federal or state laws, rules, regulations, or effluent guidelines, nor to relinquish the right of EPA to petition the LDEQ for review of any action or inaction because of violation of federal or state rules, regulations, or effluent guidelines.

**III.K.6** EPA may request in writing that the LDEQ issue, reissue or modify a permit. EPA will provide to the LDEQ specific reasons why EPA is requesting permitting action. If within six months after the initial request the State has been unable to issue said permit, EPA, at its discretion, will conduct a public hearing to review the facts surrounding the non-issuance of the subject permit.

**III.L Public Participation**

**III.L.1** Permit applications, draft permits, public notices, and fact sheets or statements of basis (when prepared) will be made available to any party upon request in accordance with LDEQ Policy 005-90, La. R.S. 30:2030 and 30:2074 (D), and the Louisiana Public Records Law (La. R.S. 44:1-41).

**III.L.2** LDEQ will prepare and distribute copies of all public notices and fact sheets in accordance with 40 CFR parts 124.8 and 124.10 unless otherwise waived by the specific organization.

**III.L.3** All draft LPDES permits, major permit modifications, and pretreatment program approvals and modifications shall be public noticed in a daily or weekly newspaper

within the area affected by the activity in accordance with 40 CFR §124.10(c)(2)(i).

## III.M Issuance of Permit or Notice of Intent to Deny

III.M.1 For final determinations, whether to issue or deny the permit, the LDEQ shall issue a response to comments in accordance with 40 CFR §124.17. The final permit or intent to deny will be forwarded to the permit applicant and, at agency discretion, may be forwarded to anyone who commented during the public notice comment period, along with a response specifying which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the changes. A response to all significant comments on the draft permit raised during the public comment period or during a hearing will also be forwarded if the action is to issue a final permit. Copies of issued permits and intents to deny will be forwarded to EPA in accordance with the schedule contained in Section VI of this Agreement.

## III.N Termination, Modification, or Revocation and Reissuance of Permits

For those permits identified in III.E.2.a, the LDEQ shall notify EPA whenever it intends to terminate an issued LPDES permit and shall transmit to EPA a copy of any permit which it proposes to modify or revoke and reissue with the proposed changes clearly identified. The procedure set forth in III.E shall be followed with respect to modifications by the LDEQ of any issued permit and, for purposes of this agreement, each permit proposed to be modified or revoked and reissued shall be deemed to be a new preliminary draft permit, except for minor modifications as described in 40 CFR §122.63.

## III.O Administrative or Court Action

If the terms of any permit, including any permit for which review has been waived pursuant

to paragraph III.K, are affected in any manner by administrative or court action, the EPA may object to said terms pursuant to §402(d)(2) of the CWA. The LDEQ shall transmit to EPA a copy of the judicial or administrative decision and a copy of the permit which has been effected by the court action or the final disposition or any administrative appeal with changes identified. The procedures set forth for general and specific objections as found in 40 CFR §123.44 shall be followed with respect to permit issuance, modification, revocation and reissuance or termination as required by a judicial or administrative decision.

**III.P Major Discharger List**

**III.P.1** EPA is responsible for classifying those facilities which are identified as NPDES "major" dischargers. Other dischargers shall be classified as NPDES "minor" dischargers. In this endeavor, EPA will work with the LDEQ and will reflect the LDEQ's preference for major/minor classifications to the maximum extent feasible.

**III.P.2** **Updates**

To facilitate maintenance of this classification system, the LDEQ will, upon permit issuance, reissuance, and modification, where appropriate, evaluate facilities for major/minor classification utilizing the latest EPA guidance. The LDEQ will forward any evaluations that recommend changes in said major/minor classifications to EPA for use in updating such classification list. The LDEQ will also provide EPA with any additional recommendations for facilities to be classified as majors along with the basis for such classification. EPA will classify such facilities as discretionary majors whenever possible.

**III.Q Variances**

The LDEQ shall conduct an initial review of all requests for fundamentally different factors

(FDFs) variances, for variances under §§301(c), (g), (i), (k), and 316(a) of the CWA, and for modifications to federal effluent limitations established under section 302 of the CWA.

**III.Q.1** With regard to CWA §§301(i) and (k) and 316(a) variances, the LDEQ may deny or approve the request (subject to EPA objection under 123.44). In regard to CWA Section 301(k) variance, LDEQ's decision to grant or deny the request will be made following consultation with EPA. A copy of LDEQ determination shall be sent to the requester, EPA and all other interested parties.

**III.Q.2** With regard to FDFs, CWA §301(c) and (g) variances, and CWA §302 modifications, the LDEQ may determine to deny the request, and such determination shall be forwarded to the requester and EPA. If the LDEQ determines that factors do exist that may warrant such a variance, the request and recommendation for approval shall be sent to EPA. If EPA denies a variance request, the LDEQ shall so notify the requestor. If EPA approves a variance request, the LDEQ will prepare a draft permit factoring in the variance.

**III.Q.3** The LDEQ shall conduct a review of all requests for removal credits as specified in 40 CFR §403.7. EPA will retain the right of review of the tentative determination done by the LDEQ before a final decision is made.

## III.R Evidentiary Hearings

**III.R.1** The LDEQ will provide EPA with a copy of all precedent setting settlements and administrative decisions which impact the LDEQ's ability to implement the LPDES program in accordance with the federal requirements. The LDEQ will provide copies

of evidentiary hearing requests to EPA on facilities where EPA has retained enforcement authority.

**III.S Public Hearings**

The LDEQ shall hold public hearings in accordance with 40 CFR §124.12 and La. R.S. 30:2011 (D) (5) and LAC 33:IX.2419 whenever it is determined a degree of significant public interest in a draft permit and/or a hearing might clarify one or more issues involved in the permit decision.

## Section IV. Enforcement

**IV.A General**

The 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.

**IV.B Compliance Monitoring**

The LDEQ shall operate a timely and effective compliance monitoring program including the input of agreed upon data into the Permit Compliance System (PCS) for the purpose of determining compliance with permit conditions and pretreatment requirements. LDEQ will enter WENDB data elements identified in Enforcement Division's Permit Compliance Unit (PCU) Standard Operating Procedure (SOP), and in accordance with EPA's letter of September 4, 2003. For purposes of this MOA, the term "compliance monitoring" includes all activities taken by the LDEQ to assure full compliance with LPDES program requirements. The LDEQ's monitoring program shall consist of two main activities:

**IV.B.1** **Compliance Review**

The LDEQ shall conduct timely and substantive reviews and keep complete records of all written material relating to the compliance status of LPDES permittees, including Compliance Schedule Reports, Discharge Monitoring Reports, Compliance Inspection Reports, and any other reports that permittees may be required to submit under the terms and conditions of an LPDES permit or court order.

**IV.B.1.a** The LDEQ shall operate a system to determine if:

- The self-monitoring reports required by permit or pretreatment regulations are submitted;
- The submitted reports are timely, complete and accurate; and
- The permit conditions and pretreatment requirements are met.

**IV.B.1.b** The LDEQ shall initiate appropriate enforcement actions whenever required performance is not achieved or when reports are not received. Priorities for reviewing these reports and for initiating enforcement actions are specified in the LDEQ Standard Operating Procedures for Enforcement Actions.

**IV.B.1.c** LDEQ and EPA shall have semi-annual record and program audits and on an ad hoc basis as needed either in person or by telephone, to decide priorities for initiating enforcement actions.

**IV.B.2** **Compliance Inspection**

The LDEQ shall conduct field activities to determine the status of compliance with permit requirements, including sampling and nonsampling inspections and EPA's

NPDES Compliance Evaluation Inspection Manual. Inspection procedures will be in accordance with the LDEQ Standard Operating Procedures for Compliance Inspections Conducted by OEC/Surveillance Personnel. For purposes of this MOA, the term "compliance inspection" includes, but is not limited to, compliance evaluation inspections, performance audits, compliance sampling inspections, and biomonitoring inspections.

**IV.B.2.a** Annually, the LDEQ will submit the Louisiana Compliance Monitoring Strategy which will be used to list major and minor permittees to be the subject of state compliance inspections. This strategy shall include municipal and industrial majors and minors. The strategy may be modified with the concurrence of both parties. The LDEQ shall also furnish an estimate of the number of other compliance inspections to be performed during the year.

**IV.B.2.b** EPA or the LDEQ may determine that additional compliance inspections are necessary to assess permit compliance. If EPA makes a determination that additional compliance inspections are necessary, it shall notify the LDEQ and may request the LDEQ conduct these inspections. EPA retains the right to perform compliance inspections of any permittee, but will notify the LDEQ at least two weeks in advance of the inspection to give it an opportunity to participate and will otherwise keep the LDEQ informed of its plans and results.

**IV.B.2.c** Reports on compliance inspections for major permittees shall be available for review by the LDEQ or the EPA Regional Administrator, as appropriate, and submitted to EPA in accordance with Section VI of this MOA within 30 days

of the completion of the inspection report including receipt of laboratory results. The LDEQ shall thoroughly review each report to determine what, if any, enforcement action should be initiated.

**IV.B.3 Information Requests**

Whenever either party requests additional information not listed under Section VI of this MOA concerning a specific discharger and the requested information is available from the files, that information will be requested and provided in as timely a manner as possible.

**IV.C Action Against Violators**

The LDEQ is responsible for taking timely and appropriate enforcement action against persons in violation of the Louisiana Environmental Quality Act and supporting regulations, pretreatment requirements, compliance schedules, effluent limitations, reporting requirements, any other permit conditions, and any other LPDES program requirements. This includes violations detected during state or federal inspections.

**IV.C.1 Public Information and Action by EPA**

The LDEQ shall maintain procedures for receiving and ensuring proper consideration of information submitted by the public about violations. If EPA determines that the LDEQ has not initiated timely and appropriate enforcement action against a violator, EPA may proceed with any or all of the enforcement options available under section 309 of the CWA after notice to and consultation with the LDEQ. Prior to proceeding with an enforcement action, EPA will adhere to the following procedures:

**IV.C.1.a EPA Enforcement Actions**

**IV.C.1.a(1)** Within two (2) weeks of the submittal of the state QNCR to EPA

Region 6, the EPA shall notify LDEQ in writing of each violation against which the EPA intends to pursue formal enforcement action. This notice shall include at a minimum:

- the name and LPDES permit number of the facility;
- an identification of the violation(s) which EPA believes warrants formal enforcement action;
- the reasons why EPA believes formal enforcement action is necessary;
- the reasons why EPA believes past or pending LDEQ responses are insufficient.

**IV.C.1.a(2)** Within thirty (30) days of the aforementioned notification by the EPA, after meeting and/or consultation with the EPA, LDEQ will respond to the EPA notice. The LDEQ response will include:

- a discussion of the circumstances of the identified violation(s);
- a description of the substance and timing of any past, pending, or planned responses to the violation(s) by the LDEQ, including identification of the staff responsible for the action;
- the amounts of any penalties, settlement agreement payments or beneficial environmental projects sought or collected; and,
- whether or not the LDEQ believes the responses are appropriate and why.

**IV.C.1.a(3)** The EPA shall notify the LDEQ in writing, within ten (10) days, either that the LDEQ response to the violation(s) is sufficient to deter a formal action by the EPA, or that EPA will proceed with a formal enforcement action pursuant

to Section 309 of the CWA.

**IV.C.1.a(4)** The EPA will not proceed with a Section 309 NOV letter until at least ninety (90) days have elapsed from the date of violation(s) detection by LDEQ or EPA.

**IV.C.1.b** The aforementioned proceedings shall not be required when EPA is exercising its emergency power under section 504 of the CWA, or when LDEQ and EPA agree that EPA should have the lead in enforcement.

**IV.C.2** **EPA Penalty Policy**

The LDEQ supports the EPA Penalty Policy as established in the Memoranda of the Assistant Administrator for Enforcement dated February 11, 1986, by applying LDEQ's penalty regulations as set forth in LAC 33:I.Chapter 7 for penalty assessment calculations. EPA will supply the LDEQ a copy of these memoranda and any subsequent additions or revisions thereto.

**IV.C.3** **Notice of Substantial Endangerment**

The LDEQ shall immediately notify the EPA Regional Administrator by telephone, or otherwise, of any situation posing a substantial endangerment to health, welfare, or the environment resulting from the actual or threatened direct or indirect discharge of pollutants into waters of the state and the proposed response to the violation(s).

**IV.C.4** **Penalties Against State Agencies and Political Subdivisions**

In the event a state agency or political subdivision against whom a penalty has been assessed by LDEQ fails to pay the full amount of the penalty within 180 days of the date it becomes final and enforceable, and the LDEQ has not agreed to

installment payments as part of a settlement, LDEQ will notify EPA within 30 days of the failure to pay. When LDEQ has agreed to installment payments as part of a settlement, and a state agency or political subdivision has failed to pay the full amount of the cash component of the settlement within 180 days of the due date of the final installment, LDEQ will, within 30 days of the failure to pay, notify EPA of such failure.

## Section V. Pretreatment

### V.A General

This section is intended to define LDEQ and EPA responsibilities for the establishment, implementation, and enforcement of the National Pretreatment Program pursuant to sections 307 and 402(b) of the CWA as follows.

