

OAKVILLE COMMUNITY ACTION	*	NUMBER <u>517017</u> , DIV. <u>24</u>
GROUP, LOUISIANA	*	
ENVIRONMENTAL ACTION	*	
NETWORK, and GLYNN MAYFIELD,	*	
	*	
Petitioners,	*	19 th JUDICIAL DISTRICT
	*	COURT
	*	
VERSUS	*	PARISH OF EAST BATON
	*	ROUGE
	*	
LOUISIANA DEPARTMENT OF	*	STATE OF LOUISIANA
ENVIRONMENTAL QUALITY	*	
	*	
Defendant.	*	

**PETITIONERS' REVISED MEMORANDUM IN OPPOSITION TO
INTERVENOR'S MOTION TO VACATE STAY**

Petitioners Oakville Community Action Group (“Oakville”), Louisiana Environmental Action Network (“LEAN”), and Glynn Mayfield respectfully file this memorandum to oppose Intervenor-Permittee Industrial Pipe, Inc.’s March 13, 2004 motion to vacate this Court’s February 12, 2004 stay. The stay prevents Industrial Pipe from expanding its landfill pursuant to permits issued by Louisiana Department of Environmental Quality (“LDEQ”) pending oral argument on the merits of this case. Petitioners submitted their original memorandum in opposition to Intervenor’s Motion on April 2, 2004, before LDEQ’s record of decision was available. Petitioners now submit this Revised Memorandum to reflect LDEQ’s April 12, 2004 record of decision.

**I.
INTRODUCTION**

The only thing keeping Industrial Pipe from irreparably harming Petitioners is the stay that this Court has granted. Without the stay, LDEQ’s permit decisions would allow Industrial Pipe to expand its landfill into the coastal wetlands adjacent to the Oakville community, and to receive improper solid waste at its transfer station. These permit decisions, which LDEQ unlawfully approved on the last day of the prior administration, threaten Petitioners’ health, safety, and welfare, as well as their conservation, recreational, and aesthetic interests.

The three months remaining on the stay are minimal in comparison to the permanent alteration of the landscape that the permits condone. Industrial Pipe’s expansion would forever

destroy a unique hardwoods wetland. Once the expansion starts, much of the irreparable injury and destruction is already done.

II. **PROCEDURAL HISTORY**

LDEQ issued permits to Industrial Pipe on January 8, 2004, for a type III construction and demolition (“C&D”) landfill¹ and a type III separation facility.² Petitioners filed appeals of both permits on February 11, 2004, requesting that this Court vacate the permits and stay their effectiveness pending the resolution of the Petition. On February 12, 2004, the Court granted a modified order, which stays the issuance of both permits pending oral argument of the appeal.

Intervenor-Permittee Industrial Pipe filed a motion to vacate the stay on March 23, 2004. On March 26, 2004, Respondent LDEQ filed a Motion and Order for First Extension of Return Date, which requested the Court to extend the date of filing its record of decision from March 31, 2004 to April 12, 2004. Petitioners submitted their original memorandum in opposition to Intervenor’s Motion to Vacate the Stay on April 2, 2004. LDEQ filed its record of decision on April 12, 2004, and Petitioners now file this revised memorandum based on that record.

III. **STATEMENT OF FACTS**

The administrative record contains the story of a landfill company that has had little regard for either the law or its neighbors. Industrial Pipe unlawfully began its C&D landfill operations as an unauthorized open dump in 1985.³ Citizen complaints to LDEQ illustrate the nature of these operations: “So many flies I can’t open doors—afraid of disease.”⁴ In 1985, the LDEQ inspector who visited the C&D landfill reported that the operations were illegal and recommended closure.⁵ LDEQ charged Industrial Pipe with a \$50,000 penalty, but accepted a \$12,000 settlement.⁶

Operations at the C&D landfill did not improve. Leachate (contaminated water) ran out

¹ Type III Construction/Demolition Debris and Woodwaste Landfill, Industrial Pipe, Inc., AI No. 14689, Site No. TP-075-2029, Permit No. P-0367. The LDEQ Record of Decision refers to page numbers in the record for this permit as “**C&D**.”

² Separation Facility, Industrial Pipe, Inc., AI No. 14689, Site No. TP-075-3077, Permit Renewal No. P-0261RI. The LDEQ Record of Decision refers to page numbers in record for this permit as “**SEP**.”

³ See LDEQ Penalty Assessment, PE-075-202, 1985. The LDEQ Record of Decision refers to page numbers in the combined record of both permits as “COMBINED” Type III Construction/Demolition Debris and Woodwaste Landfill, Permit No. P-0367 and Separation Facility, Permit No. P-0261RI, hereafter “**COM**,” 008—030.

⁴ LDNR Citizens’ Complaint Record, April 9, 1985, **COM** 001—003.

⁵ General Inspection by G. Mathes, May 29, 1985; see **COM** 001—003.

