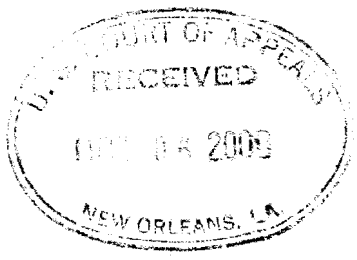
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



LOUISIANA ENVIRONMENTAL ACTION NETWORK, *et al.*	)	
Petitioners,	)	
v.	)	No. 99-60570
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

JOINT MOTION FOR PARTIAL VOLUNTARY REMAND AND STAY OF ALL PROCEEDINGS

Petitioners Louisiana Environmental Action Network, North Baton Rouge Environmental Association, Save Our Lakes and Ducks, and Southern University Environmental Law Society (collectively, "LEAN"), Intervenor State of Louisiana Department of Environmental Quality ("LDEQ"), and the United States, on behalf of Respondent United States Environmental Protection Agency ("EPA") jointly move this Court for a partial voluntary remand of this matter as it relates to EPA's approval of Louisiana's contingency measure plan for the Baton Rouge ozone nonattainment area, and also jointly request an immediate stay of all proceedings,

including the oral argument presently scheduled for the week of November 6, 2000.

In support of this Motion, the undersigned Parties state as follows:

1. On July 2, 1999, acting pursuant to section 182(c)(2)(B) of the Clean Air Act ("CAA"), 42 U.S.C. § 7511a(c)(2)(B), EPA issued final approval of the State of Louisiana's revised State Implementation Plan ("SIP") for the Baton Rouge ozone nonattainment area. *See* 64 Fed. Reg. 35,930 (July 2, 1999). *See generally* Resp. Br. at 12-14.

2. On August 30, 1999, LEAN filed a petition for review of EPA's approval of the revised Baton Rouge SIP.

3. In its petition, LEAN challenged: (a) EPA's approval of the 9% Rate of Progress plan for Baton Rouge; (b) EPA's approval of the demonstration of attainment for Baton Rouge; and (c) EPA's approval of the contingency measure for Baton Rouge. *See* Resp. Br. at 1. The last of these three issues -- the contingency measure plan -- is at issue in this joint motion.

4. Under CAA sections 172(c)(9) and 182(c)(9), 42 U.S.C. §§ 7502(c)(9) and 7511a(c)(9), many States, including Louisiana, must submit contingency measures to be implemented if reasonable further progress toward attainment is not achieved or if the air quality standard is not attained by the applicable attainment

date. 64 Fed. Reg. at 35,935. *See also* Resp. Br. at 7-9. The State of Louisiana acknowledged in a May 10, 2000 letter to EPA that the Baton Rouge ozone nonattainment area failed to attain the one-hour standard by the required date of November 1999.

5. Louisiana elected to develop a contingency measure plan using Emission Reductions Credits ("ERCs") held in escrow in the State's ERC "bank." The revised Baton Rouge SIP documented 13.0 tons per day of ERCs in the bank. *See* 64 Fed. Reg. at 35,935.

6. On June 19, 2000, one of the Petitioners in this action filed a second action in the federal district court for Louisiana against EPA under the CAA. *See LEAN v. Browner*, Civil No. 00467-A-M-2 (M.D. La.). The Complaint in the second action alleged that EPA failed to perform an alleged mandatory duty to grant or deny the Plaintiff's request to veto a CAA emissions permit for a Borden Chemical, Inc. ("BCI") facility located in Geismar, Louisiana. Specifically, the Plaintiff alleged, among other things, that the ERCs that BCI used in connection with its CAA emissions permit were invalid.

7. EPA interprets the CAA as requiring that valid ERCs must be based on emissions reductions that are surplus at the time of use. Under EPA's

interpretation, an ERC must be reduced in quantity at the time of its use to account for any emissions reduction requirements adopted since the generation of that ERC.

8. In response to the BCI litigation, EPA performed a preliminary investigation and became concerned that Louisiana's banking rule and its application might not be consistent with EPA regulations and guidance. In addition, EPA discovered that it is difficult to access data documenting the amount of valid CAA offset credits in Louisiana's bank and that there are insufficiencies in the banking database.

9. After discussing its concerns with Louisiana, EPA learned that the State had not calculated the number of ERCs in the ERC bank in accordance with EPA's expectations. Louisiana believed that, under the CAA, it was not required to discount ERCs in the bank at the time of use. By letter dated October 5, 2000, a copy of which is attached, Louisiana confirmed that the applicable State rule actually prohibits a reduction in the quantity of ERCs at the time of use. The State acknowledged the discrepancy between the federal and State interpretations of the CAA and stated that it is considering revising or repealing its ERC banking rule.

