STATE OF LOUISIANA

COURT OF APPEAL
FIRST CIRCUIT

No. 2023-CA-0578

RISE ST. JAMES, LOUISIANA BUCKET BRIGADE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, HEALTHY GULF, EARTHWORKS, and NO WASTE LOUISIANA
Petitioners-Appellees

v.

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Respondent-Appellant

CIVIL PROCEEDING

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE

THE HONORABLE TRUDY M. WHITE, PRESIDING
DIVISION J, SECTION 27
CASE NUMBER 649,029

PETITIONERS-APPELLEES' MOTION FOR LEAVE TO FILE RESPONSE TO *AMICI CURIAE* BRIEFS

Corinne Van Dalen (La. Bar No. 21175)
Michael Brown (La. Bar No. 35444)
Zora Djenohan (La. Bar No. 39865)
EARTHJUSTICE
900 Camp Street, Suite 303
New Orleans, LA 70130
T: 504.910.1776 // F: 415.217.2040
cvandalen@earthjustice.org
mlbrown@earthjustice.org
zdjenohan@earthjustice.org
Counsel for Petitioners-Appellees RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana

NOW INTO COURT, through undersigned counsel, come Petitioners-Appellees RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana (collectively, "Appellees") who respectfully move this Court for leave to file a response to the *amici curiae* briefs. As grounds for this motion, Appellees provide the following:

1. On October 24, 2023, the Court granted four motions for leave to file *amicus curiae* briefs by the Louisiana Chemical Association ("LCA"), Louisiana Associate of Business and Industry ("LABI"), American Chemistry Counsel ("ACC"), and Greater Baton Rouge Industry Alliance ("GBRIA") (together, "trade associations") in this matter.

2. The ACC, LABI, and LCA briefs contain misstatements of the record not present in LDEQ's or Formosa Plastics' briefing, raise new issues, and cite new law not argued by the parties. The ACC brief raises entirely new evidence not in the administrative record in this case.

3. Allowing Appellees to respond to the ACC, LABI, and LCA briefs will aid the Court in identifying issues in the trade associations' briefs that were not raised by the parties and not considered by the district court in light of well-settled law that "issues not raised by the parties cannot be raised by *amicus curiae* on appeal." *Barfield v. Bolotte*, 2015-0847 (La. App. 1 Cir. 12/23/15), 185 So.3d 781, 784 (citing *Banker's Ins. v. Kemp*, 96-0469 (La. App. 1 Cir. 12/20/96), 686 So.2d 111, 114).

4. Allowing Appellees to respond to the ACC brief will also aid the Court in identifying new or additional evidence and facts that are not in the record to prevent improper use of the trade associations' briefs as vehicle to present such evidence. *Bouterie v. Crane*, 604 So.2d 1051, 1052 (La. Ct. App. 1992), rev'd on other grounds, 616 So.2d 657 (La. 1993).

5. Appellees would also like to aid the Court in its review of the trade association briefs by pointing out statements therein that contradict the record, mischaracterize the District Court's holding, and misstate the law. As the attached brief demonstrates, trade associations collectively misstate the record on appeal as it concerns to material facts like the size of Formosa Plastics' emissions contributions to NAAQS violations, the size of Formosa Plastics' air toxics emissions concentrations offsite, cumulative impact modeling, and the evidence LDEQ considered on greenhouse gas and ethylene oxide emissions. Moreover, Appellees briefly explain how *amici* make new mischaracterizations of applicable law. Appellees' attached response brief is limited to responding to new points raised in the trade associations' briefs that would otherwise go unanswered. It does not address the Appellant LDEQ's or Formosa Plastics' briefs, which Appellees have already briefed.

6. Giving Appellees the opportunity to respond in writing to the issues discussed above will allow Appellees to focus their oral argument on the matters of greatest interest to the Court, as well as the ten substantive issues raised by Appellants, in the time allotted.

7. Appellees do not seek to respond to the GBRIA brief, which merely restates LDEQ's Basis for Decision and provides no additional information.

WHEREFORE, Appellees respectfully requests that this Court grant it leave to file the attached response to the *amici curiae* briefs.

Respectfully submitted on October 30, 2023, by:

Corinne Van Dalen (La. Bar No. 21175)
Michael Brown (La. Bar No. 35444)
Zora Djenohan (La. Bar No. 39865)
EARTHJUSTICE
900 Camp Street, Suite 303
New Orleans, LA 70130

T: 504.910.1776 // F: 415.217.2040
cvandalen@earthjustice.org
mlbrown@earthjustice.org
zdjenohan@earthjustice.org
Counsel for Petitioners-Appellees RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana

CERTIFICATION OF SERVICE

I certify that a legible copy of this brief has been sent by email on this day of October 30, 2023 to all counsel of record and *amici curiae*.

_____
Corinne Van Dalen

STATE OF LOUISIANA

COURT OF APPEAL
FIRST CIRCUIT

No. 2023-CA-0578

RISE ST. JAMES, LOUISIANA BUCKET BRIGADE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, HEALTHY GULF, EARTHWORKS, and NO WASTE LOUISIANA
Petitioners-Appellees

v.

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Respondent-Appellant

CIVIL PROCEEDING

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE

THE HONORABLE TRUDY M. WHITE, PRESIDING
DIVISION J, SECTION 27
CASE NUMBER 694649,029

ORDER

Considering the foregoing motion for leave to file a response to Louisiana Chemical Association's, Louisiana Associate of Business and Industry's, and American Chemistry Counsel's *amicus curiae* briefs,

IT IS HEREBY ORDERED that leave of court is granted to RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana to file a response to the above-mentioned *amicus curiae* briefs.

Baton Rouge, Louisiana, this __ day of October, 2023.