⁶ Proposed Penalty Notices, July 31, 1985; Letter from J. Brent to W. Byrd, Re: Settlement, January 23, 1987, **COM** 008—030.

of the landfill.⁷ Inspectors and neighbors reported strong odors and flies.⁸ Stacks of waste were improperly piled up inside and outside of the facility.⁹ LDEQ issued a Compliance Order to Industrial Pipe in 1988, charging Industrial Pipe \$10,000 for serious violations and calling for closure.¹⁰

Industrial Pipe continued to operate in the same manner throughout the 1980s, accruing pages of complaints and violations in LDEQ reports. LDEQ inspectors found that Industrial Pipe was improperly accepting household garbage¹¹ and disposing of illegal waste.¹² Leachate escaped the landfill,¹³ and liquid waste leached into the ground.¹⁴ Open burning continued.¹⁵ Problems with strong odors and flies became regular features in each LDEQ report.¹⁶

The recycling operation inspired similar accounts in LDEQ reports. LDEQ Inspectors found it strewn with unsorted “waste stockpiles”¹⁷ and unauthorized waste (i.e., “semi-filled soft drink containers . . . dumped on the ground outside the facility”).¹⁸ Waste liquid leached into the ground.¹⁹ There were “very strong odors” and “a definite fly problem.”²⁰ An LDEQ inspector recommended that Industrial Pipe “cease receiving any materials.”²¹

In 1989, Industrial Pipe illegally began operating a waste transfer station without a

⁷ LDEQ Fact Sheet, TP-075-3077/Permit Application No. 369, February 10, 1987, **COM 051—053**.

⁸ *Id.*

⁹ *Id.*

¹⁰ LDEQ Penalty Assessment, PE-075-2029, 6-30-88, **COM 060**.

¹¹ LDEQ Compliance Inspection Reports by M. Stansbury, November 22, 1988, **COM 069**, February 21, 1989, **COM 074**.

¹² LDEQ General Inspection Report by M. Stansbury and G. Mathes, May 9, 1989, **COM 079**; LDEQ Fact Sheet, TP-075-3077/Permit Application No. 369, July 27, 1989, **COM 100**.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *E.g.*, LDEQ General Inspection Report by M. Stansbury and G. Mathes, May 9, 1989, **COM 079**; LDEQ Fact Sheet, TP-075-3077/Permit Application No. 369, July 27, 1989, **COM 100**; LDEQ Compliance Inspection Report by M. Stansbury, 6-1-89, **COM 0088**.

¹⁷ LDEQ General Inspection Report by M. Stansbury and G. Mathes, May 9, 1989, **COM 079**; LDEQ Fact Sheet, TP-075-3077/Permit Application No. 369, July 27, 1989, **COM 100**.

¹⁸ LDEQ General and Compliance Inspection Report, PE-075-2029, July 27, 1989, **COM 0100**, **COM 0104**.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

permit.²² The same year, the transfer station caught on fire.²³ LDEQ issued a Compliance Order to Industrial Pipe for its unauthorized transfer station, calling for closure and a \$5000 penalty.²⁴

This did not curtail Industrial Pipe’s violations. The problems with odors, flies and leachate that characterized the C&D landfill began to arise at the transfer station.²⁵ On various occasions, LDEQ inspectors found an overflowing washdown collection tank,²⁶ thousands of tires improperly stacked outside the transfer station²⁷ (as well as at the C&D dump),²⁸ brown-greenish liquid leaching from the bottom of a working cell,²⁹ and crushed metal containers with hazardous wastes.³⁰

The early 1990s repeated the tumultuous chapters of the late 1980s and added new ones. At the C&D landfill, LDEQ inspectors found that Industrial Pipe had illegally failed to apply interim cover material.³¹ Industrial Pipe failed to control polluted leachate,³² to deposit waste in the smallest practicable area,³³ and to build and maintain levees to protect from flooding.³⁴ It accepted unauthorized waste,³⁵ including “animal feces, a lot of needles, which came from the medical companies . . . and . . . asbestos.”³⁶ It lacked emergency procedures, contingency plans, closure plans, and post-closure plans.³⁷ LDEQ ordered Industrial Pipeline to “cease depositing or

²² LDEQ Facility Inspection Report, PE-075-2029, July 27, 1989, **COM** 0100, **COM** 0104; LDEQ Fact Sheet, May 15, 1991, **SEP** 0590—0597.

²³ Complaints by Dept. Bayhi, Belle Chasse Fire Dept., October 18, 1989, **COM** 0108—0112.

²⁴ Compliance Order and Penalty Notice, October 9, 1989, **COM** 0114—0120.

²⁵ LDEQ Compliance Inspection Report by M. Stansbury, December 1, 1989, **COM** 0136.

²⁶ *Id.*

²⁷ LDEQ General Inspection Report by M. Stansbury, March 22, 1991, **SEP** 0246—0258.

²⁸ Complaint Inspection Report, Compliance Inspection Report by M. Stansbury, February 15, 1990, **COM** 0139; June 25, 1990, **COM** 0160.

²⁹ LDEQ Inspection Report, May 2, 1991, **COM** 0197.

³⁰ Memorandum from J. Albritton, LDEQ, to P. Romanowsky, LDEQ, May 29, 1991, **COM** 0248.

³¹ LDEQ General Inspection Report by J. Williston and B. Lions, June 22, 1993, **COM** 0382.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Testimony of Glenn Mayfield, Industrial Pipe Employee from 1989 to 1994, in *Oakville v. Industrial Pipe, Inc.*, No. 01-1258, E.D. La. April 5, 2004, trial transcript at 22.

³⁷ LDEQ General Inspection Report by J. Williston and B. Lions, June 22, 1993, **COM** 0382.

allowing the deposit of waste of any kind at the Site or at any other location.”³⁸

At the transfer station, Industrial Pipe improperly stacked large piles of wastes outside of the facility.³⁹ Inspectors found unauthorized wastes and waste that had been dumped illegally during the night.⁴⁰ Industrial Pipe failed to timely process waste⁴¹ or to clean its dirty tipping floor.⁴² LDEQ issued a compliance order to close out the site.⁴³ But even after this, neighboring residents continued to endure foul odors and flies.⁴⁴

In 1990, spontaneous combustion below ground caused an underground fire at the C&D landfill.⁴⁵ The transfer station caught on fire in 1992,⁴⁶ and later fires burned insulation off of a wire and diesel residue.⁴⁷ Open burning continued.⁴⁸

In the mid-1990s, Industrial Pipe’s failure to maintain a 200-foot buffer zone⁴⁹ between the transfer station and its neighbors became a concern. Oakville (through its counsel, the Tulane Environmental Law Clinic) and others alerted LDEQ to the possibility that the waiver of objection to the buffer, allegedly signed by the neighboring landowner, could be invalid.⁵⁰ In particular, it was signed by a man who had been dead four years, whose name was misspelled,⁵¹ and who had only a one-ninth interest in the property.⁵² Industrial Pipe owner Kennett Stewart

³⁸ LDEQ Compliance Order, December 7, 1993, **COM 0430**.

