Tulane University

TULANE ENVIRONMENTAL LAW CLINIC

July 8, 2008

Ref: 101-100

Via Certified Mail No. 7003 3110 0004 6222 1565
Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via Certified Mail No. 7003 3110 0004 6222 1596
Harold Leggett, Ph.D., Secretary
Louisiana Department of Environmental Quality
PO Box 4302
Baton Rouge, LA 70821-4302

Re: Notice of Intent to File Citizen Enforcement Suit
Pursuant to Clean Air Act § 304, 42 U.S.C. § 7604

Dear Administrator Johnson and Secretary Leggett:

EPA and LDEQ's failure to follow the Clean Air Act (CAA) puts Louisiana children and other residents at risk. For this reason, the Louisiana Environmental Action Network (LEAN) respectfully provides this notice that LEAN will file a lawsuit against the EPA administrator and LDEQ secretary.

Introduction

LEAN intends to file a lawsuit to compel EPA and LDEQ to comply with CAA requirements to protect public health from dangerous levels of ozone air pollution in the five-parish "Baton Rouge area." The Baton Rouge area has ***never*** met the CAA's minimum health protection standard for ozone pollution.

Children are "an important at-risk group" for health damage due to dangerous ozone levels.[1] Children are at special risk in part because "children tend to spend more time outdoors than adults in the warm season."[2] Also, "asthma is more prevalent [for children] than for adults."[3] Ozone exposure is linked to "school absences in all children, and emergency department visits and hospital admissions in people with lung disease."[4] Long-term exposures to ozone may cause "chronic health effects [such as] structural damage to lung tissue and accelerated decline in baseline lung function."[5] Exacerbation of asthma may continue "several days following exposure."[6] Clearly, Louisiana cannot afford to continue to inflict such damage to the health of its youngest residents.

LEAN is proud of Louisiana for the progress the state has made over the last several years in reducing ozone exposures. Nonetheless, as long as ozone concentrations continue to reach dangerous levels in the Baton Rouge area, neither the state nor EPA can afford to rest on their laurels. Even when the Baton Rouge's ozone problem has been described as "moderate" or "marginal," those terms still represent violations of health and safety standards and those violations impair the health of Louisiana's children and other residents. In this context, there is no excuse for EPA and LDEQ's continued delay in discharging legal mandates that Congress designed to bring ozone exposures down to safe levels. LDEQ and EPA's continued delay harms Louisiana's children and other residents by denying them the minimum health protections that Congress guaranteed to all U.S. citizens.

The specific, legally-required protections that EPA and LDEQ have failed to implement include:

- An enforceable plan for achieving reasonable further progress toward attainment;
- Contingency measures to kick in automatically and reduce emissions upon missed attainment deadlines or the area's failure to make reasonable further progress;
- A 25 ton-per-year major source threshold for identifying major sources of volatile organic compounds and other more stringent new source review requirements;

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[1] 73 Fed. Reg. 16,436, 16,441 (Mar. 27, 2008) (preamble to EPA final rule revising ozone standard).

[2] 73 Fed. Reg. at 16,458.

[3] *Id*.

[4] 72 Fed. Reg. 37,818, 37,824 (July 11, 2007) (preamble to EPA proposed rule to revise ozone standard).

[5] 73 Fed. Reg. 15,604, 15,605 (Mar. 24, 2008).

[6] 73 Fed. Reg. at 16,462.

- Implementation of contingency provisions and submission of contingency plans; and
- Collection of fees for major stationary sources in the Baton Rouge area that fail to reduce emissions by 20%, to create a powerful economic incentive to end the health risk to residents of the Baton Rouge area.

Background

1. The law empowers citizens to sue to require government officials to discharge non-discretionary duties.

LEAN provides notice of its intent to sue the EPA administrator under CAA § 304(a)(2). 42 U.S.C. § 7604(a)(2). That section authorizes any person to bring a citizen suit "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." Section 304(b) and 40 C.F.R. pt. 54 require that a plaintiff provide 60 days notice prior to filing such a suit. The purpose of this waiting period is to provide parties with a reasonable time to resolve the matter cooperatively.

