

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

STATE OF LOUISIANA

NO. 629421

SECTION XXIV

WALTER L. COHEN ALUMNI ASSOCIATION

VERSUS

PEGGY HATCH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

FILED: _____
DEPUTY CLERK

AMENDED PETITION FOR JUDICIAL REVIEW

TO THE HONORABLE 19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST
BATON ROUGE, STATE OF LOUISIANA, AND THE JUDGES THEREOF:

In this amended petition for judicial review, the Walter L. Cohen Alumni Association incorporates herein the original petition for judicial review and presents additional grounds for appealing the final decision by the Louisiana Department of Environmental Quality (“LDEQ”) to approve the *Corrective Action Workplan – Resubmittal* prepared for the Louisiana Recovery School District (hereinafter the “RSD Corrective Action Workplan”), Agency Interest ID No. 36659. The original petition for judicial review was filed with this Court on March 28, 2014. The RSD Corrective Action Workplan pertains to the removal of some toxic contaminants at the site of the former Booker T. Washington School in New Orleans.¹ The RSD plans to build a new school on that site for students currently attending the Cohen College Prep Middle and High Schools in New Orleans.

PARTIES

1. Petitioner is the Walter L. Cohen Alumni Association (hereinafter “Petitioner”), a nonprofit organization incorporated in the State of Louisiana that is dedicated to serving the welfare of students attending the Cohen College Prep Middle and High Schools in New Orleans, Louisiana, (hereinafter “the Cohen College Prep Schools”) which are charter schools operated by New Orleans College Prep. Petitioner shares joint responsibilities with New Orleans College

¹ CB&I, *Corrective Action Workplan (Resubmittal): Booker T. Washington High School*, prepared for the RSD, February 19, 2014, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 9195949.

Prep for the administration of certain aspects of the schools' policies and programs. Petitioner is also represented on the Board of Directors of New Orleans College Prep.

2. Defendant is Peggy Hatch in her official capacity as Secretary of the LDEQ (hereinafter "Defendant"). The LDEQ is an agency of the State of Louisiana with the power to sue and be sued and the entity that issued the final decision that is the subject of this matter.

JURISDICTION AND VENUE

3. Jurisdiction and venue are proper in this Court. Petitioner has the right to bring this action pursuant to La. Rev. Stat. 30:2050.21(A) and La. Rev. Stat. 49:964(B).

BACKGROUND

4. In the aftermath of Hurricane Katrina, the Recovery School District ("RSD") developed the *New Orleans School Facilities Master Plan* in November 2008, which was later amended in October 2011. The plan sets forth a series of school closures as well as school construction and renovation projects in the City of New Orleans, Louisiana.² The RSD Master Plan includes the landbanking of the Walter L. Cohen School building that currently houses the Cohen College Prep Schools, located at 3520 Dryades Street in New Orleans, Louisiana, and the relocation of the students, teachers, and staff to a new school that the RSD proposes to build on the site of the former Booker T. Washington High School, which is located at 1201 South Roman Street in New Orleans, Louisiana (hereinafter "the Booker T. Washington School property"). Five hundred students are currently enrolled in the Cohen College Prep Schools.

5. In the course of pursuing this plan, the RSD discovered that the Booker T. Washington School property is contaminated. Three environmental reports prepared for the RSD show the presence of unacceptable levels of arsenic, lead, mercury, and other toxic heavy metals in the soil, warranting remediation.³ Collectively, these three reports show that of the 33 total soil samples analyzed, 24 soil samples contained unacceptable levels of toxic metals.⁴ Two of these reports specified the below ground depths from which 23 of these soil samples were

² Louisiana Recovery School District, *New Orleans School Facilities Master Plan*, October 2011.

³ See Three Fold Consultants, LLC, environmental report regarding the Booker T. Washington High School, January 9, 2012, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 8315004, pp. 1 – 2 and Figure 1 (summarizing analysis of toxic heavy metals detected in 10 soil samples collected from the Booker T. Washington School property and recommending that the contaminated soil be excavated to a level that does not exceed the risk-based standard and then be backfilled with clean soil); Leaaf Environmental, LLC, *Limited Phase II Environmental Site Assessment Report: Booker T. Washington Property*, July 2012, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 8467245, p. 1 and Table 3; and CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report: Booker T. Washington High School*, August 2013, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 8965998, p. 4-1, Table 3, and Appendix E.

⁴ *Id.*

collected. These two reports found that 17 of the 23 soil samples contained unacceptable levels of toxic heavy metals at depths ranging from 4 feet to 12 feet below ground surface.⁵ One of these soil samples contained levels of toxic heavy metals that increased in concentration at lower depths.⁶

6. Historical land use records researched by the Petitioner and submitted to the LDEQ on September 24, 2013 reveal that, prior to the construction of the Booker T. Washington School in the 1940's, the property was part of an area that was used for waste disposal and was known as the Silver City Dump.⁷

7. The Booker T. Washington School property is located next to houses and apartments. The residents living near this property include infants, children, the elderly, pregnant and nursing women, and people with chronic illnesses such as asthma, who are all particularly vulnerable to the adverse health effects of toxic exposures.

8. The LDEQ decision to approve the RSD Corrective Action Workplan must comply with the environmental statutes and implementing regulations that establish the Risk Evaluation/Corrective Action Program or RECAP, a framework for the environmental remediation of immovable property. La. Rev. Stat. 30:2272; LAC 33:I.chapter 13. The RECAP regulations govern the remediation of inactive or abandoned hazardous waste and hazardous substance sites as well as the closure of unauthorized or promiscuous solid waste dumps. LAC 33:VI.503; LAC 33:VII.909.

9. The RECAP regulations establish requirements for evaluating a site and determining the appropriate option and standard for remediation. RECAP provides four options for remediation that address specific site scenarios. These options are distinguishable by the difficulty of remediation.

10. First, the "Screening Option" applies to scenarios where sensitive subpopulations⁸ are not located on or near the site, and the inhalation of dust or particulates from contaminated

⁵ Leaaf Environmental, LLC, *Limited Phase II Environmental Site Assessment Report*, *supra* n. 3; CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, *supra* n. 3.