³⁹ LDEQ Compliance Inspection Report by M. Stansbury and J. Williston, August 23, 1993, **COM 0415**.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ LDEQ Inspections following Complaints, July 30, 1993, **COM 0407**; August 23, 1993, **COM 0415**; October 7, 1993, **COM 0426**; October 11, 1993, **COM 0428**; March 23, 1994, **COM 0440**; May 19, 1994, **COM 0446**; July 5, 1994 **COM 0448**.

⁴⁵ Telephone Notification Record, Call by K. Stewart; Emergency Occurrences Form, October 15, 1990, **COM 0170**.

⁴⁶ Complaint, Inspection in Response to Complaint, February 11, 1992, **COM 0291—0293**.

⁴⁷ LDEQ 24 Hour Notification Hotline, August 19, 1996, **COM 598**; October 4, 1996, **COM 0614—0615**.

⁴⁸ Complaint Record of Open Burning, November 23, 1995, **COM 0550**.

⁴⁹ *See* L.A.C. 33:VII.717.

⁵⁰ Letter from Tulane Environmental Law Clinic to LDEQ, Re: buffer zone waiver forgery, February 18, 1992, **SEP 0804—0813**.

⁵¹ Letter from W. Goodell to B. Kucharski, LDEQ, requesting revocation/denial of permits, November 15, 1995, **COM 0540**.

⁵² Testimony of Glenn Mayfield, Industrial Pipe Employee from 1989 to 1994, in Oakville v. Industrial Pipe, Inc., No. 01-1258, E.D. La. April 5, 2004, trial transcript at 133.

later acknowledged that the waiver was “not good nor valid.”⁵³

Industrial Pipe’s violations continued in the late 1990s in spite of LDEQ’s 1997 compliance orders.⁵⁴ At the C&D landfill, an LDEQ inspector found improper waste management practices, unauthorized creosote timbers, waste tires, and flies circling the rotting garbage on the ground.⁵⁵ At the transfer station, Industrial Pipe allowed unauthorized waste to drain through a perimeter ditch, off the property, and into the natural drainage.⁵⁶ It failed to prevent acceptance of unauthorized waste,⁵⁷ including hazardous creosote and rotting garbage.⁵⁸ Petroleum, hydrocarbons, and diesel had contaminated the soil.⁵⁹ Industrial Pipe continued to violate the protective 200-foot buffer zone requirement.⁶⁰ Flies and odors pervaded,⁶¹ even as citizens complained.⁶²

LDEQ noted twice in 1998⁶³ and again in 1999⁶⁴ that Industrial Pipe had failed to fully comply with its 1997 Compliance Order. Although LDEQ had threatened to revoke Industrial Pipe’s permit in 1996 for failure to maintain an adequate buffer zone, the violation continued, unabated.⁶⁵ Meanwhile, Industrial Pipe attempted to avoid the 200-buffer zone requirement by reclassifying its Type II-A transfer station to a Type III separation facility, which would only

⁵³ Letter from K. Stewart to H. Strong, LDEQ, notifying that buffer zone waiver was not good or valid, referred to in LDEQ letter, October 21, 1996, **SEP** 1124—1126. The quoted portion is LDEQ’s language in the Table of Contents of its April 12, 2004 Record of Decision.

⁵⁴ Compliance Orders SE-C-97-0148, SE-C-97-0149, 6-19-97, **COM** 0680.

⁵⁵ LDEQ Facility Inspection Report prepared by D. Wolcott, March 31, 1999, **COM** 0848—0858.

⁵⁶ LDEQ Compliance Inspection Report by L. Baldwin, April 23, 1997, **COM** 0664; LDEQ Facility Inspection Report by B. Lions, December 17, 1997, **COM** 0720.

⁵⁷ LDEQ Compliance Inspection Report by L. Baldwin, April 23, 1997, **COM** 0664; LDEQ Facility Inspection Report by B. Lions, December 17, 1997, **COM** 0720; LDEQ Compliance Inspection Report prepared by B. Lions and M. Stansbury, August 20, 1999, **COM** 0897.

⁵⁸ LDEQ Compliance Inspection Report by W. Desselle and L. Baldwin, October 28, 1998, **COM** 0798.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ LDEQ Facility Inspection Report by B. Lions, December 17, 1997, **COM** 0720; LDEQ Compliance Inspection Report by W. Desselle and L. Baldwin, October 28, 1998, **COM** 0798.

⁶² Citizens’ Complaint Record, December 16, 1998, December 17, 1998, **COM** 0798.

⁶³ Letter from W. Mollere, LDEQ, to T. Hardy, Lemle & Kelleher, April 27, 1998, **COM** 0733 (twelve violations remained); LDEQ Compliance Inspection Report by W. Desselle and L. Baldwin, October 28, 1998, **COM** 0798.

⁶⁴ Letter from W. Mollere, LDEQ, to T. Hardy, Lemle & Kelleher, March 8, 1999, **COM** 0844 (five violations remained).