**V.A.1** The LDEQ has primary responsibility for:

**V.A.1.a** Ensuring compliance with the discharge prohibitions contained in LAC 33:IX.2709. By authorizing POTWs to operate approved pretreatment programs, EPA and LDEQ place primary responsibility for enforcement of pretreatment standards on the POTW. Only when the POTW has failed to take appropriate action to ensure compliance by industrial users should LDEQ, as the approval authority, intervene, and then only as prescribed in §309(f) of the CWA. Where LDEQ is the control authority over Significant Industrial Users (SIUs) discharging to POTWs, LDEQ is responsible for implementing and enforcing the LAC 33:IX.2709 prohibitions;

**V.A.1.b** Meeting all requirements under LAC 33:IX.2719;

**V.A.1.c** Directly enforcing categorical standards developed by EPA and codified at 40 CFR Subchapter N - Effluent Guidelines and Standards;

**V.A.1.d** Applying and enforcing the National Categorical Pretreatment Standards established by the EPA in accordance with §307(b) and (c) of the CWA, local POTW limitations, and state standards;

**V.A.1.e** Reviewing, approving, or denying POTW Pretreatment Programs in accordance with the procedures discussed in LAC 33:IX.2715, 2717, and 2721;

**V.A.1.f** Requiring a Pretreatment Program in LPDES permits issued to POTWs as required in LAC 33:IX.2715, and as provided in §402(b)(8) of the CWA;

**V.A.1.g** Requiring POTWs to develop and enforce local limits as set forth in LAC 33:IX.2709;

**V.A.1.h** Reviewing and, as appropriate, approving POTW requests for authority to modify categorical Pretreatment Standards to reflect removal of pollutants by a POTW in accordance with LAC 33:IX.2713, 2717, and 2721, and enforcing related conditions in the POTW's LPDES permit;

**V.A.1.i** Overseeing POTW Pretreatment Programs to ensure compliance with requirements specified in LAC 33:IX.2715, the approved POTW Pretreatment

Program, and the POTW's LPDES permit;

**V.A.1.j** Ensuring POTW's compliance with the pretreatment reporting requirements of LPDES permit conditions and of LAC 33:IX.2723; and

**V.A.1.k** Reviewing requests from POTWs or Industrial Users (IUs) for subcategory determinations under LAC 33:IX.2711.

**V.A.2** The LDEQ will apply and enforce all other pretreatment regulations as required by LAC 33:IX.Chapter 23, Subchapter T. EPA will oversee LDEQ pretreatment program operations consistent with LAC 33:IX.Chapter 23, Subchapter T regulations and this MOA.

**V.A.3** The LDEQ shall perform inspection, surveillance, and monitoring activities which will determine, independent of information supplied by the POTW, compliance or noncompliance by the POTW with pretreatment requirements incorporated into the POTW permit. The LDEQ shall carry out inspection, surveillance, and monitoring activities which will determine, independent of information supplied by the Industrial User, whether the Industrial User is in compliance with Pretreatment Standards. Upon request, the LDEQ will provide to EPA copies of all notices received from POTWs that relate to a new or changed introduction of pollutants into the POTW. EPA will conduct independent pretreatment inspections and/or audits in accordance with National and Regulatory Policy and Guidance. The LDEQ will be informed at least two weeks in advance of these inspections and may accompany EPA at the LDEQ's discretion.

**V.A.4** The LDEQ will issue, reissue, or modify permits to incorporate pretreatment program requirements in accordance with the procedures described in this MOA. Upon request, copies of notices received by LDEQ from POTWs that relate to the new introduction of pollutants, or substantial changes in the volume or character of pollutants will be provided to EPA.

**V.A.5** LDEQ will propose a plan for establishing and evaluating the universe of SIUs, outside of approved pretreatment programs, for which LDEQ is the Control Authority. As part of its plan, LDEQ will develop and implement a strategy for updating the list of CIUs for which it is the Control Authority. LDEQ will pursue compliance through the appropriate control mechanisms in a timely and efficient manner.. Details on implementation of this plan and strategy will be included in the PPG and/or SOPs.

## V.B Requests for Categorical Determination

The LDEQ shall review requests from POTWs and/or Industrial Users (IU) for industrial subcategory determinations to ascertain whether the Industrial User does or does not fall within a particular industrial category or subcategory in accordance with the provisions in LAC 33:IX.2711 and prepare a written determination of the applicable subcategory. The LDEQ will make a written determination and justification for the determination for each request, stating the reasons for the determination. The LDEQ shall then forward its findings, together with a copy of the request and any necessary supporting information, to the EPA Regional Water Quality Protection Division Director for concurrence. If the Water Quality Protection Division Director does not modify the LDEQ decision within 60 days after receipt thereof, the LDEQ determination is final. If EPA modifies the State's decision, then EPA's decision will be final. A copy of the final determination shall be sent to the requestor and to the LDEQ.

## V.C Removal Credits and POTW Pretreatment Program Approvals

The LDEQ shall review and approve POTW applications for POTW pretreatment program authority and POTW applications to revise discharge limits for users who are, or may in the future be, subject to categorical pretreatment standards in accordance with LAC 33:IX.2713. It shall submit its findings together with the application and supporting information to the EPA Regional Water Quality Protection Division Director for review. No POTW Pretreatment Program or request for revised discharge limits shall be approved by the LDEQ if EPA objects in writing to the approval of such submission in accordance with LAC 33:IX.2721.D.

## V.D Variances from Categorical Standards for Fundamentally Different Factors

**V.D.1** The LDEQ shall make an initial finding on all requests from Industrial Users for fundamentally different factors variances from the applicable categorical Pretreatment Standard in accordance with LAC 33:IX.2725. If the LDEQ determines that the variance request should be denied, the LDEQ will so notify the applicant and provide reasons for its determination in writing. Where the LDEQ's initial finding is to approve the request, the finding, together with the request and supporting information, shall be forwarded to the EPA Regional Water Quality Protection Division Director for a final determination. The LDEQ may deny, but not approve and implement, the fundamentally different factor(s) variance request until written approval has been received from the EPA Regional Water Quality Protection Division Director.

**V.D.2** If the EPA Regional Water Quality Protection Division Director finds that fundamentally different factors do exist, a variance reflecting that determination shall

be granted. If the EPA Regional Water Quality Protection Division Director determines that fundamentally different factors do not exist, the variance request shall be denied, and the reasons for the denial shall be provided in writing. The LDEQ shall so notify the applicant in writing.

## V.E Net/Gross Adjustments to Categorical Standards

If the LDEQ receives a request for a net/gross adjustment of applicable categorical standards in accordance with LAC 33:IX.2729, the LDEQ shall forward the application to the EPA Regional Water Quality Protection Division Director for a determination. Once this determination has been made, the EPA Regional Water Quality Protection Division Director shall notify the applicant and the applicant's POTW and provide reasons for the determination and any additional monitoring requirements the EPA Regional Water Quality Protection Division Director deems necessary, in writing. A copy of the determination and all accompanying documentation shall be provided by EPA to LDEQ.

## V.F Miscellaneous

**V.F.1** The LDEQ will submit to the EPA Regional Water Quality Protection Division Director a list of POTWs which are required to develop their own pretreatment program or are under investigation by the LDEQ for the possible need of a local pretreatment program. The LDEQ will document its reasons for all deletions from this list. Before deleting any POTW with a design flow greater than 5 million gallons per day (mgd), the LDEQ will obtain an industrial survey from the POTW and determine:

(a) that the POTW is not experiencing pass through or interference problems, and

(b) there are no industrial users of the POTW that are subject either to

categorical standards or specific limits developed pursuant to LAC 33:IX.2709.C.

The LDEQ will document all such determinations and provide copies to EPA. For deletions of POTWs with flows less than 5 mgd, the LDEQ will first determine (with appropriate documentation) that the POTW is not experiencing treatment process upsets, violations of POTW effluent limitations, or contamination of municipal sludge due to industrial users. The LDEQ will also maintain documentation on the total design flow and the nature and amount of industrial wastes received by the POTW.

**V.F.2** The LDEQ and EPA will communicate, through the annual State program grant, commitments and priorities for program implementation, including commitments for inspection of POTWs and industrial users. This document will contain, at a minimum, the following:

(1) a list of permits to be issued by the LDEQ to POTWs and indirect dischargers (categorical industrial dischargers to cities without an approved pretreatment program) subject to pretreatment requirements; and

(2) a list of POTWs and indirect dischargers (categorical industrial dischargers to cities without an approved pretreatment program) to be audited or inspected. Meetings will be scheduled to include appropriate discussion of audits conducted by LDEQ.

**V.G Other Provisions**

Nothing in this agreement is intended to affect any pretreatment requirement, including any standards or prohibitions established by state or local law, as long as the state or local

requirements are not less stringent than any set forth in the National Pretreatment Program, or other requirements or prohibitions established under the CWA or federal regulations.

## Section VI. Reporting and Transmittal of Information

### VI.A LDEQ Reporting and Transmittals

The LDEQ will submit the following to EPA:

| ITEM | DESCRIPTION | FREQUENCY |
|---|---|---|
| VI.A.1 | Copies of all preliminary draft LPDES permits, and permit modifications, including public notices, fact sheets and applications for those permits identified in III.E.2.a. | 30 days prior to public notice |
| VI.A.2 | Copies of all public notices for draft permits, except those for which EPA has waived review. | As issued |
| VI.A.3 | A copy of all individual LPDES permits and master general permits. | As issued |
| VI.A.4 | Copies of all LPDES permit applications and public notices for which EPA has waived review. | Upon request |
| VI.A.5 | A copy of the LPDES Monthly Permits Productivity Report | Monthly, by the 25th of each month |

| | | |
|---|---|---|
| **VI.A.6** | A copy of settlements and decisions in LPDES permit appeals. | As Issued |
| **VI.A.7** | A compliance monitoring strategy for selecting facilities subject to compliance inspections. The compliance monitoring strategy will include all major water facilities, all 92-500 water facilities and a count of the number of minor water facilities that are anticipated to be performed in the upcoming inspection year. | Yearly |
| **VI.A.8** | Proposed revisions to the compliance monitoring strategy. | As needed |
| **VI.A.9** | A list of compliance inspections performed during the previous quarter. | Quarterly |
| **VI.A.10** | For major dischargers, copies of all compliance inspections, report forms, data, and transmittal letters. | Within 30 days of inspection completion |
| **VI.A.11** | For 92-500 minor dischargers and significant minors to which EPA and LDEQ have mutually agreed prior to June 30 annually, copies of all compliance inspection reports and transmittal letters. | As requested |
| **VI.A.12** | For major dischargers, a quarterly narrative and noncompliance report as specified in 40 CFR §123.45 (a); the RECAP report. | Quarterly, as specified in 40 CFR §123.45(d) |
| **VI.A.13** | For minor dischargers, an annual noncompliance report as specified in 40 CFR §123.45(c). | Within 60 days of the end of the calendar year, as specified in |

| | | |
|---|---|---|
| | | 40 CFR §123.45(d) (2) |
| **VI.A.14** | Copies of all enforcement actions against major LPDES permitees (including letters, notices of violation, administrative orders, referrals to the Attorney General for judicial action, and petitions for civil judicial action). | As issued |
| **VI.A.15** | Copies of correspondence required to carry out the pretreatment program. | As issued or received |
| **VI.A.16** | For major dischargers, a semi-annual statistical summary report as required in 40 CFR §123.45 (b) | Semi-annually, as specified in 40 CFR §123.45 (b) |
| **VI.A.17** | LDEQ will provide draft comments on the consolidated EPA review of the state administration of the LPDES program. | Within 30 calendar days of receipt of the draft |
| **VI.A.18** | A list of all appealed LPDES enforcement actions, with status. | During the mid-year and end-of-year enforcement program review |

## VI.B EPA Reporting and Transmittals

EPA shall transmit the following information to the LDEQ:

| ITEM | DESCRIPTION | FREQUENCY |
|---|---|---|
| VI.B.1 | A list of compliance inspections EPA intends to conduct jointly with the state as part of its oversight activities. | Annually, by June 30 |
| VI.B.2 | Proposed revisions to the Louisiana Multi-media Compliance Monitoring Strategy. | As needed |
| VI.B.3 | Copies of all EPA compliance inspection reports and data. | Within 30 days of inspection |
| VI.B.4 | a) Copies of all EPA enforcement actions against all major permitted facilities and NPDES violators (including notice of violation, and administrative orders, Proposed and Final Consent Orders and settlements, court decisions and other administrative decisions).<br><br>b) EPA contractor reports; draft and final EPA development documents; and draft, proposed, and final ELG regulations for various industry categories.<br><br>c) Draft and final settlement agreements between EPA and litigants which concern the interpretation or modification of ELG regulations for various industry categories.<br><br>d) Draft, proposed, and final versions of EPA regulations, technical guidances, policy, and procedures which pertain to implementation of the NPDES program and water quality planning program.<br><br>e) Copies of administrative orders, settlement agreements and court decisions involving EPA's NPDES, pretreatment, storm water and sewage sludge programs, general permits and implementing regulations in Louisiana. | As performed or upon issuance |
| VI.B.5 | A review of the state administration of the LPDES Permit and Enforcement Programs, based on state reports, meetings with state program staff, and file audits. | Draft report due within 45 calendar days of |

| | | |
|---|---|---|
| | | audit |
| VI.B.6 | EPA will provide draft comments on their review of the state administration of the LPDES program to LDEQ. EPA will strive to provide these draft comments in a consolidated document when possible. | As described in VII.A.3 |

## Section VII. Program Review

**VII.A** To fulfill its responsibility for assuring the LPDES program is consistent with all federal statutes and regulations, EPA shall:

**VII.A.1** Review the information submitted by the LDEQ;

**VII.A.2** Meet with state program staff for:

(a) semi-annual enforcement program reviews (including file audits), and on an ad hoc basis as needed to discuss and/or evaluate the data handling, compliance monitoring, pretreatment processes, enforcement procedures, and PCS;

(b) periodic permitting program reviews (including file audits) in accordance with the requirements of the Region 6 NPDES Permits State Oversight Streamlining Procedure, and on an ad hoc basis as needed to discuss and/or evaluate the data handling, permit processing and development, pretreatment processes, and PCS.

**VII.A.3** Examine the files and documents at the LDEQ regarding selected facilities to

determine:

(a) whether permits are processed and issued consistent with federal requirements;

(b) whether a system is maintained to facilitate discovery of, and appropriate enforcement against, permit violations when they occur;

(c) whether the LDEQ reviews are timely and complete;

(d) whether the LDEQ selection of enforcement actions is appropriate, effective and timely;

(e) whether the LDEQ reviews all major rating sheets to ensure consistency with duly promulgated EPA regulations; and,

(f) whether the LDEQ issued appropriate penalties for violations and whether penalties are collected.

EPA shall notify the LDEQ in advance of any examination under this paragraph so that appropriate LDEQ program staff may be available to discuss individual circumstances and/or problems. A copy of the draft examination report shall be transmitted to the state within 45 days. LDEQ shall respond within 45 days, and EPA shall issue a final report on its review within 120 days of the audit.

**VII.A.4** Conduct detailed file review. The LDEQ shall be notified fifteen (15) working days

in advance of the audit so that appropriate LDEQ program staff may be available to discuss with EPA individual circumstances and/or problems. Any issues raised during the file review will be addressed in the draft report using the timeframe detailed in VII.A.3.