LEAN also provides notice of its intent to sue the LDEQ secretary under La. Rev. Stat. § 30:2026 (authorizing "any person having an interest, which is or may be adversely affected, [to] commence a civil action on his own behalf against any person whom he alleges to be in violation of this Subtitle . . . ") and under La. Code of Civ. P. art. 3863 ("A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law").

Because this notice is to Secretary Leggett and Administrator Johnson in their "official capacity" only, it does ***not*** make any allegations against them personally. The U.S. Supreme Court has explained that lawsuits against a public servant in his or her "official capacity" are "another way of pleading an action against an entity of which an officer is an agent," that is the state. An "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity, [i.e., LDEQ and EPA]."[7]

2. Congress mandated stringent rules to protect residents in areas that fail to timely attain health protection standards.

Congress enacted the CAA as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution."[8] The Act requires EPA to publish air pollution

[7] Bender v. Williamsport Area School Dist., 475 U.S. 534, 544 (1986).

[8] Union Elec. Co. v. EPA, 427 U.S. 246, 256 (1976).

standards that "are requisite to protect the public health."[9] Next, the states must devise "state implementation plans" for meeting those health protection standards.[10] One of the first pollutants for which EPA adopted health protection standards was ground-level ozone, a principal component of urban smog, and a severe lung irritant even to healthy adults.[11] Ozone is formed in the atmosphere "by the reaction of volatile organic compounds (VOC) and nitrogen oxides (NOx) in the lower atmosphere in the presence of heat and sunlight."[12] These pollutants come from "many types of pollution sources, such as . . . power plants, chemical plants, refineries, makers of consumer and commercial products, industrial facilities, and smaller area sources."[13]

After repeated failures of state cleanup efforts, Congress amended the Act in 1977 and 1990 to mandate increasingly stringent requirements for areas that failed to meet health protection standards. In the 1990 Amendments, Congress acknowledged scientific evidence that "air pollution is one of the greatest risks to public health in the United States."[14] Congress found "the health problem serious and … pervasive. There is no choice but to breathe the air, whether it is clean or polluted. Air is inhaled regardless of its quality. This is a national resource that should be protected as our parks and national monuments are protected."[15]

In the 1990 Amendments, Congress re-structured the Clean Air Act such that ***any*** area that fails to meet the health-protection standard for ozone pollution "9 years" after November 15, 1990, must be classified as a "severe" non-attainment area.[16] To protect the health of people who live in such areas, Congress provided for tighter controls on emissions of ozone precursors within them. Congress unambiguously provided that these safeguards would apply solely on the

[9] 42 U.S.C. § 7409.

[10] 42 U.S.C. § 7410.

[11] *See* 66 Fed. Reg. 5002, 5012/3 (Jan. 18, 2001).

[12] 73 Fed. Reg. 25,098 25,109 (May 6, 2008).

[13] *Id.*

[14] 1990 U.S.C.C.A.N. 3385, 3389 (quoting Study by the President of the American Public Health Association); *see also id.* (a single air pollutant may cause as many as 50,000 premature deaths).

[15] 1990 U.S.C.C.A.N. 3385, 3389.

[16] 42 U.S.C. § 7511(a)(1), tbl 1. The only exceptions to this principle are very narrow and do not apply to the Baton Rouge area. *See id*. § 7511(a)(5) (providing limited authority for one year extensions).

basis of an area's failure to attain the ozone health protection standard within a specified time period after enactment.[17]

In 2005, EPA replaced the 1-hour ozone standard with a revised 8-hour version.[18] To implement the revised standard, EPA has adopted classifications and deadlines for nonattainment areas, including Baton Rouge,[19] that differ from those that applied under the 1-hour standard.[20] But because the polluted air in these areas continues to threaten public health, the pollution control requirements that applied when EPA classified the areas as "severe" must remain in effect. Under the CAA's anti-backsliding policy, EPA and the state must implement Congress' ozone control mandates until the Baton Rouge area finally attains the ozone health protection standard, however EPA may define that standard at the time. In other words, "[t]he Act placed states onto a one-way street whose only outlet is attainment" and protection of public health.[21]

