TULANE ENVIRONMENTAL LAW CLINIC

Ref. 101-55.1

October 14, 2013

Via E-Mail to ted.broyles@la.gov and U.S. Mail
Ted Broyles
Office of the Secretary, Legal Division
Louisiana Department of Environmental Quality
P.O. Box 4302
Baton Rouge, LA 70821-4302

Re: Comments of Louisiana Environmental Action Network and Stephanie Anthony on the Proposed ExxonMobil/LDEQ Settlement Agreement;
Agency Interest Nos.: 286, 2638, 3230
Settlement Tracking No: SA-MM-13-0030

Dear Mr. Broyles:

The Louisiana Environmental Action Network (LEAN) and Stephanie Anthony respectfully submit the following comments on the proposed settlement agreement between the Louisiana Department of Environmental Quality (LDEQ) and ExxonMobil ("Agreement"). These comments focus mostly on those aspects of the settlement affecting the Baton Rouge Chemical Plant, AI No. 286 ("Chemical Plant"). However, to the extent that the comments apply generally, they should be considered as to all facilities covered by the agreement. LEAN and Ms. Anthony reserve the right to rely on comments submitted by any other person or entity in these proceedings.

LEAN is an incorporated, non-profit community organization whose purpose is to preserve and protect Louisiana's land, air, water, and other natural resources, and to protect the organization's members who live, work, and recreate within the state from threats of pollution, including harmful emissions from chemical plants. LEAN has members who live, work, and recreate in or near Baton Rouge, an area designated as non-attainment for ozone. Members of LEAN live near the Chemical Plant and suffer health effects from emissions released into the air by the Chemical Plant.

Ms. Anthony is a long-time resident of Baton Rouge and resides less than six miles from the Chemical Plant. Ms. Anthony is concerned about the health, safety, and negative environmental impacts associated with ExxonMobil's activities at this location.

LEAN and Ms. Anthony appreciate this opportunity to comment on LDEQ's proposed settlement agreement with ExxonMobil. However, they believe that the Agreement will not remedy the violations from the Chemical Plant.

COMMENTS

I. LDEQ SHOULD DISCLOSE THE AMOUNT OF PENALTIES IT COULD HAVE RECOVERED AND HOW IT ARRIVED AT ITS TOTAL PENALTY AMOUNT.

The Agreement requires ExxonMobil to pay a total of approximately 2.3 million dollar in penalties and for Beneficial Environmental Projects for numerous violations covering an approximately three-year period. While LEAN and Ms. Anthony applaud the imposition of penalties in general and BEPs in particular, the LDEQ should disclose to the public the maximum amount of penalties it could have recovered for violations from this three-year period. LDEQ must have entered negotiations with ExxonMobil with a maximum figure calculated, as it would have to have served as a starting point from which LDEQ and ExxonMobil bargained down in return for things like BEPs. As LDEQ is in the best position to know what ExxonMobil's violations were and what the statutory penalties could be for those, it should disclose this. It should then disclose how it arrived at the 2.3 million dollar figure which it ultimately determined was appropriate for ExxonMobil to pay as part of the Agreement.

Likewise, again, while LEAN and Ms. Anthony applaud the use of BEPs in place of civil penalties, they would like for LDEQ to disclose how it chose the particular BEPs which are included in the Agreement.

II. LANGUAGE IMPLEMENTING SPILL PREVENTION CONTROL AND COUNTERMEASURES PROJECTS DOES NOT ENSURE IMPLEMENTATION AND COMPLETION OF THESE PROJECTS.

This settlement agreement requires ExxonMobil to "within sixty (60) days of the effective date of [the agreement], submit to the Enforcement Division, a schedule for the completion of the long term Spill Prevention Control and Countermeasures (SPCC) projects." Agreement ¶ XX. Further, this Agreement states that the SPCC programs shall not commence until formal approval. This SPCC constitutes the only injunctive relief required of ExxonMobil.

First, LDEQ should disclose why it determined that this was the only injunctive relief it should require for the many violations covered by the Agreement. However, even with respect that that injunctive relief, the Agreement lacks details essential to ensure implementation of the SPCC program and to enable LDEQ to enforce a failure by ExxonMobil to implement these measures or to meet its schedule for implementation. First, and most basically, the agreement does not expressly require ExxonMobil to

implement the SPCC measures. Rather, it requires ExxonMobil to submit a schedule and spend one million dollars on the projects, but never directly states that ExxonMobil must do the projects. This is essential to enforceability. Second, the Agreement lacks any detail on ExxonMobil submission and LDEQ approval of the SPCC projects themselves. Instead, the agreement provides for ExxonMobil to submit a ***schedule*** for the projects. Even with respect to the required schedule, the Agreement never says ExxonMobil must meet the schedule, once approved. With regard to LDEQ approval, the Agreement is vague and unclear as to whether LDEQ approval is required for the projects themselves or only for the schedule for completion of the projects. Will ExxonMobil have complete control, with no oversight, of what the SPCC measures will be, and LDEQ will only have say-so over the schedule? Or must ExxonMobil get LDEQ's approval for the projects themselves? The Agreement's language leaves either interpretation plausible.