**VII.A.5** When appropriate, upon introduction of a new program or major modification of an existing program, hold public hearings on the LDEQ's LPDES program with respect to the adequacy of the program;

**VII.A.6** Review, as necessary, the LDEQ public participation, policies, practices and procedures; and

**VII.A.7** Conduct oversight compliance inspections.

**VII.B** Prior to taking any action to propose or effect any substantial amendment, rescission, or repeal of any statute, regulation, directive, or form which has been approved by EPA; and prior to the adoption of any new statute, regulation, directive, or form, the LDEQ shall notify the EPA Regional Administrator and shall transmit the text of any such change or new form to the EPA Regional Administrator (see 40 CFR §123.62 which provides that the change may trigger a program revision, which will not become effective until approved by EPA).

**VII.C** If an amendment, rescission, or repeal of any statute, regulation, directive, or form described in paragraph VII.B above shall occur for any reason, including action by the Louisiana legislature or a court, the LDEQ shall, within 10 days of receipt by LDEQ, notify the EPA Regional Administrator and shall transmit a copy of the text of such revision to the

EPA Regional Administrator.

**VII.D** Prior to the approval of any test method other than those specified as required for NPDES permitting, the LDEQ shall obtain the approval of the EPA Regional Administrator.

**VII.E** The LDEQ shall seek such legislation, adopt such regulations, provide Attorney General opinions, and take such further actions which may be necessary to preserve and maintain any compliance with NPDES program requirements.

**VII.F** LDEQ will keep the EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its LPDES forms, and LPDES program procedures and priorities.

**VII.G** In the event EPA determines that elements of the LDEQ's LPDES program are in any way deficient or inconsistent with this MOA, applicable federal and state regulations and/or statutes, and the annual State program grant, EPA shall notify the LDEQ in writing of these inconsistencies or other deficiencies. The LDEQ shall respond in writing within 30 days of this determination, indicating whether noted inconsistencies, and/or deficiencies have been rectified. If they have not been corrected, EPA may proceed in accordance with §402 (c) of the CWA and 40 CFR 123.64.

**VII.H** LDEQ will provide EPA with the opportunity for meaningful involvement as a partner in the program development activities and program initiatives. Accordingly, when appropriate LDEQ will provide EPA with the opportunity to provide input into new or revised LPDES statutes, regulations, forms, procedures, or priorities.

**VII.I** LDEQ will ensure new federal NPDES regulations are incorporated into state regulations

within one year of federal promulgation or within two years if a state statute must first be enacted.

## Section VIII. Independent EPA Powers

**VIII.A** Nothing in this MOA shall be construed to limit the authority of EPA to take action pursuant to any applicable federal laws or regulations including Sections 308, 309, 311, 402, 405, 504, or other sections of the CWA. This MOA is for the administrative convenience of EPA and LDEQ, and does not confer any rights to violators.

## Section IX. Computations of Time

**IX.A** In computing any period of time prescribed by this MOA, the day from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which case the period extends until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time is less than seven days, intermediate Saturdays, Sundays, or legal holidays shall be excluded from the computation.

**IX.B** For the purpose of EPA's review of permit applications, draft or proposed permits, or permit modifications, the period for review shall not commence until received by EPA.

## Section X. Modification

**X.A** This MOA shall take effect immediately upon approval by the EPA Regional Administrator

and the Secretary of LDEQ. It shall be reviewed jointly and revised as needed. Either the LDEQ or EPA may initiate action to modify this MOA at any time. If EPA determines that any modification to the MOA initiated by the LDEQ does not conform to the requirements of §§402(b) and 405 (f) of the CWA, or to the requirements of 40 CFR Parts 122-125 or any other applicable federal regulation, the EPA Regional Administrator or Administrator of EPA shall notify the LDEQ in writing. Any proposed amendments or revisions to this Agreement must be in accordance with 40 CFR §123.62. In the spirit of partnership, minor administrative/procedural modifications to the implementation of this agreement may be made by agreement between the appropriate LDEQ and EPA staff. Any substantive changes must be in writing and signed by the LDEQ Secretary and the EPA Regional Administrator.

## Section XI. MOA Effective Date

This Memorandum of Agreement shall become effective when approved by both the EPA Regional Administrator pursuant to 40 CFR §123.24(a) and the Secretary of LDEQ.

In witness whereof, the parties execute this agreement.

**FOR LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY:**

Mike D. McDaniel 4-29-04

Mike D. McDaniel, Ph.D. Date
Secretary

**FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

12-28-04

Regional Administrator, Region 6 Date

ENVIRONMENTAL PROTECTION AGENCY

[FRL–]

**State Program Requirements; Approval of Revisions to the National Pollutant Discharge Elimination System (NPDES) Program; Louisiana**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Approval of Revisions to the Louisiana Pollutant Discharge Elimination System Program.

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**SUMMARY:** Pursuant to a request by the Environmental Protection Agency (EPA) and as required by 40 CFR123.62, the State of Louisiana submitted a request for approval of revisions to the Louisiana Pollutant Discharge Elimination System (LPDES) program, which was originally approved on August 26, 1996. Through the submission of the revised program authorization documents, including a complete program description, a Memorandum of Agreement (MOA) with EPA Region 6, and an Attorney General—s Statement, the Louisiana Department of Environmental Quality (LDEQ) seeks approval of the proposed revisions to the LPDES program. Today, EPA Region 6 is publishing notice of its approval of the revised LPDES program and is responding to comments

received during the 30-day public notice period on the proposed revisions. EPA is approving the State's request based upon the requirements of 40 CFR Part 123 after considering all comments received.

Pursuant to an October 9, 2001, petition from numerous environmental groups in Louisiana requesting EPA withdraw LDEQ—s authorization to administer the LPDES program along with EPA program reviews of the water permitting and enforcement programs, EPA delineated seven performance measures for LDEQ in a letter dated February 14, 2003, from Tracy Mehan, former EPA Assistant Administrator for Water, and John Peter Suarez, former EPA Assistant Administrator for Enforcement and Compliance Assurance, to former Governor M. J. Foster. Former Governor Foster replied in a letter dated March 27, 2003, with the commitment of LDEQ and the State of Louisiana to complete the seven performance measures. With the submission of the revision to the LPDES program, LDEQ completed the last of the seven performance measures. Regional Administrator Richard Greene notified Governor Kathleen Blanco of the completion of the performance measures in a letter dated May 13, 2004. After evaluation of the comments and other information related to this Federal Register notice regarding the revision to the LPDES program authorization, EPA is denying the petition for EPA to withdraw LDEQ-s-authorization to administer the LPDES program.

Section 402 of the Clean Water Act (CWA) created the National Pollutant Discharge Elimination System (NPDES) program under which EPA may issue permits

for the point source discharge of pollutants to waters of the United States under conditions required by the Act. Section 402(b) requires EPA to authorize a state to administer an equivalent state program, upon the Governor—s request, provided the state has appropriate legal authority and a program sufficient to meet the Act's requirements. The regulatory requirements for state program approval are set forth in 40 CFR Part 123. Today, EPA is announcing its final approval action on the revisions to the LPDES program, the Regional Administrator has notified the State, has signed the revised MOA, and is publishing notice of the action in the Federal Register along with responses to comments received.

**COMMENTS, DISCUSSION, AND EPA RESPONSES**

EPA received 12 comments on the revision to the LPDES program authorization documents. The comments received were from the Tulane Environmental Law Clinic representing the Louisiana Environmental Action Network, the Louisiana Audubon Council, the Gulf Restoration Network, the Association of Community Organizations for Reform Now, the Lake Pontchartrain Basin Foundation, CFACT, the Lake Maurepas Society, and the Concerned Citizens of Livingston Parish; American Electric Power; and The Dow Chemical Company. The comments and responses, in their entirety are listed below.

**Comment 1**: LDEQ has no right to judicial review of Administrative Law Judge (ALJ)

decisions and thus ALJs can force LDEQ to issue permits the agency believes are illegal.

**Discussion by Commenter**: Louisiana law provides that in an adjudication by the Division of Administrative Law (DAL), the decision of the ALJ is final and ˜the agency shall have no authority to override such a decision or order.™In addition, La. R.S. 49:992(B)(3) states that ˜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™. This provision impairs LDEQ—bility to carry out the LPDES program properly because it cannot appeal an adverse decision. Consequently, LDEQ may be required to issue a permit that violates the CWA. In short, this regulation limits the authority of LDEQ, as the agency primarily responsible for administering the federal CWA within the state, to ensure that all permits it issues comply with the law, and instead places that burden on the public, who must intervene to object to a wrongfully issued permit.

Commenters assert that EPA—s response is that La. R.S. 49:992(D)(2) allows LDEQ to be exempt from the DAL provisions ˜if required by a federal mandate™. Accordingly, if EPA requires LDEQ to conduct or to render a final order in an adjudication proceeding as a condition of federal funding, LDEQ can conduct its adjudicatory hearings –in house— rather than undthe DAL. The Program Description further states that ˜assuming [LDEQ] was to conduct adjudicatory hearings -in house—it maintains the authority to do so.™In that case, the decision of the hearing officer would

become final unless the Secretary grants administrative review, in which case he would make the final decision.

Commenters believe that EPA—s response does not clearly address the problem. To the best of our knowledge, EPA has not yet required ~as a condition of federal funding™that LDEQ conduct in house adjudication proceedings. Until and unless EPA does so, La. R.S. 49:992(D)(2) will be inapplicable and thus irrelevant. Accordingly, to ensure that LDEQ has adequate authority to administer the NPDES program in Louisiana, EPA-s-approval must specifically provide that LDEQ conduct all adjudicatory hearings ~in house™rather than under the DAL as a condition of federal funding.

**EPA Response**: The commenters are correct in stating that La. R.S. 49:992(B) precludes LDEQ from appealing an adverse decision in an adjudication by the DAL. However, EPA does not believe this restriction on the agency—s power requires withdrawal of the States— authority to run the NPDES program. This issue arises only if a request for hearing is filed by the permit applicant within 30 days after he receives notice of LDEQ—s issuance of the NPDES permit. If the hearing request is granted by the Secretary of LDEQ, an adjudicative hearing is held by an ALJ with DAL, an agency independent of LDEQ. The ALJ—s decision concerning the permit appeal is final, and under State law, LDEQ cannot unilaterally revise an adverse decision or appeal it to State Court. Therefore, an ALJ could order LDEQ to make revisions to a permit that LDEQ does not believe comport with the CWA.

Although EPA does not believe this situation to be ideal, there are additional safeguards in place to insure final issuance of an NPDES permit that meets all the requirements of the CWA. First of all, pursuant to La. R.S. 30:2050.21, any ~aggrieved person™may appeal a final permit action to State District Court. ~Aggrieved person™is defined by La. R.S. 30:2004(17) as any ~natural or juridical person who has a real and actual interest that is or may be adversely affected by a final action under this Subtitle.™ Thus, even though LDEQ cannot appeal an adverse NPDES permit decision by an ALJ, members of the general public, so long as they meet the broad definition of ~aggrieved person,™ may The public—s right to appeal is bolstered bythe fact that any decision by an ALJ under these circumstances, that results in a major modification to an NPDES permit, requires LDEQ to prepare a new draft permit and notice it to the public for public comment. See Louisiana Administrative Code (LAC) 33:2903. Under LAC 33:3123, after the close of the public comment period, LDEQ must notify each person who has submitted written comments or requested notice of the final permit decision, and such notice must include reference to the procedures for appealing the decision.

Another safeguard to LDEQ—s permit issuance process is EPA—s oversight role. Under the MOA signed by LDEQ and EPA upon authorization of the LPDES program, if the terms of any permit, including any permit over which EPA has waived review, are affected in any way by administrative action, LDEQ must forward to EPA a copy of the administrative decision, along with a copy of the permit affected with any changes identified. EPA has the right to object to such a modified permit under Section 402(d)(2)

of the CWA and 40 CFR 123.44. If EPA objects to such a permit and LDEQ fails to revise the permit to comply with EPA-s-objections, exclusive authority to issue the permit reverts to EPA pursuant to 40 CFR 123.44(h)(3).

As a result of the additional safeguards in place, EPA believes LDEQ-s-inability to appeal an adverse permitting decision of an ALJ does not undercut LDEQ-s-ability to implement an adequate LPDES program. However, EPA is aware of the fact that Acts 739 and 1332 of the 1999 Regular Session of the Louisiana legislature, which created the DAL and which precluded any agency of the State from seeking judicial review of a decision of a DAL ALJ, have been ruled unconstitutional by the 19th Judicial District Court in Louisiana. (See, Judge Janice C. Clark-s-judgment in J. Robert Wooley, in his capacity as Commissioner of Insurance, State of Louisiana v. State Farm Fire and Casualty Insurance Company, et al., Suit No. 502,311 (19th J.D.C. 3/15/04). The District Court—s ruling is currentlyn appeal to the Louisiana Supreme Court, which heard oral argument on September 7, 2004, and has taken the matter under advisement. Should the Supreme Court—s ruling on this matter indicate the need to revisit this issue, EPA will do so at that time.

**Comment 2**: The public receives no notice of hearings and thus has no opportunity to intervene.

**Discussion by Commenter**: An ~aggrieved person™ can request an adjudicatory hearing

on a disputed issue of fact or law, which the Secretary may grant ~when equity and justice require™. An aggieved person also has the right to intervene as a party in an adjudicatory hearing when the intervention ~is unlikely to unduly broaden the issues or to unduly impede the resolution of the matter under consideration.™ Howeer, these provisions offer the public little protection because 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. Without notice, the public effectively never has an opportunity to intervene. Accordingly, to ensure adequate public participation in adjudicatory hearings, EPA—s approval must be conditioned on LDEQ-s-agreement to provide a minimum of 30 days notice of adjudicatory hearings and settlements, including at a minimum, notice published in the public notices section of LDEQ-s-web page (currently http://www.deq.state.la.us/news/PubNotice) and public notice list-serve.