Specific requirements include:

- A definition of "major source" that broadens the requirement that new and modified major sources install state-of-the-art pollution control technology and offset increases in emissions with reductions elsewhere;[22]
- Reduction of the so-called "de minimis" exception to the requirement that major sources install state-of-the-art control technology and offset increases in emissions when making "significant" modifications of existing sources;[23]

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[17] South Coast Air Quality Management Dist. v. EPA, 472 F.3d 882, 888 (D.C. Cir. 2006) ("This protocol was prescribed whether or not that area was closer to attainment when it missed the deadline than when it was originally classified"), cert. denied, 128 S. Ct. 1065 (2008).

[18] 69 Fed. Reg. 23,951, 23,954 (Apr. 30, 2004) ("We will revoke the 1-hour standard in full, including the associated designations and classifications, 1 year following the effective date of the designations for the 8-hour NAAQS.").

[19] 73 Fed. Reg. 15,087, 15087 (Mar. 21, 2008) ("By operation of law, the Baton Rouge area is to be reclassified from a "marginal" to a "moderate" *8-hour* ozone nonattainment area on the effective date of this rule") (emphasis added).

[20] See CAA § 181(a)(1), tbl. 1, 42 U.S.C. § 7511(a)(1), tbl. 1.

[21] South Coast Air Quality Management Dist. v. EPA, 472 F.3d at 900.

[22] 42 U.S.C. §§ 7511a(d) (setting the major source threshold at 25 tons per year for "severe" areas); *see also id*. § 7511a(c) (setting the major source threshold at 50 tons per year for "serious" areas).

[23] 42 U.S.C. § 7511a(c)(6), (d) (reducing EPA's "significance" threshold for application of the Lowest Achievable Emission Rate ("LAER") in serious and severe areas to 25 tons per year). The reduction is from EPA's standard definition of "significant" (set at 40 tons per year) found at 40 C.F.R. §51.165(a)(1)(x).

- An increased ratio by which sources must reduce emissions to offset increases from new and modified sources;[24]
- State implementation plans must include contingency measures to take effect automatically and reduce emissions if an area fails to make reasonable progress or misses an attainment deadline;[25] and
- States must create financial incentives for pollution reduction in areas that failed to attain the ozone health protection standard by November 15, 2005, by assessing fees on each major stationary source of VOCs located in the area that fails to reduce its emissions by 20 percent.[26]

3. *EPA and Louisiana have consistently delayed implementation of the ozone health protection standard in the Baton Rouge area.*

EPA first declared the Baton Rouge area to be in nonattainment of the ozone health protection standard in 1978.[27] In 1991, EPA designated the Baton Rouge area as a "serious" ozone nonattainment area.[28] The CAA provides that "serious" areas that fail to meet health protection standards by November 15, 1999 must be reclassified as "severe" nonattainment areas and become subject to more stringent control requirements.[29] Further, the CAA requires more stringent measures to protect the public in areas that—like the Baton Rouge area—continue to violate the ozone health protection standard after November 15, 2005.

a. EPA's first attempt to avoid implementing the CAA: Withholding a legally-required determination of compliance

To avoid imposing the CAA's stringent requirements for "severe" ozone nonattainment areas, EPA failed to comply with the Clean Air Act's command that EPA determine, within "6 months following" the Baton Rouge area's November 15, 1999 deadline, whether or not

[24] 42 U.S.C. § 7511a(d)(2) (providing for a more protective offset ratio—1.3 tons of reductions for each 1 ton of new emissions—in severe areas); *see also id* § 7511a(c)(10) (offsets required in serious areas are 1.2 to 1).

[25] 42 U.S.C. § 7502(c)(9).

[26] 42 U.S.C. § 7511d.

[27] 43 Fed. Reg. 8,962, 8,998 (Mar. 3, 1978).

[28] 56 Fed. Reg. 56,694, 56,770 (Nov. 6, 1991).

[29] 42 U.S.C. § 7511(a)(1).

