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To the Members of the Natural Resources Steering Commission:

The Tulane Institute on Water Resources Law & Policy writes to submit public comments in response to the Natural Resources Steering Commission’s first public hearing. As the state welcomes new industry, it will be crucial that Louisiana’s Department of Energy & Natural Resources strikes the right balance of resource management, public needs, and environmental protection. This is especially true when considering the tremendous challenges facing Louisianans today—sea level rise, increased intensity and frequency of storms, persistent drought conditions in the Mississippi River basin, economic challenges facing local governments and communities—and the urgency with which they must be addressed. While there are many important aspects to address in this reorganization process, these comments will focus on water management and the energy/water nexus in the current landscape.

I. LDENR Should Exercise its Authority to Improve Monitoring and Oversight of Water Use

Louisiana has been defined by an abundance of water, but that assumption is changing, and water availability is not guaranteed. Over the past couple years, Mississippi River levels have not been consistently high enough to support shipping nor keep the Gulf of Mexico from intruding upriver. The growing problems require us to assess current conditions and ask some basic questions: Who uses Louisiana waters? What is that water used for? Is it pumped from a well or withdrawn from a stream? Is it a consumptive use? At present, LDENR cannot meaningfully answer these questions. The State has done little to exercise its authority to monitor or regulate consumptive water uses, but now is a crucial time to prioritize the proper legal frameworks and policies that will help the state better manage and leverage such a valuable resource.

Act 727 of the 2024 Regular Legislative Session laid out the framework for LDENR’s new structure, providing that it is responsible for “administration of groundwater, surface water, and other water resources for quantity purposes.” As the reorganization process continues, LDENR needs to clarify what is meant by “other water resources” and how that will impact the structure of the Office of Land and Water. In addition, while this authority is only over “quantity,” water quality must also be considered. The quality of waters employed flood control or coastal projects can limit the use and effectiveness of those projects and expose public entities to liability under related federal or state law, as evidenced by legal challenges relating to the aftermath of the 2019 openings of the Bonnet Carré Spillway.¹ Given the persistent nutrient pollution issues and their

¹ Complaint, *Harrison Co. v. U.S. Army Corps of Engineers*, (S.D. Miss. 2024), available at <https://bloximages.newyork1.vip.townnews.com/nola.com/content/tncms/assets/v3/editorial/1/4c/14c10a1e-b97b-11ee-a71e-fb68aab9e061/65aef5c87be98.pdf.pdf>.



impact on water management, LDENR cannot overlook its role in the state's nutrient management strategy and should look for opportunities within existing regulatory schemes to address impacts from water quality.

Growing industrial water demand will pose challenges to not only communities, but also the State's larger watershed management efforts. Massive industrial operations are competing with and compromising the local water supplies. The over pumping of groundwater for industrial uses can lead to—and has led to—saltwater intrusion into aquifers, and incoming industrial operations threaten to compromise local water supplies. Manufacturing demands are changing while newer water dependent industries are experiencing an era of rapid growth. LDENR's offices must coordinate to ensure water intensity of hydrogen production, carbon capture and underground storage (CCUS), mining, fracking, and other new and emerging sectors will be planned for both in larger governance efforts and in individual permitting programs. It will be critical for the state to implement monitoring and regulations to coordinate groundwater management, especially with the increase in Class VI well proposals. The NRSC has posed extensive questions on projected energy and related resource demands, yet the same has not been done for water, even though it is just as necessary a resource for energy and industrial use, but also at the municipal and household level. It is a crucial element for all aspects of industrial and domestic needs. This is also important for addressing saltwater intrusion into aquifers and addressing subsidence and its related impacts. It also matters for drinking water planning and coastal management, all which require consistent, sufficient flows in the rivers, streams, and aquifers of the state.