**EPA Response**: CWA Section 402(b) and 40 CFR Part 123 establish the minimum requirements for public participation in approved State NPDES programs. In regard to permit issuance, states seeking NPDES authorization must have authority sufficient ~to insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.™ In regard to enforcement, 40 CFR 123.27(d) requires States to provide for public participation in the State enforcement process in one of two ways: A) The State must allow intervention as of right in any civil or

administrative action to obtain enforcement remedies by any citizen with an interest that is or may be adversely affected; or B) The State must investigate and provide written responses to all citizen complaints, not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation, and publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action. EPA believes LDEQ is in compliance with the federal requirements for public participation in both permitting and enforcement.

Pursuant to LAC 33:IX.3113, LDEQ provides public notice of every draft permit prepared by the agency and of every notice of intent to deny a permit application. As required by both federal and State regulations, notice is provided by mailing a copy of the notice to persons on a mailing list that includes any person who requests in writing to be on the list and by publication of the notice in a daily or weekly newspaper within the area affected by the facility or activity. LDEQ also publishes notices of draft NPDES permits on its public website. The public notice on draft permits provides for a public comment period of at least 30 days, during which any interested person may submit written comments and/or request a public hearing. A public hearing is held anytime LDEQ finds, on the basis of requests, a significant degree of public interest in a draft permit, or at the agency—s discretion whenever, for instance, a hearing might clarify one or more issues involved in the permit decision. LAC 33:IX.3115 & 3117.

LDEQ chose to provide for public participation in enforcement matters in

accordance with the second method allowed by 40 CFR 123.27(d). The State investigates and provides written responses to citizen complaints, and does not oppose intervention by any citizen in adjudicatory hearings held at the request of the respondent regarding any disputed issue of material fact or law arising from a compliance order or penalty assessment. Such adjudicatory hearings are held by an ALJ with the DAL. LDEQ also publishes notice of each proposed settlement of a State enforcement action on its public website at least 45 days prior to final action on the proposed settlement, and, as a condition to settlement, requires respondents to publish notice of the proposed settlement in a newspaper of general circulation in the parish in which the violations occurred at least 45 days prior to final action.

Although LDEQ does not provide specific notice to the public of the request for an adjudicatory hearing by the applicant in regard to permit issuance or by the respondent in regard to an enforcement action, neither the CWA nor implementing federal regulations require it to do so. However, it is easy enough for persons interested in a particular permit or enforcement matter (the existence of which is widely publicized by LDEQ) to find out if a hearing has been requested, granted or scheduled by contacting the Legal Affairs Division at LDEQ or the DAL.

**Comment 3**: Timely permit issuance requires consistent additional funding.

**Discussion by Commenter**: Allowing facilities to operate without a valid discharge

permit is a violation of the CWA Section 301(a). Even so, Louisiana regulations currently authorize a facility that submits an application at least 180 days before the permit expires to continue operating until LDEQ can reissue the permit. The 2002 Audit revealed that ~these continuations may result in DEQ not reissuing permits for several years.™ As of January 2001, 54% of major water permits and 10% of minor water permits were expired.

The Revised MOA requires that LDEQ reissue all expiring permits ~as close as possible to their expiration dates,™ and that LDEQ may not modify any continued permit. However, the problem remains that many facilities are illegally discharging into the waters of Louisiana without a permit. These facilities may be subject to an enforcement action for these violations. Thus, both the regulated community and the public have an interest in ensuring that LDEQ issue permits before they expire.

LDEQ revised its LPDES Permit Issuance Strategy (~Permit Issuance Strategy™) on April 30, 2003. It provided $1.49 million in federal grant money for the 2003 fiscal year to pay for EPA contract support to assist with permit issuance. According to the report, as of May 1, 2003, 244 major facilities exist in Louisiana, and 95 of those permits are backlogged. The plan reports LDEQ will have no major permit backlog by the end of 2005. Of the 1637 minor facilities in Louisiana, 869 are operating under a current permit - 332 are expired but continued, and 446 have unknown status. LDEQ projects it will have a minor permit backlog of 9.5% by the end of 2005. EPA considers a level of less

than 10% expired permits to be indicative of a well-maintained program. Further, in a July 30, 2003, letter to Region 6, LDEQ reported that it had met or exceeded performance measures for permit issuance from January 1 through July 30 of 2003. This is excellent progress. However, LDEQ must reach a point where it can handle its permitting workload without relying on federal grants. Without a long-term budgetary solution, LDEQ will once again have a backlog.

EPA—s approval must therefore be conditioned on assurance of adequate funding of LPDES, for example, (1) a program of permit fees adequate to cover the program—s administration or (2) the Governor-s adherence to a specific and signed commitment to seek a specific minimum level of funding for LPDES that EPA concludes, based on analysis in the record, is adequate for a well-maintained program.

**EPA Response**: LDEQ—s PDES program receives the bulk of it—s funding (83%) from the States—Environmental Trust Fund. The Environmental Trust Fund receives it funding from permit fees and administrative penalties. Thirteen percent of funds that support the LPDES program are from the Federal 106 Grant Program. The commentor notes that LDEQ has made excellent progress for permit issuance from January 1 through July 30 of 2003, and further states that LDEQ must reach a point where it can handle its permitting workload without relying on federal grants. In the first quarter of calendar year 2003, EPA and LDEQ agreed that in order to document that the State had the capabilities to administer the LPDES program, that LDEQ would issue 35 major and provide coverage

for 300 minor individual permits for calendar year 2003. All work on the permits was to be completed by LDEQ staff. Contractor drafted permits were not included in the count. For calendar year 2003, LDEQ drafted and issued 36 major permits and provided coverage for 382 individual minor facilities. Coverage for 236 of the minor permits were provided by individual permits and the remaining permits (186) were provided coverage under general permits. All of this was completed without contractor support.

In calendar year 2004, LDEQ continues to make excellent progress in its permit issuance. As of August 2004, LDEQ has a major individual permit universe of 254 permits of which 84% are current and a minor permit universe of 6042 (individual and non-storm water general permits) of which 92% are current. LDEQ-s-overall backlog rate for individual majors, minors, and non-storm water general permits for August is 8%. Only one state in Region 6 has a better overall permit issuance rate. LDEQ has committed to issuing 60 individual major and 300 individual minor permits for calendar year 2004. Of the 28 major permits and 303 minor permits issue so far in calendar year 2004, six major permits and 39 minor permits were written by a contractor.

**Comment 4**: EPA must ensure that LDEQ regularly inspects permitted facilities.

**Discussion by Commenter:** La. R.S. 30:2012 provides that "[e]very permit shall as a matter of law be conditioned upon the right of the secretary or his representative to make an annual monitoring inspection and, when appropriate, an exigent inspection of the

facility operating there under.™However, the 2002 Audit found that LDEQ failed to inspect 4 percent of permitted major facilities in fiscal year 2000 and 2001, as well as 31% of minor permitted facilities.

Section 5.3 of the Program Description requires regional Surveillance Division personnel to conduct routine inspections of permitted major and minor discharges via unannounced visits in accordance with the NPDES Compliance Inspections Manual and LDEQ Standard Operating Procedure (SOP) #1108. It also lists six factors that determine the frequency of inspections. These factors are (a) facility compliance history; (b) facility location; (c) potential environmental impact; (d) operational practices being steady or seasonal; (e) grant or funding commitments made by LDEQ; and (f) any other relevant environmental, health, or enforcement factors. In addition, the Revised MOA requires the Louisiana Compliance Monitoring Strategy be submitted to EPA annually, and it will list major and minor permittees to be subject of state compliance inspections. This is a good improvement. However, inspections are essential to proper enforcement of the CWA, and thus EPA oversight is crucial to ensuring that LDEQ is conducting inspections properly and in a timely manner.

**EPA Response**: EPA does not believe that the regulations define, with no flexibility, a precise number or type of inspections that must occur. Rather, the regulations in 40 CFR 123.26 (e)(5) require States to show that they have "procedures and ability" to inspect all major dischargers and all Class I sludge management facilities, where applicable. Thus,

the regulations require a showing of capacity and a commitment to a level-of-effort for inspections, reserving discretion to the two sovereign governments to decide what number of inspections to undertake, and the identity of the facilities to be inspected. These judgments are matters of enforcement discretion, and under this discretion, EPA and LDEQ have agreed, and included commitments in the Annual Performance Partnership Grant Agreement, that LDEQ will inspect 90% of the Major, 92-500 Minor and Significant Minor facilities annually. It was also agreed that the significant minor definition would be determined and agreed upon, by EPA and LDEQ, prior to the beginning of each inspection year. For the current inspection year, beginning 7/1/04, the significant minor universe has been determined to represent the Total Environmental Solutions, Incorporated (TESI) facilities included in the Consent Decree (approximately 172 facilities).

There is not a specific targeting strategy utilized in selecting the facilities to be included in the 90%, because the number represents the majority of the facilities in the universe, and because LDEQ considers the 90% to be a hedge on perfection, due to the fact that the intent is to inspect 100%. Based on evaluation of data for the last inspection year, beginning 7/1/03 and ending 6/30/04, EPA determined that LDEQ conducted inspections at 98% of the Major and 92-500 Minor facilities. In the future, because of national priorities, the percentage may be reduced, and at that time, factors for selection will be considered, such as environmental harm, location, and compliance history. In addition to meeting and exceeding the commitments agreed in the Annual Performance

Partnership Grant Agreement, LDEQ has also conducted inspections at nearly 3,000 facilities, covered by Minor or General Permits, during each of the last three inspection years. LDEQ plans to inspect all of the general permit sewage treatment plants every 3 years. Currently, there are more than 4000 of these facilities. LDEQ has also implemented a Regional Circuit Rider Approach, which results in the issuance of a Notice of Deficiency (NOD) accompanied by an Expedited Penalty Agreement of up to $3,000 for minor violations. Noncompliance with the NOD will result in a referral to Enforcement for further action.

Although EPA believes that LDEQ is currently conducting inspections properly and in a timely manner, EPA, as part of its oversight role, will continue to monitor the state—s inspection program through oversight audits and review of information submitted by LDEQ.

**Comment 5**: Neither Region 6 nor LDEQ has established a timeframe for completing enforcement actions.

**Discussion by Commenter**: The LPDES Program Description provides that the Surveillance Division is responsible for referring inspections or investigations that result in findings of areas of concern to the enforcement division within 30 working days. However, LDEQ has not established a mandated timeframe for completing enforcement actions, or for obtaining the information it needs to bring an enforcement action. This

process alone can take weeks, months or years. Although every enforcement action presents its own facts and circumstances, LDEQ should establish a definitive timeframe for bringing enforcement actions. In the past, as many as 80% of water enforcement actions were entered over 150 days after the violation occurred.

EPA—s approval must therefore be conditioned on DEQ—s adherence to a written schedule (and reporting obligation) that will show by 2008 that at least 80% of LDEQ—s water enforcement actions are brought within (1) 60 days of an inspection uncovering violations and (2) 150 days of a violation.

**EPA Response**: Section I.C. of the MOA indicates that the state has primary responsibility for implementing the LPDES program in accordance with the MOA, specified sections of the CWA, applicable state legal authority, applicable requirements of 40 CFR, applicable federal regulations, the Multi-Media/Multi-year Enforcement Memorandum of Understanding and the annual Performance Partnership Grant. LDEQ has the primary responsibility to establish LPDES program priorities with consideration of EPA Region 6 and national NPDES goals, and objectives. The Enforcement Response Guide (ERG), included in the referenced Enforcement Actions SOP #1215, is consistent with the EPA ERG and provides a guide to be used for selecting the most appropriate response or set of responses to instances of noncompliance.

The annual Performance Partnership Grant referenced in the MOA establishes

timeframes for responses to specific activities/commitments. This agreement requires that the state identify and initiate enforcement action for majors, 92-500 minors and significant minors with inspection deficiencies within 90 days of the date which enforcement receives the inspection report. It also specifies that LDEQ identify and initiate enforcement actions for identified violations for the same classes of facilities within 90 days of receipt of the Discharge Monitoring Report (DMR). Based on the facility reviews conducted during the most recent EPA site visit, and review of information received at EPA during the year, it has been determined that in the majority of the instances, where the inspection noted areas of concern, actions were issued within an average of 20 days. It was also noted that in many of the instances where a warning letter was issued as the initial action, there was a follow-up enforcement order issued within 60 days, escalating that initial action. Instances of significant non-compliance are addressed within the timeframes established in the oversight guidance. Isolated instances of non-compliance may not merit a formal enforcement action when the violation occurs. However, when these isolated instances are combined with inspection violations or other instances of non-compliance, action may be warranted in accordance with the ERG. For example, an isolated violation, which occurs in January, may not merit a Formal Enforcement Action until detection of a subsequent violation and/or inspection deficiency, which perhaps occurs in May.

**Comment 6**: LDEQ must collect the penalties it assesses.

**Discussion by Commenter**: The 2002 audit revealed that LDEQ had not collected nearly $4.5 million, equaling 75% of the monetary penalties assessed in 1999, 2000, and 2001 fiscal years. SOP #1215 provides that an enforcement action may be made executory ~if violations continue after issuance of a final enforcement action, or if a final penalty action is not paid.™It further provides that ~the Legal Division has a goal that all enforcement cases should be brought to final resolution within 12 months of the Legal Division—s acceptance of the case. However, neither the Revised MOA, the Program Documents, nor SOP #1215 provide assurances that LDEQ will pursue the penalties they have assessed, much less recover them. Proper inspection, timely enforcement and aggressive penalty collection motivate industry to comply with the CWA. If any of these elements are lacking, the deterrent effect of penalty assessment is lost.

EPA—s approval must therefore be conditioned on DEQ—s adherence to a written schedule (and reporting obligation) that will show by 2008 that at least 80% of LDEQ—s water penalty assessments are collected within 60 days of becoming final and collectable.

**EPA Response**: LDEQ maintains that the data presented in the 2002 legislative audit is not an accurate representation of the actual figures. The audit—s figes include several categories of monies not actually owed to LDEQ. For instance, the difference between the cash component in finalized settlement agreements and the appealed penalty assessments, which are associated with the settlements, are not owed to LDEQ. Penalty assessments under appeal are not considered final enforcement actions and thus are not

owed to LDEQ, until the appeal process has been completed. LDEQ maintains that removing monies not actually owed to LDEQ from the ~uncollected penalties™ calculation would significantly lower the uncollected amount for all media.

