UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Louisiana Environmental Action Network and Sierra Club,	)	
	)	Case No.: 06-4161
Plaintiffs,	)	
	)	Section: R
v.	)	
	)	Judge: Vance
Mike D. McDaniel, in his official capacity as Secretary of the Louisiana Department of Environmental Quality,	)	Magistrate: 2
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, Plaintiffs Louisiana Environmental Action Network ("LEAN") and Sierra Club respectfully submit this Memorandum in Support of their Motion for Summary Judgment that:

1) the Supremacy Clause, U.S. Const., art VI, cl. 2, preempts the "Seventh Amended Declaration of Emergency and Administrative Order," A.I. No. 130534 (dated Aug. 28, 2006)[1] and "Fifth Amended Declaration of Emergency and Administrative Order" (In the Matter of

[1]http://www.deq.louisiana.gov/portal/portals/0/news/pdf/HurricaneKatrina7thEmergencyOrder8-28-06.pdf (attached in pertinent part as Ex. A).

Hurricane Rita and its Aftermath, A.I. No. 131019) (dated Aug. 28, 2006)[2] and other orders in this series (the "Hurricane Orders") issued by Dr. Mike D. McDaniel, Secretary of the Louisiana Department of Environmental Quality Secretary (the "Secretary") and

2) the Plaintiffs have standing to prosecute this lawsuit.

Introduction

This case is about the Secretary's issuance of a series of orders that authorize open dumping and other waste disposal practices that conflict with federal standards for protection of public health, welfare, and the environment.[3] The Secretary's issuance of these orders denies members of LEAN and Sierra Club their constitutional right to be free from interference—under color of state law—with implementation of federal law. The U.S. Constitution's Supremacy Clause, art. VI, cl. 2, guarantees that right. See Rollins Envtl. Servs., Inc. v. Parish of Saint James, 775 F.2d 627, 637 (5th Cir. 1985) (enjoining enforcement of a St. James Parish ordinance preempted by the federal Toxic Substances Control Act because "enforcement of it would violate the Supremacy Clause of the federal Constitution."). Congress authorized citizens to vindicate this right under 42 U.S.C. § 1983.[4]

By allowing dumping of waste materials into landfills not designed to accept these wastes, the Secretary's Hurricane Orders withdraw federal health, safety, and welfare protections

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[2] http://www.deq.louisiana.gov/portal/portals/0/news/pdf/HurricaneRita5thDeclaration8-28-06.pdf (attached in pertinent part as Ex. B).

[3] The Secretary has acted and continues to act under color of state law, La. Rev. Stat. 30:2001 et seq. and particularly La. R.S. 30:2033 and 2011(D)(6), in the issuance and implementation of the Hurricane Orders.

[4] 42 U.S.C. § 1983 provides that: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

from residents across the State of Louisiana. Indeed, the Louisiana Department of Environmental Quality (LDEQ) has admitted that its Secretary's orders "expanded the scope of the definition of [Construction and Demolition] debris" [5] and allow into the landfills "material not technically included in the regulatory definition" for those landfills.[6]

"[L]ower laws are preempted to the extent that they conflict with federal law" and when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . it is preempted." Rollins Envtl. Servs., 775 F.2d at 634 (internal quotation marks and citation omitted). The Secretary's orders conflict with the express prohibition against open dumping contained in the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. § 6945(a). In addition—in the Clean Water Act (CWA), 33 U.S.C. §1370, and Clean Air Act (CAA), 42 U.S.C. § 7416—Congress expressly preempted conflicting state law, such as the Hurricane Orders. As a result, the Supremacy Clause in Article VI of the Constitution preempts the Secretary's orders.

LEAN and Sierra Club have standing to enforce the Supremacy Clause in this case because they have members statewide who live, work, and recreate in the area of many disposal sites and suffer injuries because of the disposal practices of those landfills. Because there is no genuine issue of material fact, Plaintiffs are entitled to judgment as a matter of law that federal law preempts the Hurricane Orders.

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[5] LDEQ, Decision for Utilization of Gentilly Landfill "Type III" For the Disposal of Hurricane Generated Debris (Aug. 28, 2006), at 6, http://www.deq.louisiana.gov/apps/pubNotice/pdf/CONOdecisionletter9-8-06.pdf (attached in pertinent part as Ex. C).