⁶⁵ Letter from N. Poissant, Tulane, to D. Givens, LDEQ, June 25, 1999, **SEP** 1659—1661.

require a 50-foot buffer.⁶⁶ Although LDEQ initially declined to treat this request as a minor modification (which would not require public comment),⁶⁷ it later decided to address the issue by piecemealing the facility into parts that met the Type II-A standards and parts that could achieve Type III status via a minor modification.⁶⁸ In 2000, this Court vacated and remanded LDEQ's approval of this hodgepodge permit modification.⁶⁹

In 2001, Industrial Pipe began the application process to reclassify its entire transfer station to Type III-separation facility status, and an expansion of its existing Type III C&D landfill into 8.3 acres of wetlands.⁷⁰ In the meantime, the transfer station continued to violate the 200-foot buffer zone requirement.⁷¹ The citizens of Oakville had little to separate them from Industrial Pipe's improperly managed leachate⁷² and rotting garbage.⁷³ Nor did Industrial Pipe's employees have adequate protection: Industrial Pipe failed to provide them with proper safety equipment.⁷⁴

Petitioners attended LDEQ's November 19, 2003 public hearing to address Industrial Pipe's proposed type III C&D landfill permit, proposed type III separation facility permit, and environmental assessments for both proposed permits.⁷⁵ Glynn Mayfield registered his grievances and opposed Industrial Pipe's permit applications on the record.⁷⁶ Oakville and LEAN also registered their grievances and opposed Industrial Pipe's permit applications on the

⁶⁶ Letter from P. Romanowsky, Industrial Pipe, to W. Mollere, LDEQ, response to Compliance Order and permit modification request, June 19, 1998, **SEP** 1159—1228.

⁶⁷ See Letter from W. Mollere, LDEQ, to K. Stewart, Industrial Pipe, Notice of Deficiencies for the Mandatory Modification No.2, October 8, 1998, **SEP** 1229—1232; Letter from W. Mollere, LDEQ, to K. Stewart, Industrial Pipe, Notice of Deficiencies for the Mandatory Modification No.3, December 4, 1998, **SEP** 1236—1239; Letter from W. Mollere, LDEQ, to K. Stewart, Industrial Pipe, denying request to combine modifications, March 30, 1999, **SEP** 1240—1242.

⁶⁸ In a February 29, 2000, LDEQ modification approval letter to Industrial Pipe, LDEQ stated, "the picking/conveyer belt system, located in the southern part of the facility, is hereby classified as a Type III Separation Facility." **SEP** 1707—1710.

⁶⁹ Mayfield v. Givens, 19th Judicial District Court, Division D, Docket 470,993, December 8, 2000, **SEP** 1793.

⁷⁰ Solid Waste Permit Renewal Application/Mandatory Modification Document Type II-A/III Transfer Station/Separation Facility AI No. 14689, August 14, 2001, **SEP** 1946—2159.

⁷¹ Inspection Report by B. Lions, June 26, 2003, **COM** 0992.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Public Hearings Transcripts, November 19, 2003, **COM** 1322—1484.

⁷⁶ See Glenn Mayfield, in Public Comments in globo: November 19, 2003—December 22, 2003, **COM** 1485—1734.

record at this hearing,⁷⁷ and timely submitted written comments.⁷⁸

LDEQ granted the permits on Friday, January 8, 2004,⁷⁹ the last day before a new administration came in on Monday, January 12, 2004. Assistant Secretary for the Office of Environmental Quality Linda Levy said her aim was to act on the permits before a new administration took over.⁸⁰

As the Petition demonstrates, LDEQ's permit approvals allow Industrial Pipe's history of violations and harm to continue. Industrial Pipe's landfill and waste processing facility are not properly zoned.⁸¹ Examination of the record shows that Industrial Pipe failed to provide a zoning affidavit demonstrating that the proposed use does not violate existing land-use requirements.⁸² Neither Industrial Pipe nor LDEQ conducted a meaningful evaluation of alternative sites outside Plaquemines Parish.⁸³ LDEQ cannot point to a single page in either permit application that reflects a consideration of environmental costs.⁸⁴

LDEQ's decision to grant Industrial Pipe's permits in violation of applicable law and procedure aggrieves Petitioners, who have suffered through years of Industrial Pipe's odors, fires, and disease vectors.⁸⁵ Added to these injuries is the prospect of irreparable destruction of the bottomland hardwood wetlands adjacent to the Oakville Community. The first of two phases of expansion would sacrifice 8.3 acres of wetlands.⁸⁶ The second phase would extend Industrial Pipe's operation over 26.7 acres of virgin swamp.⁸⁷ Destruction of these unique wetlands will not

⁷⁷ See Tulane Environmental Law Clinic Comments, in Public Comments in globo: November 19, 2003—December 22, 2003, **COM** 1485—1734.

⁷⁸ See Tulane Law Environmental Clinic Comments, in Public Comments in globo: November 19, 2003—December 22, 2003, **COM** 1485—1734.

⁷⁹ See Notice from Linda Korn Levy, LDEQ, to Kennett Stewart, Industrial Pipe, Issuance of Standard Type III Permit, **SEP** 3329—3351; **C&D** 1742—1756.

⁸⁰ Landfill Permits Granted in Foster's Last Week, Louisiana Politics, by John Maginnis, January 23, 2004, available at <http://www.lapolitics.com/index.php>.

⁸¹ Petition, ¶ 32, *see also* Section IV(A)(1)(a) of this Memorandum.

⁸² Petition, ¶ 44, *see also* Section IV(A)(1)(a) of this Memorandum.

⁸³ Petition, ¶ 42, *see also* Section IV(A)(1)(c) of this Memorandum.