Regardless of what the actual figures are, LDEQ has committed to aggressively pursue collection of all penalty dollars, including, if necessary, going to court to obtain judgment for those penalties that remain unpaid after a reasonable period of time. As a result, EPA does not believe it is necessary to require LDEQ—sdherence to the written schedule suggested by the commenter. However, as a part of its statutorily mandated oversight of the LPDES program, EPA will continue to monitor LDEQ—s enforcement program, including its assessment and collection of penalties, for consistency with the CWA and other applicable federal regulations, guidance and policies.

**Comment 7**: LDEQ must provide accurate and accessible information on compliance status.

**Discussion by Commenter**: For several years, LDEQ has failed to keep sufficient records as to self-monitoring reports, has maintained inaccurate compliance status information, and has lost or misfiled important documents. In addition, in its 2003 mid-year review of LDEQ, the EPA noted that ~the Electronic Document Management System (EDMS) remains problematic for public retrieval and review of LPDES permits and supporting materials. The database contains voluminous amounts of information and the

poor indexing of materials and files containing misfiled information makes the system difficult for the public to use.™During the review, EPA noted that ˜the EDMS was too cumbersome to complete the file review because documents were not correctly indexed.™

Revised MOA IV.B.1 requires LDEQ to conduct ˜timely and substantive reviews and keep complete records of all written materials relating to the compliance status of LPDES permittees.™Required records include Compliance Schedule Reports, DMRs, Compliance Inspection Reports, and any other report required by the permit. Revised MOA IV.B.1.a further requires LDEQ to operate a system to determine if the self-monitoring reports are submitted, submitted reports are timely, complete and accurate, and that permit conditions are met.

In order to meet these requirements, LDEQ has prepared SOP #1453 governing the Permit Compliance System (PCS), which is a national database of NPDES information. The goals of this system are to ensure the accuracy, timeliness and completeness of all submissions. Improved accuracy, timeliness and completeness of submissions are vitally important. However, LDEQ must also ensure that the public is able to access this information. Importantly, LDEQ has committed to enter data which it deems appropriate, and that the decision will be made without public input. Therefore, citizens may be deprived of important data regarding the compliance of industrial and municipal facilities.

To improve public access, LDEQ should promptly allow online access to information. EPA-s-approval must therefore be conditioned on (1) LDEQ-s-immediate inclusion of full copies of current and future DMRs and other records of compliance in its electronic, searchable (currently ~EDMS™)records management system, (2) LDEQ—s inclusion of WENDB data elements; (3) LDEQ—s adherence to a scheduleof providing online public access to CWA compliance records by August 2005.

**EPA Response**: During the most recent Enforcement Program Review which was conducted June 2004, EPA staff noted significant improvements in the process for utilizing the EDMS at LDEQ. It appears that the continuous analysis and revisions being made to the system have been beneficial. LDEQ has enhanced the indexing system which provides more descriptive information for the documents in the system. While attempting to locate documents in the system, it was noted that documents included an additional description, which was helpful in the identification process. The percent of documents located during this review was found to have improved by 46% for minor facilities and 38% for major facilities from the March 2003 review. There were no documents found to be imaged under the incorrect identification number for the files included in the search. Because of the fact that DMRs are produced on a type of paper that does not scan well, those documents are maintained as paper records in files onsite. These documents were readily available and were found to be filed under the correct record numbers. The program documents require only that the state maintain adequate public files for each permittee at the central office and must be accessible to EPA and the public. Instructions

for the various request options for access to public records are available on the LDEQ Web page (publicrecords@la.gov).

Under the Program MOA, LDEQ is committed to enter all permit related and enforcement WENDB data into the National PCS for all Major, 92-500 Minor and Significant Minor facilities. Significant Minors are identified as those minor facilities mutually agreed upon by both EPA and LDEQ and identified in the Annual State Program Performance Partnership Grant.

**Comment 8** : LDEQ must provide public notice for all permit applications it receives.

**Discussion by Commenter**: LDEQ should issue public notices for *all* permit applications it receives, not just for major facilities and general permits. This enables citizens to be informed of all the sources of pollution in their area and gives them an opportunity to provide input during the permitting process.

**EPA Response**: LDEQ meets or exceeds EPA ~~s~~ public participation requirements in its permitting program. LDEQ must demonstrate to EPA that it can carry out the NPDES program and that state requirements are at least as stringent as the federal requirements. LAC 33:IX.2415.C.2 was patterned after the federal regulations. Federal regulations require that draft major permits undergo public noticing in a newspaper and go through a comment period. Louisiana regulations are further interpreted to extend this requirement

to include minor permits, making Louisiana regulations more stringent than the federal requirements. In addition, the Program Description and LDEQ SOPs include requirements for issuing public notice in a newspaper for both major and minor individual draft permits.

**Comment 9**: EPA must take prompt action if LDEQ fails to abide by the Revised MOA or the Program Description.

**Discussion by Commenter**: We acknowledge that LDEQ has made significant improvements in its administration of the LPDES. We also believe that LDEQ—s current Secretary and Deputy Secretary have demonstrated a sincere desire to run a professional, well-maintained program. Nonetheless, each of the problems discussed above has existed since 1996, when EPA first authorized Louisiana to administer the LPDES program. The citizens of Louisiana are therefore being asked to wait for LDEQ to catch up, while facilities continue to operate with expired permits, to violate their effluent limits, and to illegally impair the waters of the State of Louisiana. Given the pervasive nature of these problems and the significant efforts required to remedy them, the EPA should exercise strong oversight over LPDES until LDEQ has demonstrated that it has the regulatory and legal structure and funding necessary to administer the program in full compliance with the CWA and has established a track record of running a well-maintained program.

**EPA Response**: It is the intent of EPA to take prompt action if LDEQ does not meet its

commitments in the MOA. EPA will continue its oversight and review of the LDEQ water permitting and enforcement programs at the mid-year and end-of-year reviews of the Performance Partnership Grant program. Twice each year, EPA reviews the commitments made by LDEQ and the progress on those commitments in the water permitting and enforcement programs. If EPA determines that adequate progress is not being made in the water program, in line with the LDEQ program commitments and the MOA, EPA will work with LDEQ on appropriate actions to correct noted deficiencies.

**Comment 10**: III.D. Permit Reissuance: This section contains language that reads ~in no event will permits that have been administratively continued beyond their expiration date be modified.™American Electric Power (AEP) requests that EPA clarify that this language is only applicable to ~major modifications™, and is not applicable to ~minor modifications™ as defined in 40 CFR 124.5 and 122.63 (specifically applicable to NPDES permits).

**Discussion by Commenter**: AEP contends that in some cases the state may not process a permit application within the prescribed processing period (minimum of 180 days prior to the expiration date of the permit). AEP believes the permittee (applicant) should be allowed to have minor modifications accommodated by the permitting authority without having to re-apply and/or re-initiate the public participation process via re-noticing of the application. As such, AEP recommends that the draft language be modified to ~in no event will permits that have been administratively continued beyond their expiration date

be allowed to incorporate major modifications without formal modification of the application and re-initiation of the public participation process. Upon consent of the permittee, the Director may allow minor modifications to these permits.™

**EPA Response**: 40 CFR 122.46 and LAC 33:IX. 2365 state that the effective term of a permit shall not exceed five years and shall not be extended by modification beyond the five year period. LAC 33:IX. 2321, and 40 CFR 122.6 list two causes to administratively extend a permit beyond its expiration date, 1) the permittee has submitted a timely and complete application prior to the expiration date of the permit and 2) through no fault of the permittee the permitting authority has not reissued the permit. Permits continued in this manner remain fully effective and enforceable. To modify a permit that has been administratively continued would, in affect, be extending the permit beyond the specified period.

**Comment 11**: It should be made clear that information appropriately declared ˜proprietary™ by the pmittee cannot be released to the public.

**Discussion by Commenter**: Section II.A.5 reads as follows: LDEQ will remain in compliance with federal right to know statutes and Louisiana public records law, while protecting sensitive information. Material containing security procedures, criminal intelligence information pertaining to terrorist-related activity, or threat or vulnerability assessments created, collected, or obtained in the prevention of terrorist-related activity,

including but not limited to physical security information, proprietary information, operational plans, and the analysis of such information, or internal security information is not required to be disclosed under an exemption in the Louisiana Public Records Law (La. R.S. 44:3.1)

Although the exempted material is not regarded as public record, there is no prohibition from releasing the material. LDEQ will consider the merits of each request on a case-by-case basis while striving to achieve balance between the public-~~s~~ right to know, security issues, and applicable federal and state statutes.

The next to the last paragraph of this section as referenced above, describes several types of information that might be collected by the agency but are not required to be disclosed. The listing of information includes ~proprietary information™ The next paragraph states that though the above mentioned material is not regarded as public record, it can be released at the discretion of the LDEQ.

**EPA Response**: The commenter is correct that information properly claimed as proprietary by the permittee will not be released to the public, provided the Secretary of LDEQ makes the determination that confidentiality is necessary to ~[p]rotect trade secrets, proprietary secrets and information, and commercial or financial information.™ La. R.S. 30:2030. However, La. R.S. 30:2074(D)(7) and LAC 33:IX.2323 specify that no claim of confidentiality will be accepted for certain categories of information associated

with LPDES permit applicants or permittees, including all information required by the permit application, the permit itself, and any effluent or discharge data.

**Comment 12**: There should be no reason, other than those currently in the regulations, to limit the ability to modify a permit that is legally active. This restriction on the permitting agency (LDEQ) is beyond the authority given the EPA in either statute or promulgated regulations. It can only result in hardship on the permit holder with no environmental benefit.

**Discussion by Commenter**: Section III.D. reads as follows: All expiring permits shall be reissued as close as possible to their expiration dates. In no event will permits which have been administratively continued beyond an expiration date be modified. The LDEQ may use the flexibility allowed in EPA—s Permitting for Environmental Results initiative (August 15, 2003) to account for and to prioritize these facilities that remain in the backlog. LDEQ plans to utilize the approved Permit Issuance Strategy as its guide for permit issuance, and will update/revise the strategy yearly to reflect ongoing permit issuance goals.

This section prohibits modification of a permit that has been administratively continued beyond its expiration date. It has been our experience that permits may be administratively extended for some time. Awaiting the often lengthy time necessary for a complete re-issuance of an expired permit but continued permit when a modification is

needed could result in substantial conflict with business timing or our ability to continue compliant operations under changing conditions. The relevant section of Louisiana Title 33 Section 309 reads: C. If the applicant submits a timely and complete application pursuant to LAC 33:IX.309.A, and the department, through no fault of the applicant, fails to act on the application on or before the expiration date of the existing permit, the permittee shall continue to operate the facility under the terms and conditions of the expired permit which shall remain in effect until final action on the application is taken by the department. If the application is denied or the terms of the new permit contested, the expired permit shall remain in effect until the appeal process has been completed and a final decision rendered unless the secretary finds that an emergency exists which requires that immediate action be taken and in such case any appeal or request for review shall not suspend the implementation of the action ordered. Permits continued under this Section remain fully effective and enforceable.

**EPA Response**: 40 CFR 122.46 and LAC 33:IX. 2365 state that the effective term of a permit shall not exceed five years and shall not be extended by modification beyond the five year period. LAC 33:IX. 2321, and 40 CFR 122.6 list two causes to administratively extend a permit beyond its expiration date, 1) the permittee has submitted a timely and complete application prior to the expiration date of the permit and 2) through no fault of the permittee the permitting authority has not reissued the permit. Permits continued in this manner remain fully effective and enforceable. To modify a permit that has been administratively continued would, in affect, be extending the permit beyond the specified

period.

**PETITION TO WITHDRAW LPDES PROGRAM**

On October 9, 2001, a petition for withdrawal of the CWA NPDES program authorization for the State of Louisiana was filed by the Tulane Environmental Law Clinic on behalf of the Louisiana Environmental Action Network, Louisiana Audubon Council, Gulf Coast Restoration Network, Association of Community Organizations for Reform Now, Lake Pontchartrain 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. Supplements to the October 9, 2001, petition were filed on December 19, 2001, February 22, 2002, and September 17, 2002.

The petition, as supplemented (~the Petition™), alleges that the State of Louisiana is not administering the LPDES program in accordance with the CWA, 40 CFR Part 123 or the MOA signed by EPA and LDEQ upon program authorization. Specifically, the Petition alleges:

1) deficiencies in the States—s permitting program, including insufficient statutes and regulations to ensure meaningful public participation, lax procedures for identifying point sources and a large backlog of expired permits;

2) deficiencies in the State—s compliance monitoring system, including insufficient record keeping regarding self-monitoring reports, inaccurate and inaccessible information on compliance status, inadequate compliance inspections and inadequate guidance to the regulated community;

3) deficiencies in the State—s enforcement program, including failure to timely identify NPDES violations, failure to bring enforcement actions sufficient to deter future violations, failure to issue timely enforcement actions, failure to assess and collect penalties, improper use of beneficial environmental projects (BEPs) and failure to comply with the requirements for public participation in the enforcement process;

4) deficiencies in the State—s records managment; and

5) deficiencies in the State-s-legal authority, including an inability to appeal permits altered by the administrative review process and a failure to promulgate new authorities necessary to comply with the requirements of NPDES authorization.

Based on these allegations, the Petition requests that EPA initiate formal proceedings to withdraw the LPDES program under Section 402(c)(3) of the CWA and 40 CFR 123.64(b), including a public hearing as provided for under those sections.

In response to the Petition and in accordance with 40 CFR 123.64(b), EPA staff conducted an informal investigation of the allegations in the Petition to determine whether cause exists to commence withdrawal proceedings. EPA—s informal investigation included on-site reviews of LPDES files, interviews with LDEQ

management and staff, and an evaluation by EPA staff of information and data concerning program implementation provided in writing to EPA by LDEQ. The data collected as a result of the informal investigation supplemented the large body of information already in EPA—s possession as a result of EPA—s ongoing statutory oversight responsibilities with respect to the LPDES program. Simultaneous with EPA—s informal investigation under 40 CFR 123.64(b), former Governor M.J. Foster, Jr. convened a special Governor-s-Task Force to review the administration of the LPDES program, also in response to citizens— concerns.