Louisiana had met that deadline (for what was then a "serious" nonattainment area).[30] EPA continued to flout the law until LEAN went to court to obtain a judgment ordering compliance.[31] Under court order, EPA finally issued a finding on June 24, 2002 that Louisiana had missed the November 15, 1999, deadline and would be reclassified as a "severe" nonattainment area.[32]

b. EPA's second attempt to avoid implementing the CAA: The ozone transport policy.

EPA continued to drag its heels. On October 2, 2002, EPA delayed implementing the CAA's requirement for more stringent control of ozone pollution by withdrawing its finding that Louisiana had missed its deadline for meeting health protection standards in the Baton Rouge area. EPA purported to justify this withdrawal (citing an "ozone transport policy") with an estimate that "7 percent of the Baton Rouge exceedance days (*i.e.*, 2 out of 28 exceedance days) were *potentially associated* with transport of ozone and/or precursor pollutants from the Houston area."[33] LEAN again filed a lawsuit.[34] After several courts declared that EPA's policy was illegal,[35] EPA agreed to ask the Fifth Circuit to remand its decision purporting to extend LDEQ's attainment deadline for the Baton Rouge area and agreed to reinstate the "severe" designation within 45 days of the court's ruling.[36] Thus, EPA finally "bumped up" the Baton Rouge area to a

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[30] 42 U.S.C. § 7511(b)(2). Earlier, LDEQ and EPA had rejected selected data from an ozone monitor (showing two exceedances of the standard) as "invalid"—although the monitor "appeared to pass all quality assurance checks." Joel A. Maddy, Review of the Grosse Tete Ozone Monitor and Data in Iberville Parish (Draft, May 15, 2000); *see also* Letter of Suzanne S. Dickey and Hali E. Wieties, Tulane Environmental Law Clinic to Rebecca E. Weber, EPA (May 25, 2000). LDEQ, however, ultimately elected not to rely on the resulting lack of data as grounds for a one-year extension of the compliance deadline. *See* 66 Fed. Reg. 23,646, 23,649 (May 9, 2001).

[31] *See* LEAN v. Whitman, No. 00-879-A (M.D. La. Feb. 27, 2002).

[32] 67 Fed. Reg. 42,688 (June 24, 2002).

[33] 67 Fed. Reg. 61,786, 61,796 (Oct. 2, 2002) (emphasis added).

[34] *See* LEAN v. EPA, 382 F.3d 575, 580 (5th Cir. 2004) ("EPA . . . requested a voluntary remand of its extension policy to the Baton Rouge area, and this court granted the remand").

[35] *See* Sierra Club v. EPA, 314 F.3d 735, 741 (5th Cir. 2002) (EPA's ozone transport policy violated the "plain terms of the CAA"); Organizing Comm. for Econ. & Soc. Justice v. EPA, 333 F.3d 1288, 1290 (11th Cir. 2003) (EPA's extension policy is "unauthorized agency action contrary to the express language of the CAA."); Sierra Club v. EPA, 311 F.3d 853, 861 (7th Cir. 2002) (EPA may not "disregard statutory limitations on its discretion"); Sierra Club v. EPA, 294 F.3d 155, 161 (D.C. Cir. 2002) ("to permit an extension of the sort urged by the EPA would subvert the purposes of the Act").

[36] EPA Unopposed Motion for a Partial Voluntary Remand at 3-4 ("EPA now believes it has no choice but to withdraw its determination to extend the attainment deadline for Baton Rouge. . . Accordingly, EPA is requesting a partial voluntary remand of its October 2, 2002 final rule, so that it can withdraw its decision to extend the attainment date for Baton Rouge. . . . [I]t is EPA's intention to withdraw the

"severe" nonattainment in April 2003.[37] EPA ordered Louisiana to submit a revised state implementation plan for the Baton Rouge ozone nonattainment area to comply with the CAA requirements for a severe nonattainment area by June 23, 2004.[38] EPA further ordered that "Louisiana is required to submit a revision to the SIP containing additional contingency measures for its severe area [state implementation plan] to meet ROP [*i.e.*, rate of progress] requirements and backfill for failure to attain."[39] EPA noted that Louisiana was required to show that "the first required post-1999 nine percent ROP is achieved as expeditiously as practicable after November 15, 2002," and must also "provide for the second increment of post-1999 ROP for the period 2002 to 2005 and thus must achieve a minimum of 18 percent emission reductions from base line emissions by November 15, 2005."[40] LDEQ has never complied with that order.