The high-level decisions made during this process will shape future uses of Louisiana water for decades to come. As such, during this proposed reorganization, particularly the creation of the Office of Land and Water, LDENR must use this authority to implement a management regime that accounts for existing uses while addressing future weather and hydrology changes. This will require that LDENR understand surface water and groundwater use and manage them conjunctively. The best way to ensure this is done correctly will be to implement water use permitting and enforceable monitoring and reporting regulations. LDENR offices with regulatory and enforcement responsibilities must be adequately staffed and resourced to achieve the state goals of enhanced regulatory oversight and enforcement.

II. LDENR Should Establish Appropriate Governance and Regulatory Frameworks for Emerging Industries

As the state welcomes new industry, it must be more proactive than it has been in the past with monitoring and oversight of the energy sector. Louisiana statutes and recent legislation lack clarity/certainty as to what activities or industries qualify as energy. During this reorganization process, LDENR should review existing regulations and standards for oil and gas, and alternative energy in existing state law. With new energy industries and technologies coming under LDENR's authority, there should be meaningful consideration of the unique needs and concerns of renewable and alternative energy related sectors, such as CCUS and green hydrogen. Because

of the unique nature and risks associated with this industry, they should not be treated these the same as oil, gas, and minerals production.

In the questions posed to the NRSC, there is a vague discussion of enforcement responsibilities for federal and state programs that deal with natural resources. Read broadly, this could encompass regulatory programs housed within several state agencies, as well as federal law and standards that provide the backdrop for many environmental related programs. There must be assurance that LDENR does overstep its authority or create inconsistencies with delegated regulatory programs. This could create issues with the overlap/mismanagement with the Louisiana Department of Environmental Quality and Louisiana Department of Health. Act 727 now gives the LDENR secretary authority over conservation, development, and management of timber and fish. Previously, state law excepted timber and fish from LDENR's mission and purpose, but the broad authorities now granted by Act 727 could create operational inconsistencies with the Department of Agriculture & Forestry and the Department of Wildlife & Fisheries.

Louisiana Act 727 gives the Office of Land and Water authority over energy-related rights of way and energy-related leasing of state waterbottoms. What does energy-related mean? This distinction is important. CCUS has vastly different concerns and needs than traditional energy facilities and energy production. The lack of detail is concerning, particularly given how current CCUS and wind operating agreements have proceeded without a clear regulatory or governance framework, also leading to overlap in the areas awarded to developers.²

The functions of the Office of Land and Water will undoubtedly overlap with the new Office of Energy, thus LDENR should prioritize creating a framework for offshore wind in state waters to ensure the approved operating agreements proceed in a responsible manner that gives due consideration to energy needs, environmental considerations, and land and water management. First, LDENR should finalize the proposed regulations "Leasing State Lands and Water Bottoms for the Exploration, Development and Production of Wind Energy" to amend Louisiana Administrative Code 43:V. Chapter 7.³ After accepting public comments through June 12, 2023, these rules are still pending, and the state's current operating agreement process for initiating wind projects lacks transparency, effective governance, and environmental safeguards. LDENR must incorporate an enforceable review process, either via state leasing rules or other authorities, to help the state manage multiple uses of state waterbottoms and addressing safety concerns with

² Tristan Baurick, *Wind Farms and Carbon Capture Want the Same Turf Off Louisiana's Coast. Who Gets It?* Times-Picayune (Jan. 4, 2024), https://www.nola.com/news/environment/offshore-wind-carbon-projects-clash-on-louisiana-coast/article_a53ad65a-aa81-11ee-81b7-8738b521105d.html.

³ La. Dep't of Energy & Natural Resources, Office of Mineral Resources Rulemaking and Fee Changes, <https://www.dnr.louisiana.gov/index.cfm/page/1248>.

oil/gas, CCUS, fisheries, and other habitat management.⁴ Not only will these measures reduce potential for litigation and project delays, thereby providing regulatory certainty for developers, it creates a needed open framework for public engagement and involvement. Further, LDENR should incorporate the forthcoming Offshore Wind Roadmap⁵ in a manner akin to the Coastal Master Plan to guide LDENR’s office in ensuring responsible siting and project planning. These measures will undoubtedly be more successful with support from wider range of constituencies while helping to solidify Louisiana as a leader in the wind energy space.