⁶ See Leaaf Environmental, LLC, *Limited Phase II Environmental Site Assessment Report*, *supra* n. 3, p. 4 (finding that "the lowest interval from Borehole B10 [at 4 – 6 feet below ground surface] had higher concentrations than the shallower interval [at 0 – 2 feet below ground surface]").

⁷ Documents submitted by the Walter L. Cohen Alumni Association to the LDEQ on September 24, 2013, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 902761, pp.15-20.

⁸ RECAP identifies sensitive subpopulations as infants and children, elderly people, pregnant and nursing women, and people with chronic illness. LAC 33:I.1307, RECAP § 2.1.

soil is not an exposure pathway. LAC 33:I.1307, RECAP § 3.1.1(1) and (2). This option provides LDEQ-established “screening standards” for soil or groundwater. *Id.* § 1.1.1.

11. Second, the “Management Option 1” or “MO-1” also applies to scenarios where sensitive subpopulations are not located on or near the site, and the inhalation of dust or particulates from contaminated soil is not an exposure pathway. *Id.* § 4.1.1(1) and (2). This option provides LDEQ-established remediation standards for acceptable levels of individual contaminants, known as the “MO-1 RECAP Standards.” *Id.* at § 1.1.2. Remediation of a site meeting the criteria for Management Option 1 must achieve the MO-1 RECAP Standards for each contaminant in soil or groundwater. *Id.* at § 1.1.2.

12. Third, the “Management Option 2” applies to scenarios where soil or groundwater contaminants exceed the MO-1 RECAP Standards, and sensitive subpopulations are not located on or near the site. *Id.* at §§ 1.1.2, 5.1.1(1). Under this option, remediation standards for acceptable levels of individual contaminants must be developed based on site-specific conditions. *Id.* at § 1.1.3.

13. Fourth, the “Management Option 3” is considered the most stringent option for remediation because it applies to scenarios where sensitive subpopulations *are* located on or near the site, and soil or groundwater contaminants exceed the MO-1 RECAP Standards. Under this option, remediation standards for acceptable levels of individual contaminants must be developed based on site-specific exposure and environmental fate and transport data, as well as other site-specific conditions. *Id.* at §§ 1.1.2, 1.1.4, and 6.0 *et seq.*

14. The RSD submitted to the LDEQ three environmental reports detailing soil and groundwater samples collected from the Booker T. Washington School property which were analyzed for the presence of toxic heavy metals by laboratories. The first report prepared by Three Fold Consultants, LLC and submitted to the LDEQ on January 9, 2012 identified the presence of toxic heavy metals in the soil at the school site and recommended remedial action.⁹ The second report prepared by Leaff Environmental, LLC and submitted to the LDEQ on July 19, 2012 provided further evaluation of the soils contaminated with toxic heavy metals, and confirmed the findings by Three Fold Consultants, LLC.¹⁰ The third report prepared by CB&I,

⁹ Three Fold Consultants, LLC, environmental report regarding the Booker T. Washington High School, *supra* n. 3.

¹⁰ Leaff Environmental, LLC, *Limited Phase II Environmental Site Assessment Report*, *supra* n. 3, pp. 1

Inc. and submitted to the LDEQ on August 20, 2013 documented its investigation of the former Booker T. Washington School property and recommended the use of Management Option 1 RECAP Standards for the unacceptable levels of toxic heavy metals in the soil.¹¹ According to this report, the concentrations of the following toxic heavy metals detected in the soil of the Booker T. Washington School property are in excess of the Management Option 1 RECAP Standards: antimony, arsenic, cadmium, lead, mercury, and zinc.¹²

15. The LDEQ approved the report prepared by CB&I, Inc.¹³ and, later, instructed the RSD to submit a detailed corrective action workplan based on the report's recommendation.¹⁴ In accordance with the LDEQ's instruction, the RSD submitted a corrective action workplan¹⁵ that was later revised and resubmitted.¹⁶ The LDEQ approved the resubmitted RSD Corrective Action Workplan on February 26, 2014,¹⁷ which is the subject of this appeal.

16. The LDEQ has chosen to manage the remediation of the Booker T. Washington School property pursuant to RECAP requirements applicable to solid waste, not hazardous waste,¹⁸ based on "the presence of material, such as brick, glass, wood, coal, gravel, and shell contained within soil borings collected from the site [and] no indication in either the historical record or current analytical data that hazardous waste were ever disposed of at the 1201 S.

and 5.

¹¹ CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, supra n. 3, p. 7-4.

¹² See *id.*, Table 7 (showing that the following toxic heavy metals detected in the soil of the Booker T. Washington School property exceed the MO-1 RECAP standard: antimony, arsenic, cadmium, lead, mercury, and zinc).

¹³ Letter from Regina Atterbury Philson, LDEQ Underground Storage Tank and Remediation Division, to Lona Hankins, RSD Director of Capital Projects, September 16, 2013, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 9020223.

¹⁴ Letter from Regina Atterbury Philson, LDEQ Underground Storage Tank and Remediation Division, to Lona Hankins, RSD Director of Capital Projects, November 1, 2013, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 9084283.

¹⁵ CB&I, *Corrective Action Workplan: Booker T. Washington High School*, prepared for the RSD, January 21, 2014, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 9161192, pp. 9 – 10.

¹⁶ CB&I, *Corrective Action Workplan (Resubmittal): Booker T. Washington High School*, prepared for the RSD, February 19, 2014, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 9195949.

¹⁷ The LDEQ approval of the RSD *Corrective Action Workplan* is in the form of a letter from Regina Atterbury Philson, LDEQ Underground Storage Tank and Remediation Division, to Lona Hankins, RSD Director of Capital Projects, February 26, 2014, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 9203474.

¹⁸ See Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance, letter to Monique Harden, Advocates for Environmental Human Rights, March 26, 2014, LDEQ Electronic Data Management System Doc. No. 9247189, p. 1 (asserting that the "**LDEQ is managing this site under Chapter 9 of the Solid Waste Regulations**" [emphasis in the original]).

