LOUISIANA SUPREME COURT

NO._____

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

A CIVIL PROCEEDING

FROM THE RULING OF THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT NO. 2023-CA-0578

REVERSING THE JUDGMENT OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, NO. 649,029

APPLICATION FOR WRIT OF CERTIORARI ON BEHALF OF RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana

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SUPREME COURT OF LOUISIANA

CIVIL

WRIT APPLICATION FILING SHEET

TO BE COMPLETED BY COUNSEL OR PRO SE LITIGANT FILING APPLICATION

CASE TITLE: **RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, EarthWorks and No Waste Lousiana VS. Louisiana Department of Environmental Quality**

APPLICANT PARTY NAME(S): **RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, EarthWorks and No Waste Louisiana**

Have there been any other filings in this Court in this matter: □ YES ☒ NO

Are you seeking a Stay Order? □ YES ☒ NO. If so, you MUST complete a civil priority form.

Are you seeking Priority Treatment? □ YES ☒ NO. If so, you MUST complete a civil priority form.

Does this pleading contain confidential information? □ YES ☒ NO. If so, please file a motion to seal.

Does any pleading contain a constitutional challenge to any Louisiana codal or statutory provision? □ YES ☒ NO

If yes, which pleading? _____

If yes, has the Office of the Louisiana Attorney General been notified pursuant to La. R.S. 13:4448? □ YES □ NO

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Is the pleading being filed: ☒ In proper person. □ In forma pauperis

Are there any pro se litigants involved in this matter: □ YES ☒ NO

TYPE OF PLEADING

□ Tort □ Contract □ Property □ Probate □ Family □ Juvenile □ Workers' Comp. □ Revenue (tax) □ Civil Other

☒ Administrative Agency □ Bar Admission □ Lawyer Discipline □ Judicial Discipline □ Licensing / Discipline Other

LOWER COURT INFORMATION

Parish and Judicial District Court: **19th Judicial District Court Parish of East Baton Rouge** Docket No: **694,029**

Judge and Section: **Hon. Trudy M. White** Date of Ruling: **Sept. 8, 2022**

APPELLATE COURT INFORMATION

Circuit: **First** Docket No.: **2023CA0578** Applicant: **Louisiana Department of Environmental Quality** Filing date: **Sept. 27, 2022**

Was this pleading simultaneously filed? □ YES ☒ NO.

Ruling date: **Jan. 19, 2024** Action: **District Court Judgment reversed.**

Panel of Judges: **Hon. Jewel E. Welch, Jr., Mitchell R. Theriot, Guy Holdridge, Allison H. Penzato, Elizabeth Wolfe** En Banc: □

REHEARING INFORMATION

Applicant: **RISE St. James, et al.** Filing date: **Feb. 2, 2024** Ruling date: **Feb. 15, 2024**

Action: **Application denied.** Panel of Judges: **Jewel E. Welch, Jr., Mitchell R. Theriot, Guy Holdridge, Allison H. Penzato, Elizabeth Wolfe** En Banc: □

PRESENT STATUS

□ pre-trial

□ hearing; scheduled date:_____

□ trial; scheduled date:_____

□ trial in progress

Is there a stay now in effect: □ YES ☒ NO

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal, to the lower court judge, and to all other counsel and unrepresented parties.

Date: **Mar. 18, 2024** Signature: C. Van Dalen

(Rev. 12/2022)

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STATEMENT OF WRIT CONSIDERATIONS

RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana (collectively, "RISE St. James") urge the Court to grant certiorari to resolve three sharply defined legal conflicts, including a significant circuit split, that concern the standard of review under the Louisiana Administrative Procedure Act and a core component of the Louisiana's public trust doctrine that is enshrined in the constitution and interpreted by this Court. These errors have serious implications for the protection of public health and the environment.

The case springs from the decision of the Louisiana Department of Environmental Quality ("LDEQ") to award federal Clean Air Act permits to FG LA, LLC ("Formosa Plastics")[1] to construct one of the largest, and most polluting, petrochemical complexes anywhere in the country within an area of St. James Parish already inundated with pollution from large industrial facilities. Formosa Plastics' complex would cover an area larger than the towns of Sorrento or Abita Springs. The complex would emit thousands of tons per year of air pollutants, just over a mile from an elementary school and near several of the Parish's majority-Black communities. Welcome, one of those communities, already suffers from a higher cancer risk from exposure to toxic pollution from industrial facilities than virtually any place in the nation, according to U.S. Environmental Protection Agency ("EPA") data. And Burton Lane, another majority-Black community, sits in an area that is so polluted that Formosa Plastics' modeling shows the air exceeds national health-based standards.

RISE St. James filed a petition for review of LDEQ's decision to grant the air permits in the Nineteenth Judicial District Court (the "District Court"), joined by Intervenor Ms. Beverly Alexander, a resident of St. James Parish. After lengthy proceedings, including a five-and-a-half hour oral argument, the District Court ruled in RISE St. James' favor on each of the Clean Air Act, public trust doctrine, and state statutory errors, vacating the permits and remanding to LDEQ.[2] But on appeal by LDEQ and Formosa Plastics (as an Intervenor), the majority of a First Circuit panel (the "panel majority") reversed the District Court's judgment "in its entirety," and

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[1] FG LA, LLC is a local subsidiary of a Taiwanese corporation, Formosa Plastics Group.

[2] 19th JDC J., App'x. A; 19th JDC Reasons, App'x. B.

reinstated the air permits.[3] Judge Wolfe dissented and Judge Theriot concurred, both without reasons.[4]

In this application for a writ of certiorari, RISE St. James urges the Supreme Court to resolve two serious errors made by the panel majority in applying the standard of review under the Louisiana Administrative Procedure Act ("LAPA"), La. R.S. 49:978.1(G). The first was ignoring the District Court's factual findings made upon review of the record where the court sits as a trier of fact. *See id.* (G)(6). The second was applying a version of *Chevron* deference to yield to LDEQ's interpretation of the federal Clean Air Act when it was the court's duty to interpret without deference. *See id.* (G)(1)-(4). In a third assignment, RISE St. James asks the Court to address the panel majority's failure to apply well-established law on LDEQ's public trust duty under Louisiana Constitution Article IX, Section 1, to protect the public from environmental harm to "the maximum extent possible." Supreme Court intervention here would resolve a consequential conflict of law in the circuit courts (in our first error assignment), and the panel majority's failure to apply the law in a way that would strikingly change well-settled jurisprudence (in our second and third error assignments). *See* La. Sup. Ct. R. X, § 1(a)(1)–(2), (4).

I. The Supreme Court should grant certiorari to resolve a conflict in the circuit courts regarding the standard of review of factual determinations by a district court made under the Louisiana Administrative Procedure Act.

First, RISE St. James asks the Supreme Court to resolve a persistent conflict in the circuit courts concerning the proper standard of review of a district court's factual determinations in a judicial review proceeding like this one under the LAPA. In 1997, the legislature amended what is now La. R.S. 49:978.1(G)(6) to enable district courts to reweigh the record evidence and reverse agency decisions that are not supported by the preponderance of record evidence. As one group of circuit court rulings and Louisiana civil procedure treatise authors recognize, the better rule is that because the legislature empowered district courts to review facts by a preponderance, the appellate court must apply a manifest error standard in review of the district court's factual

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[3] 1st Cir. J. at 53, App'x C.

[4] 1st Cir. J. at 1, App'x C.

determinations. This reflects how the law generally allocates review of facts in civil cases in our three-tiered judiciary.

The District Court made such evidentiary findings in the case at bar. But the panel majority held it was entitled to ignore the District Court altogether, owing no deference to factual findings and applying de novo review. The panel majority focused only on LDEQ's conclusions, which it affirmed without change. This had profound consequences on the merits, as the panel ignored record evidence conflicting with LDEQ's position. As if to emphasize the importance of granting certiorari, just a week after the ruling in this case, a different First Circuit panel hearing another LAPA case noted the persistence of the split in authority on this same issue, and both the majority and dissenting opinions raised the lack of clarity. *See La. Bd. of Ethics in Matter of Barnett*, No. 2023-CA-0321, 2024 WL 301930, p. 15 n.1, 6 (La. App. 1 Cir. 1/26/24), --So.3d--; *id.* (Miller, J., dissenting). RISE St. James asks the Court to resolve that split and bring uniformity on this threshold legal issue.

II. The Supreme Court should reverse the First Circuit's erroneous *Chevron* deference to LDEQ's interpretation of Clean Air Act text, in violation of well-established *jurisprudence constante*.

Second, RISE St. James asks the Supreme Court to confirm that Louisiana is *not* a state that applies a version of the controversial doctrine of deferring to agency statutory interpretations, under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843–44 (1984), which the panel majority did in ruling in LDEQ's favor. Until the decision below, Louisiana has not been in that number; it sides with the majority of states that eschew *Chevron*. *See* Luke Phillips, *Chevron in the States? Not So Much*, 89 Miss. L.J. 313, 314 (2020). This Court has clarified repeatedly that a reviewing court must conduct de novo review of any agency legal interpretation of statutory, constitutional, or judicial language. *See, e.g.*, *Bowers v. Firefighters' Ret. Sys.*, 2008-1268, pp. 4–5 (La. 3/17/09), 6 So.3d 173, 176; La. R.S. 49:978.1(G)(1)–(4). But rather than de novo review, the panel majority erroneously held that "deference must be awarded" to LDEQ's interpretation of a federal Clean Air Act standard whose meaning the parties dispute. *See* 42 U.S.C. § 7475(a)(3).[5] For its part, the District Court properly interpreted the law de novo, analyzing the Clean Air Act text's plain meaning, context,

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[5] 1st Cir. J. at 21–22, 32, App'x C.

and purpose to find they forbade LDEQ from issuing the construction air permit—without first modifying it to reduce the chemical complex's emissions—because Formosa Plastics' own modeling showed it would "cause, or contribute" to violations of federal air quality health limits. *See* 42 U.S.C. § 7475(a)(3).

III. The Supreme Court should reaffirm that mere compliance with regulations does not satisfy the constitutional duty for an agency, as public trustee, to avoid or minimize potential and real adverse environmental effects of the proposed facility to the *maximum extent possible*.

Finally, the panel majority departed from well-settled Supreme Court precedent in holding that LDEQ's purported compliance with Clean Air Act permitting requirements also satisfied the agency's separate duty as a public trustee for the environment under Article IX, Section 1 of the Constitution to protect, "to the maximum extent possible," against harm from Formosa Plastics worsening violations of health-based air quality standards across St. James Parish. *See Save Ourselves, Inc. v. La. Env't. Control Comm'n*, 452 So.2d 1152, 1160 (La. 1984). Namely, the company's own modeling showed it would exacerbate violations of federal health-based standards for fine particulate matter and nitrogen dioxide, at levels that EPA determined could trigger respiratory and cardiac disorders. On this claim, the panel majority's reasoning did not take account of this Court's admonishment, across forty years of precedent, that an agency errs if it assumes "that its duty was to adhere only to its own regulations," without also applying the broader and searching constitutional standard. *Id.* at 1160. LDEQ had an obligation to avoid or mitigate that harm to "the maximum extent possible," as the District Court properly held, and this Court should reaffirm.

MEMORANDUM IN SUPPORT OF WRIT APPLICATION

Statement of the Case

I. Nature of the Case.

This case is about LDEQ's decision to give 15 air permits to Formosa Plastics for the construction of a massive new petrochemical complex. The scale of the proposed facility, and its pollution, would be staggering. The petrochemical complex would be comprised of 10 different chemical plants that would manufacture feedstock for plastics, as well as four support facilities (including two new power plants) for the plastics-making process. A facility that emits pollutants over a yearly threshold—here, over 100 tons per year of any conventional air pollutant (e.g., soot and ozone-forming pollutants) or over 10 tons per year of any hazardous air pollutant (i.e., those with toxic or cancer-causing effects)—is considered a "major source." LAC 33:III.502, 509(B). The proposed complex is a "major source" of conventional air pollutants 63 times over, and a "major source" of hazardous air pollutants 36 times over. Formosa Plastics would also emit over 20 different hazardous air pollutants, three of which are known to cause cancer when inhaled (i.e., ethylene oxide, benzene, and formaldehyde). Of particular concern is the potent carcinogen ethylene oxide. LDEQ has authorized Formosa Plastics to be among the highest emitters of ethylene oxide in the state at a time when EPA is working to reduce ethylene oxide emissions nationwide after a peer-reviewed study showed the chemical is 30 times more likely to cause cancer than previously understood. Illinois has reacted by banning the construction of new ethylene oxide-emitting facilities within 10 miles of a school or a park. Additionally, the company would emit over 13 million tons per year of carbon dioxide, a greenhouse gas, which would be equivalent to the annual emissions of at least three million gas-burning cars. Indeed, a project like this has never come along before. LDEQ has never been tasked with reviewing an application for a project of this size all at once.

The plants would spread over a 2,400-acre site next to the majority-Black community of Welcome, approximately a mile from an elementary school, and near other majority-Black communities in the Parish's Fourth and Fifth Districts, like Union, Burton Lane, Romeville, Jamestown, Freetown, Chatman Town, and Convent. According to EPA data, the 1,100 people who live in Welcome already suffer from air that is more toxic with cancer-causing pollutants than 99.6 percent of census tracts in the nation, and ethylene oxide is the principal driver of that

risk. EPA data also show that the Welcome is in the 90th percentile, or higher, of Louisiana census tracts for risk from disproportionate exposure to ozone, soot or fine particulate matter ($PM_{2.5}$), and other respiratory-harming pollution. Those risk figures are based on emissions data *before* Formosa Plastics' added pollution. And Formosa Plastics would triple the amount of toxic pollution for this community.

In the final permits, LDEQ made few changes to Formosa Plastics' application, even after receiving thousands of comments expressing concern with the project and its emissions. LDEQ issued the permits based on Formosa Plastics' emission estimates and own modeling, where the company relies on various assumptions about the efficiency of its emission control devices. At issue in this case is the amount of ethylene oxide Formosa Plastics claims it will emit and the cancer risk the emissions would add to the already heavily burdened communities nearby. Also, LDEQ agreed to allow Formosa Plastics to proceed despite the fact that its modeling showed it would increase violations of federal ambient air quality limits that protect human health from exposure to conventional pollutants like fine particulate matter ($PM_{2.5}$ or soot) and nitrogen dioxide (NO_2) across the Parish. These include violations next to the Burton Lane community.

II. Summary of Prior Proceedings.

This matter began in 2018 when Formosa Plastics applied to LDEQ for air permits to construct the proposed petrochemical complex. On May 28, 2019, LDEQ issued 15 proposed air permits for public comment and held a public hearing where community members packed the meeting hall. The vast majority of people who spoke were opposed because of the glut of industrial plants that already crowd historic Black communities in the area. They told the agency that they cannot handle more toxic pollution and that too many people were already dying of cancer from toxic pollution. Opponents also voiced critical concerns about the project's climate impacts at a time when Louisiana is grappling with how to reduce its already outsized carbon footprint and facing some of the worst effects from a warming planet. During the public comment period, the agency also received over 9,000 written comments from individuals and organizations opposing the permits, including those from RISE St. James detailing over 100 deficiencies with the agency's review.

Over these objections, LDEQ issued a final decision granting all 15 final air permits on January 6, 2020. RISE St. James timely initiated a proceeding in the 19th Judicial District Court for judicial review of the agency's decision. The proceeding was before the District Court for over two active years where the court heard motions on record issues and remanded to the agency to supplement the record. The District Court received over 200 pages of briefing on the merits (having lifted the page limit) and held oral argument for over five hours on March 14, 2022. Following oral argument, the court took the matter under advisement and instructed all parties to prepare proposed judgments and reasons for judgment for submission on May 13, 2022, for the court to consider in issuing a written decision. Each party complied. On September 8, 2022, the District Court issued its judgment and written reasons reversing LDEQ's decision and vacating all 15 air permits, while thoroughly addressing each of LDEQ's and Formosa Plastics' arguments.[6] The court also remanded the matter to the agency for further proceedings consistent with its reasons for judgment.[7]

LDEQ and Formosa Plastics each filed a suspensive appeal to the First Circuit. On January 19, 2024, the panel majority (three of five judges) reversed the District Court's judgment "in its entirety" and reinstated the air permits.[8] Judge Wolfe dissented, and Judge Theriot concurred, both without reasons.[9] RISE St. James, Beverely Alexander, and LDEQ filed motions for rehearing on February 2, 2024, each of which was denied on February 15, 2024.[10]

Assignment of Errors

Error 1: The panel majority erred in failing to grant deference to the District Court's fact-findings, which the District Court made by a preponderance of the evidence in the record, pursuant to La. R.S. 49:978.1(G)(6) of the LAPA. The panel majority widened the split among (and within) the circuit courts on this issue by claiming it could ignore the District Court's determinations altogether. Specifically, the panel majority failed to follow the line of circuit decisions on La. R.S. 49:978.1(G)(6) that properly apply this Court's general body of case law

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[6] 19th JDC J. at 1, App'x A; *see* 19th JDC Reasons, App'x B.

[7] *Id.* at 2; *see* 19th JDC Reasons, App'x B.

[8] 1st Cir. J. at 53, App'x C.

[9] *Id.* at 1.

[10] 1st Cir. Order Denying Rehearing, Feb. 15, 2024, App'x D.

on standard of review in civil matters. That case law mandates that the court of appeal applies the manifest error standard when reviewing a district court's fact findings.

Error 2: The panel majority erred and applied the wrong standard of review in erroneously granting *Chevron*-style deference to LDEQ's disputed interpretation of the federal Clean Air Act, rather than conducting the de novo review without deference required under well-established law under La. R.S. 49:978.1(G)(1)–(4) of the LAPA.

Error 3: The panel majority erred in holding that LDEQ's purported compliance with its regulations also satisfied the agency's heightened constitutional duty as a public trustee to avoid or minimize potential and real adverse environmental effects of the proposed facility to the maximum extent possible. In doing so, the panel majority failed to apply well-established constitutional law of this Court, exposing St. James Parish to heightened health risks from air pollution.

Summary of the Argument

Error 1: The panel majority further deepened a split among the circuits and within the First Circuit over the proper standard an appellate court must apply when reviewing the factual determinations made by a district court under the LAPA. The issue is straightforward. The LAPA provides several grounds for the district court to overturn a final agency decision. La. R.S. 49:978.1(G). In 1997, the legislature amended the judicial review standards in the LAPA to give the district court a mandatory fact-finding role, and further empowered the court to reverse an agency's decision if the court finds it unsupported by a preponderance of record evidence. *See* La. R.S. 49:978.1(G)(6). In a decision that explored the impact of this change on the court of appeal's standard of review of a district court LAPA ruling, the First Circuit properly found that it must give deference to the district court's factual findings, applying the manifest error rule that this Court's case law requires out of deference to district courts' factfinding function. Many First Circuit cases follow this decision, as does the Third Circuit. However, other First Circuit cases have held the opposite—giving no deference to the district court's factual determinations, applying a de novo standard. This led to a split within the First Circuit, and with the Second, Fourth, and Fifth Circuits following the no-deference view, there is a split among the Circuits. The panel majority adopted the no-deference view, which had serious implications in this case,

as it held it was empowered to ignore the District Court's ruling, including all fact findings, only citing in the judgment LDEQ's statements in its decision to approve the permits.

The mandatory fact-finding role the legislature assigned the district court, the well-reasoned decisions that examine the effect of the legislative amendment and this Court's case law on standard of review, and scholars and treatise authors opining on the subject all support the conclusion that deference is owed to the district court's factual findings. RISE St. James urges this Court to resolve the split and determine that the manifest error standard applies upon review of a district court's factual determinations under La. R.S. 49:978.1(G)(6) and conduct or remand for proper review.

Error 2: The panel majority altered decades of Louisiana *jurisprudence constante* concerning the LAPA standard of review of an agency's legal interpretations by deferring to, rather than independently scrutinizing, LDEQ's position. *See* La. R.S. 49:978.1(G)(1)–(4) (empowering court to reverse agency "conclusions, or decisions" that are "in violation" of law). The court below applied what amounts to an extreme version of *Chevron* deference, holding erroneously that "deference must be awarded" to LDEQ's interpretation of Clean Air Act text at the heart of the parties' dispute in this case.[11] Rather than defer, the reviewing court must interpret such text de novo, giving no deference to the agency interpretation, and applying the traditional tools of statutory interpretation to determine the law's plain meaning for itself. *See Bowers v. Firefighters' Ret. Sys.*, 2008-1268, pp. 4–5 (La. 3/17/09), 6 So.3d 173, 176; La. Civil Code arts. 9–12. Surprisingly, the panel majority did this at a time when a number of states, and potentially the United States Supreme Court, are moving to limit or abandon precedent that might allow *Chevron* deference. *See Loper Bright Enter., et al., v. Raimondo*, Case No. 21-5166, Order Granting Writ of Certiorari (U.S. Sup. Ct. May 1, 2023); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (reemphasizing the many constraints on deferring to agencies); *e.g.*, *King v. Miss. Military Dep't*, 245 So.3d 404, 408 (Miss. 2018) (announcing court will "abandon" any such precedent).

The panel majority's doctrinal error had consequences on the merits. In the Clean Air Act, Congress forbids any large new source like Formosa Plastics from getting a permit to

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[11] *See* 1st Cir. J. at 21–22, 32, App'x C.

construct unless it "demonstrates" it would not "cause, or contribute to" violations of federal health-based air quality limits in the surrounding area. *See* 42 U.S.C. § 7475(a)(3). The parties dispute the meaning of the term, "contribute," with LDEQ arguing it could greenlight Formosa Plastics even though the company's modeling showed that the chemical complex would add to violations across St. James Parish for at least two pollutants. LDEQ argued it could interpret "contribute" to include only those contributions below a significance threshold. Deferring to LDEQ, the First Circuit affirmed. But applying the proper de novo standard to statutory interpretation, the District Court had reversed, relying on the plain meaning of "contribute," and case law on point, that shows contribute "does not incorporate any 'significance' requirement." *Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004).[12] This Court should grant certiorari to reaffirm the applicable de novo standard of review and render judgment against LDEQ like the District Court, or at least remand for the lower courts to apply the proper analysis.

Error 3: To comply with its duty as a public trustee for the environment under Article IX, Section 1 of the Louisiana constitution, LDEQ must demonstrate "the adverse environmental effects of the facility have been avoided or minimized to the maximum extent possible," and it errs in "assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates." *See Save Ourselves, Inc. v. La. Env't. Control Comm'n*, 452 So.2d 1152, 1160 (La. 1984); La. Const. art. IX, § 1. Here, the panel majority erred in holding, directly contrary to that precedent, that LDEQ complied with its public trust duty simply by applying its permitting regulations.[13] Namely, the panel majority held that LDEQ did not need to take further measures to minimize or avoid Formosa Plastics' emissions that would worsen violations of health-based air quality standards across St. James Parish for fine particulate matter and nitrogen dioxide, including threatening nearby residents.[14] This "adverse environmental effect" would remain, even if Formosa Plastics complied with its Clean Air Act permits. In other words, it is precisely the circumstance the public trust duty is meant to address by requiring the agency to do more, the "maximum extent possible." *See, e.g.*, *Matter of American Waste*, 93-3163 (La. 9/15/94), 642 So.2d 1258 (reversing LDEQ's reliance on

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[12] 19th JDC Reasons at 5–11, App'x B.

[13] 1st Cir. J. at 41, App'x C.

[14] *Id.*

regulatory standard where public would still face threat of drinking water contamination from landfill). This Court should grant certiorari to reaffirm the legal requirement that, as a public trustee, LDEQ must evaluate measures to avoid or mitigate harm beyond purported regulatory compliance. It should render judgment against LDEQ like the District Court, or remand for the lower courts to review the record using the proper legal standard.

Argument

I. The panel majority's interpretation of the standard of review that an appellate court applies to the district court's conclusions of fact made upon evaluation of an agency record directly conflicts with Third Circuit decisions, other First Circuit decisions, and scholars who have opined on the issue.

The LAPA commands that the district court when reviewing an agency decision for record support "*shall* make its own determination and conclusions of fact by a preponderance of evidence based upon *its own evaluation of the record* reviewed in its entirety upon judicial review." La. R.S. 49:978.1(G)(6) (emphasis added). As discussed in full below, First and Third Circuit cases have held that on appeal of a judicial review proceeding, an appellate court must defer to the district court's factual findings made pursuant of La. R.S. 49:978.1(G)(6). They determined that an appellate court must not disturb the district court's findings unless they are manifestly erroneous, due to the fact-finding function of the district courts. These cases have the best view of the law, because they are aligned with this Court's controlling decisions that preserve the traditional functions of Louisiana's three-tiered court system that makes district courts the principal factfinders and avoids duplicating that role on appeal. *See Virgil v. Am. Guar. and Liab. Ins. Co*., 507 So.2d 825, 826 (La. 1987). And scholars who have addressed the subject have all determined that the manifest error standard is the correct one. Nonetheless, other

First Circuit cases,[15] and other circuits that follow these cases,[16] have taken the opposite view and apply a de novo standard of review. These decisions grant no deference to the district court as the legislatively-mandated fact-finder and insist that the appellate court has the authority to redo the fact-finding process. A number of these cases simply apply now-outdated precedent on the pre-amended (G)(6) to the current (G)(6), ignoring that the legislature changed the provision in 1997 to establish the district court's factfinding role on judicial review of administrative determinations.

Thus, there is a split among the circuits (and within the First Circuit) as to whether appellate courts review for manifest error or conduct their own de novo review of the record when reviewing a district court's factual findings under (G)(6). Although RISE St. James brought this split to the First Circuit's attention, the panel majority did not acknowledge it and instead summarily held that "no deference is owed to the factual findings or legal conclusions of the district court."[17] In contrast, only one week after the First Circuit issued its opinion in this case, a different First Circuit panel noted that "courts have conflicting interpretations of . . . LSA-R.S 49:978.1(G)(6), regarding the deference owed by the appellate court to the factual findings of the trial court." *La. Bd. of Ethics in Matter of Barnett*, No. 2023-CA-0321, 2024 WL 301930, p. 15 n.1, 6 (La. App. 1 Cir. 1/26/24), ---So.3d---. And Judge Miller's dissent in *Barnett* also focused on this legal uncertainty. *Id.* (Miller, J., dissenting).

RISE St. James urges this Court to step in to resolve the split and determine the appropriate standard of review for courts of appeal when reviewing a district court's factual

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[15] *See, e.g.*, *Carpenter v. State Dep't of Health and Hosp.*, 2005-1904, p. 6 (La. App. 1st Cir. 9/20/06), 944 So. 2d 604, 608, *writ denied*, 2006-2804 (La. 1/26/07), 948 So. 2d 174 (finding a court of appeals owes no deference to the factual findings on the district court in judicial review proceeding) (citing *Maraist v. Alton Ochsner Med. Found.*, 2002-2677, p. 4, (La. App. 1st Cir. 5/26/04) 879 So.2d 815, 817, *Cochrane v. La. Tax Comm'n*, 2004-1671, p. 3 (La. App. 1 Cir. 5/18/05); 905 So.2d 353, 356, *Hakim–El–Mumit v. Stalder*, 2003-2549, p. 3 (La. App. 1 Cir. 10/29/04); 897 So.2d 112, 113, *EOP New Orleans, L.L.C. v. La. Tax Comm'n*, 2001-2966, p. 5 (La. App. 1 Cir. 8/14/02); 831 So.2d 1005, 1008, writ denied, 2002-2395 (La.11/27/02); 831 So.2d 286, among others). *But see*, *Carpenter,* 948 So.2d at 614–15 (Downing J., concurring) (stating that the majority opinion erred in finding no deference is owned to the lower court's factual finding and that cases cited by majority failed to "address the effect of the 1997 amendment").

[16] *See e.g., Smith v. State, Dep't of Health and Hospitals*, 39-368, pp. 4-5 (La. App. 2d Cir. 3/2/05), 895 So.2d 735, 739 (internal citation omitted); *Clark v. Louisiana State Racing Comm'n*, 2012-1049 (La. App. 4 Cir. 12/12/12), 104 So.3d 820, 827, writ denied, 2013-0386 (La. 4/1/13), 110 So.3d 589 (same); *Joseph v. Sec'y, Louisiana Dep't of Nat. Res.*, 18-414 (La. App. 5 Cir. 1/30/19), 265 So.3d 945, 950, writ denied, 2019-00454 (La. 5/20/19), 271 So.3d 1273 (same).

[17] 1st Cir. J. at 21, App'x C.

conclusions under La. R.S. 49:978.1(G)(6). The circuit split has existed for almost 20 years and is continuing as illustrated by the panel majority's opinion, which further compounds the divide and uncertainty. Indeed, a law review article is dedicated to the conflict. Brady Holtzclaw, *To Defer or Not to Defer: The Standard of Review Regarding Administrative Rulings in the Appellate Courts of Louisiana*, 40 S.U. L. Rev. 435 (2013) (noting the differing opinions among the circuit courts regarding the appropriate standard and resulting confusion). And treatise writers have pointed out the divide. Roger A. Stetter, La. Prac. Civ. App. § 10:155 (Aug. 2023) ("The courts have conflicting interpretations of . . . La. Rev. Stat. Ann. § 49:978.1(G)(6)[] regarding the deference owed by the appellate court to the factual findings of the trial court."). There is a great and outstanding need for this Court to weigh in and resolve this issue.

A. The Legislature amended La. R.S. 49:978.1(G)(6), assigning the district court a mandatory fact-finding role when determining whether an agency decision is supported by a preponderance of the evidence in the record.

The LAPA provides several grounds under which the district court may reverse an agency decision. La. R.S. 49:978.1(G). Among them is where the district court finds the agency's decision is "[n]ot supported and sustainable by a preponderance of evidence as determined by the reviewing court." La. R.S. 49:978.1(G)(6).[18, 19] Importantly, this provision goes on to provide that "[i]n the application of this rule, the court *shall* make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review." *Id.* (emphasis added).

The current version of (G)(6) came into being in 1997 when the legislature amended the provision "to make the trial court [here, the 19th Judicial District Court[20]] a fact finder who weighs the evidence and makes its own conclusions of fact by a preponderance of the evidence." *In re Dow Chem. Co.*, 2003-2278, p. 7 (La. App. 1 Cir. 9/17/04), 885 So.2d 5, 10.[21] The 1997

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[18] LAPA renumbered from 49:964 to 49:978.1 by La. Legis. Act No. 663, Reg. Session 2022.