[6] Id. at 10.

Factual Background

The facts of this case are beyond dispute. In response to Hurricanes Katrina and Rita, the Secretary issued a series of orders beginning on August 30, 2005. The orders issued through August 10, 2006 are listed in the Plaintiffs' Complaint at paragraphs 15 through 23 (the Katrina Orders), and 26 though 32 (the Rita Orders) and appear on LDEQ's web site. Most recently, the Secretary issued his Seventh Amended Declaration of Emergency and Administrative Order, A.I. No. 130534 (dated Aug. 28, 2006) ("7th Katrina Order")[7] and "Fifth Amended Declaration of Emergency and Administrative Order" (In the Matter of Hurricane Rita and its Aftermath, A.I. No. 131019) (dated Aug. 28, 2006) ("5th Rita Order").[8] Using substantially identical language, each of these orders expands the categories of wastes that may be disposed of in construction and demolition debris landfills.

The new materials that the Secretary's order allow to be disposed of in construction and demolition debris landfills include "household hazardous waste . . . where segregation is not practicable," (7th Katrina Order at 7 (Ex. A); 5th Rita Order at 7 (Ex. B)), "white goods . . . where segregation is not practicable," (7th Katrina Order at 7 (Ex. A); 5th Rita Order at 7 (Ex. B)), "furniture" and "carpet" as well as "yard trash and other vegetative matter." (7th Katrina Order at 7 & App. D (Ex. A); 5th Rita Order at 7 & App. D (Ex. B)). Also, the orders authorize "[t]he discharge of pollutants to waters of the state from all construction and demolition debris landfills," (7th Katrina Order at 5 (Ex. A); 5th Rita Order at 5 (Ex. B)), and disposal of "incidental admixture of construction and demolition debris with asbestos-contaminated waste." (7th Katrina Order at 7 & App. D (Ex. A); 5th Rita Order at 7 & App. D (Ex. B)) ("For the

[7] Supra note 1.

[8] Supra note 2.

purposes of this Order, construction and demolition debris shall be the materials indicated in Appendix D of this Declaration.").

Standard of Review

Summary judgment is appropriate "if the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The adverse party "may not rest upon mere allegations or denials," but rather "must set forth specific facts showing that there is a genuine issue [of material fact] for trial." Fed. R. Civ. P. 56(c); see, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) ("opponent must do more than simply show that there is some metaphysical doubt as to the material facts"). But showing the existence of an alleged factual dispute only defeats a summary judgment motion if the dispute "might affect the outcome of the lawsuit under governing law." Taita Chem. Co. v. Westlake Styrene Corp., 246 F.3d 377, 385 (5th Cir. 2001); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). Summary judgment must be entered for the moving party if there is no such dispute. O'Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1017 (5th Cir. 1990) ("Summary judgments . . . must be granted if there is no need for a trial.").

Argument

I. THE SUPREMACY CLAUSE PREEMPTS STATE LAWS THAT CONFLICT WITH FEDERAL LAW OR THAT ARE EXPRESSLY PREEMPTED BY FEDERAL LAW.

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S.

Const., art. VI, cl. 2. The doctrine of preemption is derived from the Supremacy Clause. See, e.g., Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 90 (1992). "Preemption is an absolute necessity, an imperative, if the federal government is to be a federal government." Rollins Envtl. Servs., 775 F.2d at 638. Thus, "even state regulation designed to protect vital state interests must give way to paramount federal legislation." Decanas v. Bica, 424 U.S. 351, 357 (1976). Further, federal regulations issued by agencies have "no less preemptive effect than federal statutes." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984).

Preemption of state and local laws may occur in one of three ways. First, Congress may expressly preempt state law in a particular statute. See California v. ARC Am. Corp., 490 U.S. 93, 100 (1989). A finding of preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

Second, when Congress has "occupied the entire field" with federal law, state and local laws in that area are preempted. See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983).