c. EPA's third attempt to avoid implementing the CAA: Using revision of the Ozone standard as an excuse to roll back protections for the public

EPA made still another attempt to avoid implementing Congress' command that EPA protect residents of "non-attainment areas" from ozone exposures. Specifically, when implementing a revised ("8-hour") ozone standard, EPA purported to waive CAA provisions that Congress mandated for areas, like Baton Rouge, that had failed to attain the health protection standard by CAA deadlines. EPA claimed that these protections applied only to the prior 1-hour ozone standard. LEAN and others appealed. The U.S. Court of Appeals for the D.C. Circuit rejected EPA's attempt to withdraw ozone protections as "impermissible backsliding."[41] The court held that "EPA is required by statute to keep in place measures intended to constrain ozone levels to prevent backsliding."[42] The court explained, "[t]he Act placed states onto a one-way street whose only outlet is attainment."[43]

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attainment date extension for Baton Rouge and reinstate its June 24, 2002, final rule . . . . within 45 days of the date it is served with the Court's grant of this request") *filed* Jan. 31, 2003, LEAN v. EPA, 382 F.3d 575 (5th Cir. 2004) (No. 02-60991).

[37] 68 Fed. Reg. 20,077 (April 24, 2003).

[38] 68 Fed. Reg. at 20,077 ("EPA is establishing a schedule for Louisiana to submit State Implementation Plan (SIP) revisions addressing the CAA's pollution control requirements for severe ozone nonattainment areas within 12 months of [June 23, 2003]."

[39] 68 Fed. Reg. at 20,079.

[40] 68 Fed. Reg. at 20,079.

[41] South Coast Air Quality Management Dist. v. EPA, 472 F.3d 882, 900 (D.C. Cir. 2006), modified 489 F.3d 1245, cert. denied, 128 S. Ct. 1065 (2008).

[42] *Id*. at 905.

[43] South Coast Air Quality Management Dist. v. EPA, 472 F.3d at 900.

4. EPA and Louisiana have facilitated excessive increases of VOC and NOx emissions which cause formation of ozone and harm public health.

EPA and LDEQ have exacerbated the Baton Rouge area's ozone problem and increased the risk to public health by facilitating increased emissions of NOx and VOCs. Even when courts have reversed those decisions—and when EPA and LDEQ have admitted they were mistaken—the agencies have done nothing to withdraw or offset the emission increases. Indeed, it was not until the consequences of missing the November 2005 deadline (including economic sanctions) were imminent that EPA and LDEQ shifted their focus from facilitating increased emissions to monitoring and controlling emissions.[44]

a. EPA and LDEQ agreed to exempt industry in the Baton Rouge area from most controls on NOx between January 18, 1996 and June 4, 2003.

NOx emissions were almost unregulated in the Baton Rouge area for years because EPA and LDEQ agreed to waive the Act's requirement that major new sources of NOx install state-of-the-art emission controls.[45] EPA based this decision on LDEQ modeling that purported to show that "additional NOx emission controls within the nonattainment area will not contribute to attainment of the ozone [standard] within the area."[46] After years of allowing construction of uncontrolled sources which increased NOx emissions, LDEQ revised its models, reversed its conclusion by 180 degrees, and decided that NOx emissions contributed to ozone after all. EPA then revoked the waiver.[47] This left Baton Rouge with an artificially inflated "baseline" of NOx emissions. In a shockingly bold move to increase emissions of volatile organic compounds, EPA approved an LDEQ request to allow companies to "trade" reductions in this artificially high baseline of NOx for increases in VOC emissions. In other words, having purposefully allowed NOx emissions to increase, despite ongoing ozone violations, EPA and LDEQ sought to use this admittedly faulty decision as a bootstrap to facilitate increase of VOC emissions. LEAN filed suit.[48] After LEAN filed its opening brief in the U.S. Court of Appeals for the Fifth Circuit, EPA

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[44] A positive development occurred in 2004, when LDEQ issued "an administrative order to 16 Baton Rouge-area facilities requiring them to install air monitors around their perimeters." See LDEQ Press Release (Oct. 6, 2005), http://www.deq.louisiana.gov/portal/portals/0/news/pdf/Administrativeorders.pdf.

