

LITTLE TCHEFUNCTE RIVER  
ASSOCIATION, GULF  
RESTORATION NETWORK, and  
MATTHEW ALLEN, Petitioners

VERSUS

LOUISIANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY ,  
Respondent

\* NUMBER \_\_\_\_\_

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\* DIV. \_\_\_\_\_

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\* 19<sup>TH</sup> JUDICIAL DISTRICT COURT

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\* PARISH OF EAST BATON ROUGE

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\* STATE OF LOUISIANA

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## PETITION FOR JUDICIAL REVIEW

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1. This is an appeal by the Little Tchefuncte River Association, the Gulf Restoration Network (“GRN”), and Matthew Allen (“Petitioners”) from a final action of the Louisiana Department of Environmental Quality (“LDEQ”) pursuant to La. Rev. Stat. § 30:2050.21.A. Specifically, Petitioners appeal of LDEQ’s reissuance of Water Discharge Permit No. LA0118966, AI 111355 (the “Permit”) for H2O Systems, Inc.’s private wastewater treatment facility at Penn Mill Lakes Subdivision into Horse Branch Creek and the Tchefuncte River, two streams designated as “Outstanding Natural Resource Waters.”

### PARTIES

2. The Little Tchefuncte River Association is a non-profit corporation dedicated to the protection of the Tchefuncte River and its tributaries.

3. GRN is a non-profit corporation organized under the laws of the State of Louisiana. GRN, a regional coalition of more than forty-five environmental and social justice groups, is committed to the protection and restoration of the natural resources of the Gulf of Mexico region.

4. Matthew Allen is an individual who works, recreates, and resides in St. Tammany Parish and lives next to the Tchefuncte River less than two miles downstream from where Horse Branch Creek flows into the Tchefuncte River. He uses and enjoys both Horse Branch Creek and the Tchefuncte River.

5. Petitioners are directly affected and damaged by LDEQ's final decision and the Permit. Petitioners are aggrieved persons who may appeal LDEQ's final permit action pursuant to La. Rev. Stat. § 30:2050.21.A.

6. LDEQ is an agency of the State of Louisiana with the power to sue and be sued and made the final permit action in this matter.

### **JURISDICTION AND VENUE**

7. Jurisdiction and venue are proper in this Court, and Petitioners have the right to bring this action pursuant to La. Rev. Stat. § 30:2050.21.A.

### **BACKGROUND**

8. The Permit allows pollutant discharges from H2O System's private wastewater treatment facility for the Penn Mill Lakes Subdivision into the Tchefuncte River and its tributary Horse Branch Creek. These receiving waters are each an Outstanding Natural Resource Water – high quality waters that the law requires LDEQ to afford the most stringent protections.

9. On June 1, 2009, LDEQ issued a public notice that proposed reissuance of the Permit. The notice invited comments to be submitted on or before July 16, 2009.

10. On July 16, 2009, Petitioners timely submitted comments ("Comments") on the Permit stating, among other things, that the Permit is unlawful because it "fails to prohibit existing discharges from wastewater treatment facilities into Outstanding Natural Resource Waters . . . when a reasonable alternative discharge location is available." Comments, pg 2.

11. LDEQ sent notice of its final decision and a response to public comments (the "Response") postmarked September 28, 2009.

### **Legal Standard**

12. Section 1109 of the Louisiana Administrative Code states that "no degradation shall be allowed in high-quality waters that constitute outstanding natural resources." La. Admin. Code tit. 33, pt. IX, § 1109(A)(2).

13. Section 1115 of the Louisiana Administrative Code explains that while its "antidegradation statement requires that all waters which exceed the water quality standards be maintained at their existing high quality, . . . [m]ore stringent requirements apply to those waters

designated as outstanding natural resource waters.” La. Admin. Code, tit. 33, pt. IX, § 1115(A)(3).

14. Specifically, section 1119(C)(4) states that LDEQ “shall not approve” a wastewater discharge or activity proposed for an Outstanding Natural Resource Water body “if it will cause degradation of these waters.” La. Admin. Code tit. 33, pt. IX, § 1119(C)(4). The same regulation defines “degradation” as a “statistically significant difference at the 90 percent confidence interval from existing physical, chemical and biological conditions.” *Id.*

15. Section 1119(C)(4) only authorizes LDEQ to permit “[e]xisting discharges of treated sanitary wastewater [into Outstanding Natural Resource Waters] . . . if no reasonable alternative discharge location is available or if the discharge existed before the designation as an outstanding natural resource water body.”

*LDEQ’s Failure to Meet the Legal Standard*

16. LDEQ states that the discharge of pollutants into outstanding natural resource waters under the Permit is acceptable because the Tchefuncte River “is currently fully supporting the designated use of Outstanding Natural Resource Water (ONRW). Therefore, it appears that the discharge from the Penn Mills Lake STP has had little to no effect on the receiving waterbodies.” Resp., pg. 2.

17. By reissuing the Permit and allowing discharges into Outstanding Natural Resource Waters on the basis that degradation is allowable so long as the waters are still “fully supporting the designated use,” LDEQ failed to apply the correct “no degradation” standard under La. Admin. Code., tit. 33, pt. IX, § 1119(C)(4) and erred as a matter of law.

18. LDEQ did not find that degradation under the Permit was not “statistically significant,” as § 1119(C)(4) requires. Thus, LDEQ did not apply the correct standard for “degradation” under La. Admin. Code., tit. 33, pt. IX, § 1119(C)(4) and erred as a matter of law.

