Tulane Institute
on Water Resources Law & Policy
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August 15, 2019

Louisiana Department of Environmental Quality
Via Email: Nutrient.management@la.gov

Re: Louisiana Nutrient Management Strategy

Dear Sir or Madam:

About the Tulane Institute on Water Resources Law and Policy. The Tulane Institute on Water Resources Law and Policy is a program of Tulane Law School. The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and stewardship of water. The Institute does not engage in client representation and is appearing today at the request of the Committee to provide information requested by the Committee. The views expressed in these comments reflect the best judgment of the Institute but do not necessarily reflect the views of Tulane University or Tulane University Law School.

Introduction: This Nutrient Management Strategy (NMS) comes at a time when the efforts to manage nutrient levels in the Mississippi River and the Gulf of Mexico are at a crossroads. The NMS is an extension of the 2014 NMS and the Gulf of Mexico Hypoxia Task Force Action Plans of 2001 and 2008. From those efforts and years of experience one can draw three important conclusions:

1. Louisiana's contributions to the nutrient loading of the Mississippi River and the Gulf of Mexico are much smaller than other states' contributions, and the NMS is aimed at more waterways than the Mississippi River and the Gulf.

2. The negative impacts of high nutrient loads in the Mississippi River and the Gulf of Mexico have disproportionately impacted Louisiana. Section A.2. of the NMS speaks to that.

3. Things are getting worse, not better.

Despite years of well-intended voluntary and cooperative efforts to reduce nutrient levels in Louisiana's waters, the Mississippi River, and the Gulf, those levels remain unacceptably high. Those nutrient loads are combining with a warming Gulf and longer and more frequent periods of high river levels to disrupt fisheries and close beaches. All of this draws greater attention to the need for prompt and effective action to reduce nutrient levels.

Louisiana has to decide what actions are needed and how it can help bring them about. That will take more than an NMS, but the NMS must be a clear part of a strategy that produces waters that are fit for use and that the public trusts. Presently, Louisiana does not have such a strategy, but the 2019 NMS offers an opportunity to begin to change that. The proposed NMS needs additional work in order to do that.

It is with that in mind, and with respect for the work that has gone into the crafting of the 2019 NMS, that these comments are proffered.

Comments and Recommendations

Strategic Objective. There is much to admire in the various elements of the NMS. The metrics for public participation in the adoption of Best Management Practices (BMPs) and others are impressive, but ultimately it is not clear what strategic goal they actually are moving toward.
The purpose of the NMS (page 10) is declared to be:

> "The purpose of the Louisiana Nutrient Management Strategy is to manage nitrogen and phosphorus to protect, improve, and restore the nutrient-related water quality in Louisiana's inland and coastal waters."

This is an entirely laudable purpose but it lacks any definition of the "nutrient-related water quality" targets, and the NMS does not set forth a course for setting those targets. Box 1 of the NMS (see page 2) suggests that those targets will come out of targets set for the Gulf of Mexico ("A strategy focused on the nitrogen and phosphorus loads to the Gulf of Mexico (GOM) will determine what improvements are necessary for Louisiana to contribute to nutrient management throughout the Mississippi-Atchafalaya River Basin"). That may have been a realistic and reasonable expectation in 2001, 2008, or even 2014, but today it is not. It is now clear that no such numeric targets are forthcoming from the Environmental Protection Agency or the Gulf Mexico Hypoxia Task Force and will not be until Louisiana makes their development a priority and forces the issue on upstream states and the federal government.

Recommendation: We recommend that the NMS add a clear strategic objective that it, in combination with related programs, seeks to achieve. This objective could be both qualitative (e.g. a river fit for its current and projected uses and receiving bodies) and quantitative (numeric reduction targets and time thresholds).

River Diversions as an Integral Strategic Component. The NMS places great emphasis on the role that river reintroduction (diversion) projects developed by Louisiana's coastal restoration program can play in the management of nutrients, especially those arriving from up river (see pages iv and 47). There is no question that the use of wetlands to assimilate nutrients is an important management tool as noted in the NMS. There is also no question that the restoration program's diversion projects will offer some assimilation benefits. Apparently, the hope is that up river states will see that as a reason to support Louisiana's coastal restoration efforts by offering to do more than Louisiana's share or nutrient abatement (see page iv). We question that presumption and whether it is appropriate to bring those projects into the state's NMS for several reasons.