Finally, "even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law . . . ." ARC Am. Corp., 490 U.S. at 100. Conflict preemption occurs if "compliance with both federal and state regulations is a physical impossibility." Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Further conflict preemption occurs when any state or local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). A state law that weakens a federal law's protections of health and the environment stands as an obstacle to the accomplishment and execution of the

act's purposes and objectives. See Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1269-70 (11th Cir. 2000) (". . . RCRA sets a floor for regulation of hazardous waste . . . and to allow the Florida program to restrict or limit the federal remedy would lower that floor.").

In this case, federal law preempts the Hurricane Orders under the first category of express preemption and the third category of conflict preemption.

II. THE SECRETARY'S ORDERS CONFLICT WITH FEDERAL LAW BECAUSE THEY AUTHORIZE OPEN DUMPING IN CONFLICT WITH THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA").

A. **RCRA regulates solid waste landfills.**

Congress enacted RCRA "to promote the protection of health and the environment," 42 U.S.C. § 6902(a), and found that "disposal of solid waste . . . in or on the land without careful planning and management can present a danger to human health and the environment." Id. § 6901(b)(2).

RCRA Subchapter IV (also known as Subtitle D) regulates "solid waste," as opposed to "hazardous waste" (which is governed by RCRA Subchapter III). The term "solid waste" includes "any garbage [or] refuse" and virtually all "discarded material," whether liquid or solid. 42 U.S.C. § 6903(27).[9] Solid waste landfills can be every bit as dangerous to public health and welfare as hazardous waste landfills. 56 Fed. Reg. 50978, 50982 (Oct. 9, 1991) ("[D]ata available to the [EPA] . . . do not provide strong support for distinguishing the health and environmental threats posed by" municipal landfills and hazardous waste landfills.).

The distinction between solid and hazardous waste is important because RCRA regulates these two categories of dangerous material in very different ways. Specifically, RCRA's "solid

[9] This definition creates four exceptions to the definition of solid waste that are not relevant to this case.

waste" program (unlike the hazardous waste program) is not delegated to the states. Compare 42 U.S.C. § 6947(b)(1) (providing that an EPA approved state "solid waste" plan is eligible for federal "financial assistance") with id. § 6926(b) (providing that an EPA approved state "hazardous waste program" operates "in lieu of the Federal program under this subchapter [III]."). Instead, states are responsible for developing solid waste programs that comply with—but do not replace—federal solid waste criteria.

RCRA's approach to regulating solid waste is to command EPA to promulgate criteria that set minimum federal standards for solid waste disposal. 42 U.S.C. §§ 6907, 6944. States can qualify for federal funding by developing regulatory programs that EPA approves. 42 U.S.C. § 6947(b)(1). But the EPA criteria are directly binding on owners and operators of solid waste disposal facilities. As explained below, these criteria are binding because Congress defined violation of the criteria as "open dumping" and banned open dumps.

An important purpose of EPA's solid waste criteria is to ensure that landfills avoid the classification of open dump "only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such a facility." 42 U.S.C. § 6944(a).

B. **RCRA defines violation of EPA criteria as "open dumping," which it prohibits.**

RCRA commands that "any . . . disposal of solid waste . . . which constitutes the open dumping of solid waste . . . is prohibited." 42 U.S.C. § 6945(a). Further, RCRA defines landfills as "open dumps" if those facilities fail to meet EPA regulatory criteria. 42 U.S.C. § 6903(14) ("'open dump' means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title . . . "); 42 U.S.C. § 6944(a) (authorizing EPA to promulgate criteria "for determining which facilities . . . shall be classified as open dumps."). See also Backcountry Against Dumps v. EPA, 100 F.3d 147, 148

(D.C. Cir. 1996) (noting that federal regulations establish "criteria for determining which solid-waste facilities should be classified as 'landfills' and which as 'open dumps'").

"[F]ailing *any* criterion listed . . . automatically renders a facility an open dump." S. Rd. Assocs. v. Int'l Bus. Machs. Corp., 216 F.3d 251, 256 (2d Cir. 2000) (emphasis added); see Cox v. City of Dallas, 256 F.3d 281, 302 (5th Cir. 2001). Because open dumps are prohibited, "*failure to satisfy any one criterion itself violates* RCRA." S. Rd. Assocs., 216 F.3d at 256.