This language should be changed to reflect that: 1) ExxonMobil must implement SPCC measures; 2) ExxonMobil must get LDEQ approval of the SPCC measures; and 3) ExxonMobil must get LDEQ approval of the schedule to implement the measures. Additionally, LDEQ should provide for public notice and comment on the SPCC projects themselves and the schedule for their implementation. As this is the only injunctive relief required of ExxonMobil, the citizens – the ones affected by spills – should have a say in how ExxonMobil and LDEQ plan to fix it. Whether or not LDEQ intends to publicly notice these plans, the Agreement should provide for it.

Additionally, the Agreement should provide for what happens if LDEQ does not approve the plan and/or schedule. As it stands, if ExxonMobil's initial plan/schedule is partially or totally disapproved by LDEQ, there is nothing in this Agreement that ensures ExxonMobil will submit another plan or that SPCC projects will ever be implemented. In addition to making this section unenforceable, this omission gives incentive to ExxonMobil to submit a deficient plan, as doing so arguably relieves it of any deadlines under the Agreement.

The United States Environmental Protection Agency (EPA) uses more detailed provisions in its settlement agreements and consent decrees when discussing injunctive relief. For example, in a Consent Decree between EPA and INEOS ABS Corp., for each of the numerous injunctive relief requirements, EPA clearly provided the obligation for the company to implement the injunctive relief. So, for instance, with respect to flare monitoring injunctive relief, the Decree states: "INEOS shall adopt the following new and/or revised Standard Operating Procedure (SOP) for compliance with its Flare Monitoring Requirements . . . ." U.S. v. INEOS ABS Corp., Case No. 1:09-CV-545, Consent Decree at 18 (S.D.Ohio 2009).[1] With respect to duct leak detection and repair, the Decree states: "Within thirty (30) Days of approval of the SOP pursuant to Paragraph 13, INEOS shall implement the approved Main Duct SOP at the Facility . . . ." *Id.* at 25. Every injunctive relief measure contains clear language requiring implementation, even those which require a plan and schedule before implementation.

[1] This Consent Decree is attached as Attachment A.

The EPA INEOS Consent Decree also clearly states that the companies must get EPA approval of plans for injunctive relief projects, rather than just approval of the schedule for implementation. So, for example, with respect to the duct leak detection and repair injunctive relief, the Consent Decree states: "Within thirty (30) Days of the Effective Date of the Consent Decree, INEOS shall submit to U.S. EPA and Ohio EPA ***for approval*** pursuant to Paragraph 13 a new and/or revised SOP . . . ." *Id.* at 25. With respect to EPA approval of schedules for implementation of these measures, the EPA Consent Decree generally provides a mandatory schedule for implementation within the Consent Decree itself. So, for example, for a required Biofilter project, the Decree contains a schedule for submission of the project work plans, initiation of construction, and completion. *Id.* at 23-24.

Further, EPA's Consent Decrees include detailed information about procedures for implementation of projects in the event that the initial plan is either disapproved in part or in whole and allows EPA to approve plans with specified conditions. Thus, in the EPA INEOS ABS Consent Decree, it states that in the event of disapproval, the company "shall, within forty-five (45) Days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan… for approval in accordance with [the requirements for the initial submission]." *Id.* at 14. If the second plan is still not approved in its entirety, "U.S. EPA, after consultation with the State, may again require [the company] to correct any deficiencies, in accordance with [the above requirements], or may itself correct any deficiencies, subject to [the company's] right to invoke Dispute Resolution and the right of U.S. EPA and the State to seek stipulated penalties as provided." *Id.*

LDEQ should amend the Agreement to include language like that in the EPA INEOS ABS Consent Decree for each of the problems noted. LDEQ should include some sort of contingency plan like the one EPA uses for situations in which the initial plans are not approved. These details need to be added to this Agreement, so that there is a definite plan for implementation of SPCC programs. With nothing more than a timeline for submitting an initial plan for approval, this Agreement does not ensure that any SPCC programs will be implemented.