Roman Street site.”¹⁹

17. The LDEQ cites to the documents, listed below, as providing “adequate information regarding the site’s history, nature of contaminants, the vertical and horizontal extents of contamination within the defined boundary of the property, and risk assessment performed at the site.”²⁰

- *Phase I Environmental Assessment* of the Booker T. Washington School property prepared by the Waldemar S. Nelson & Company for the RSD, November 2009;²¹
- Environmental report regarding the Booker T. Washington High School prepared by Three Fold Consultants, LLC, January 9, 2012;²²
- *Limited Phase II Environmental Site Assessment Report* on the Booker T. Washington Property, prepared by Leaaf Environmental, LLC for Hewitt-Washington & Associates, July 2012;²³
- *Site Investigation Work Plan* for the Booker T. Washington School property, prepared by Leaaf Environmental, LLC for the RSD, revised October 4, 2012;²⁴
- *Site Investigation and Risk Evaluation Corrective Action Program (RECAP) Report* on the Booker T. Washington Property, prepared by CB&I, Inc. for the RSD, August 2013;²⁵ and
- Documents pertaining to historic land use prior to the construction of the Booker T. Washington School, prepared by the Walter L. Cohen Alumni Association.²⁶

18. The LDEQ approval of the RSD Corrective Action Workplan is based, in part, on the LDEQ’s determination that the above-listed reports prepared for the RSD provide “adequate

¹⁹ Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance, letter to Monique Harden, Advocates for Environmental Human Rights, December 10, 2013, LDEQ Electronic Data Management System Doc. No. 9124860, p. 3.

²⁰ *Id.*

²¹ *Id.* at pp. 2 and 4.

The LDEQ asserts in this letter that it reviewed the November 2009 *Phase I Environmental Assessment* prepared by Waldemar S. Nelson & Company prior to its September 16, 2013 written approval of the *Site Investigation and Risk Evaluation Corrective Action Program (RECAP) Report*. However, the LDEQ’s claim appears to be in conflict with records indicating that the first time the LDEQ received the *Phase I Environmental Assessment* report occurred on December 9, 2013. See letter from Regina Philson Atterbury, LDEQ-USTRD, to Lona Hankins, RSD, November 20, 2013, LDEQ Electronic Data Management System Doc. No. 9113821 (requesting the *Phase I Environmental Assessment* report prepared by Waldemar S. Nelson & Company); see also letter from Lisa Pultz, CB&I, to Thomas Harris, LDEQ-USTRD, December 6, 2013, LDEQ Electronic Data Management System Doc. No. 911562 (conveying an enclosed copy of the November 2009 *Phase I Environmental Assessment* report prepared by Waldemar S. Nelson & Company).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at p. 4.

information regarding the site's history”²⁷ However, the RSD reports provide information regarding prior use of the Booker T. Washington School property that is either not credible or woefully insufficient. An example of site history information that is not credible is the 2009 *Phase I Environmental Assessment* report prepared for the RSD. This assessment incorrectly concludes that the property was “vacant” prior to the construction of the Booker T. Washington School.²⁸ No reference whatsoever is made to the Silver City Dump that operated on the land where the Booker T. Washington School was built. Examples of woefully insufficient site history information are found in the October 2012 *Site Investigation Work Plan* and the August 2013 *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, which only summarily conclude without any further discussion that there is “. . . general knowledge that this neighborhood was the location of a city dump prior to the construction of the school,”²⁹ and “. . . the property was reportedly a ‘city dump’ prior to the construction of the Booker T. Washington High School in the 1940s.”³⁰ These reports do not indicate that any effort was made to research historical site data or obtain information regarding prior use of the property from credible sources such as archived municipal government records which document land use and waste disposal activities on immovable property in the City of New Orleans.

19. The RSD Corrective Action Workplan approved by the LDEQ not only repeats the insufficient site history information contained in the reports prepared for the RSD (“the site was reportedly used as a city dump . . . prior to the construction of the school”³¹) but also misleadingly states, as though it were fact, that there are “limited historical records”³² for the Booker T. Washington School property. However, there is absolutely no indication that the preparers of the workplan and the environmental assessment reports diligently searched for such records.

20. The only effort to research the past use of the Booker T. Washington School property is not included in the reports prepared for the RSD. This research only appears in a

²⁷ *Id.* at p. 2.

²⁸ Waldemar S. Nelson & Company, *Phase I Environmental Site Assessment: Booker T. Washington High School*, November 2009, LDEQ Electronic Data Management System Doc. No. 9115621, p. 3.

²⁹ Leaa Environmental, LLC, *Site Investigation Work Plan: Booker T. Washington School*, revised October 4, 2012, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 8575291, p. 4.

³⁰ CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, *supra* n. 3, p. 1-1.

³¹ CB&I, *Corrective Action Workplan*, *supra* n. 1, p. 2.

³² *Id.*

packet of information that the **Petitioner** provided to the LDEQ. This packet contains a copy of the historical documents that Petitioner members found in the archives of a New Orleans public library. These documents indicate that the Booker T. Washington School property is located on a portion of land that was known as the Silver City Dump, where waste was disposed until the late 1930s. These documents consist of historical accounts of events at the Silver City Dump during the 1930s that are excerpted from an autobiography by Louis Armstrong and a book about the history of the Southern Yacht Club, an undated photograph of Works Project Administration (“WPA”) workers excavating a portion of the Silver City Dump to be used as fill to build a harbor for the Southern Yacht Club, and a hand-drawn sketch of the Silver City Dump and boundary streets.³³ The site history information that Petitioner provided to the LDEQ is by no means a thorough research of prior land uses of the Booker T. Washington School property performed by qualified experts, but it is at least some basic research which the LDEQ did not bother to require of the RSD. The paltry site history information provided in the reports prepared for the RSD pales in comparison to the information provided by Petitioner to LDEQ. Yet, it remains unknown who operated or owned the Silver City Dump, the duration that the dump was in operation, the types of waste disposed on the site, and the antecedent uses of this land prior to the Silver City Dump.