_____
JUDGE

STATE OF LOUISIANA

COURT OF APPEAL
FIRST CIRCUIT

No. 2023-CA-0578

RISE ST. JAMES, LOUISIANA BUCKET BRIGADE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, HEALTHY GULF, EARTHWORKS, and NO WASTE LOUISIANA
Petitioners-Appellees

v.

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Respondent-Appellant

CIVIL PROCEEDING

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE

THE HONORABLE TRUDY M. WHITE, PRESIDING
DIVISION J, SECTION 27
CASE NUMBER 694,029

PETITIONERS-APPELLEES' RESPONSE TO *AMICI CURIAE* BRIEFS

Corinne Van Dalen (La. Bar No. 21175)
Michael Brown (La. Bar No. 35444)
Zora Djenohan (La. Bar No. 39865)
EARTHJUSTICE
900 Camp Street, Suite 303
New Orleans, LA 70130
T: 504.910.1776 // F: 415.217.2040
cvandalen@earthjustice.org
mlbrown@earthjustice.org
zdjenohan@earthjustice.org
Counsel for Petitioners-Appellees RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

State Cases

Federal Statutes

State Statutes

Regulations

Other Citations

I. The Clean Air Act.

A. LCA's brief makes an important mischaracterization to wrongly minimize the size of Formosa Plastics' contributions to violations of the NAAQS.

LCA's brief (at 6) materially misstates the record to argue that Formosa Plastics' offending contributions to NAAQS and increment violations would be "far below the respective SILs of NO_2 and $PM_{2.5}$." To the contrary, the Basis for Decision shows Formosa Plastics would make contributions to violations far more closely approaching the SILs, equivalent to 74 percent of the 24-hour $PM_{2.5}$ SIL at the precise time and place of a NAAQS violation.[1] And equivalent to 85 percent of the 1-hour NO_2 SIL, at the precise time and place of a NAAQS violation.[2] The smaller concentrations LCA references are not Formosa Plastics' "maximum modeled contributions," as LCA misstates (at 6), but the company's contributions to just the largest of the collection of NAAQS violations the model predicted for these pollutants in St. James Parish.[3]

B. LCA and LABI inaccurately speculate about policy scenarios without support.

LCA (at 6–9) and LABI (*e.g.*, at 17–19) dedicate pages to unsupported speculation on the supposedly "chilling" policy consequences of enforcing the Clean Air Act and its implementing regulations in this permitting action. Never mind that Amici offer no factual citations, and little if any legal support, for their remarks. *See id.*; *Roberts v. Owens-Corning Fiberglas Corp.*, 2003-0248, p. 13 (La. App. 1 Cir. 4/2/04), 878 So.2d 631, 643 (holding mere "arguments of counsel

---

[1] 1stCir. R. Vol. 35, 9456 at n.40. LDEQ explains that Formosa Plastics' maximum contribution to a modeled exceedance is 0.89 microgram per cubic meter of air ($\mu g/m^3$), as compared to the SIL of 1.2 $\mu g/m^3$. *Id.* This is more than 17-times the figure, 0.052 $\mu g/m^3$, LCA stated as the maximum. *See* LCA Br. at 6.

[2] *Id.* LDEQ explains that Formosa Plastics' maximum contribution to a modeled exceedance is 6.35 $\mu g/m^3$, as compared to the SIL of 7.5 $\mu g/m^3$. *Id.* This is 334-times the figure, 0.019 $\mu g/m^3$, LCA stated as the maximum. *See* LCA Br. at 6.

[3] *See* 1stCir. R. Vol. 35, 9386–87.

are not considered evidence"). Their uncited statements are untethered from the law Congress enacted.

The Clean Air Act caps the allowable, "significant deterioration," *at the lower* of the NAAQS and increments to protect human health and the environment. *Ala. Power Co. v. Costle*, 636 F.2d 323, 361–62 (D.C. Cir. 1979) (construing 42 U.S.C. § 7473(b)(4)); *contra* LABI Br. at 9 (attempting to redefine threshold of "significant deterioration" differently). These limits are not just numbers on a page to manipulate; they are standards "the attainment and maintenance of which" are "requisite to protect the public health." 42 U.S.C. § 7409(b)(1); *id.* § 7470(3) (prioritizing "preservation of existing clean air"). The "principal mechanism" to safeguard these limits is the PSD permit review, including the Air Quality Analysis, *Ala. Power*, 636 F.2d at 362 (also calling this the Act's "emphatic goal"). And the Act prohibits not just causing, but *contributing* to ongoing violations. *See* 42 U.S.C. § 7475(a); LAC 33:III.509.K.1; *contra* LCA Br. at 7 (expressing surprise at this undisputed law). Amici's argument amounts to the notion that unlimited numbers of new sources should be allowed to build in those exact places in our state where the air does not meet the NAAQS or increments, so long as each source contributes less than a SIL.[4] And in this case, Louisianans like residents of Burton Lane, St. James Parish, could suffer the consequences of failing to enforce that basic law.[5]

At the same time, the Air Quality Analysis only has permitting consequences when the air *violates* the NAAQS and increments, and only for those

[4] This is like the "Simpsons" episode where, instead of taking out an overflowing kitchen trash can, Homer, Bart, and Lisa instead staple banana peels or balance discarded wrappers on top of the precarious rubbish heap. *The Simpsons: Trash of the Titans*, Season 9, Ep. 22 (FOX TV broadcast Apr. 26, 1998), relevant clip avail. at, https://www.youtube.com/watch?v=AI323JeIhAk.