III. THE AGREEMENT IMPOSES NO CONSEQUENCES ON EXXONMOBIL FOR FAILURE TO COMPLY WITH ITS PROVISIONS.

A critical component of any Settlement Agreement which purports to permanently and irrevocably resolve numerous violations of the law should be consequences of failure to comply with its provisions. However, the Agreement imposes no consequences at all on ExxonMobil if it fails to comply with the terms of the Agreement. So, if ExxonMobil fails to implement the Spill Control Measures, fails to submit the Spill Control plan, or fails to submit the schedule for implementation of the Spill Control measures, it suffers no consequences. If ExxonMobil fails to pay the money for the BEPs, nothing happens.

If ExxonMobil fails to pay LDEQ the $300,000 penalty, ExxonMobil suffers nothing. If ExxonMobil fails to pay the Stipulated Penalties, there is no consequence.

Essentially, then, compliance with the Agreement is completely within ExxonMobil's control. ExxonMobil can pick and choose which provisions it wants to comply with and which it does not, and LDEQ can do nothing about it. This is essentially the same situation that existed before the Settlement Agreement was entered into, so one can say that the Agreement accomplishes nothing for LDEQ, though it arguably accomplishes a lot for ExxonMobil, as LDEQ "hereby compromise[s] and settle[s]" all claims.

EPA Consent Decrees do not give away EPA's enforcement rights so easily. They include provisions imposing consequences on companies for failure to comply with the decree's provisions (and, of course, being Consent Decrees rather than Settlement Agreements, the attached examples also have the power of the court behind them, which is absent here). EPA includes a penalty assessment for each failure to comply with a Consent Decree requirement. An example of these extensive fines assessed under EPA Consent Decrees can be found in Section XI of the Illinois EPA/ExxonMobil Consent Decree.

More specifically, in EPA's and LDEQ's Consent Decree with ExxonMobil, EPA lays out fines in the event that ExxonMobil fails to timely implement Environmentally Beneficial Projects, to pay civil penalties, and to pay stipulated penalties:

> For failure timely complete implementation of a SEP required under Section VIII, per day:
>
> | Period of Non-Compliance | Penalty per day |
> |---|---|
> | 1st through 30th day after deadline | $1,000 |
> | 31st through 60th day after deadline | $1,500 |
> | Beyond 60th day | $2,000 |
>
> For failure to make any civil penalty payment required by Paragraph 162 of this Consent Decree, ExxonMobil shall be liable for $15,000 per day, and interest on the amount overdue at the rate specified in 28 U.S.C. § 1961(a).
>
> ExxonMobil shall be liable for $2,500 per day, and interest on the amount overdue at the rate specified in 28 U.S.C. § 1961(a), for failure to do either of the following within sixty (60) days after receipt of a written demand pursuant to Paragraph 214: (i) pay stipulated penalties as required by Paragraph 165 of this Consent Decree; or (ii) place the amount of stipulated penalties demanded in escrow pursuant to Paragraph 215.

U.S. v. ExxonMobil Corp., Case No. 05-CV-05809, Consent Decree at 165. (N.D.Ill.2005)[2].

LDEQ must give meaning and enforceability to its Settlement Agreement by imposing consequences on ExxonMobil for failure to comply with its provisions.

IV. THE AGREEMENT MUST BE VOIDABLE ON LDEQ'S ELECTION.

Particularly given the problem noted above, where there are no consequences for failure of ExxonMobil to comply with the Agreement, the Agreement must allow LDEQ to revoke for failure of ExxonMobil to comply with its terms. The Agreement provides for this only in one limited circumstance, and even then, it is too vague to be enforceable.

Paragraph XXIII states: "Payment is to be made within ten (10) days from notice of the Secretary's signature. If payment is not received within that time, this Agreement is voidable at the option of the Department." This is the only provision on voidability within the Agreement, and it is wholly inadequate.

First, the provision is too vague to be reliably enforced. It never states which "payment" is the one which allows LDEQ to void the Agreement for nonreceipt. Presumably, it is the $300,000 civil penalty payable to the LDEQ, because the other payments all have sixty-day delays stated for payment, which would conflict with the ten day provision here. Additionally, this paragraph refers to Attachment P as the form which ExxonMobil must turn in, and that sample form lists $300,000 as the payment. However, Paragraph XXIII discussed "payments" plural, and refers to "each" payment, so it unclear which other payments LDEQ intended to cover with this provision.

It would seem, at a minimum, that the payment references do not include most of the BEPs, because Paragraph XXIII details that the check must be made payable to the Department, and most of the BEPs are paid to other governmental entities or to NGO's. Thus, with respect to the BEPs, not only can LDEQ arguably not enforce an ExxonMobil failure to make these payments, but it cannot even void the Agreement if ExxonMobil fails to make these payments.