[19] The other grounds include: "(1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; [and] (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." La. R.S. 49:978.1(G)(1)-(5).

[20] The 19th Judicial District Court is vested with exclusive jurisdiction to review final permit actions, final enforcement actions, or declaratory rulings made by LDEQ. La. R.S. 30:2050.21(A).

[21] *See also* La. R.S. 49:978.1 (noting amendment to (G)(6) as per Section 2 of Acts 1997, No. 128, § 1); H.B. 895, Reg. Sess. (La. 1997).

amendment marked a major shift: under the prior version of (G)(6),[22] the district court was not entitled to weigh the record evidence, but applied a manifest error test "in reviewing the facts as found by the agency." *Id.* The state bar journal opined that this amendment "drastically changes the standards for judicial review of an agency decision from the traditional 'manifest error' to a preponderance of the evidence" and that "[i]t would appear that agency decisions will no longer be entitled to a presumption of correctness." Donald J. Trahan, Env't. Law, 45 La. B.J. 273 (1997). The legislature indeed cemented the independent, fact-finding role of the District Courts in amending (G)(6).

B. The courts are split on the standard an appellate court must apply when reviewing a district court's factual findings under (G)(6), but the First Circuit decision in *Multi-Care* and the cases that follow it within the First Circuit and the Third Circuit correctly determine the issue.

1. *Multi-Care* determined that a district court's factual determinations cannot be disturbed on appeal without a finding of manifest error.

The first court to analyze the impact of the (G)(6) amendment on appellate review of a district court decision was the First Circuit in *Multi-Care, Inc. v. State, Dep't of Health & Hosps*, 2000-2001, p. 4 (La. App. 1 Cir. 11/9/01), 804 So.2d 673. There, the First Circuit analyzed the effect of the amendment at length and held that "while we do not defer to the trial court's legal conclusions, we do defer to the trial court's factual determinations and use a manifest error standard of review where the legislature has empowered it with the function of fact finding." 804 So.2d at 675 (citing *Virgil v. Am. Guar. & Liab. Ins. Co.*, 507 So.2d 825, 826 (La. 1987) (internal citation omitted)).

The First Circuit based its decision on this Court's ruling in *Virgil*, a *per curiam* opinion, which found "[t]he court of appeal erred in holding that the manifest error standard of appellate review does not apply when the evidence before the trier of fact consists solely of written

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[22] Before the legislative amendment, (G)(6) provided that the reviewing court could reverse an agency decision where it is "[m]anifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Matter of Am. Waste & Pollution Control Co*., 633 So.2d 188, 194 (La. App. 1 Cir. 1993), writ granted, 634 So. 2d 837 (La. 1994), and aff'd and remanded, 93-3163 (La. 9/15/94), 642 So.2d 1258 (quoting pre-amended (G)(6) as earlier numbered as La. R.S. 49:964(G)(6)). *See also* H.B. 895 (1997) (repealing and replacing former standard, which read, "[m]anifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record" with "[n]ot supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review") (available at https://www.legis.la.gov/legis/ViewDocument.aspx?d=51043)).

reports, records and depositions." 507 So.2d at 826 (1987). This Court confirmed that "Louisiana's three-tiered court system allocates the fact finding function to the trial courts," and that because of this allocation "great deference is accorded to the trial court's factual findings, both express and implicit, and reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on appellate review of the trial court's judgment." *Id.* The Court recognized that this is a "well-settled principle of review" and that it that applies "even though the appellate court may feel that its own evaluations and inferences are as reasonable." *Id.* (internal quotations omitted).

Moreover, in *Shephard on Behalf of Shepard v. Scheeler*, this Court "carefully stud[ied] the issue" and reaffirmed its holding in *Virgil*. 96-1690 (La. 10/21/97), 701 So.2d 1308, 1317. The Court found that "the proper allocation of trial and appellate functions between the respective courts are better served by the heightened standard of manifest error review" even where the record consists of documentary evidence. *Id.* This Court recognized that "[t]he rigid and strenuous application of manifest error review has served the judicial process well." *Id.* at 1316. And putting great emphasis on the functional roles of the courts, the Court rejected "[a] lesser standard, albeit when a case is submitted to the trial court solely upon a written record" finding it "unduly undermines the allocation of the fact finding function to the trial courts." *Id.*

Not only is *Multi-Care* aligned with this Court's consistent application of the manifest error rule, a long line of First Circuit cases follow *Multi-Care* (or its progeny),[23] as do Third Circuit cases that address the standard appellate courts apply when reviewing district court findings under (G)(6) as amended in 1997.[24] There are Louisiana treatises and a law review

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[23] *See e.g.*, *Tewelde v. La. Bd. of Pharm.*, 2011-2244, p. 9 (La. App. 1 Cir. 6/14/12), 93 So.3d 801, 808 ("[W]hile this court does not defer to the district court's legal conclusions, we do defer to the district court's factual determinations and use a manifest error standard of review where the legislature has empowered it with the function of fact finding."); *Universal Placement Int'l, Inc. v. La. Workforce Comm'n et al.*, 2011-1353, p. 6 (La. App. 1 Cir. 7/26/12), 97 So.3d 1154, 1158 (same); *Lirette v. City of Baton Rouge et al.*, 2005-1929, p. 5 (La. App. 1 Cir. 10/6/06), 945 So.2d 40, 44 (same); *Seal v. Fla. Gas Transmission Co.*, 2009-0808, p. 6 (La. App. 1 Cir. 8/14/09) (unpublished opinion), 2009 WL 2486918, at 6 (same); *St. Martinville, LLC v. La. Tax Comm'n*, 2005-0457, p. 4 (La. App. 1 Cir. 6/10/05), 917 So.2d 38, 41–42 (same); *Bueche v. State*, 2000-1473, p. 4–5 (La. App. 1 Cir. 6/21/02), 822 So.2d 25, 27 (same).

[24] *See Perry v. State Dep't of Child. & Fam. Servs*., 2016-857, p. 2 (La. App. 3 Cir. 3/8/17), 215 So.3d 452, 454; *Abshire v. City of Kaplan*, 2014-533, p. 2 (La. App. 3 Cir. 11/5/14) (unpublished opinion), 2014 WL 5770703 (applying manifest error to trial court fact finding); *CHL Enter., LLC v. State, Dep't of Revenue*, 2009-487, p. 8 (La. App. 3 Cir. 11/4/09), 23 So.3d 1000, 1005, *writ denied*, 2009-2613 (La.

article dedicated to the issue and they all agree with *Multi-Chem*. *See* Roger A. Stetter, La. Prac. Civ. App. § 10:155 (Aug. 2023) (noting that "the correct interpretations [of (G)(6)] are those that give deference to the factual findings of the trial court because it allows the prevailing notions in terms of the role of the appellate courts to remain intact") (quotations omitted); Frank L. Maraist, 1A La. Civ. L. Treatise, Civ. Pro. § 14.2 (Sept. 2022) ("The manifest error standard applies to appellate review of the findings of fact by the trial court on administrative review."); Brady Holtzclaw, *To Defer or Not To Defer: The Standard of Review Regarding Administrative Rulings In The Appellate Courts of Louisiana*, 40 S.U. L. Rev. 435 (Spring, 2013) (concluding "the First Circuit's opinion in Multi-Care [is] the correct interpretation[] of [] (G)(6) regarding the deference owed by the appellate court to the factual findings of the trial court").

2. The opposing view adopted by the panel majority stems from *Carpenter*, which contradicts *Multi-Care* and has been controversial from the start.

The panel majority held that "when this Court reviews the judgment of the district court in cases such as this, no deference is owed to the findings or conclusions of the district court; rather, this Court reviews the findings and decision of the DEQ and not that of the district court."[25] The panel majority cited *Save Our Hills, et al. v. LDEQ*, a case that explained that "[w]hen reviewing an administrative final decision in an adjudication proceeding, the district court functions as an appellate court." 2018-0100, p. 13 (La. App. 1 Cir. 11/5/18), 266 So.3d 916, 927, *writ denied*, 2019-0057 (La. 3/18/19), 267 So.3d 87. And because the court determined that the district court sits in its appellate capacity, even when serving as a factfinder, it held "no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal." *Id.* This view traces back to *Carpenter v. State, Dep't of Health & Hosps*., 2005-1904 (La. App. 1 Cir. 9/20/06), 944 So.2d 604, where, in responding to the criticism of a concurring judge, the majority in a footnote acknowledged that it was

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2/12/10), 27 So.3d 848; *Reed v. State, Dep't of Health & Hosps*., 2007-1208, p. 2 (La. App. 3 Cir. 3/5/08) (unpublished opinion), 2008 WL 588903 (applying manifest error to trial court fact finding); *Soileau v. La. State Racing Comm'n*, 2014-540 (La. App. 3 Cir. 12/10/14), 156 So.3d 729, 732, *writ denied*, 2015-0080 (La. 4/2/15), 163 So.3d 796. *But see TBM-WC Sabine, LLC v. Sabine Par. Bd. of Rev.*, 2017-1189 (La. App. 3 Cir. 7/18/18), 250 So.3d 1075, 1081 (relying on a Second Circuit case that analyzed the pre-amended version of (G)(6), i.e., before the legislature assigned the fact-finding duty to the district court, and therefore is not relevant to the issue here).

[25] 1st Cir. J. at 19, App'x C (citation omitted).

choosing to apply a different standard than in *Multi-Care*. The majority in *Carpenter* recognized that the (G)(6) amendment empowers district courts with a fact-finding function, but chose instead to find that this change "has not, however, affected the standard of review available to courts of appeal when they sit in review over district court decisions in the administrative context." 977 So.2d at 608 n.2.

Departing from *Multi-Care* was controversial as soon as the *Carpenter* court articulated it. The concurring opinion in *Carpenter* agreed with *Multi-Care* and rejected the majority's conclusion that no deference was owed to the trial court's findings of fact. *Id.* at 614–15. As the concurrence pointed out, the majority failed to reckon with the implications of the legislature's decision to amend (G)(6), instead carrying forward pre-amendment precedent:

> *Multi–Care* appears to be the only reported case analyzing and addressing the effect of the 1997 amendment to La. R.S. 49:964 G(6). None of the cases cited by the majority in their footnote address the effect of the 1997 amendment. Rather, they repeat the tired pre-amendment mantra that judicial review is appellate review and that the court of appeal owes no deference to the district court's factual findings.

Id. at 615. Furthermore, six First Circuit cases since *Carpenter* have adopted the approach in *Multi-Care* as do five Third Circuit cases. *See supra*, nn. 23 & 24. And *Carpenter*, unlike *Multi-Care*, does not address this Court's holdings in the past scrutinizing the application of the manifest error rule and consistently finding it must apply to preserve the allocation of the three-tiered court system, even in reviewing paper-record evidence. This situation is no different. Rather than preserve the distinct role of the district court, the rule in *Carpenter* strains judicial economy and heightens legal uncertainty by making every court—district, circuit, and Supreme—a factfinder anew. Furthermore, applying the manifest error rule in the administrative context does not impose an undue limitation on appellate review of facts. A litigant that loses in district court may appeal and, as in any civil case, "the reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous." *Stobart v. State, through Dep't of Transp. & Dev.*, 617 So.2d 880, 882 (La. 1993).

Carpenter and the cases that follow it do not provide a compelling basis for carving out an exception for the manifest error rule in the administrative context. They do not contend with Supreme Court case law that gives deference to the district court as fact-finder and the implications of the legislature's decision to make the district court review the full record and make its own determination under (G)(6). *Multi-Care*, which applies the manifest error rule in

the administrative context, preserves the allocated functions among the courts and properly applies deference to the district court when exercising a fact-finding role.

C. Resolving the split over the standard of review is central to this case as the District Court made significant findings of fact in concluding that LDEQ's decision is not supported by a preponderance of record evidence under (G)(6).

The District Court based its judgment to reverse LDEQ's decision and vacate the permits in part on its determination that the agency's decision was not supported by a preponderance of the evidence under (G)(6). In making that determination, the District Court made several conclusions of fact by a preponderance of the evidence in the entire record as (G)(6) mandates.

For instance, the District Court determined that LDEQ's findings about the adverse environmental effects of Formosa Plastics' cancer-causing ethylene oxide emissions were not supported by a preponderance of the evidence.[26] The District Court examined LDEQ's findings that Formosa Plastics' ethylene oxide emissions would not violate the state ambient air standard beyond the petrochemical complex's property, or exceed the EPA threshold in residential areas. The District Cout found that the contour map and underlying modeling results used to make the map to determine the extent and potency of Formosa Plastics' ethylene oxide was based on the company's unenforceable and unsupported assumption that it could eliminate 99.9 percent of the ethylene oxide from its waste gas before sending those cancer-causing chemicals into the air.[27] The District Court in turn found that LDEQ's conclusion that the permits will not allow for air quality impacts that could adversely affect human health or the environment in Welcome or the surrounding areas was not supported by a preponderance of the evidence.[28] The panel majority not only ignored the District Court's factual findings, it only looked at LDEQ's statements—not the evidence in the record that showed no support for Formosa Plastics' claimed emissions reductions.[29]

Should this Court find that an appellate court must defer to the district court's factual findings, the District Court's determination that the record does not support LDEQ's conclusion on the impacts of ethylene oxide would stand absent a finding of manifest error. This is a critical

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[26] 19th JDC Reasons at 20-22, App'x B.

[27] *Id.* at 20–21.

[28] *Id.* at 20.

[29] 1st. Cir. J. at 19, 38–42, 50–51, App'x C.

issue. As the District Court recognized, ethylene oxide is a potent human carcinogen that Formosa Plastics would be allowed to emit in enormous amounts approximately one mile from an elementary school and residential areas. For the children who go to the nearby elementary school and area residents, having competent evidence to support LDEQ's findings on a critical issue like ethylene oxide is of utmost importance.

II. The panel majority applied the wrong standard of review in giving improper *Chevron*-style deference to LDEQ's interpretation of the Clean Air Act, when Louisiana law required the court to interpret the law de novo without deferring.

RISE St. James urges the Court to grant certiorari because the panel majority departed from well-established Louisiana law and instead relied on *Chevron*-style deference to approve LDEQ's unlawful, narrowing interpretation of the key federal Clean Air Act standard in this case. *See* La. Sup. Ct. R. X(a)(1), (4).[30] The Clean Air Act provision at issue is meant to protect public health by prohibiting a new source, like Formosa Plastics, from getting a permit until it "demonstrates" it would not "cause, *or contribute to*" violations of federal health-based air quality limits, called the National Ambient Air Quality Standards ("NAAQS"), and permitting increments that protect the NAAQS further. *See* 42 U.S.C. § 7475(a)(3) (emphasis added).[31] That provision is copied almost identically into a parallel cite in the Louisiana air regulations. LAC 33:III.509(K)(1).[32] The parties dispute the meaning of "contribute," in considering Formosa Plastics' modeling of its air pollutants showing they would increase violations of these health-based limits in areas across St. James Parish. Under established law, the reviewing court must conduct de novo review, and LDEQ is "not entitled to deference" in its interpretation of a statutory standard. *See Bowers v. Firefighters' Ret. Sys.*, 2008-1268, pp. 4–5 (La. 3/17/09); 6

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[30] *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843–44 (1984) (providing that if a federal court finds a statutory provision ambiguous, it "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[31] Increments are limits on new industrial emissions in a given area, as compared to the baseline emissions when EPA first promulgated the NAAQS, which are meant to guard the NAAQS from even nearing exceedance. *See* 42 U.S.C. § 7473(b)(2). Both increments and NAAQS are expressed in terms of a maximum concentration of an air pollutant in the air, such as micrograms per cubic meter or parts per billion. *See, e.g.*, LAC 33:III.509(C) (showing the increment for short-term exposure to fine particulate matter (soot) is 9 $\mu g/m^3$).

[32] The only relevant difference is that the statute has an extra comma in "cause, or contribute to," and says, "in excess of," rather than in "violation of" NAAQS and increments. *Compare* 42 U.S.C. 7475(a)(3), *with* LAC 33:III.509(K)(1). LDEQ has never shown "its interpretation turns on any difference between the statutory and regulatory language," nor could it. *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (discussed further below, explaining that there is no deference to agency interpretation of a regulation that copies or paraphrases statute).

So.3d 173, 176; La. R.S. 49:978.1(G)(1)–(4). The District Court properly applied that standard of review[33] and found LDEQ could not circumvent the Act's bar on "contribut[ing] to" violations, by arguing that none of Formosa Plastics contributions are significant.[34] In reversing, the panel majority failed to conduct de novo review, instead stating it was obligated to defer to LDEQ's interpretation.[35] That unprecedented application of *Chevron*-like deference would shift our state's law on standard of review in the opposite direction of the U.S. Supreme Court that is presently considering limiting or abandoning *Chevron*, just like the high courts in sister states. *See Loper Bright Enter., et al., v. Raimondo*, Case No. 21-5166, Order Granting Writ of Certiorari (U.S. Sup. Ct. May 1, 2023);[36] *e.g.*, *King v. Miss. Military Dep't*, 245 So.3d 404, 408 (Miss. 2018) (announcing court will "abandon" any *Chevron*-like precedent).[37] And it strikes an especially discordant note in our civilian legal system where, "as in all codified systems, legislation is the superior source of law which custom cannot abrogate." *See M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 16 (La. 7/1/08), 998 So.2d 16, 29; *see also CITGO Petro. Corp. v. La. Pub. Serv. Comm'n*, 2001-1902, p. 5 (La. 3/15/02), 815 So.2d 19, 23 (holding courts are "the ultimate arbiter of meaning" of legislative text). This standard-of-review error also led to the wrong result on the merits, exposing St. James Parish to unhealthy, worsening air.

Specifically, Formosa Plastics' own modeling showed its chemical complex would contribute to a collection of violations across St. James Parish—multiple violations of the NAAQS and the established increment for fine particulate matter ($PM_{2.5}$) (known as soot) and multiple violations of the NAAQS for nitrogen dioxide (NO_2), pollutants that also combine to create smog. Several of the violations threaten the majority-Black residential community of Burton Lane.[38] EPA has found that even short-burst exposure to the projected levels of air pollution to which Burton Lane and other parts of the Parish could be exposed could result in

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[33] 19th JDC Reasons at 7–8, App'x B.

[34] 19th JDC Reasons at 5–11, App'x B.

[35] 1st Cir. J. at 21–22, 32, App'x C.

[36] https://www.supremecourt.gov/docket/docketfiles/html/qp/22-00451qp.pdf.

[37] In 2018 alone, four states overturned their *Chevron*-like precedent via court decisions, legislation, or ballot initiatives. Luke Phillips, *Chevron in the States? Not So Much*, 89 Miss. L.J. 313, 314 (2020). As of 2020, only a minority of states adhered to *Chevron*, with at least 25—including Louisiana—applying de novo review without deference to the agency's interpretation of statutory language. *Id.*

[38] 19th JDC Reasons at 6, 13–16, App'x B; 1st Cir. J. at 27, App'x C.

increased incidence of asthma and respiratory disorders, cardiovascular disease, hospital visits, and even death.[39]

In approving air permits anyway, LDEQ adopted a narrowed interpretation of "contribute," to only include purportedly significant contributions, excluding Formosa Plastics' contributions because they were less than so-called significant impact levels (SILs) at the specific points on the map where the modeled violations occur.[40] LDEQ adopted the concept of SILs from a nonbinding EPA memorandum that suggests certain SILs to simplify modeling as an administrative convenience, but only if there is no "basis for concern" in using them.[41] The SILs are not in the text of the Act or Louisiana's air regulations that adopt the Act. Indeed, this law forbids a source from "contribut[ing]" to violations, without specifying a threshold below which such contributions might be allowed. *See* 42 U.S.C. § 7475; LAC 33:III.509; 40 C.F.R. § Part 51, App'x W. And the federal D.C. Circuit, reviewing a past EPA attempt to add the SILs into federal Clean Air Act regulations, vacated the rules as inconsistent with the Act, agreeing with challengers that even contributions below the SIL might still cause or contribute to NAAQS or increment violations. *See Sierra Club v. EPA*, 705 F.3d 458, 464–65 (D.C. Cir. 2013); *see also Powder River Basin Res. Council v. Wyo. Dep't Env't Quality*, 226 P.3d 809, 818–19 (Wyo. 2010) (rejecting use of SILs in state's air permitting like LDEQ's here).[42] That is consistent with the plain, dictionary meaning of "contribute," which "does not incorporate any 'significance' requirement," and simply means to have a "share in any act or effect." *Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004) (cleaned up) (concerning analogous Clean Air Act

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[39] *See e.g.*, *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342, 1345–47 (D.C. Cir. 2012) (describing EPA's findings of increased respiratory morbidity from short spikes of NO_2 that necessitated standard); *see Recon. of the NAAQS for PM*, 88 Fed. Reg. 5558, 5583–5607 (Jan. 27, 2023) (describing short-term $PM_{2.5}$ exposure leads to increased mortality, cardiovascular disease, respiratory ailments, and increased emergency room visits).

[40] *See* 1st Cir. J. at 29, App'x C.

[41] *See* 19th JDC Reasons at 6, 9–11, App'x B; 1st Cir. J. at 27 (citing guidance memo), App'x C.

[42] Thus, the panel majority opinion erred in referring to this use of SILs as a "regulation" in one part of the opinion. *See* 1st Cir. J. at 7, App'x C. To the contrary, after *Sierra Club*, EPA struck all references to SILs from its model air regulations, but one. *See* 40 C.F.R. 51.165(b)(2). It only left in this vestigial provision because it was uncontroversial—and does not apply here. It merely requires *denying* any permit if the application emits concentrations *above* the SILs. *Id.* The court in *Sierra Club* specifically contrasted that with the unlawful situation at issue here, where an agency might try to *grant* a permit to an applicant emitting below the SIL level, despite otherwise causing or contributing to a NAAQS or increment violation. 705 F.3d at 465–66. And as already described, the SILs are nowhere to be found, in any form, in the Act or Louisiana's air regulations.

provision using same language); *see also Cox v. City of Dallas*, 256 F.3d 281, 294 (5th Cir. 2001) (applying same definition of "contribute to," in another federal environmental statute).

De novo legal review is integral to the court's duty under the LAPA to overturn any agency decision "in violation of" law or in excess of authority. La. R.S. 49:978.1(G)(1)–(4); *Arrant v. Wayne Acree PLS, Inc.*, 2015-0905, p. 8 (La. 1/27/16), 187 So.3d 417, 422–23; *see also Save Ourselves v. La. Env't. Control Comm'n*, 452 So.2d 1152, 1159 (La. 1984) (underscoring "the courts' traditional primacy in interpreting constitutional and statutory provisions and enforcing procedural rectitude"). The touchstone of the First Circuit's de novo review should have been the ordinary meaning of the word "contribute." *See* La. Civil Code arts. 9, 12; *Livingston Par. Council on Aging v. Graves*, 2012-0232, pp. 3–4 (La. 12/4/12), 105 So.3d 683, 685. As summarized above, its meaning is clear from prior decisions. But even if that term remained susceptible of multiple meanings, the court must examine legislative intent to determine which reading best comports with Congress's will. *See* La. Civil Code art. 10; La. R.S. 24:177.[43] It cannot simply defer to LDEQ's interpretation. The one (inapplicable) instance a court might defer to an agency's legal interpretation is when the dispute concerns *regulations* that the agency *itself created*. *Women's & Child.'s Hosp. v. La. Dep't of Health*, 2008-946, pp. 7–8 (La. 1/21/09), 2 So.3d 397, 402–03 (reasoning that in that situation, the agency is "in a superior position to determine what it intended when it issued the rule"). But that is not the case here, where Congress drafted the provision at issue, and LDEQ copied Congress's words into a parallel cite in state regulations. Courts do not defer in that copy-and-paste (or even a copy-and-paraphrase) scenario. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding no deference to agency regulatory interpretation when regulation "does little more than restate" a statute); *see Elio Motors, Inc. v. La. Motor Vehicle Comm'n*, 18-545, pp. 25–26 (La. App. 5 Cir. 3/27/19), 268 So.3d 1132, 1150-51 (refusing to defer to agency interpretation of regulatory language not of the agency's creation).

The panel majority announced a new and incorrect standard of review, not only noting the traditional rule on deference regarding agency-created regulations, but further using language

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[43] The District Court also examined the legislative intent, finding it consistent with forbidding the use of the SILs to authorize Formosa Plastics' contributions to NAAQS and increment violations. *See* 19th JDC Reasons at 11, App'x B.

almost identical to *Chevron* to hold it had to give "considerable weight," and that "deference must be awarded," to the agency's reading of "contribute" in the Clean Air Act to encompass only contributions larger than a SIL.[44] The panel majority took this statement on deference out of context from a 1994 First Circuit case that quoted *Chevron*. *See* 1st Cir. J. at 21–22, 32, App'x C (holding a "reviewing court should afford considerable weight to DEQ's construction and interpretation of the statutory scheme that it is entrusted to administer, *and deference must be awarded to its administrative interpretations*" of the statute) (emphasis added) (citing *Matter of Recovery I*, 93-0441 (La. App. 1 Cir. 4/8/94), 635 So.2d 690, 696, *writ denied*, 94-1232 (La. 7/ l/ 94), 639 So.2d 1169 (citing *Chevron* for same wording)); *see also Chevron,* 467 U.S. at 844 (requiring "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations"). But the court in *Matter of Recovery* only mentioned *Chevron*'s deference as "analogous" to the rule described above that allows courts in Louisiana to defer to "DEQ's interpretation of its *own regulations*." 635 So.2d at 696–97 (emphasis added) (noting regulations at issue were "DEQ drafted" where agency had "a void" to fill by the legislature).[45] It did not defer to LDEQ's statutory interpretation, as here, or provide that such *Chevron* deference is allowed in Louisiana. *Id*.[46]

Louisiana courts have not applied *Chevron*, or *Matter of Recovery*, to defer to an agency's statutory interpretation. *See generally* Luke Phillips, *Chevron in the States? Not So Much*, 89 Miss. L.J. 313, 335–36 (2020) (surveying Louisiana cases to find courts apply de novo scrutiny to agencies' interpretations of statutes, not deference). In reviewing the 40 years of reported Louisiana cases since *Chevron*, only one could be located, other than the one at bar, that

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[44] *See* 1st Cir. J. at 21–22, 32, App'x C.

[45] The panel majority also cited one other case, *Matter of Dow Chem. Co.*, 2003-2278 (La. App. 1 Cir. 9/17/04), 885 So.2d 5, *writ denied*, 2004-3005 (La. 2/18/05), 896 So.2d 34. But the court in *Dow* did not defer to the agency's statutory interpretation either; it merely found LDEQ had properly calculated emission reduction credit amounts, regardless of how the court were to construe the disputed regulatory text. *See id.* at 15–16, 885 So.2d at 14 (explaining "there were sufficient emission reduction credits in Dow's favor applying either the DEQ's or LEAN's analysis of the credits").

[46] Other decisions that use the same "considerable weight" phrase as *Matter of Recovery* are likewise explicit in clarifying that it applies only to the "rules and regulations" the agency has adopted and administers, not to statutory language. *See, e.g.*, *Women's & Child.'s Hosp. v. Dep't of Health & Hosps.*, 2007-1157, pp. 12–13 (La. App. 1 Cir. 2/8/08), 984 So.2d 760, 768–69, *writ granted*, 2008-0946 (La. 6/27/08), 983 So.2d 1287, and *aff'd*, 2008-946 (La. 1/21/09), 2 So.3d 397.

arguably did so.[47] This Court has consistently reinforced the doctrine that review is de novo without deference, overturning agency interpretations, like LDEQ's here, that would narrow the agency's statutory authority to regulate. *See e.g.*, *CITGO*, p. 5, 815 So.2d at 23 (rejecting Public Service Commission's narrowing construction of its statutory authority, ordering it to regulate ship pilotage even before vessels reach state waters). Narrowing the statutory text—even in a properly issued regulation, much less without one as here—would be nothing but unenforceable "surplusage." *See Midtown Med., LLC v. Dep't of Health & Hosps.*, 2014-0005, p. 4 (La. 3/14/14), 135 So.3d 594, 596. That is especially true here where LDEQ's interpretation springs from simply citing a nonbinding guidance memorandum, issued by another agency, EPA. *See In re Waste Mgmt.*, 2006-1011, 2007 WL 2377337, pp. 3–4 (La. App. 1 Cir. 8/22/07) (reversing LDEQ and rejecting reliance on EPA guidance memorandum in the absence of Clean Air Act regulation on point)*; cf. Rainey v. Credithrift of Am. # 5 Inc.*, 441 So.2d 278, 282 (La. App. 4 Cir. 1983) ("Clearly, the FRB opinion upon which plaintiff relies is an unofficial interpretation. Accordingly, we pay greater deference to the federal judiciary.").

Instead of deference, the most Louisiana jurisprudence allows is that an agency's longstanding statutory reading might be "persuasive indication" of meaning that could inform de novo review, under the doctrine of contemporaneous construction. *Traigle v. PPG Indus., Inc.*, 332 So.2d 777, 782 (La. 1976). The panel majority did not discuss or rely on that established doctrine, although Formosa Plastics did in its briefing below.[48] Contemporaneous construction would not alter the District Court's result here. The doctrine is "not absolutely applied" and "Louisiana courts also sharply limit" its application. *Clark v. Bd. of Comm'rs, Port of New Orleans*, 422 So.2d 247, 250–51 (La. App. 4 Cir. 1982) (discussing origins of the doctrine). It only applies where the court has first engaged in de novo statutory interpretation and found the text "ambiguous," which the panel majority did not examine or conclude here. *See Traigle*, 332 So.2d at 782. And even then, an agency's "construction cannot be given effect where it is

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[47] *J. Ray McDermott, Inc. v. Morrison*, 96-2337, p. 15 (La. App. 1 Cir. 11/7/97), 705 So.2d 195, 205, *writ denied*, 97-3055 (La. 2/13/98), 709 So.2d 753, and *writ denied*, 97-3062 (La. 2/13/98), 709 So.2d 754. It only arguably deferred, because in this tax case the court also noted that the agency's interpretation of the disputed text was consistent with prevailing jurisprudence that the court was also inclined to apply. *Id.*

[48] It also would not apply here where contrary to the prerequisite of "longstanding," consistent interpretation, in 2013, the D.C. Circuit vacated EPA's attempt to craft a SILs regulation that would have permitted what LDEQ did here. *See Sierra Club*, 705 F.3d at 464–65.

contrary to or inconsistent with legislative intent." *Jurisich v. Jenkins*, 99-0076, pp. 8–9 (La. 10/19/99), 749 So.2d 597, 602.[49] Finally, to be clear, a court's finding that an agency's argument is "persuasive," is not the same thing as recognizing an obligation to "defer" to it like the panel majority did. Deference is an obligation to "yield" to what the agency says, while a persuasive authority merely "carries some weight." *Compare Defer*, *Black's Law Dictionary* (11th ed. 2019) ("[T]o yield to the opinion of <because it was a political question, the courts deferred to the legislature>"), *with id. Authority: Persuasive Authority* ("[C]arries some weight but is not binding on a court, often from a court in a different jurisdiction."); *see Kisor v. Wilkie*, 139 S.Ct. 2400, 2424–25 (2019) (Roberts, C.J. concurring) (noting the same distinction).

