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Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 26, 2010

Mr. Lawrence E. Starfield
Deputy Regional Administrator
EPA Region 6
1445 Ross Avenue, Suite 1200
Mail Code: 6RA-D
Dallas, Texas 75202-2733

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EXTERNAL AFFAIRS DIVISION

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Dear Mr. Starfield:

We received the Environmental Protection Agency's (EPA) letters dated December 18, 2009, and December 22, 2009, relating to the Texas Commission on Environmental Quality's (TCEQ) reasonable potential determination and Whole Effluent Toxicity (WET) limits requirements. The TCEQ has worked tirelessly with EPA to develop an approach to WET implementation that is acceptable to both the EPA and the State of Texas. The TCEQ has acknowledged on numerous occasions the importance of having a WET program that is dependent on a reasonable potential (RP) determination. The TCEQ has also expressed a willingness to move beyond its EPA approved Implementation Procedures to implement a WET program, with EPA's support.

Over the past three years, the TCEQ has offered numerous, reasonable solutions to try to gain EPA's support. However, the EPA continues to find TCEQ's suggested approaches unsatisfactory without offering any scientific justification. EPA's only approach has been to require the State to strictly follow EPA's 1991 "Technical Support Document for Water Quality Based Toxics Control" (TSD) and draft guidance methodology to determine RP for WET. This approach is inappropriate given EPA headquarters has not finalized the draft document. Requiring Texas to follow a draft guidance document is not sound public policy, effective in protecting water quality, or appropriate under the interagency National Pollutant Discharge Elimination System (NPDES) delegation Memorandum of Agreement (MOA).

Under the MOA, TCEQ -

[W]ill utilize EPA national and regional policies and guidance to the extent there is no conflict with Texas statutes, a specific state policy, or guidance adopted by TNRCC. TNRCC *agrees to consider* EPA national and regional policies and guidance when adopting corresponding or related state policies and guidance and will avoid state policies or guidance that would conflict with §402(b) of the CWA or applicable federal regulations or limit [TCEQ's] ability to implement the NPDES program; . . .¹

¹ Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency, Region 6 Concerning the National Pollution Discharge Elimination System (MOA between TNRCC and U.S. EPA), p. 5 (1998).

The MOA does not require TCEQ to follow any and all EPA guidance whether or not they are consistent with state or federal laws, nor does it require TCEQ to follow draft EPA guidance.

The proposed revisions to the "Procedures to Implement the Texas Surface Water Quality Standards" containing Texas' approach to reasonable determination for WET was approved by the Commissioners at the January 13, 2009 agenda for proposal and publication in the *Texas Register*. The TCEQ is committed to building consensus with the EPA and all affected parties in Texas. The TCEQ intends to utilize best professional judgment to add WET limits to permits. This approach will be grounded in the best scientific information available, consideration of EPA guidance as allowed under the MOA, the permit writers' professional and scientific knowledge (including but not limited to, artifactual toxicity, non-representative data, and source water toxicity) in dealing with reasonable potential determination and WET related issues, experience and familiarity with program administration of permits with lethal and sublethal monitoring, and testing methodologies. This plan offers an understandable, manageable, and less controversial approach to managing lethal and sublethal effects associated with acute and chronic WET testing. We strongly believe that this approach will lead to effective regulation and water quality protection based on a scientific process that is fair and transparent.

With respect to the December 18, 2009 correspondence which purports to provide new comments on permits that EPA had already commented on, TCEQ is of the opinion that the new comments are untimely as they were not provided within the timeline established in the MOA.

EPA shall provide written comments, objections (general or interim) to, or recommendations with respect to draft permits within forty-five (45) days from its receipt of a draft permit. Upon a written request by EPA, if a general or interim objection to a draft permit is made, EPA will have up to an additional forty-five (45) days to submit specific objections.

If no interim or general objections are submitted by the EPA in writing within forty-five (45) days after EPA's receipt of a draft permit, the TNRCC may proceed with issuance of the permit in the form submitted to EPA.

If EPA has made interim or general objections within the initial forty-five (45) day review period, but has not provided specific objections in writing within ninety (90) days from its receipt of a complete application package, the TNRCC may proceed with issuance of the permit as submitted.²

The TCEQ has considered and addressed EPA's comments on monitoring and TRE requirements for each of the permits referenced in the correspondence in light of its draft implementation procedures. Other provisions including WET limits may be included after reasonable potential is determined if the inclusion of WET limits are warranted based on the reasonable potential determination.

Finally, in multiple conversations both Bill Luthans and Bill Honker (EPA representatives) encouraged the TCEQ to proceed with the revisions made to the "Procedures to Implement the Texas Surface Water Quality Standards" thereby giving the impression that issues between the TCEQ and EPA relating to reasonable potential and WET had been resolved. Based on these conversations, TCEQ staff finalized the proposed revisions for Commission action. Thus, the position in the December correspondence came as a surprise to TCEQ.

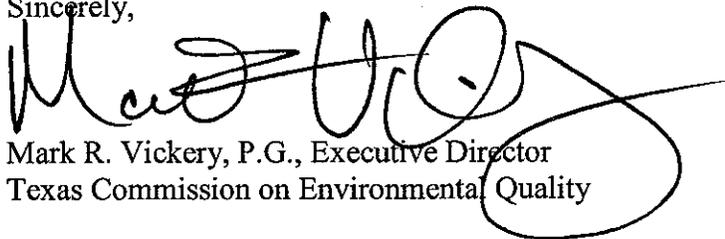
² MOA between TNRCC and U.S. EPA, p. 25-26.

Mr. Lawrence E. Starfield
Page 3

Nevertheless, TCEQ remains optimistic that EPA and the TCEQ will continue to work together on this issue. The TCEQ is committed to protecting water quality and implementing water quality standards in Texas. The TCEQ remains, as always, open to meetings and further discussions. It is important for us to build consensus. The TCEQ is focusing on results of the program and encourages the EPA to support its efforts.

If you have any questions or would like to schedule a followup meeting please, contact Charles Maguire, Water Quality Division Director at (512) 239-5308.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark R. Vickery". The signature is stylized and somewhat cursive, with a large loop at the end. It is positioned above the printed name and title.

Mark R. Vickery, P.G., Executive Director
Texas Commission on Environmental Quality