With respect to the Stipulated Penalties, again, it is by no means clear whether LDEQ and ExxonMobil intended to allow LDEQ to void the Agreement if ExxonMobil fails to pay these, because it is unclear if these payments are included in the vague "payments" language used in this provision. Once again, however, it appears that the stipulated penalties are not included, and only the initial $300,000 is included, because the paragraph says the payment is to be made within ten days "from notice of the Secretary's signature." The stipulated penalties will accrue in the future, so there is no way they could be due and payable upon entry of the Agreement. So, if ExxonMobil fails to pay the stipulated penalties, not only will there be no consequence, but LDEQ

[2] This Consent Decree is attached as Attachment B.

will have no options to enforce it. It will be forced to wait three years until the Agreement expires, while ExxonMobil continues as it pleases.

V. EXXONMOBIL SHOULD BE REQUIRED TO SUBMIT VIOLATION REPORTS MORE FREQUENTLY DURING THE FIRST YEAR OF THE AGREEMENT.

The Agreement requires that ExxonMobil report violations subject to the Stipulated Penalty Agreement either by submitting them with Title V Semiannual or Annual Compliance reports or in a separate annual report. Agreement ¶ XXI. Further, "[t]he report shall be postmarked by March 31st in the year following the year in which the non-compliance giving rise to the stipulated penalty occurs." Agreement ¶ XXI. With this provision in place, ExxonMobil may not submit its first report of these violations for more than a year after this Agreement is in place.

Because LDEQ has never entered into a Stipulated Penalty Agreement before and because it is essential to ensure the workability and accuracy of ExxonMobil's self-reporting of the violations which will be subject to the Stipulated Penalty Agreement, this provision should be changed. LEAN and Ms. Anthony request that this Agreement be amended to require ExxonMobil to submit quarterly reports of these violations for the first year this Agreement is in place, before moving to submission in semiannual or annual reports. This will allow LDEQ to work out any issues while ensuring that ExxonMobil has accurately reported the violations. Additionally, the Agreement should require these reports to be publicly noticed.

Along similar lines, it does not appear that the Agreement contains any provisions to improve upon LDEQ's and the public's ability to determine whether violations have occurred at the facility. This has been a problem in the past with ExxonMobil's reporting. If the Agreement contains no such provisions, LDEQ should explain why it feels no improvement is needed in this area.

VI. THE AGREEMENT'S BENEFICIAL ENVIRONMENTAL PROJECT PROVISIONS, INCLUDING THE GROUNDWATER REDUCTION PROJECT, ARE IMPORTANT.

The Agreement requires ExxonMobil to fund a number of Beneficial Environmental Projects (BEPs). LEAN and Ms. Anthony support these provisions. In particular, the Agreement includes a provision requiring ExxonMobil to submit plans to reduce its usage of groundwater. This provision requires that ExxonMobil "shall spend no less than FOUR HUNDRED THOUSAND AND NO/100 DOLLARS ($400,000.00) on these projects." Agreement ¶ XXIII. LEAN and Ms. Anthony would like to commend this effort, as they feel that these projects are important for the community and the environment.

VII. LANGUAGE STATING THAT CLAIMS ARE HEREBY COMPROMISED AND SETTLED IS TOO BROAD.

The Agreement includes a provision stating that "any claims for penalties are hereby compromised and settled in accordance with the terms of this Settlement Agreement." Agreement ¶ XXIX. This clause is far too broad and vague. In particular, when considered in conjunction with other vague and overly broad provisions in this Agreement and the Stipulated Penalty Agreement, it can be interpreted to remove much of the flexibility and discretion that LDEQ likely intended to reserve for itself in this Agreement. The clause does not state which claims are included; therefore, it can be read to include all past and future claims for any violation or incident. This provision should either be deleted from the Agreement or amended significantly to describe exactly what claims, particularly for future violations, LDEQ intends to include.

Again, in EPA's Consent Decrees, it is very specific as to which claims, past and future, it is settling in an agreement. In an EPA agreement with Shell, EPA spells out precisely which claims it is settling. *See* ¶¶ 124-130; U.S. v. Shell Oil Co., Case No. 4:13-cv-2009, Consent Decree at 97-100 (S.D.Tex 2013)[3].