21. The Petitioner provided the packet of information, which included some documentation of the site history, to the LDEQ as a follow-up to a September 17, 2013 meeting with the LDEQ staff, requested by Petitioner to discuss public health concerns regarding the RSD’s plan to build a new school on the Booker T. Washington property.³⁴ The LDEQ received this packet of documents from Petitioner on September 24, 2013,³⁵ which is more than one week **after** the LDEQ approved the *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report* prepared by CB&I for the RSD on September 16, 2013.³⁶ However, the LDEQ falsely contends that it considered the site history information submitted by Petitioner in its decision to approve this report,³⁷ which is impossible since the LDEQ did not have this

³³ Documents submitted by the Walter L. Cohen Alumni Association to the LDEQ, *supra* n. 7.

³⁴ LDEQ Meeting Record with members of the Walter L. Cohen Alumni Association, September 17, 2013, LDEQ Electronic Data Management System Doc. No. 9020221.

³⁵ Documents submitted by the Walter L. Cohen Alumni Association to the LDEQ, *supra* n. 7.

³⁶ See Regina Philson Atterbury, LDEQ-USTRD, letter to Lona Hankins, RSD, *supra* n. 13.

³⁷ See Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance, letter to Monique Harden, Advocates for Environmental Human Rights, *supra* n. 19, p. 4 (writing that: “[t]he LDEQ-USTRD would like to thank your client, the Walter L. Cohen Alumni Association, for the

information at the time that the LDEQ issued its approval of the report. Without the information provided by the Petitioner, the LDEQ could have only reviewed and based its approval decision on the reports prepared for the RSD which provide site history information that is not credible, sufficient, or substantiated.

22. The LDEQ approval of the RSD Corrective Action Workplan is based, in part, on the LDEQ's determination that the reports prepared for the RSD provide "adequate information regarding the . . . nature of contaminants, [and] the vertical and horizontal extents of contamination within the defined boundary of the property" ³⁸ The RSD reports provide an incomplete identification of contaminants on the Booker T. Washington School property. The collection of soil and groundwater samples and laboratory analyses performed for the RSD focused exclusively on detecting the presence of toxic heavy metals in the soil and groundwater. ³⁹ These environmental assessments do not involve a complete laboratory analysis to determine the presence of other toxic substances in the soil and groundwater. Therefore, the environmental assessments provide the LDEQ with an insufficient basis for its decision to apply solid waste regulations to the remediation of the Booker T. Washington School property. ⁴⁰ Furthermore, the environmental assessments performed on the site do not eliminate the possibility that other toxic substances may be present in the soil and groundwater, the handling of which may constitute the generation of hazardous waste which is subject to laws and regulations applicable to a hazardous substance site, not a solid waste site, or may require different methods and standards for remediation than those currently proposed in the RSD Corrective Action Workplan. Additionally, the presence of other toxic substances may warrant changes in plans for waste characterization and disposal pursuant to state environmental laws

information provided following our 9/17/2013 meeting. This package, which also contained historical information of the Silver City Dump, has been added to the permanent site file The Department's assessment of the site's history was not entirely based on the RSD document you referenced but also from . . . the documents provided to us by your client.").

³⁸ *Id.* at p. 2.

³⁹ See Leaf Environmental, LLC, *Limited Phase II Environmental Site Assessment Report*, *supra* n. 3, p. 1 (explaining that "[t]he purpose of the investigation was to further evaluate the soils contaminated with . . . metals previously identified by Three Fold Consultants, LLC . . .").

See Leaf Environmental, LLC, *Site Investigation Work Plan*, *supra* n. 29, p. 4 (stating that "[a]s requested by LDEQ (August 13, 2012), this work plan describes the Site Investigation to be completed at the site . . . to define the nature and extent of heavy metal contamination . . .").

See also CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, *supra* n. 3, pp. 1-2 and 3-1 (explaining that "CB&I conducted the . . . investigation as described in the . . . LDEQ-approved *Site Investigation Work Plan* prepared by Leaf . . ." and that "[t]he soil borings and temporary monitoring wells were installed to further delineate the extent of the metals impact to the soil and groundwater . . .").

⁴⁰ Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance, letter to Monique Harden, Advocates for Environmental Human Rights, *supra* n. 19, p. 3.

and the federal Resource Conservation and Recovery Act. In short, the LDEQ accepted the RSD reports notwithstanding the absence of a thorough identification of on-site toxic substances.

23. The LDEQ approval of the RSD Corrective Action Workplan is based, in part, on the LDEQ's determination that the reports prepared for the RSD provide "adequate information regarding the . . . risk assessment performed on the site."⁴¹ Such a risk assessment should have included the risk of toxic exposure for the people living in the houses and apartments that are located next to the Booker T. Washington School property. The people living near this property include infants, children, pregnant and nursing women, elderly people, and people with chronic illnesses such as asthma who are all particularly vulnerable to the adverse health effects of toxic exposure. However, the LDEQ approved the *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report* prepared by CB&I for the RSD and, later, the RSD Corrective Action Workplan, both of which ignore the fact that people, including those who are particularly vulnerable to toxic exposure, live near the Booker T. Washington School property and should be protected from exposure to contaminants that are likely to be released during the various soil-disturbing and dust-generating activities that the RSD plans for the site. According to the workplan, these activities involve the excavation of three feet of contaminated soil that would be piled up on the site and eventually transported to a disposal facility, demolition of concrete foundations and paving, removal of existing utilities, and the installation of underground utilities.⁴² The workplan presents options for dust suppression – moistening piles of excavated contaminated soil, covering these piles with plastic sheets, placing the piles in containers, or loading the piles directly into trucks.⁴³ However, these options are not provided as protections for nearby residents, who are not considered at all in the RSD Corrective Action Workplan and reports; the options for dust suppression apply only to site workers who would presumably be equipped with respiratory gear, safety gloves, etc. to avoid inhalation, dermal and other exposure contact with the contaminated soil and dust.