Thus, to fulfill its judicial role, a reviewing court must undertake the sometimes challenging work of statutory interpretation, engaging with the plain meaning of the text, context, and statutory purpose using the tools of statutory interpretation. *See* La. Civ. Code, arts. 9–13; *Davis-Lynch Holding Co. v. Robinson*, 2019-1574, pp. 10–14 (La. App. 1 Cir. 12/30/20), 316 So.3d 1126, 1132–35. The District Court did this, but the panel majority did not. RISE St. James urges this Court to grant review, enforce the de novo standard of review, and either render judgment or remand for the court below to engage in the proper analysis.

III. The panel majority erred in finding that mere compliance with regulations achieved the constitutional requirement to protect against "potential and real" harm to the "maximum extent possible."

RISE St. James urges the Court to grant certiorari to affirm and apply the bedrock requirement of the constitutional public trust doctrine that LDEQ must document and support its demonstration that "potential and real adverse environmental effects of the proposed facility been avoided to the *maximum extent possible*." *See Matter of Am. Waste & Pollution Control*

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[49] Indeed, this would be the case *even* in courts that require granting deference to agency legal interpretations under federal canons like *Chevron*. *Chevron* itself emphasized that the "judiciary is the final authority on issues of statutory construction," and before deferring to an agency interpretation, the court must employ all "traditional tools of statutory construction" to ascertain the language's meaning. *Chevron*, 467 U.S. at 843 n.9. If in doing so, the court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect," even where it conflicts with the agency's reading. *Id.* In the years since, the U.S. Supreme Court has only underscored this requirement, holding that regardless of whether a reviewing court is considering a disputed statute or a disputed regulation, the court must first exhaust statutory interpretive tools and find the language "genuinely ambiguous." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). Otherwise, "a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id.* As explained above, the panel majority did not do that textual, statutory analysis here before asserting it must grant deference.

Co., 633 So.2d 188, 194–95 (La. App. 1 Cir. 1993) (emphasis added), *writ granted*, 634 So.2d 837, and *aff'd on same grounds*, 93-3163 (La. 9/15/94), 642 So.2d 1258; *Save Ourselves*, 452 So.2d at 1156–57, 1160; La Const. art. IX, § 1 (requiring protection of, *inter alia*, the "healthful quality of the environment . . . insofar as possible and consistent with the health, safety, and welfare of the people."). Here, LDEQ did nothing but note the potential and real violations of the health-based NAAQS that Formosa Plastics' model predicted the proposed chemical complex would worsen. LDEQ claimed it did not need to require anything to avoid that harm after relying on the SILs, and added that the violations may "not necessarily" actually occur in real life to impact residents.[50] As explained in greater detail below, the SILs are not a public-health measure of the added risk from Formosa Plastics' emissions, as EPA itself has argued in court; indeed Formosa Plastics emissions below the SIL could cause "irreparable harm" over years of operation, and here they would worsen air that the model shows already fails to meet federal standards. *See U.S. v. Ameren Mo.*, 421 F.Supp.3d 729, 817–18 (E.D. Mo. 2019) (ruling in favor of EPA's position), *aff'd in part, rev'd in part on other grounds*, 9 F.4th 989 (8th Cir. 2021).

In the three sentences of its opinion devoted to this argument, the panel majority held LDEQ's "reliance on those federal standards" in Clean Air Act permitting also satisfied its public trust duty concerning Formosa Plastics' role in worsening violations of those standards (i.e., $PM_{2.5}$ and NO_2 air quality violations).[51] But compliance with the Act—which LDEQ did not actually achieve, *see* Section II above—would not ensure compliance with a public trustee's obligation to determine that the worsened air quality (real and potential) had been avoided to "maximum extent possible." *Save Ourselves*, 452 So.2d at 1160 (holding same). Rather, an agency errs if it assumes "that its duty was to adhere only to its own regulations." *Id*. If the panel majority's approach instead were correct, both the constitutional public trustee duty and the legislature's specific mandate that LDEQ comply with the duty would be meaningless and redundant because LDEQ already has the obligation to comply with its own regulations. *Cf. id.*; La. R.S. 30:2014(A)(4) (requiring that LDEQ "act as the primary public trustee of the environment, and shall consider and follow the will and intent of the Constitution of Louisiana").

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[50] *See* 19th JDC Reasons at 14, App'x B.

[51] 1st Cir. J. at 41, App'x C.

The "maximum extent possible" legal duty is meaningful and important, because statutory and regulatory environmental law sometimes falls short of this constitutional level. An excellent illustration of this point and the appropriate legal standard is this Court's ruling in *Matter of Am. Waste*, 93-3163 (La. 9/15/94), 642 So.2d 1258. The Court affirmed the First Circuit in vacating an LDEQ permit for a landfill that residents argued risked leaching contaminants into the Chicot Aquifer, their drinking water supply. *Id.* pp. 2, 18–20, 642 So.2d at 1260, 1265–66. LDEQ had argued that it satisfied its public trustee duty by assuring the permit met solid waste regulations that would protect against any "unreasonable danger." *Matter of Am. Waste*, 633 So.2d at 192, 195. The First Circuit reversed, holding that LDEQ's compliance with the regulations fell well short of the constitutional duty. *Id.* As the court described it, if we imagine environmental protection on a scale from zero to ten, where zero is most protective and ten is least, the regulations were at best a five. *Id.* at 195, n.5. But "maximum extent possible" means "achiev[ing] a one or two." *Id.* The agency would have to apply such "one or two" level of protection, or support that it was "unavailable or precluded," to comply with its public trustee obligation. *Id.* On review, this Court agreed, affirming the First Circuit's "proper analysis," and holding that LDEQ "failed to utilize the constitutional standard" by conflating it with the regulations. *Matter of Am. Waste*, pp. 18–20, 642 So.2d at 1265–66.

Applying that test here, as the District Court recognized, the undisputed record evidence—Formosa Plastics' own modeling—shows widespread violations of the NAAQS for $PM_{2.5}$ and NO_2.[52] These are violations of health-based limits set at "the maximum airborne concentration of a pollutant that the public health can tolerate" with a necessary margin of safety. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465, 473 (2001) (Scalia, J.); 42 U.S.C. § 7409(b)(1). As the District Court found, several of the $PM_{2.5}$ violations Formosa Plastics would worsen threaten the residents of Burton Lane.[53] Without marshaling any evidence to the contrary, LDEQ simply dismissed these violations as "not necessarily" likely to appear in real life.[54] But LDEQ does not discharge its duty by making "conclusions without stated bases" or

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[52] 19th JDC Reasons at 13–16, App'x B. The panel majority, by focusing on SILs, did not address this evidence in the public-trust context. *See* 1st Cir. J. at 41, App'x C.

[53] 19th JDC Reasons at 14–15, App'x B.

[54] *See* 19th JDC Reasons at 14, App'x B.

without evidentiary support. *See Matter of Am. Waste*, pp. 19–20, 642 So.2d at 1266. LDEQ failed as required to "make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings . . . [and] articulate a rational connection between the facts found and the order issued." *See Save Ourselves*, 452 So.2d at 1159–60; *see also* La. R.S. 49:978.1(G)(6) (requiring de novo review of the agency's factual determinations).

The panel majority's reliance on LDEQ's use of the SILs to excuse Formosa Plastics' role in the violations ignores that the SILs are not health standards like the NAAQS. *See Matter of Am. Waste*, pp. 18–20, 642 So.2d at 1265–66. EPA's position is that the SILs are only "a compliance demonstration tool," and "not a valid means of determining the significance of downwind health effects," as is necessary for public trust review. *See Ameren Mo.*, 421 F.Supp.3d 729, 817–18. Indeed, EPA specifies that according to "[t]he scientific consensus" there is no known "safe threshold" of incremental $PM_{2.5}$ exposure, especially when the air already surpasses the health-based limit set in the NAAQS. *See id.* at 773, 778, 817. Accordingly, in *Ameren Mo.*, an EPA enforcement action against a coal plant for excessive pollution, the federal court held the coal plant's years of excess $PM_{2.5}$ emissions resulting in pollution concentrations at levels well below the SIL were severe enough to support a finding of *irreparable harm* and issued a permanent injunction against the plant. *Id.* 817–18.

LDEQ had options to avoid or minimize the harm from these NAAQS violations and Formosa Plastics' contributions to them "to the maximum extent possible" (i.e., a one or two on the protection scale). *See Matter of Am. Waste*, 633 So.2d at 194, 195 n.5. For instance, LDEQ could have required Formosa Plastics to reduce its emissions of $PM_{2.5}$ and NO_2 to fully offset the complex's contributions to the violations. Or it could have examined building the plant in a different part of the state, with cleaner air. It also could have denied the permit outright, or considered any number of other options that might achieve the constitutional objective. The point is it did nothing, just like the agency decisions reversed in cases like *Save Ourselves* or *Matter of American Waste*. And the panel majority's ruling failed to apply this foundational law. RISE St. James urges this Court to grant review and render judgment against LDEQ, or remand to apply the "maximum extent possible" standard in the lower courts in the first instance.

Conclusion

For the foregoing reasons, the RISE St. James respectfully asks this Court to grant their application for writs of certiorari and review of the ruling of the Louisiana First Circuit Court of Appeal.

Respectfully submitted on March 18, 2024 by:

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LOUISIANA SUPREME COURT RULE X § 2(D) CERTIFICATION

I certify that the allegations contained in the foregoing application are true and correct to the best of my knowledge, information and belief. I further certify that on this 18th day of March, 2024, I have served a copy of this Application for Writ of Certiorari to all counsel of record identified below and filed a copy with the Clerk of the Louisiana First Circuit Court of Appeal.

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APPENDIX

19th Judicial District Court, Judgment, Sept. 8, 2022, Attachment A

19th Judicial District Court, Written Reasons for Judgment, Sept. 8, 2022, Attachment B

First Circuit Court of Appeal, Notice of Judgment and Disposition, Jan. 19, 2024, Attachment C

First Circuit Court of Appeal, Order Denying Rehearing, Feb. 15, 2024, Attachment D

ATTACHMENT A

EAST BATON ROUGE PARISH
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19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

RISE ST. JAMES, LOUISIANA BUCKET BRIGADE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, HEALTHY GULF, EARTHWORKS, and NO WASTE LOUISIANA	*	**DOCKET NUMBER: 694,029**
	*	**SECTION: "27"**
	*	**JUDGE: Hon. Trudy M. White**
v.	*	
LOUISIANA DEPARTMENT OF ENVIROMENTAL QUALITY	*	

JUDGMENT

This matter came before this Court on March 14, 2022, for a hearing on the Petition for Judicial Review filed by the Petitioners, RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana.

Present at the hearing were:

Corinne Van Dalen and Michael Brown, Counsel for the Petitioners;

Devin Lowell and Lisa Jordan, counsel for Intervenor Beverly Alexander and Supervising Attorneys for David Ivy-Taylor, and David Ivy-Taylor, Student Counsel for Intervenor Beverly Alexander;

Jill Carter, Ashley Plunkett, Rodney Barnes, and Courtney Burdette, Counsel for Defendant Louisiana Department of Environmental Quality; and,

James Percy, John King, and Marjorie McKeithen, Counsel for Intervenor FG LA, LLC.

Having considered the administrative record, pleadings, briefs submitted by the parties, arguments of counsel, and the law, and for the reasons more fully described in this Court's September 8, 2022 *Written Reasons for Judgment*, the Court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Louisiana Department of Environmental Quality's decision to issue Prevention of Significant Deterioration Permit PSD-LA-812 and Title V/Part 70 Air Operating Permits 3141-V0, 3142-V0, 3143-V0, 3144-V0, 3145-V0, 3146-V0, 3147-V0, 3148-V0, 3149-V0, 3150-V0, 3151-V0, 3152-V0, 3153-V0, and 3154-V0 to FG LA LLC for a proposed chemical complex in Welcome, Louisiana is hereby **REVERSED** and all permits **VACATED.**

The matter is **REMANDED** to Louisiana Department of Environmental Quality for further proceedings consistent with the *Written Reasons for Judgment.*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs in this matter shall be paid by the Louisiana Department of Environmental Quality.

THUS, DONE AND SIGNED on this 8th day of September, 2022, in Baton Rouge, Louisiana.

JUDGE TRUDY M. WHITE

PLEASE PROVIDE NOTICE TO ALL ATTORNEYS OF RECORD

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT / JUDGMENT / ORDER / COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED.
SEE ATTACHED LETTER FOR LIST OF RECIPIENTS.

DONE AND MAILED ON September 14, 2022

DEPUTY CLERK OF COURT

ATTACHMENT B

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19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

RISE ST. JAMES, LOUISIANA BUCKET BRIGADE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, HEALTHY GULF, EARTHWORKS, and NO WASTE LOUISIANA	*	**DOCKET NUMBER: 694,029**
	*	**SECTION: "27"**
	*	**JUDGE: Hon. Trudy M. White**
v.	*	
LOUISIANA DEPARTMENT OF ENVIROMENTAL QUALITY	*	

WRITTEN REASONS FOR JUDGMENT

This matter came before this Court on a Petition for Judicial Review filed timely by RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana appealing the decision of the Louisiana Department of Environmental Quality ("LDEQ") issuance of air permits to FG LA, a Formosa Plastics Group company, for the construction of a new chemical manufacturing complex on a 2,400-acre site adjacent to Welcome in St. James Parish. Beverly Alexander, a resident of St. James Parish, intervened in the matter in opposition to the permit decision. FG LA intervened in the matter in defense of the permit decision.

LDEQ issued PSD-LA-812 for the construction of the complex under Louisiana's Prevention and Significant Deterioration ("PSD") regulations that implement federal Clean Air Act requirements. LDEQ also issued 14 permits for the operation of 14 separate plants that comprise the proposed complex under Louisiana's Title V/Part 70 regulations authorized under the Clean Air Act. Those fourteen permits are designated as 3141-V0, 3142-V0, 3143-V0, 3144-V0, 3145-V0, 3146-V0, 3147-V0, 3148-V0, 3149-V0, 3150-V0, 3151-V0, 3152-V0, 3153-V0, and 3154-V0. LDEQ issued the PSD and Title V permits pursuant to a decision made on January 6, 2020 (Basis for Decision) and supplemented on August 10, 2021 (Supplemental Basis for Decision), following a remand ordered by this Court to supplement the administrative record.

The proposed complex would use ethane and propane as feedstock to make ethylene and propylene, and ultimately a variety of products used in plastics manufacturing. R. Vol. 35, 8314-8316. As permitted, the complex would emit large amounts of air pollutants, including soot, ozone-

forming chemicals, toxic air pollutants, and greenhouse gases. The proposed complex location is in Louisiana's "Industrial Corridor," bordering the town of Welcome, Louisiana. Welcome is a small community and has a 99% minority population, 87% of whom identify as Black. 3rd Supp. R., 8957, R. Vol. 29, 7133. The demographics of Welcome reflect its roots as a place once dominated by plantations, populated by the enslaved ancestors of present-day residents.

Sharon Lavigne of RISE St. James explained: "These are sacred lands. They were passed down to Black residents from their great-great-great grandparents who worked hard to buy these lands along the Mississippi to make them productive and pass them on to their families." R. Vol. 25, 6253. This Court further unpacks the meaning of "these are sacred lands". The spirit of those words to Sharon Lavigne and the other Welcome residents, is that the blood, sweat and tears of their Ancestors is ***tied to the land.*** Remarkably, the Black residents of Welcome are descendants of men and women who were kidnapped from Africa; who survived the Middle Passage; who were transported to a foreign land; and, then sold on auction blocks and enslaved. Their Ancestors worked the land with the hope and dream of passing down productive agricultural untainted land along the Mississippi land to their families.

The Petitioners and Alexander (collectively, "Petitioners") seek a judgment reversing LDEQ's decision, vacating all permits, and remanding the matter to the agency for the following reasons:

1. LDEQ's decision violates the Clean Air Act and implementing regulations because the record of the agency's permit decision (record) shows FG LA's emissions could cause or contribute to violations of National Ambient Air Quality Standards and increments.

2. LDEQ's conclusion that FG LA's emissions of fine particulate matter ($PM_{2.5}$) and nitrogen dioxide (NO_2), together with emissions of these pollutants from other sources, will not allow for air quality impacts 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.

3. LDEQ's conclusion that FG LA's emissions of cancer-causing toxic air pollutants together with those of other sources will not allow for air quality impacts 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.

4. LDEQ's conclusion that the proposed permits have minimized or avoided potential and real adverse environmental impacts of FG LA's ethylene oxide emissions to the maximum extent possible is arbitrary and capricious, not supported by a preponderance of the evidence in the record, and it does not comply with the agency's public trustee duties, as detailed by the Supreme Court in *Save Ourselves*.

5. LDEQ's environmental justice analysis is arbitrary and capricious, not supported by a preponderance of the evidence, and does not comply with the agency's public trustee duties, as detailed by the Supreme Court in *Save Ourselves*.

6. LDEQ's failure to consider the effects of the project's emissions on the existing pollution burden in Welcome in its environmental justice analysis was arbitrary and capricious.
7. LDEQ's finding that Welcome is not currently disproportionately affected by air pollution is arbitrary and capricious and not supported by a preponderance of the evidence.

8. LDEQ's conclusion that there are no alternative sites for FG LA's proposed complex that would offer more protection to the environment than the proposed site without unduly curtailing non-environmental benefits is arbitrary and capricious, not supported by a preponderance of the evidence in the record, and it does not comply with the agency's public trustee duties, as detailed by the Supreme Court in *Save Ourselves*.

9. LDEQ violated the public trust doctrine by failing to carry out its duty to conduct a fair and rational balancing of environmental costs against the benefits of the proposed complex.

10. LDEQ violated La. R.S. 109.1 because the agency failed to consider how FG LA's complex would affect elements of St. James Parish's master land use plan.

The parties submitted briefs and presented oral arguments on March 14, 2022. The case is now ripe for decision on the merits. The Court begins these reasons for judgment by describing the standard of review. It then addresses Petitioners' Clean Air Act claim, followed by Petitioners' claims under the public trust doctrine and La. R.S. 109.1.

STANDARD OF REVIEW

The judicial review provision of the Louisiana Environmental Quality Act provides for this Court's review of LDEQ's final decision to issue the FG LA air permits. La. R.S. 30:2050.21.A. The Court functions as an appellate court over the matter and the standard of review provisions of the Administrative Procedure Act ("APA") apply. La. R.S. 30:2050.21.F. Under the APA, this Court may remand the permit decision to LDEQ or reverse or modify if:

> substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. La. R.S. 49:964.G.

The first four grounds "involve evaluations of agency actions in light of established legal standards and raise traditional legal issues." *Save Ourselves, Inc. v. La. Env't Control Comm'n,* 452 So.2d 1152, 1159 (La. 1984). Regarding the fifth standard, "[a]n arbitrary decision shows disregard of evidence or the proper weight thereof while a capricious decision has no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence." *Carpenter v. State, Dep't of Health & Hosps.*, 2005-1904 (La. App. 1 Cir. 9/20/06); 944 So.2d 604, 612 (internal quotations and citations omitted). The final ground, as the APA itself explains, requires that the "court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review." La. R.S. 49:964.G(6). The Louisiana Supreme Court stated that the "test of § 964 G(6) is used in reviewing the facts as found by the agency, as opposed to the arbitrariness test used in reviewing conclusions and exercises of agency discretion." *Save Ourselves*, 452 So.2d at 1159.[1]

When an agency acts as public trustee over the environment under Article IX, section 1 of the Louisiana Constitution, as LDEQ does here, additional standards apply that require the agency to detail its reasoning. *Save Ourselves*, 452 So.2d at 1160. The Supreme Court has instructed that "in a contested case involving complex issues, the agency is required to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings; and it must articulate a rational connection between the facts found and the order issued." *Id.* at 1159. This court recognizes that "[r]eviewing courts should not reverse a substantive decision on its merits, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental protection." *Save Ourselves*, 452 So.2d at 1159. However, "the constitutional-statutory scheme, its history, intent and the nature of the duties it delegates to the agency and the judiciary, does not imply any derogation of the courts' traditional primacy in interpreting constitutional and statutory provisions and enforcing procedural rectitude." *Id.*

Thus, where an agency decision was reached "without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the courts'

[1] At the time of the Supreme Court's decision in *Save Ourselves*, the § 964 G(6) test was "manifest error," which has since be replaced with "preponderance of the evidence." *See* La. R.S. § 49:964 (Editors' Notes).

responsibility to reverse." *Id. See also In re Rubicon, Inc.*, 95–0108, p. 5 (La. App. 1st Cir. 2/14/96); 670 So.2d 475, 488-89 (finding that where LDEQ has not complied with "its responsibilities and obligations" under the public trust doctrine the "permit [] is null and void and must be vacated" and rejecting the agency's request for a simple remand).

I. Clean Air Act Argument

Petitioners first argue that LDEQ violated the Clean Air Act, which forbids issuing a PSD permit unless a new facility can "demonstrate" it would not "cause or contribute to" air pollution exceeding the Act's public-health-based, air-quality standards. *See* LAC 33:III.509.K.1. FG LA's air quality modeling showed that after the chemical complex is built, the air would fail to meet standards for fine particulate matter ($PM_{2.5}$), also known as "soot," and nitrogen dioxide (NO_2), an ozone-forming compound. Respondents claim that LDEQ nonetheless could interpret the law to authorize FG LA's emissions, because the chemical complex's share of each violation would fall below significance thresholds. For the reasons below, ***the Court agrees with Petitioners that LDEQ's interpretation fails to comply with the Act's mandate, and LDEQ should have denied FG LA's application.***

A. Clean Air Act Federal Air Standards and FG LA's PSD Permitting

The Clean Air Act's National Ambient Air Quality Standards ("NAAQS") are meant to ensure that everyone in the United States breathes air meeting health-based limits that the Environmental Protection Agency ("EPA") sets for six harmful "criteria" pollutants, including $PM_{2.5}$ and NO_2. 42 U.S.C. § 7409 (mandating EPA set the NAAQS at levels it concludes are "requisite to protect the public health," by "an adequate margin of safety"); *see* 40 C.F.R. pt. 50 (listing pollutants). EPA also sets "increments" to forestall NAAQS violations from industrial growth. An increment is a level of "maximum allowable increase" of a criteria pollutant by permitted sources in an area. 42 U.S.C. § 7473(b)(2). The Court refers to the NAAQS and increments collectively here as the "federal air standards." At issue in this case are the federal air standards for short-term (24-hour) exposure to $PM_{2.5}$ and short-term (1-hour) exposure to NO_2.

The Act's PSD permit program is designed to enforce these federal air standards against violations in individual permitting decisions. 42 U.S.C. § 7475(a) (forbidding new major sources

of air pollution from constructing without a PSD permit). EPA delegated to LDEQ the authority to issue PSD permits in Louisiana. *See* 42 U.S.C. § 7410(a)(1)-(2) (allowing state agencies to administer program, with EPA approval and oversight); 40 C.F.R. § 52.970(c) (identifying Louisiana's EPA-approved PSD permit regulations). Louisiana's permitting program must meet or exceed the Act's minimum requirements. *See* 42 U.S.C. § 7410(k)–(l); *Luminant Generation Co. v. EPA*, 714 F.3d 841, 846 (5th Cir. 2013).

To get a PSD permit, the new source must "demonstrate" that it will not "cause, or contribute to," violations of the NAAQS or increments. 42 U.S.C. § 7475(a)(3). Louisiana incorporates this federal requirement directly into state law. *See* LAC 33:III.509.K.1 (incorporating same). The way an applicant "demonstrate[s]" compliance with the NAAQS and increments is with standardized computer modeling that follows federal regulations. LAC 33:III.509.L, M. The computer model must account for both the proposed source's potential new emissions, as well as emissions from other relevant pollution sources in the same area that could also degrade air quality. *See* LAC 33:III.509.K.[2]

FG LA submitted this modeling with its permit application. The modeling report shows that when FG LA operates, the air will fail to meet the limits EPA set for the 24-hour $PM_{2.5}$ NAAQS, 24-hour $PM_{2.5}$ increment, and 1-hour NO_2 NAAQS, in locations across St. James Parish. R. Vol. 34, 8449–52. The violations are not even close in some instances, spiking to more than double the NAAQS for 1-hour NO_2. *Id.* In its Basis for Decision, LDEQ acknowledged that FG LA's modeling shows that the chemical complex makes a "contribution" to these violations. R. Vol. 34, 8449 n.40, 8481–83. But the agency urges that it could interpret the word "contribute"—in the Act's "cause, or contribute to," prohibition—to allow contributions below a level LDEQ determines significant. R. Vol. 34, 8449 n.40, 8481–83. In setting significance thresholds here, LDEQ relied on nonbinding EPA guidance memoranda that offer "Significant Impact Levels" or "SILs" for these pollutants that permitting agencies might use in some circumstances. *See* R. Vol. 34, 8481–83; *but see Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013) (described below, vacating EPA's SILs regulation). LDEQ argues it should get deference from the Court in making this legal

[2] The Act only requires sources emitting large amounts of pollution to model their emissions. *See* LAC 33:III.509.B, K, M.1. The mammoth chemical complex exceeded the air quality modeling thresholds, and then some. The threshold to model $PM_{2.5}$ is 25 tons per year, while FG LA would emit 340 tons of $PM_{2.5}$ per year. The threshold for nitrogen oxides is 40 tons per year, while FG LA would emit 1,243 tons of nitrogen oxides per year. *See id.*

interpretation. But as explained below, LDEQ is not entitled to deference on this legal question. And LDEQ's decision violates the Act's PSD permitting requirement's plain text and purpose.

B. Clean Air Act Analysis

Neither the Clean Air Act nor its implementing regulations defines the term "contribute" in this context. Accordingly, the Court must determine and apply the text's plain meaning. *See* La. Civil Code arts. 9, 11. If the Court finds the text "susceptible of different meanings," it must interpret it to have "the meaning that best conforms to the purpose of the law." *Id.* art. 10.

1. LDEQ's claim of agency deference.

To begin, LDEQ and FG LA erred in claiming that the Court must defer to the agency's interpretation of "contribute." As LDEQ correctly explains, courts defer to an agency's interpretation of "rules and regulations that [the agency] promulgates," based on the notion that the legislature authorized the agency to fill a legal "void." *Matter of Recovery I, Inc.*, 635 So.2d 690, 696 (La. App. 1 Cir. 1994). But LDEQ skips past the important fact it did not craft the regulation at issue here, and the regulation does not fill any legislative void. Rather, the regulation is a near carbon-copy of the Clean Air Act, transposing Congress's wording into state law. *See* LAC 33:III.509.K.1; 42 U.S.C. § 7475(a)(3); LDEQ Br. at 44 (describing same). Louisiana agencies are not entitled to deference in interpreting statutes written by a legislature or decisions authored by courts. *Bowers v. Firefighters' Ret. Sys.*, 2008-1268, pp. 4–5 (La. 3/17/09), 6 So.3d 173, 176. That is the judiciary's province. *Id.* The agency cannot circumvent the rule in *Bowers* by copying statutory text into the Louisiana Administrative Code. *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that judicial deference to an agency's interpretation of its own regulation does not apply when "the underlying regulation does little more than restate the terms of the statute itself").

But even assuming deference were applicable, before it could defer to LDEQ's specific interpretation, the Court would have to satisfy itself that LDEQ's interpretation is a reasonable reading of the law. *See Matter of Recovery I*, 635 So.2d 690, 696–98 (La. App. 1 Cir. 1994). To do that, the Court must examine the text to determine whether the law is ambiguous, whether it is broad enough to encompass LDEQ's interpretation, and whether LDEQ's interpretation is a reasonable reading in light of the statutory scheme. *See id.* at 696–98 (undertaking this analysis

before deferring); *Kisor v. Wilkie,* 139 S.Ct. 2400, 2415 (2019) (holding court must first "exhaust all traditional tools of construction" as one of the prerequisites to deference) (cleaned up). As explained below, LDEQ's interpretation that "contribute" allows LDEQ to add a significance test conflicts with the term's plain meaning and the statutory scheme designed to prevent NAAQS and increments violations. For the same reason, the doctrine of contemporaneous construction of statutes that FG LA urges is unavailing. FG LA Br. at 22. Under this softer deference doctrine, Louisiana courts may view longstanding agency interpretations of ambiguous text as "persuasive indication" of the statute's meaning. *See Jurisich v. Jenkins,* 1999–0076 (La. 10/19/99), 749 So.2d 597, 602. But the Court cannot approve such an agency interpretation that is "contrary to or inconsistent with the statute." *Id.* (refusing application of contemporaneous construction). And here again, LDEQ's interpretation conflicts with the law's plain meaning and structure.

2. Whether FG LA contributes to violations of the federal air standards.

Petitioners are correct that the text's plain meaning requires denying a PSD permit application when a proposed source's model shows it would have a share in NAAQS or increment violations. *See Bluewater Network v. EPA*, 370 F.3d 1 (D.C. Cir. 2004); *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013) (*Sierra Club I*). In *Bluewater Network*, 370 F.3d 1, the court reviewed the ordinary meaning of identical Clean Air Act language. The challenge there centered on the Act's requirement to regulate snowmobile engine emissions where EPA finds these emissions to "cause, or contribute to" violations in any area of the country that fails to meet the NAAQS. *Id.* at 5, 11. The court rejected petitioners' claim that "contribute," means "significantly contributes." *Id.* at 13. The court examined Webster's and Oxford dictionaries to conclude that the "ordinary meaning" of "contribute" is "to have a share in any act or effect," or "to have a part or share in producing," and "the term has *no inherent connotation as to the magnitude or importance of the relevant 'share' in the effect; certainly it does not incorporate any 'significance' requirement.*" *Id.* (emphasis added). The court accordingly affirmed EPA's decision to regulate snowmobile carbon monoxide emissions, even on the basis of data showing these emissions contributed only one percent of total emissions in a nearby area that failed to attain the NAAQS. *Id.* at 15. Reviewing the generally prevailing meaning of the identical language, the court found no room for LDEQ's desired construction. *See* La Civil Code arts. 9, 11.