[5] *See* Appellees' Br. at 27 for more discussion.

sources that are large enough to model for that specific pollutant.[6] *See* LAC 33:III.509.K.1; *contra, e.g.*, LCA Br. 8 (proclaiming all permits will "grind to a halt"). And it is pure fantasy when LABI (at 3–4) states (again without support) there could be a "*per se* bar to new market entrants" thanks to PSD review. Even when a source's model shows it could cause or contribute to violations, LDEQ could still permit the source to build by reducing its contributing emissions directly and/or securing offsets. *See* 40 C.F.R. § Part 51, App'x W, 9.2.3(d); *id.* § 51.165(b)(3). LDEQ simply refused to enforce those remedies here.

By contrast, the extratextual SILs exemption is *not in* the Act or Louisiana's air regulations, although LABI misleadingly implies otherwise (*e.g.*, at 4). Rather, the D.C. Circuit vacated such federal SILs regulations, because the Act forbids agencies from simply concluding contributions "below the SIL," do not cause or contribute to NAAQS or increment violations or are "de minimis." *See Sierra Club v. EPA*, 705 F.3d 458, 464–65 (D.C. Cir. 2013) (*Sierra Club I*); *contra* LABI Br. at 18. But that prohibited practice is exactly what LDEQ did here.[7] *See In re Waste Mgmt.*, 2006-1011, 2007 WL 2377337, pp. 3–4 (La. App. 1 Cir. 8/22/07) (reversing LDEQ for near-identical reliance on EPA memo when analogous PSD regulation vacated by D.C. Circuit).

C. LABI's additional arguments are unavailing.

- *Amici cite no case law on SILs that addresses the D.C. Circuit's reasoning in* Sierra Club I.

[6] *See generally* Appellees' Br. at 21–23 for detailed discussion. This includes modifying major sources, which LCA discusses in its brief (at 7). The regulatory thresholds for major modifications apply only to sources that are already *major* sources, meaning they already exceeded the same regulatory emissions thresholds we discuss at length in our response brief, and then *also* exceed the separate thresholds for modifying their facilities. *See* LAC 33:III.509.A–B. And the regulations allow sources to minimize their exposure by subtracting any offsetting emissions decreases from the facility's emissions totals, and sources can exempt entire categories of modification project types from the rules altogether. *See id.*A.2, A.4.a, .B (defining "major modification" and "net emissions increase").

[7] *See* 1stCir. R. Vol. 35, 9456 at n.40.

Amici combined only reference one additional case that squarely addresses the SILs, a 2006, EPA administrative-law-judge decision that is no longer good law on this point. *See In re Prairie State Generating Co.*, 13 E.A.D. 1 (EAB 2006).[8] In approving the use of the SILs there as "de minimis," *id.* at 83, the EPA judges could not have addressed the D.C. Circuit's 2013 ruling in *Sierra Club I* (which now binds EPA) that objected to EPA's reliance on a "de minimis" rationale for the SILs to "exempt" sources from complying with the law. *Sierra Club I*, 705 F.3d at 464–65.[9] And after *In re Prairie State*, in 2010 and 2014, EPA issued clarifying statements to caution "that use of a SIL may not be appropriate when a substantial portion of any NAAQS or increment is known to be consumed."[10] *See Powder River Basin Res. Council v. Wyo. DEQ* ("*PRBC*"), 226 P.3d 809, 818 (Wyo. 2010) (rejecting reliance on *In re Prairie State* for similar reason). Amici ignore this change altogether in their telling of SILs' history. *See* LABI Br. at 11–12; *see also New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("We do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation.") (internal quotation marks omitted). Finally, unlike petitioners in *In re Prairie State*, we *do* also argue that LDEQ misapplied the SILs memoranda and that Formosa Plastics' contributions below the SILs are "significant" from a health standpoint.

---

[8] *See* LCA Br. at 5; LABI Br. 12.

[9] Similarly, the administrative judges in *in re Prairie Generating* relied on what is now an outdated version of EPA's air quality modeling rules, which appropriately no longer reference "significance" in determining whether a source causes or contributes to violations. *Compare* 13 E.A.D. at 81, *with* 40 C.F.R. § Part 51, App'x W, especially § 9.2.3(d) (2023) (explaining modeling procedure).

[10] *PSD for $PM_{2.5}$ —Increments, SILs*, 75 Fed. Reg. 64864, 64894 (2010); *see also* EPA, "Guidance on SILs for Ozone and Fine Particles in the PSD Permitting Program" 10 (Apr. 17, 2018), https://www.epa.gov/sites/production/files/2018-04/documents/sils_policy_guidance_document_final_signed_4-17-18.pdf (1stCir. R. Vol. 42, 11160, n. 133) (LDEQ brief summarizing EPA's 2014 statement, "recommend[ing] that permitting authorities use those SILs only where they could establish that the difference between background concentrations in a particular area and the NAAQS was greater than those SIL values. This approach was intended to guard against misuse of the SILs in situations where the existing air quality was already close to the NAAQS.").

See 13 E.A.D. at 81; Appellees' Br. at 23–24, 26–29; *United States v. Ameren Mo.*, 421 F. Supp. 3d 729, 817–18 (E.D. Mo. 2019).

Meanwhile, a second case that LABI suggests (at 13) "endorsed" the SILs made no such holding. *See Sur Contra la Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). The court in *Sur* never had to address the SILs' legality. *Id.* at 448. The case resolved a series of other arguments concerning the accuracy of EPA's air quality data and the efficiency of the applicant's pollution controls. *See id.* 448–49.