24. The LDEQ claims that in the reports prepared for the RSD, "the site's risk assessment shows contaminants to be . . . capable of presenting ingestion and dermal contact risks only when there is exposure and direct contact with contaminated media."⁴⁴ However, the

⁴¹ *Id.* at p. 2.

⁴² CB&I, *Corrective Action Workplan*, *supra* n. 1, p. 4.

⁴³ *Id.* at p. 7.

⁴⁴ Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance, letter to

LDEQ's claim is contradicted by the RSD's Corrective Action Workplan. The RSD's workplan recognizes the potential exposure from indirect contact with the contaminated soil that would be excavated and that the dust from it would be generated by the construction activities planned for the Booker T. Washington School property. These activities include the "demolition of foundations and paved parking areas, removal of underground utilities, installation of new utilities, excavation and removal of existing impacted soil, placement of clean fill material, fill grading, and other related construction activities."⁴⁵

25. Notwithstanding the acknowledgement of potential exposures from soil-disturbing activities planned on the Booker T. Washington School property, the flawed RSD Corrective Action Workplan fails to meet the basic requirements for protecting human health. Instead of providing the requisite health and safety plan for workers and the surrounding community, the RSD Corrective Action Workplan leaves it to unidentified subcontractors to develop such a plan for site workers, and omits any consideration of protection for the surrounding community.⁴⁶

26. The RSD Corrective Action Workplan approved by the LDEQ provides for the limited removal of contaminated soil. The environmental assessments of the Booker T. Washington School property show that contaminated soil is present at the surface level and extends at least 12 feet below ground.⁴⁷ Of the 23 total soil samples collected from the Booker T. Washington School property and analyzed for toxic heavy metals by laboratories, 17 samples contained one or more toxic heavy metals in excess of risk-based standards at depths ranging from 4 feet to 12 feet below ground.⁴⁸ Yet, the LDEQ approved the removal of only three feet of contaminated soil which would leave in place at least nine feet of contaminated soil. The Corrective Action Workplan provides no justification whatsoever for the LDEQ's decision to allow such limited soil removal. Instead, the Corrective Action Workplan merely notes, without providing any supporting analysis, that at an August 7, 2013 meeting between the LDEQ, RSD, and the RSD contractor, CB&I simply agreed to excavate contaminated soil no further than 3

Monique Harden, Advocates for Environmental Human Rights, *supra* n. 19, p. 2.

⁴⁵ CB&I, *Corrective Action Workplan*, *supra* n. 1, p. 4.

⁴⁶ *Id.*, pp. 11 - 12.

⁴⁷ CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, *supra* n. 3, p. 4-1, Table 3, and Appendix E.

⁴⁸ *Id.*

feet below ground.⁴⁹

27. According to the RSD Corrective Action Workplan, after the limited soil excavation, geotextile material would be placed on top of the remaining contaminated soil and under clean fill material.⁵⁰ There would be no geotextile material on the sidewalls of the excavated areas. This would allow for the migration of soil contaminants around the geotextile material with no protection against exposure to soil contaminants for workers involved in the remediation, demolition, and construction projects or for students, teachers, and staff who would occupy the site after the construction of the new school.

28. The Booker T. Washington School property currently has building structures.⁵¹ The soil under these building structures would not be excavated or removed.⁵² The RSD Corrective Action Workplan does not provide a mechanism by which it can protect against exposure to soil contaminants under such existing building structures for workers involved in the site activities, students, teachers, and staff who would occupy the site after the construction of the proposed new school, or residents in the surrounding community.

29. According to the RSD Corrective Action Workplan, toxic runoff and stormwater accumulated in the basement area may be directed to enter municipal storm drains without regard for exposure risks and impacts on water quality.⁵³

30. Although the RSD plan to build a new school is premised, in part, on the damage caused by Hurricane Katrina, the RSD Corrective Action Workplan disregards preparations to mitigate the impacts of a hurricane or strong storm. The workplan also fails to consider the exposure risks that flooding and subsidence, which are endemic to the area where the Booker T. Washington School property is located, would create by increasing the opportunity for the contaminated soil to migrate and re-contaminate the site.

31. Contrary to protocols for the removal of contaminated soil, which would involve confirmatory sampling to ensure that the excavation does actually remove unacceptable levels of

⁴⁹ CB&I, *Corrective Action Workplan*, *supra* n. 1, p. 9.

⁵⁰ *Id.* at p. 5.

⁵¹ See CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, *supra* n. 3, Figure 2 (indicating with a dotted line the three existing building structures on the Booker T. Washington School property, all other buildings shown in the aerial photograph have been demolished).

⁵² CB&I, *Corrective Action Workplan*, *supra* n. 1, p. 5.

⁵³ *Id.* at p. 11.

contaminants,⁵⁴ the LDEQ approved the RSD Corrective Action Workplan after it was resubmitted with the deletion of all references to providing confirmatory sampling that were in the original version of the Corrective Action Workplan.⁵⁵ The removal of confirmatory sampling from the workplan increases the potential for harmful exposure in the future.

THE LDEQ APPROVAL OF THE RSD CORRECTIVE ACTION WORKPLAN
IS PROHIBITED BY THE CONSTITUTION, ENVIRONMENTAL STATUTES,
AND REGULATIONS OF LOUISIANA

32. The LDEQ's final decision to approve the RSD Corrective Action Workplan violates the LDEQ's constitutional public trustee duty under Article IX, Section 1 of the Louisiana Constitution. This duty requires the LDEQ, before granting approval of a proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible and consistent with the health, safety, and welfare of the people. *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So.2d 1152, 1157 (La. 1984). As discussed in detail below, the LDEQ's final decision would allow activities, prohibited by environmental statutes and regulations, to take place on the Booker T. Washington School property that would endanger the health, safety, and welfare of residents living near the property, workers involved in a variety of planned soil-disturbing activities on the property, and students and faculty who would occupy the property.