The D.C. Circuit in *Sierra Club I* applied similar logic to the very PSD permitting scheme at issue here, rejecting EPA's attempt to create a federal significance levels regulation that "exempt[s] sources from the [air modeling] requirements of the Act." *Sierra Club I*, 705 F.3d at 466. Chiefly, the court rejected the claim that EPA (like LDEQ here) could declare that any contribution below a significance level cannot "cause or contribute" to a violation of the federal air standards, especially in situations where the air might already exceed the NAAQS or increments (like in St. James Parish). *See Sierra Club I*, 705 F.3d at 464–65 (vacating, among other regulations, one that "state[d] that the demonstration required . . . is deemed to have been made if a proposed source or modification's air quality impact is below the SIL."). This prohibited act is precisely what LDEQ did in issuing FG LA its PSD permit, allowing the chemical complex to participate in violations of the federal air standards in St. James Parish.

By contrast, elsewhere the Act and Louisiana air regulations use a version of "significantly contributes," to limit the breadth of the term. *See, e.g.*, LAC 33:III.504.K, 509.B, 531.B.2; 42 U.S.C. §§ 7506a(a), 7492(c)(1), 7426(a)(1)(B), 7547(a)(1), (4); *see Bluewater Network*, 370 F.3d at 13–14 (describing same); *Matter of BASF Corp.*, 538 So.2d 635, 644 (La. App. 1 Cir. 1988) ("It is presumed that every word, sentence or provision in the law was intended to serve some useful purpose, that some effect is to be given to each such provision, and that no unnecessary words or provisions were used.") (cleaned up); *see also* La. Civil Code art. 12 (specifying that if words of the law are ambiguous, "their meaning must be sought by examining the context in which they occur and the text of the law as a whole"). LDEQ's interpretation would do violence to this statutory scheme, effectively writing "significantly contribute to" in a place where the law did not.

Respondents highlight that there remains one federal regulatory provision, 40 C.F.R. § 51.165(b)(2), that uses significance levels even after *Sierra Club I*. *See* LDEQ Br. at 52; FG LA Br. at 21. Respondents suggest this provision's continued existence supports LDEQ's use of significance levels in this case. But this is no help to Respondents; section 51.165(b)(2) still exists only because it allows the converse of LDEQ's approach. *See Sierra Club I*, 705 F.3d at 463, 463–66 (contrasting § 51.165(b)(2), which the court allowed to stand and petitioner did not challenge, with other regulation using "the SILs to exempt a source from conducting a cumulative air quality analysis," which the court vacated). In contrast to the way LDEQ uses significance levels here, section 51.165(b)(2) specifies that PSD permitting agencies must find that a source *contributes* to

a violation of federal air standards—and therefore cannot receive a permit—if the source emits concentrations of a pollutant *above* the significance level. 40 C.F.R. § 51.165(b)(2); *see Sierra Club I*, 705 F.3d at 463, 465–66. That is the opposite of the way LDEQ invokes significance levels here, to deem that FG LA *can construct* even where it would add to NAAQS and increment violations, just because the chemical complex would add *less* than the significance level.

Also contrary to LDEQ's claim, the decision in *Catawba County v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009), does not contradict the result in *Bluewater Network* and *Sierra Club I*. The court acknowledged ambiguity in the term "contribute to" when it is used in combination with at least three other undefined terms that were ambiguous in that context. *See Catawba Cty.*, 571 F.3d at 35 ("nearby," "based on," and "necessary," as used in setting geographic boundaries for NAAQS nonattainment areas). But the court likewise rejected the claim that pollution must "significantly contribute" when the law merely states, "contribute" to NAAQS violations. *Id.* at 38-9. FG LA also raises *Sur Contra la Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000) (rejecting challenge to Puerto Rico power plant's PSD permit). But the court in *Sur* never addressed the legality of significance levels. *Id.* at 448. It resolved the case on a series of other arguments the petitioners had raised concerning the accuracy of air quality data and the efficiency of the facility's pollution controls. *See id.* at 448-49.

A permitting agency does not have the power to contradict the law's plain meaning by citing nonbinding memoranda. In 2018, EPA issued such generalized nonbinding memoranda, in an effort to continue to use the SILs in some circumstances even after *Sierra Club I*. But these memoranda merely offer suggested significance levels, and do not claim that relying on the significance levels to issue permits would be lawful in all circumstances. *See* R. Vol. 34, 8482. Nor could they, after the case law discussed above. On challenge in *Sierra Club II*, the D.C. Circuit held these memoranda are not themselves final agency actions subject to facial attack; courts must assess the significance levels' legality as-applied in individual permitting decisions. *Sierra Club v. EPA*, 955 F.3d 56, 63-64 (D.C. Cir. 2020) (*Sierra Club II*) (explaining "simply quoting" the guidance is insufficient). In this case, LDEQ's use of the significance levels resembles the exact fact pattern that the D.C. Circuit in *Sierra Club I* described as unlawful: using significance levels to authorize an applicant to have a share in pollution that fails to meet the federal air standards. *See Sierra Club I*, 705 F.3d at 465–66. The Court need not determine here whether LDEQ could

properly justify using the significance levels in some other factual circumstance; it suffices to hold that the significance levels cannot absolve FG LA on these facts. The Court finds that FG LA's model shows that the chemical complex would in fact "contribute" to NAAQS and increment violations, based on the plain meaning of the term.

The text is clear. But even if the text were ambiguous, this textual reading is more in line with Congress's protective purpose in establishing the PSD permitting program than Respondents' interpretation. *See* La. Civil Code art. 10. The "emphatic goal of the PSD provisions is to prevent those thresholds [the NAAQS and increments] from being exceeded." *Ala. Power Co. v. Costle*, 636 F.2d 323, 362 (D.C. Cir. 1979); *see also* H.R. Rep. No. 95-294 (May 12, 1977), 1977 U.S.C.C.A.N. 1077, 1087 (1977 WL 16034) (stating in House committee report that "the purpose of the [PSD] permit is to assure that the allowable increments and allowable ceilings will not be exceeded as a result of emissions from any new or modified major stationary source"). And the "principal mechanism" to do this is the "preconstruction review and permit process required for new or modified major emitting facilities." *Ala. Power Co.*, 636 F.2d at 362; *Sierra Club I*, 705 F.3d at 465 (explaining permitting authorities must "prevent violations by requiring demonstration" in the Air Quality Analysis). By contrast, using the significance levels here would flip this statutory scheme on its head; LDEQ would be able to issue PSD permits to new sources, despite the fact that these sources would participate in violations of the NAAQS and increments.

FG LA failed to demonstrate that its emissions would not "cause or contribute to" violations of the federal air standards. LDEQ's decision to issue the PSD permit anyway violated the Clean Air Act permitting law the agency was obligated to apply. The Court REVERSES that decision. *See* La. R.S. 49:964.G (specifying court may reverse decision for being in "violation of constitutional or statutory command," in "excess of the statutory authority of the agency," "[m]ade upon unlawful procedure," or "[a]ffected by other error of law")."

II. Public Trust Doctrine and Agency Duty

The Louisiana Constitution establishes the public trust doctrine, which 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.

In *Save Ourselves*, the seminal public trustee case, the Louisiana Supreme Court interpreted this constitutional mandate as requiring agencies to determine "before granting approval of proposed action affecting the environment, [] 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). The Supreme Court explained that while "the constitution does not establish environmental protection as an exclusive goal, [it] requires 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 Louisiana Environmental Quality Act underscores this duty, mandating that "as the primary public trustee of the environment, [LDEQ] shall consider and follow the will and intent of the Constitution of Louisiana and Louisiana statutory law in making any determination relative to the granting or denying of permits." La. R.S. 30:2014.A(4).

The First Circuit further refined LDEQ's public trustee duty by dictating issues that the agency must address in a written decision before it issues a permit as follows:

(1) Whether the potential and real adverse environmental effects of the proposed facility have been avoided to the maximum extent possible;

(2) Whether 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;

(3) Whether there are alternative projects which would offer more protection to the environment than the proposed facility without unduly curtailing non-environmental benefits;

(4) Whether there are alternative sites which would offer more protection to the environment than the proposed facility site without unduly curtailing non-environmental benefits; and

(5) Whether there are 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 and Pollution Control Co., 633 So.2d 188, 194 (La. App. 1st Cir. 1993).[3]

The Supreme Court has made clear that LDEQ "must act with diligence, fairness and faithfulness to protect this particular public interest in the resources." *Save Ourselves*, 452 So.2d at 1157. The agency's "role as the representative of the public interest does not permit it to act as

[3] In other decisions, the First Circuit has collapsed this 5-factor test into three factors, merging parts (3)–(5) without any alteration to the substance. *See, e.g., in re Oil & Gas Expl.*, 2010-1640, p. 4; 70 So.3d at 104. LDEQ sometimes refers to this inquiry as the "*IT* Requirements" or "*IT* Questions" after the name of the permittee in *Save Ourselves.*

an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission." *Id.* (citing *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n,* 449 F.2d 1109, 1119 (D.C. Cir. 1971)). LDEQ "is required to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings; and it must also articulate a rational connection between the facts found and the order issued." *Save Ourselves*, 452 So.2d at 1159.

A. $PM_{2.5}$ and NO_2 Public-Health Standards.

Petitioners first argue that LDEQ failed to discharge its duty when it allowed FG LA's emissions of $PM_{2.5}$ and NO_2 that violate federal air standards. Regardless of whether LDEQ correctly followed the PSD permitting rules concerning these pollutants—the focus of the Clean Air Act section above—the agency's public trust duty required it to "avoid[]" the "potential and real adverse environmental effects of the proposed project" to the "maximum extent possible." *In re Oil & Gas Expl., Dev., & Prod. Facilities, Permit No. LAG260000*, 2010-1640, p. 4 (La. App. 1 Cir. 6/10/11); 70 So.3d 101, 104. Evidence in the record must support LDEQ's public-trust determination, "and [LDEQ] must articulate a rational connection between the facts found and the order, or in this case, the permit issued." *Id.* LDEQ's decision does not reflect this process; LDEQ dismissed the public-health threat from $PM_{2.5}$ and NO_2 as unrealistic when the record shows the opposite.

This Court will first address FG LA's argument that LDEQ met its public trustee burden solely by complying with the PSD permitting rules. FG LA Br. at 31. ***As stated above, the Court finds that LDEQ did not comply with the Act's PSD permitting rules.*** But even assuming it did, the constitutional public trust duty imposes an additional legal standard. It demands LDEQ go beyond its regulations if necessary to avoid potential environmental harm *to the maximum extent possible*. *See Save Ourselves*, 452 So.2d at 1157, 1160. From this Court's review it appears that the agency may have erred by assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates.

In the instant case, FG LA's air quality model shows the chemical complex's emissions would add to violations of health-based, federal air standards in the parish *even if* FG LA complied with its PSD permit. R. Vol. 34, pp. 8449 n.40, 8481–83. FG LA *does not explain* how this would equate to avoiding harm to the "maximum extent possible." Rather, the air modeling illustrates

remaining potential for environmental harm, after regulatory review, that LDEQ must assess as a public trustee. *See Save Ourselves*, 452 So.2d at 1157, 1160.

This Court now turns to LDEQ's arguments. The agency argues, first, that it can discount FG LA's model results as unrealistically conservative, and second, suggests that the air quality violations the model predicts are located where they would not adversely impact members of the public anyway. The Court agrees with Petitioners that LDEQ failed to support either of these conclusions with evidence in the administrative record. First, LDEQ asserts that the modeled violations "do[] not necessarily mean that there are or will be actual exceedances of these standards," because the model relies on supposedly conservative assumptions. R. Vol. 34, p. 8450. LDEQ cannot simply dismiss the model's conclusions on the hope that these violations may not appear in real life. The public trust duty requires LDEQ to address "potential" as well as "real," environmental harm. *See In re Am. Waste,* 633 So.2d at 194. And LDEQ offers no evidence that would contradict the model's conclusions.

To the contrary, FG LA's model is the *only record evidence* that evaluates criteria air pollutant concentrations in St. James Parish following the chemical complex's operation. FG LA prepared this evidence according to federal guidelines, LDEQ approved it, and LDEQ relied upon it to issue the PSD permit. *See* 40 C.F.R. Part 51, App. W § 9.1(b) (stating that "air quality model estimates . . . are the preferred basis for air quality demonstrations"). This evidence shows violations of public-health standards for 24-hour $PM_{2.5}$ and 1-hour NO_2 across the parish. Moreover, as Petitioners explain, these results are not an aberration. In 2011, EPA sent a letter warning LDEQ that a nearby facility's air modeling showed that the air in St. James Parish already exceeded or threatened to violate federal air standards for $PM_{2.5}$ and NO_2, in addition to two other pollutants.[4] ***LDEQ's lack of support in rejecting modeling data it approved, data that contradicts the agency's conclusions, is arbitrary and capricious decisionmaking.*** *See* La. R.S. 49:964.G (stating court may reverse arbitrary or capricious or unsupported decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (specifying agency action "would

[4] Letter from Jeffrey Robinson Chief, Air Permits Section U.S. Envtl. Protec. Agency, Region 6 to Tegan Treadaway, Louisiana Dep't of Envtl. Quality, p. 8, (Jan. 7, 2011), https://edms.deq.louisiana.gov/app/doc/view.aspx?doc=7830225&ob=yes&child=yes, cited in R. Vol. 30, pp. 7442-7443, EDMS 11960006, Petitioners' Nov. 26, 2019 Supp. Comments, p. 10–11 & n.62.

be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency").

LDEQ makes the second argument that "the modeled exceedances are not located on residential property, property that is generally accessible to the public, or any other location where long-term exposure to emissions could be reasonably anticipated," asserting this means "the health of those living in the vicinity of the FG LA Complex will not be adversely impacted." R. Vol. 34, p. 8452. But the record belies this statement, both concerning the locations and concerning the health risks from the violations. To begin, the mapped violations do pose a threat to several residential areas that border these violations, as Petitioners point out. In particular, two of the $PM_{2.5}$ NAAQS violations in the southern part of the Parish would take place near the community of Burton Lane, alongside its only public road. *See* R. Vol. 34, pp. 8451–52 (mapping violations); R. Vol. 28, p. 6947 (providing map of St. James Parish communities).

LDEQ's reasoning also is unsupported and unresponsive because the agency focuses only on avoiding *long-term* exposures in residential areas, while ignoring that the $PM_{2.5}$ and NO_2 violations are of *short-term* standards and could harm the public's health with more limited contact. *See* R. Vol. 34, p. 8452. The *1-hour* NO_2 and the *24-hour* $PM_{2.5}$ standards protect against negative health impacts EPA concluded could come from even just hour- or day-long exposures to excessive levels of these pollutants. *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342, 1345, 1347 (D.C. Cir. 2012) (explaining that EPA promulgated the 1-hour NO_2 standard because it found a relationship between "short-term" exposure to air pollution above this standard and "various types of respiratory morbidity," such as asthma and childhood respiratory illness, especially near public roads). A plant worker on her shift, an elderly person and grandkids spending an afternoon fishing from the road next door, or someone who visits an area experiencing violations all could suffer harmful health impacts from these exposures. LDEQ owes a public-trust duty to the whole public. *See Save Ourselves*, 452 So.2d at 1157 (specifying that agency acts as "representative of the public interest"). And the agency's failure to address the potential for these individuals to suffer harm was arbitrary and capricious and unsupported. *See* La. R.S. 49:964.G; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (specifying agency action "would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem"). Simply put, LDEQ failed to address the core problem posed by FG LA's model, the only record evidence on point: people

working, living, traveling, or recreating in St. James Parish could suffer serious health consequences from breathing this air, even from short-run exposure. ***LDEQ's decision to authorize these potential public health violations, without offering evidence to show it had avoided the risk to the maximum extent possible, was arbitrary and capricious and against the preponderance of the evidence under the agency's public trust duty.***

B. Cumulative Impacts of Toxic Air Pollutant

LDEQ found that "emissions from the FG LA Complex, together with those of nearby sources . . . , will not allow for air quality impacts that could adversely affect human health or the environment." R. Vol. 35, 8604. Petitioners claim that the record does not support LDEQ's conclusion because the agency failed to do a cumulative assessment of FG LA's toxic air pollutants together with those from other sources. As Petitioners argue, LDEQ had ample cause to investigate further as a public trustee. EPA data shows that Welcome residents already face some of the worst risk of cancer from industrial air pollution in the nation, and the chemical complex's permits would allow FG LA to greatly increase the amount of cancer-causing toxic air pollutants emitted in the area. Specifically, Petitioners cite record evidence showing that the area is already inundated with toxic air pollutants from existing and planned industrial facilities based on emissions information from major source facilities located in the area and maps showing facility locations. R. Vol. 28, 6932-6940, 6947.

In addition, Petitioners point to a ProPublica/Advocate study that found, based on EPA data, the area around FG LA's site is more toxic with cancer-causing chemicals than 99.6 percent of industrialized areas in the country. R. Vol. 30, 7436. At the public hearing on the air permits, area residents repeatedly expressed alarm to LDEQ about the harm from the toxic pollution to their lives and health. R. Vols. 25, 6030-6038. Additionally, Petitioners cite data from EPA's environmental justice screening tool called EJSCREEN, which shows that the communities closest to the FG LA site are in the 95-100th percentile for cancer risk associated with exposure to toxic air pollutants from industrial sites. 3rd Supp. R. 8957.

The record shows that FG LA's permits allow it to emit large quantities of cancer-causing toxic air pollutants. LDEQ acknowledged ethylene oxide, a toxic air pollutant that is a known human carcinogen, is one of the main pollutants responsible for EPA's high cancer risk ranking

for the census tract for the communities closest to the FG LA site (i.e., Welcome and St. James). 3rd Supp. R. 8964; *see also* R. Vol. 29, 7131 (census map). LDEQ also recognized that benzene, another toxic air pollutant known to cause cancer in humans, drives EPA's cancer risk ranking for this census tract. 3rd Supp. R. 8964. The permits that LDEQ issued to FG LA allow the company to emit 7.7 tons per year of ethylene oxide and 36.58 tons per year of benzene. R. Vol. 34, 8440. Petitioners showed that only one facility in the state, using data from EPA's Toxic Release Inventory, reported that it emitted more ethylene oxide than FG LA's permits allow. Petitioners also showed that for benzene, just one facility in the state reported that it emitted greater amounts than FG LA's permits allow. R. Vol. 28, 6903-04. LDEQ argues that the comparison is not fair because the FG LA figures are permitted or allowable amounts and not actual emissions as reported by the facility. Nonetheless, LDEQ does not deny that its facility would emit large quantities of these carcinogenic toxic air pollutants.

The record thus shows that LDEQ had information showing that the area near FG LA's facility already experiences substantial amounts of toxic air pollutants, that LDEQ acknowledged that EPA's cancer risk figures for the area were driven by ethylene oxide and benzene, and that the permits allow FG LA to emit a great deal more ethylene oxide and benzene.

LDEQ admits that it did not do a cumulative assessment of FG LA's toxic emissions together with other sources. Instead, it said that it "[u]s[ed] actual stack heights and locations; release parameters (e.g., velocity, temperature); permitted emission rates; local meteorological data; and EPA's 'preferred/recommended' dispersion model (AERMOD)" to determine that "emissions from the FG LA Complex, together with those of nearby sources . . . , will not allow for air quality impacts that could adversely affect human health or the environment." R. Vol. 35, 8604. But LDEQ does not dispute Petitioners' assertion that this analysis only included information from FG LA's facility—i.e., that the model only used the stack heights/locations, release parameters, and permitted emission rates of FG LA's facility. *LDEQ does not explain how analyzing data about FG LA's facility alone could support its conclusion on the cumulative emissions, i.e., that "emissions from the FG LA Complex, together with those of nearby sources . . . , will not allow for air quality impacts that could adversely affect human health or the environment."* R. Vol. 35, 8604 (emphasis added).

LDEQ only cites generally to Section VI of its Basis for Decision where the agency says that its ambient air standards for toxic air pollutants "contemplate multiple sources of pollution and establish protective limits on cumulative emissions that should ordinarily prevent adverse air quality impacts." R. Vol. 34, 8448. But Petitioners point out that LDEQ's statement is misleading because the ambient air standards are limits on the concentration of toxic air pollutants expressed in micrograms per cubic meter of air under LAC 33:III.1501, Table 51.2, and LDEQ did not determine the ambient air pollutant concentrations of FG LA's toxic emissions in combination with emissions from other sources. Petitioners' Reply Br. at 25. LDEQ does not dispute this point. Furthermore, LDEQ cannot determine Welcome's full risk for cancer from exposure to toxic air pollutants if the agency does not consider FG LA's 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.

For these reasons, ***the Court finds that LDEQ's conclusion that "the FG LA Complex, together with those of nearby sources . . . , will not allow for air quality impacts 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.*** *See, e.g., In re Oil & Gas Expl., Dev., & Prod. Facilities,* 70 So.3d 101, 110-11 (finding LDEQ decision was arbitrary and capricious and not supported by a preponderance of the evidence thus violating public trustee requirements where the studies the agency relied on to show that the discharges had no significant environmental impact were not tailored to the very environment at issue). 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. LDEQ "is duty bound to demonstrate that it has properly exercised the discretion vested in it" by making "basic findings supported by evidence and ultimate findings that flow rationally from the basic findings." *Save Ourselves,* 452 So.2d at 1159–60. LDEQ "must articulate a rational connection between the facts found and the order," or in this case, the permit issued. *Id.* LDEQ did not do that here.

Additionally, ***the Court finds*** as unpersuasive LDEQ's assertion that the complex is subject to applicable federal and state emission standards or that its modeling guidance does not require a cumulative assessment of the toxic air emissions. As the Supreme Court made clear in *Save*

Ourselves, the agency's public trust duty requires it to examine potential adverse effects that exist beyond a rote application of regulatory standards or guidance documents. 452 So.2d at 1160 ("[I]t appears that the agency may have erred by assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates.").

C. Ethylene Oxide

Petitioners also claim LDEQ violated its public trustee duty because the agency's conclusion that the proposed permits have minimized or avoided potential and real adverse environmental impacts of FG LA's ethylene oxide emissions to the maximum extent possible is arbitrary and capricious and not supported by a preponderance of the evidence in the record.

LDEQ has authorized FG LA to emit 7.7 tons (or 15,400 pounds) per year of ethylene oxide, which (as discussed above) is an amount that exceeds the amount that any plant in the state, except for one, has reported that it actually emits. R. Vol. 34, 8440. LDEQ lists ethylene oxide as a "known and probable human carcinogen." LAC 33:III.5112, Table 51.1. Petitioners show that EPA is in the process of reducing ethylene oxide emissions nationwide, R. Vol. 30, 7440, and that one state has banned the construction of new facilities that emit ethylene oxide within 10 miles of a school or park. Petitioners Orig. Br, p. 28 (citing 415 Ill. Comp. Stat. 5/9.16). In 2016, EPA revised its cancer risk assessment for ethylene oxide, finding that inhaling much smaller concentrations of the chemical than previously understood could lead to excessive risk of contracting cancer. EPA's review was based on a 10-year-long, peer-reviewed study. R. Vol. 28, 6910-6911 (citing *Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide*, EPA (Dec. 2016)).

In its Basis for Decision, LDEQ explains that EPA updated its inhalation unit risk factor for ethylene oxide in response to this study and established a concentration for long-term exposure of 0.02 ug/m^3 (i.e., the limit on the amount of ethylene oxide measured in micrograms per cubic meter of air). R. Vol. 34, 8453. This limit reflects EPA's upper risk threshold, above which the agency determined that inhaling the air presents an unacceptable cancer risk. R. Vol. 28, 6910-6911. LDEQ's regulations contain a limit on airborne concentrations for ethylene oxide of 1.0 ug/m^3, but, as no party disputes, this standard (or limit) has not been updated in 25 years and is 50 times less protective than the EPA limit. LAC 33:III.5112, Table 51.1.

FG LA would emit ethylene oxide into the air from the two identical ethylene glycol manufacturing plants that FG LA plans to build at the chemical complex, each permitted for 3.85 tons per year of the toxic air pollutant for a total of 7.7 tons per year facility-wide. R. Vol. 33, 8108 (Ethylene Glycol Plant 1 permit); R. Vol. 31, 7738 (Ethylene Glycol Plant 2 permit). Most of these emissions would come from combusting the units' waste gases in thermal oxidizers (one at each of the ethylene glycol plants) that together account for 5.76 tons per year (or two-thirds) of the total 7.7 tons per year allowed under the permits. R. Vol. 33, 8129-8130; Vol. 31, 7757-7758; Petitioners' Reply Br. at 35. The thermal oxidizers release the chemicals that they cannot completely combust through cylindrical stacks that stand 150-feet tall. R. Vol. 31, 7737, 7752-53. The leftover ethylene oxide emissions that are not fully combusted would be emitted from the top of the thermal oxidizers' stacks into the air, where they can travel to surrounding areas. *See* Petitioners Orig. Br. at 9; R. Vol. 31, 7737, 7752-53.

FG LA's modeled ethylene oxide emissions show a maximum ground level concentration of 0.41 ug/m^3 at the facility border (or "fenceline"). R. Vol. 34, 8450. *See also* FG LA Br. at 35. FG LA created a contour map that illustrates the extent of its modeled ethylene concentrations at ground level that exceed EPA's limit of 0.02 ug/m^3. R. Vol. 19, 4739, 4766 (contour map); *see also* R. Vol. 34, 8454-8455; FG LA Br. at 35-37. The map appears to show that ethylene oxide concentrations in excess of EPA's limit stop short of an elementary school, which is approximately one mile from FG LA's site, and that they reach the river road that runs along the residential community of Union (as contrasted with the Illinois 10-mile restriction). R. Vol. 19, 4766; Vol. 14, 3505 (map showing location of school).

LDEQ made several findings about FG LA's ethylene oxide emissions based on the company's modeled emissions and map. LDEQ found that FG LA's ethylene oxide will not violate the state ambient air standard beyond the fenceline and therefore the permits will not allow for air quality impacts that could adversely affect human health or the environment in Welcome or the surrounding areas. R. Vol. 34, 8448; Vol. 35, 8538. LDEQ also found that residential areas would not experience concentrations that would exceed EPA's cancer risk threshold limit of 0.02 ug/m^3. Petitioners assert that these findings are arbitrary and capricious and not supported by a preponderance of the evidence, and ***the Court agrees***.

Specifically, Petitioners argue that FG LA's model is based on an unverified assumption about the effectiveness of its emission controls that is not required in the permit, resulting in ethylene oxide emissions that are merely aspirational but not grounded in the permit. *See* Petitioners' Reply Br. at 33. Petitioners urge that LDEQ violated its public trustee duty by basing its decision on modeled emissions for a dangerous cancer-causing pollutant, without verifying the assumption, and without making the assumption a condition of the permit. ***The Court agrees.***

FG LA's ethylene oxide modeling is based on the company's assumptions, including its assumption that its thermal oxidizers will achieve a destruction and removal efficiency of 99.9% as shown in the emissions calculations. R. Vol. 31, 7737; *see also* R. Vol. 3, 0736 and R. Vol. 4, 0842 (emission calculations for the thermal oxidizers showing ethylene oxide destruction rate at 99.9%, resulting in 2.88 tons per year from each thermal oxidizer being emitted to the air, which together total 5.76 tons per year); *see also* FG LA Br. at 34, 41-42. As Petitioners' correctly point out, the 99.9 percent destruction and removal rate for ethylene oxide is a hollow promise that the permits do not actually require. Petitioners Reply Br. at 36-37; R. Vol. 33, 8131-8133. Instead, as Petitioners show and FG LA admits, the permits only require the thermal oxidizers to reduce ethylene oxide by 98 percent. R. Vol. 31, 7759 (Specific Requirement 7) and R. Vol. 33, 8131 (Specific Requirement 8); FG LA Br. at 41-42. This nearly two percent difference in efficiency makes a substantial difference in yearly emissions. If the two thermal oxidizers only destroy 98 percent of the ethylene oxide, they would emit 20 times more of the toxic pollutant than FG LA "expects" in the model. Petitioners Reply at 37. As Petitioners further argue, and Respondents do not dispute, LDEQ did not require a vendor confirmation or any support that FG LA's thermal oxidizers would even be capable of achieving a 99.9 percent destruction and removal rate, even though the agency did require such a guarantee for nitrogen oxides (NO_x) emissions. *Id.*; R. Vol. 34, 8491-8493).

Moreover, relying on its factual findings about ethylene oxide, LDEQ determined in its public trust analysis that "there are no mitigating measures that would offer more protection to the environment than the facility as proposed without unduly curtailing non-environmental benefits." R. Vol. 34, 8458. LDEQ then ultimately determined that "the proposed permits have minimized or avoided potential and real adverse environmental impacts to the maximum extent possible and that social and economic benefits of the FG LA Complex outweigh its adverse environmental

impacts." R. Vol. 34, 8479. ***The Court finds 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.***

The Supreme Court made clear that LDEQ "is duty bound to demonstrate that it has properly exercised the discretion vested in it" by making "basic findings supported by evidence and ultimate findings that flow rationally from the basic findings." *Save Ourselves,* 452 So.2d at 1159–60. The Supreme Court went on to say that LDEQ "must articulate a rational connection between the facts found and the order," or in this case, the permit issued. *Id.* LDEQ did not do this. LDEQ did not comply with its duty to consider the potential and real adverse effects of FG LA's ethylene oxide emissions because it did not require the company to model its full ethylene oxide emissions. Moreover, the record does not support LDEQ's conclusion that there are "no mitigating measures that would offer more protection to the environment than the facility as proposed without unduly curtailing non-environmental benefits." R. Vol. 34, 8458. For instance, LDEQ could have easily included a requirement that FG LA's thermal oxidizers meet and maintain a 99.9 percent combustion rate along with a vendor guarantee.

