

**Comment Summary Response & Concise Statement – WQ110
Criteria
LAC 33:IX.1113.C.Table 1A**

COMMENT 1: The EPA has reviewed the March 20, 2022 publication of the Louisiana Register which identifies a “Request for Stakeholder Input Regarding Adoption and Implementation of the Numeric Freshwater Ammonia Criteria” as well as a Notice of Intent that “gives notice that rulemaking procedures have been initiated to amend the Water Quality regulations, LAC 33:IX.1113.C.Table 1A (WQ110)”.

FOR/AGAINST -- No arguments necessary; comment does not suggest amendment or change.

RESPONSE 1: The department appreciates the EPA’s review of WQ110.

COMMENT 2: The EPA understands these publications propose the rescission of freshwater ammonia criteria previously adopted by the Louisiana Department of Environmental Quality (LDEQ) into water quality standards (WQS) that were approved by the EPA pursuant to the Clean Water Act (CWA) § 303(c) in January 2021.

FOR/AGAINST -- No arguments necessary; comment does not suggest amendment or change.

RESPONSE 2: The EPA’s understanding of WQ110 is correct.

COMMENT 3: Regarding the proposed rescission, the EPA appreciates the LDEQ’s efforts to engage in productive dialogue.

FOR/AGAINST -- No arguments necessary; comment does not suggest amendment or change.

RESPONSE 3: The department appreciates the support for department’s efforts to engage in productive dialogue.

COMMENT 4: With the sharing of information as a priority, it is important to understand that the state’s rescission itself will not affect the

application of the currently approved ammonia criteria that are effective for CWA purposes.

FOR: The rulemaking rescinding the freshwater ammonia criteria will not affect the application of the criteria that were approved by the EPA pursuant to the Clean Water Act (CWA) § 303(C) in January 2021.

AGAINST: The rulemaking rescinding the freshwater ammonia criteria will affect the application of the criteria approved by the EPA pursuant to the Clean Water Act (CWA) § 303 (C) in January 2021. LDEQ lacks the legal authority to implement a water quality standard into LPDES permits that has been rescinded from the Louisiana Administrative Code (LAC) pursuant to state law rulemaking provisions.

RESPONSE 4: Louisiana's water quality standards are promulgated in accordance with state law rulemaking provisions in Louisiana's Administrative Procedures Act (APA), La. R.S. 49:950 et seq, and in particular with the requirements of La. R.S. 49:953. Pursuant to La. R.S. 49:953, Louisiana agencies shall give notice of any intended action prior to the adoption, amendment, or repeal of any rule, and that notice must include a statement, approved by the state legislative fiscal office, of the economic impact of the intended action, if any. See La. R.S. 49:953(A)(1)(a)(iii). Further, the LDEQ, specifically, is required to publish a report in the Louisiana register satisfying the requirements of La. R.S. 49:953(G)(1), unless the proposed regulation or policy satisfies an exception outlined by La. R.S. 49:953(G)(3). One exception is that LDEQ's proposed regulation will cost the state of Louisiana, and all affected persons, less than one million dollars, in the aggregate, to implement. Pursuant to La. R.S. 49:953(G)(2), no regulation promulgated by the department shall become effective unless LDEQ complies with the requirements of La. R.S. 49:953(G). These requirements are also outlined in the Louisiana Environmental Quality Act (LDEQ), at La. R.S. 30:2019(D).

As stated in the Notice of Intent for WQ110, after promulgation of the freshwater ammonia criteria approved by the EPA pursuant to the Clean Water Act (CWA) § 303(C) in January 2021, the LDEQ discovered additional information pertaining to the cost of the implementation of the criteria, which will potentially cost affected facilities, in the aggregate, between 157 million and one billion dollars, to implement. As explained above, every regulation

promulgated by the LDEQ, including water quality standards, must satisfy the requirements of state rulemaking procedures under La. R.S. 49:953.

The purpose of this rulemaking is to rescind the freshwater ammonia criteria from the state's water quality standards, pursuant to the rulemaking provisions of La. R.S. 49:953, so that the Department can reconsider the costs to directly affected persons, in the aggregate, to implement the freshwater ammonia criteria, together with the environmental and/or human health risks and benefits. Simultaneously, as described in the Potpourri Notice 2203Pot1, the LDEQ has requested participation, information, and comments from stakeholders, including directly affected persons, concerning costs, environmental and/or human health risks and benefits, treatment options and costs, implementation criteria, and potential revisions to the Water Quality Management Plan.

