19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

IN THE MATTER OF:	*	
LOUISIANA DEPARTMENT OF	*	**NUMBER 546,678**
ENVIRONMENTAL QUALITY	*	
PERMITTING DECISION :	*	
GENERAL PERMITS FOR WATER	*	
DISCHARGES FROM LIGHT	*	**SECTION "D"**
COMMERCIAL FACILTIES (AI 84683)	*	
	*	

PETITIONERS' OPPOSITION TO DEFENDANT'S
MOTION TO RECONSIDER ORDER STAYING GENERAL PERMIT

Petitioners Louisiana Environmental Action Network ("LEAN") and Mr. O'Neill Couvillion respectfully submit this Opposition to Defendant Louisiana Department of Environmental Quality's ("LDEQ") Motion to Reconsider Order Setting Date for Filing Record of Decision and Staying General Permit, filed September 15, 2006 (the "Motion to Lift Stay").

INTRODUCTION

The Court's August 30, 2006 order to stay LDEQ's General Permit for Water Discharges From Light Commercial Facilities (the "General Permit") is appropriate and necessary to protect the state's waters, including its designated Outstanding Natural Resource Waters.[1] Without the stay, the General Permit would cause petitioners and the environment irreparable harm by permitting facilities to pollute these pristine water bodies, which are afforded the most stringent protection under Louisiana law. Any temporary inconvenience to LDEQ resulting from the stay is minimal in comparison to the degradation of Louisiana's waters under the General Permit.

1. "Outstanding Natural Resource Waters" include water bodies designated for preservation, protection, reclamation, or enhancement of wilderness, aesthetic qualities, and ecological regimes, such as those designated under the Louisiana Natural and Scenic Rivers System or those designated by LDEQ as waters of ecological significance. La. Admin. Code tit. 33, pt. IX, § 1111(G). Those water bodies presently listed as outstanding natural resources are listed in Table 3 of La. Admin. Code tit. 33, pt. IX, § 1123.

STATEMENT OF FACTS

On May 4 and 11, 2006, LDEQ issued public notice of the draft General Permit for Water Discharges From Light Commercial Facilities ("Public Notice," attached at Ex. A). The General Permit would allow facilities to discharge polluted water into any and all waters of the state, without exclusion. (Ex. A at 1; General Permit at pt. I, p. 1, attached in relevant part as Ex. B). LDEQ acknowledged that, as a result of discharges under the General Permit, "some change in existing water quality may occur." (Ex. A at 1.)

On June 19, 2006, LEAN timely submitted two sets of comments to LDEQ. Comments that LEAN submitted directly are attached at Exhibit C. Comments that Tulane Environmental Law Clinic submitted on LEAN's behalf are attached at Exhibit D. These comments express concern that, among other things, the General Permit would allow discharges into the state's designated Outstanding Natural Resource Waters, waters which Louisiana law protects from any degradation.

On July 27, 2006, LDEQ approved the General Permit and responded to LEAN's comments. (LDEQ Response to Public Comments on Draft LPDES Permit No. LAG480000 for Discharges From Light Commercial Facilities, July 27, 2006 (the "Response," attached at Ex. E)). LDEQ's Response stated, among other things, that "[d]ischarges may be permitted to Outstanding Natural Resource Waters provided the discharges do not result in the degradation of the water body so that it no longer meets the Outstanding Natural Resource Waters designation." (Ex. E at 5).

LDEQ's Response failed to address several of LEAN's other comments, including comments concerning the inadequacy of LDEQ's analyses on the environmental impacts of discharges under the General Permit.

On August 25, 2006, Petitioners filed a petition for judicial review of the General Permit (the "Petition") asserting, among other things, that 1) LDEQ based its decision on an error of law when it asserted that discharges under the General Permit into Outstanding Natural Resource Waters were permissible, and 2) LDEQ failed to meet its public trustee duties when it did not perform sufficient analyses to determine that adverse environmental impacts had been minimized or avoided as much as possible consistent with the public welfare and when it failed to respond

adequately to LEAN's comments. Petitioners requested that this Court vacate the permit and stay its effectiveness pending the resolution of the Petition.

On August 30, 2006, the Court ordered a stay of the general permit pending final resolution of Petitioners' appeal. The Court also ordered LDEQ to produce the administrative record by September 15, 2006.

On September 15, 2006, LDEQ filed its Motion To Lift Stay. On September 18, 2006, the Court granted LDEQ 15 additional days to file the record and set a hearing for October 30, 2006 to determine whether the Court should lift the Stay.