[45] 61 Fed. Reg. 2438 (Jan. 26, 1996). EPA and LDEQ also waived the requirement that major *existing* sources of NOx install "reasonably available" controls.

[46] *Id.*

[47] 68 Fed. Reg. 23597, 23597 (May 5, 2003).

[48] *See* LEAN v. EPA, 382 F.3d 575, 581 (5th Cir. 2004) ("EPA hence requested, and we granted, a voluntary vacatur of the agency's final rules approving the . . . inter-precursor trading provision"). This is the same lawsuit noted in footnote 28, above.

agreed that the court should vacate its decision. The court vacated EPA's approval of this scheme to increase VOC emissions on November 20, 2003.[49]

b. *LDEQ operated an unlawful "bank" of emission reduction credits in violation of the Clean Air Act; neither EPA nor LDEQ have required emission reductions to compensate for the admittedly illegal increases due to that bank.*

From 1994 until 2002, LDEQ ran a "bank" for trading "emission reduction credits." LDEQ's bank violated 42 U.S.C. § 7503(c)(2), which prohibits allowing emission increases in exchange for offsets that are "otherwise required by this chapter." In response to a LEAN petition to EPA, EPA determined that LDEQ had been allowing offsets 1) based on reductions that the law already required, and 2) based on reductions from levels above baseline limits set by the state.[50] Further, LDEQ's records for the bank were inadequate; indeed, EPA reported to a federal court that "it is difficult to access data documenting the amount of valid CAA offset credits" and "there are insufficiencies in the banking database."[51] LDEQ did not dispute that its database was flawed and agreed that the bank violated federal policy.[52]

Despite admitting its error, LDEQ has allowed CAA permits that it issued to companies that drew on the illegal emissions credit bank to remain in effect. Based on those permits, companies continue to emit excess tons of pollution into air that already violates minimum health protections standards. Although LDEQ took steps to reform its "banking" regulations going forward, neither EPA nor LDEQ have ever investigated or determined the number of permits based on illegal credits and have never taken steps to compensate for these illegal emissions. On April 10, 2002, LEAN petitioned EPA for an independent audit and full accounting of LDEQ's emission reduction credit "bank." EPA never responded.

c. *EPA and LDEQ agreed to an illegal "contingency plan" after missing the November 1999 attainment date. After a court vacated that plan as illegal,*

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[49] Order Granting EPA Mot. for Partial Vacatur, *filed* Nov. 20, 2003, LEAN v. EPA, 382 F.3d 575 (5th Cir. 2004) (No. 02-60991).

[50] EPA, Order Responding to Petitioner's Request That the Administrator Object to the Issuance of a State Operating Permit (EPA Order), *in re. Operating Permit Formaldehyde Plant Borden Chemical, Inc. Geismar Ascension Parish Louisiana, Permit No 2631-VO*, at 14 (Dec. 22, 2000). (http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions/borden_response1999.pdf).

[51] Joint Motion for Partial Voluntary Remand and Stay of All Proceedings at 4, *filed* Oct. 6, 2000, LEAN v. EPA, No. 99-60570 (5th Cir. Oct. 6, 2000) (hereinafter referred to as "Joint Motion").

[52] *See* LDEQ letter to EPA dated October 5, 2000 from Bliss Higgins, Assistant Secretary of State of Louisiana to Carl Edlund, EPA (Attached as Exhibit A) (hereinafter referred to as "LDEQ letter").

the agencies never replaced it—ignoring their legal obligation to reduce Baton Rouge area emissions.

Because the Baton Rouge area missed its November 15, 1999 deadline for complying with the ozone health protection standard, the CAA required that a contingency plan kick in automatically to reduce emissions.[53] LDEQ and EPA have never implemented contingency measures for the Baton Rouge area's failure to meet its attainment deadline.

