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	*	

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*.

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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.

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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).

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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

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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.*

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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

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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.

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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

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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

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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.

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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*.

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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. <u>$PM_{2.5}$ and NO_2 Public-Health Standards</u>.

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

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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.

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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

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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

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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).

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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*

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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.

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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***.

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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

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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. Environmental Justice

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.

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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

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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).

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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

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[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.

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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.

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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. <u>Alternatives Sites</u>

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.

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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.

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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

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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

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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. <u>Louisiana Revised Statutes 33:109.1</u>

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

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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

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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)

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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

DEPUTY CLERK OF COURT