C. **EPA criteria set more protective standards for household waste than for construction and demolition debris.**

RCRA criteria regulate landfills that receive household waste more stringently than facilities receiving only construction and demolition debris. Compare 40 C.F.R. pt. 257 (criteria for landfills that receive *only* construction and demolition waste) with 40 C.F.R. pt. 258 (criteria for landfills that receive *any* household waste). If a landfill receives any "household waste" as defined by federal regulations, therefore, it must meet the more stringent standards set forth in 40 C.F.R. part 258. Otherwise, it is an "open dump" prohibited by RCRA. 40 C.F.R. § 258.1(h) ("[m]unicipal solid waste landfill units failing to satisfy these criteria constitute open dumps").

For municipal solid waste landfills, which receive household waste that may include yard waste and garbage (that degrades into "leachate"[10]) or toxic materials (e.g. household hazardous wastes or materials in furniture and carpets), federal regulations impose design and monitoring criteria to protect groundwater. 40 C.F.R. §§ 258.40-.58. Generally, municipal solid waste landfills must include a "composite liner," 40 C.F.R. § 258.40(b), and a "leachate collection system," id. § 258.40(a)(2), and must comply with extensive ground-water monitoring requirements. Id. §§ 258.50-.58. Municipal solid waste landfills must also comply with EPA

[10] "Leachate" is formed when waste mixes with water. To illustrate, if a garbage can is left in the rain with garbage in it, the liquid at the bottom is analogous to leachate. Such liquids can contaminate ground water and surface water, endangering public health and welfare.

operating requirements, which mandate the facilities "cover disposed solid waste with six inches of earthen material at the end of each operating day…," id. § 258.21, and "design, construct, and maintain a run-on control system… [and] a run-off control system…." Id. § 258.26. Further, the owner or operator of a municipal solid waste landfill must conduct post-closure care, which includes "maintaining the integrity and effectiveness of any final cover," "maintaining and operating the leachate collection system," and "monitoring ground water" for thirty years following the facility's closure. Id. § 258.61.

In contrast, construction and demolition debris landfills are not subject to the protective criteria set forth in 40 C.F.R. § 258, but rather are subject to less protective standards of 40 C.F.R. §§ 257.1-.4. Unlike regulations governing municipal solid waste landfills that protect groundwater by establishing design and monitoring requirements, regulations governing construction and demolition debris landfills merely state that "a facility or practice shall not contaminate an underground drinking water source…," but do not require groundwater monitoring. Id. § 257.3-4(a). Further, construction and demolition debris landfills are not subject to daily cover, run-on/run-off control system, or post-closure care requirements applicable to municipal solid waste landfills. Compare 40 C.F.R. §§ 258.21, .26, .61 with 40 C.F.R. §§ 257.1-.4.

Residents of Louisiana—no less than other U.S. Citizens—are entitled to the enhanced protections of 40 C.F.R. § 258 for landfills that receive household waste.

D. **The Hurricane Orders authorize disposal of household waste in construction and demolition debris landfills, which conflicts with EPA criteria.**

The Hurricane Orders redefine "construction and demolition debris" for purposes of the orders to include household waste. See LDEQ, Decision for Utilization of Gentilly Landfill at 6, 10 (Ex. C) (noting that the orders "expanded the scope of the definition of [Construction and

Demolition] debris" to include "material not technically included in the regulatory definition . . . .").[11] Specifically, "where segregation is not practicable," the Hurricane Orders define construction and demolition debris to include household hazardous waste and white goods (e.g., air conditioners, stoves, refrigerators, and freezers). Exs. A & B at 7. The orders also authorize disposal of "furniture," "carpet," and "yard trash and other vegetative matter" as construction and demolition debris. Id. at 7 & App. D.