D. <u>Environmental Justice</u>

Petitioners assert that LDEQ's environmental justice analysis was arbitrary and capricious and did not comply with the agency's public trustee duties, as detailed by the Supreme Court in *Save Ourselves*. Additionally, Petitioners assert that the agency's factual conclusion that Welcome is not disproportionately affected by air pollution was arbitrary and capricious, and not supported by a preponderance of the evidence. ***The Court agrees as to both issues.***

It is clear from the record, briefing, and oral argument that disproportionality and environmental justice issues are at the very heart of this case. Environmental justice issues were prominent in the public comments, as well as the public hearings held by LDEQ. Indeed, LDEQ itself discussed the topic in its decision. In its decision, LDEQ defines "environmental justice" as:

> [T]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial operations.

R. Vol. 34, 8471. To meet its own definition, LDEQ would need to show that it minimized the disproportionate impacts of its permitting decisions in order to avoid even unintentionally discriminatory effects from state actions.

LDEQ's definition of "fair treatment" requires more of the agency than mere lip service or opportunities for public involvement. R. Vol. 34, 8471-8472. Rather, it demands "***active and affirmative protection.***" *See Save Ourselves* at 1157 (Emphasis added). Although the record shows that the demographics in Welcome are not in dispute, nowhere in its decision does LDEQ weigh, or even acknowledge, this vital contextual information. *See, e.g., Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1370 (D.C. Cir. 2017) (affirming the agency's environmental justice analysis in part because the decision "*did* recognize the existence and demographics of the neighborhood in question."). ***This Court holds that, on the facts of this case, an environmental justice analysis was mandatory under the constitutional protections of Save Ourselves.***

Additionally, neither La. R.S. 49:964.G nor *Save Ourselves* contain an exception for discretionary agency action, and thus such actions may be set aside if they are arbitrary or capricious or inconsistent with the agency's public trustee duty. Once LDEQ chose to consider environmental justice issues as a matter of discretion, it had a duty to do so in a lawful way: one which was non-arbitrary, was supported by the preponderance of the evidence, was performed with procedural rectitude, and involved individualized consideration. La. R.S. 49:964.G; *Save Ourselves*, at 1159. This LDEQ failed to do.

In its Basis for Decision, LDEQ offers two reasons for dismissing the environmental justice concerns posed by the project. First, the agency argues that the project complies with the applicable emissions limits, and thus there is no adverse effect that could be experienced disproportionately. However, as Petitioners describe, the record shows that emissions from the project will, in fact, exceed the health-based NAAQS for short-term harm from $PM_{2.5}$ and NO_2.

Relying on its assessment of the project's compliance with emission limits, LDEQ did not consider what effect the project's emissions would have on nearby communities in the environmental justice section of its decision. Instead, LDEQ focused on the *current* pollution burden in Welcome without adding FG LA's pollutants to that burden, and found in its decision that "residents of the community closest to the FG LA complex do *not* bear a disproportionate

share of the negative environmental consequences resulting from industrial operations" (emphasis in original). R. Vol. 34, 8475. ***However, because the undisputed record evidence shows that the project's emissions have the potential to result in harmful health consequences for members of the public nearby,*** *supra at Section II.A.*, ***the Court finds that failing to consider those effects was arbitrary and capricious.***

Additionally, LDEQ's finding is directly contrary to evidence in the record showing that Welcome *is* disproportionately affected by air pollution. EJSCREEN, a tool developed by EPA to identify overburdened communities, shows that members of Welcome are in the 86th percentile for air pollution-related cancer risk in the State of Louisiana, meaning that they face a higher cancer risk from air pollution than the vast majority of Louisiana residents. 3rd Supp. R. p. 8957. The pollution-related risk faced by these communities is even more conspicuous when considered on the national scale: EJSCREEN shows that residents of Welcome are in the 95th-100th percentile nationally, meaning that Welcome is one of the most burdened communities in the United States. *Id.* Despite relying on EJSCREEN information in its original decision, when LDEQ was ordered by this Court to consider the concerns raised by an updated version of EJSCREEN[5] LDEQ chose to disregard EJSCREEN's findings. Instead, the agency reaffirmed its conclusion that Welcome is not disproportionately affected by air pollution, as well as the decision to issue the permits at issue.

Petitioners argue that the analysis by LDEQ dismissing EJSCREEN findings is overly-broad and fails to consider the individualized situation, and that the disproportionality in Welcome has been obscured by less significant regional data. Petitioners urge that the "individualized consideration" mandated by *Save Ourselves* is uniquely important when addressing environmental justice issues presented by a project and cannot be accomplished when an agency analyzes emission trends taking place all over the region in order to dismiss local concerns and localized disproportionality. ***The Court agrees.***

To justify disregarding the EJSCREEN evidence, LDEQ argues that the information does not reflect substantial reductions in emissions that have occurred since the information was

[5] LDEQ's original decision relied on an outdated version of EJSCREEN, which showed that the pollution-related cancer risk for Welcome was comparable to or less than the state average. On motion of Intervenor Alexander and pursuant to La. R.S. 30:2050.21(E), this Court ordered LDEQ to consider the more recent EJSCREEN information, which reflects the figures cited in this Reasons for Judgment. The Court ordered LDEQ to make it part of the administrative record and gave LDEQ an opportunity to change its decision or analysis in light of the new information pursuant to La. R.S. 30:2050.21(E).

published in 2014, and that these reductions dismiss the concerns regarding the disproportionate burden in Welcome portrayed by EJSCREEN.[6] However, LDEQ's irrational approach to data in the trends analyses in both its original and supplemental decisions likewise renders those analyses arbitrary. In its original decision, when LDEQ conducted its emission trends analysis, it arbitrarily omitted key data without explanation. LDEQ considered trends in permitted emissions in the five-mile area surrounding the proposed FG LA site, recognizing this radius as an appropriately focused geographical area, but it only considered trends in criteria pollutants. It entirely omitted toxic pollutant emissions — a critical part of the analysis. R. Vol. 34, 8477. LDEQ offered no explanation for this omission.

Yet when it considered trends in actual emissions it included toxic pollutants, but — without explanation — then broadened the geographic view to parish-wide and so did not capture the impacts on the communities actually neighboring the proposed FG LA chemical complex. R. Vol. 34, 8476-8477. The agency relied on this parish-wide analysis to conclude that there were "dramatic declines" in toxic and criteria pollutant emissions since the mid-1990s, but with respect to toxics, the agency's analysis does not support such a conclusion about the five-mile area surrounding the FG LA site. R. Vol. 34, 8477.

In identifying downward trends in its supplemental decision, LDEQ utilized inconsistent scopes of analysis, depending on what type of pollutant it was discussing as well as whether it was considering permitted or actual emissions. While *local* trends in air emissions could have the significance LDEQ asserts, the trends alleged by LDEQ in this case were not specific to Welcome, but rather captured emission reductions taking place as far away as 100 miles from Welcome — effectively capturing *regional* trends. 3rd Supp. R., 8965, n.14.

LDEQ did not show a rational connection between emission decreases so far away and the issue the analysis was supposed to be aimed at — whether *Welcome* is disproportionately burdened by air pollution.[7] *Save Ourselves*, at 1159 ("[T]he agency is required to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings."). For

[6] LDEQ also argued that the EJSCREEN numbers can be disregarded because EJSCREEN "grossly overestimates" public exposure to pollution. However, LDEQ's argument regarding EJSCREEN's exposure model is arbitrary and capricious, because it is contrary to substantiated competent evidence.

[7] This Court does not hold that a 100-mile radius could *never* be an appropriate geographical scope to utilize in evaluating the disproportionate pollution burden in a given town or area. However, LDEQ must provide a reasonable basis for choosing such an analysis in its basis for decision and must then consistently apply that rationale if it is to be affirmed upon judicial review.

example, when considering actual ethylene oxide emission trends in its supplemental decision, LDEQ utilized a 27-mile radius to identify decreases. However, when considering *permitted* emissions of the same pollutant, LDEQ utilized a *100-mile* radius for its analysis. Both scopes lacked explanation of their connection to air quality in Welcome. And for benzene, LDEQ utilized a *third* scope of analysis, analyzing trends only within the parish, without explaining why a political boundary is an appropriate scope of analysis for air pollution. 3rd Supp. R., 8965, n.14, 16.

Significantly, these analyses omitted an analysis of benzene emissions trends utilizing either the 27- or 100-mile scope utilized by the agency for ethylene oxide, and also omitted data regarding the trends of permitted emissions using a 27-mile radius, or the trends of actual emissions using the 100-mile radius. As with LDEQ's first environmental justice decision, this approach lacks rationality.

Use of such an inconsistent and selective approach makes it nearly impossible to determine the significance of the alleged trends, compared either with each other or with the information they were intended to rebut (the EJSCREEN data, which was localized to Welcome). The data relied on by LDEQ reveals little about the emissions trends in the communities most likely to be impacted by FG LA's emissions. Nor does LDEQ's analysis fully capture the future but looming build-out of petrochemical plants in the area, much of which has already been permitted by LDEQ. R. Vol. 28, 6867, 6939-6940, 6945-6967. Environmental justice is an inherently local issue, and its effects can and do vary from place to place, or even within a single community. That is precisely what is meant by "disproportionality."

LDEQ further argues that EJSCREEN cannot provide the basis for a permitting decision but admits that "EJSCREEN is a screening tool." The agency's view is that "[u]sers of EJSCREEN should supplement the results with additional information and analysis as the Department has done." LDEQ Br. at 38. However, such additional information and analysis will carry no weight with a reviewing court when that additional analysis is performed in a way that is arbitrary or capricious or is in violation of the agency's public trust duties. Because LDEQ has failed to offer a rational connection between the regional trends cited by the agency and air quality in Welcome, the evidence offered by LDEQ does not rebut the localized EJSCREEN data.

Thus, because the agency's environmental justice analysis showed disregard for and was contrary to substantiated competent evidence in the record, it was arbitrary and capricious. And for these reasons, the actual balance of costs and benefits struck by LDEQ was arbitrary, and clearly gave insufficient weight to environmental protection. ***Thus, it is this Court's responsibility to reverse.*** *Save Ourselves*, at 1159.

E. Alternatives Sites

Petitioners assert that LDEQ's conclusion that there are no alternative sites for FG LA's proposed complex that would offer more protection to the environment than the proposed site without unduly curtailing non-environmental benefits is arbitrary and capricious and not supported by a preponderance of the evidence in the record. LDEQ and FG LA argue that the alternatives analysis conducted by FG LA and ratified by LDEQ adequately addressed alternative sites and selected the proposed site as the only rational choice based on objective factors.

Petitioners' argument rests on the elimination of five sites in Ascension Parish from contention, and their assertion that such an elimination was arbitrary. Both LDEQ and FG LA, in their briefs and argument, now respond that locating the proposed complex in Ascension Parish was an impossibility, as the parish was anticipated to be in nonattainment status under the Clean Air Act.[8] They argue in briefs that this status would require FG LA to purchase emissions reduction credits that were unavailable – thus making construction in Ascension impossible and the elimination of those sites "necessary and proper." However, the record does not reflect basic findings that lead to that conclusion.

In its Basis for Decision, LDEQ merely referred to locating the complex in Ascension Parish as "effectively preclude[d]," presumably by the cost of applicable offset requirements for NOx and volatile organic compounds (VOCs), and made no mention of emissions reduction credits, the number of credits that FG LA would have needed to purchase, or the number of credits available. R. Vol. 34, 8443, n.23. The record, in other words, only supports the conclusion that locating in Ascension Parish would be more difficult or more costly to FG LA, not that it was impossible. The record raises the question of how much *more* difficult or costly the alternative

[8] According to the record, Ascension Parish was anticipated to be classified nonattainment under the Clean Air Act, but was later designated "attainment/unclassifiable." R. Vol. 34, 8443.

sites would be, and whether they would still be feasible. *See In re Am. Waste*, 633 So.2d at 194. But Respondents' briefing ignore that data.

For this Court to uphold LDEQ's decision, the agency's ultimate conclusions must be based on basic facts present in the record. If construction in Ascension Parish were factually impossible, LDEQ must say so and provide the basic facts to lead to that conclusion – something the agency failed to do. ***As written, the conclusion regarding alternative sites presented by FG LA and LDEQ was reached arbitrarily and is not supported by a preponderance of the evidence.***

F. Cost-Benefit Analysis

Petitioners assert that LDEQ violated the public trust doctrine by failing to carry out its duty to conduct a fair and rational balancing of environmental costs against the benefits of the proposed complex. They claim that as a result, LDEQ arbitrarily and capriciously determined that the benefits of FG LA's chemical complex would greatly outweigh its adverse environmental effects.

The Louisiana Constitution requires that LDEQ fully and carefully balance "environmental costs and benefits," giving consideration to the "economic, social and other factors" of its decisions. *Save Ourselves,* 452 So.2d at 1157. To perform this analysis, LDEQ must determine whether "the environmental impact costs balanced against the social and economic benefits of the project demonstrates that the latter outweighs the former[.]" *In re General Permit*, 2010-1640 (La. App. 1 Cir. 6/10/11); 70 So.3d 101, 104. As the First Circuit explained, while "[h]arm to the environment cannot always be quantified as easily as the economic benefits derived from taxes and salaries," LDEQ must conduct a balancing "to insure protection of the environment without too high a cost to the economy and our way of life." *In re CECOS Int'l*, 574 So.2d 385, 392 (La. App. 1 Cir. 1990).

Petitioners claim that LDEQ failed to put any harm that could potentially result from the chemical complex on the scale—that the agency only recognized the purported economic and social benefits. Petitioners' Orig. Br. at 57-60, Petitioners' Reply Br. at 59-60. Petitioners claim that LDEQ wrongfully "zeroed out" all environmental impact costs after conducting its regulatory compliance analysis.

More specifically, Petitioners claim that LDEQ failed to weigh, among other things, the impacts of FG LA's $PM_{2.5}$ and NO_2 emissions that exceed federal air standards around Burton Lane and elsewhere in the parish, the effect of ethylene oxide emissions that exceed EPA's cancer-risk threshold, cumulative impacts of certain toxic air pollutants, the negative consequences of the facility's greenhouse gas emissions. In terms of greenhouse gases, Petitioners highlight that LDEQ never weighed the impacts associated with the 13.6 million tons per year of greenhouse gases that LDEQ has authorized FG LA to emit, against the purported benefits of the project, and the added environmental burden to already over-burdened majority-Black communities.

LDEQ does not dispute Petitioners' assertion that it failed to put any of these environmental costs on the scale. Instead, the agency points to its conclusion that potential and real adverse impacts will be "within allowable federal and state standards[.]" R. Vol. 35, 8538 (response to comment 76). Application of environmental standards alone does not zero out all adverse impacts or eliminate the need for the agency to weigh the impacts along with any benefits associated with its permit decision. As explained in *Calvert Cliffs'*, the foundational case relied upon by the Louisiana Supreme Court when first detailing LDEQ's public trustee duty, *Save Ourselves*, 452 So.2d at 1157, compliance with environmental standards does not ameliorate an agency's duty to consider impacts of pollutants regulated under those standards. 449 F.2d 1109, 1122–23 (D.C. Cir. 1971) (recognizing that "there may be significant environmental damage . . . but not quite enough to violate applicable . . . standards"); *see also WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1227–28 (D. Colo. 2015) (order vacated, appeal dismissed on mootness grounds) (finding compliance with the NAAQS does not excuse an agency from analyzing air quality environmental impacts because a project may comply with Clean Air Act standards but still impact the environment); *Friends of Buckingham*, 947 F.3d at 86 (vacating and remanding decision where agency "failed to individually consider the potential degree of injury to the local population independent of NAAQS and state emission standards"). Furthermore, the Clean Air Act does not require EPA when setting the NAAQS to "definitively identify pollutant levels below which risks to public health are negligible." *American Trucking Ass'n v. EPA*, 283 F.3d 355, 369-70 (D.C. Cir. 2002). When it makes NAAQS determinations, "EPA does not purport to set the NAAQS at a level which would entirely preclude negative health

outcomes." *North Carolina v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812, 822 n.6 (W.D.N.C. 2009), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010).

Petitioners assert that LDEQ's failure to weigh FG LA's enormous greenhouse gases is especially egregious given coastal Louisiana's particular vulnerabilities from the effects of greenhouse-gas induced climate change, such more intense hurricanes, sea level rise, catastrophic flooding, coastal land loss, among other impacts. LDEQ acknowledges that greenhouse gases affect the climate. R. Vol. 34, 8458. And neither LDEQ nor FG LA dispute Petitioners' claim (based on U.S. Energy Information Agency data) that the greenhouse gases authorized under permits increase Louisiana's total energy related greenhouse gas emissions by 6.5% above 2016 levels or that 13.6 million tons per year is equivalent to the yearly greenhouse gas emissions of 3.5 coal-fired power plants.

Yet rather than assessing the climate-related impacts of FG LA's emissions, LDEQ avoided addressing the impact of the 13.6 million tons per year of greenhouse gases that the agency authorized *after* applying emission limits the agency asserts represents regulatory requirements, i.e., Best Available Control Technology (BACT). R. Vol. 34, 8457. LDEQ claimed it is not possible to "determine how a specific industrial facility's incremental contribution of GHGs would translate into physical effects on the global environment." R. Vol. 34, 8457.

The Court does not find that excuse compelling. LDEQ's public trustee duty does not require exactness. If it did, the agency could avoid considering environmental impacts of all sorts. As Petitioners explain, "[a]ir pollutants disperse in the air, and wind can carry pollutants far from their source. Mercury emissions, for example, 'are a global problem that knows no national or continental boundaries[,]' and 'can travel thousands of miles in the atmosphere before it is eventually deposited back to the earth.'" Petitioners' Orig. Br. at 52 (quoting U.S. EPA, Mercury Emissions: The Global Context). LDEQ is not excused of its duty to evaluate the potential and real adverse impacts of FG LA's greenhouse gases—especially given the enormity of the emissions—because it cannot quantify the exact impact at a specific place on Earth. *In re CECOS Int'l*, 574 So.2d at 392 (explaining that "[h]arm to the environment cannot always be quantified as easily as the economic benefits derived from taxes and salaries," but must still be balanced).

Moreover, the Court rejects LDEQ's argument that building a chemical complex elsewhere would "have no more impact on Louisiana (relative to GHGs)," R. Vol. 34, 8458, because there is

no evidence in the record that FG LA would build its planned complex anywhere else. Likewise, there is no evidence in the record for LDEQ's claim that products made at the FG LA complex would displace products that are made from higher greenhouse gas processes. *Id.* Lastly, the Court rejects as irrelevant LDEQ's notion that "direct exposure to GHGs at current or projected ambient levels appear to have no known adverse effects on human health." *Id.*

LDEQ's public trustee duty is not limited to health impacts from direct exposure greenhouse gas. Rather, the duty extends beyond human health to "economic, social and other factors." *Save Ourselves*, 452 So.2d at 1159; *See Matter of Dravo Basic Materials Co., Inc.*, 604 So.2d 630, 635 (La. 1st Cir. 1992) (finding "DEQ's inquiry is not limited to the discharged substance," but includes "the entire activity which results in the discharge, as well as the effect of the discharge on the environment in general"). ***LDEQ must take special care to consider the impact of climate-driven disasters fueled by greenhouse gases on environmental justice communities and their ability to recover.***

The Court has determined that by relying on its finding that FG LA's chemical complex will comply with applicable standards and emission controls (including BACT for greenhouse gases) as a reason not to analyze the environmental impacts of the project's greenhouse gas emissions, LDEQ violated its public trustee duty to weigh the resulting environmental impacts. By project's benefits and failed to show that it had considered the full "gravity of the possible harm." *CECOS*, 574 So.2d at 393. LDEQ failed to act "with diligence, fairness and faithfulness" as its constitutional duty requires when making a decision that affects environmental resources (here the very air people living near the FG LA site will be forced to breathe), LDEQ failed to conduct any kind of meaningful cost-benefit analysis. *Save Ourselves,* 452 So.2d at. 1157. ***LDEQ's failure to weigh, or in some cases even acknowledge, the full range of environmental harms resulting from its permit action, renders its conclusion that "the social and economic benefits of the proposed project will greatly outweigh its adverse environmental impacts" arbitrary and capricious.***

III. Louisiana Revised Statutes 33:109.1

Petitioners assert that LDEQ violated La. R.S. 109.1 because the agency failed to consider how FG LA's complex would affect elements of St. James Parish's master land use plan.

Louisiana Revised Statutes 33:109.1 provides: "Whenever a parish or municipal planning

commission has adopted a master plan, state agencies and departments shall consider such adopted master plan before undertaking any activity or action which would affect the adopted elements of the master plan." Petitioners assert that St. James Parish has adopted a master plan and that the plan designates an area just downriver of FG LA's site for "Residential Growth." Petitioners also assert that the permits allow FG LA to emit ethylene oxide in concentrations that exceed EPA's cancer risk threshold for the pollutant (i.e., greater than 0.02 ug/ $m^{3)}$ within that area. Neither LDEQ nor FG LA dispute these facts.

Petitioners argue LDEQ failed to "'consider' how its 'action' 'would affect the adopted elements of the [St. James Parish] master plan,'" specifically how FG LA's ethylene oxide emissions would affect the area designated for "Residential Growth." Petitioners' Reply Br. at 46 (quoting La. R.S. 33:109.1). Petitioners explain that LDEQ referenced a statement in FG LA's alternative sites analysis in the company's Environmental Assessment Statement that describes the site as being in an area designated by the parish as industrial and adjacent to other industrial properties, but that LDEQ did not reference the master plan, let alone consider the fact that an area designated for Residential Growth is just downriver of the site. Petitioners' Reply Br. at 45 (citing LDEQ Basis for Decision, p. 8); *see also* R. Vol. 34, 8444 (LDEQ Basis for Decision, p. 8 (citing EDMS Doc. ID 11230529, p. 40 of 231); R. Vol. 14, 3467) (FG LA's Environmental Assessment Statement with header identifying document as 11230529, p. 40 of 231). ***The Court agrees.***

Summarizing FG LA's characterization of the site without even referencing the parish's master plan does not discharge LDEQ's duty under La. R.S. 33:109.1. *See St. Tammany Par. Gov't v. Welsh*, 2015-1152 (La. App. 1 Cir. 3/9/16), 199 So.3d 3, 12 (relying on ordinary meaning of "consider" to hold agency discharged obligation when it "examined, deliberated about, pondered over, and inspected" the parish plan); *see also Save Ourselves*, 452 So.2d at 1160 (rejecting decision where court could not "determine from th[e] record that agency fully understood its function or properly exercised the discretion it has been given" where "its factual findings do not sufficiently illumine its decision-making process").

Moreover, LDEQ did not uphold its duty under the public trust doctrine. LDEQ "must act with diligence, fairness and faithfulness to protect this particular public interest in the resources." *Save Ourselves*, 452 So.2d at 1157. The agency's "role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing

before it; the rights of the public must receive active and affirmative protection at the hands of the commission." *Id.* (citing *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n,* 449 F.2d 1109, 1119 (D.C. Cir. 1971)). Relying on FG LA's characterization of the site without considering the effect of the permit decision on the parish's plan that is designed to encourage residential growth in an area just downriver of FG LA's site — especially where it is undisputed that modeled emissions of ethylene oxide exceed EPA's cancer risk threshold in that area—does not display "active and affirmative protection" the public has the right to receive.

The Court is not persuaded by the argument that Petitioners' La. R.S. 33:109.1 claim is moot because Petitioners did not raise it in their comments. LDEQ Br. at 33-34, *see also* FG LA Br. at 43-44. Petitioners were not required to remind LDEQ in their comments that the agency must abide by a statutory mandate.

Petitioners could not have known that LDEQ would violate its duty under La. R.S. 33:109.1 until the agency issued its decision, thereby giving Petitioners "good cause" to raise the issue on judicial review in satisfaction of La. R.S. 30:2014.3.C (providing that a party to a judicial review proceeding may raise an issue that was not raised before the department if good cause is shown). The instant matter is distinguishable from the *City of Baton Rouge v. La. Dept. of Envtl. Quality*, 2014-1485 (La. App. 1 Cir. 4/28/15); 172 So.3d 13, relied on by LDEQ, because there the City of Baton Rouge had not invoked the "good cause" exception under La. R.S. 30:2014.3.C as Petitioners do here. For the same reason, *In re Louisiana Dep't of Env't Quality Permitting Decision*, 2010-CA-1194 (La. App. 1 Cir. 3/25/11), 2011 La. Unpub. LEXIS 166 at *17-19 cited by FG LA in its brief is likewise inapplicable.

Furthermore, FG LA's claim that judicial notice of the parish's ordinance is inappropriate is also misplaced. FG LA Br. at 43-44 (relying on La. R.S. 30:2014.3). As already discussed, Petitioners have good cause under La. R.S. 30:2014.3.C . Moreover, because neither FG LA nor LDEQ contests that the area adjacent to the site is zoned for Residential Growth, the Court need not review the substance of the parish's master plan for that purpose.

The Court is also not persuaded by LDEQ's and FG LA's reference to the parish's approval of FG LA's land use application. The fact that the parish approved FG LA's land use application has no bearing on LDEQ's *statutory duty* to affirmatively consider the effect of its decision on the parish's master plan. The statute puts the onus on LDEQ (not the parish, applicant, or the public)

as it is the agency that must consider how its actions would affect the plan. LDEQ did not do this, even though it had the evidence that FG LA's modeled ethylene oxide emissions exceed EPA's cancer risk threshold well outside the site. R. Vol. 19, 4766.

There is no evidence that the parish was aware of that ethylene oxide emissions that exceed EPA's cancer risk threshold would be emitted beyond the site. In fact, according to the record, the earliest evaluation of FG LA's ethylene oxide emissions using EPA's cancer risk threshold is December 2018, well after the parish approved FG LA's land use application on October 30, 2018. *Id.* (showing date FG LA performed the modeling using the EPA threshold); 2nd Supp. R. 8886-8890 (showing Parish Planning Commission approval).

CONCLUSION

The Court finds that the errors identified in LDEQ's decision prejudice substantial rights, including the constitutional rights of the Petitioners, under Article IX, Section 1 of the Louisiana Constitution.

Based on the foregoing, the LDEQ's decision to issue Prevention of Significant Deterioration Permit PSD-LA-812 and Title V/Part 70 Air Operating Permits 3141-V0, 3142-V0, 3143-V0, 3144-V0, 3145-V0, 3146-V0, 3147-V0, 3148-V0, 3149-V0, 3150-V0, 3151-V0, 3152-V0, 3153-V0, and 3154-V0 to FG LA for a proposed chemical complex adjacent to Welcome, Louisiana is reversed and all permits are vacated.

The matter is remanded in accordance with La. R.S. 49:964 and *Save Ourselves*, 452 So.2d at 1159. *See also In re Rubicon, Inc.*, 670 So.2d at 488-89 (finding that where LDEQ has not complied with "its responsibilities and obligations" under the public trust doctrine the "permit [] is null and void and must be vacated" and rejecting the agency's request for a simple remand).

THUS, DONE AND SIGNED on this 8th day of September, 2022, in Baton Rouge, Louisiana.

Trudy M. White

JUDGE TRUDY M. WHITE

PLEASE PROVIDE NOTICE TO ALL ATTORNEYS OF RECORD

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT / JUDGMENT / ORDER / COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED.
SEE ATTACHED LETTER FOR LIST OF RECIPIENTS.

DONE AND MAILED ON September 14, 2022

Gina Taylor Randall

DEPUTY CLERK OF COURT

ATTACHMENT C

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Notice of Judgment and Disposition

January 19, 2024

Docket Number: 2023 - CA - 0578

Rise St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks & No Waste Louisiana
versus
Louisiana Department of Environmental Quality

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In accordance with Local Rule 6 of the Court of Appeal, First Circuit, I hereby certify that this notice of judgment and disposition and the attached disposition were transmitted this date to the trial judge or equivalent, all counsel of record, and all parties not represented by counsel.

Peggy J. Landry

RODD NAQUIN
CLERK OF COURT

STATE OF LOUISIANA

JEW
AHP by JEW
GH

COURT OF APPEAL

FIRST CIRCUIT

* * * * * * *

2023 CA 0578

RISE ST. JAMES, LOUISIANA BUCKET BRIGADE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, HEALTHY GULF, EARTHWORKS, AND NO WASTE LOUISIANA

VERSUS

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

JUDGMENT RENDERED: JAN 19 2024

* * * * * * *

Appealed from the Nineteenth Judicial District Court
Parish of East Baton Rouge • State of Louisiana
Docket Number 694,029 • Section 27

The Honorable Trudy M. White, Presiding Judge

* * * * * * *

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* * * * * * *

BEFORE: WELCH, THERIOT, HOLDRIDGE,[1] PENZATO, AND WOLFE, JJ.

[1] The Honorable Guy Holdridge, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

Theriot, J. concurs
Wolfe J. dissents without reasons EW dwg JEW

WELCH, J.

The defendant, Louisiana Department of Environmental Quality ("DEQ"), and an intervenor, FG LA LLC ("Formosa"[2]), appeal a judgment of the district court, which reversed DEQ's decision to issue fifteen permits to Formosa for a proposed chemical complex in St. James Parish, Louisiana, and further vacated those permits. For reasons that follow, we reverse the judgment of the district court, reinstate the permits, and render judgment dismissing the plaintiffs' petition for judicial review.

I. BACKGROUND

A. Legal Background

In order to understand the issues involved in this complex environmental action, it is necessary to set forth a general foundation of the applicable legal precepts from which this matter arises.

1. Public Trust Doctrine

Louisiana Constitution article IX, §1 establishes the public trust doctrine, which mandates that "[t]he natural resources of the state, including air and water," be "protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people," and orders the legislature to "enact laws to implement this policy." In furtherance of this mandate, the legislature created and established DEQ as the primary agency in Louisiana concerned with environmental protection and regulation. See La. R.S. 30:2011; **Matter of American Waste and Pollution Control, Co.**, 93-3163 (La. 9/15/94), 642 So.2d 1258, 1262. DEQ is vested with jurisdiction over matters affecting the regulation of the environment within this State, including, but not limited to, the regulation of air quality. La. R.S. 30:2011; see also La. R.S. 30:2051, *et seq.* DEQ also has authority delegated to it

[2] FG LA LLC is a subsidiary of Formosa Petrochemical Corporation. For ease of reference, we refer to FG LA LLC as Formosa.

APPENDIX - ATTACHMENT C

from the United States Environmental Protection Agency ("EPA") to enforce and implement certain federal environmental standards, including air emissions.