- *LABI's quest for dictionary definitions to support ambiguity in "contribute" (at 6–7) ignores* Bluewater Network's *judicial resolution of that same search.*

LABI elides the fact that the court in *Bluewater Network v. EPA* already answered the question of Congress's meaning for "contribute" in this context; the term is meant to be enforced broadly, not whittled down. 370 F.3d 1, 13 (D.C. Cir. 2004). The court there reviewed the dictionary definitions and found that "contribute," as used in the same phrase in an analogous Clean Air Act context, means "to have a share in any act or effect," and "*does not incorporate any 'significance' requirement*." *Id.* (emphasis added). And Congress and regulatory drafters answered it too: when they meant to install a significance test, they knew how to do so by using a version of the phrase "significantly contribute."[11] *See PRBC*, 226 P.3d at 818 (making same point concerning SILs).

- *LABI relies heavily on cases relating to setting nonattainment political boundaries, which involves discretionary language, like "deems necessary," precisely lacking here*.

LABI also inappositely claims (at 7) that courts have "endorsed" discretion to define contribute narrowly. But nearly all the Clean Air Act law LABI cites is from the unrelated context of EPA determining the political boundaries of

[11] *See, e.g.*, 42 U.S.C. §§ 7506a(a), 7492(c)(1), 7426(a)(1)(B), 7547(a)(1), (4); LAC 33:III.504(K), 509(B), 531(B)(2).

nonattainment areas.[12] *See* 42 U.S.C. § 7407(d). In these cases, the Fifth and D.C. Circuits pointedly *rejected* the argument that the law requires a narrowing, "significance" emissions threshold when assessing whether an outlying county contributes to nonattainment in a metropolitan area. *See, e.g.*, *Texas v. EPA*, 983 F.3d 826, 841–42 (5th Cir. 2020). And these cases also show what it looks like when Congress actually confers discretion on an agency. Determining the size of a nonattainment zone is a multi-factor, multi-government process. *See id.* at 831–32, 836–37 (explaining process). States submit initial lists of all the state's counties to be included in a proposed nonattainment region. *Id.* Crucially, Congress then allows EPA authority to modify those lists as the Administrator "*deems necessary*." *Id.* at 836–37 (emphasis added). As LABI omits, but the Fifth Circuit found decisive, using "deems," confers discretion that a term like "necessary" alone could not. *Id.*

Here, Congress did not authorize EPA or state agencies to do anything like "deem" certain contributions to violations significant in a multi-layered and judgment-driven process. *See* 42 U.S.C. § 7475(a); LAC 33:III.509.K.1. Rather the NAAQS and increments are bright-line limits, and Congress ordered applicants to assess compliance by plugging pollutant emissions and meteorological data into a computer model. *See id.*; *Ala. Power Co.*, 636 F.2d at 362; *PRBC*, 226 P.3d at 818.

Congress did give EPA discretion to determine the appropriate air quality modeling program "in *regulations* of the [EPA] Administrator" for applicants to use. 42 U.S.C. § 7475(e) (emphasis added); *see Sierra Club v. EPA,* 939 F.3d 649, 683–84 (5th Cir. 2019). But in attempting to twist that point in its favor (at 2, 9), LABI ignores the reality of this case: we are not challenging that regulatory

[12] Citing, for example, *Catawba Cnty. v. EPA*, 571 F.3d 20 (D.C. Cir. 2009); *Texas v. EPA*, 983 F.3d 826 (5th Cir. 2020); *Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015); *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D.C. Cir. 1996). We already addressed several decisions from this line of cases that Appellants cited, including *Catawba Cnty.* and *EDF*. *See* Appellees' Br. at 20.

modeling protocol, which EPA defined at 40 C.F.R. § Part 51, Appendix W, and *does not* include the extratextual SILs exemption to "cause or contribute." *See also* LAC 33:III.509.L.1 (requiring LDEQ generally to use the same, "Appendix W of 40 CFR Part 51" to estimate air quality). The absence of the SILs in the regulatory modeling protocol only strengthens our point that what LDEQ did after obtaining the undisputed modeling results is illegal: alter statute's "cause or contribute" legal standard with the extratextual SILs, to approve a PSD permit despite modeled contributions to violations.

- *LABI's comparisons to nonattainment review were rejected by the court in* Sierra Club I.

  LABI (at 2–4, 10–11, 14) also contrasts the Act's nonattainment provisions with its PSD permitting provisions, theorizing that nonattainment rules already give "ample regulatory tools" to clean unhealthy air. LABI then argues this somehow means LDEQ should get even greater discretion to issue PSD permits to pollute the same air Congress wishes to clean—by interpreting the law to exempt contributions to violations LDEQ determines insignificant. The court in *Sierra Club I* rejected the same, incongruous argument for the SILs. 705 F.3d at 465. The court held that it would "conflict with [the] statutory command," to simply rely "on permitting authorities to address violations, rather than to prevent violations by requiring demonstration that a proposed source or modification will not cause a violation." *Id.*[13] Nonattainment review also is more onerous than simply enforcing the PSD provisions as written.[14] *Ala. Power*, 636 F.3d at 362 (quoting legislative history that PSD review was meant to help protect existing industry having to comply with strict nonattainment rules). LDEQ's failure to protect air quality in St.

[13] LABI's argument is like claiming that because Congress enacted the Oil Pollution Act to manage oil-spill disaster response, Congress cares less for enforcing safety laws to prevent spills.

[14] Among several other provisions, a proposed major source in a nonattainment area cannot use modeling to avoid offsetting its emissions; it simply must offset "the total tonnage of all" of its new pollutant emissions and go further to prove it would achieve a "net air quality benefit." LAC 33:III.504.D.4–5, .F. In especially severe nonattainment areas, these offsets must be as much as 1.5 times the emissions of the proposed new source. *Id.*

James Parish in PSD permitting[15] only makes EPA's resort to that stricter, remedial intervention more likely.

This Court should affirm and enforce the plain meaning of the law that is meant to protect our right to breathe clean air as Louisianans.