ARGUMENTS AND AUTHORITIES

I. The Court Properly Exercised Its Discretion In Imposing The Stay.

This Court properly exercised its discretion when it imposed the Stay. Pursuant to Title 30, Section 2050.22(B) of the Louisiana Revised Statutes, after a petition for review of an LDEQ permit has been filed, this Court may, in its discretion, order a stay of the permit "with appropriate terms," pending final resolution of the appeal. The Louisiana First Circuit Court of Appeal has approvingly noted the rule that, in granting stays pending final resolution, "***much discretion*** is vested" in the reviewing court. Div. of Admin. v. Dep't of Civil Serv., 345 So.2d 67, 69 (La. App. 1st Cir. 1976) (emphasis added). The court explained that, when assessing the appropriateness of a particular stay order, courts should consider four questions: "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .. (4) Where lies the public interest? Div. of Admin. v. Dep't of Civil Serv., 345 So.2d 67, 68-69 (La. App. 1st Cir. 1976). Here, the answers to these questions support this Court's decision to issue a stay.

II. Petitioners Will Prevail On the Merits.

Petitioners will prevail on the merits because LDEQ's approval of the General Permit violates of Louisiana law. In Division of Administration, the Louisiana First Circuit held that a

showing of "a serious legal question for resolution" sufficed for a strong showing that the applicant would prevail on the merits of the appeal. 345 So.2d at 70.

The relevant standard of review on the merits of this case is whether LDEQ's decision was "(1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority . . . (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Arbitrary or capricious or characterized by abuse of discretion . . . or (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court." La. Rev. Stat. tit. 49 § 964(G). LDEQ's approval of the General Permit cannot survive scrutiny under that standard.

A. <u>LDEQ's Approval of the General Permit Is Based On An Error Of Law</u>

LDEQ approved the General Permit, which allows discharges of pollutants into Outstanding Natural Resource Waters, on the basis that "[d]ischarges may be permitted to Outstanding Natural Resource Waters provided the discharges do not result in the degradation of the water body so that it no longer meets the Outstanding Natural Resource Waters designation." (Ex. E at 5.) The Louisiana Administrative Code, however, expressly prohibits LDEQ from authorizing ***any*** degradation of the state's outstanding natural resource waters. La. Admin. Code tit. 33, pt. IX, § 1109(A)(2) ("no degradation shall be allowed in high-quality waters that constitute outstanding natural resources."); La. Admin. Code tit. 33, pt. IX, § 1119(C)(4) ("If a wastewater discharge or activity is proposed for an outstanding natural resource waterbody, . . . [LDEQ] shall not approve that activity if it will cause degradation of these waters. For these purposes, degradation is defined as a statistically significant difference . . . from existing physical, chemical and biological conditions.") LDEQ, therefore, simply used the wrong standard for approving the permit, in violation of clear provisions of law.

LDEQ's assessment of the extent of discharges that it may allow to Outstanding Natural Resource Waters is not only inaccurate, it is far less stringent than law requires. Where sections 1109 and 1119 of the state regulations prohibit any degradation at all within the designated use of Outstanding Natural Resource Waters, LDEQ would allow as much degradation as possible within the water quality criteria for that use up to the point of having to change the "outstanding" classification. (Ex. E at 5.) (mistakenly asserting that LDEQ may allow discharges provided

that they "do not result in the degradation of the water body so that it no longer meets the Outstanding Natural Resource Waters designation." Therefore, LDEQ has based its final decision on an error of law.

Moreover LDEQ admitted that it violated state regulations prohibiting degradation of Outstanding Natural Resource Waters when it acknowledged that, as a result of discharges under the General Permit, "some change in existing water quality may occur." (Pub. Not. Ex. A at 1.) Sections 1109 and 1119 do not allow LDEQ to authorize a change in water quality for Outstanding Natural Resources Waters. La. Admin. Code tit. 33, pt. IX, §§ 1109(A)(2) & 1119(C)(4). The General Permit does not exclude discharges into Outstanding Natural Resource Waters. Therefore, because LDEQ has permitted some change to existing water quality where state regulations prohibit LDEQ from allowing any, the General Permit violates state law.

B. LDEQ Failed To Meet Its Public Trustee Duties And Made Its Decision Based on Unlawful Procedure.

Petitioners will also prevail on the merits because LDEQ has failed its duties as public trustee: 1) to ensure that adverse environmental impacts resulting from discharges under the general permit have been minimized or avoided as much as possible; and 2) to respond to all of LEAN's comments.