Both the multi-stakeholder Task Force created by Governor Foster, and EPA, through performance of its general oversight duties and through its informal investigation, found weaknesses in LDEQ—s operation of the LPDES program. The Governor—s Task Force shared its findings in recommendations to the Governor for improvements in the State program. EPA worked directly with LDEQ in the development of a list of seven performance measures aimed at addressing both EPA—s and the citizens—concerns. These seven performance measures, which were forwarded to Governor Foster in a February 14, 2003, letter from EPA Assistant Administrators for the Office of Water and the Office of Enforcement and Compliance Assurance, identified specific actions to be performed by LDEQ within specified time frames in the areas of NPDES permitting and enforcement. The actions included drafting and issuing a specified number of permits, improving public access to LDEQ files, clarifying certain requirements under LDEQ—s Penalty rule and its BEP rule, clarifying and implementing

procedures in regard to LDEQ—s unilateral enforcement actions, raising all LPDES program authorization documents and providing a legal opinion from LDEQ counsel and the Louisiana Attorney General—s Office regarding the State—s ability to enforce penalties against municipalities. Further discussion of the Performance Measures and the various changes made to the LPDES program can be found in EPA—s Federal Register notice of the revised LPDES program authorization documents, 69 FR 50,199, August 13, 2004.

By letter dated May 12, 2004, EPA Regional Administrator Richard Greene informed the Governor of Louisiana that LDEQ had successfully completed all seven performance measures. EPA is greatly encouraged by the timely completion of these performance measures and by the State of Louisiana—s renewed commitment to making its NPDES program as strong and effective as any in the Country. In June, 2004, EPA staff performed a follow-up review of LDEQ—s administration of the LPDES program in order to assess LDEQ—s implementation of the processes and procedures outlined in the revised LPDES program authorization documents. As a result of that review, EPA staff determined that LDEQ was implementing the changes agreed to as a result of the performance measures and that the agency—s administration of the LPDES program showed marked improvement.

EPA has concluded our informal investigation of the allegations in the Petition and determined that cause does not exist to initiate program withdrawal proceedings. The criteria for responding to citizens— petitions for withdrawal of state NPDES programs are

set out in 40 CFR 123.63. These criteria relate generally to the State-s-legal authorities, program administration and enforcement activities (see 40 CFR 123.63(a)(1)-(3)), as well as other components. Those criteria are general in nature and vest EPA with discretion in deciding whether cause exists to commence proceedings to withdraw a state—s NPDES authority. For example, 40 CFR 123.63(a)(3) states that the Administrator may withdraw program approval when the state—sn forcement program fails to comply with the requirements of 40 CFR Part 123, including i) failure to act on permit or other program violations, ii) failure to seek and collect adequate penalties, and iii) failure to inspect and monitor regulated facilities. However, Federal regulations do not specify with any precision the number of times a state must, for instance, fail to act on permit or other program violations before NPDES authority should be withdrawn. Rather, the CWA and the regulations vest EPA with substantial discretion to determine whether a State is failing to meet minimum federal requirements. The structure of the CWA provides for primary NPDES authority to rest with the states, and Congress intended for EPA to exercise its oversight capacity in furtherance of appropriate State regulations of point source discharges under Section 402(b). With no bright line separating an insufficient program from a sufficient one, EPA must use its discretion to determine if the particular actions or inactions of an NPDES authorized state fall within a range of what EPA considers acceptable under the CWA and 40 CFR Part 123.

In certain areas identified in the Petition, EPA concluded that improvements were warranted in the State-s-administration of the program. These areas related primarily to

record keeping, data management and compliance and enforcement. The State has made substantial improvements in these areas. EPA is continuing to work with Louisiana, as EPA works with all State NPDES permitting authorities, to achieve ever greater levels of environmental protection. However, as the program now stands, EPA has concluded that the LPDES program is within the range of NPDES program practices required under the CWA and 40 CFR Part 123, so that withdrawal proceedings are not an appropriate response[1].

Thus, EPA has determined that cause does not exist to commence formal withdrawal proceedings under 40 CFR 123.64(b). EPA will continue to monitor the State—s program, both through routine oversight procedures, as well as through special national initiatives such as the Permitting for Environmental Results (PER) program. If any additional concerns are noted in the State-s-LPDES program as a result of this oversight, they will be addressed at that time.

**FOR FURTHER INFORMATION CONTACT**: Ms. Diane Smith, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 665-7191, or via e-mail to the following address: ~smith.diane@epa.gov™.

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EPA-s-record for this decision contains a ~Crosswalk™between the specific allegations in the Petition and EPA-s-findings in regard to each allegation. To receive a copy of this Crosswalk, please contact Cathy Gilmore at (214) 665-6766 or Renea Ryland at (214) 665-2130.

## CONCLUSION

After evaluation of the comments and other information related to this Federal Register notice regarding the revision to the LPDES program authorization, I hereby provide public notice of the approval for the State of Louisiana to administer, in accordance with 40 CFR Part 123, the LPDES program and denial of the petition for EPA to withdraw LDEQ's authorization to administer the LPDES program.

Dated: Dec 28, 2004

Richard E. Greene,

Regional Administrator

EPA Region 6.

**BILLING CODE _____ (WordPerfect disk)**

Petition to Withdraw the Louisiana NPDES Program
filed by Tulane Environmental Law Clinic on October 9, 2001,
and supplemented on December 19, 2001, February 22, 2002, and September 17, 2002.

## CROSSWALK BETWEEN PETITION ALLEGATIONS AND FINDING AND/OR ACTION TAKEN

On October 9, 2001, a petition for withdrawal of the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program authorization for the State of Louisiana was filed by the Tulane Environmental Law Clinic 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. Supplements to the October 9, 2001, petition were filed on December 19, 2001, February 22, 2002, and September 17, 2002.

The petition, as supplemented ("the Petition"), alleges that the State of Louisiana is not administering the Louisiana Pollutant Discharge Elimination System (LPDES) program in accordance with the CWA, 40 C.F.R. Part 123 or the MOA signed by EPA and LDEQ upon program authorization. Specifically, the Petition alleges:

1) deficiencies in the States's permitting program, including insufficient statutes and regulations to ensure meaningful public participation, lax procedures for identifying point sources and a large backlog of expired permits;
2) deficiencies in the State's compliance monitoring system, including insufficient record keeping regarding self-monitoring reports, inaccurate and inaccessible information on compliance status, inadequate compliance inspections and inadequate guidance to the regulated community;
3) deficiencies in the State's enforcement program, including failure to timely identify NPDES violations, failure to bring enforcement actions sufficient to deter future violations, failure to issue timely enforcement actions, failure to assess and collect penalties, improper use of beneficial environmental projects (BEPs) and failure to comply with the requirements for public participation in the enforcement process;
4) deficiencies in the State's records management; and
5) deficiencies in the State's legal authority, including an inability to appeal permits altered by the administrative review process and a failure to promulgate new authorities necessary to comply with the requirements of NPDES authorization.

Based on these allegations, the Petition requests that EPA initiate formal proceedings to withdraw the LPDES program under Section 402(c)(3) of the CWA and 40 CFR 123.64(b), including a public hearing as provided for under those sections.

In response to the Petition and in accordance with 40 CFR123.64(b), EPA staff conducted

an informal investigation of the allegations in the Petition to determine whether cause exists to commence withdrawal proceedings. EPA's informal investigation included on-site reviews of LPDES files, interviews with LDEQ management and staff, and an evaluation by EPA staff of information and data concerning program implementation provided in writing to EPA by LDEQ. The data collected as a result of the informal investigation supplemented the large body of information already in EPA's possession as a result of EPA's ongoing statutory oversight responsibilities with respect to the LPDES program. Simultaneous with EPA's informal investigation under 40 CFR123.64(b), former Governor M.J. Foster, Jr. convened a special Governor's Task Force to review the administration of the LPDES program, also in response to citizens' concerns.

Both the multi-stakeholder Task Force created by Governor Foster, and EPA, through performance of its general oversight duties and through its informal investigation, found weaknesses in LDEQ's operation of the LPDES program. The Governor's Task Force shared its findings in recommendations to the Governor for improvements in the State program. EPA worked directly with LDEQ in the development of a list of seven performance measures aimed at addressing both EPA's and the citizens' concerns. These seven performance measures, which were forwarded to Governor Foster in a February 14, 2003, letter from EPA Assistant Administrators for the Office of Water and the Office of Enforcement and Compliance Assurance, identified specific actions to be performed by LDEQ within specified time frames in the areas of NPDES permitting and enforcement. The actions included drafting and issuing a specified number of permits, improving public access to LDEQ files, clarifying certain requirements under LDEQ's Penalty rule and its BEP rule, clarifying and implementing procedures in regard to LDEQ's unilateral enforcement actions, revising all LPDES program authorization documents and providing a legal opinion from LDEQ counsel and the Louisiana Attorney General's Office regarding the State's ability to enforce penalties against municipalities. Further discussion of the Performance Measures and the various changes made to the LPDES program can be found in EPA's Federal Register notice of the revised LPDES program authorization documents, 69 FR 50,199, August 13, 2004.

By letter dated May 12, 2004, EPA Regional Administrator Richard Greene informed the Governor of Louisiana that LDEQ had successfully completed all seven performance measures. EPA is greatly encouraged by the timely completion of these performance measures and by the State of Louisiana's renewed commitment to making its NPDES program as strong and effective as any in the Country. In June, 2004, EPA staff performed a follow-up review of LDEQ's administration of the LPDES program in order to assess LDEQ's implementation of the processes and procedures outlined in the revised LPDES program authorization documents. As a result of that review, EPA staff determined that LDEQ was implementing the changes agreed to as a result of the performance measures and that the agency's administration of the LPDES program showed marked improvement.

EPA has concluded our informal investigation of the allegations in the Petition and determined that cause does not exist to initiate program withdrawal proceedings. Below is a

detailed analysis of the allegations made in the Petition. The allegations are in no particular order and do not track the numbering of the allegations in the Petition. For each allegation, EPA concluded the either (1) the allegation failed to demonstrate a deficiency in the State's program, or (2) the allegation raised issues that have been addressed by actions undertaken by the State.

The criteria for responding to citizens' petitions for withdrawal of state NPDES programs are set out in 40 C.F.R. § 123.63. These criteria relate generally to the State's legal authorities, program administration and enforcement activities (see § 123.63(a)(1)-(3)), as well as other components. Those criteria are general in nature and vest EPA with discretion in deciding whether cause exists to commence proceedings to withdraw a state's NPDES authority. For example, Section 123.63(a)(3) states that the Administrator may withdraw program approval when the state's enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including i) failure to act on permit or other program violations, ii) failure to seek and collect adequate penalties, and iii) failure to inspect and monitor regulated facilities. However, Federal regulations do not specify with any precision the number of times a state must, for instance, fail to act on permit or other program violations before NPDES authority should be withdrawn. Rather, the CWA and the regulations vest EPA with substantial discretion to determine whether a State is failing to meet minimum federal requirements. The structure of the CWA provides for primary NPDES authority to rest with the states, and Congress intended for EPA to exercise its oversight capacity in furtherance of appropriate State regulations of point source discharges under Section 402(b). With no bright line separating an insufficient program from a sufficient one, EPA must use its discretion to determine if the particular actions or inactions of an NPDES authorized state fall within a range of what EPA considers acceptable under the CWA and 40 C.F.R. Part 123.

In certain areas identified in the Petition, EPA concluded that improvements were warranted in the State's administration of the program. These areas related primarily to record keeping, data management and compliance and enforcement. As described in the Federal Register notice approving revisions to the State's program and in more detail below, the State has made substantial improvements in these areas. EPA is continuing to work with Louisiana, as EPA works with all State NPDES permitting authorities, to achieve ever greater levels of environmental protection. However, as the program now stands, EPA has concluded that the LPDES program is within the range of NPDES program practices required under the CWA and 40 C.F.R. Part 123, so that withdrawal proceedings are not an appropriate response.

Thus, EPA has determined that cause does not exist to commence formal withdrawal proceedings under 40 C.F.R.§ 123.64(b). We will continue to monitor the State's program, both through routine oversight procedures, as well as through special national initiatives such as the Permitting for Environmental Results (PER) program. If any additional concerns are noted in the State's LPDES program as a result of this oversight, they will be addressed at that time.

**PETITION ALLEGATION #1**

Louisiana's enabling statutes and regulations prevent full public participation in permit decisions. Louisiana law does not provide the public with any right to an adjudicatory review of a permit decision. Moreover, State law does not provide the public with any right to notification of a request for an adjudicatory hearing filed by the permittee nor with any right to notification of the results of such a hearing.

**FINDING AND/OR ACTION TAKEN**

CWA Section 402(b) and 40 C.F.R. Part 123 establish the minimum requirements for public participation in approved State NPDES programs. In regard to permit issuance, States seeking NPDES authorization must have authority sufficient "to insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application." CWA Section 402(b)(2)(B). In addition, 40 C.F.R. § 123.30 requires States to provide an opportunity for judicial review in State Court of the final permit decision that is sufficient to provide for, encourage, and assist public participation in the permitting process. In regard to enforcement, 40 C.F.R. Section 123.27(d) requires States to provide for public participation in the State enforcement process in one of two ways: A) The State must allow intervention as of right in any civil or administrative action to obtain enforcement remedies by any citizen with an interest that is or may be adversely affected; or B) The State must investigate and provide written responses to all citizen complaints, not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation, and publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action. EPA believes LDEQ is in compliance with the Federal requirements for public participation in both permitting and enforcement.

Pursuant to LAC 33:IX.3113, LDEQ provides public notice of every draft permit prepared by the agency and of every notice of intent to deny a permit application. As required by both Federal and State regulations, notice is provided by mailing a copy of the notice to persons on a mailing list that includes any person who requests in writing to be on the list and by publication of the notice in a daily or weekly newspaper within the area affected by the facility or activity. LDEQ also publishes notices of draft NPDES permits on its public website. The public notice on draft permits provides for a public comment period of at least 30 days, during which any interested person may submit written comments and/or request a public hearing. A public hearing is held anytime LDEQ finds, on the basis of requests, a significant degree of public interest in a draft permit, or at the agency's discretion whenever, for instance, a hearing might clarify one or more issues involved in the permit decision. LAC 33:IX.3115 & 3117. Finally, any "aggrieved person" may appeal a final permit action to State Court under La. Rev. Stat. 30:2051.21.