33. The LDEQ's final decision to approve the RSD Corrective Action Workplan also violates the LDEQ's statutory and regulatory duties under La. Rev. Stat. 30: 2203; La. Rev. Stat. 30:2204; La. Rev. Stat. 30:2272.1; La. Rev. Stat. 2286.1; LAC 33:I.1307; LAC 33:VI.503; and LAC 33:VII.909, which govern the remediation of toxic substances in soil and groundwater.

34. As authorized by La. Rev. Stat. 30:2272.1, the LDEQ, in consultation with stakeholders, developed the Risk Evaluation/Corrective Action Program ("RECAP"):

⁵⁴ See, e.g., Three Fold Consultants, LLC, environmental report regarding the Booker T. Washington High School, *supra* n. 3, p. 1 (recommending that the contaminated soil be excavated to a level that does not exceed the risk-based standard and then backfilled with clean soil).

The LDEQ approved the *Site Investigation Risk Evaluation/Corrective Action Program (RECAP) Report*, prepared by CB&I, that explicitly excludes from its risk-based evaluation the environmental report prepared by Three Fold Consultants, LLC. The CB&I report claims that the exclusion is based on not being able to confirm the data collection methodology. CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, *supra* n. 3, p. 4-1. However, the Three Fold Consultants report includes documentation detailing the data collection methodology. Three Fold Consultants, LLC, environmental report regarding the Booker T. Washington High School, *supra* n. 3, pp. 3 - 38.

⁵⁵ CB&I, *Corrective Action Workplan: Booker T. Washington High School*, prepared for the RSD, January 21, 2014, AI No. 36659, LDEQ Electronic Data Management System Doc. No. 9161192, pp. 9 – 10.

to ensure that the potential for harm to public health and safety and to the environment is minimized to acceptable levels, taking into consideration the location, the surroundings, the intended use of the property, the potential exposure to the discharge, and the surrounding ambient conditions, whether naturally occurring or man-made.

LAC 30:2272.1. RECAP is adopted by reference as LAC 33:1.1307, and applies to the remediation of inactive and abandoned hazardous waste and hazardous substance sites, LAC 33:VI.503, and the closure of unauthorized and promiscuous dumps, LAC 33:VIII.909.

35. Pursuant to RECAP, the remediation of a contaminated site requires the identification of all constituents of concern present on the site. LAC 33:1.1307, RECAP § 2.6.2. A constituent of concern, as defined in RECAP § 2.1, is a solid waste, hazardous waste, industrial solid waste, regulated substance, pollutant, or toxic substance that meet other regulatory definitions. Such identification must include the vertical and horizontal extent of the constituent of concern based on their concentrations that exceed the applicable limiting standard to determine the area of investigation. LAC 33:1.1307, RECAP § 2.6.1. Additional procedures for evaluating the area of investigation are required for site-specific conditions, such as the potential exposure of an individual or population to one or more constituents of concern. LAC 33:1.1307, RECAP § 2.6.1.2. Infants, children, pregnant and nursing women, elderly people, and people with chronic illnesses, are identified in RECAP § 2.1 as “sensitive subpopulations” because of their particular vulnerability to the adverse health effects of toxic exposure.

36. In contravention of LAC 33:1.1307, RECAP §§ 2.6.1 and 2.6.2, the LDEQ approved the RSD Corrective Action Workplan and the various reports prepared for the RSD upon which the workplan is based. As discussed in paragraph 22 herein, the workplan and reports impermissibly limit the identification of constituents of concern on the Booker T. Washington School property to the detection of heavy metals, and entirely fail to consider the exposure pathways for nearby residents, who include those particularly vulnerable to the negative health effects of toxic exposure. Furthermore, as discussed in paragraphs 23 – 31 herein, the workplan provides inadequate evaluation of potential toxic exposure for nearby residents, site workers, as well as school students, teachers, and staff who would occupy the site.

37. Pursuant to RECAP, the remediation of a contaminated site requires a site investigation, LAC 33:1.1307, RECAP § 2.3.⁵⁶ The site investigation must include research of

⁵⁶ Pursuant to LAC 33:1.1307, RECAP § 2.3, the LDEQ has the authority to allow a deviation from the site investigation requirements. However, any such deviation is required to be outlined and summarized in the cover letter attached to the site investigation report. The *Site Investigation and Risk*

the site history that provides information regarding any former facilities or site activities, especially any which used, stored, or possibly released a potential constituent of concern, the environmental conditions associated with former operations, along with a chronological listing of the dates of operation of the former facilities and their respective owners/responsible parties. LAC 33:1.1307, RECAP § 2.3, Appendix B at p. B-3. Additionally, the site investigation must also include a health and safety plan for personnel involved in site activities and the surrounding community that details procedures and protocols, decontamination procedures, personnel training, type and extent of medical surveillance, problems or hazards that may be faced by workers, members of the surrounding community, or site visitors and how they are to be addressed, as well as procedures for protecting the surrounding community and site visitors. LAC 33:1.1307, RECAP § 2.3, Appendix B at p. B-5.

38. In contravention of LAC 33:1.1307, RECAP § 2.3, the LDEQ approved the RSD Corrective Action Workplan and the various reports prepared for the RSD upon which the workplan is based. As discussed in paragraphs 18 – 21 herein, the workplan and reports provide site history information that can best be described as not credible, vague, and insufficient. Furthermore, as discussed in paragraphs 23 – 25 herein, the workplan fails to provide a health and safety plan or acknowledge that such a plan would have to include protections for the surrounding community. Instead, the workplan merely mentions that a plan would be developed in the future for site workers by unidentified subcontractors.

39. Pursuant to RECAP, the remediation of a contaminated site requires an exposure assessment. LAC 33:1.1307, RECAP § 2.7. Such an assessment must identify current and future on-site and off-site receptor populations and sensitive populations, potential current and future exposure pathways, including routes of toxic substance migration, reasonable maximum exposure assumptions, and a determination of whether the area of investigation meets the criteria for management under the Screening Option (“SO”), Management Option 1 (“MO-1”) and/or Management Option 2 (“MO-2”).