⁸⁴ Petition, ¶ 41, *see also* Section IV(A)(1)(d) of this Memorandum.

⁸⁵ The record is replete with these complaints, from LDNR Citizens' Complaint Record, April 9, 1985, **COM** 001—003 to Incident Report, March 13, 2003, **COM** 0990.

⁸⁶ Department of the Army Permit Application, Phase I Landfill Project, Industrial Pipe, Inc., Plaquemines Parish, Louisiana, Revision 1, prepared by URS, June 5, 2002, Application for Coastal Use Permit, Plaquemines Parish Government, in **C&D** 0739—1234.

only increase Plaintiffs' exposure to the harms and nuisances listed above; it will also irreparably destroy a valuable storm barrier that protects the Petitioners and other area residents.⁸⁸

IV. ARGUMENTS AND AUTHORITIES

A. THE ADMINISTRATIVE RECORD SHOWS THAT THE COURT PROPERLY EXERCISED ITS DISCRETION IN IMPOSING THE STAY.

The record shows that Petitioners have met the four elements which the Court may, in its discretion, consider with regard to the stay⁸⁹: (1) Petitioners are “likely to prevail on the merits”; (2) Petitioners “will sustain irreparable injury” if the stay is lifted; (3) Industrial Pipe will not be substantially harmed; and (4) it is “the public interest lie[s]” in staying the permits.

(1) Petitioners will prevail on the merits.

LDEQ's issuance of Industrial Pipe's permits violates Louisiana law. La. R.S. 49:964(G) empowers this Court to reverse the unlawful issuance, given that LDEQ's decision was

(1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court.

a. Neither facility is properly zoned.

LDEQ violated Article IX, Section 1 of the Louisiana Constitution and La. R.S. 30:2018(B)(1) and LAC 33:VII.519.N because the record does not contain “a zoning affidavit or other documentation stating that the proposed use does *not* violate existing land-use requirements.” LAC 33:VII.519.N (emphasis added). Industrial Pipe offers not a single reference for its claim that “the site is zoned industrial.”⁹⁰ In fact, Industrial Pipe's facility is located in a flood plain⁹¹ and is zoned “A-2 Rural and Agricultural.”⁹² The Plaquemines Parish

⁸⁷ Department of the Army Permit Application, Phase I Landfill Project, Industrial Pipe, Inc., Plaquemines Parish, Louisiana, Revision 1, prepared by URS, June 5, 2002, Engineering Form 4345, October 24, 2001, in **C&D** 0739—1234.

⁸⁸ See p. 17 of Comments on Behalf of the Oakville Community Action Group and the Louisiana Environmental Action Network, December 22, 2003, Public Comments in globo, **COM** 1485—1734.

⁸⁹ “The application for a stay order is to be determined by the court in the exercise of its discretion in light of the guidelines set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958), and adopted in the case of Division of Admin. v. Dept. of Civil Service, 345 So.2d 67 (La. App. 1st Cir. 1976).” In re Rubicon, Inc., 543 So. 2d 63, 64 (La. App. 1989); see also New Iberia Bancorp v. Schwing, 95-638 (La. App. 3 Cir. 08/23/95) 663 So. 2d 104, 106.

⁹⁰ Expanded IT Questions, p. 523-15, in **SEP** 2616—2972; Expanded IT Questions, 5-4, in **C&D** 0739-1234.

⁹¹ Expanded IT Questions, p. 523-14, in **SEP** 2616—2972; Expanded IT Questions, 5-2, in **C&D** 0739-1234.

⁹² See Section I-2, Letter from Luke Petrovich, President, Plaquemines Parish Government, to Kenny Stewart, President, Industrial Pipe, March 15, 1990, in **SEP** 2616—2972.

Comprehensive Zoning Ordinance, which prohibits locating and operating landfills and separation facilities in flood plain zones,⁹³ is conspicuously absent from the list of references in the section on IT questions.⁹⁴

Industrial Pipe’s sole justification for violating the Plaquemines Parish Comprehensive Zoning Ordinance is a zoning exemption received fourteen years ago “to install a warehouse and burner on their property.”⁹⁵ This exemption has *nothing* to do with either of its current permit applications, and Industrial Pipe has *not* received an exemption for its present permit from Plaquemines Parish. Therefore, LDEQ unlawfully approved permits for a facility that is *improperly zoned*.

b. The permits fail to consider alternative sites.

LDEQ violated Article IX, Section 1 of the Louisiana Constitution, La. R. S. 30:2018(B)(1), and LAC 33:VII.523.D in approving Industrial Pipe’s permits, because Industrial Pipe failed to conduct a meaningful evaluation of alternative sites outside Plaquemines Parish.

While Industrial Pipe retained an independent realtor (Belle Chasse Real Estate, Inc.) to identify potential sites for its facilities, Industrial Pipe specifically constrained the potential sites to Plaquemines Parish.⁹⁶ In a similar case, In the Matter of Browning-Ferris Industries Petit Bois Landfill, 93-2050 (La. App. 1 Cir, 06/23/95) 657 So.2d 633, the court found that the “site survey should have gone outside the boundaries of Calcasieu Parish.” *Id.* at 638. It reasoned that, “Since the proposed facility would service areas within a 200 mile radius, which includes areas outside of the parish and into Texas, it is likely that an alternative site could be found outside the parish boundaries that would serve the area while providing greater protection to the environment.” *Id.* Similarly, although the Industrial Pipe plans to serve more than a quarter of the Louisiana population, located throughout Lafourche, Jefferson, Orleans, Plaquemines, St. Bernard, and St. Charles parishes,⁹⁷ it has unlawfully failed to look further than Plaquemines Parish.