Under RCRA, these materials are "household waste" that must be disposed of in a municipal solid waste landfill (as opposed to a construction and demolition debris landfill). "Household waste" includes "solid waste . . . derived from households (including single and multiple residences, hotels and motels, [etc.]." 40 C.F.R. § 258.2. To belabor the obvious, EPA guidance specifically lists furniture, "durable goods" - which include "carpets" - appliances, and yard debris as household waste. EPA, Municipal Solid Waste in The United States: 2001 Facts and Figures 4, 5, 44-56 (EPA530-R-03-011, Oct. 2003).[12] *Household* hazardous waste may only be disposed of in facilities that lawfully "manag[e] municipal solid waste," 40 C.F.R. §§ 261.4(b)(1).[13]

Any landfill that receives "household waste" is —by definition— a "municipal solid waste landfill" under RCRA solid waste criteria. 40 C.F.R. § 258.2 (defining a municipal solid

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[11] See supra note 4.

[12] http://www.epa.gov/garbage/pubs/msw2001.pdf. Page 4 of this report notes that "MSW—otherwise known as trash or garbage—consists of everyday items such as product packaging, **grass clippings**, **furniture**, clothing, bottles, food scraps, newspapers, appliances, and batteries." Page 5 notes that such waste includes "durable goods," which page 50 clarifies include "**carpets**," id. at 50. EPA has also specifically noted that household waste includes "yard debris." 59 Fed. Reg.18,852,18,855 (Apr. 20, 1994).

[13] The section provides that ***municipal*** solid waste facilities will not be regulated as hazardous waste facilities based on management of household waste (some of which, without the exclusion, would meet RCRA's definition of hazardous waste). No such exemption is provided for construction and demolition debris landfills.

waste landfill unit as "a discrete area of land or an excavation that receives household waste . . ."). Further, a landfill that accepts household waste but fails to meet federal criteria set forth in the solid waste criteria, 40 C.F.R. pt. 258, is—by definition— an "open dump." 40 C.F.R. § 258.1(h) ("Municipal solid waste landfill units failing to satisfy these criteria constitute open dumps, which are prohibited under section 4005 of RCRA [i.e., 42 U.S.C. § 6945].").

Because the Hurricane Orders authorize the disposal of household waste in construction and demolition landfills (facilities governed by 40 C.F.R. pt. 257) that fail to meet the more stringent standards applicable to household waste (under 40 C.F.R. pt. 258), the orders authorize violation of EPA criteria, i.e., open dumping, in conflict with RCRA. By encouraging waste disposal practices that federal law prohibits, the Secretary's Hurricane Orders, like the state action in Boyes, weaken RCRA's protections of health and the environment. Accordingly, the Hurricane Orders "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); see Boyes, 199 F.3d at 1269-70. Thus, the Supremacy Clause, U.S. Const., art VI, cl. 2, preempts the Hurricane Orders.

III. CONGRESS COMMANDED THAT STATE RULES LESS STRINGENT THAN THOSE REQUIRED BY THE CLEAN WATER ACT BE PREEMPTED.

The Supremacy Clause also preempts the Hurricane Orders because they allow discharges of pollutants into waters without a CWA permit. Congress specifically provided that states "may not adopt or enforce any . . . effluent limitation, or other limitation . . . or standard of performance which is less stringent than the . . . effluent limitation, or other limitation . . . or standard of performance under this chapter." 33 U.S.C. § 1370.

CWA standards include a prohibition of the "discharge of any pollutant by any person" except in compliance with the act's permitting and other requirements. 33 U.S.C. § 1311(a). The CWA provides for permitting of discharges under 33 U.S.C. §1342(a) & (b). The term "discharge of a pollutant" is broad, meaning "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1363(12). Thus, any addition of a pollutant to navigable water from a point source is illegal unless it is subject to a CWA permit.

For permits to issue under 33 U.S.C. §1342(b) (which governs state-implemented permitting programs), the CWA requires "that the public . . . receive notice of each application for a permit and . . . an opportunity for public hearing before a ruling on each such application." 33 U.S.C. §1342(b)(3). Moreover, such public notice "shall allow at least 30 days for public comment." 40 C.F.R. § 124.10(b)(1). CWA permits must also contain monitoring and reporting provisions. 33 U.S.C. § 1342(b)(2)(B); id. § 1318(a). The Hurricane Orders conflict with all of these provisions.