In accordance with the public trust doctrine, before granting approval of any proposed action affecting the environment, including permits, DEQ must "determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." **Save Ourselves, Inc. v. Louisiana Environmental Control Commission**, 452 So.2d 1152, 1157 (La. 1984). In making this determination, the Louisiana Supreme Court imposed a "rule of reasonableness," noting that "the constitution does not establish environmental protection as an exclusive goal, but requires 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 supreme court also recognized that "[e]nvironmental amenities will often be in conflict with economic and social considerations[,]" and "[t]o consider the former along with the latter must involve a balancing process." *Id.* The supreme court further recognized that "[i]n some instances environmental costs may outweigh economic and social benefits and in other instances they may not[,]" and that "[t]his leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances." *Id.*

Based on the **Save Ourselves** decision, this Court has held that DEQ's written findings of fact and reasons for a decision must address whether: (1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible; (2) a cost-benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and (3) there are alternative projects or alternative sites or mitigating measures that would offer more protection to the environment than the proposed project without unduly curtailing non-

environmental benefits to the extent applicable. **In re Shintech, Inc.**, 2000-1984 (La. App. 1st Cir. 2/15/02), 814 So.2d 20, 25, writ denied, 2002-0742 (La. 5/10/02), 815 So.2d 845; **In re Rubicon, Inc.**, 95-0108 (La. App. 1st Cir. 2/14/96), 670 So.2d 475, 483. These inquiries are commonly referred to as the "IT requirements," the "IT issues," or "the IT questions,"[3] which name is derived from IT Corporation, the holder of the hazardous waste disposal permit at issue in **Save Ourselves**.

In furtherance of the aforementioned rulings from this Court, La. R.S. 30:2018 was enacted, which requires applicants for new permits to submit an environmental assessment statement ("EAS") to be utilized by DEQ in satisfaction of its public trustee requirements; the EAS consists of the applicant's answers or responses to the IT issues. See La. R.S. 30:2018(A) and (B).

Also included within DEQ's decision-making analysis under the public trust doctrine is consideration of the issue of environmental justice. See **Dow Chemical Co. Louisiana Operations Complex Cellulose and Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications & Emission v. Reduction Credits**, 2003-2278 (La. App. 1st Cir. 9/17/04), 885 So.2d 5, 16, writ denied sub nom. **Dow Chemical Co. v. Reduction Credits**, 2004-3005 (La. 2/18/05), 896 So.2d 34 ("**Dow Chem. Co.**") (finding that DEQ's "analysis, which considered the background, public comment, public comment response summary, alternative sites, alternative projects, mitigating measures, avoidance of adverse environmental effects, cost/benefit analysis, social and economic benefits, and environmental justice/civil rights Title [VI] issues as mandated by the Louisiana Supreme Court" in **Save Ourselves** was sufficient to establish that DEQ complied with its constitutional mandate under the public trust doctrine); **North Baton Rouge Environmental Association v. Louisiana Department of Environmental Quality**, 2000-1878 (La.

[3] Although the IT issues are generally set forth in the jurisprudence as a list of three issues, there are actually five inquiries, as the third IT issue has three separate, but related, inquiries within it.

App. 1st Cir. 11/14/01), 805 So.2d 255, 263-264, writ denied, 2002-0408 (La. 4/19/02), 813 So.2d 1086 (wherein this Court found that DEQ adequately responded to public comment regarding environmental justice concerns related to the location of a proposed plant near a minority community, declined to substitute its judgment for that of the DEQ, and opined that DEQ did not violate its constitutional duty to act as trustee of the environment). See also 40 C.F.R. Part 7.

Environmental justice is defined by the EPA as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[4] Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial operations. Meaningful involvement means that people have an opportunity to participate in decisions about activities that may affect their environment and/or health, the public's contribution can influence the permitting authority's decision, community concerns will be considered in the decision-making process, and decisionmakers will seek out and facilitate the involvement of those potentially affected.[5]

2. Air Permits

The National Ambient Air Quality Standards ("NAAQS") are health-based standards established by the EPA pursuant to the Clean Air Act, 42 U.S.C. §7401, *et seq.*, for pollutants considered harmful to public health. See 42 U.S.C. §§7408 and 7409(b). The Clean Air Act has established primary and secondary standards for NAAQS. See *Id.* The primary standards prescribe maximum acceptable

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[4] See https://www.epa.gov/environmentaljustice. This is also the definition utilized by DEQ in its environmental justice analysis in this case. Courts may take judicial notice of information from governmental websites. **Mendoza v. Mendoza**, 2017-0070 (La. App. 4th Cir. 6/6/18), 249 So.3d 67, 71, writ denied, 2018-1138 (La. 8/31/18), 251 So.3d 1083; see also La. C.E. art. 201(B).

[5] See https://www.epa.gov/environmentaljustice/learn-about-environmental-justice.

concentrations of various pollutants in the outdoor air which, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. §7409(b)(1). The secondary standards prescribe levels of air quality "requisite to protect the public welfare from any known or anticipated adverse effect[s]." 42 U.S.C. §7409(b)(2). The EPA has established NAAQS for six pollutants, referred to as "criteria pollutants," which are: particulate matter (PM_{10} and $PM_{2.5}$),[6] sulfur dioxide (SO_2), nitrogen dioxide (NO_2), carbon monoxide (CO), ozone (O_3),[7] and lead (Pb). 40 C.F.R. §§50.2, 50.4-50.13; see also 42 U.S.C. §§7408 and 7409(b)(1).[8] These standards function as benchmarks for state implementation plans that each state develops, which contain emission limits and other control measures to enforce the NAAQS within the state. See 42 U.S.C. §§7407(a) and 7410. DEQ has developed and adopted the standards for the criteria pollutants. See LAC 33:III.701, *et seq*.

In areas that have attained NAAQS or that are unclassifiable,[9] the Clean Air Act, through the Prevention of Significant Deterioration ("PSD") program, requires major emitting facilities to obtain a permit "setting forth emission limitations" for a facility prior to construction. 42 U.S.C. §§7471 and 7475(a)(1). The PSD program requires any applicant for a PSD permit to demonstrate that new emissions from the

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[6] Particulate Matter is any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than 100 micrometers. LAC 33:III.111. $PM_{2.5}$ consists of particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers. PM_{10} consists of particulate matter with an aerodynamic diameter less than or equal to 10 micrometers. See 40 C.F.R. §50.6 and 50.7.

[7] Although the NAAQS is set for ozone, it is the emissions of volatile organic compounds (VOC) and nitrogen oxides (NOx) that are regulated in place of ozone, as ozone is a pollutant formed in the atmosphere over time from emissions of VOC and NOx.

[8] At issue in this case are the NAAQS for NO_2 and $PM_{2.5}$. More specifically, the 1-hour standard for NO_2 and the 24-hour standard for $PM_{2.5}$.

[9] An area that meets a NAAQS is classified as an "attainment area" for that standard, and an area that does not meet a NAAQS is classified as a "non-attainment area" for that standard. See 42 U.S.C. §7407(d)(1)(A)(i)-(ii). Alternatively, an area may be designated as "unclassifiable," which means that the area cannot be classified on the basis of available information as meeting or not meeting the NAAQS. 42 U.S.C. §7407(d)(1)(A)(iii). Unclassifiable areas are generally treated as if they were attainment areas. See 42 U.S.C. §7471.

The area at issue in this case, St. James Parish, is classified as "unclassifiable/attainment" for several standards, including $PM_{2.5}$ and NO_2.

proposed project "will not cause, or contribute to, air pollution in excess of any … maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies … [or] … [NAAQS] in any air quality control region[.]" 42 U.S.C. §7475(a)(3)(A) and (B). The maximum allowable increase in concentration is a marginal level of increase above the defined baseline concentration; it is known as the "increment" (or the "PSD increment") and, for the six criteria pollutants, is set forth in 42 U.S.C. §7473 and 40 C.F.R. §52.21(c).[10] DEQ's standards for the PSD program are set forth in LAC 33:III.509.

The PSD permitting process is primarily implemented at the state level, with states issuing preconstruction permits in accordance with their state implementation plans and federal minimum standards. **Sierra Club v. Environmental Protection Agency**, 955 F.3d 56, 59 (D.C. Cir. 2020), citing 42 U.S.C. §7410(a)(1)-(2), (l). However, 42 U.S.C. § 7475(e)(3)(D) authorizes the EPA to promulgate regulations regarding the ambient air quality analysis required under the permit application review. **Sierra Club**, 955 F.3d at 59; 42 U.S.C. §§7410(a)(1)-(2) and 7475(e)(3)(D). Pursuant to this power, EPA promulgated a regulation outlining a set of values—called "significance values"—for states to use in determining what level of emissions does "cause or contribute to" a violation under 42 U.S.C. §7475(a)(3). See 40 C.F.R. § 51.165(b)(2) and 52 Federal Register 24,672, 24,713 (July 1, 1987); **Sierra Club**, 955 F.3d at 59. These air quality concentration values have become known as "significant impact levels," or "SILs," when used as part of an air quality demonstration in a permit application. **Sierra Club**, 955 F.3d at 59.

The Clean Air Act also establishes an extensive list of compounds that are classified as "hazardous air pollutants," which are pollutants that present or may present a threat of adverse human health effects or adverse environmental effects.

[10] At issue in this case is the increment for $PM_{2.5}$. More specifically, the 24-hour increment.

See 42 U.S.C. §7412. The National Emission Standards for Hazardous Air Pollutants ("NESHAP") are set forth in 40 C.F.R. Part 61 (NESHAP for specific hazardous air pollutants) and 63 (NESHAP for source categories). These standards have been adopted by DEQ. See LAC 33:III.5116 and 5122. In addition, DEQ has established unique ambient air standards ("AAS") for numerous compounds, which are known as "toxic air pollutants." See LAC 33:III.5101, 5103, 5109, and 5111. Toxic air pollutants include all of the chemical compounds that are hazardous air pollutants, as well as chemical compounds that are not federally regulated hazardous air pollutants. See LAC 33:III.5112. Thus, all hazardous air pollutants are toxic air pollutants, but not all toxic air pollutants are hazardous air pollutants.[11] See La. R.S. 30:2053(3)(b); 42 U.S.C. §7412.

Before construction of a major source of toxic air pollutants, the owner or operator shall obtain an air permit. LAC 33:III.5111. Any stationary source is considered a major source of toxic air pollutants if it emits or has the potential to emit, in the aggregate, ten tons per year or more of any toxic air pollutant listed in LAC 33:III.5112, Table 51.1, or twenty-five tons per year or more of any combination of toxic pollutants listed therein. LAC 33: III.5103.A. An owner or operator that emits or is permitted to emit a Class I or Class II toxic air pollutant at a rate greater than or equal to the minimum emission rate listed in that table shall control emissions of those specific toxic air pollutants to a degree that constitutes Maximum Achievable Control Technology ("MACT")[12] as approved by DEQ. LAC 33:III.5109.A.1.

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[11] At issue in this case is ethylene oxide (EO), which is both a hazardous air pollutant and a toxic air pollutant.

[12] MACT is the maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory and cannot be less stringent than the emission control that is achieved in practice by the best controlled similar source. 42 U.S.C. §7412(d)(3).

Under LAC 33:III.507, major sources, among other sources, of criteria pollutants, hazardous air pollutants, or both, must also obtain and operate in compliance with an operating permit, commonly referred to as a "Title V permit," a "Part 70 permit" or a "Title V/Part 70 permit." This reference is derived from Title V of the Clean Air Act and 40 C.F.R. Part 70. These same sources may also be subject to the preconstruction PSD permit.[13] In Louisiana, both the Title V/Part 70 and PSD permitting programs are administered by DEQ, through its delegated authority from the EPA.[14]

A permit application for a Title V/Part 70 air operating permit must satisfy the requirements of the Part 70 Operating Permits Program set forth in LAC 33:III.507, and a permit application for a PSD permit must satisfy the requirements set forth in LAC 33:III.509. See also 40 C.F.R. §51.165. These initial permits serve to authorize construction and operation of a new facility. The Title V/Part 70 operating permits provide operational requirements and limitations, including emission limitations, which are enforceable by both EPA and DEQ. See LAC 33:III.507. Construction of a new major stationary source cannot begin until that new major stationary source subject to PSD permitting meets all of the requirements for the PSD permit. See LAC 33:III.509.A.3. These requirements include meeting applicable emission limitations and applying the best available control technology ("BACT") for each regulated pollutant that it would have the potential to emit in significant amounts. LAC 33:III:509.J.

As previously set forth, the proposed facility or new major stationary source must also demonstrate that emissions from construction or operation of such facility

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[13] Sources subject to Title V/Part 70 permitting are found at LAC 33:III.507.A.1, and include any major source as defined in LAC 33:III.502, and sources subject to PSD permitting are found at LAC 33:III.509.B, under the definition of major stationary source.

[14] See 60 Federal Register 47,296 (September 12, 1995); 81 Federal Register 46,606 (July 18, 2016); and 81 Federal Register 74,923 (October 28, 2016).

or proposed source will not "cause, or contribute to," air pollution in violation of any NAAQS or an increment. LAC 33:III.509.K; see also 42 U.S.C. §7475(a)(3). Also, as previously set forth, pursuant to 40 C.F.R. §51.165(b)(2), a "major source … will be considered to cause or contribute to a violation of a [NAAQS] when such source … would, at a minimum, exceed the" SILs value. Conversely, if the major source's maximum projected impact is below the corresponding SILs value, that may be a sufficient demonstration that the proposed source will not cause or contribute to a violation of NAAQS. See **Sierra Club**, 955 F.3d at 60, citing "Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program," published by the EPA on April 17, 2018 ("SILs guidance document").[15]

Next, to demonstrate that a proposed facility or major source will not cause or contribute to any NAAQS exceedance or increment, the application for a preconstruction PSD permit must contain an air quality impact analysis or "AQIA," which is commonly referred to as "air quality modeling" or "air modeling," of the area that the facility or new major source would affect for each pollutant that it would have a potential to emit above major stationary source threshold. LAC 33:III.509.L and M. The estimates of the ambient concentrations shall generally be based on the applicable air quality models, databases, and other requirements specified in Appendix W of 40 C.F.R. Part 51. LAC 33:III.509.L.

According to Paragraph 2.2 of Appendix W of 40 C.F.R. Part 51, estimates of the sources' emissions are initially modeled and analyzed using simplified assumptions and conservative methods (*i.e.*, worst-case scenario) to determine whether the proposed construction will cause or contribute to ambient concentrations in excess of either the NAAQS or an increment. Only if the screening model

[15] For the SILs guidance document, see https://www.epa.gov/sites/default/files/2018-04/documents/sils_policy_guidance_document_final_signed_4-17-18.pdf

indicates that the increase in concentration attributable to the source could cause or contribute to a violation of any NAAQS or increment, then the second level of more sophisticated, complex, and refined model should be applied. *Id.*; see also **Sierra Club**, 955 F.3d at 60, citing SILs guidance document (rather than requiring every PSD applicant to conduct a full cumulative impact analysis, if a preliminary analysis shows a proposed source's maximum impact will be below the corresponding SIL value, EPA is open to a finding by the state permitting authority that such an impact will not cause or contribute to a violation of the applicable NAAQS or increment; if a cumulative impact analysis is done and predicts a NAAQS violation, a source whose contribution to the violation is less than the SIL for a given pollutant may be considered not culpable for the violation).[16]

The PSD permit application from the owner or operator of a proposed source must also contain, among other things, specific information relative to the source, such as a description of the nature, location, design capacity, and typical operating schedule of the source, as provided in LAC 33:III.509.N, and additional impact analyses, such as impairment to visibility, soils, and vegetation and commercial, residential, industrial, and other growth associated with the source, as provided in LAC 33:III.509.O. In addition, there must be notice to the public and the opportunity for the public to participate through comments and a hearing, as provided in LAC 33:III.509.Q.

B. Factual Background and Procedural History

Formosa proposes to construct a large chemical manufacturing complex consisting of fourteen separate facilities (ten plants and four support facilities) on a tract of land known as the Mosaic-Gavilon site, which is located along the Mississippi River in St. James Parish, Louisiana, in an area just south of the Sunshine

[16] For new sources that are major sources of toxic air pollutants pursuant to LAC 33:III.5101, *et seq.*, a similar air modeling analysis/air dispersion modeling report is used. LAC 33:III.5111.

Bridge.[17] The proposed Formosa complex will be located in a predominantly industrial and agricultural area near the communities of Welcome and St. James and across the Mississippi River from the community of Union. Notably, 87.1% of the combined population of the communities of Welcome and St James identify as "Black or African American," and the community of Union has a 64% minority population, 80% of whom identify as African American.[18] The proposed Formosa complex facility will be a new major source of criteria pollutants, hazardous air pollutants, and toxic air pollutants and will be located in an attainment/unclassifiable area. It is, therefore, subject to the Title V/Part 70 permitting program and the preconstruction PSD permitting program.

In connection with the proposed construction of the facility, Formosa submitted applications to DEQ for fifteen total permits—fourteen Title V/Part 70 permits (one for each plant in the complex) and one PSD permit. In support of the permit applications, Formosa submitted all of the requisite and extensive information and documentation for the permits. Relevant to this appeal, the information and documentation included, but was not limited to, several air quality analysis reports detailing the results of approved air modeling efforts to determine whether the proposed facility's air emissions would cause or contribute to an exceedance of the NAAQS, an increment, and/or the AAS for toxic air pollutants, and a detailed economic analysis of the proposed facility by Dr. James Richardson, an economics professor at Louisiana State University.

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[17] The proposed site location is in a predominantly industrial and agricultural area. The St. James Parish Council unanimously passed a resolution approving the proposed Formosa complex "UNDER THE ST. JAMES PARISH LAND USE ORDINANCE, WITH CONDITIONS." In addition, in that unanimous resolution, the St. James Parish Council noted that the St. James Parish Planning Commission had approved Formosa's request to build the complex under the St. James Parish Code of Ordinances and the St. James Parish Comprehensive Plan.

[18] We acknowledge that these are unincorporated areas without boundaries, so we cannot accurately ascertain the percentage of residents, much less the percentage identifying as minority.

On May 28, 2019, DEQ issued a public notice on the permit applications to solicit public comments. DEQ also held a public hearing on July 9, 2019, and extended the deadline for public comments until August 12, 2019. DEQ also considered additional comments filed after that deadline. The majority of the comments focused on the harmful health and environmental impacts the proposed complex would have on the area.

On January 6, 2020,[19] DEQ issued all fifteen permits.[20] In reaching its decision to issue the permits, DEQ issued an extensive 43-page Basis for Decision, explaining its rationale for issuing the permits. At the beginning of its Basis for Decision, DEQ found "that as part of the 'IT Requirements,' adverse environmental impacts have been minimized or avoided to the maximum extent possible," citing **Save Ourselves**, and to make that determination, DEQ found that Formosa "has complied with all applicable federal and state statutes and regulations and has otherwise minimized or avoided environmental impacts to the maximum extent possible" and "has met the alternative sites, alternative projects, and mitigating measures requirements of" **Save Ourselves**. DEQ further stated that after determining "that adverse environmental effects had been minimized or avoided to the maximum extent possible, it balanced social and economic factors with environmental impacts." Noting that, under **Save Ourselves**, the Louisiana Constitution "does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be

[19] Prior to issuing the permits on January 6, 2020, and in accordance with LAC 33:III.533.B.2, DEQ submitted a copy of the proposed permits and its Statement of Basis to EPA on May 23, 2019. DEQ received no comments or objections from EPA at the end of the 45-day period set forth in LAC 33:III.533.C and D.

[20] The fifteen permits are Prevention of Significant Deterioration permit PSD-LA-812 and Part 70 Operating Permit Nos. 3141-V0 (Ethylene 1 Plant); 3142-V0 (Ethylene Glycol 1 Plant); 3143-V0 (High Density Polyethylene 1 Plant); 3144-V0 (Linear Low Density Polyethylene Plant); 3145-V0 (Propylene Plant); 3146-V0 (Polypropylene Plant); 3147-V0 (Logistics Plant); 3148-V0 (Utility 1 Plant); 3149-V0 (Central Wastewater Treatment Plant); 3150-V0 (Ethylene 2 Plant); 3151-V0 (Ethylene Glycol 2 Plant); 3152-V0 (High Density Polyethylene 2 Plant); 3153-V0 (Low Density Polyethylene Plant); and 3154-V0 (Utility 2 Plant).

given full and careful consideration along with economic, social[,] and other factors," DEQ found that "the social and economic benefits of the proposed project [would] greatly outweigh its adverse environmental impacts."

DEQ's Basis for Decision then set forth in detail its extensive findings of fact and analysis of the background information; the permitted emissions of both criteria pollutants and toxic air pollutants; the public comments; the IT issues of alternative sites, alternative projects, mitigating measures (including permit requirements, emission limits, ambient air monitoring, impacts to Class I federal areas, greenhouse gas emissions, and forested buffer), avoidance of adverse environmental effects, a cost/benefit analysis of the environmental impact costs balanced against the social and economic benefits; and environmental justice/civil rights Title VI issues, all as mandated by the Louisiana Supreme Court in **Save Ourselves**; and Formosa's enforcement history. DEQ's decision then concluded, after a careful review and evaluation of the administrative record, that the proposed permits minimized or avoided potential and real adverse environmental impacts to the maximum extent possible and that the social and economic benefits of the proposed complex outweighed its adverse environmental impacts.

Along with DEQ's Basis for Decision, DEQ also issued and incorporated a 139-page Public Comments Response Summary in which DEQ responded to statements and comments by the public that it received via mail, email, and at the public hearing.

Following DEQ's issuance of the fifteen permits to Formosa, the plaintiffs, RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana,[21] filed a petition for judicial review of the DEQ's decision. In the plaintiffs' petition for judicial review,

[21] The plaintiffs are various environmental organizations.

they set forth numerous assignments of error, essentially claiming, among other things, that: (1) the PSD permit was in violation of the Clean Air Act because Formosa failed to demonstrate that the emissions from the proposed complex would not cause or contribute to air pollution in violation of the $PM_{2.5}$ 24-hour NAAQS, the $PM_{2.5}$ 24-hour increment, and the NO_2 1-hour NAAQS due to modeled exceedances and further, that DEQ's use of SILs to dismiss Formosa's contributions to the NAAQS and increment exceedances was arbitrary and capricious; (2) DEQ's decision to issue the permits was in violation of the public trust doctrine and its analysis of the IT issues was arbitrary and capricious because DEQ failed to consider the impacts of NO_2 and $PM_{2.5}$ emissions, the impacts of ethylene oxide emissions, the impacts of toxic air pollutants in combination with existing permitted emissions and greenhouse gases, and the adverse environmental public health costs in the cost-benefit analysis; and (3) DEQ's decision to issue the permits was in violation of the public trust doctrine because its analysis of environmental justice was arbitrary and capricious and failed to consider the disproportionate impact to nearby minority communities. Subsequently, Beverly Alexander, a resident of the community of St. James, and Formosa each filed petitions for intervention, which the district court granted.

On October 6, 2020, Ms. Alexander filed a "Motion for Judicial Notice of Adjudicative Facts and to Admit Proof of Procedural Irregularities." Therein, Ms. Alexander requested that the district court consider two attached pieces of evidence in ruling on the merits of the judicial review action: (1) certain "pollution and health risk data from the [EPA's] EJScreen[22] public website"[23] that allegedly "tends to

[22] Throughout the record and briefs herein, "EJScreen" is referred to as "EJScreen" and "EJSCREEN." For consistency, we utilize "EJScreen."

[23] EJScreen is an environmental justice mapping and screening tool developed by the EPA. It is based on nationally consistent data and an approach that combines environmental and demographic indicators in maps and reports. EJScreen users choose a geographic area or location,

APPENDIX - ATTACHMENT C

prove that [DEQ's] ... environmental justice analysis failed to adequately assess environmental justice concerns[;]"and (2) a newly-obtained affidavit from Kimberly Terrell, Ph.D, Director of Community Outreach at the Tulane Law Clinic, who serves as a staff scientist, which Ms. Alexander claimed established that the "environmental justice analysis of trends in permitted emissions in St. James Parish was irregular, improper, and flawed." Ms. Alexander alleged that DEQ, in rendering its permitting decisions, relied on outdated EJScreen data, even though updated EJScreen data was readily available to DEQ prior to its permitting decision. Ms. Alexander further alleged that the updated EJScreen data presented a much different picture of the health risks borne by the nearby community of Welcome. Therefore, Ms. Alexander requested that the district court, in considering the petition for judicial review, "take judicial notice" of the EJScreen data and admit Dr. Terrell's affidavit as proof of a procedural irregularity in DEQ's environmental justice analysis.

On November 18, 2020, the district court heard argument on Ms. Alexander's motion. The administrative record from the DEQ was not offered into evidence at the hearing on the motion; rather, the only evidence offered was the two additional exhibits submitted by Ms. Alexander, which were outside of DEQ's administrative record. Following argument of counsel regarding the merits of Ms. Alexander's motion, the district court deferred ruling on the motion. The district court then remanded the matter to DEQ for a more thorough environmental justice analysis, which included additional evidence, *i.e.*, the updated EJScreen data, for reconsideration of its environmental justice analysis, and to allow for a second public comment period. An interlocutory judgment in accordance with the district court's ruling in this regard was signed on December 14, 2020.

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then the tool provides the demographic and environmental information used in that area. See https://www.epa.gov/ejscreen.

In response to that interlocutory judgment, both DEQ and Formosa filed applications for supervisory writ with this Court. The writ applications were consolidated, and thereafter, this Court granted the supervisory writ, reversed the judgment of the district court, and remanded the matter to the district court for further proceedings. See **Rise St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earth Works, and No Waste Louisiana v. Louisiana Department of Environmental Quality**, 2021-0032 and 2021-0037 (La. App. 1st Cir. 3/15/21) (*unpublished writ action*), 2021 WL 961098. In doing so, this Court found "that the district court exceeded the statutory authority ... because, in addition to instructing DEQ to consider the additional evidence, the district court also ordered DEQ to provide 'a more thorough environmental justice analysis,' 'publicly notice and receive public comment on pollution and health risks ... in its reconsideration of the environmental justice analysis,' and 'evaluate the facts and data received in the public comments ... in its reconsideration of the environmental justice analysis.'" *Id.*

On remand, Ms. Alexander then filed a "Supplemental and Amending Motion for Judicial Notice of Adjudicative Facts and to Admit Proof of Procedural Irregularities." In this supplemental motion, Ms. Alexander removed her request to introduce the affidavit of Dr. Terrell, and she added a request that pursuant to La. R.S. 30:2050.21(E), the district court order that additional information be taken before DEQ, *i.e.,* the updated EJScreen data for the community of Welcome, and that DEQ then be ordered to file that information with the district court, along with any modifications DEQ may make in its findings and decision by reason of the updated information. The district court granted the motion as it pertained to La. R.S. 30:2050.21(E), but deferred ruling on the issues of judicial notice of adjudicative facts and to admit proof of procedural irregularities. An interlocutory judgment in accordance with the district court's ruling was signed on June 8, 2021.

Pursuant to the June 8, 2021 interlocutory judgment, DEQ filed the updated EJScreen data for the community of Welcome in the administrative record with the district court, along with its updated findings and updated responses to the original public comments after consideration of that new information. In addition, DEQ issued a Supplement to the Basis for Decision in regards to environmental justice/civil rights Title VI issues. Therein, DEQ determined that the updated data did not materially change the results of the impact of the proposed complex on human health and environment, and therefore, reaffirmed its determination that the social and economic benefits of the proposed project would greatly outweigh its adverse environmental impacts.

After all briefs on the matter were submitted, the district court heard oral argument on the petition for judicial review on March 14, 2022.[24] On September 8, 2022, the district court signed a judgment reversing DEQ's decision to issue all fifteen permits and further vacating said permits. On that same date, the district court issued extensive written reasons for judgment.[25] Both DEQ and Formosa have appealed the September 8, 2022 judgment.

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[24] At the conclusion of the hearing, the district court ordered all of the parties to submit proposed written reasons for judgment and a proposed judgment in Microsoft Word format. It is undisputed that the district court subsequently adopted, almost verbatim, both the written reasons for judgment and the judgment submitted by the plaintiffs.

[25] In the district court's reasons for judgment, it determined that: (1) DEQ's decision to issue the PSD permit was in violation of the Clean Air Act and implementing regulations because the record showed that Formosa's emissions could cause or contribute to violations of NAAQS and increments; (2) DEQ's conclusion that Formosa's emissions of $PM_{2.5}$ and NO_2, together with emissions of these pollutants from other sources would not allow for air quality impacts that could adversely affect human health or the environment was arbitrary and capricious; (3) DEQ's conclusion that Formosa's emissions of toxic air pollutants, together with those of other sources, would not allow for air quality impacts that could adversely affect human health or the environment was arbitrary and capricious; (4) DEQ's conclusion that the proposed permits had minimized or avoided potential and real adverse environmental impacts of Formosa's ethylene oxide emissions to the maximum extent possible was arbitrary and capricious and did not comply with DEQ's duty under the public trust doctrine; (5) DEQ's environmental justice analysis was arbitrary and capricious and did not comply with DEQ's duty under the public trust doctrine; (6) DEQ's failure to consider the effects of the project's emissions on the existing pollution in Welcome in its environmental justice analysis was arbitrary and capricious; (7) DEQ's finding that Welcome was not currently disproportionately affected by air pollution was arbitrary and capricious and not supported by a preponderance of the evidence; (8) DEQ's conclusion that there were no alternative sites for Formosa's proposed complex that would offer more protection to the environment than the proposed site without unduly curtailing non-environmental benefits was

II. ASSIGNMENTS OF ERROR

On appeal, DEQ challenges the district court's June 8, 2021 interlocutory judgment regarding the submission of the updated EJScreen data for the community of Welcome and the order to supplement its findings and decision after considering that information.[26] In addition, both DEQ and Formosa challenge the district court's September 8, 2022 final judgment, arguing that the district court erred in reversing DEQ's decision to issue the permits, in vacating the permits, and in remanding the matter to DEQ for further proceedings.