In fact, Industrial Pipe failed to look further than its existing site. As Industrial Pipe states

⁹³ Plaquemines Parish Comprehensive Zoning Ordinance No. 142 (1996) at pages 26-28 (for Agricultural 2 zones) and at pages 62-63 (for Flood Plain zones).

⁹⁴ Expanded IT Questions, p. 523-20, in **SEP** 2616—2972; Expanded IT Questions, 7-1, in **C&D** 0739-1234

⁹⁵ Zoning Documentation appears as Exhibit I-2 in both permit applications. The document is Resolution No. 90-60, adopted February 8, 1990 by Plaquemines Parish Council.

⁹⁶ Letter from David Eley, URS, to Ronald Ventola, Army Corps, January 31, 2003, Exhibit III-2, in **C&D** 0739-1234; Expanded IT Questions, p. 523-17, in **SEP** 2616—2972.

⁹⁷ James Richardson, An Economic Analysis of the Impact of Construction and Operation at the Riverside Recycling and Disposal Facility in Belle Chase, LA: A Transfer Station and A C&D Landfill, July 2001, p. 3, in **SEP** 2616—2972 and **C&D** 0739-1234.

in both of its permit applications, “In lieu of a traditional site analysis, IPI has performed a comprehensive review of the environmental impacts of continuing to operate the existing [separation] facility.”⁹⁸ Industrial Pipe justifies its exclusive consideration of the existing site for the transfer station because this site “actually results in a beneficial use of an otherwise very limited use tract. . . .No other site is similar in this respect.”⁹⁹

Although Industrial Pipe’s C&D landfill expansion would destroy 8.3 acres of unique bottomland hardwood wetlands, it claims that it “can avoid disturbance of undeveloped land” by “operating a previous landfill site with limited alternative uses.”¹⁰⁰ Industrial Pipe apparently included that it would be impossible to for any alternative site to be less destructive, because “any other site in the search area meeting minimum site requirements is very likely to have the same impacts that IPI’s current facility has.”¹⁰¹

In sum, Industrial Pipe failed to consider alternative sites for either facility. Therefore, LDEQ unlawfully approved permits for a facility that *failed* to consider alternative sites.

c. There was no analysis of environmental costs.

LDEQ’s cost-benefit analysis¹⁰² violated La. R. S. 30:2018(B)(1), and LAC 33:VII.523.B by failing to conduct a “balancing process in which environmental costs and benefits [are] given full and careful consideration.” Save Ourselves v. La. Env’tl. Control Comm’n, 452 So. 2d 1152, 1157 (La. 1984); *see also* In the Matter of Rubicon, Inc., 95-0108 (La. App. 1 Cir. 2/14/96), 670 So.2d 475, 482 (LDEQ must consider whether “a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate[s] that the latter outweighs the former.”).

First, LDEQ failed to consider the costs of permitting a transfer station with a history of noncompliance to sit within 95 feet of the Oakville Community.¹⁰³ After years of being unable to meet the 200-foot buffer zone that LAC 33:VII.717(B)(2)(a) requires for Type II-A facilities, the

⁹⁸ Expanded IT Questions, p. 523-13, in **SEP** 2616—2972. The wording is identical in the C&D permit, minus the word “separation.” *See* Expanded IT Questions, p. 5-1, in **C&D** 0739-1234.

⁹⁹ Form C & D-G, Section IV(D)(1), in **SEP** 2616—2972.

¹⁰⁰ Expanded IT Questions, p. 5-1, in **C&D** 0739-1234.

¹⁰¹ Expanded IT Questions, p. 5-6, in **C&D** 0739-1234.

¹⁰² James Richardson, An Economic Analysis of the Impact of Construction and Operation at the Riverside Recycling and Disposal Facility in Belle Chase, LA: A Transfer Station and A C&D Landfill, July 2001, in **SEP** 2616—2972 and **C&D** 0739-1234.

¹⁰³ *See* p. 26 of Comments on Behalf of the Oakville Community Action Group and the Louisiana Environmental Action Network, December 22, 2003, Public Comments in globo, **COM** 1485—1734.

same Industrial Pipe facility is now suddenly allowed to sit within 50 feet of its neighbors as a “Type III separation facility.”¹⁰⁴ Yet nowhere in the permit is there any evaluation of the impact that this less protective buffer zone will have on society. Far from “protect[ing] the air, groundwater, and surface water, and the environment from pollution from solid wastes” and “eliminat[ing] the potential threat to human health from pollution,” LAC 33:VII.101(B), LDEQ is sending a message that violations can be remedied by reclassification.

Second, LDEQ failed to consider the costs to society and to the environment of sacrificing 8.3 acres of bottomland hardwood wetlands to a C&D landfill expansion. Although this destruction will result in a loss of storm barrier protection, eradication of wildlife, habitat depletion, and a loss of recreational uses, the C&D permit does not reflect these costs.¹⁰⁵ The 27-page economic analysis submitted by Industrial Pipe does not even contain the word “environment.” The estimate of the economic impact is limited to “overall business activity, household earning, and new jobs created.”¹⁰⁶

As this Court has noted, “It is clear that it is the public policy of this state . . . that our wetlands are a very important part of our environmental policy, and destruction of our wetlands must be taken very seriously and treated accordingly.” *O’Reilly v. LDEQ*, 19th Judicial District, Docket 509,564, Div. I, February 9, 2004, transcript p. 14.