19. When considering a similar state agency attempt to interpret antidegradation policies “to permit deterioration to a point short of interference with the designated use,” the Ohio Supreme Court found that such an “interpretation conflicts with federal law.” *Columbus & Franklin County Metropolitan Park District v. Shank*, 600 N.E.2d 1042, 1054 (Ohio 1992). The *Shank* court explained that the Clean Water Act recognizes a “distinction between water quality

sufficient to support a designated use and the more exacting and variable antidegradation standard which is based on water quality.” 600 N.E.2d at 1054.

20. LDEQ did not find that no reasonable alternative discharge location is available. To the contrary, LDEQ admits that “alternative projects are possibly available.”

21. By reissuing the Permit and allowing existing discharges from a wastewater treatment facility into Outstanding Natural Resource Waters without finding that no reasonable alternative discharge location is available, LDEQ erred as a matter of law.

22. LDEQ did not find that the discharges existed before the receiving waters’ designation as outstanding natural resource waters. To the contrary, the designation of the Tchefuncte River and its tributaries dates to at least 1988, well over a decade before the original 2004 permit for this discharge. *See* LAC 33:IX.1123 (1988).

23. By reissuing the Permit and allowing existing discharges from a wastewater treatment facility into Outstanding Natural Resource Waters without finding that the discharge existed before the designation as an outstanding natural resource water body, LDEQ erred as a matter of law.

#### Timely Filing of Petition

24. This Petition is timely filed within 30 days after September 28, 2009 and thus “within thirty days after notice of the action or ruling being appealed has been given.” 30:2050.21(A); *In re: Natural Resources Recovery, Inc.*, 98-2917 (La. App. 1<sup>st</sup> cir. 2/18/2000), 752 So. 2d 369.

#### **ASSIGNMENTS OF ERROR**

25. LDEQ’s reissuance of the permit has prejudiced substantial rights of Petitioners because LDEQ’s decision is “in violation of constitutional or statutory provisions.” La. Rev. Stat. 2050.21(F); La. Rev. Stat. 49:964(G).

26. LDEQ’s reissuance of the Permit has prejudiced substantial right of Petitioners because LDEQ’s decision is “[a]ffected by...error of law.” La. Rev. Stat. 2050.21(F); La. Rev. Stat. 49:964(G).

27. LDEQ's reissuance of the Permit is "not supported and sustainable by a preponderance of evidence." La. Rev. Stat. § 49:964(G).

**DESIGNATION OF RECORD FOR APPEAL**

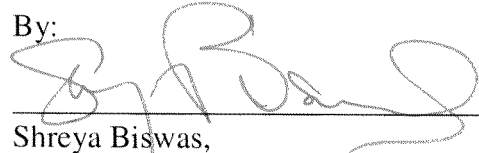
28. Petitioners designate the following as the record on appeal in this matter: the entire public record regarding the Permit that exists as of the date of the filing of this Petition for Judicial Review, including but not limited to the draft Permit, the Permit, Petitioner's comments to the Permit and LDEQ's Response.

**PRAYER FOR RELIEF**

**WHEREFORE**, Petitioners respectfully request that this Court grant relief as follows:

- a. Vacate the Permit and remand the matter to LDEQ with instructions to follow the proper legal procedures and standards;
- b. Award all other relief the Court finds proper.

By:



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*Supervising Attorney for Ms. Biswas's representation of Matthew Allen and Counsel for the Little Tchefuncte River Association, the Gulf Restoration Network, and Matthew Allen*

**Please Serve:**

Harold Legget, PhD, Secretary (certified)  
Louisiana Department of Environmental Quality  
602 N. Fifth Street, Galvez Building  
Baton Rouge, Louisiana 70802

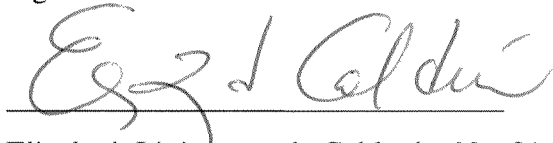
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**SUPERVISING ATTORNEY'S INTRODUCTION OF STUDENT ATTORNEY**

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Undersigned counsel respectfully introduces student attorney Shreya Biswas to this Court pursuant to Louisiana Supreme Court Rule XX. As the student attorneys' supervising attorney, I approve of the student attorney's appearance in this case on behalf of Mr. Matthew Allen only. I also attach Mr. Allen's written consent to an appearance by student attorney in this matter (Exhibit A).

Signed:



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*Supervising Attorney for Ms. Biswas's  
representation of Matthew Allen and Counsel for  
the Little Tchefuncte River Association, the Gulf  
Restoration Network, and Matthew Allen*

LITTLE TCHEFUNCTE RIVER  
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**ORDER**

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The Court received the Petition for Judicial Review appealing the Louisiana Department of Environmental Quality’s Permit (AI 111355) that Tulane Environmental Law Clinic on behalf of the Little Tchefuncte River Association, the Gulf Restoration Network, and Matthew Allen (“Petitioners”) filed with this Court on October 28, 2009. The record designated by the Petitioners shall be compiled and forwarded to the Nineteenth Judicial District Court, and the appeal shall be returnable to the 19<sup>th</sup> Judicial District Court on or before the \_\_\_\_ day of \_\_\_\_\_, 2009.

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DISTRICT JUDGE  
NINETEENTH JUDICIAL DISTRICT COURT

**CLIENT'S WRITTEN CONSENT FOR STUDENT ATTORNEY APPEARANCE**

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

Dated: 10/17/09

[signed:]



[name:]

Matthew Allen

Exhibit A