40. In contravention of LAC 33:1.1307, RECAP § 2.7, the LDEQ approved the RSD Corrective Action Workplan and the various reports prepared for the RSD upon which the workplan is based. As discussed in paragraphs 23 – 31 herein, the workplan and reports entirely disregard the fact that people, including those who are vulnerable to the adverse effects of toxic

Evaluation/Corrective Action Program (RECAP) Report approved by the LDEQ did not note any such deviation had been permitted by the LDEQ.

exposure, live in houses and apartments next to the Booker T. Washington School property, where they would be exposed to the site contaminants during soil-disturbing activities planned on the site. There is no consideration of nearby residents being exposed to contaminants via the inhalation of dust that would be generated during soil excavation, slab demolition, and underground construction activities. In fact, the LDEQ claimed that “the only complete routes of human exposure are dermal contact and ingestion of the soils,”⁵⁷ which is patently false and contradicted by the statements in the workplan which acknowledge that “[t]he main concern . . . is exposure to dust generated by the construction activities,” which includes inhalation.⁵⁸ The workplan and reports do not consider the potential for site workers, students, teachers, and staff to be exposed to contaminated soil that will not be removed from the site as well as the contaminated soil in the sidewalls of excavated areas that will not be covered by the geotextile barrier material, which is planned to be only placed over the floor of the excavated areas. Although the workplan contemplates that runoff from the site during excavation and other soil-disturbing activities may occur,⁵⁹ there is no mention of this possibility in the exposure assessment presented in the reports prepared for the RSD.⁶⁰ Furthermore, as an area of concern, the Booker T. Washington School property fails to meet the criteria established for the Screening Option (“SO”), Management Option 1 (“MO-1”), and Management Option 2 (“MO-2”), all of which state that they apply only to areas of concern, where “there are no sensitive subpopulations on or near the site.” LAC 33:I.1307, RECAP §§ 3.1.1, 4.1.1, 5.1.1.

41. The RSD Corrective Action Workplan, approved by the LDEQ, impermissibly applies Management Option 1 or MO-1, and presents the activities to be implemented pursuant to this option.⁶¹ As discussed in paragraphs 9 – 13, Management Option 1 is one of four options provided in the RECAP regulation that each have strict selection criteria.

42. The selection criteria for the Management Option 1 explicitly state that it is applicable when “there are no sensitive subpopulations on or **near** the AOI,” the area of investigation. LAC 33:I.1307, RECAP §4.1.1 [emphasis added]. Under RECAP, sensitive

⁵⁷ Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance, letter to Monique Harden, Advocates for Environmental Human Rights, *supra* n. 19, p. 5.

⁵⁸ CB&I, *Corrective Action Workplan*, *supra* n. 1, p. 4.

⁵⁹ *Id.*, p. 11.

⁶⁰ See, e.g., CB&I, *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*, *supra* n. 3, p. 5-1, Figure 6 (presenting soil-disturbing activities as “mixing & infiltration → soil,” but omitting stormwater runoff and the exposure routes of stormwater runoff that are caused by such activities).

⁶¹ CB&I, *Corrective Action Workplan*, *supra* n. 1, p. 3.

subpopulations are identified as “infants and children, elderly people, pregnant and nursing women, and people with chronic illness.” LAC 33:I.1307, RECAP § 2.1.

43. Additional criteria for Management Option 1 state that it does not address the inhalation of small particles, and directs the selection of a more stringent remediation standard, such as Management Option 3 or MO-3, to protect against the inhalation of small particles. The remediation, demolition, and construction activities that are planned for the Booker T. Washington School property would create dust inhalation exposures for residents living nearby. These activities would generate dust and cause small and fine particles to become airborne and migrate away from the Booker T. Washington School property into the surrounding neighborhood.

44. The only remediation option applicable to a contaminated site located near a sensitive subpopulation (as is the Booker T. Washington School property), is Management Option 3. In contrast to Management Option 1, Management Option 3 requires protective public health safeguards as well as stringent protocols for site evaluation, exposure assessment, documentation of exposure conditions, and the application of more sophisticated fate and transport models, in addition to other measures to prevent exposure. These safeguards and protocols are necessary for developing the remediation standards for acceptable levels of individual contaminants pursuant to Management Option 3 or MO-3 that are based on site-specific exposure and environmental fate and transport data, as well as other site-specific conditions. LAC 33:I.1307, RECAP §§ 6.0 - 6.9.

45. RECAP requires a demonstration of compliance with the appropriate remediation standards for acceptable levels of individual contaminants through confirmatory sampling. LAC 33:I.1307, RECAP § 2.19. However, as discussed in paragraphs 26 and 31 herein, the LDEQ has not required the RSD to provide any such demonstration. Instead, the RSD Corrective Action Workplan, approved by the LDEQ, impermissibly replaces confirmatory sampling with “post-excavation sampling,” which bears no relation to demonstrating compliance with remediation standards for individual contaminants. Furthermore, the criteria for Management Option 3, the only appropriate option for the Booker T. Washington School property, require confirmatory sampling to demonstrate that the concentration of any remaining toxic substance is equivalent to or less than the designated remediation standard. LAC 33:I.1307, RECAP § 1.1.4.

46. The LDEQ has unlawfully approved the RSD Corrective Action Workplan which

fails to meet the remediation standards mandated by statutes and established by regulations. La. Rev. Stat. 30: 2203; La. Rev. Stat. 30:2204; La. Rev. Stat. 30:2272.1; La. Rev. Stat. 2286.1; LAC 33:I.1307; LAC 33:VI.503; and LAC 33:VII.909. The selection of Management Option 1 or MO-1 in the RSD Corrective Action Workplan is explicitly prohibited by the provisions of RECAP, which provides that Management Option 1 or MO-1 is not applicable for the remediation of a site such as the Booker T. Washington School property because it is located near sensitive subpopulations that include infants and children, the elderly, pregnant or nursing women, and people with chronic illness. Furthermore, the LDEQ's approval of the RSD Corrective Action Workplan would place site workers, as well as school students, teachers, and staff, who would be relocated from the Cohen College Prep Middle and High Schools to a new school constructed on the Booker T. Washington School property, at risk of toxic exposure from the flawed and inadequate plan for remediation.