The Louisiana Constitution requires LDEQ, as public trustee, to analyze the environmental impacts of its decision to issue a permit for water discharges. The Louisiana Constitution states that "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. art. IX, § 1. The Louisiana Supreme Court found that this constitutional provision "requires an agency or official, before granting approval of [the] proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984). The court explained that LDEQ's must "use a systematic, interdisciplinary approach to evaluation of each . . . project . . . . In determining whether the proposed project fully minimizes adverse

environmental effects, [LDEQ] necessarily must consider whether alternate projects, alternate sites, or mitigative measures would offer more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits." Id.; see In re Rubicon, Inc., 670 So. 2d 475, 482. Also, LDEQ "is required to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings; and it must articulate a rational connection between the facts found and the order issued." Save Ourselves, 452 So. 2d at 1159 (citations omitted). "[I]f the decision was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the courts' responsibility to reverse." Id. (citations omitted).

To date, LDEQ has not engaged in the environmental analyses that would satisfy Save Ourselves and Rubicon in regards to the General Permit. LDEQ has not ensured that adverse environmental impacts resulting from discharges under the General Permit have been avoided to the maximum extent possible. (See Sulkin Aff. Ex. F ¶¶ 14-16, 19-23.) LDEQ has not assessed the cumulative impacts of discharges under the General Permit. (See Sulkin Aff. Ex. F ¶¶ 17, 18.) LDEQ has not analyzed whether there are mitigating measures that could offer more protection to the environment, for example excluding Outstanding Natural Resource Waters from General Permit's receiving water bodies. (See Sulkin Aff. Ex. F ¶¶ 22, 23.) Moreover, without considering the individual receiving water bodies, LDEQ can not effectively draw conclusions about the environmental impacts of the General Permit. (See Sulkin Aff. Ex. F ¶¶ 14-17.)

LDEQ has also failed its duty as public trustee to respond to all of LEAN's comments. In Rubicon, the Court of Appeal reasoned that an agency decision which complies with the mandates of Save Ourselves would contain, at a minimum, among other things, "a response to all reasonable public comments." 670 So. 2d at 483. In this case, LDEQ failed to respond to several comments submitted by LEAN, including a comment that the General Permit is inappropriate for discharges that require extensive analysis, a comment requesting an explanation of how LDEQ will execute the analyses that it stated it will do after issuing the General Permit, and a comment inquiring how LDEQ has analyzed or will track and measure the cumulative impacts of discharges authorized under the General Permit. (Exs. C at 3-5 and D at 1-3.) Therefore, LDEQ's issuance of the General Permit is based on unlawful procedure.

Because this Court is empowered to reverse LDEQ's issuance of the General Permit on the basis that (a) LDEQ's decision is based on an error of law, (b) issuance of the General Permit violates state regulations, and (c) LDEQ's decision is based on unlawful procedure because it failed to meet its public trustee duties under the Louisiana Constitution, the Petitioners have shown that they should win this case on the merits.

III. The Stay Serves To Prevent Irreparably Injury.

A. Environmental Injury Is Irreparable.

Petitioners will suffer irreparable injury if the stay is lifted. "Irreparable injury" is "that which can not be adequately compensated in damages, or for which damages cannot be compensable in money." Lassalle v. Daniels, 673 So.2d 704, 709 (La. App. 1 Cir. 1996), (citing Greenberg v. De Salvo, 229 So. 2d 83, 86 (La. 1969)). The U.S. Supreme Court has noted that, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable." Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). The Court held, "[i]f such [irreparable] injury is sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." Id.

If the Court lifts the Stay, facilities will discharge pollutants into the state's waters, including its Outstanding Natural Resource Waters. Those pollutants, some of which are biocumulative by nature (i.e. do not dissolve into the water and, therefore, result in injury that is permanent or of long-duration) (see Sulkin Aff. Ex. F ¶ 18) and some of which the General Permit allows at levels that may violate state water quality standards (see Sulkin Aff. Ex. F ¶ 21), will "impact and degrade the quality of the receiving water body," causing irreparable environmental injury. (Sulkin Aff. Ex. F ¶¶ 12 & 13) Because LDEQ has not provided sufficient analyses of the General Permit's environmental impacts, the extent of the environmental harm cannot be quantified. (See Sulkin Aff. Ex. F ¶¶ 14-19 and supra § (A)(1)(c)) Nevertheless, by their nature, such environmental harms can not be remedied by monetary damages, and are therefore irreparable injuries. See Amoco, 480 U.S. at 545; Lassalle, 673 So.2d at 709.