VIII. THE INTRODUCTION TO THE STIPULATED PENALTY AGREEMENT IS UNACCEPTABLE.

The Stipulated Penalty Agreement contains an introduction that has no place in a legal agreement, particularly one signed by the authority responsible for enforcing the requirements of the Clean Air Act. The first sentence of the Stipulated Penalty Agreement, which is attached to the Agreement as Attachment O, states: "ExxonMobil is a responsible member of the communities in which it operates, and is committed to operating its facilities in compliance with all applicable laws and regulations." Stipulated Penalty Agreement, p. 1. This type of puffery should be reserved for situations such as public relations statements made by ExxonMobil. By including this in the agreement signed by LDEQ, LDEQ sends a message to the public that it agrees with this statement. Such blanket praise for ExxonMobil should not be contained in the Agreement. LEAN and Ms. Anthony request that this language be removed from the Stipulated Penalty Agreement.

IX. THE SECTION ON "INCIDENTS NOT SUBJECT TO THIS AGREEMENT" IS UNENFORCABLE.

The Agreement appears to attempt to exempt certain incidents from the Stipulated Penalty Agreement. Stipulated Penalty Agreement, p. 1. It provides: "This Agreement acknowledges that there could be incidents that, because of their significance, fall outside of this stipulated penalty structure." Stipulated Penalty Agreement p. 1. It then goes on

[3] This Consent Decree is attached as Attachment C.

to define "Significant Compliance Incidents" presumably exempted from the Stipulated Penalty Agreement.

LEAN and Ms. Anthony believe it is essential that LDEQ include language in the Agreement that allows it to impose higher fines and penalties than those in the Stipulated Penalty Agreement. However, if this is the intent to the language quoted above, it utterly fails to achieve this, and presents many enforceability issues if LDEQ attempts to do this.

If LDEQ intends to give itself flexibility to impose penalties beyond those provided in the Agreement, it must state that clearly. Stating that "there could be incidents that . . . fall outside of" the Agreement is a far cry from stating that LDEQ has the right to seek higher penalties in the enumerated situations. Once again, a review of EPA language to this effect reveals how this language can be clearly crafted so that it is enforceable. In the Illinois EPA/ExxonMobil Consent Decree, it provides:

> In cases where a violation of this Consent Decree is also a violation that provides a basis for potential recovery of civil penalties under of the Clean Air Act, another federal environmental law, and/or an applicable state or local environmental law, the United States and the Applicable Co-Plaintiff will each elect between seeking stipulated penalties under this Consent Decree and commencing a new action for civil penalties under such laws. Notwithstanding the foregoing, the United States and the Applicable Co-Plaintiffs reserve the right to pursue any other non-monetary remedies to which they are legally entitled, including but not limited to injunctive relief for violations of the Consent Decree.

U.S. v. ExxonMobil Corp., Case No. 05-CV-05809, Consent Decree at 144.

Another method of providing this flexibility was used by EPA its Consent Decree with Shell, which provides:

> This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the CAA or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraphs 125–130. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by the Covered Facilities, whether related to the violations addressed in this Consent Decree or otherwise.

U.S. v. Shell Oil Co., Case No. 4:13-cv-2009, Consent Decree at 101.

However, as it stands, because of the language in this clause and language contained elsewhere in this Agreement[4], this aspect of the Agreement will likely be unenforceable in the event that a court is asked to intervene.

A. The Exemption for Emergency Conditions Beyond the Resources of the Facility Is Overly Broad and Vague.

The Stipulated Penalty Agreement exempts "[e]mergency conditions beyond the resources of the facility." This language is very vague and overly broad and results in a large loophole for ExxonMobil. "Emergency conditions" are not defined anywhere in the Agreement. Further, allowing ExxonMobil to avoid stipulated penalties whenever it does not have the resources to respond to an emergency sets an extraordinarily bad precedent, and creates a disincentive for ExxonMobil to ensure it has proper response capabilities and resources.

If, with this provision, LDEQ intended to create an exception from stipulated penalties when violations are caused by an "act of God," it should have expressly provided for this in a well-crafted, precise Force Majeure clause. While force majeure clauses are commonly used, this provision goes far beyond a standard force majeure. LDEQ should remove this overly broad and vague language and replace it with a clear Force Majeure provision, similar to the one the EPA used in its agreement with Shell, Deer Park [SDP]: "SDP shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below unless excused under Section XI of this Decree (Force Majeure)." U.S. v. Shell Oil Co., Case No. 4:13-cv-2009, Consent Decree at 77. The Decree defines Force Majeure in detail. *Id.* at 87-89. This clause would provide clarity and certainty in the event that ExxonMobil attempts to invoke the clause and would make court intervention less likely.

B. The Agreement's Language Puts a Large Burden On LDEQ If It Seeks To Assess Penalties Above and Beyond Those In the Agreement.