47. The LDEQ decision has prejudiced the substantial rights of Petitioners defined by La. Rev. Stat. 49:964(G) because the LDEQ's decision violates constitutional and statutory provisions; is in excess of the statutory authority of the agency; is made upon unlawful procedure; is affected by other error of law; is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; and is neither supportable nor sustainable by a preponderance of the evidence.

DESIGNATION OF RECORD FOR APPEAL

48. Petitioner designates the entire record compiled by and considered by the LDEQ prior to and including the February 26, 2014 approval of the RSD Corrective Action Workplan for the Booker T. Washington School property, as well as communications regarding the LDEQ's decisions to approve the RSD Corrective Action Workplan and the *Site Investigation and Risk Evaluation/Corrective Action Program (RECAP) Report*. Petitioner expressly requests that all documents contained in the record, including letters and communications made by members of the public and governmental agencies and attachments thereto to the LDEQ in this matter and the LDEQ's responses to those letters and communications, be included in the record and in the chronological index that will be prepared by the LDEQ to accompany the administrative record. In particular, the following must be included in the administrative record:

- Waldemar S. Nelson & Company, *Phase I Environmental Assessment Report: Booker T. Washington High School*, November 2009;

- Three Fold Consultants, LLC, environmental report regarding the Booker T. Washington High School, January 9, 2012;
- Leaff Environmental, LLC, Phase II Environmental Site Assessment for Booker T. Washington School, 1201 South Roman Street, New Orleans, LA 70125, Agency Identification No. 36659, July 2012;
- Leaff Environmental, LLC, Site Investigation Work Plan for the Booker T. Washington School, 1201 South Roman Street, New Orleans, LA 70125, prepared for the Louisiana Recovery School District, Agency Identification No. 36659, October 4, 2012;
- CB&I, Site Investigation and Risk Evaluation Corrective Action Program Report for the Booker T. Washington School, 1201 South Roman Street, New Orleans, LA 70125, prepared for the Louisiana Recovery School District, Agency Identification No. 36659, August 2013;
- September 16, 2013 letter from Regina Atterby Philson, LDEQ Underground Storage Tank and Remediation Division, to Lona Hankins, Director of Capital Improvements for the RSD;
- October 29, 2013 letter from Monique Harden, Attorney, Advocates for Environmental Human Rights on behalf of the Walter L. Cohen Alumni Association, to Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance;
- November 1, 2013 letter from Regina Atterby Philson, LDEQ Underground Storage Tank and Remediation Division, to Lona Hankins, Director of Capital Improvements for the RSD;
- November 26, 2013 letters from Monique Harden, Attorney, Advocates for Environmental Human Rights on behalf of the Walter L. Cohen Alumni Association, to Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance;
- December 10, 2013 letter from Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance to Monique Harden, Attorney, Advocates for Environmental Human Rights;
- CB&I, Corrective Action Workplan for the Booker T. Washington School, 1201 South Roman Street, New Orleans, LA 70125, prepared for the Louisiana Recovery School District, Agency Identification No. 36659, January 21, 2014;
- CB&I, Revised Corrective Action Workplan (Resubmittal) for the Booker T. Washington School, 1201 South Roman Street, New Orleans, LA 70125, prepared for the Louisiana Recovery School District, Agency Identification No. 36659, February 19, 2014;
- February 26, 2014 letter from Regina Atterby Philson, LDEQ Underground Storage Tank and Remediation Division, to Lona Hankins, Director of Capital Improvements for the RSD;
- March 6, 2014 letter from Nathalie Walker and Monique Harden, Advocates for Environmental Human Rights, to Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance; and
- March 26, 2014 letter from Cheryl Nolan, LDEQ Assistant Secretary of the Office of Environmental Compliance to Monique Harden, Attorney, Advocates for Environmental Human Rights.

PRAYER FOR RELIEF

WHEREFORE, Petitioner, Walter L. Cohen Alumni Association, prays that this amended petition be duly filed and that Defendant, Peggy Hatch as the Secretary of the Louisiana Department of Environmental Quality, be cited to appear and to answer same, and that after all

legal delays and due proceedings, that there be judgment herein in favor of Petitioner and against Defendant as follows:

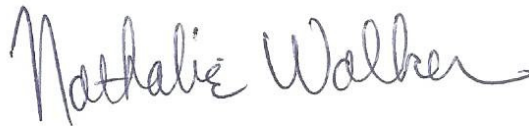
1. Stay the LDEQ final decision, issued by letter dated February 26, 2014, to approve the CB&I, *Revised Corrective Action Workplan - Resubmittal* for the Booker T. Washington School, 1201 South Roman Street, New Orleans, LA 70125, prepared for the Louisiana Recovery School District, Agency Identification No. 36659, February 19, 2014, pending final resolution of this appeal.

2. Vacate the CB&I, *Revised Corrective Action Workplan - Resubmittal* for the Booker T. Washington School, 1201 South Roman Street, New Orleans, LA 70125, prepared for the Louisiana Recovery School District, Agency Identification No. 36659, February 19, 2014.

3. Award Petitioner all costs of these proceedings, as well as all general and equitable relief.

Respectfully submitted on May 13, 2014.

ADVOCATES FOR ENVIRONMENTAL HUMAN RIGHTS



BY: _____
NATHALIE WALKER, Bar No. 13188



BY: _____
MONIQUE HARDEN, Bar No. 24118

832 Topaz Street
New Orleans, Louisiana 70124
Telephone: (504) 799-3060
nwalker@ehumanrights.org
mharden@ehumanrights.org

Counsel for Petitioner

Please serve:
Peggy Hatch, Secretary
Louisiana Department of Environmental Quality
602 North Fifth Street, Galvez Building
Baton Rouge, LA 70802