LDEQ chose to provide for public participation in enforcement matters in accordance

with the second method allowed by 40 C.F.R. Section 123.27(d). The State investigates and provides written responses to citizen complaints, and does not oppose intervention by any citizen in adjudicatory hearings held at the request of the respondent regarding any disputed issue of material fact or law arising from a compliance order or penalty assessment. Such adjudicatory hearings are held by an administrative law judge with the Division of Administrative Law, Department of State Civil Service ("DAL"). LDEQ also publishes notice of each proposed settlement of a State enforcement action on its public website at least 45 days prior to final action on the proposed settlement, and, as a condition to settlement, requires respondents to publish notice of the proposed settlement in a newspaper of general circulation in the parish in which the violations occurred at least 45 days prior to final action.

Although LDEQ does not provide specific notice to the public of the request for an adjudicatory hearing by the applicant in regard to permit issuance or by the respondent in regard to an enforcement action, neither the CWA nor implementing Federal regulations require it to do so. However, it is easy enough for persons interested in a particular permit or enforcement matter (the existence of which is widely publicized by LDEQ) to find out if a hearing has been requested, granted or scheduled by contacting the Legal Affairs Division at LDEQ or the Division of Administrative Law at the Department of State Civil Service.

**PETITION ALLEGATION #2**

La. Rev. Stat. 49:992(B) prohibits LDEQ from judicially appealing an erroneous administrative decision that may be in violation of the CWA.

**FINDING AND/OR ACTION TAKEN**

It is true that La. Rev. Stat. 49:992(B) precludes LDEQ from appealing an adverse decision in an adjudication by the Division of Administrative Law, DAL. However, EPA does not believe this restriction on the agency's power requires withdrawal of the State's authority to run the NPDES program. This issue arises only if a request for hearing is filed by the permit applicant within 30 days after he receives notice of LDEQ's issuance of the NPDES permit. If the hearing request is granted by the Secretary of LDEQ, an adjudicative hearing is held by an administrative law judge (ALJ) with DAL, an agency independent of LDEQ. The ALJ's decision concerning the permit appeal is final, and under State law, LDEQ cannot unilaterally revise an adverse decision or appeal it to State Court. Therefore, in theory, an ALJ could order LDEQ to make revisions to a permit that LDEQ does not believe comport with the CWA.

However, there are additional safeguards in place to insure final issuance of an NPDES permit that meets all the requirements of the CWA. First of all, the ALJs hearing the permit appeals are bound by the requirements of the CWA and the LPDES program in the same manner as LDEQ, and any decision they make should reflect those requirements. Further, under La. Rev. Stat. 30:2050.21, any "aggrieved person" may appeal a final permit action to State District Court. "Aggrieved person" is defined by La. Rev. Stat. 30:2004(17) as any "natural or juridical person

who has a real and actual interest that is or may be adversely affected by a final action under this Subtitle." Thus, even though LDEQ cannot appeal an adverse NPDES permit decision by an ALJ, members of the general public, so long as they meet the broad definition of "aggrieved person," may. The public's right to appeal is bolstered by the fact that any decision by an ALJ under these circumstances that results in a major modification to an NPDES permit requires LDEQ to prepare a new draft permit and notice it to the public for public comment. See Louisiana Administrative Code (LAC) 33:2903. Under LAC 33:3123, after the close of the public comment period, LDEQ must notify each person who has submitted written comments or requested notice of the final permit decision, and such notice must include reference to the procedures for appealing the decision.

Another safeguard to LDEQ's permit issuance process is EPA's oversight role. Under the Memorandum of Agreement (MOA) signed by LDEQ and EPA upon authorization of the LPDES program, if the terms of any permit, including any permit over which EPA has waived review, are affected in any way by administrative action, LDEQ must forward to EPA a copy of the administrative decision, along with a copy of the permit affected with any changes identified. EPA has the right to object to such a modified permit under Section 402(d)(2) of the CWA and 40 CFR Section 123.44. If EPA objects to such a permit and LDEQ fails to revise the permit to comply with EPA's objections, exclusive authority to issue the permit reverts to EPA pursuant to 40 CFR Section 123.44(h)(3). With respect to enforcement decisions, EPA retains independent enforcement authority in authorized NPDES States under CWA § 402(i). Further, the MOA specifically provides for EPA's ability to proceed with its own enforcement action if it finds an action by the State to be insufficient.

Finally, although a DAL ALJ ordering LDEQ to make revisions to a permit that LDEQ does not believe comport with the CWA is a theoretical concern, the concern is at this point only theoretical. Neither EPA nor LDEQ know of any instance since the creation of the DAL in which this has occurred.

As a result of the additional safeguards in place, EPA believes LDEQ's inability to appeal an adverse decision of an ALJ does not undercut LDEQ's ability to implement an adequate LPDES program. However, EPA is aware of the fact that Acts 739 and 1332 of the 1999 Regular Session of the Louisiana legislature, which created the DAL and which precluded any agency of the State from seeking judicial review of a decision of a DAL ALJ, have been ruled unconstitutional by the 19th Judicial District Court in Louisiana. (See, Judge Janice C. Clark's judgment in J. Robert Wooley, in his capacity as Commissioner of Insurance, State of Louisiana v. State Farm Fire and Casualty Insurance Company, et al., Suit No. 502,311 (19th J.D.C. 3/15/04). The District Court's ruling is currently on appeal to the Louisiana Supreme Court, which heard oral argument on September 7, 2004, and has taken the matter under advisement. Should the Supreme Court's ruling on this matter indicate the need to revisit this issue, EPA will do so at that time.

**PETITION ALLEGATION #3**

Procedures for identifying Point Sources are inadequate. The petitioners cite Pelts and Skins, L.L.C. as a recent illustration of this problem. Pelts and Skins, L.L.C. owns an alligator farm in St. Tammany Parish, Louisiana, which according to the Petition does not have a LPDES permit nor has ever applied to LDEQ for a permit.

**FINDING AND/OR ACTION TAKEN**

LDEQ received two complaints regarding the Pelts and Skins facility in St. Tammany Parish, on March 16 and April 11, 2000. ~~The Company was issued a Compliance Order with Notice of Potential Penalty #WECN000207 on April 9, 2001, and this document went through the hearing process.~~ The March 16, 2000, complaint was investigated on March 17, 2000, at which time the facility was found to have ceased discharge. The April 11, 2000, complaint was investigated on April 17, 2000, and no evidence of discharge was found. The facility installed a permanent no discharge process with the assistance of the USDA National Resource Conservation Service and this was verified by an inspection conducted by LDEQ on October 1, 2002. Because there is no discharge from the facility, the facility does not need a permit. No additional complaints have been filed and no discharge should be expected unless there is an unusual rainfall event.

Identification of point sources not self-identified through the submittal of a permit application must be made through routine inspections or as a result of citizen complaints. Although the Program Description submitted to EPA by LDEQ in 1996 included a description of LDEQ's inspection procedures, EPA was concerned, based on its informal review of the LPDES program, that the 1996 program authorization documents were outdated and did not correctly reflect the processes and procedures currently in use at LDEQ. EPA addressed this concern through Performance Measure 6, which asked LDEQ to submit to EPA updated versions of its program authorization documents, including the Memorandum of Agreement between EPA and the State, the Program Description and the Attorney General's Statement. LDEQ completed this performance measure and the revised program documents are ready for final approval by EPA. In revising its Program Description, LDEQ included a number of new SOPs detailing the processes and procedures utilized by the agency in implementing various aspects of the LPDES program. With respect to inspections and the investigation of citizen complaints, LDEQ created SOP 1108 - Compliance Inspections Conducted by OEC/Surveillance Personnel; SOP 1295 - Investigating Environmental Complaints; and SOP 1529 - SOP for Receiving and Routing Incident Notifications. With respect to enforcement of violations discovered through such inspections or investigations, e.g, for discharging without a permit, LDEQ created SOP 1215 - SOP for Enforcement Actions. EPA believes these new SOPs will not only enable LDEQ to more efficiently track and identify point sources subject to the LPDES program, but they will also enable the public to more easily track the State's progress in doing so.

**PETITION ALLEGATION #4**

LDEQ has an enormous backlog of expired permits.

**FINDING AND/OR ACTION TAKEN**

LDEQ did have a large backlog of expired permits. This issue was addressed through Performance Measure 1. LDEQ submitted to EPA on May 16, 2003, a LDPES Permit Issuance Strategy aimed at addressing the backlog. LDEQ completed this performance measure by drafting and issuing 13 major and 100 minor permits by June 30, 2003, and 35 major and 300 minor permits by December 31, 2003. LDEQ is currently on track to meet the 10% backlog reduction target set by EPA HQ for majors, consistent with the May 16, 2003, Permit Issuance Strategy, and will meet that goal for minors by 2005.

**PETITION ALLEGATION #5**

LDEQ has insufficient record keeping practices as to self-monitoring reports, namely LDEQ fails to ensure that self-monitoring reports for minor facilities are submitted or to review those reports that are submitted.

**FINDING AND/OR ACTION TAKEN**

Both EPA and the Louisiana State Auditor noted concerns with LDEQ's record keeping practices. However, LDEQ has implemented various changes to improve its performance in this area. With regard to Discharge Monitoring Reports (DMRs) for minors, LDEQ now enters a specific outfall designated as "DMRR" into PCS for tracking receipt of DMRs for each minor permitted facility. This allows a determination to be made as to whether at least one DMR has been received for the monitoring period. The date of receipt of the DMR is also captured in this entry and a report is run on a quarterly basis to detect facilities that failed to submit a DMR for the monitoring period. Each 20$^{th}$ DMR is pulled from the groups of DMRs being entered into PCS and a file review is conducted in order to determine if significant violations were reported. If action is determined to be warranted the file is referred to enforcement for issuance of that action. This process is conducted at the time each batch of DMRs is entered into the system. LDEQ intends to expand the scope of information being entering into PCS to include all DMR data reported for all permitted minor facilities.

**PETITION ALLEGATION #6**

LDEQ fails to provide accurate and accessible information on compliance status. Information in LDEQ's Permit Compliance System (PCS) is neither accurate nor up-to-date and Violation Summary Logs are not consistent and/or accurate. There are serious problems with LDEQ's records management practices, e.g., documents are missing from files and there is an excessive backlog of material needing to be filed. LDEQ's new computer database makes it

more difficult to locate misfiled documents because it does not allow searches for the most fundamental compliance documents, rendering the data essentially inaccessible to the general public.

## FINDING AND/OR ACTION TAKEN

_____This allegation was addressed by Performance Measure 2. Performance Measure 2 asked LDEQ to submit a draft plan to EPA to improve public access to LDEQ files, including expanding the indexing system and providing technical and administrative assistance to the public. It also asked LDEQ to develop and implement quality assurance/quality control plans for the State paper and imaging systems and for LDEQ's input into national data systems. LDEQ developed the suggested plans and began implementing them by December 31, 2003. EPA's June 2004 audit of the LPDES program showed significant improvement in the area of records management. EPA noted particular improvements in the process for utilizing the Electronic Data Management System (EDMS). The computer provided for EPA use in retrieving documents was determined adequate and included the current version of the imaging software which resulted in no delays in accessing documents. While attempting to locate documents in the system, it was noted that document titles included additional description, e.g., inspection reports, orders, settlements, etc. which was helpful in the identification process. The percentage of documents located during this review was found to have improved by 46% for minor facilities and 38% for major facilities from the March 2003 review. There were no documents found to be imaged under the incorrect identification number for the files included in the search. Because DMRs are produced on a type of paper that does not scan well, those documents are maintained as paper records in files onsite. These documents were readily available and were found to be filed under the correct record numbers.

## PETITION ALLEGATION #7

LDEQ fails to conduct adequate compliance inspections. Although La. Rev. Stat. Ann § 30:2012 requires LDEQ to inspect all major facilities at least once per year, LDEQ failed to inspect 68 of 198 (34%) permitted major at some point over the last five years. LDEQ failed to inspect 15% of these 68 facilities on multiple occasions. LDEQ's policies require inspection of minor facilities once every three years. However, of the approximately 6,131 minor permittees, LDEQ never inspected 10% of the facilities that required inspection over a nine year period from 1990-1999.

## FINDING AND/OR ACTION TAKEN

Federal regulations do not define a precise number or type of inspections that must occur. Rather, the regulations at 40 CFR 123.26 (e) (5) require States to show that they have "procedures and ability" to inspect all major dischargers and all Class I sludge management facilities, where applicable. Thus, the regulations require a showing of capacity and a commitment to a level-of-effort for inspections, reserving discretion to the two sovereign

governments to decide what number of inspections to undertake, and the identity of the facilities to be inspected. These judgments are matters of enforcement discretion, and under this discretion, EPA and LDEQ have agreed, and included commitments in the Annual Performance Partnership Grant Agreement, that LDEQ will inspect 90% of the Major, 92-500 Minor and Significant Minor facilities annually. It was also agreed that the significant minor definition would be determined and agreed upon, by EPA and LDEQ, prior to the beginning of each inspection year. For the current inspection year, beginning 7/1/04, the significant minor universe has been determined to represent the Total Environmental Solutions, Incorporated (TESI) facilities included in the Consent Decree (approximately 172 facilities).

There is not a specific targeting strategy utilized in selecting the facilities to be included in the 90%, because the number represents the majority of the facilities in the universe, and because LDEQ considers the 90% to be a hedge on perfection, due to the fact that the intent is to inspect 100%. Based on evaluation of data for the last inspection year, beginning 7/1/03 and ending 6/30/04, EPA determined that LDEQ conducted inspections at 98% of the Major and 92-500 Minor facilities. In the future, because of national priorities, the percentage may be reduced, and at that time, factors for selection will be considered, such as environmental harm, location, and compliance history. In addition to meeting and exceeding the commitments agreed in the Annual Performance Partnership Grant Agreement, LDEQ has also conducted inspections at nearly 3,000 facilities covered by minor or general permits during each of the last three inspection years. LDEQ plans to inspect all of the general permit sewage treatment plants every 3 years. Currently, there are more than 4000 of these facilities. LDEQ has also implemented a Regional Circuit Rider Approach, which results in the issuance of a Notice of Deficiency (NOD) accompanied by an Expedited Penalty Agreement of up to $3,000 for minor violations. Noncompliance with the NOD will result in a referral to Enforcement for further action.

