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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

EXTERNAL AFFAIRS DIVISION

Protecting Texas by Reducing and Preventing Pollution

May 26, 2010

Al Armendariz, Ph.D.
Regional Administrator
United States Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Letter Regarding Whole Effluent Toxicity Dated March 30, 2010

Dear Dr. Armendariz:

We received the Environmental Protection Agency's (EPA) March 30, 2010 letter relating to the Texas Commission on Environmental Quality's (TCEQ) reasonable potential determination and Whole Effluent Toxicity (WET) limits requirements. As stated in our January 26, 2010 response to your December letters on this subject, TCEQ will continue to work with EPA to develop an approach to WET implementation that is acceptable to both agencies. TCEQ has taken substantial steps to address the sub-lethal WET concerns raised by EPA Region 6. In response to your December 18, 2009 correspondence, TCEQ has issued seven permits that complied with the timely letters received from EPA consistent with the Memorandum of Agreement (MOA) between our agencies and two permits with sub-lethal WET limits pending review with EPA Region 6.

To address your December 22, 2009 list, TCEQ is currently reviewing several applications based on the scientific data in the applications to determine if WET limits for sub-lethal effects are needed. If, based on our analysis, we believe that it is appropriate to have limits in those permits, we will work with Region 6 on permit and fact sheet language. We have already communicated that approach to your staff. Given that Region 6 is well aware of this progress and our numerous attempts to reach out and develop an agreement with EPA, it is a concern to TCEQ that EPA continues to send letters calling our program management into question without any acknowledgement of the outstanding efforts we are making to implement a WET program in draft permits and in our proposed "Procedures to Implement the Texas Surface Water Quality Standards" (IPs). In addition, EPA states that 10 to 15 percent of Texas permits will be affected by using the Region 6 approach. However, our estimates are much higher when the EPA's 1991 TSD approach is followed, which is the process we understand EPA Region 6 is using.

EPA asserts that TCEQ's proposed IPs would address only those facilities that demonstrate the most egregious levels of toxicity. This assertion is somewhat confusing

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for us, because the TCEQ's proposed approach will evaluate all applicable permits to determine if a WET limit is necessary or not. So, EPA's comment appears premature and unfounded. EPA has indicated that TCEQ "... need not strictly follow the 1991 TSD, but may develop an alternative method that ensures that there will be no exceedance of water quality standards for aquatic life."

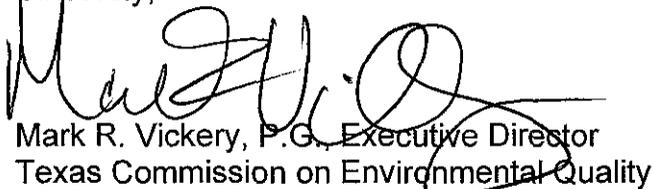
To date, TCEQ has discussed several alternatives based upon reasonable scientific principles including looking at (1) failure rates (2) the South Carolina method, (3) risk-based and weight-of-scientific evidence approach for which your staff previously expressed their support. In each instance, without any specific rationale as to why it can't be approved, EPA has rejected these reasonable alternatives. Apparently, the only rationale is because they are not identical to the 1991 TSD guidance document or the 2004 draft guidance document. If EPA is truly inclined to accept an alternative method, we would encourage EPA to take a fresh look at the proposed Implementation Procedures and find ways to bring our agencies to consensus, since there are not detailed federally promulgated procedures for determining reasonable potential.

The proposed revisions to the IPs were approved for proposal by our Commissioners at the January 13, 2010 Agenda. The IPs are scheduled to be back before the Commission in late June for adoption. The TCEQ is committed to building consensus with the EPA and all affected parties by utilizing its weight-of-scientific evidence approach to add WET limits to permits when appropriate. TCEQ's method offers an understandable and manageable approach for water quality protection based on a scientific process.

TCEQ is implementing a well-managed water quality program, and I want to ask that you evaluate the program based on the results the agency has achieved and not on any particular preferred methodology. TCEQ will protect water quality and put sub-lethal WET limits in permits where appropriate. The weight-of-scientific evidence approach eliminates the need to add a WET limit where one is not needed, and this procedure adds a WET limit when it is needed.

Again, we reiterate our desire to work with EPA on this issue and our commitment to protect water quality in Texas. We remain open to meetings and further discussions to establish mutually acceptable WET testing procedures.

Sincerely,



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

MRV/CM/me