II. Public Trustee Duty

LCA's public trust doctrine argument (at 3–4, 9–13) rewrites 40 years of this Court's consistent application of Article IX, Section 1 and the public trustee analysis following the Louisiana Supreme Court's seminal decision in *Save Ourselves*. While abridging the constitutional law enacted by the people of this state and interpreted by its courts might theoretically serve some parties' interests, it is not appropriate for this proceeding. The District Court faithfully applied the public trust doctrine to the facts of this case, in light of the sheer size of the chemical complex and the environmental impacts at stake, and in keeping with *Save Ourselves* and its First Circuit progeny.

LCA's chief complaint (at 9) is that the District Court did not recognize the Public Trust Doctrine's balancing of "environmental, economic, and other public welfare concerns." But it is LCA that ignored the factors the courts and legislature require to be considered, in the appropriate order, to protect the environment and public-health, consistent with other interests under the doctrine. Article IX, Section 1 mandates: "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment *shall be* protected, conserved, and replenished *insofar as possible and consistent with the health, safety, and welfare of the people*." La. Const. Art. IX, § 1 (emphasis added).[16] The Louisiana Supreme Court's interpretation of the doctrine in turn

---

See also 1stCir. R. Vol. 31, 8346–47 (EPA letter from 2011, warning LDEQ about the need to address PSD permit modeling showing violations of the NAAQS in St. James Parish).

[16] And indeed, as the District Court held, it was LDEQ that failed to properly weigh environmental harms when it reached the cost-benefit test of the public trust doctrine, while considering only the project's supposed economic benefits.

mandates that "before granting approval of any proposed action affecting the environment," agencies such as LDEQ shall determine that "*adverse environmental impacts have been* ***minimized or avoided as much as possible*** *consistently with the public welfare*." *Save Ourselves, Inc. v. La. Env't Control Comm'n,* 452 So.2d 1152, 1157 (La. 1984) (emphasis added). Having shown that it "minimized or avoided as much as possible consistently with the public welfare," the agency must engage in a "balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." *Id.* The First Circuit then refined this analysis decades ago, repeated consistently in dozens of cases, that LDEQ's written decision must address the following questions (or *IT* issues):

> First, have the potential and real adverse environmental effects of the proposed facility been avoided to the maximum extent possible? Second, does a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed facility demonstrate that the latter outweighs the former? Third, are there alternative projects which would offer more protection to the environment than the proposed facility without unduly curtailing non-environmental benefits? Fourth, are there alternative sites which would offer more protection to the environment than the proposed facility site without unduly curtailing non-environmental benefits? Fifth, are there mitigating measures which would offer more protection to the environment than the facility as proposed without unduly curtailing non-environmental benefits?

In re Am. Waste & Pollution Control Co., 633 So.2d 188, 194 (La. App. 1 Cir. 1993) (quoting *Blackett v. LDEQ*, 506 So.2d 749, 754 (La. App. 1 Cir. 1987)). The legislature incorporated the substantially same test into the statute governing LDEQ's air permit review. *See* La. R.S. 30:2018.B. But LCA finds fault with this analysis (at 3, 13–15), arguing that LDEQ's free-wheeling license to "balance," means the agency can use rote compliance with its regulations to show it avoided environmental effects to the "maximum extent possible." And that LDEQ has the discretion to ignore remaining environmental harms in its cost-benefit test. But the First Circuit rejected that approach. In *In re Am. Waste*, the First Circuit found

LDEQ had violated its public trust duty where although LDEQ had determined the facility "meets every requirement of Louisiana statute and regulation" the agency had not "'require[d] maximum protection' of the water resources" before reaching its conclusion that risks are outweighed by the public benefit. 633 So.2d at 192-196 & n.5 (also rejecting agency's less protective, "unreasonable danger" standard). Indeed, this Court made clear:

> The Louisiana Supreme Court dictated that the agency can not assume that its duty is merely to adhere to its own regulations rather than to the constitutional and statutory mandates. The agency has a duty to see that the environment will be protected to the fullest extent possible consistent with the health, safety and welfare of the people.

In re Dravo Basic Materials Co., Inc., 604 So.2d 630, 640 (La. App. 1 Cir. 1992) (discussing *Save Ourselves*, 452 So.2d at 1160). An agency, thus, cannot show that it has avoided environmental effects to the "maximum extent possible" and balanced them against benefits, by merely going through a regulatory checklist. And LCA's approach would simply collapse these two separate, judicially- and legislatively-mandated requirements into one. While this Court has recognized the "interrelationship of the concepts of alternatives sites, alternative projects, and mitigating measures" and sometimes considers those requirements as one, the Court has never collapsed or intertwined the first two factors, which it continues to list in a particular order. *Save Our Hills v. LDEQ*, 2018-0100 (La. App. 1 Cir. 11/5/18), 266 So. 3d 916, 929 (citing *In re Rubicon, Inc.*, 95-0108 (La. App. 1 Cir. 2/14/96), 670 So.2d 475, 483). LCA's contorted process not only makes a mockery of the Court's public trustee analysis but also renders La. R.S. 30:2018 of the Louisiana Environmental Quality Act superfluous as it requires applicants for major air permits to submit an Environmental Assessment Statement that addressees each of the public trustee factors for LDEQ to rely on in carrying out its analysis. La. R.S. 30:2018.B. Further, since LDEQ's air regulations require the applicant to list the applicable regulations, there would be no need for the applicant

to discuss how it has purportedly avoided environmental effects if regulatory compliance were all that is needed for LDEQ to make this determination. *See* LAC 33:III.517.