Over the years, LDEQ and EPA have agreed on two illegal contingency measures. The first relied on LDEQ's invalid "emission reduction credit" bank and EPA therefore withdrew its approval in response to a LEAN lawsuit.[54] Next, EPA approved a contingency plan based on historical emission reductions that were not located in the Baton Rouge area. LEAN again sued and the court rejected EPA's approval.[55] The Court remanded the matter to EPA for development of a new contingency measure, but LDEQ and EPA simply dropped the ball. There has been no contingency measure submitted, approved, or implemented.

Violations

I. Secretary Leggett (in his official capacity) has violated the Louisiana Law Requiring that LDEQ follow the Clean Air Act.

Secretary Leggett (in his official capacity) is in violation of CAA §§ 172(c), 181(b)(4), 182(d), 182(d)(3), 182(i), and 185.[56] The LDEQ Secretary failed to meet the June 23, 2004, deadline for submission of a revised "severe" state implementation plan and to date has yet to submit such a plan revision containing all requirements. The LDEQ Secretary's failure to submit a implementation plan complying with the all severe nonattainment area provisions for the Baton Rouge area and including all contingency measures required to respond to the areas' failure to attain by 1999 results in violation of the Act and of state law.

Additionally, under CAA § 7511(b)(4)(a), when an area that EPA had classified as being in severe ozone nonattainment, such as the Baton Rouge area, fails to achieve the health protection standard by the applicable attainment date then "the fee provisions under section 7511d of [the CAA] shall apply within the area."[57] The Baton Rouge area failed to attain by

[53] 42 U.S.C. § 7502(c)(9); 57 Fed. Reg. 13,498, 13,511 (April 16, 1992).

[54] *See* Joint Motion, supra note 51 at 4; 67 Fed. Reg. 35,468, 35,469 (May 20, 2002).

[55] LEAN v. EPA, 382 F.3d 575, 586 (5th Cir. 2004) (finding "no record support to demonstrate that reductions outside the Baton Rouge area can qualify as a contingency measure").

[56] 42 U.S.C. §§ 7502(c), 7511(b)(4), 7511a(d), 7511a(d)(3), 7511a(i) and 7511d.

[57] 42 U.S.C. § 7511(b)(4)(a).

November 15, 2005. Therefore, Mr. Leggett must assess fees on those major stationary sources of volatile organic compounds (VOCs) in the Baton Rouge area that failed to timely reduce their emissions by 20 percent. He has not done so; therefore, he is in violation of the Act. These fees implement Congress' plan to create a powerful financial incentive for major sources to substantially reduce their emissions of dangerous pollutants. The fees are therefore necessary to provide for the health and safety of Louisiana residents.

Under Louisiana law, Secretary Leggett (in his official capacity) has the duty to develop a state implementation plan that complies with all federal requirements.[58] This duty may be enforced under La. Rev. Stat. § 30:2026 and La. Code of Civ. P. art. 3863.

II. EPA Has Failed to Perform Its Nondiscretionary Duty to Promulgate a Federal Implementation Plan.

Administrator Johnson (in his official capacity) is in violation of CAA §§ 110(c)(1) and 185(d).[59] Under current circumstances the CAA requires EPA to promulgate a Federal Implementation Plan complying with the all severe nonattainment area provisions for the Baton Rouge area and including all contingency measures required to respond to the areas' failure to attain by 1999. Administrator Johnson has failed to comply with that requirement.

Congress commanded that:

> The Administrator ***shall*** promulgate a Federal implementation plan at any time within 2 years after the Administrator--
>
> **(A)** finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or
>
> **(B)** disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1) (emphasis added).

Here, Louisiana drafted a state implementation plan for the Baton Rouge serious ozone

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[58] *See, e.g.*, La. Rev. Stat. § 30:2054(B) (imposing a duty to "adopt and promulgate [air quality] rules and regulations consistent with applicable state and federal law" and to "develop permitting procedures and regulations conforming to applicable state and federal laws"); *see also* La. Rev. Stat. § 30:2054(A)(3) (imposing a duty to "prepare and develop a general plan for the ***proper*** control of the air resources in the state of Louisiana") (emphasis added).