The Stipulated Penalty Agreement also attempts to exempt:

> Actual and significant measureable harm, or substantial risk of harm, to the environment and/or public health; or [ ] [s]ignificant deviations from the requirements of applicable statutes, regulations, and/or permits to such an extent that little or no implementation of requirements of such statutes, regulations, and/or permits can be said to have occurred.

Stipulated Penalty Agreement p. 1. This language puts a huge burden on LDEQ when attempting to prove that an incident falls under this exception. The Stipulated Penalty Agreement does not define significant, which creates a huge burden in a situation in which LDEQ tries to apply this provision. Additionally, what is "measureable harm" or

[4] This language is discussed elsewhere in these comments; specifically, in Sections VI and X.

"substantial risk of harm" to the environment? The language apparently gives LDEQ the burden to show this, but it is undefined and undefineable. Paragraph (c) is worse. How would LDEQ show that "little to no implementation of requirements . . . can be said to have occurred"? If LDEQ fails to meet this burden, which is probable, ExxonMobil will be able to pay only $10,000 per day maximum in penalties for incidents that should create a considerably larger penalty.

If LDEQ was attempting to allow for an exception to the Stipulated Penalty Agreement for situations that call for penalties above and beyond those allowed under the Stipulated Penalty Agreement, the provision should be much clearer, and not impose such a high burden on LDEQ to prove measurable harm or substantial risk or to prove that ExxonMobil did little or nothing to comply with the law.

If LDEQ does so, it will not be met with an impossible burden when a serious situation arises that should require ExxonMobil to pay above and beyond the penalties in the Stipulated Penalty Agreement.

X. THE CAP ON PENALTIES AT $10,000 PER DAY IS UNACCEPTABLE WHEN USED WITH OTHER PROVISIONS IN THIS AGREEMENT.

The Stipulated Penalty Agreement states that "[s]tipulated penalty costs for deviations shall not exceed $10,000 per day for any individual violation, incident, or event…." Stipulated Penalty Agreement p. 2. LDEQ should explain how it arrived at this figure for the cap. Additionally, because of the higher burden the Agreement puts on LDEQ to assess penalties above and beyond the Stipulated Penalty Agreement (as discussed above in Section VI), this low cap is unacceptable. If a major incident occurs and LDEQ cannot meet the burden of proving that the incident is not subject to this Agreement, LDEQ will only be able to collect $10,000 per day for the event. However, Louisiana statutes allow LDEQ to collect up to $32,500 per day in penalties when no separate agreement is in place to govern the incident. La. R.S. § 30:2025. If the Agreement must contain a cap, LEAN and Ms. Anthony suggest that that cap should be equal to, or at least closer to, $32,500, especially considering the problems created by the language in the *Incidents Not Subject to this Agreement* provision of the Stipulated Penalty Agreement.

XI. CORRECTIVE ACTIONS SHOULD NOT OFFSET PENALTIES.

The Stipulated Penalty Agreement states that "[t]he cost of any corrective actions and/or beneficial environmental projects may be utilized to offset the cost of any such stipulated penalties." Stipulated Penalty Agreement p. 2. LEAN and Ms. Anthony support that LDEQ has allowed for ExxonMobil to offset costs of penalties under this Agreement by any costs attributed to beneficial environmental projects (BEPs). This encourages ExxonMobil to spend money on BEPs, which is beneficial to both the community and the environment.

However, the Agreement cannot allow ExxonMobil to offset penalties with costs expended in taking corrective actions. Such a provision removes or reduces the incentives that penalties provide to enforce compliance, and may be illegal. The Agreement should create an incentive to comply with regulations and permits, not alleviate the cost of any noncompliance. Further, penalties are punitive in nature, above and beyond the cost of coming into compliance. Additionally, this offset takes away from the incentive created by allowing the cost of BEPs to offset the cost of penalties. ExxonMobil's ability to offset penalties by the cost of any corrective action must be removed from this Agreement, while leaving its ability to offset penalties by the cost of BEPs in place.

XII. THE AGREEMENT SHOULD NOT PROVIDE THAT THE LOWER OF TWO STIPULATED PENALTIES CAN BE APPLIED.

The Agreement states that "[w]here a single event triggers more than one stipulated penalty provision, the provision providing the lower stipulated penalty may… be applied." Stipulated Penalty Agreement p. 2. This is left to LDEQ's discretion. However, LEAN and Ms. Anthony have a difficult time understanding LDEQ's reason for leaving this door open. This is particularly true given that LDEQ has lowered the legally-allowed cap by $22,000. EPA generally stipulates that the higher of two stipulated penalties *will* be applied when one event triggers more than one stipulated penalty in consent decrees. U.S. v. ExxonMobil Corp., Case No. 05-CV-05809, Consent Decree at 144. LEAN and Ms. Anthony ask that LDEQ amend the clause to apply the higher of the two stipulated penalties in these situations.