All of these violations must be interpreted with respect to the Louisiana Constitution, which imposes a substantial obligation on the State to protect, conserve, and replenish “[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment . . . consistent with the health, safety, and welfare of the people.” La. Const. art. IX § 1. The Louisiana Supreme Court has unanimously recognized the constitutional mandate as a “public trust doctrine,” which imposes a “duty of environmental protection on all state agencies and officials.” *Save Ourselves, Inc. v. La. Envntl. Control Comm’n*, 452 So.2d 1152, 1156 (La. 1984).

Although all agencies carry this duty to the public, LDEQ is the *primary public trustee* of the environment. Article IX, Section 1 of the Louisiana Constitution; Louisiana Environmental

¹⁰⁴ For Type III facilities, “Buffer zones of not less than 50 feet shall be provided between the facility and the property line.” LAC 33:VII.719(B)(2)(a).

¹⁰⁵ James Richardson, *An Economic Analysis of the Impact of Construction and Operation at the Riverside Recycling and Disposal Facility in Belle Chase, LA: A Transfer Station and A C&D Landfill*, July 2001, in *SEP* 2616—2972 and *C&D* 0739-1234.

¹⁰⁶ *Id.*

Quality Act, La. R.S. 30:2014(A)(4). But LDEQ has failed its duty by approving permits for a landfill that is improperly zoned, would accept improper wastes, and was not based on an adequate site survey. Further, LDEQ has failed to conduct the required analyses to protect the environment, “insofar as possible and consistent with the health, safety, and welfare of the people,” La. Const. art. IX § 1. LDEQ, an institution charged with the protection of the public, has condoned a landfill to the permanent detriment of the public.

(2) Petitioners will suffer irreparable harm if the stay is lifted.

If the stay were lifted, nothing could remedy the harm that Industrial Pipe’s activities would cause. Industrial Pipe has itself acknowledged that the securing of these permits is the only barrier that remains before Industrial Pipe can commence the very activities that threaten the Petitioners’ health, safety, and welfare, and their conservation, recreational, and aesthetic interests. As Industrial Pipe stated in its Petition in Intervention, ¶ 8, “These permits include authority to add equipment and construct new facilities. The stay necessarily impedes those activities.”

The petition also explains the permits were issued without performing the analysis of environmental impacts required by law, such that Plaintiffs are unprotected from known or even unknown harm. The expansion would destroy 8.3 acres of unique bottomland hardwood wetlands (in the first of two phases of expansion). Destruction of these wetlands will not only increase Plaintiffs’ exposure to the harms and nuisances, it will also irreparably destroy a valuable storm barrier, which protects the Plaintiffs and other area residents.¹⁰⁷ The more that irreplaceable wetlands like these vanish from the Louisiana coast, the more priceless the remaining wetlands become. Yet nowhere did LDEQ so much as mention the costs to our society of wetland destruction. As the Supreme Court has noted, “Environmental 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).

If Industrial Pipe begins its expansion, the harms described in this Memorandum will commence. This Court’s stay is the only barrier against these harms. *See* Petition for Review ¶¶ 15-19. “If such injury [i.e. irreparable injury] is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” Amoco, 480

¹⁰⁷ *See* p. 17 of Comments on Behalf of the Oakville Community Action Group and the Louisiana Environmental Action Network, December 22, 2003, Public Comments in globo, COM 1485—1734.

U.S. at 545.

Even if Petitioners were unable to show irreparable harm, LDEQ's unlawful approval of the permits would be sufficient basis for a stay. The Louisiana Supreme Court has clarified that there need not be irreparable harm to stay an *unlawful* agency action: "[W]e have held that where 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 plaintiff to show irreparable injury." Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board, 586 So. 2d 1354, 1359 (La. 1991), citing Bardwell v. Parish Council of Parish of East Baton Rouge, 216 La. 537, 44 So. 2d 107 (La. 1949). In other words, the public's interest in restraining unlawful agency action overpowers the requirement for irreparable harm. Therefore, the Court's order to stay should be upheld.

(3) Industrial Pipe will not be substantially harmed.

By the time the Court receives this memorandum, there will be no more than 79 days left on the stay.¹⁰⁸ By the time the Court hears arguments on this motion, there will be no more than 69 days left. Maintaining the stay for an additional 69 days, at most, will not divest any of Industrial Pipe's existing revenues. Nor will the stay infringe upon Industrial Pipe's present use of its property. By comparison, the day that the stay is lifted, Industrial Pipe will begin an expansion that will permanently destroy an irreplaceable wetland. In light of the substantial harm that would result from terminating the stay, and considering the fact that it took Industrial Pipe more than two years to assemble an adequate permit application,¹⁰⁹ an additional 69 days will not substantially harm Industrial Pipe.

(4) It is within the public interest to stay the permit actions.

The public has an interest not only in the broad goal of environmental protection, but also in seeing that LDEQ follows the laws that were designed to protect the public. Without controls on flies, rodents, litter, and infectious waste, the necessary endeavor of providing landfill space becomes subject to manipulation and public exploitation. LDEQ is the one agency that can uphold the law against the detriment that comes with environmental contamination. *See* LSA-R.S. 30:2014(A) (In making a determination relative to the granting or denying of permits, the

¹⁰⁸ LDEQ submitted the revised administrative record to this Court on April 12, 2004. Under La. R.S. 30:2050.21, "In no case shall the date for a final decision on the merits of such review or appeals extend beyond the ninetieth day after receipt by the court of the record for adjudication." This means that by July 12, 2004, the Court will have made a final decision on Industrial Pipe's permits.

¹⁰⁹ *See* Solid Waste Permit Renewal Application/Mandatory Modification Document Type II-A/III Transfer Station/Separation Facility AI No. 14689, August 14, 2001, **SEP** 1946—2159; **SEP** 2616—2972; **C&D** 0739—1234.