In challenging the district court's September 8, 2022 final judgment, DEQ and Formosa raise numerous assignments of error, which present two main issues for review: (1) whether DEQ's decision to issue the PSD permit was in violation of the Clean Air Act because of air modeling exceedances of NAAQS and increments for two criteria pollutants and whether DEQ's use of SILs to find that Formosa's proposed complex would not cause or contribute to those exceedances was arbitrary and capricious; and (2) whether DEQ's decision to issue the permits was in violation

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arbitrary and capricious and did not comply with DEQ's duty under the public trust doctrine; (9) DEQ violated the public trust doctrine by failing to conduct a fair and rational balancing of environmental costs against the benefits of the proposed complex; and (10) DEQ violated La. R.S. 33:109.1 because it failed to consider how Formosa's complex would affect elements of St. James Parish's master land use plan.

We set forth the district court's reasons for judgment solely to elucidate the district court's thought process in reversing the decision of DEQ to issue the permits. However, those reasons for judgment are not binding on this court, as it is well-settled that appeals are taken from judgments, not reasons for judgment. See **Wooley v. Lucksinger**, 2009-0571, 2009-0584, 2009-0585, 2009-0586 (La. 4/1/11), 61 So.3d 507, 572. This Court's job is to review judgments, not reasons for judgment. See *Id.* Furthermore, as detailed hereinbelow, when this Court reviews the judgment of the district court in cases such as this, no deference is owed to the findings or conclusions of the district court; rather, this Court reviews the findings and decision of the DEQ and not that of the district court. See **Save Our Hills v. Louisiana Department of Environmental Quality**, 2018-0100 (La. App. 1st Cir. 11/5/18), 266 So.3d 916, 927, writ denied, 2019-0057 (La. 3/18/19), 267 So.3d 87.

[26] Although interlocutory judgments are generally not appealable unless expressly provided for by law, when an unrestricted appeal is taken from a final judgment, such as the September 8, 2022 final judgment in this case, an appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him in addition to the review of the final judgment. **Judson v. Davis**, 2004-1699 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1112, writ denied, 2005-1998 (La. 2/10/06), 924 So.2d 167.

of the public trust doctrine because its analyses pursuant to **Save Ourselves** of the IT issues and environmental justice were arbitrary and capricious or without sufficient weight given to environmental protection.[27]

III. STANDARD OF REVIEW

Louisiana Revised Statutes 30:2050.21 sets forth the procedure for judicial review of a final permit decision by DEQ. It provides that an aggrieved person may devolutively appeal a final permit action to the Nineteenth Judicial District Court. La. R.S. 30:2050.21(A). Further, any party aggrieved by a final judgment or interlocutory order or ruling of the Nineteenth Judicial District Court may appeal or seek review thereof to this Court. La. R.S. 30:2050.31.

The judicial review provisions of the Louisiana Administrative Procedure Act, La. R.S. 49:978.1(F) and (G), and its standard of review are applicable to such appeals. La. R.S. 30:2050.21(F). Judicial review is conducted by the court without a jury and is confined to the record. La. R.S. 49:978.1(F). The court may affirm the decision of the agency or remand the case for further proceedings. La. R.S. 49:978.1(G). The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences,

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[27] As set forth in footnote 25, the district court determined that DEQ erroneously failed to consider how the permits and Formosa's complex would affect the St. James Parish land use plan in violation of La. R.S. 33:109.1, and on appeal, both DEQ and Formosa contend that the district court erred in this regard.

Although the plaintiffs made allegations regarding the adoption of the St. James Parish land use plan and the subsequent amendment of that land use plan so as to designate the area where the Formosa facility was to be constructed as "residential growth," the plaintiffs did not specifically set forth in their "ASSIGNMENT OF ERRORS" in their petition for judicial review that DEQ failed to consider the land use plan. Nonetheless, to the extent that any of the plaintiffs' allegations in its petition for judicial review raise the issue of whether DEQ erroneously failed to consider the land use plan in issuing the permits, we note that in DEQ's Basis for Decision, it specifically found that the proposed site is "located in an area specifically designated by St. James Parish for industrial development and is adjacent to other industrial properties." Further, the St. James Parish Council resolution approving the proposed Formosa complex under the St. James Parish land use ordinance was part of the administrative record and was likewise considered by DEQ in making its decision. See footnote 17. Thus, we conclude, without further discussion, that DEQ clearly considered how the permits and Formosa's complex would affect the St. James Parish land use plan in accordance with La. R.S. 33:109.1, and that the district court erred in determining otherwise.

conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) not supported and sustainable by a preponderance of evidence as determined by the reviewing court. *Id.*

When reviewing the DEQ's decision, the district court functions as an appellate court. See **Save Our Hills v. Louisiana Department of Environmental Quality**, 2018-0100 (La. App. 1st Cir. 11/5/18), 266 So.3d 916, 927, writ denied, 2019-0057 (La. 3/18/19), 267 So.3d 87. When this Court reviews the judgment of the district court, no deference is owed to the factual findings or legal conclusions of the district court. *Id.* Thus, this Court reviews the findings and decision of the DEQ and not the decision of the district court. See *Id.*

With respect to the constitutional public trust doctrine, on review, this Court should not reverse a substantive decision of DEQ on its merits unless it can be shown that the decision was arbitrary or that DEQ clearly gave insufficient weight to environmental protection in balancing the costs and benefits of the proposed action. *Id.*, **In Re Shintech**, 814 So.2d at 26. If the decision was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the Court's responsibility to reverse. **Save Our Hills**, 266 So.3d at 927, citing **Save Ourselves, Inc.**, 452 So.2d at 1159. The test for determining whether an action was arbitrary or capricious is whether the action was taken "without reason." **Save Our Hills**, 266 So.3d at 927. This test imposes a significant limitation on judicial review. *Id.* at 934.

Moreover, a reviewing court should afford considerable weight to DEQ's construction and interpretation of the statutory scheme that it is entrusted to administer, and deference must be awarded to its administrative interpretations. See

Dow Chem. Co., 885 So.2d at 9; **Matter of Recovery I, Inc.**, 93-0441 (La. App. 1st Cir. 4/8/94), 635 So.2d 690, 696, writ denied, 94-1232 (La. 7/1/94), 639 So.2d 1169. This same standard must also be afforded to DEQ regarding the construction and interpretation of the rules and regulations under its authority and that it promulgates. **Matter of Recovery**, 635 So.2d at 696. Thus, DEQ's interpretations should stand unless they are arbitrary, capricious, or manifestly contrary to its rules and regulations. *Id.*

IV. DISCUSSION

A. Updated EJScreen Data and the Supplementation of DEQ's Findings and Decision

As set forth above, in Ms. Alexander's "Supplemental and Amending Motion for Judicial Notice of Adjudicative Facts and to Admit Proof of Procedural Irregularities," she requested, in part, that the district court order that additional information be taken before DEQ, *i.e.*, the updated EJScreen data, and that it then be filed with the district court, along with any modifications DEQ may make in its findings and decision by reason of that information. The district court granted that part of the motion, and DEQ complied with the district courts' order, and supplemented its decision. DEQ contends that the district court's ruling in this regard was erroneous and that this Court should disregard the updated EJScreen data, as well as DEQ's supplemental decision addressing that information.

Louisiana Revised Statutes 30:2050.21(E)[28] provides:

> If, before the date set for [judicial review] hearing, application is made to the court for leave to present additional information, and it is shown to the satisfaction of the court that the additional information is material and that there was good cause for failure to present it in the proceedings before [DEQ], the court may order that the additional information be taken before the [DEQ] upon conditions determined by the court. [DEQ] may modify its findings and decision by reason of the additional information and shall file that information and any modifications, new findings, or decisions with the reviewing court.

[28] See also La. R.S. 49:978.1(E).

Thus, under this statute, Ms. Alexander had to establish that: 1) the additional information, *i.e.* the updated EJScreen data, was material, and 2) there was good cause for failing to present it in the DEQ proceedings.[29] See **In re Belle Co., L.L.C.**, 2000-0504 (La. App. 1st Cir. 6/27/01), 809 So.2d 225, 237 (providing that if the district court is satisfied that the additional evidence is material and that there was good cause for failing to present it at the proceedings before DEQ, remand is necessary to allow DEQ the opportunity to consider the evidence).

Furthermore, La. R.S. 30:2014.3(C) provides:

> No evidence shall be admissible by any party to an administrative or judicial proceeding to review the secretary's decision on the application that was not submitted to the department prior to issuance of a final decision or made a part of the administrative record for the application, unless good cause is shown for the failure to submit it. No issues shall be raised by any party that were not submitted to the department prior to issuance of a final decision or made a part of the administrative record for the application unless good cause is shown for the failure to submit them. *Good cause includes the case where the party seeking to raise new issues or introduce new evidence shows that it could not reasonably have ascertained the issues or made the evidence available within the time established for public comment by the department, or that it could not have reasonably anticipated the relevance or materiality of the evidence or issues sought to be introduced.*
> (Emphasis added).

Ms. Alexander argued in her motion that the updated EJScreen data was "material because it tend[ed] to prove that [DEQ's] procedure in conducting its environmental justice analysis failed to adequately assess environmental justice concerns, which [were] at issue in [the] judicial review." She further argued that the updated EJScreen data was material because it showed "that [DEQ] relied in part on the outdated version of the EJScreen" data as justification for its permit decision in concluding "that 'residents of the community closest to the Formosa complex [did] *not* bear a disproportionate share of the negative environmental consequences

[29] We recognize that under La. R.S. 30:2050.21(E), the application made to the court for leave to present additional information must be made before the date set for a hearing on the petition for judicial review. In this case, there is no dispute that Ms. Alexander's request was made before the date set for the hearing.

resulting from industrial operations' because that EJScreen [data] reflected that the cancer risk in [that] community … was on par with state averages." Ms. Alexander further argued that the 2019 EJScreen data "shows [that] rather than being on par with state averages for cancer risks," the residents of the community closest to the proposed Formosa complex (Welcome) "suffer[] from cancer risks at the ***eighty-sixth percentile***."

In opposition to this motion, Formosa asserted that DEQ did not seek out and rely on the EJScreen data for its permitting decision; rather, it simply responded to the plaintiffs' public comments (as it was required to do) in which the plaintiffs relied upon the EJScreen data to support their arguments. Further, Formosa noted that, as pointed out by the EPA's own EJScreen guidance and DEQ's decision, the EJScreen data, should not be used "(1) as a means to identify or label an area as an '[environmental justice] community'; (2) to quantify specific risk values for a selected area; (3) to measure cumulative impacts of multiple environmental factors; and or (4) as a basis for agency decision-making or making a determination regarding the existence or absence of [environmental justice] concerns." Similarly, DEQ maintained that the EJScreen data was not a detailed risk analysis, but a screening tool that examines some, but not all, of the relevant issues related to environmental justice.

With regard to whether Ms. Alexander had good cause for failing to present the updated EJScreen data in the proceedings before DEQ, Ms. Alexander pointed out that the updated EJScreen data was not available to the public until November 2019, after the public hearing and the close of the public comment period, but prior to DEQ's decision to issue the fifteen permits on January 6, 2020. Ms. Alexander also explained that she could not have known that DEQ would rely on outdated EJScreen data until after DEQ issued its final permit decision on January 6, 2020, wherein it detailed its reliance on such outdated data in its decision.

Both Formosa and DEQ claimed that Ms. Alexander's arguments concerning good cause were without merit, noting that DEQ continued to receive and respond to substantive public comments well after the close of the public comment period, but before its decision to issue the permits, and that Ms. Alexander could have submitted the updated EJScreen data to DEQ after the close of the public comment period and DEQ would have responded to that information.

In granting Ms. Alexander's motion, the district court specifically found that the information contained in the 2019 EJScreen data was material and that Ms. Alexander had good cause for not presenting that information in the proceedings before DEQ. Considering the district court's vast discretion in deciding whether a matter should be remanded to an agency to consider additional information, we cannot say that the district court abused its discretion in determining that the updated EJScreen data was material and that Ms. Alexander had good cause for not presenting it in the proceedings before the DEQ. Therefore, the district court was required to remand the matter to DEQ to afford it an opportunity to consider the information contained in the 2019 EJScreen data. See **In re Belle**, 809 So.2d at 237.

A review of DEQ's decision herein—both its Basis for Decision and Public Comments Response Summary—indicates that DEQ *did not rely on any EJScreen data in making its permit decision* due to the limitations on that information set out by the EPA. However, DEQ did set forth in its Basis for Decision that the "[EJScreen] data shows that residents of the community closest to the [proposed Formosa] [c]omplex do *not* bear a disproportionate share of the negative environmental consequences resulting from industrial operations" and that "EPA's own [EJScreen] data shows that the environmental indicators of Particulate Matter, Ozone, [National Air Toxics Assessment ("NATA")] Air Toxics Cancer Risk, and NATA Respiratory Hazard Index are comparable with or less than state averages." Given DEQ's limited use or reference to the EJScreen data in its Basis for Decision,

as well as Ms. Alexander's contention that the data in that regard had changed, we cannot say that the district court abused its vast discretion in granting Ms. Alexander's motion, remanding the matter to DEQ for the purpose of taking the updated EJScreen data for the community of Welcome, ordering the supplementation of the administrative record with that information, and filing that information, along with any modifications, new findings, or decision by DEQ, with the district court.

B. Whether DEQ's Decision to Issue the PSD Permit Violated the Clean Air Act

The plaintiffs and Ms. Alexander contend that DEQ's decision to issue the PSD permit was in violation of the Clean Air Act because Formosa failed to demonstrate that the emissions from the proposed complex would not cause or contribute to air pollution in violation of the NAAQS or an increment, as there were modeled exceedances of the NAAQS for two criteria pollutants and further, that DEQ's use of SILs to find that Formosa was not responsible for those contributions was arbitrary and capricious.

As previously detailed, under the Clean Air Act and DEQ's implementing regulations of the PSD program, in order to obtain a PSD permit, a proposed facility (or applicant for a PSD permit) must demonstrate, among other things, that new emissions from the proposed project "will not cause or contribute" to air pollution in excess of any NAAQS or increment. 42 U.S.C. §7475(a)(3); LAC 33:III.509.K. To determine whether this standard has been met, DEQ requires that a permit application contain an analysis of the ambient air based on EPA's air modeling requirements, which analysis shall be based on the applicable air quality models, databases, and other requirements specified in Appendix W of 40 C.F.R. Part 51. LAC 33:III.509.L and M.

In accordance with these provisions, Formosa conducted extensive air modeling; it performed a preliminary impact analysis, a full impact analysis, and

detailed refined modeling. In Formosa's preliminary impact analysis, it modeled its own emissions and compared them to the relevant SILs; for pollutants above their respective SILs, Formosa then conducted a full-impact analysis to predict the ambient concentrations for comparison to the NAAQS. As part of the full impact analysis, Formosa modeled its own emissions, as well as emissions from off-property sources within the area and added ambient background concentrations. Based on the full impact analysis, there were predicted exceedances of the NAAQS at off-site receptor locations for two pollutants: $PM_{2.5}$ (24-hour standard) and NO_2 (1-hour standard). To further analyze these two pollutants, Formosa conducted detailed, refined modeling.

The detailed, refined modeling was done for all receptors that had a predicted exceedance of the NAAQS, and in each case, the results of the modeling demonstrated that the predicted impacts from the emissions attributable to Formosa were below the respective SIL at each receptor. Because the predicted concentration at each such receptor was less than the relevant SIL, Formosa demonstrated that its emissions would not "cause or contribute to" an exceedance of the NAAQS or increment at any off-site receptor.

In DEQ's Basis for Decision, it noted that the "[m]odeling results indicate that $PM_{2.5}$ and NO_2 concentrations *may* exceed the 24-hour $PM_{2.5}$ and 1-hour NO_2 NAAQS." DEQ further noted that "[c]onsistent with 40 C.F.R. [§]51.165(b)(2), a major source shall not be considered to cause or contribute to a violation of a NAAQS unless such source would, at a minimum, exceed a significance level (*i.e.* a SIL) at a locality that does not or would not meet the applicable standard." See also SILs guidance document. DEQ further noted that Formosa's maximum contribution to any modeled exceedance of the $PM_{2.5}$ NAAQS was 0.89 $\mu g/m^3$, which was below the SIL of 1.2 $\mu g/m^3$, and its maximum contribution to any modeled exceedance of the NO_2 NAAQS would be 6.35 $\mu g/m^3$, which was below

the SIL of 7.5 $\mu g/m^3$. These conclusions are supported by the administrative record. Thus, DEQ concluded that Formosa "will not 'cause or contribute' to a violation of the 24-hour $PM_{2.5}$ or 1-hour NO_2 NAAQS."

Further, with regard to the modeled exceedances, in DEQ's Basis for Decision, DEQ recognized that the maximum modeled concentrations of $PM_{2.5}$ and NO_2 exceeded their respective 24-hour and 1-hour NAAQS. However, DEQ pointed out that this did "not necessarily mean that there are or will be actual exceedances of these standards" and that "[t]o derive maximum ground level concentrations for the 24-hour and 1-hour standards, [Formosa] modeled the maximum permitted hourly rate of all sources within the modeling domain." Thus, DEQ recognized that the modeling "results effectively assume worst-case emissions from multiple industrial facilities will coincide with worst-case meteorological conditions, a circumstance that is improbable at best and, given the number of sources modeled, likely never to occur." DEQ then noted that nevertheless, given those "extremely conservative inputs," receptors for the modeled exceedances were not located on residential property, property that was generally accessible to the public, or any other location where long-term exposure to emissions could reasonably be anticipated." Thus, DEQ determined that "the health of those living in the vicinity of the [Formosa] [c]omplex [would] not be adversely impacted," that "the modeled exceedances exist[ed] irrespective of the [proposed Formosa] [c]omplex," and that [the proposed Formosa] [c]omplex's contributions to these exceedances will be insignificant."

In further justification on this issue, DEQ referred to its Public Comments Response Summary, response to comment number 1. Therein, DEQ again noted that consistent with 40 C.F.R. §51.165(b)(2), a major source shall not be considered to cause or contribute to a violation of a NAAQS unless such source would, at a minimum, exceed a SIL at a locality that does not or would not meet the applicable

standard. DEQ explained that it used the SIL values recommended by EPA in implementing its PSD program. LAC 33:III.509. For $PM_{2.5}$, these values are 0.2 $\mu g/m^3$ for the annual standard and 1.2 $\mu g/m^3$ for the 24-hour standard.[30] For NO_2, these values are 1.0 $\mu g/m^3$ for the annual standard and 7.5 $\mu g/m^3$ for the 1-hour.[31]

DEQ recognized that the maximum modeled concentrations of NO_2 and $PM_{2.5}$ exceeded their respective 1-hour and 24-hour NAAQS (and the 24-hour $PM_{2.5}$ increment). However, it also noted that the modeling predicted that Formosa's maximum contribution to the modeled exceedance of the 24-hour $PM_{2.5}$ NAAQS would be 0.89 $\mu g/m^3$ (including secondary formation), which was below the SIL of 1.2 $\mu g/m^3$; the 24-hour $PM_{2.5}$ increment would be 0.67 $\mu g/m^3$, which was below the SIL of 1.2 $\mu g/m^3$; and the 1-hour NO_2 NAAQS would be 6.35 $\mu g/m^3$, which was below the SIL of 7.5 $\mu g/m^3$. Thus, DEQ concluded that Formosa would not "cause or contribute" to a violation of the 24-hour $PM_{2.5}$ NAAQS, the 1-hour NO_2 NAAQS, or the 24-hour $PM_{2.5}$ increment.

The plaintiffs and Ms. Alexander claim that the mere existence of a modeled exceedance violates the Clean Air Act, pointing to the results of the full-impact analysis in which there were predicted exceedances of the NAAQS for $PM_{2.5}$ and NO_2. However, based on our review of the law and implementing regulations, we disagree. The existence of a predicted modeled exceedance is merely one step in the modeling process. If an exceedance is predicted by the model, additional analysis is required, and the applicant must determine the proposed project's contribution to the potential exceedance, as set forth in the applicable air quality modeling procedures. Formosa did so by performing the detailed refined modeling discussed above,

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[30] See SILs guidance document; 40 C.F.R. §51.165(b)(2).

[31] See 40 C.F.R. §51.165(b)(2); https://www.epa.gov/sites/production/files/2015-07/documents/appwno2.pdf.

thereby demonstrating that the modeled exceedances were not caused by Formosa, but rather, "are caused by off property sources."

The plaintiffs and Ms. Alexander also claim that DEQ's use of SILs to determine that Formosa did not "cause or contribute" to the NAAQS or increment exceedance is arbitrary and capricious and violates the Clean Air Act. However, we find DEQ's use of SILs in the PSD program is supported by its interpretation of the Clean Air Act itself, case law interpreting the Clean Air Act, and the regulations and guidance promulgated or issued by the EPA pursuant to the Clean Air Act. Thus, DEQ had a reasonable basis for incorporating the use of SILs in its PSD program, and its use of SILs is neither erroneous nor arbitrary and capricious.

The Clean Air Act specifically provides that, with respect to the PSD program, "each applicable [state] implementation plan shall contain emission limitations and such other measures as may be necessary ... to prevent **significant** deterioration of air quality" in attainment areas. 42 U.S.C. §7471 (emphasis added). Furthermore, courts have recognized that the PSD program of the Clean Air Act "by its title and by its terms, is designed to prevent **significant** deterioration of air quality." **Alabama Power Company v. Costle**, 636 F.2d 323, 361 (D.C. Cir. 1979) (emphasis added).

Further, the concepts of significant, significance levels, and SILs are specifically incorporated by regulation into the PSD program. Pursuant to 40 C.F.R. §51.165(b)(2), a "major source ... will be considered to cause or contribute to a violation of a [NAAQS] when such source ... would, at a minimum, exceed the following **significance levels**" set out in the included table. (Emphasis added). Both $PM_{2.5}$ and NO_2 are included in that table. Thus, by federally promulgated regulation, the EPA has determined that SILs are an integral part of the demonstration as to whether a source will cause or contribute to a predicted modeled exceedance.

Furthermore, the EPA has also stated that its "longstanding policy" is to allow the use of SILs "to determine whether a … source will cause or contribute to a violation of the [NAAQS] or PSD increments."[32] In addition, as noted by DEQ in its Public Comment Response Summary, response to comment number 1, the EPA has issued several guidance memoranda confirming its longstanding policy that SILs may be used as a method to demonstrate whether a proposed project causes or contributes to a predicted modeled exceedance. In one document, entitled "Legal Memorandum: Application of Significant Impact Levels in the Air Quality Demonstration for Prevention of Significant Deterioration Permitting under the Clean Air Act,"[33] it states that "a permitting authority is not required to conclude that any level of ambient impact from a source located in an attainment area automatically 'causes or contributes' to a violation." It further concludes that "[w]here SIL values developed by EPA are used to show that a source does not cause or contribute to a violation, [the] permit-specific record can incorporate the information and technical analysis provided by the EPA to show that a source with a projected impact below the relevant SIL value will not cause or contribute to a violation of the NAAQS or PSD increment." Further, the SILs guidance document provides a straightforward explanation for EPA's use of SILs values:

> Where a cumulative impact analysis predicts a NAAQS violation, the permitting authority may further evaluate whether the proposed source will cause or contribute to the violation by comparing the proposed source's modeled contribution to that violation to the corresponding SIL value. If the modeled impact is below the recommended SIL value at the violating receptor during the violation, the EPA believes this will be sufficient in most cases for a permitting authority to conclude that the source does not cause or contribute to (is not culpable for) the predicted violation. This demonstration would, thus, allow the permit to be issued if all other PSD requirements are satisfied.
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[32] https://www.epa.gov/sites/production/files/2015-07/documents/levels.pdf

[33] https://www.epa.gov/sites/default/files/2018-04/documents/legal_memorandum_final_4-17-18.pdf

> [T]he PSD increment SILs recommended above may be used to determine if the proposed source will cause or contribute to that exceedance. If the cumulative impact analysis shows an annual average $PM_{2.5}$ PSD increment exceedance or a 24-hour PSD increment exceedance at a location, the comparison of the proposed source's impact at that location during the exceedance to the corresponding SIL value may be used to determine whether the proposed source will cause or contribute to the exceedance(s) at that receptor. If the modeled impact is below the SILs for the relevant pollutant, then the permitting authority may conclude that the source does not cause or contribute to a violation of the PSD increment for that pollutant.

Notably, DEQ specifically incorporated these legal memoranda from EPA into the administrative/permit record as justification for the use of EPA's recommended SILS in its PSD program.

The EPA and thus, the DEQ, have consistently interpreted the phrase "cause or contribute" to incorporate the use of SILs. As previously set forth, a reviewing court should afford considerable weight to DEQ's construction and interpretation of the statutory scheme that it was entrusted to administer, and deference must be awarded to its administrative interpretations; this same standard must also be afforded to DEQ regarding the construction and interpretation of the rules and regulations under its authority and that it promulgates. See **Dow Chem. Co.**, 885 So.2d at 9; **Matter of Recovery**, 635 So.2d at 696. Given the considerable weight afforded to DEQ in its interpretation of "cause or contribute" to include the use of SILs, we cannot say that DEQ's decision to issue the permits was in violation of the Clean Air Act or that its use of SILs to determine that Formosa would not violate a NAAQS or increment or "cause or contribute to" any modeled exceedance was arbitrary and capricious.

C. Whether DEQ's Decision to Issue the Permits Violated the Public Trust Doctrine

1. DEQ's Analysis of the IT Issues

a. Whether There Are Alternative Projects Or Alternative Sites Or Mitigating Measures That Would Offer More Protection To the Environment Than The Proposed Project Without Unduly Curtailing Non-Environmental Benefits To The Extent Applicable

In its Basis for Decision, DEQ noted that the issues of whether there were alternative sites, alternative projects, and mitigating measures were closely interrelated and overlapped, and although it separately addressed each issue, because of this interrelationship, it adopted any and all of its findings on all three issues under each specific issue addressed. In addition, DEQ also noted that the issue of avoidance of adverse environmental effects was also interrelated to those issues and had been considered in relation to those facts.

i. Alternative Sites

In the alternative sites analysis, DEQ noted that Formosa had identified a number of undeveloped properties potentially suitable for its proposed complex, and that it considered the following environmental and logistical factors relevant to its site selection process: attainment status with respect to criteria pollutants; access to an adequate dock on the Mississippi River or a location suitable for the construction of a new dock; access to rail transportation; access or proximity to ethylene, ethane, and natural gas pipelines; access to 230-kilovolt electrical transmission lines; the amount of jurisdictional wetlands or waters on the property; the amount and location of land on the property within the 100-year floodplain; proximity of the property to residences; and amount of acreage available, with 800 acres being the minimum necessary.

Initially, Formosa identified six properties as meriting consideration for the facility, and it ultimately selected what it referred to as the "Zeringue/St. Emma site." However, that site had to be eliminated because there was no dock and the New Orleans-Baton Rouge Steamship Pilots Association would not approve construction of a dock due to its location by a bend in the river that would make negotiating the bend unacceptably dangerous.

After this site was dismissed, Formosa identified additional prospective sites for the proposed complex from the remaining properties, as well as eight newly identified properties. These properties were located in Ascension Parish, St. James Parish, and St. John the Baptist Parish. To evaluate these thirteen sites, a two-tiered process was utilized, with the sole consideration being the attainment status of the parish. At the time, Ascension Parish was anticipated to be designated as "nonattainment" with respect to the 8-hour NAAQS for ozone based on the recommendation of DEQ; thus, Formosa eliminated the five properties in Ascension Parish, because the requirement to offset NOx and VOC emissions under the nonattainment new source review provisions would have effectively precluded construction of the complex. See LAC 33:III.504.

With regard to the remaining eight properties, six were noted to have residents in very close proximity and three of the properties were noted to be small and/or narrow, making an expansive facility difficult. Two sites—Winchester/Acadia and Minnie—were then identified as having more positive and fewer negative characteristics. As a result, the Winchester/Acadia site, with as much of Minnie as could be obtained, was identified as the location that best met its criteria. These properties became known as the Mosaic-Gavilon site, which is where Formosa proposes to build the complex.

DEQ pointed out that this site was located in an attainment area with respect to all NAAQS; provided riverfront access for the construction of a dock that would not obstruct navigation; was traversed by Union Pacific Railroad, 230-kilovolt electrical transmission lines, and ethane and natural gas pipelines; contained a minimal amount of jurisdictional wetlands or waters on the portion of the property on which the facility would be constructed; was mostly located outside of the 100-year floodplain; was over a mile from the nearest community on the west side of the river and more than 0.5 miles from the nearest residence on the east side of the river,

and further that this site had the lowest population density within one mile of each prospective location; was sufficiently sized to allow for at least a 300-foot buffer between process equipment and the property boundary; and was located in an area specifically designated by St. James Parish for industrial development and was adjacent to other industrial properties.

DEQ also noted that, although the Mosaic-Gavilon site had never been the location of an industrial facility, there had been ongoing activities (sugar cane productions and oil and gas production) that resulted in several areas with low levels of contamination. After environmental sampling and analyses of these locations by Formosa, DEQ concluded that the low levels of contamination did not pose a risk to human health or the environment. Thus, based on all of this information, DEQ found that there were no alternative sites that would offer more protection to the environment than the proposed site without unduly curtailing non-environmental benefits.

The plaintiffs and Ms. Alexander maintain that DEQ's analysis of alternative sites was arbitrary and capricious because of the elimination of the five locations in Ascension Parish. We disagree. As noted by DEQ in its Basis for Decision, Ascension Parish was anticipated to be classified in nonattainment status, based on DEQ's recommendation, during site selection. In order to construct a facility in a nonattainment area, Formosa, as a major stationary source, would have had to purchase emission reduction credits. See LAC 33:III.504; LAC 33:III.Chapter 6. As the requisite number of emission reduction credits were not available, construction of the complex would have been effectively precluded. Thus, DEQ had a reason, supported by the administrative record, to find that the five sites in Ascension Parish were not feasible alternative sites for the proposed Formosa complex, and we further, we cannot say that DEQ's analysis of whether there were

alternative sites that would offer more protection to the environment than the proposed project was arbitrary and capricious.

ii. Alternative Projects

Next, with regard to alternative projects, DEQ's analysis of this issue was not challenged by the plaintiffs or by Ms. Alexander. However, as this issue must be addressed by DEQ in a complete and thorough analysis of the IT issues, we note that DEQ concluded that the project, as proposed, offered more protection to the environment than any other possible alternatives without unduly curtailing non-environmental benefits and recognized that selection of the most environmentally sound projects usually also serves as a mitigating measure because the two considerations overlap. DEQ also noted that the proposed complex would utilize state-of-the-art technology; be constructed to meet the latest, and therefore most protective technological standards; and employ advanced emissions abatement technology and monitoring equipment to ensure emissions were compliant with permitted limits.