LCA also complains (at 3–4, 14) that the District Court imposed additional regulatory requirements. But that is far from the case. As discussed in sections III.B and D below, the District Court did not create new standards or review requirements. Rather, the District Court found pursuant to its authority under the judicial review standards of the LAPA (*i.e.*, La. R.S. 49:978.1(G)(5)&(6)) that LDEQ's conclusions were arbitrary and capricious and not supported by record evidence.

III. Toxic Air Pollutants

A. LCA introduces false information about Formosa Plastics' toxic pollutants.

LCA falsely states (at 24) that other than ethylene oxide, Formosa Plastics' other toxic pollutant levels "were so low" and did not "screen [] above 7.5%" of the state ambient air quality standards ("AAS") for toxic air pollutants ("TAPs"). But Formosa Plastics itself explained, and the record is clear (and undisputed until LCA introduced this falsity), that its "predicted benzene, 1,3-butadiene, ethylene oxide, n-hexane, and vinyl acetate concentrations *are greater than their 7.5 percent of AAS*."[17] Below is an image copied directly from Formosa Plastics' Air Quality Analysis showing the screening results for 11 of the company's TAPs (or chemicals):[18]

[17] 1stCir. R. Vol. 14, 3514 (Formosa's Air Quality Analysis) (emphasis added).
[18] *Id.* at 3513-14 (Table 11-7).

TAP	Averaging Period	Maximum Modeled Concentration (µg/m³)	AAS (µg/m³)	7.5% AAS (µg/m³)	Greater than 7.5 % of AAS
Benzene	Annual	2.62	12.00	0.90	Yes
Formaldehyde	Annual	0.03	7.69	0.58	No
1,3-Butadiene	Annual	0.72	0.92	0.07	Yes
Acetaldehyde	Annual	3.59	45.50	3.41	Yes
Ethylene Oxide	Annual	0.74	1.00	0.08	Yes
Ethylene Glycol	8-Hour	133.92	2,380.00	178.50	No
n-Hexane	8-Hour	342.59	4,190.00	314.25	Yes
Propionaldehyde	8-Hour	0.15	4,290.00	321.75	No
Vinyl Acetate	8-Hour	213.73	830.00	62.25	Yes
Ammonia	8-Hour	44.82	640.00	48.00	No
Sulfuric Acid	8-Hour	0.55	23.80	1.79	No

LCA's claim, therefore, that all of Formosa Plastics' chemicals except for ethylene oxide are low and not above the 7.5 percent screening threshold *is far from accurate*. In fact, Formosa Plastics' benzene emissions, which LDEQ regulates as a "known and probable human carcinogen,"[19] is *21 percent of the AAS*. And Formosa Plastics' 1,3-butadiene emissions, which LDEQ regulates as a "suspected human carcinogen and known or suspected human reproductive toxins," [20] is *78 percent of the AAS*. It is irresponsible for the LCA to introduce this false information to the Court for its review and it potentially threatens a fair outcome of this matter by grossly and inaccurately minimizing carcinogenic and other harmful toxic pollutants Formosa Plastics expects to emit.

B. ACC and LCA mischaracterize the District Court's holding on ethylene oxide.

ACC (at 2–4) and LCA (at 18–23) both contort the District Court's holding on ethylene oxide by claiming it required LDEQ to apply EPA's cancer risk value of 0.02 µg/m³ for ethylene oxide "IRIS value."[21] ACC and LCA complain that the court required LDEQ to use the IRIS value over LDEQ's older standard of 1.0 µg/m³, but it is LDEQ (not the court) that appropriately *required* Formosa Plastics to analyze its ethylene emissions and create a contour map showing the

[19] LAC 33:III.5112, Table 51.1 (listing Class I TAPs).
[20] LAC 33:III.5112, Table 51.1 (listing Class I TAPs).
[21] IRIS stands for EPA's Integrated Risk Information System. 1stCir. R. Vol 35, 9536.

concentrations of its emissions using the IRIS standard.[22] It was LDEQ that then relied on the analysis and map to determine incorrectly that ethylene oxide emissions in excess of the IRIS value would not reach residential areas, which thus "would not be adversely impacted."[23] The District Court properly exercised its authority under the judicial review provisions of the Louisiana Administrative Procedures Act, La. R.S. 49:978.1(G)(5)–(6), finding that the agency's determination was arbitrary and capricious and not supported by a preponderance of the evidence because Formosa Plastics' analysis and map was based on its own unenforceable and unsupported assumption (i.e., empty promise) that it could somehow eliminate 99.9 percent of the ethylene oxide from its waste gas before sending those cancer-causing chemicals into the air.[24] The District Court, in turn, found that "LDEQ violated its public trustee duty because it failed to support with record evidence the claim that residential areas would not be exposed to ethylene oxide concentrations beyond EPA's cancer risk limit."[25]

The court did not "overstep its function as a judiciary" or "mandate that LDEQ side-step formal rulemaking to adopt a new standard" as LCA (at 23) contends. And ACC's argument (at 2) about what the District Court might have "assume[d]" about the IRIS value is not relevant as the court made no findings about the value. As a result, ACC's arguments (at 2–4) about the soundness of the IRIS value or its use in individual permit proceedings is similarly misplaced. Furthermore, this is not a proper forum for LCA (at 23, n.14) and ACC (at 2, n.6) to promote Texas Commission on Environmental Quality's alternative ethylene oxide value that they would prefer, especially where LDEQ rightly did not apply

[22] 1stCir. R. Vol. 20, 5362–63, 5390.
[23] 1stCir. R. Vol. 35, 9461–62.
[24] 1stCir. R. Vol. 43, 11392–93.
[25] 1stCir. R. Vol. 43, 11394.

it.[26] Lastly, LCA's purported interest in this matter—that the District Court's decision would "impose a near moratorium on industrial development"—is completely meritless. The District Court stayed well within its authority applying judicial review standards to LDEQ's treatment of *this record*, especially given Formosa Plastics' uncommonly massive air toxics emissions.

