

# EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

DEC 22 2009

Mark R. Vickery, P.G., Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

Re: Revisions to the Procedures to Implement the Texas Water Quality Standards with  
Regard to Whole Effluent Toxicity Requirements in Wastewater Discharge Permits

Dear Mr. Vickery:

In February 2005, EPA Region 6 notified the Texas Commission on Environmental Quality (TCEQ) that certain revisions were necessary to the Texas Pollutant Discharge Elimination System (TPDES) permitting procedures for whole effluent toxicity (WET) in order to comply with federal regulations and State water quality standards. In particular, Region 6 discussed with TCEQ the need to 1) perform an analysis of WET data to determine whether a facility's wastewater discharge has the reasonable potential to cause or contribute to an exceedance of the Texas water quality standard for the protection of aquatic life and, 2) include limits in wastewater discharge permits where Reasonable Potential (RP) is found based on lethal and/or sub-lethal effects to aquatic organisms.

Over the past four years, Region 6 has met with TCEQ on numerous occasions to discuss this issue, as well as to provide training and technical assistance in making appropriate revisions to the State's implementation procedures for WET. In spite of numerous discussions, including a video conference call with you and your staff, I am disappointed that we have been unable to agree on a methodology for RP and the need for WET limits in permits. As a result, EPA continues to maintain that TPDES permits do not adequately protect aquatic life against chronic toxicity as required by federal regulations and the Texas water quality standards. In addition, the TPDES permit fact sheets do not provide an appropriate determination of reasonable potential for whole effluent toxicity, a specific requirement of federal regulations (40CFR 122.46(d)(1)).

Since 2007, EPA Region 6 has issued letters to TCEQ regarding permits that have a large percentage of lethal and sub-lethal test failures, and has required the inclusion of acceptable toxicity limits in those permits. The growing list of facilities receiving such letters (see enclosure) demonstrates that the current TCEQ procedures are inadequate to identify facilities requiring WET limits, even where test failures have already occurred. It is EPA's position that test failures are demonstrated exceedances of the State water quality standard criteria for aquatic life protection and therefore require the inclusion of WET limits in permits.

Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 25% Postconsumer)

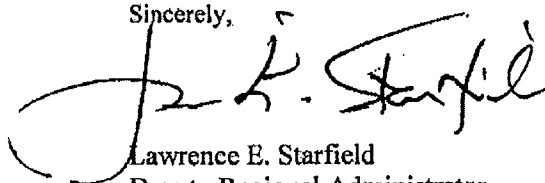
During recent TPDES program review discussions between EPA and TCEQ we were informed of TCEQ's plan to present revisions to the permitting implementation procedures to the Commissioners in January, 2010. While EPA has reviewed and submitted comments on several drafts (public and deliberative) of the implementation procedures, none of these proposals has incorporated protective WET procedures to adequately implement the State's water quality standards in compliance with the Clean Water Act and federal regulations.

The same is true of the draft proposal provided to EPA by TCEQ on November 5, 2009. While this version of proposed revisions to TCEQ's Implementation Procedures and Standard Operating Procedures, if finalized and followed, would address the more egregious cases with more numerous test failures, the procedures as presented would fall short of a WET permitting program that EPA would view as meeting the requirements of the Clean Water Act. Therefore, we would not expect TCEQ's implementation of these procedures to resolve the issue of EPA objecting to a significant percentage of TCEQ draft permit decisions.

EPA strongly recommends that any WET implementation procedures proposed by TCEQ incorporate EPA's recommendations to meet the minimum established state and federal requirements, which, per TCEQ rules, could include a compliance schedule of up to three years, if appropriate. If TCEQ's WET implementation procedures are not revised to meet the minimum State and federal requirements, EPA will have little recourse but to object to issuance of TCEQ permits that do not include an acceptable reasonable potential determination and appropriate toxicity limits.

