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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

EXTERNAL AFFAIRS DIVISION

*Protecting Texas by Reducing and Preventing Pollution*

October 7, 2010

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

Re: Response to August 4, 2010 letter regarding Whole-Effluent Toxicity (WET) issues

Dear Dr. Armendariz:

Thank you for your August 4, 2010 letter regarding the issues with implementation of the WET program within the Texas Pollutant Discharge Elimination System (TPDES) Program. I am encouraged by your acknowledgement of the "recent progress" in implementing the WET program in Texas. I hope our two agencies can continue to build on this progress to bring this issue to a resolution. In the letter, you summarized several responses you believe EPA has provided as feedback to the TCEQ's methods for determining reasonable potential (RP). I would like to further clarify TCEQ's perspective and hope that we can work towards a final resolution on this matter.

First, I want to address the use of the 1991 Technical Support Document (TSD) approach to determine reasonable potential. You mentioned a "misunderstanding concerning the Region's flexibility in our implementation of a TSD-based approach to WET." I encourage you to have your staff explore this misunderstanding fully with my staff to ensure there is clear management direction from both agencies.

Also, I must reiterate that the 1991 TSD is guidance and states, "This document is agency guidance only. It does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed." EPA's continued insistence on the required use of the 1991 TSD approach clearly contradicts these expressed statements and ignores the fact that the guidance is not binding on any state including the State of Texas. Given that the guidance is not binding, EPA has no authority to require the use of the TSD method to determine reasonable potential. I am confident that our agencies working together can develop a method that satisfies all state and federal requirements.

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Accordingly, on page 114 of the newly adopted Procedures to Implement the Texas Surface Water Quality Standards, it is clearly stated that reasonable potential determination will be performed "based on best professional judgment as well as additional factors, such as duration and magnitude, as agreed upon by the TCEQ and the EPA." This acknowledgement of the need to work together to resolve the WET issue is indicative of the TCEQ's willingness and commitment to continue to work with the EPA in a way that is beneficial to the environment.

You stated in your letter that "Region 6 has consistently voiced support for any approach that would yield equivalent RP determinations to those that would follow from the TSD approach" and "TCEQ has not proposed an acceptable alternative to the risk-based TSD approach used by Region 6." These statements seem to indicate that the only "acceptable" alternative would mirror the TSD results, which is no alternative at all. The problem with the TSD approach is that it can result in reasonable potential determination (1) where sufficient data does not exist, (2) where there is only one test failure, (3) where there were test failures in the distant past and the permittee has since demonstrated a sustained period of compliance, or (4) where there is no test failure. I am confident that you would agree that the purpose of WET limits is to ensure the protection of the water body receiving the discharge. It is my hope that our respective staffs are allowed the opportunity to explore options that allow for best professional judgment in determining the need for and method of providing water quality protection.

My staff has developed an approach for RP determination that we feel is technically and legally defensible and that allows for site-specific determinations and the institutional knowledge and technical expertise of the water quality permitting staff. With respect to test failures, you stated that "EPA does not believe the Texas water quality standards (WQS) allow for multiple exceedances of the standard." This statement implies that under the Texas Surface Water Quality Standards (TSWQS), a single test failure would require imposition of a WET limit in a permit. This requirement is not in the TSWQS. To the contrary, 30 TAC § 307.6(e)(2)(D) allows a toxicity reduction evaluation (TRE) before a WET limit is imposed. In fact, if the TRE identifies the cause of the exceedance, a chemical specific limit may be included in the permit in lieu of a WET limit. When the TSWQS and the TCEQ's entire water quality protection program are evaluated in tandem, there is no indication that a single WET test failure would constitute a violation of the narrative provisions.

You have also stated that, "We believe that an approach that finds 'no reasonable potential for toxicity' despite multiple WET test failures, is neither scientifically nor legally defensible under the Texas WQS and EPA's regulations." This implies that multiple and recent failures of WET tests would not result in a RP determination under the weight-of-scientific-evidence method we have proposed. While we do not believe failures in the distant past followed by a sustained period of compliance demonstrates

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RP, we have never indicated that multiple or recent failures would be disregarded in making RP determinations.

It is imperative that EPA approve the new Implementation Procedures so that more protective permits can begin to be issued by TCEQ, including those with more stringent non-WET related provisions.

Thank you again for the opportunity to respond to your August 4, 2010 letter. I hope that through continued dialogue and greater understanding of our proposal that our agencies can come to an agreement that we can both agree is protective of surface water in Texas.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark R. Vickery". The signature is fluid and cursive, with a large, sweeping flourish at the end.

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