Further, based on LDEQ's review of information developed after the standard was adopted, the freshwater ammonia criteria were promulgated by the department, and approved by EPA, without complying with the requirements of 40 C.F.R. § 130.5 and 130.6(c)(2). Therefore, the continued maintenance and implementation of such criteria would not comply with the CWA. See Response 5.

Whether this rulemaking, which rescinds the freshwater ammonia criteria that were approved by the EPA pursuant to the Clean Water Act (CWA) § 303(C) in January of 2021, affects the application of the criteria by the LDEQ in LPDES permits is a question of state law. LDEQ lacks the legal authority to implement a water quality standard into LPDES permits that has been rescinded from the Louisiana Administrative Code (LAC) pursuant to state law rulemaking provisions. The rescission of the ammonia criteria from LAC 33:IX, Chapter 11 will be effective upon the publication of the final rule in the Louisiana Register, in accordance with La. R.S. 49:954.

After this rulemaking has become effective, and until such time as any future rulemaking affecting water quality standards for ammonia has been finalized, LDEQ will rely upon the recently approved 2022 Integrated Report (IR), which incorporates water quality assessments based on the EPA approved freshwater ammonia criteria. The water quality assessments were conducted and approved by EPA while the criteria were included in LAC 33:IX, Chapter 11, and, therefore, are considered valid until new assessments are conducted and approved. The 2022 IR identifies

four subsegments that are currently impaired for ammonia. The department will consider these impairments during the permitting process, in compliance with the most recent version of the *Permitting Guidance Document for Implementing Louisiana Surface Water Quality Standards, Water Quality Management Plan, Volume 3*. Additionally, LDEQ will continue to implement ammonia limits into LPDES permits in accordance with the long-standing EPA-approved policy, documented in the January, 2003 memo from Jack Ferguson (EPA) to Linda Levy (LDEQ). See <https://edms.deq.louisiana.gov/app/doc/view?doc=13172544>.

COMMENT 5: To support revisions to the EPA-approved ammonia criteria, the LDEQ must demonstrate that these criteria do not protect designated aquatic life uses or are not scientifically defensible. The EPA can only approve revised ammonia criteria adopted by the LDEQ based on such a demonstration before the resulting criteria can be implemented in NPDES permits. The EPA-approved criteria will continue to apply for CWA purposes until new criteria are approved by the EPA.

FOR: LDEQ must demonstrate that the freshwater numeric ammonia criteria do not protect designated aquatic life uses or are not scientifically defensible to support revisions. The freshwater numeric ammonia criteria approved by the EPA pursuant to the Clean Water Act (CWA) § 303(C) in January 2021 will continue to apply for CWA purposes until new criteria are approved by the EPA.

AGAINST: The freshwater numeric ammonia criteria approved by the EPA pursuant to the Clean Water Act (CWA) § 303(C) in January 2021 will not apply for CWA purposes, after the rulemaking rescinding the criteria has become effective. LDEQ lacks the legal authority to implement a water quality standard into LPDES permits that has been rescinded from the Louisiana Administrative Code (LAC) pursuant to state law rulemaking provisions.

RESPONSE 5: LDEQ lacks the legal authority to implement a water quality standard into LPDES permits that has been rescinded from the Louisiana Administrative Code (LAC) pursuant to state law rulemaking provisions. See Response 4.

Freshwater numeric ammonia criteria were adopted into LAC 33:IX.1113.C.Table 1A as part of the promulgation of the Water Quality Standards Triennial Revision on November 20, 2020.