**PETITION ALLEGATION #8**

LDEQ fails to provide adequate guidance to the regulated community. LDEQ had no public relations director for almost two years, seldom publishes its informational magazine and rarely issues press releases.

**FINDING AND/OR ACTION TAKEN**

Neither the CWA nor Federal regulations require States to maintain specific public relations practices, other than the public participation requirements set out in 40 C.F.R. Part 123. As discussed under Petition Allegation #1, LDEQ is compliant with all Federal requirements for public participation in both permitting and enforcement.

**PETITION ALLEGATION #9**

LDEQ fails to timely identify NPDES violations. The Louisiana State Auditor's review of 42 minor facility permit files indicated 675 violations, 373 of which LDEQ never addressed

with an enforcement action. Further, the State Auditor's report found there were no indications LDEQ ever even reviewed the files and may not have even known violations occurred. When LDEQ did identify violations, it often didn't even send a warning letter. An EPA audit of the program in 1997 found that inspection deficiencies were unaddressed by written correspondence 56% of the time. The State Auditor's report showed the situation had worsened over the next 3 years . Of 76 total inspections in 1998 and 1999, 42 resulted in an unsatisfactory rating in one or more areas, however 29 of the 42 (69%) did not result in even a warning letter.

**FINDING AND/OR ACTION TAKEN**

This allegation was addressed by Performance Measure 5, which asked LDEQ to develop and implement procedures and policies to issue unilateral enforcement actions that require corrective action to address violations in a timely manner as defined by EPA oversight guidance. LDEQ revised both its Legal Division and Enforcement Standard Operating Procedures (SOPs) to address this Performance Measure. Changes in LDEQ's procedures were already showing positive results in EPA's June 2004 audit of the LPDES program. Based on the facility reviews conducted and review of information received by EPA during the year, EPA found that in the majority of instances where the inspection noted areas of concern actions were issued within an average of 20 days. It was also noted that in many of the instances where a warning letter was issued as the initial action, there was a follow-up enforcement order issued within 60 days, escalating that initial action. Instances of significant non-compliance were addressed within the time frames established in the oversight guidance. EPA also determined that both the number of facilities having violations addressed, as well as the average time without action, had improved, by 10% and 3 months, respectively. This determination was made without regard to the type or severity of the violation and did not exclude isolated or infrequent occurrences.

**PETITION ALLEGATION #10**

LDEQ's lack of enforcement fails to deter future non-compliance and violations. The State Auditor found 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."

**FINDING AND/OR ACTION TAKEN**

As discussed in the response to Allegation #9, EPA's June 2004 audit of the LPDES program showed improvements in LDEQ's enforcement program. EPA is convinced continued improvement in the LPDES enforcement program will serve to deter noncompliance.

**PETITION ALLEGATION #11**

LDEQ fails to issue timely enforcement actions. The State Auditor found "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."

## FINDING AND/OR ACTION TAKEN

LDEQ's issuance of timely enforcement actions is discussed in response to Allegation #9. As noted in that response, EPA's June 2004 audit of the LPDES program indicated improvement in this aspect of the program as a result of changes made by LDEQ in response to Performance Measure 5. During the June 2004 audit, EPA randomly reviewed 26 enforcement files ~~in which enforcement actions had been taken to address violations. EPA determined an appropriate enforcement action had been taken in all 26 instances, and in 25 out of the 26, the action had been taken in a timely manner. Only 1 enforcement action, taken against a minor facility 22 months after the first violation was detected, was determined not to have been timely.~~ and in all of the instances in which an enforcement action was warranted and issued, only one (1), taken against a minor facility, was determined to have been untimely.

## PETITION ALLEGATION #12

LDEQ fails to assess and collect penalties and LDEQ's use of Beneficial Environmental Projects (BEPs) violates CWA penalty requirements. Of 11,500 enforcement citations 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. (quoting NY Times Regional Newspaper article). The State Auditor's Report indicated LDEQ assessed 33 penalties in 1998 and 1999, totaling $946,147. However, LDEQ never collected $441,188 (47%) of these penalties. In regard to beneficial environmental projects, LDEQ approved projects that included 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.

## FINDING AND/OR ACTION TAKEN

Penalties and BEPs were addressed by Performance Measures 3 and 4. In response to Performance Measure 3, LDEQ added the following sentence to its Penalty Rule, LAC 33:1.705G: "A cash penalty should be collected unless it has been demonstrated and documented that the violator cannot pay the cash penalty." The amendment to the rule became final on March 20, 2004. In response to Performance Measure 4, LDEQ updated its SOP related to BEPs, SOP 1569 - SOP for Settlement Agreements. Subsequent to the program audit conducted in March 2003, LDEQ has shown improvement in the area of assessing and collecting penalties. During the June 2004 audit, EPA noted that LDEQ has implemented a new procedure for documenting the penalty rationale and penalty calculations, including economic benefit, for settlement negotiations. The facility file reviews also indicated that LDEQ has begun providing documentation of assessment and collection of penalties. In addition, LDEQ has committed to aggressively pursue collection of all penalty dollars, including, if necessary, going to court to obtain judgment for those penalties that remain unpaid after a reasonable period of time.

## PETITION ALLEGATION #13

LDEQ has failed to promulgate new authorities as necessary to comply with its NPDES authorization. Examples given include standards for the use and disposal of sewage sludge, permit application requirements for publicly owned treatment works, effluent limitation guidelines for a subcategory of the pulp, paper, and paperboard industry, regulations regarding test procedures for cyanide, standards for landfills, and standards for hazardous waste combustors.

**FINDING AND/OR ACTION TAKEN**

EPA found no evidence that LDEQ is not updating its program to comply with new requirements under its NPDES authorization. In regard to the examples given, LDEQ did not take authorization for the Federal sewage sludge program, and test procedures for cyanide, standards for landfills, and standards for hazardous waste combustors do not fail within the purview of the NPDES program. EPA could not find any deficiencies with LDEQ's permit application requirements for publicly owned treatment works or with effluent limitation guidelines for a subcategory of the pulp, paper, and paperboard industry.

**PETITION ALLEGATION #14**

The State fails to comply with the public participation requirements of its NPDES authorization in that State law does not provide the public with any right to notice or any opportunity to comment or be heard in administrative appeals filed by permittees regarding LDEQ permit decisions. Because the public never gets notice of such appeals, has no right of intervention should they somehow learn of such appeals, has no right to notice or comment on proposed settlements of such appeals, and has no notice of decisions on such appeals, citizens have no opportunity to seek judicial review of anything related to such appeals. LDEQ fails to comply with the public participation requirements of authorization in the area of enforcement as well. For the same reasons articulated for permitting, State law does not provide for public notice, comment, or right of intervention in any enforcement actions that take place in the administrative appeals forum.

**FINDING AND/OR ACTION TAKEN**

As detailed in EPA's response to Allegation #1, LDEQ is in compliance with Federal public participation requirements for both permitting and enforcement. Although LDEQ does not provide specific notice to the public of the request for an adjudicatory hearing by the applicant in regard to permit issuance or by the respondent in regard to an enforcement action, neither the CWA nor implementing Federal regulations require it to do so. However, it is easy enough for persons interested in a particular permit or enforcement matter (the existence of which is widely publicized by LDEQ) to find out if a hearing has been requested, granted or scheduled by contacting the Legal Affairs Division at LDEQ or the Division of Administrative Law at the Department of State Civil Service, which is the agency in charge of such hearings. LDEQ does not oppose intervention by any citizen in adjudicatory hearings held at the request of

the applicant or respondent, and any aggrieved person may appeal a final permit action or a final enforcement action to the Nineteenth Judicial District Court pursuant to La. Rev. Stat. 30:2050.21. LDEQ also publishes notice of each proposed settlement of a State enforcement action on its public website at least 45 days prior to final action on the proposed settlement, and, as a condition to settlement, requires respondents to publish notice of the proposed settlement in a newspaper of general circulation in the parish in which the violations occurred at least 45 days prior to final action.

**PETITION ALLEGATION #15**

LDEQ's new filing system does not provide accurate and accessible information on compliance status, and is, in fact, far worse than the previous practice of maintaining hard copy files. LDEQ is not scanning numerous public records regarding CWA permitting and compliance into its computer system, e.g., LDEQ is not scanning internal memoranda, notes to the file, e-mails, telephone logs and similar documents into the computer. LDEQ is destroying these vital public records created by LDEQ employees during the course of their employment or making them unavailable for public access.

**FINDING AND/OR ACTION TAKEN**

As discussed in the response to Allegation #6, LDEQ has made significant improvements in the area of records management, particularly relating to use of its new electronic data imaging system, EDMS. In response to Performance Measure 2, LDEQ developed and implemented a quality assurance/quality control plan for the State's new imaging system, which appears to have greatly improved the ability to access documents required to be made available to the public under the NPDES program. These documents include such items as the permit application, the draft permit, the final permit, inspection reports, enforcement orders, etc. In its June 2004 Audit of the LPDES program, EPA found that the percentage of such documents searched for and located had improved by 46% for minor facilities and 38% for major facilities from the March 2003 review. However, EPA does not as a general rule search for such items as e-mails or telephone logs as these are not specifically required to be made available to the public under the NPDES program. Whether such documents are "public records" required to be maintained and made available to the public under the Louisiana Public Records Act is a matter of State law.

**PETITION ALLEGATION #16**

LDEQ has attempted to destroy public records required to be kept under the State's authorization, and that demonstrate compliance or noncompliance with the CWA. Contamination, the grounds stated for the destruction, is untrue. Petitioners asked EPA to fully investigate this situation to determine if records required to be maintained under Louisiana's CWA authorization are involved.

**FINDING AND/OR ACTION TAKEN**

As discussed in the responses to Allegations # 6 and #15, problems with LDEQ's records management were addressed by Performance Measure 2, and EPA's most recent audit of the LPDES program indicated the State has made significant improvements in this area. In its review of LDEQ's LPDES files, EPA found no indication that documents required to be maintained under the LPDES program had been destroyed or were missing on a large scale basis.

**PETITION ALLEGATION #17**

LDEQ may not have adequate authority to issue permits that insure compliance with the CWA, to inspect, monitor, enter and require reports that insure compliance with the CWA, and to abate violations of the permit or the permit program because there is no legal authority under the CWA or State law to allow or enforce an electronic signature, or a signature that has been scanned into a computer file.

**FINDING AND/OR ACTION TAKEN**

Section 2043 of the Louisiana Environmental Quality Act specifically provides for the use of electronic documents by LDEQ. Section 2043(D) states that "[s]ubject to such guidelines and limitations as may be promulgated by the department, electronic signatures and the use of electronic documents are hereby authorized" and that an electronic document may be "used to satisfy any requirement otherwise required by this Subtitle." An electronic document is defined under the section as "any document in electronic, magnetic, optical or other format, except an audio recording, used to create, transfer, approve, or store the document for subsequent retrieval."

**PETITION ALLEGATION #18**

LDEQ is not capable of adequately administering its CWA authorization because the agency itself admits it has inadequate funding and staff. As LDEQ secretary Dale Givens stated in an October 23, 2001 article, LDEQ needs more money "just to be able to tread water."

**FINDING AND/OR ACTION TAKEN**

EPA found no evidence that LDEQ is unable to administer an adequate NPDES program due to inadequate funding and staff. LDEQ's LPDES program receives the bulk of its funding (83%) from the States' Environmental Trust Fund. The Environmental Trust Fund receives it funding from permit fees and administrative penalties. Thirteen percent of funds that support the LPDES program are from the Federal 106 Grant Program. In the first quarter of calendar year 2003, EPA and LDEQ agreed that in order to document that the State had the capabilities to administer the LPDES program, LDEQ would issue 35 major and provide coverage for 300 minor individual permits for calendar year 2003. All work on the permits was to be completed by LDEQ staff. Contractor drafted permits were not included in the count. For calendar year

2003, LDEQ drafted and issued 36 major permits and provided coverage for 382 individual minor facilities. Coverage for 236 of the minor permits were provided by individual permits and the remaining permits (186) were provided coverage under general permits. All of this was completed without contractor support.

In calendar year 2004, LDEQ continues to make excellent progress in its permit issuance. As of August 2004, LDEQ has a major individual permit universe of 254 permits of which 84% are current and a minor permit universe of 6042 (individual and non-storm water general permits) of which 92% are current. LDEQ's overall backlog rate for individual majors, minors, and non-storm water general permits for August is 8%. Only one state in Region 6 has a better overall permit issuance rate. LDEQ has committed to issuing 60 individual major and 300 individual minor permits for calendar year 2004. Of the 28 major permits and 303 minor permits issue so far in calendar year 2004, six major permits and 39 minor permits were written by a contractor.

**PETITION ALLEGATION #19**

Shortly after obtaining LPDES authorization, the Louisiana legislature approved Act. No. 739, S.B. No. 636. This Act created a Division of Administrative Law in the Department of Civil Service, which 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 LDEQ's administrative hearings process as described in the program authorization documents on which EPA had approved the LPDES program. LDEQ knew its representation to EPA regarding its administrative appeals process was inaccurate months before program approval but failed to revise the process or notify EPA of the change.

**FINDING AND/OR ACTION TAKEN**

LDEQ did make EPA aware of Act 739 of the 1995 Regular Session, which took effect on October 1, 1996, and created the new Division of Administrative Law within the Department of Civil Service. A discussion of the Act and its possible effect on the LPDES program was included in the Program Description submitted to EPA by LDEQ in 1995 as part of the State's application to assume the NPDES program. A copy of the Act was also included with a list of La. Procedural Changes attached to the 1995 Louisiana Attorney General's Statement submitted as part of the State's application.

**PETITION ALLEGATION #20**

Since 1997, EPA has consistently noted deficiencies in LDEQ's enforcement activities, citing problems with enforcement actions not being initiated in all appropriate instances and improper procedures being followed in some instances in which enforcement actions were initiated.

**FINDING AND/OR ACTION TAKEN**

EPA did find problems with LDEQ's enforcement program, both as a result of audits conducted in accordance with its CWA oversight responsibility and as a result of the informal investigation performed in response to the Petition. However, as discussed in detail herein in responses to Allegation Numbers 9 & 12, LDEQ has taken significant actions to address these problems. EPA believes LDEQ's enforcement program is in compliance with the requirements of the CWA and 40 C.F.R. Part 123 and that the program should continue to improve.