[59] 42 U.S.C. §§ 7410(c)(1) and 7511d(d).

nonattainment area that EPA unlawfully approved on October 2, 2002.[60] However, as a result of litigation challenging that approval, on October 24, 2003, EPA found that this plan is insufficient, and that "Louisiana will therefore have to implement additional measures" to comply with the CAA.[61] EPA went on to state that Louisiana's plan does not "qualify as a severe ozone nonattainment area attainment demonstration, and Louisiana will therefore have to develop by June 23, 2004, a new attainment demonstration addressing the reductions to be achieved by the additional measures."[62] This constitutes a finding under the CAA that Louisiana's SIP did not "satisfy the minimum criteria established under [the CAA]" under CAA § 110(c)(1)(A). It also constitutes a disapproval of the state's plan under CAA § 110(c)1)(B). Moreover, it constitutes a finding and call for plan revisions under CAA § 110(k)(5)[63] Since EPA made this finding, Louisiana has failed to submit a new severe attainment demonstration for EPA approval, and, therefore, Louisiana has not corrected the deficiency. Under CAA § 110(c)(1), therefore, EPA has a nondiscretionary duty to promulgate a Federal Implementation Plan for the Baton Rouge area.

Further, pursuant to the CAA § 110(k)(1)(C), where a finding of incompleteness has been made, "the State shall be treated as not having made the submission."[64] Here, EPA determined that Louisiana's SIP plan did not meet EPA's minimum criteria and therefore is incomplete. Thus, under CAA § 110(k)(1)(C), Louisiana is treated the same as if no SIP plan had ever been submitted.

Air quality in the Baton Rouge area has never met minimum health protection standards for ozone pollution. Louisiana has failed to comply with an EPA order to submit a new SIP by June 24, 2004. EPA has also failed and unreasonably delayed compliance with the Fifth Circuit's remand for a new contingency measure to make up for missing the 1999 attainment deadline.[65] By law, EPA must now step in to ensure that Baton Rouge area air quality promptly attains minimum federal health protection standards. The law requires EPA to promulgate a

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[60] 67 Fed. Reg. 61,786 (Oct. 2, 2002).

[61] EPA Motion to Vacate and Remand at 2(Oct. 24, 2003) ("The current attainment demonstration does not qualify as a severe ozone nonattainment area attainment demonstration, and Louisiana will therefore have to develop, by June 23, 2004, a new attainment demonstration addressing the reductions to be achieved by the additional measures.") *filed* Oct. 24, 2003, LEAN v. EPA, 382 F.3d 575 (5th Cir. 2004) (No. 02-60991).

[62] *Id.*

[63] 40 U.S.C. § 7410(k)(5).

[64]40 U.S.C. § 7410(k)1)(C)).

[65] LEAN v. EPA, 382 F.3d 575 (5th Cir. 2004).

federal implementation plan and to collect unpaid fees under CAA § 185(d).

Additional Information

The full names and addresses of the party giving this Notice is:

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The Louisiana Environmental Action Network is represented in this matter by:

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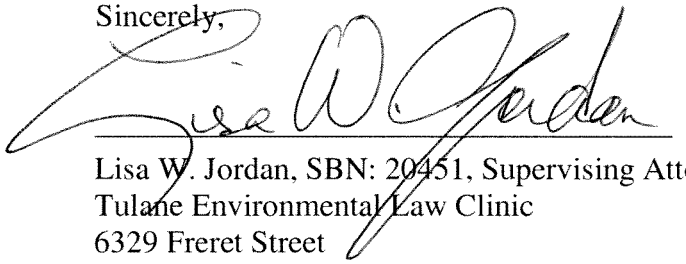
Conclusion

If you believe that any portion of this Notice is in error or if you wish to discuss any portion of this Notice, please contact Lisa W. Jordan at the address and phone number listed below. The Louisiana Environmental Action Network would be pleased to discuss alternatives for a cooperative resolution of the violations listed in this Notice.

Sincerely,



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