1. With respect to diversions that currently exist or are authorized and under development, nutrient abatement is not among their authorized objectives, and Louisiana should be extremely careful about adding objectives or creating expectations about what they might deliver in the way of nutrient assimilation.

2. Most of the assimilation benefits anticipated in the NMS (see page 54) come from projects that have not been built, funded, or even authorized, and whose benefits would not be realized for 5 to 50 years. That is wishful thinking, not a strategy for nutrient management. Indeed, recent experience has shown that concerns about Mississippi River water quality are likely to be limiting factors on constructing and operating coastal restoration projects. In our view, the NMS has the synergy between nutrient reduction and coastal restoration backwards. A cleaner river will make its use in restoration easier and more acceptable. There is simply no evidence or experience to suggest that it works the other way around.

3. It is contrary to Louisiana's interests and duties as a steward of its waters and natural resources to encourage other states to do less or wait longer to reduce their nutrient contributions. Even if our coastal projects are built and can contribute to a cleaner river, Louisiana cannot wait that long or bear the cost of financing those projects to gain those benefits. The inclusion of this component is not an inducement to support coastal restoration. Rather, it only sends the message that nutrient reduction is not a priority for Louisiana and that we are willing to subsidize them with time and money to reduce their share of nutrients. That approach will never get Louisiana the Mississippi River it needs and deserves in time for it to matter.

Recommendation: Characterize the role of coastal restoration projects to correctly reflect them as projects that are more reliant on a clean river than a tool for cleaning the river. The 5 to 50 year horizon for constructing and operating those projects combined with the uncertainty of their authorization and funding also make them ill-suited for inclusion as a component of the NMS.

Regulatory, Policies and Programs. The Framework of Strategic Components of the NMS (see page 12) describes this strategy and calls for it to "Examine current regulations, policies, and programs that may guide nutrient management activities."

Examining current regulations, policies, and programs is not an action that can lead to any improvements. Examination must lead to action, including the development of new regulation, policies, and programs. The NMS recognizes that (see page 15) where it declares:

> "The strategic actions for Regulations, Policies, & Programs under the Louisiana Nutrient Management Strategy are to:
>
> - Propose or establish new regulations, policies and/or programs pertinent to strategy objectives
> - Leverage multiple regulations, policies, and/or programs to most efficiently utilize varying practices in managing nutrients
>
> Timelines and milestones for these strategic actions are given in Appendix A."

More troublesome than reconciling the language between parts of the NMS is the fact that the NMS does not actually call for any changes to regulations, policies, and programs. When one goes to the referenced Appendix A (see page 106) there are no milestones or timelines other than to say that work is ongoing. However, there is no explanation as to what work is ongoing. Surely the now documented failure of current efforts to reduce nutrient loading in the Mississippi and hypoxia in the Gulf should have produced even a single specific recommended change. At the least, the NMS should reference the 2009 EPA Inspector General's recommendation, in which the EPA set enforceable nutrient standards given the states' failure to do so, and explain what Louisiana is doing with respect to enforceable standards.

Recommendation: It is clear at this point that achieving meaningful reductions in nutrient loadings and hypoxia will require more focused, urgent, and comprehensive efforts, efforts that will necessarily demand supporting policies, programs, and regulations. Since it is evident that those do not currently exist, the NMS needs to more forthrightly acknowledge that and explain what might be necessary. We appreciate that this will not be an easy task nor is it one that will be met with immediate public or political acceptance. That is in part why it is so important to do. There are reasons that our nutrient management efforts are not succeeding, and the public needs to be educated about those reasons so it can take on the civic challenge of addressing those reasons or so it can recalibrate its expectations.

We greatly appreciate the work that went into this NMS and the years of experience that have shaped it. Getting waters that are fit to use is no small task, and it will demand a

range of tools and talents as envisioned in the NMS. Our aim in providing these comments is not to be critical but to be helpful. We would be happy to discuss or explain any of our comments and recommendations and be of any assistance.

Respectfully submitted,

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