C. LCA's assertion that there is no "scientifically supportable" method for analysis of the cumulative effects of toxic air pollutants is false.

LCA falsely asserts (at 24) that "[t]here is no scientifically supportable cumulative impacts analysis available for LDEQ to use in evaluating air permits." *See also* LCA Br. at 24 (discussing EPA's effort to establish guidance for cumulative analyses). But LDEQ has an air modeling program to do a cumulative impacts analysis, which it calls a "refined analysis" for toxic air pollutants that are screened above 7.5 percent of the state ambient air quality standards. LDEQ just did not perform it here properly.[27] This "refined analysis" *is* a cumulative impacts analysis as it determines through modeling the combined concentration of the applicant's and other sources' particular toxic pollutant such as ethylene oxide at a given point where people in the community breathe the air. There is, therefore, a method for determining cumulative impacts that not only exists but that LDEQ has adopted. But this appeal centers on LDEQ's finding that Formosa Plastics' toxic pollutants *together with* emissions from other sources will not "adversely affect human health or the environment," without actually modeling Formosa Plastics' emissions of either ethylene oxide or benzene *together with* the emissions of these

[26] At the time of LDEQ's decision, the TCEQ value was a non-final draft. 1stCir. R. Vol. 35, p. 9461(LDEQ Basis for Decision, p. 18, n.49). Furthermore, ACC's discussion of the TCEQ value relies on new evidence that is not in the record and should be ignored. *Bouterie v. Crane*, 604 So.2d 1051, 1052 (La. App. 5th Cir. App. 1992), rev'd on other grounds, 616 So.2d 657 (La. 1993) (quotes omitted) (explaining that "brief of an *amicus curiae* cannot be used as a vehicle to present additional evidence or new evidence to the appellate court"). *See infra*, Section IV for fuller discussion.

[27] *See* 1stCir. R. Vol. 14, 3514.

pollutants from the sources that LDEQ said are responsible for EPA's high cancer risk figures for the community of Welcome. *See* Appellee's Br. at 35–36.

More specifically, at the heart of the cumulative impacts dispute is LDEQ's and Formosa Plastics' use of the agency's unpromulgated modeling guidance (that is not even in the record) as an excuse not to include either existing pollutant concentrations in the air already in St. James, or emissions of these other offsite sources because they are not within what LCA (at 21) calls "the area of review" that has no regulatory basis or any support. In other words, Formosa Plastics drew a circle around its site based on purported modeling guidance that is not in the record and because the other offsite sources that emit ethylene oxide and benzene are outside the circle, those emissions were not included, leaving LDEQ with no way to determine what the total concentration of ethylene oxide or benzene would be for the community of Welcome. All it inputted into the model were Formosa Plastics' emissions standing alone.

D. LCA misstates the District Court's holding on cumulative impacts.

LCA misstates (at 25) the District Court's holding by claiming "there is no existing state law directing performance of the type of cumulative impact analysis the District Court found to be required under the Public Trust Doctrine."[28] But the District Court did not direct any specific type of cumulative impact analysis. Instead, the District Court held LDEQ failed to perform the one it had claimed:

> LDEQ's conclusion that "the [Formosa Plastics] Complex, together with those of nearby sources ... , will not allow for air quality impacts

[28] Furthermore, even if the District Court had found that the Public Trust Doctrine *requires* a cumulative impacts analysis (which it did not need to reach here, because it was undisputed and LDEQ claimed it did one), it would be in keeping with other states' decisions. *See Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 959 (Pa. 2013) (holding that the public trustee duty extends to the interests of present and future beneficiaries, requiring trustees to balance long term, incremental environmental impacts in decisions involving natural resources); *Sullivan v. Resisting Env't Destruction on Indigenous Lands*, 311 P.3d 625, 634–35 (Alaska 2013) (holding that the state constitution requires state's Department of Natural Resources to take a "hard look" at all factors relevant to the public interest, including consideration of cumulative impacts); *In re Water Use Permit Apps.*, 9 P.3d 409, 455 (Haw. 2000) (citing *Save Ourselves*) (same); *see also Save Ourselves*, 452 So.2d 1152 (La. 1984) at 1157 (explaining that other states' cases interpreting environmental statutes "may provide guidance in applying the Louisiana statutes").

> that could adversely affect human health or the environment" is arbitrary and capricious and not supported by a preponderance of the evidence in the record. . . . In turn, because LDEQ relied on this conclusion as the basis for its conclusion under its public trust analysis that "adverse environmental impacts have been minimized or avoided to the maximum extent possible," the agency failed to meet its public trustee duty.[29]

The court based its holding on the following findings:

1. "LDEQ had information showing the area near [Formosa Plastics' proposed] facility already experiences substantial amounts of toxic air pollutants";[30]
2. "LDEQ acknowledged that EPA's cancer risk figures for the area were driven by ethylene oxide and benzene";[31]
3. "the permits allow [Formosa Plastics] to emit a great deal more ethylene oxide and benzene";[32]
4. "LDEQ cannot determine Welcome's full risk for cancer from exposure to toxic air pollutants if the agency does not consider [Formosa Plastics'] ethylene oxide and benzene emissions in combination with such emissions from other facilities that the agency itself says drives EPA's cancer risk data for the area";[33]
5. "LDEQ admits that it did not do a cumulative assessment of [Formosa Plastics'] toxic emissions together with other sources," but instead only modeled Formosa Plastics emissions;[34] and
6. "LDEQ does not explain how analyzing data about [Formosa Plastics'] facility alone could support its conclusion on the cumulative emissions, i.e., that 'emissions from the [Formosa Plastics], together with those of nearby sources . . . , will not allow for air quality impacts that could adversely affect human health or the environment.'"[35]

As shown, the District Court carefully examined the basis for LDEQ finding that Formosa Plastics' toxic emissions *together with* the toxic emissions of other facilities would not adversely affect human health and environment and found that finding to be arbitrary and capricious and not supported by a preponderance of record evidence—no more, no less. The District Court did *not* require LDEQ to

---

[29] 1stCir. R. Vol. 43, 11390.
[30] *Id.* at 11389.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 11390.
[34] *Id.* at 11389.
[35] *Id.*

perform a certain type of analysis. The District Court based its holding on the facts of this record.