10. In light of Louisiana's anticipated action revising or repealing its banking rule and EPA's concerns with the bank that may necessitate such State action, all of the undersigned Parties agree that EPA's approval of Louisiana's

contingency measure plan should be remanded to EPA for further action and/or rulemaking.

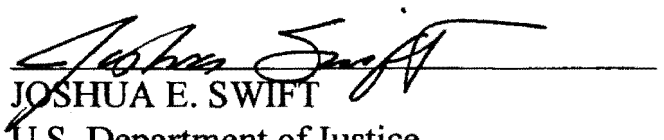
11. In addition, the undersigned Parties have recently participated in several productive, serious, and lengthy settlement discussions and have reached a settlement in principle of the entire petition, subject to final approval from the Parties' management and clients as well as public notice and comment under CAA section 113(g), 42 U.S.C. § 7413(g). The Parties agree that it is therefore appropriate to stay this litigation, including oral argument, to conserve the resources of the Court and the Parties. The Parties will inform the Court as soon as a final settlement has been achieved.

12. For the aforementioned reasons, the undersigned Parties respectfully ask the Court to grant this joint motion for a partial voluntary remand of this matter as it relates to EPA's approval of Louisiana's contingency measure plan for the Baton Rouge ozone nonattainment area, and also request that the Court stay all proceedings in this matter, including the oral argument presently scheduled for the week of November 6, 2000.

ON BEHALF OF THE UNITED STATES:

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division

Oct. 5, 2000
Date



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ON BEHALF OF ALL PETITIONERS:

October 6, 2000
Date

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October 6, 2000
Date

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ON BEHALF OF THE LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY:

Oct. 5, 2000
Date

Donald Trahan

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State of Louisiana

Department of Environmental Quality

M.J. "MIKE" FOSTER, JR.
GOVERNOR

J. DALE GIVENS
SECRETARY

October 5, 2000

Carl E. Edlund, P.E.
Director
Multimedia Planning and Permitting Division (6PD)
U. S. Environmental Protection Agency, Region VI
1445 Ross Avenue
Dallas, Texas 75202-2733

Dear Carl:

Over the last several months, specifically in discussions relating to the pending "Borden petition" and "5th Circuit SIP Appeal", questions have been raised regarding whether the Louisiana VOC banking rule (LAC 33:III, Chapter 6) and its application are consistent with current EPA policy/guidance regarding Nonattainment New Source Review procedures. Specifically, your office has stated its position that the rule as promulgated should be properly interpreted and applied to require that banked emission reduction credits (ERCs) be reduced in quantity at the time of their use, to account for any emission reductions that would have been required by any new regulations adopted since the time the credited emission reductions were generated. I understand that your position is based on a statement in the Background section of Chapter 6 that the regulation does not alter new source review requirements or exempt owners or operators from compliance with applicable regulations (LAC 33:III.601.A), as well as the language of section 173(c)(2) of the Clean Air Act (and the corresponding state regulation, LAC 33:III.504.F.10). Such an interpretation would be consistent with EPA's current national "surplus when used" policy. Your office has further noted that the Agency's approval of the rule in July 1999 was premised on this interpretation.

I must clarify, however, that the Department intended, interprets and has applied the rule to prohibit such a reduction in quantity of emission reduction credits. We believe that our intention is illustrated in the rulemaking record, by our first including and later striking rule provisions that would have adopted the "surplus when used" practice, as well as by our response to comments received during the rulemaking process. In addition, the rule establishes definitions and procedures for calculating ERCs that set forth a "surplus when generated" approach and further provides for the protection of credits once approved (LAC 33:III.605, 607.G, and 621).

Because it is our firm belief that the SIP approved banking system for offsets and netting in Louisiana does not require, and in fact prohibits, a review and adjustment of emission reduction credits at the time of their use, it has not been our practice to perform such a review. I fully acknowledge that these apparent inconsistencies between the State rule and Federal policy, or between the State and Federal interpretation of our rule, must be resolved. Toward this end, the Department has already begun a review of the rule to consider whether it should be revised or repealed in the context of our ongoing 2001 SIP development, or in a separate process. I look forward to a mutually satisfactory resolution of this issue and will be happy to discuss this matter with you further at any time.