The Hurricane Orders contain a blanket authorization for "discharge of pollutants to waters of the state from all construction and demolition debris landfills." (7th Katrina Order at 5; 5th Rita Order at 5.) While the orders call for discharging landfills to meet general effluent limitations, (7th Katrina Order at 5; 5th Rita Order at 5), they do not require a permit for such discharges, do not contain the self-monitoring, self-reporting provisions that permits require, and did not undergo a public notice and comment period or provide an opportunity for a hearing.

IV. THE HURRICANE ORDERS ARE PREEMPTED BECAUSE THEY AUTHORIZE THE DISPOSAL OF ASBESTOS-CONTAMINATED DEBRIS WITHOUT REGARD TO WHETHER RECEIVING FACILITIES MEET FEDERALLY-MANDATED CAA STANDARDS.

The Supremacy Clause preempts the orders because they allow disposal of asbestos-contaminated debris in landfills that do not meet CAA standards for receiving asbestos-

contaminated waste. In the CAA, Congress expressly provided for preemption of state law that authorizes an emission or limitation standard less stringent than the federal act. 42 U.S.C. § 7416 ("[Any] State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under [the act]."). Among other restrictions, the CAA requires disposal of asbestos-contaminated debris be into a facility operated in accordance with federal requirements. 42 U.S.C § 7412 (listing asbestos as a hazardous air pollutant); 40 C.F.R. § 61.154 (describing federal requirements for facilities that receive asbestos-containing waste material). For example, asbestos-contaminated material must be covered with six inches of nonasbestos-containing material, or covered with a dust suppression agent. 40 C.F.R. § 61.154(c).

The Hurricane Orders include "incidental admixture of construction and demolition debris with asbestos-contaminated waste" within the definition of "construction and demolition debris." (7th Katrina Order at 7 & App. D (Ex. A); 5th Rita Order at 7 & App. D (Ex. B)). Thus, the orders authorize disposal of asbestos-contaminated debris in construction and demolition debris landfills regardless of whether these landfills meet the standards for disposal of asbestos-contaminated debris set forth in 40 C.F.R. § 61.154. The Hurricane Orders therefore authorize an emission standard that is less stringent than that in the CAA and are preempted under the Supremacy Clause.

V. LOUISIANA ENVIRONMENTAL ACTION NETWORK AND SIERRA CLUB HAVE STANDING TO PROSECUTE THIS ACTION.

An association, including a nonprofit corporation, has standing to sue if any of its members are "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 342-43 (1977) (internal citations and

quotations omitted). Specifically, "[a]ssociational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members." Texas Democratic Party v. Benkiser, 459 F.3d 582, 587 (5th Cir. 2006); see also St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Refining, 354 F. Supp. 2d 697, 700-05 (E.D. La. 2005) (Vance, J.) (reviewing standing requirements). Both LEAN and Sierra Club meet the requirements for associational standing.

A. LEAN and Sierra Club Members Independently Meet the Requirements for Standing.

LEAN and Sierra Club members meet the standing requirements to sue as individuals. The United States Supreme Court has interpreted Article III of the Constitution to provide federal court jurisdiction to cases in which the plaintiff (1) has suffered an "injury in fact," (2) which is fairly traceable to the challenged action of the defendant, and (3) which can be redressed by a favorable decision by the court. Bennett v. Spear, 520 U.S. 154, 167 (1997); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000).

1. LEAN and Sierra Club Members have suffered an injury in fact.

LEAN and Sierra Club members have incurred and will continue to incur an injury in fact because landfills governed by the Hurricane Orders affect areas where they live, work, or recreate and have impaired their enjoyment of those areas. For environmental citizen suits, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." Laidlaw, 528 U.S. at 181. For standing purposes, "injury in fact" need not be physical or economic. To the contrary, the Supreme Court has long recognized that

in environmental cases "the interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values." Sierra Club v. Morton, 405 U.S. 727, 738 (internal quotations and citations omitted); see Laidlaw, 528 U.S. at 183; see generally St. Bernard Citizens, 354 F. Supp. at 702.