IV. Greenhouse Gas Emissions

ACC's entire greenhouse gas / climate-change discussion (at 4–15) should be disregarded as it discusses and relies entirely on evidence that is not in the record and, frequently, focuses on matters that are not even related to the facts of the case. That is prohibited for an amicus:

> The law is well settled that issues not raised by the litigants cannot be raised by amicus curiae on appeal . . . We now hold that the brief of an *amicus curiae* cannot be used as a vehicle to present additional evidence or new evidence to the appellate court . . . We are duty bound to decide the issues based on the record before us.

Bouterie v. Crane, 604 So.2d 1051, 1052 (La. App. 5th Cir. 1992), rev'd on other grounds, 616 So.2d 657 (La. 1993) (quotes omitted) (following *United States, etc. v. Victory Land Co.,* 410 So.2d 359, 361 (La. App. 4th Cir. 1982)). The court further explained that "[p]ursuant to La. C.C.P. art. 2164, an 'appellant court, *shall* render any judgment which is just, legal, and proper upon the *record* on appeal' [and] may not consider evidence which is outside that record." *Id.* (emphasis original). The court concluded that it "has no authority to consider on appeal *facts* referred to in brief." *Id.* (emphasis original). ACC's climate change discussion, which takes up the vast majority of its brief, consists entirely of facts that are not in the record along with citations to websites and other reports that are also not in the record. And ACC inaccurately lists (at ii-iv) websites to various articles and reports that it offers as factual support as "Other authorities." For this reason alone, this entire discussion should be ignored.[36]

[36] And we already explain at length in our response brief how LDEQ's *actual* discussion of Formosa Plastics' greenhouse-gas emissions, including the speculation that the company might build its facility overseas and use different feedstock, was unsupported and contradicted the record and relevant case law. Appellees' Br. at 47–53. We will not repeat that argument here.

Furthermore, much of ACC's climate change discussion (at 4–8) is merely generalized statements touting the chemical industry it represents, and without any connection to the administrative record or issues on appeal. ACC also dedicates (at 7–8) a good portion of its climate change discussion to the various uses of ethylene oxide. But Formosa Plastics does not intend to manufacture ethylene oxide. Instead, Formosa Plastics' ethylene oxide is a *waste gas* resulting from the manufacturing of ethylene glycol. The company intends to combust or burn (in part) its ethylene oxide, emitting what it does not combust or burn into the air. ACC admits (at 7, n.27) that its "discussion [of ethylene oxide] is not intended to suggest that [ethylene oxide] produced by Formosa would necessarily go into any of these end products," because it "has no knowledge regarding Formosa's business model." *Id.* But the briefs, which ACC claims to have read,[37] lists every chemical and product the company intends to manufacture, and ethylene oxide is clearly not one of them.[38] Indeed, ethylene oxide's potential uses are not at issue in this case and have not been raised by any party in this case. ACC asserts (at 7) that the chemical has a role in "addressing climate change" because it is used in manufacturing electric vehicle batteries. Not only is this discussion improper since it raises an issue not raised by any party, *Barfield*, 185 So.3d at 784, but it is also extremely disingenuous to tout its speculative "climate change benefits" associated with electric vehicles when the permits at issue allow 13.6 tons per year of greenhouse gases, which is equivalent to the greenhouse gases emitted annually by over three million cars that burn petroleum.[39] ACC's discussion about ethylene oxide should be disregarded as the law is clear that "issues not raised by the parties

[37] ACC Mot. for Leave to File *Amicus Curiae* Brief at 1.

[38] *See e.g.*, LDEQ Br. at 7-8 (explaining that if built Formosa Plastics "will utilize ethane and propane to make ethylene and propylene, and ultimately will produce high density polyethylene, linear and low density polyethylene, polypropylene, and ethylene glycol"); Formosa Br. at 5-6, n.1 (listing permits for the same chemicals and products).

[39] *See* 1stCir. R. Vol. 38, 10207 (CIEL, *Plastics & Climate, The Hidden Costs of a Plastic Planet,* May 2019, Exec. Summary, p. 2).

cannot be raised by *amicus curiae* on appeal." *Barfield v. Bolotte*, 2015-0847 (La. App. 1 Cir. 12/23/15), 185 So.3d 781, 784 (citing *Banker's Ins. v. Kemp*, 96-0469 (La. App. 1 Cir. 12/20/96), 686 So.2d 111, 114).

Respectfully submitted on October 30, 2023, by:

Corinne Van Dalen (La. Bar No. 21175)
Michael Brown (La. Bar No. 35444)
Zora Djenohan (La. Bar No. 39865)
EARTHJUSTICE
900 Camp Street, Suite 303
New Orleans, LA 70130
T: 504.910.1776 // F: 415.217.2040
cvandalen@earthjustice.org
mlbrown@earthjustice.org
zdjenohan@earthjustice.org
Counsel for Petitioners-Appellees RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana

CERTIFICATION OF SERVICE

I certify that a legible copy of this brief has been sent by email on this day of October 30, 2023 to all counsel of record and counsel for amici curiae.

_____

Corinne Van Dalen