EPA and the State of Texas share common goals of ensuring compliance with all federal requirements for the State TPDES program, and ensuring that Texas water quality standards are met. With those ends in mind, EPA will continue to work with TCEQ toward resolving the above concerns. In addition, our offer still stands to accompany TCEQ to Washington, DC to discuss the matter with the Office of Water if it would help resolve the matter.

Sincerely,

A handwritten signature in black ink, appearing to read "L. E. Starfield". The signature is written in a cursive style with a large, sweeping initial "L".

Lawrence E. Starfield  
Deputy Regional Administrator

Enclosure

cc: L'Oreal Stepney, TCEQ

**Proposed TCEQ Permits Backlogged With Toxicity Issues**

DATE	NPDES #	Permittee	Lethal Failures Species 1 and/or Species 2	Sub-Lethal Failures Species 1 and/or Species 2	Highest Fail Rate
03.02.07	TX0064734	Langham Creek MUD	1 / 7	4 / 7	67%
06.28.07	TX0075388	TDC (Beto Unit)	1 / 10 and 2 / 21	1 / 10 and 9 / 21	43%
07.23.07	TX0057029	White Oak Joint Powers Board	0 / 14 and 2 / 29	1 / 14 and 9 / 29	31%
09.28.07	TX0092789	TDC (Estelle Unit)	1 / 2 and 0 / 4	2 / 2 and 3 / 4	76%
10.01.07	TX0063029	Houston Homestead	2 / 20	7 / 20	36%
12.21.07	TX0003689	Goodyear	1 / 10	4 / 10	40%
01.24.08	TX0091715	SJRA Woodlands #2	0 / 10	5 / 10	60%
03.05.08	TX0081337	NW Harris County MUD #20	0 / 26	10 / 26	39%
03.25.08	TX0126152	NW Harris County MUD #9	3 / 15	7 / 15	47%
07.09.08	TX0003824	Texas Instruments	13 / 26	20 / 26	80%
07.17.08	TX0057304	South Houston	9 / 29	19 / 29	66%
07.28.08	TX0007048	Lubrizon	1 / 17 and 1 / 29	7 / 17 and 9 / 29	41%
08.15.08	TX0025062	Harris County Water District #51	1 / 19 and 3 / 25	1 / 19 and 13 / 25	62%
09.11.08	TX0089125	Exxon-Mobil	0 / 19	5 / 19	26%
09.15.08	TX0087971	SolWay Chemicals	6 / 11	6 / 11	66%
10.14.08	TX0126098	Red River Redevelopment 001 002	1 / 13 and 5 / 16	NA	31%
10.31.08	TX0005592	Huntsman Corp.	14 / 17 and 15 / 17	14 / 17 and 15 / 17	88%
11.19.08	TX0022667	Georgetown	0 / 17 and 0 / 19	2 / 15 and 7 / 19	37%
03.13.09	TX0073954	Bryan Dansby Electric	2 / 15 and 2 / 15	2 / 15 and 2 / 15	13%
05.05.09	TX0023914	McGregor South	0 / 16 and 1 / 22	2 / 16 and 8 / 22	36%
07.01.09	TX0069736	City of Houston (Metro Central)	6 / 31 and 7 / 13	6 / 31 and 7 / 13	64%
07.06.09	TX0111201	Prairie View A&M University	8 / 36 and 3 / 26	9 / 36 and 16 / 26	62%
07.08.09	TX0047457	Memorial Villages Water Authority	2 / 26	7 / 26	27%
09.09.09	TX0034461	City of Bay City	1 / 22	8 / 22	36%
09.24.09	TX0071790	City of Navasota	1 / 27	3 / 21 and 10 / 30	33%
10.23.09	TX0098957	Cinco Municipal Utility District No. 1	1 / 19 and 0 / 13	6 / 27	22%
10.29.09	TX0034401	City of Humble- Southwest	0 / 15	2 / 15	16%
11.06.09	TX0021474	City of El Campo	0 / 15 and 0 / 11	2 / 15 and 1 / 11	13%
11.12.09	TX0035009	City of Houston-Southeast	0 / 19	4 / 19	16%
11.04.09	TX0106071	City of Lubbock	0 / 24	2 / 24	21%
					8%

# EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

DEC 18 2009

RECEIVED

DEC 21 2009

WATER QUALITY DIVISION

Ms. L'Oreal W. Stepney, Director  
Office of Water  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

Re: Texas Pollutant Discharge Elimination System (TPDES) Permits on Hold for Issues  
Related to Whole Effluent Toxicity (WET) Requirements

Dear Ms. Stepney:

This correspondence updates EPA's position concerning the nine (9) draft TPDES permits listed below. In each case, the facility's history of WET test failures indicates significant lethal and/or sublethal effects.

ACTION DATE	NPDES PERMIT NO	FACILITY NAME	FAIL RATE
03.02.07	TX0064734	Langham Creek MUD	67%
06.28.07	TX0075388	TDC (Beto Unit)	43%
07.23.07	TX0057029	White Oak Joint Powers Board	31%
09.28.07	TX0092789	TDC (Estelle Unit)	76%
10.01.07	TX0063029	Houston Homestead	36%
12.21.07	TX0003689	Goodyear	40%
01.24.08	TX0091715	SJRA Woodlands #2	60%
03.05.08	TX0081337	NW Harris County MUD #20	39%
03.25.08	TX0126152	NW Harris County MUD #9	47%

When EPA initially reviewed the draft permits in question, our agencies were hoping to soon resolve the issues between us with respect to reasonable potential and sublethal limits. That being the case, EPA did not at that time insist that the permits be revised to include toxicity (lethal and sublethal) limits. Instead, EPA required that each of the listed draft permits be revised to require a sublethal effect toxicity reduction evaluation (TRE) under certain conditions. However, since the WET issues between EPA and TCEQ remain unresolved, EPA must now require each of the listed permits to be revised to include toxicity limits for both lethal and sublethal endpoints.

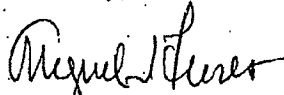
Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 25% Postconsumer)

It is regrettable that this step is necessary, however TCEQ has not yet provided EPA an approvable method to assess reasonable potential for WET, nor has TCEQ independently required a single TRE or WET limit based on sublethal toxicity. While EPA will continue to work with TCEQ to arrive at permit conditions that are mutually acceptable, we are providing this notice to ensure that any revisions of the subject permits will meet all requirements of the State water quality standards, the Clean Water Act (CWA), and the federal NPDES permitting regulations at 40 CFR §122.44(d)(1).

If you have any questions regarding this issue please contact me or Claudia Hosch at 214/665-6464 [e-mail: [hosch.claudia@epa.gov](mailto:hosch.claudia@epa.gov)].

Sincerely,



Miguel I. Flores  
Director  
Water Quality Protection Division

cc: Charles Maguire, Director (MC-145)  
Water Quality Division, TCEQ  
P.O. Box 13087  
Austin, Texas 78711-3087

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
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

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; . . .<sup>1</sup>

<sup>1</sup> 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.<sup>2</sup>

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.

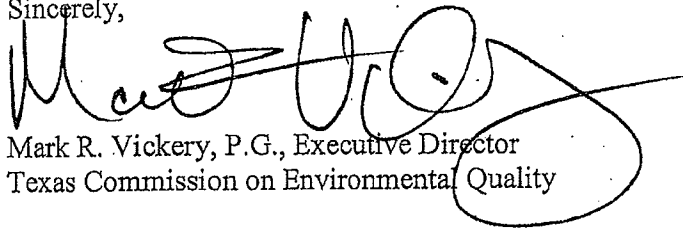
<sup>2</sup> MOA between TNRCC and U.S. EPA, p. 25-26.

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 Vickery". The signature is stylized with large loops and a long horizontal stroke extending to the right.

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