LDEQ “shall act as the primary public trustee of the environment, and shall consider and follow the will and intent of the Louisiana Constitution and Louisiana statutory law.”). Considering the vast degree of damage that removing the stay on the permits would unleash, the public interest lies in upholding the stay.

B. THE STAY SHOULD BE UPHELD BECAUSE IT WAS ISSUED PROPERLY PURSUANT TO LA. R. S. 49:964(F).

(1) This Court granted the stay on appropriate terms.

Industrial Pipe contends that the stay does not have “appropriate terms.” This contention is incorrect for two reasons. First, La. R. S. 49:964 gives *discretion* to the *district court* to set the terms. In deciding upon a request for a stay order, “much discretion is vested in the Appellate Court.” Div. of Admin. v. Dept. of Civil Serv., 345 So. 2d 67, 69 (La. App. 1976). Second, the Court considered what was appropriate when it granted the stay. It modified the Petitioners’ request for a stay *pending final resolution* to a stay *pending oral argument*.

The Court’s basis for granting the stay is set out in La. R. S. 30:2050.21(A), which allows an “aggrieved person” to “appeal devolutively a final permit action, a final enforcement action, or a declaratory ruling only to the Nineteenth Judicial District Court.” In such an appeal, special administrative procedural provisions of La. R. S. 49:964 apply. La. R. S. 30:2050.21(F). Upon receiving the petition, “The agency may grant, or the reviewing court may order, *a stay ex parte upon appropriate terms* . . . The court *may* require that the stay be granted in accordance with the local rules of the reviewing court pertaining to injunctive relief and the issuance of temporary restraining orders.” La. R. S. 49:964(C) (emphasis added).

(2) Notice is not required for a stay to issue in an administrative appeal.

Industrial Pipe mistakenly contends that the *ex parte* nature of the order was improper because La. C. C. P. art. 3602 requires notice and an opportunity for hearing for the adverse party for a *preliminary injunction*. A *stay* is not the same as a *preliminary injunction* and is not subject to the requirements for a preliminary injunction. “[A]lthough the two terms are similar, they are not synonymous. A preliminary injunction is issued for the protection of one or more parties to the litigation and is designed to preserve the existing status of the litigants and usually requires a showing of irreparable injury, loss, or damage.” M.P.G. Constr., Inc. v. DOT & Dev., 2003 0164 (La. App. 1 Cir, 04/02/04) 2004 La. App. LEXIS 771 at *13. Contrarily, “Black’s Law Dictionary, Fifth Edition, defines ‘stay of proceedings’ in pertinent part as ‘the temporary suspension of the regular order of proceedings in a cause, by direction or order of the court.’” *Id.*

at *13.

La. R. S. 49:964(C) specifically permits the court to grant a “stay *ex parte*” in an appeal of an administrative decision. An order “is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and *without notice* to, or contestation by, any person adversely interested.” Black’s Law Dictionary 576 (6th ed. 1990) (emphasis added).

(3) Issuance of a stay is within the exercise of judicial discretion.

Industrial Pipe’s Motion to Vacate this Court’s order to stay LDEQ’s permit actions amounts to an attack upon this Court’s legitimate exercise of discretion. In deciding upon a request for a stay order, “much discretion is vested in the Appellate Court.” Div. of Admin. v. Dept. of Civil Serv., 345 So.2d 67, 69 (La. App. 1976).

Even if Plaintiffs had not demonstrated irreparable harm, entitlement to relief, and likelihood of prevailing on the merits, the Court would have the discretion to determine the appropriateness of a stay. First, in cases where an action is unlawful, neither a showing of irreparable harm nor notice is necessary for a stay. See Louisiana Auto Dealers Ass’n v. Politz, 95-0432 (La. App. 1 Cir, 11/09/95) 664 So. 2d 1251, 1258 (“[I]n cases where there is proof that a statutory violation will result, it is not necessary to establish irreparable harm.”). Although the defendant in Louisiana Auto Dealers argued that the plaintiff’s “affidavit itself fails to clearly specify facts evincing immediate and irreparable injury or reasons why notice should not be given,” the court found that, “the effects of the proposed change would have been immediate.” *Id.* Notice was not required because “irreparable damage would have resulted from vacillating back and forth” on the decision. *Id.*

Second, courts have the discretion to “issue an injunction without making findings of irreparable harm, inadequacy of legal remedy, or the balance of convenience, provided that traditional equitable principles permit such a course of action.” U.S. v. Marine Shale Processors, 81 F.3d 1329, 1358 (5th Cir. 1996). *Id.* In Marine Shale, the court discussed two equitable factors—willfulness and public interest—that may influence a court’s decision. *Id.* These factors apply to the instant case. Both Industrial Pipe and LDEQ are fully aware of Industrial Pipe’s history of unlawful practices that have endangered the public. Yet LDEQ has issued permits to Industrial Pipe that fail to meet the statutory guidelines for public protection. This Court has the discretion to acknowledge the unlawful actions of Industrial Pipe and LDEQ and uphold a stay to protect Petitioners and the public as a whole.

CONCLUSION

This Court has already recognized that the stay is necessary to protect Petitioners and the public from irreparable harm. Because the Court exercised its legitimate discretion in granting this stay; because Petitioners will ultimately prevail on the merits; and because Industrial Pipe will not be harmed by waiting an additional 69 days for this litigation to be resolved, Petitioners respectfully request that this Court uphold its decision to grant a stay of LDEQ's permit actions pending oral argument.

Respectfully submitted on April 23, 2004,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Petitioners' Brief in Support of Petition for Judicial Review has been delivered via facsimile and regular mail to counsel of record this 23rd day of April, 2004:

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