An "injury in fact" is "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Bennett, 520 U.S. at 167. Specifically, the Court has held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." Laidlaw, 528 U.S. at 183 (internal quotations and citations omitted). In Sierra Club v. Cedar Point Oil Co., Sierra Club members established an injury in fact where its members testified that pollutants had impaired their recreational activities, including "swimming, canoeing, and birdwatching." 73 F.3d 546, 556 (5th Cir. 1996). Moreover, in another case, the Fifth Circuit found the plaintiffs satisfied the injury in fact requirement for standing where plaintiffs' members stated they "suffered repeated exposure to sulfurous odors while in the home, yard, or driving through town that severely diminished their enjoyment of their surroundings." Texans United for a Safe Econ. Educ. Fund v. Crown Cen. Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000) (citing NRDC v. EPA, 507 F.2d 905, 910 (9th Cir. 1974) (holding that "breathing and smelling polluted air is sufficient to demonstrate an injury in fact and thus confer standing under the CAA.").

Members of LEAN and Sierra Club have incurred actual injury because the Hurricane Orders affect landfills in areas where they live, work, or recreate and lessen the values of the affected area for those members. For example, a member of LEAN, Mr. Allen Green, owns

property located no more than two city blocks from the Industrial Pipe Landfill. (Green Decl. ¶¶ 2 & 4 (Ex. D).) Like the Laidlaw case, where one of the standing witnesses occasionally drove over the river which "looked and smelled" polluted, 528 U.S. at 181, Mr Green, from his house, can "see mountains of white goods…some towering about sixty (60) feet" and finds the sight of the trash "offensive and unpleasant," "ruin[ing] the aesthetic enjoyment of [his] home." (Ex. D ¶ 7.) Furthermore, like in Crown Central, where the court found standing because the smell of pollutants were overpowering and invading the home, 207 F.3d at 792, the overpowering smell "constantly invades [Mr. Green's] home" and "ruins the smell of [his] house." (Ex. D ¶ 8.) Knowing that the Hurricane Orders allow debris into the landfill that federal public health laws prohibit, Mr. Green is reasonably concerned for his health and welfare. (Ex. D ¶¶ 6 & 10.)

Another member of LEAN, Reverend Vien Nguyen, lives, works, and recreates approximately two miles from the Chef Menteur Landfill in Village de l'Est. (Vien Decl. ¶¶ 2 & 4-5 (Ex. E).) Chef Menteur Landfill abuts the Maxent Canal which then flows into a lagoon adjacent to the community. (Ex. E ¶ 8.) Reverend Vien uses the canal for recreational activities including environmental site-seeing tours. (Ex. E ¶ 9.) Like in Cedar Point, where the court found polluted water injured an association's member because it impaired his enjoyment of bird-watching near that polluted water, 73 F.3d at 556-57, the lack of federal public safety protections from the Hurricane Orders "impairs [his] enjoyment of the canal." (Ex. E ¶ 9.) Reverend Vien fears that waste from the landfill will seep into the water, ruining its use for himself and his parishioners. (Ex. E ¶ 11.) For example, members of his community fish in the waters surrounding the community and offer him fish, which he is "afraid to eat" because the landfill abuts the canal. (Ex. E ¶ 10.)

Members of Sierra Club have also incurred actual injury because the Hurricane Orders

affect landfills in areas where they live, work, or recreate and lessen the values of the affected area for those members. For example, Ms. Laura Koch, a Sierra Club member, hikes in Bayou Savauge National Wildlife Refuge for recreational purposes. (Koch Decl. ¶¶ 2 & 6 (Ex. F).) Like in Cedar Point, where pollution impaired a member's bird-watching, 73 F.3d at 555-56, Ms. Koch's awareness that Chef Menteur Landfill operates on the boundary of the wildlife refuge without complying with federal safety regulations "impairs [her] enjoyment of the refuge." (Ex. F ¶¶ 5-6.)

Another member of Sierra Club, Ms. Mary Tran, lives and works in Village de l'Est approximately one mile from the Chef Menteur Landfill. (Tran Decl. ¶¶ 2-4 (Ex. G).) Like Crown Central, Ms. Tran smells a "distinctive, unpleasant" odor that "impairs her enjoyment of her home." (Ex. G ¶ 9.) Moreover, Ms. Tran fears that the landfill may contaminate the waters surrounding the landfill and her community prevent her from "enjoy[ing] … the fish" her father catches and brings "home for dinner and expects" her to eat. (Ex. G ¶ 7.) Moreover, for Ms. Tran the Hurricane Orders have impaired her enjoyment of her home and sense of health and welfare while in her home. (Ex. G ¶ 5.)