DEQ also stated that it considered the "no build" alternative and an alternative that entailed approval of less capacity. However, DEQ concluded that because it had determined that the proposed permits minimized or avoided potential and real adverse environmental impacts to the maximum extent possible and that the social and economic benefits of the proposed Formosa complex outweighed its adverse environmental impacts, those two alternatives would only serve to eliminate or minimize the social and economic benefits stemming from the proposed project. Thus, those alternatives were discounted. From our review of the administrative record and DEQ's Basis for Decision, DEQ's analysis of whether there were alternative projects that would offer more protection to the environment than the proposed project was not arbitrary and capricious.

iii. Mitigating Measures

With regard to DEQ's analysis of mitigating measures, DEQ noted that the Title V/Part 70 operating permits required that Formosa meet or exceed the requirements of all applicable federal emission standards promulgated pursuant to the Clean Air Act and the state emission standards promulgated pursuant to the Louisiana Environmental Quality Act. DEQ further noted that Formosa would be subject to a host of comprehensive emission standards and performance testing, monitoring, recordkeeping, and reporting requirements covering every facet of its operations. DEQ explained that these provisions mandate that hazardous air pollutants be controlled using MACT and then set forth a list of the federal regulations that would be applicable to the complex. DEQ further explained that because the facility would be a major stationary source under the PSD program, emissions of PM_{10}, $PM_{2.5}$, SO_2, NOx, CO, VOC and greenhouse gases must be controlled by BACT, which establish additional standards and control requirements, and further, listed specific, additional testing and monitoring provisions being imposed on Formosa by DEQ in order to assure compliance with the terms and conditions of the permits.

As to emission limits and as previously discussed, DEQ found that the emission limits set forth for the criteria pollutants and the toxic air pollutants from the Formosa complex would not cause or contribute to a violation of a NAAQS or AAS under the air modeling performed; therefore, "the permits [did] not allow for air quality impacts that could adversely affect human health or the environment." Also, as previously discussed, DEQ addressed the modeled exceedances, noting that those modeled exceedances exist irrespective of the complex and that Formosa's contribution to those exceedances would be insignificant.

Next, although the permitted emission limit for ethylene oxide[34] (annual) of 0.41 $\mu g/m^3$, was below the AAS of 1.00 $\mu g/m^3$, DEQ specifically addressed the impacts of Formosa's ethylene oxide emissions. In doing so, DEQ noted that the EPA's 2014 NATA posits that ethylene oxide significantly contributes to *potential* elevated risks for some types of cancers, including cancers of the white blood cells (such as non-Hodgkin's lymphoma, myeloma, and lymphocytic leukemia) and breast cancer in females and that the concentration of ethylene oxide associated with a 1-in-10,000 cancer risk for a lifetime of continuous exposure was 0.02 $\mu g/m^3$. However, DEQ found that recent data published from the Louisiana Tumor Registry did not support that supposition, and after reviewing the data for the census tracts in which the largest emitters of ethylene oxide in the state were located, there was no evidence that cancer rates in those census tracts were elevated as a consequence of exposure to ethylene oxide emissions, and that the average rates for all cancers combined and for breast cancer in those areas were *below* state averages. DEQ also explained that research conducted by other entities, including the Texas Commission on Environmental Quality ("TCEQ"), demonstrated that the EPA's risk assessment for ethylene oxide significantly over-predicted the number of cancers that were observed in a study used to derive the 0.02 $\mu g/m^3$ value, and TCEQ, after evaluating the same data, recommended the use of 7 $\mu g/m^3$, which corresponded to a 1-in-100,000 (not 1-in-10,000) cancer risk, as a protective ambient air threshold for permitting purposes.

Nevertheless, DEQ found that the residential areas to the east and northeast of the complex were "well beyond the 0.02 $\mu g/m^3$ isopleth (red line) [and] [t]hus, even if one were to conservatively employ the 0.02 $\mu g/m^3$ as a protective standard, [those] areas would not be adversely impacted." Furthermore, DEQ explained that

[34] As previously noted, ethylene oxide is a toxic air pollutant.

notwithstanding the protections already provided by the Title V/Part 70 permits and that the two ethylene glycol plants in the complex would be subject to one of the most stringent federal leak detection and repair programs promulgated to date by the EPA, it established specific, more stringent requirements for the components in ethylene oxide service and was requiring Formosa to continuously monitor ambient concentrations of ethylene oxide.

With regard to ambient air monitoring, DEQ was requiring Formosa to conduct air quality monitoring along its eastern property boundary and a section of its northeastern property boundary for three toxic air pollutants—1,3 butadiene, vinyl acetate, and ethylene oxide—and to install a sufficient number of monitors to provide data on air emissions potentially impacting the surrounding community.

In its mitigating measures analysis, DEQ also addressed greenhouse gas emissions and found the following to be relevant: (1) the permits require BACT for greenhouse gas emissions from the Formosa complex, which requires Formosa to minimize such emissions by employing design features that maximize efficiency, by employing proper combustion techniques to minimize fuel use, and by using no carbon fuel where available; (2) there is no current methodology or guidance to determine how a specific industrial facility's incremental contribution of greenhouse gases would translate into physical effects on the global environment; (3) exposure to greenhouse gases does not adversely affect human health; (4) unlike most traditional air pollutants, greenhouse gases become well mixed throughout the global atmosphere such that the long-term distribution of greenhouse gases is not dependent on local emission sources—rather it tends to be uniform around the world—and as a result of this global mixing, greenhouse gases emitted anywhere in the world affect climate everywhere in the world;[35] and (5) the Formosa complex will employ state-

[35] DEQ further noted that it was for this reason the "no build" alternative (in the alternative projects analysis) fails, because construction of the Formosa complex in St. James Parish would, in effect, have no more impact on Louisiana relative to greenhouse gases than if the facility was constructed

of-the-art technology that will ostensibly result in less consumption of natural gas per unit of product produced than existing facilities that manufacture the same chemicals that the Formosa complex will manufacture, and thus, should any product produced at the Formosa complex displace its production elsewhere, net greenhouse gas emissions may actually decrease.[36]

Based on all of these considerations, DEQ concluded that there were no mitigating measures that would offer more protection to the environment than the facility as proposed, without unduly curtailing non-environmental benefits.

With regard to the emissions of $PM_{2.5}$ and NO_2, ethylene oxide, toxic air pollutants, and greenhouse gases in combination with existing permitted emissions for the area, the plaintiffs and Ms. Alexander contend that DEQ's decision to issue the permits was in violation of its public trust duty and its analysis of the IT issues relating to those emissions was arbitrary and capricious because it failed to consider the impacts of those emissions. Although DEQ addressed those emissions in its analysis of mitigating measures, it specifically incorporated its discussion of air emissions in its analysis of avoidance of environmental effects. Because the issues raised by the plaintiffs and Ms. Alexander with regard to those emissions are more appropriately addressed in the analysis of avoidance of adverse environmental effects, we address them below.

b. Whether The Potential And Real Adverse Environmental Effects of the Proposed Project Have Been Avoided to the Maximum Extent Possible

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elsewhere, but it would provide the social and economic benefits addressed in DEQ's cost-benefit analysis.

[36] In its mitigating measures analysis, DEQ also addressed impacts to Class I areas, which include national parks and other areas of special national and cultural significance, and determined that the Formosa complex would not cause or contribute to an exceedance of any Class I PSD increment or cause an unacceptable degradation of any applicable air quality related value. DEQ also addressed the establishment of a forested buffer along the eastern boundary of the complex to mitigate the visual impacts on residential areas, notwithstanding that the complex will be located over a mile from the nearest community on the west side of the Mississippi River.

In determining whether the potential and real adverse environmental impacts of pollutant emissions from the Formosa complex were minimized to the maximum extent possible, DEQ specifically addressed: wastewater, including during construction, during operations, spills, and discharge of plastic pellets; groundwater; waste; process safety, including chemical accident prevention provisions, process safety management, defensive emergency protective measures, and evacuation routes; wetlands; traffic; noise; cultural resources; and endangered species.

With regard to air emissions, DEQ adopted its discussion set forth in mitigating measures. The plaintiffs and Ms. Alexander contend that DEQ's decision to issue the permits was in violation of the public trust doctrine and its analysis of the IT issues was arbitrary and capricious because DEQ failed to consider the impacts of NO_2 and $PM_{2.5}$ emissions, the impacts of ethylene oxide emissions, the combined impacts of toxic air pollutants, and the impacts of greenhouse gases. We disagree.

As to the emission of NO_2 and $PM_{2.5}$ and as discussed above, DEQ properly considered those emissions in relation to the Clean Air Act and found that Formosa's emissions did not cause or contribute to the modeled exceedances, did not cause or contribute to a NAAQS exceedance or violation, and that the emissions did "not allow for air quality impacts that could adversely affect human health or the environment." The standards set forth in the Clean Air Act, including the NAAQS, are national standards that are designed to be protective of public health and the environment. See 42 U.S.C. §7409(b). DEQ's reliance on those federal standards in considering the emissions of NO_2 and $PM_{2.5}$ is not arbitrary and capricious and does not violate DEQ's duty under the public trust doctrine.

With regard to ethylene oxide emissions, DEQ specifically considered the impact of those emissions and determined that the surrounding communities "would not be adversely effected" by Formosa's ethylene oxide emissions. This

determination was based on several findings. First, the applicable AAS, which is a risk-based regulatory standard established to be protective of human health, of 1.0 $\mu g/m^3$ will not be exceeded at any off-site location. See LAC 33:III.5112, Table 51.2. This fact alone provided a reason for DEQ's decision in this regard. Further, even assuming that the ethylene oxide cancer risk threshold of .02 $\mu g/m^3$ was the appropriate standard to consider under the public trust doctrine, the residential communities are located beyond the areas where the ethylene oxide levels up to this threshold are expected. As additional support and reasons for concluding that the ethylene oxide emissions from the Formosa complex would not adversely impact human health or the environment, DEQ relied on data from the Louisiana Tumor Registry regarding actual cancer incidence data for the census blocks where historical ethylene oxide emitters are located. In doing so, DEQ found that average cancer rates for all cancers combined and for breast cancer in these areas were below state averages. DEQ's reliance on the data from the Louisiana Tumor Registry, which is collected and published in accordance with state law, is not arbitrary and capricious or an abuse of discretion. See La. R.S. 40:1105.1, *et seq*.

Further, as to the amount of ethylene oxide emissions, DEQ determined that Formosa avoided ethylene oxide emissions to the maximum extent possible consistent with the public welfare. DEQ imposed MACT, and even though Formosa would be "subject to the most stringent federal ... programs," DEQ established even more stringent requirements for components in ethylene oxide service. DEQ also required Formosa to monitor ethylene oxide at the property boundaries. Thus, we cannot say that DEQ's consideration of ethylene oxide emissions violated the public trust doctrine or that its analysis of these emissions under the IT issues was arbitrary and capricious.

We also find that DEQ gave proper consideration to toxic air pollutants. Although the plaintiffs and Ms. Alexander claim that DEQ failed in its public trust

duty by not requiring Formosa to model the cumulative or combined impact of all of its toxic air pollutants, there is no such requirement in DEQ's modeling protocol. In fact, this Court previously rejected an identical argument in this regard in **In Re Louisiana Dept. of Environmental Quality Permitting Decision: Regarding State (Synthetic Minor Source) Permit No. 2560-00292-00 to Petroplex International, L.L.C.**, 2010-1194 (La. App. 1st Cir. 3/25/11), 2011 WL 1225871, *7 (unpublished) ("**In re Petroplex**"). In that case, it was argued that the permit applicant and DEQ "improperly failed to address the cumulative effects of air emissions from the proposed ... facility and releases from other surrounding industrial facilities." *Id.* The air modeling therein was based on a protocol previously approved by DEQ, and based on the air modeling results, it was determined that the proposed facility's results were lower than Louisiana's AAS for each pollutant. *Id.* Consequently, because of those results, "further modeling, including that which would have addressed the cumulative impact of the proposed emissions along with those released by other facilities operating in the area, was not required." *Id.*

In this case, there is no dispute that Formosa conducted air modeling regarding toxic air pollutants in accordance with DEQ's air modeling procedures set forth in the modeling protocol submitted and approved by DEQ. Like the proposed facility in **In Re Petroplex**, Formosa's air modeling results showed that AAS for toxic air pollutants would not be exceeded. Consequently, no additional modeling was required. Thus, we cannot say that DEQ's decision not to require Formosa to model the cumulative or combined impact of all of its toxic air pollutants was arbitrary and capricious or in violation of its duty under the public trust doctrine.

With regard to greenhouse gas emissions, DEQ's Basis for Decision reflects that it considered those emissions, as well as their impact on the environment. The DEQ permits required BACT on those emissions in the PSD permit, as well as

maximum allowable emission rates. DEQ minimized Formosa's greenhouse gas emissions to the maximum extent possible, and DEQ's determination in this regard was not arbitrary and capricious or an abuse of discretion.

c. Whether a Cost-Benefit Analysis of the Environmental Impacts Costs Balanced Against the Social and Economic Benefits of the Project Demonstrate that the Latter Outweighs the Former

In its cost-benefit balancing analysis, DEQ noted that, under **Save Ourselves**, 452 So.2d at 1157, the Louisiana Constitution requires balancing—not protection of the environment as an exclusive goal—and found that the social and economic benefits of the proposed project outweighed its potential environmental impacts. DEQ then noted, in the subsection entitled "**A. Environmental Impact Costs**" that the impacts to air quality and other media were previously discussed "in Sections VI [mitigating measures] and VII [avoidance of adverse environmental effects] above" and that those impacts had been avoided to the maximum extent possible without unduly curtailing non-environmental benefits. DEQ then addressed the numerous social and economic benefits of the proposed project. With regard to social benefits, DEQ noted the establishment of the FG Workforce Academy to provide potential job applicants with training and skills required to gain employment at the complex; transportation improvements; health screening; community improvements, including beautification of the nearby public park; and education grants. With regard to economic benefits, DEQ noted the creation of over 1,200 permanent jobs and 8,000 temporary construction-related jobs, as well as the direct economic benefits, including capital expenditures associated with the construction, revenue from the complex's operations, as well as federal, state, and local tax benefits. Accordingly, DEQ concluded that the social and economic benefits outweighed the environmental impact costs.

The plaintiffs and Ms. Alexander contend that DEQ's analysis in this regard was arbitrary and capricious and did not comply with its public trust duty because it

failed to consider the environmental impacts associated with the permitted emissions in the cost-benefit analysis. However, a review of DEQ's Basis for Decision belies this contention. As set forth above, in DEQ's Basis for Decision, it found that the social and economic benefits would outweigh the potential adverse environmental impacts, and further in the subsection entitled "**Environmental Impact Costs**" noted that impacts to air quality and other media had been discussed "in Sections VI [mitigating measures] and VII [avoidance of adverse environmental effects] above." Thus, DEQ clearly incorporated its discussion of environmental impacts from mitigating measures and avoidance of adverse environmental effects into its analysis and balancing of the costs versus benefits. DEQ then identified the specific social and economic benefits and concluded that those benefits outweighed the environmental impact costs.

As set forth in **Save Ourselves**, 452 So.2d at 1157, DEQ has a "latitude of discretion" regarding this balancing process in which "environmental costs may outweigh economic and social benefits and in other instances they may not" and that this "leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances." DEQ is entitled to considerable deference in its conclusion that the social and economic benefits outweigh the environmental impact costs, and we cannot say that its analysis or conclusion in this regard was arbitrary and capricious or otherwise characterized by an abuse of discretion.

2. Environmental Justice

Lastly, the plaintiffs and Ms. Alexander claim that DEQ's decision to issue the permits to Formosa was a violation of its duty under the public trust doctrine because its environmental justice analysis was arbitrary and capricious. Specifically, they claim that DEQ failed to consider the purported disproportionate impact its

decision would have on surrounding "communities of color," and failed to appropriately consider the EJScreen data.

In response, both DEQ and Formosa argue that there is no constitutional provision, statute, regulation, or policy mandating that DEQ conduct an environmental justice analysis in conjunction with its permitting decisions. However, we find the directives from the Louisiana Supreme Court in **Save Ourselves**, 452 So.2d at 1157, which require consideration of "economic, "social[,] and other factors," broad enough to include an analysis of environmental justice, as defined by the EPA. See **Dow Chem. Co.**, 885 So.2d at 15 (DEQ's "thorough analysis, which considered [among other things] ... environmental justice/civil rights Title [VI] issues as mandated by the Louisiana Supreme Court in **Save Ourselves**" was sufficient to establish that DEQ complied with its constitutional mandate under the public trust doctrine); and **North Baton Rouge Environmental Association**, 805 So.2d at 263 (DEQ adequately responded to public comment regarding environmental justice concerns and did not violate its constitutional duty to act as trustee of the environment). See also 40 C.F.R. Part 7.

Despite DEQ's arguments as to the necessity of an environmental justice analysis, it nonetheless specifically addressed and conducted an analysis of the environmental justice/civil rights Title VI issues raised by the proposed Formosa complex in its Basis for Decision and in the Supplement to the Basis for Decision. It also addressed environmental justice issues in its Public Comments Response Summary. Importantly, and as previously discussed, prior to addressing environmental justice/civil rights Title VI issues, DEQ made a specific finding that "emissions from the [proposed Formosa] [c]omplex will not cause or contribute to a violation of a NAAQS or AAS [;] ... [t]herefore, the permits do not allow for air quality impacts that could adversely affect human health or the environment."

DEQ began its environmental justice/civil rights Title VI analysis by setting forth the EPA's definition of environmental justice (previously set forth) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies" with "[f]air treatment" meaning that "no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial operations."

DEQ then addressed how the EPA has previously handled environmental justice issues. DEQ noted that for many years, the EPA took the position that air quality meeting the NAAQS were presumptively protective and that emissions of a pollutant meeting the NAAQS should not be viewed as "adverse" under Title VI of the Civil Rights Act. DEQ noted that, under this analysis and EPA's regulations, "to be actionable under Title VI, an impact must be both 'adverse' and 'disparate,'" and that if "EPA ha[d] determined that there [was] no 'adverse' impact for anyone living in the vicinity of a facility, it [was] unnecessary to reach the question of whether the impacts [were] 'disparate.'" DEQ then noted while that EPA's current approach to environmental justice/civil rights Title VI issues had "eliminate[d] application of the rebuttable presumption," the determination of whether there were "adverse" impacts was "still intrinsically linked to whether a given area is compliant with the NAAQS."

DEQ then specifically addressed and considered the EJScreen data. First DEQ explained that the EPA cautions that EJScreen "should *not* be used" "as a means to identify or label an area as an '[environmental justice] community,'" "to quantify specific risk values for a selected area," "to measure cumulative impacts of multiple environmental factors," or "as a basis for agency decision-making or making a determination regarding the existence or absence of [environmental justice] concerns." DEQ also explained that according to EPA, the "screening-level

results" of EJScreen "do not, by themselves, determine the existence or absence of environmental justice concerns in a given location," "do not provide a risk assessment," and "have other significant limitations." DEQ then found that in this case, the EJScreen data "shows that residents of the community closest to the [proposed Formosa complex] do *not* bear a disproportionate share of the negative environmental consequences resulting from industrial operations" and that "the environmental indicators of Particulate Matter, Ozone, NATA Air Toxics Cancer Risk, and NATA Respiratory Hazard Index [were] comparable with or *less* than state averages."

DEQ also evaluated whether the net effect of individual permitting decisions had, over time, increased the burden on the residents of St. James Parish and examined the emissions trends over the recent timeframe. In doing so DEQ found that the results had shown dramatic declines in actual emissions of criteria pollutants and toxic air pollutants, as well as declines in permitted emissions of criteria pollutants. DEQ also noted that the construction of the complex would not create a "fenceline community," as the population density within one mile of Formosa's property boundary was only ten people per square mile per the EJScreen data, and in fact, as the EJScreen reports the population within a one-mile radius from the center of the proposed facility to be zero.

DEQ then concluded that its analyses conducted in support of the proposed permits had shown that Formosa would meet the primary and secondary NAAQS for criteria pollutants and the Louisiana AAS for toxic air pollutants and that there were no "hot spots" over non-industrial properties that were in violation of these standards; that EPA's own EJScreen data showed that the environmental indicators of Particulate Matter, Ozone, NATA Air Toxics Cancer Risk, and NATA Respiratory Hazard Index were comparable with or less than state averages; that actual emissions of both criteria pollutants and toxic air pollutants had decreased

dramatically over time; and that permitted emissions from major sources located near the proposed Formosa complex have also declined significantly. DEQ also noted that it provided an opportunity for all parties to be meaningfully involved in the permits process, provided a lengthy comment period and a public hearing on the proposed permits, and, as evidenced by its Public Comments Response Summary, it carefully considered the community's concerns in the decision- making process.

In addition to these determinations, DEQ specifically considered and addressed environmental justice, cancer rates in the surrounding communities, and how it affected Black and minority members in its Public Comment Response Summary—more specifically, in its responses to comments 85, 86, 87, and 126. For instance, in response to comment number 86, DEQ explained in detail that:

> … data from the Louisiana Tumor Registry shows that in the so-called "Industrial Corridor," which includes the parishes of Ascension, East Baton Rouge, Iberville, St. Charles, St. James, St. John the Baptist, and West Baton Rouge, the incidence rates for all cancers combined for [W]hite women are significantly lower than the statewide rate, and the rates for all cancers combined for [W]hite men, [B]lack men, and [B]lack women do not differ significantly from Louisiana rates. Death rates for all cancers combined in the Industrial Corridor are significantly lower than those elsewhere in Louisiana among [W]hites; [B]lacks experience the same mortality rates as their counterparts statewide. [Footnote omitted]
>
> Despite the Louisiana Tumor Registry's findings …[it is alleged] that cancer incidence rates in St. James Parish are "significantly higher than in [the] rest of Louisiana." That is simply not the case. In fact, the cancer rates in St. James Parish were not even the highest *in* the Industrial Corridor for [B]lack men or [B]lack women, and another study even represents the cumulative cancer risk for all air toxics in the parish as "low."[Footnote omitted.]
>
> In St. James Parish, the incidence rates for the ten most commonly diagnosed cancers in Louisiana were slightly higher (8 percent) than Louisiana averages for [B]lack women … but markedly *lower* for [B]lack men. … Notably, these rates were below those observed in 19 other parishes for [B]lack women and in 45 other parishes for [B]lack men, including parishes with little to no industrial activity….

In DEQ's Supplement to its Basis for Decision, wherein DEQ addressed the updated EJScreen data, DEQ noted that for the community of Welcome, "the

environmental indicators of Particulate Matter, Ozone, and NATA Respiratory Hazard Index *decreased* and remain virtually equivalent to or less than state averages." However, it recognized that the NATA Cancer Risk for the area had increased. Further, DEQ found that "[w]hile this risk value did increase relative to the state average, this change [did] not represent a statistically significant increase in the overall cancer risk to those living in the vicinity of the [proposed Formosa] [c]omplex" because even with the increased cancer rate, "it would take a population essentially equivalent to that of St. James and St. John the Baptist Parishes combined for the increase to result in one additional case of cancer."

DEQ also noted that the NATA Cancer Risk value "overestimates actual cancer risk" for two primary reasons. First, "EPA's assumed exposure scenario does not reflect 'real world' conditions" in that it assumed continuous, 24-hours- per-day exposure to the specific concentration over 70 years, which DEQ stated was "simply not realistic." Second, "reported emissions for chloroprene and ethylene oxide"—the compounds identified as "contributing 'to most of the risk'[—] ... have declined significantly since 2014." Thus, DEQ concluded that:

> ...the 2014 NATA [(the updated EJScreen)] data does not materially change the results of the impact of the [proposed Formosa] [c]omplex on human health and environment. The NATA Cancer Risk value is based on date emissions inventory which fails to account for the recent and substantial reductions in emissions of the compounds which EPA asserts contribute "to most of the risk" and grossly overestimates public exposure to all carcinogenic pollutants.
>
> For these reasons, [DEQ] reaffirms that the social and economic benefits of the proposed project will greatly outweigh its adverse environmental impacts.

Based on our review of DEQ's Basis for Decision, Supplement to the Basis for Decision, Public Comments Response Summary, and the administrative record, we cannot say that DEQ's decision was in violation of its public trust duty or that its environmental justice analysis was arbitrary and capricious or otherwise without reason. DEQ specifically conducted an environmental justice analysis, and in doing

so, found that the permits did not allow for air quality impacts that could adversely affect human health and the environment and that those living in the vicinity of the proposed Formosa complex would not be adversely impacted. There is ample documentation in the administrative record to support DEQ's conclusion in this regard, as well as its determinations that Formosa will not cause or contribute to any NAAQS violations or increment exceedances or any exceedances of any AAS for toxic air pollutants at any off-site location and that the level of ethylene oxide above the cancer risk threshold did not extend into any residential community. Thus, DEQ's determination that there were no "adverse impacts" made it unnecessary to reach the issue of "disparate impact."

Nevertheless, even though DEQ determined there was no "adverse impact," DEQ specifically considered the impact of emissions on the nearby Black and minority communities, specifically noting that the overall emissions had significantly declined and that cancer rates were not significantly different based on data from the Louisiana Tumor Registry. Furthermore, as explained in DEQ's alternative sites analysis, Formosa sought property as remote and as far away from all people as possible, regardless of race. In granting the permits, DEQ reviewed and considered all of this information, finding that the site was at least a mile from residential communities and that the population density was low. The fact that the proposed facility is situated near a minority community alone is insufficient to establish a disproportionate effect on a minority community. See **North Baton Rouge Environmental Association**, 805 So.2d at 263. Thus, even if there was evidence of an "adverse impact," there was no evidence of a "disparate impact."

While the plaintiffs and Ms. Alexander submit that the EJScreen data establishes that there is a "disparate impact" or a disproportionate effect on a minority community, the DEQ—based on specific directives from the EPA—has determined that the EJScreen information remains unsuitable for the use to which

the plaintiffs and Ms. Alexander are trying to use it: to quantify specific risk values for a selected area and as a basis for agency decision-making regarding the existence or absence of environmental justice concerns. Thus, we find that DEQ had a legitimate basis, a valid and supported reason, and was well within its vast discretion to reject and/or not rely on the EJScreen data, even with the updated NATA risk factor.

DEQ thoroughly considered all of the information presented to it on the issue of environmental justice and concluded that the communities closest to the proposed Formosa complex would *not* bear a disproportionate share of the negative environmental consequences resulting from industrial operations, and thus, there were no environmental justice concerns with regard to its decision to grant Formosa the fifteen permits. Thus, we cannot say that DEQ's decision to issue the permits was in violation of its public trust duty or that its analysis of environmental justice was arbitrary and capricious.

V. CONCLUSION

In sum, we find that the district court did not abuse its vast discretion in granting Ms. Alexander's motion wherein she sought a remand to DEQ for the purpose of taking the updated EJScreen data for the community of Welcome, ordering the supplementation of the administrative record with that information, and filing that information, along with any modifications, new findings, or decision by DEQ, with the district court.

We also find that DEQ's decision to grant Formosa the fifteen permits was not in violation of any constitutional or statutory law and was not arbitrary or capricious or characterized by abuse of discretion or unwarranted exercise of discretion. In granting the permits, DEQ complied with the Clean Air Act. DEQ also complied with its constitutional duty under the public trust doctrine by documenting a thorough analysis in which it considered the background, public

comments, alternative sites, alternative projects, mitigating measures, avoidance of adverse environmental effects, cost-benefit analysis, social and economic benefits, and environmental justice/civil rights Title VI issues as mandated by the Louisiana Supreme Court in **Save Ourselves**. In doing so, DEQ did not reach its decision "procedurally, without individualized consideration and balancing of environmental factors." **Save Ourselves**, 452 So.2d at 1159. Instead, DEQ performed the required balancing and reached a substantive outcome that was supported by the facts in the administrative record. Although the substantive results and outcome of this balancing process may not be the plaintiffs' and Ms. Alexander's preferred outcome, we find that DEQ reasonably exercised its discretion to determine the substantive results of this balancing process.

We also find that DEQ's analyses of the IT issues were not arbitrary and capricious, the balance of costs and benefits that was struck was not arbitrary, and sufficient weight was given to environmental protection. DEQ reasonably and within its vast discretion determined that any adverse environmental impacts were avoided and/or minimized as much as possible consistent with the public welfare. Because the district court improperly concluded otherwise as to all of these issues, its September 8, 2022 judgment must be reversed.

VI. DECREE

For all of the above and foregoing reasons, we reverse the district court's September 8, 2022 judgment in its entirety; we reinstate Prevention of Significant Deterioration Permit PSD-LA-812 and Part 70 Operating Permit Nos. 3141-V0, 3142-V0, 3143-V0, 3144-V0, 3145-V0, 3146-V0, 3147-V0, 3148-V0, 3149-V0, 3150-V0, 3151-V0, 3152-V0, 3153-V0, and 3154-V0, which were issued by the Louisiana Department of Environmental Quality to FG LA LLC; and we render judgment dismissing the petition for judicial review filed by the plaintiffs, RISE St.

James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana.

All costs of this appeal are assessed to the plaintiffs/appellees, RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, and No Waste Louisiana.

JUDGMENT REVERSED; PERMITS REINSTATED; JUDGMENT RENDERED.

ATTACHMENT D

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Notice of Judgment and Disposition

February 15, 2024

Docket Number: 2023 - CA - 0578

Rise St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks & No Waste Louisiana
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In accordance with Local Rule 6 of the Court of Appeal, First Circuit, I hereby certify that this notice of judgment and disposition and the attached disposition were transmitted this date to the trial judge or equivalent, all counsel of record, and all parties not represented by counsel.

Peggy J. Landry

RODD NAQUIN
CLERK OF COURT

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 2023-CA-0578

Rise St. James, Louisiana Bucket Brigade, Sierra Club,
Center for Biological Diversity, Healthy Gulf, Earthworks &
No Waste Louisiana

- - Versus - -

Louisiana Department of Environmental Quality

19th Judicial District Court
Case #: 694029
East Baton Rouge Parish

On Application for Rehearing filed on 02/02/2024 by Intervenor- Beverly Alexander

Rehearing DENIED

Jewel E. "Duke" Welch Jr.

Mitchell R. Theriot

Guy Holdridge

Allison H. Penzato

Elizabeth Wolfe

Date FEB 15 2024

Rodd Naquin, Clerk

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