III. LDENR’s Work Should Enhance Louisiana’s Coastal Efforts and Allow CPRA to Maintain Independence

Out of the roughly 200 public comments filed as an initial response to JML 24-13, all but a handful supported CPRA remaining an agency independent of LDENR. This Commission should take into account this public input and keep the Coastal Master Plan and related project implementation process separate, as the current system promotes efficiency in its science and data-based approach to coastal management. LDENR should also consider how changes in the reach of federal law will impact the wetlands conservation landscape in Louisiana and how existing authorities, like the State and Local Coastal Resources Management Act, can help the state maintain wetlands protections. Without oversight of development in floodplain wetlands, there could be severe consequences for local drainage capacity and community flood risk. Even more, the state of Louisiana, pursuant to the Coastal Wetlands Planning, Protection, and Restoration Act, must implement certain wetlands management and protections policies that achieve “no net loss” in order to qualify for the discounted cost-share laid out in the statute.⁶ This conservation plan requires coordination within LDENR.⁷ If Louisiana fails to meet these goals, the state could face even more fiscal challenges in implementing future coastal projects.

Further, LDENR must consider the future impacts to the state’s wetlands following the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*. The loss of Army Corps jurisdiction under Section 404 should be a primary concern for, especially in terms of flood risk. The loss of mitigation requirements for development in wetlands will cause challenges for

⁴ Haley Gentry, [Offshore Wind in Louisiana Waters: Legal Framework for Environmental Review](#). A report by the Tulane Institute on Water Resources Law & Policy and the National Wildlife Federation. May 20, 2024.

⁵ La. Dep’t of Energy & Natural Resources, Request for Information,

<https://www.dnr.louisiana.gov/assets/purchasing/RFIComprehensiveWindRoadmap.pdf>.

⁶ 16 U.S.C. § 3952(f)(1); LOUISIANA COASTAL WETLANDS CONSERVATION PLAN (1997), https://www.dnr.louisiana.gov/assets/OCM/OCM/Louisiana_Coastal_Wetlands_Conservation_Plan_1997.PDF.

⁷ 16 U.S.C. § 3953(c)(4) (“The conservation plan authorized by this section shall include. . . a system that the State shall implement to account for gains and losses of coastal wetlands within coastal areas for purposes of evaluating the degree to which the goal of no net loss of wetlands as a result of development activities in such wetlands or other waters has been attained”).



communities across the state. LDENR has indicated interest in assuming Section 404 from the Army Corps. With everything on LDENR's plate and the budget/fiscal challenges repeatedly mentioned through the NRSC process, this effort would be an inefficient use of time or resources. There is a reason why only two states have successfully assumed authority over CWA Section 404. It is costly, technically complex, and has high barriers for compliance. Instead of the Army Corps funding all of the permitting and mitigation programs, it would fall to LDENR without any real benefit, as it would still have to comply with minimum federal standards, which is how the states CWA standards are tied. The recent attempt and then revocation of 404 authority in Florida is a cautionary example.⁸

Conclusion

The NRSC and LDENR do not have easy tasks ahead of them, but it is crucial that there is clarity moving forward and that reorganization will not compromise or overlook crucial needs of Louisiana's natural resources and its people. The Tulane Institute on Water Resources Law & Policy appreciates the opportunity to submit these comments and look forward to future participation in the restructuring of LDENR.

Sincerely,

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⁸ Kayla Goggin, *EPA Broke Federal Law in Handing Off Wetlands Permit Approval to Florida, DC Judge Rules*, Courthouse News Service (Feb. 16, 2024), <https://www.courthousenews.com/epa-broke-federal-law-in-handing-off-wetlands-permit-approval-to-florida-d-c-judge-rules/>.