XIII. VAGUE AND OVERLY-BROAD LANGUAGE REGARDING ENFORCEMENT OF THE AGREEMENT AND LEGAL RAMIFICATIONS RENDERS THE AGREEMENT UNENFORCEABLE.

A. The Agreement's Inclusion of Language Relieving ExxonMobil From Any Additional Obligation Essentially Negates the Entire Agreement.

The Agreement states: "Nothing in this agreement shall be deemed to create any obligation on the part of ExxonMobil that does not otherwise exist under a currently enforceable consent decree, state or federally issued permit and/or applicable law or regulation…." Stipulated Penalty Agreement p. 2. This language is so broad that it essentially nullifies the entire agreement. As written, this clause states that the Agreement itself does not create any new obligation on the part of ExxonMobil, as most of the Agreement's provisions – particularly the BEP provisions – do not otherwise exist under any consent decrees, permits or laws.

LEAN and Ms. Anthony believe this entire paragraph should be removed. It is unclear what LDEQ intended this paragraph to accomplish with this paragraph. No EPA Consent Decree reviewed by LEAN and Ms. Anthony contain language such as this.

B. The Agreement's Provision Allowing ExxonMobil to Retain All Affirmative Defenses Removes Many of the Potential Benefits of the Agreement.

This same paragraph of the Agreement also states that nothing in this Agreement shall "be construed as a waiver of any affirmative defense(s) otherwise available to ExxonMobil." Stipulated Penalty Agreement p. 2. Including this provision in this Agreement eliminates any certainty that might have otherwise been created by this Agreement, and nullifies many of the benefits of having a Stipulated Penalty Agreement.

If LDEQ wants to allow ExxonMobil to maintain the Force Majeure defense, and perhaps others, it should specify precisely which defenses ExxonMobil will maintain. However, while Force Majeure is a standard, reasonable defense to allow a company to preserve in a Settlement Agreement, the more additional defenses the agency allows, the less it benefits from the certainty and savings in resources that such agreements provide.

In an agreement with EPA, ExxonMobil agreed to the following provision regarding affirmative defenses in response to a demand by the U.S. for stipulated penalties:

> ExxonMobil may raise the following affirmative defenses in response to a demand by the United States for stipulated penalties:
>
> i. Force majeure.
> ii. As to Paragraph 83, the AG Flaring Incident does not meet the identified criteria.
> iii. As to Paragraph 84, Malfunction.
> iv. As to Paragraph 85, the AG Flaring Incident does not meet the identified criteria and/or was due to a Malfunction.
>
> In the event a dispute under Paragraphs 82-86 is brought to the Court pursuant to the Dispute Resolution provisions of this Consent Decree, ExxonMobil may also assert a startup, shutdown and/or Malfunction defense, but the United States shall be entitled to assert that such defenses are not available. If ExxonMobil prevails in persuading the Court that the defenses of startup, shutdown and/or Malfunction are available for AG Flaring Incidents under 40 C.F.R. 60.104(a)(1), ExxonMobil shall not be liable for stipulated penalties for emissions resulting from such startup, shutdown and/or Malfunction. If the United States prevails in persuading the Court that the defenses of startup, shutdown and/or Malfunction are not available, ExxonMobil shall be liable for such stipulated penalties.

U.S. v. ExxonMobil Corp., Case No. 05-CV-05809, Consent Decree at 76-77.

LDEQ should explicitly state that ExxonMobil retains the affirmative defense of Force Majeure and expressly require waiver of all others. If LDEQ wants to allow ExxonMobil to retain additional defenses, it should specify them.

XIV. LDEQ MUST INCLUDE LANGUAGE WHICH STATES THAT NOTHING IN THE AGREEMENT RELIEVES EXXONMOBIL FROM ANY OTHER LEGAL OBLIGATIONS.

The Agreement does not contain any language stating that the Agreement does not change any other obligation ExxonMobil has under current law. Such a provision is vital in any settlement agreement or consent decree. Such language provides clarity and ensures that ExxonMobil cannot later claim that the Agreement intended to modify or replace some provision or requirement contained in a statute or permit but not contained in the Agreement. LDEQ must include language that explicitly states that nothing in the agreement relieves ExxonMobil from complying with any obligation otherwise imposed by law or permit.