At a minimum, each of these members of LEAN and Sierra Club suffer impaired recreational value for areas near landfills affected by the Hurricane Orders, thus qualifying for standing. Moreover, these landfills impair their enjoyment of home, community, and health. Therefore, LEAN and Sierra Club members have suffered actual injuries and suffer from threatened injuries.

2. LEAN's and Sierra Club's members' injuries are fairly traceable to the challenged action.

The injuries of LEAN's and Sierra Club's members are "fairly traceable" to the

Hurricane Orders. See Bennett, 520 U.S. at 167. The Hurricane Orders waive federal protections that Congress mandated to protect the public against any "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such a facility." 42 U.S.C. § 6944(a). Thus, the orders have reduced health, safety, and welfare protections at facilities that—because of their potential to cause harm to health and welfare—impair the declarants enjoyment of living in and visiting Louisiana communities and resources.

3. LEAN and Sierra Club's Injuries are Redressable by this Court.

LEAN and Sierra Club seek injunctive relief to redress the injuries from the Hurricane Orders. This court has authority to order injunctive relief and enjoin the state from actions in violation of federal law. See Rollins Envtl. Svcs., 775 F.2d at 637 (enjoining enforcement of a St. James Parish ordinance preempted by the federal Toxic Substances Control Act because "enforcement of it would violate the Supremacy Clause of the federal Constitution.").

Because members of LEAN and Sierra Club have suffered actual injuries that are fairly traceable to the Hurricane Orders and which this Court can redress, these members independently meet the requirements for standing.

B. The Interests LEAN and Sierra Club Seek To Protect Are Germane To the Organizations' Purposes.

LEAN and Sierra Club meet the second requirement for associational standing because the interests they seek to protect by this lawsuit are "germane" to their organizational purposes. See Cedar Point, 73 F.3d at 555. LEAN's purpose is to preserve and protect the state's land, air, water, and other natural resources, and to protect its members and other residents of the state from threats of pollution. (Orr Decl. ¶ 4 (Ex. H).) Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth, to practice and promote the responsible use of the Earth's

resources and ecosystems, to educate and enlist humanity to protect and restore the quality of the natural and human environment, and to use all lawful means to carry out these objectives. (March Decl. ¶ 4. (Ex. I).)

C. This Case Does Not Require the Participation of Individual Members of LEAN or Sierra Club.

The nature of this case is such that neither the claims asserted nor the relief requested requires the participation of the individual members of either association. When organizations do not seek "monetary damages or particularized relief limited to a single person or group, their lawsuit does not require the participation of individual members of the organizations." St. Bernard Citizens, 354 F. Supp. 2d at 701. When "neither the [claim asserted] nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context." Hunt, 432 U.S. at 344.

LEAN and Sierra Club do not seek monetary damages but seek injunctive relief that is not particularized to an individual or group. In sum, LEAN and Sierra Club meet all the elements of associational standing to prosecute this lawsuit.

Prayer for Relief

For the foregoing reasons, this Court should GRANT the Plaintiffs' Motion for Summary Judgment that:

1) the Supremacy Clause, U.S. Const., art VI, cl. 2, preempts the "Seventh Amended Declaration of Emergency and Administrative Order," A.I. No. 130534 (dated Aug. 28, 2006) and "Fifth Amended Declaration of Emergency and Administrative Order" (In the Matter of Hurricane Rita and its Aftermath, A.I. No. 131019) (dated Aug. 28, 2006) and other orders in this series issued by Secretary McDaniel, and

2) the Plaintiffs have standing to prosecute this lawsuit.

Respectfully submitted on October 17, 2006,

/s/ Adam Babich

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon

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by e-mail to Donald Trahan and Dianne Little on October 17, 2006, and by U.S. mail, postage prepaid to Donald Trahan on October 18, 2006.

/s/Adam Babich

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