Public Notice for the original promulgation of the freshwater ammonia criteria was published in the Louisiana Register on December 20, 2019, which included a fiscal and economic impact statement approved by the legislative fiscal office, as required by La. R.S. 49:953(A), which indicated that there were no estimated costs to directly affected persons or non-governmental groups. The Public Notice also included certification that the Triennial Revision would cost the state and affected persons less than one million dollars, in the aggregate, to implement, satisfying an exception to the report requirements for the promulgation of LDEQ regulations in La. R.S. 49:953(G). See also La. R.S. 30:2019(D). After promulgation, the LDEQ discovered additional information pertaining to the cost of implementation of the criteria, which would potentially cost affected facilities, in the aggregate, between 157 million and one billion dollars to implement. As stated in the Notice of Intent for WQ110, without the freshwater ammonia criteria, the Water Quality Standards Triennial Revision has no estimated costs to directly affected persons or nongovernmental groups, and the costs to state and affected persons is less than one million dollars, in the aggregate, to implement.

Federal regulations (40 C.F.R. § 130.3) also require the State to review and revise water quality standards and, as appropriate, update their Water Quality Management plans to reflect such revisions. One required component of a Water Quality Management Plan is a process for developing effluent limitations and schedules of compliance based on the adopted Water Quality Standards, including numeric criteria (40 C.F.R. § 130.5 and 130.6(c)(2); LAC 33:IX.1109.I). Due to a lack of inter-office coordination, the department did not initiate nor complete revisions to the Water Quality Management Plan to include a process for developing limits and schedules of compliance prior to promulgation of the freshwater ammonia criteria.

Precedent exists for the remand of water quality standards and criteria to an agency to correct deficiencies in administrative procedures. In the June 3, 2016 approval letter of a water quality standards revision, Rule No. WQ092, EPA acknowledged both its duty to complete an Endangered Species Act (ESA) consultation with the United States Fish and Wildlife Service (USFWS) on the approval action, and its failure to do so. An ESA consultation is required by Section 7(a)(2) of the ESA. The EPA's failure to comply with all administrative procedures also called the scientific validity of the water quality criteria into question. This scenario was subsequently cited in the Notice of Intent to Sue filed by plaintiffs who challenged the criteria in *Gulf Restoration Network, et. al. v.*

U.S. Environmental Protection Agency, et al., Civil Action No. 18-1632, filed in the U.S. District Court, E.D. Louisiana. The suit resulted in the EPA filing a motion for voluntary remand, and the Court vacating LDEQ's approved dissolved oxygen water quality criteria for the Eastern Lower Mississippi River Alluvial Plain Ecoregion, and requiring LDEQ to revert to the previous water quality criteria. In doing so, the Court recognized that EPA had "in essence, consented to a partial vacatur" which consisted of the challenged water quality standards. *Gulf Restoration Network v. EPA*, 18-1632 (E.D. La., Oct. 25, 2018). As explained by the Court in its order granting EPA's motion for Voluntary remand, and vacating the dissolved oxygen water quality standards, EPA acknowledged that remand and reconsideration of the standards at the agency level was necessary.

In conjunction with the public notice of draft rule WQ110, LDEQ published Potpourri Notice 2203Pot1, requesting stakeholder input regarding the adoption and implementation of the numeric freshwater ammonia criteria. The purpose of stakeholder involvement is to inform the Department's reconsideration, of freshwater ammonia criteria, as well as potential future rulemaking particularly in terms of the costs to directly affected persons together with environmental and/or human health risks and benefits, including information regarding treatment options and costs. As a result, any subsequent rulemaking action will fully comply with 40 C.F.R. § 130.5 and 130.6(c)(1), and with state rulemaking requirements at La. R.S. 49:953.

As always, LDEQ fully intends to seek EPA approval for any program revisions, and recognizes that any such program revisions must be supported by a final and effective state regulation. Accordingly, LDEQ intends to provide supporting information as required together with any future adopted revised ammonia numeric criteria, when submitting program revisions for approval. In addition, LDEQ anticipates further consultation with EPA Region 6 as the Department considers costs, environmental and/or human health risks and benefits, treatment options and costs, implementation criteria, and potential revisions to the Water Quality Management Plan through our stakeholder engagement process.

**Comment Summary Response & Concise Statement – WQ110
Criteria
LAC 33:IX.1113.C.Table 1A**

COMMENT #

SUGGESTED BY

01 - 05

Charles W. Maguire, Director, Water Division /
Environmental Protection Agency

Comments reflected in this document are repeated verbatim from the written
submittal.

Total Commenters: 01

Total Comments: 05