Sincerely yours,

Bliss M. Higgins
Assistant Secretary

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

October 5, 2000

VIA TELEFAX AND OVERNIGHT MAIL

Jason T. Barbeau, Student Attorney
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Bliss Higgins, Assistant Secretary
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Baton Rouge, LA 70882-2282

Re: 5th Circuit SIP Appeal – Settlement in Principle

Dear Colleagues:

This letter is to confirm that, subject to obtaining final approvals within our organizations and with the Department of Justice, we have reached an agreement in principle to settle the above-referenced litigation, styled *Louisiana Environmental Action Network, et al., v. United States Environmental Protection Agency*, No. 99-60570 (5th Cir.). In that case, four environmental groups[1] represented by the Tulane Environmental Law Clinic petitioned for judicial review of a final rule promulgated by the U.S. Environmental Protection Agency ("EPA") on July 2, 1999, published at 64 Fed. Reg. 35930, approving revised Post-1996 Rate of Progress (ROP), Attainment Demonstration, and Contingency Measures State Implementation Plans (SIPs) for the Baton Rouge Ozone Nonattainment Area (the "1999 Approved SIP").

Based on the discussions among all the parties over the past several days, it is my understanding that we have reached agreement, in principle, that compliance with the following conditions would constitute grounds for settlement of this lawsuit:

A. On or before October 6, 2000, the United States (on behalf of EPA) and the Tulane Environmental Law Clinic (on behalf of the Petitioners), and LDEQ will file a joint motion with the Court requesting:

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[1] The Louisiana Environmental Action Network (LEAN), Save Our Lakes and Ducks (SOLD), the North Baton Rouge Environmental Association (NBREA), and the Southern University Environmental Law Society (SUELS).

i. A voluntary remand of the contingency measures designated by LDEQ in the 1999 Approved SIP.

ii. A stay of all proceedings, including oral argument, in the above-referenced case, until publication by EPA of final action either approving the revised SIP for Baton Rouge, which LDEQ has committed to submit to EPA in August, 2001 (the "Year 2001 SIP"), or disapproving the Year 2001 SIP.

This joint motion will reference the differing interpretations between EPA and LDEQ concerning the need for emission reduction credits to be surplus of all requirements of the Clean Air Act at time of use as offsets, and that SIP revisions will be needed to make the Louisiana program consistent with the federal interpretation. In addition, the joint motion will acknowledge that EPA discovered that it is difficult to access data documenting the amount of valid CAA offset credits in Louisiana's bank and that there are insufficiencies in Louisiana's banking database.

B. EPA and LDEQ will meet with one or more technical representatives from Petitioners to discuss the proper modeling and attainment protocols to calculate and assess Louisiana's Year 2001 attainment demonstration including ozone transport analyses. This will include a discussion of the expected exceedance factor.

C. Within five (5) days after publication of a final EPA notice either approving or disapproving the Year 2001 SIP for Baton Rouge, the Tulane Environmental Law Clinic (on behalf of all Petitioners) will file a motion to dismiss the challenge to the 1999 Approved SIP, with prejudice to its refiling. The dismissal of this action by Petitioners shall not serve as a waiver or relinquishment of any rights they may have under the Clean Air Act to challenge the Year 2001 SIP, or other future SIPs, including by petition for review in federal court.

D. The parties will negotiate the issue of EPA's reimbursement of some or all of Petitioners' costs and reasonable attorney's fees. Any agreement will be reduced to writing in a separate document.

If this letter accurately reflects your understanding of our agreement in principle to settle the litigation over the 1999 Approved SIP, please so signify by countersigning below and returning the signed copy to me. As noted above, our signatures represent our good faith belief that the conditions set out above represent satisfactory grounds for settlement, and that we will recommend such a settlement to our clients, management, and/or litigation counsel. It is understood that final approval of this settlement is subject to approval by Petitioners, management approval of the regulatory agencies and the Department of Justice, and is further subject to the notice and comment requirements of section 113(g) of the Clean Air Act. Over the

next several weeks, we will need to work to develop a formal settlement agreement.

I appreciate the hard work and spirit of cooperation that everyone has demonstrated in reaching this point in the settlement process.

Sincerely,

Lawrence E. Starfield
Regional Counsel

AGREED

ON BEHALF OF PETITIONERS — Date

Jason T. Barbeau — October 6, 2000

Jason T. Barbeau, Student Attorney
Suzanne Dickey, Esquire
Tulane Environmental Law Clinic

ON BEHALF OF LDEQ — Date

Bliss M. Higgins — October 5, 2000

Bliss M. Higgins, Assistant Secretary
Office of Environmental Services
Louisiana Department of Environmental Quality