B. Because LDEQ's Action is Unlawful, a Stay Is Appropriate Without Regard to Irreparable Injury.

The Louisiana Supreme Court has stated that there need not be irreparable harm to stay an unlawful agency action: "[W]here the threatened action of a municipal body is 'in direct violation of a prohibitory law' a court of equity may enjoin the threatened action . . . . In such cases, it is not necessary for the Petitioners to show irreparable injury." Louisiana Assoc. Gen. Contractors, Inc. v. Calcasieu Parish Sch. Bd., 586 So. 2d 1354, 1359 (La. 1991), (quoting Bardwell v. Parish Council of Parish of East Baton Rouge, 216 La. 537, 545, 44 So. 2d 107, 109 (La. 1949)). Here, LDEQ has issued the General Permit in violation of, among other things, Louisiana regulations prohibiting LDEQ from approving any degradation of Outstanding Natural Resource Waters. La. Admin. Code tit. 33, pt. IX, § 1109(A)(2) ("no degradation shall be allowed in high-quality waters that constitute outstanding natural resources."); La. Admin. Code tit. 33, pt. IX, § 1119(C)(4) ("If a wastewater discharge or activity is proposed for an outstanding natural resource waterbody, . . . [LDEQ] ***shall not approve*** that activity if it will cause degradation of these waters. For these purposes, degradation is defined as a statistically significant difference . . . from existing physical, chemical and biological conditions." (emphasis added)).

Petitioners will be irreparably injured without the Stay. But LDEQ's issuance of the General Permit in violation of Louisiana law shows, independently, that the stay is appropriate.

III. The Stay Will Not Harm Other Interested Parties.

Neither LDEQ nor the commercial facilities that the General Permit affects will suffer substantial harm as a result of the Stay. In Division of Administration, the court was asked to stay a decision of the Louisiana Civil Service Commission, which decreed that all employees of the Division of Administration be brought into the Civil Service System, pending final resolution of the appeal by the division of Administration. 345 So. 2d at 68. The defendant challenged the stay, arguing that its image would be tarnished and its integrity held suspect if its order were not immediately implemented. Id. at 71. The Court of Appeals ordered the stay, finding that defendant's concerns did not rise to the level of substantial harm. Id.

In this case, LDEQ's concern is that it will take more work on its part if the Stay is maintained. LDEQ remains free to issue permits to cover discharges from these facilities. Any facilities affected by the Stay can apply to LDEQ to discharge under an individual permit or under a different general permit. This inconvenience is minimal in comparison to the substantial and irreparable harm that the degradation of Louisiana's waters, and particularly its Outstanding Natural Resource Waters, will cause to petitioners. Moreover, LDEQ's interest in minimizing its workload does not justify degradation of the state's waters, particularly when such degradation violates state law.

LDEQ argues that the process of issuing individual, instead of general, permits will be too time-consuming and will expend the agency's limited resources. While the Stay may indeed increase LDEQ's work load to some degree, issuing permits and protecting Louisiana's natural environment are two of the agency's most important functions. As the "primary public trustee of the environment," the agency is presumed to possess unique knowledge in environmental protection and is thus charged with the responsibility of issuing discharge permits that adhere to the state's environmental laws. La. Rev. Stat. tit. 30, § 2014(A). LDEQ should not be allowed to evade its statutory duty to protect Louisiana's waters simply because the process of doing so will be time-consuming.

IV. The Public Interest Favors The Stay.

The public has a strong interest in the protection of the state's waters. According to the Louisiana Administrative Code, it is the state's policy that "all waters of the state . . . whose existing quality exceeds the specifications of the approved water quality standards or otherwise supports an unusual abundance and diversity of fish and wildlife resources . . . will be maintained at their existing high quality." La. Admin. Code tit. 33, pt. IX, § 1109(A)(1). Staying the General Permit pending resolution of this appeal, which seeks to protect the state's waters from an under-considered and over-permissive permit, will protect the public interest laid out in the states regulations: to maintain the quality of the states waters – particularly its high quality waters.

In addition, the public has an interest in seeing that LDEQ adheres to the laws of the state. "There is a strong public interest in requiring a government agency to follow its own rules

and regulations." Department of Public Safety & Corrections v. Savoie, 569 So.2d 139, 143 n.2 (La. App. 1 Cir. 1990). Allowing LDEQ to ignore its own regulations by authorizing discharges into the state's outstanding natural resource waters would directly contravene this "strong public interest." Id.

CONCLUSION

This Court has appropriately exercised its discretion in granting the Stay. Therefore, Petitioners LEAN and Mr. O'Neil Couvillion respectfully request that this Court DENY Defendant's Motion to Re-Consider Its Order Staying the General Permit.

Respectfully submitted this 20th day of October, 2006,

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CERTIFICATE

I certify that legible copies of the foregoing document have this date been served on opposing counsel of record by email and by placing same in the U.S. Mails, properly addressed, and postage prepaid.

New Orleans, Louisiana, this 20th day of October, 2006.

Adam Babich