Again, LEAN and Ms. Anthony refer LDEQ to language found in EPA's Consent Decrees to capture this idea:

> Except as specifically provided by this Consent Decree, nothing in this Consent Decree shall relieve ExxonMobil of its obligation to comply with all applicable federal, state and local laws and regulations, permits, and administrative order, including, but not limited, to, more stringent standards. In addition, nothing in this Consent Decree shall be construed to prohibit or prevent the United States or the Co-Plaintiffs from developing, implementing, and enforcing more stringent standards subsequent to the Date of Lodging of this Consent Decree through rulemaking, the permit process, or as otherwise authorized or required under federal, state, regional, or local laws and regulations. In addition, except as otherwise expressly provided in this Consent Decree, nothing in this Consent Decree is intended to eliminate, limit or otherwise restrict any compliance options, exceptions, exclusions, waivers, variances, or other right otherwise provided or available to ExxonMobil under any applicable statute, regulation, ordinance, regulatory or statutory determination, or permitting process. Subject to the [Effect of the Settlement] and except as provided under [Stipulated Penalties], nothing contained in this Consent Decree shall be construed to prevent, alter or limit the United States' and the Applicable Co-Plaintiff's rights to seek or obtain other remedies or sanctions against ExxonMobil available under other federal, state or local statutes or regulations, in the event that ExxonMobil violates this Consent Decree or the statutes and regulations applicable to violations of this Consent Decree. This shall include the United States' and the Applicable Co-Plaintiff's right to invoke the authority of the Court to order ExxonMobil's compliance with this Consent Decree in a subsequent contempt action.

U.S. v. ExxonMobil Corp., Case No. 05-CV-05809, Consent Decree at 187-88.

Finally, LEAN and Ms. Anthony request a public hearing on this settlement agreement.

Respectfully submitted on October 14, 2013 by:

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As Counsel for LEAN and Ms. Stephanie Anthony and as supervising attorney for Lauren Matthews' representation of Ms. Anthony

STATE OF LOUISIANA

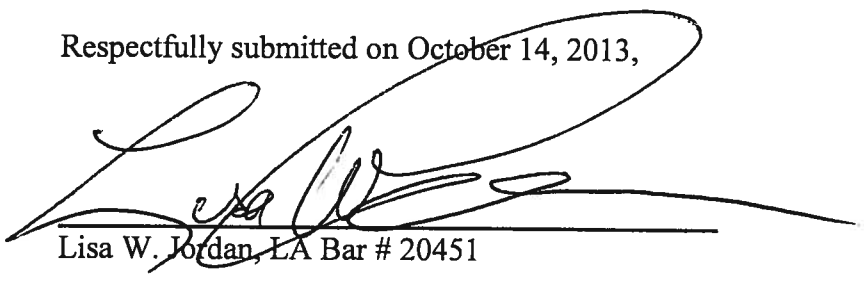
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:	*	**Settlement Tracking No.**
	*	**SA-MM-13-0030**
EXXONMOBIL CORPORATION	*	
	*	**Enforcement Tracking No.**
AI Nos. 286, 2638, 3230, 858	*	**AE-CN-08-0017, AE-CN-08-0017A,**
	*	**AE-CN-08-0017B, AE-CN-10-00275,**
	*	**AE-CN-10-00877, AE-PP-08-0132,**
	*	**AE-CN-10-00263, AE-CN-10-01561,**
PROCEEDINGS UNDER THE	*	**AE-CN-10-00263A, AE-CN-11-00892,**
LOUISIANA ENVIRONMENTAL	*	**HE-PP-11-00654, AE-CN-11-00898,**
QUALITY ACT, LA. R.S. 30:2001 ET SEQ.	*	**MM-CN-12-00838**

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

Undersigned counsel respectfully introduces student attorney Lauren Matthews as authorized to practice under Supreme Court Rule XX. As Ms. Matthews' supervising attorney, I approve of her appearance in this matter on behalf of Ms. Stephanie Anthony. Ms. Anthony's written consent to representation by a student attorney in this matter is attached.

Respectfully submitted on October 14, 2013,



Lisa W. Jordan, LA Bar # 20451

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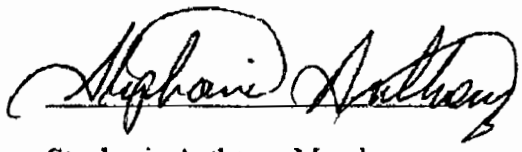
CLIENT'S WRITTEN CONSENT FOR STUDENT ATTORNEY APPEARANCE

I hereby grant my consent for student attorneys from the Tulane Environmental Law Clinic to Appear on my behalf in any matter in which the Tulane Environmental Law Clinic represents me, whether in Court or before an administrative tribunal.

Dated: March 24, 2004.

[Signed:] 

[Name:] Stephanie Anthony, Member
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