BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: San Jacinto River Authority	)	**NPDES Appeal No. 07-19**
NPDES Permit No. TX0054186	)	

MEMORANDUM IN SUPPORT OF NOTIFICATION OF WITHDRAWAL OF PORTIONS OF NPDES PERMIT AND RESPONDENT'S MOTION TO DISMISS AS MOOT, OR IN THE ALTERNATIVE FOR A STAY OF PROCEEDINGS

Respondent, Region 6 of the U.S. Environmental Protection Agency (EPA Region 6), respectfully submits to the Environmental Appeals Board (EAB) this notification of its withdrawal of the challenged portions of NPDES Permit No. TX0054186, Exhibit 1, and its intention to re-propose draft permit modifications, as appropriate, to address the portions so withdrawn, pursuant to 40 CFR § 124.19(d). EPA Region 6 moves the Board to dismiss the petition as moot or, in the alternative, a stay of the proceedings, pending the issuance of a final permit modification by EPA Region 6. Counsel for EPA Region 6 contacted counsel for the Petitioner, San Jacinto River Authority, regarding this motion, who indicated that the Petitioner did not have a response at this time.

I. BACKGROUND

This matter involves NPDES Permit No. TX0054186 (Permit) issued by EPA Region 6 to the San Jacinto River Authority (SJRA), on September 28, 2007, with an effective date of November 1, 2007. On October 29, 2007, SJRA filed a "Petition for Review of NPDES Permit Issued by EPA Region 6 on September 28, 2007" (SJRA

Petition) challenging the following permit conditions, listed in the order they appear in the Permit:

1. Permit Part I, section A.1, page 1 of Part I and footnote 6, page 2 of Part I, limitations and monitoring requirements for E. coli Bacteria. *See* SJRA Petition section IV.F, at page 41.

2. Permit Part I, section A.1, page 1 of Part I, limitations and monitoring requirements for copper. *See* SJRA Petition section IV.G, at page 45.

3. Permit Part I, section A, page 2 of Part I and footnotes 10 & 11, page 2 of Part I, limitations and monitoring requirements for whole effluent toxicity. *See* SJRA Petition section IV.E, at page 37.

4. Permit Part I, section B, pages 3-4 of Part I, schedule of compliance. *See* SJRA Petition section IV.B, at page 15.

5. Permit Part II, section D, pages 3-11 of Part II, whole effluent toxicity monitoring (7 day chronic NOEC freshwater). *See* SJRA Petition section IV.C, at page 26, and SJRA Petition section E, at page 37.

6. Permit Part II, section E, pages 11-16 of Part II, whole effluent toxicity limits (7 day chronic NOEC freshwater). *See* SJRA Petition section IV.C, at page 26, SJRA Petition section IV.D, at page 31, and SJRA Petition section IV.E, at page 37.

II. BASIS FOR WITHDRAWAL OF PERMIT

Under 40 CFR §124.19(d),

> The Regional Administrator, at any time prior to the rendering of a decision to grant or deny review of a permit decision under paragraph (c) of this section, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under §124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit which are not withdrawn and which are not stayed under §124.16(a) continue to apply.

Because the EAB has not yet issued a decision on whether to grant the SJRA Petition for review, EPA Region 6 is exercising its authority under this provision to

withdraw the challenged permit terms[1] and to prepare draft permit modifications, as appropriate, to address the portions so withdrawn.

EPA Region 6 withdraws the contested conditions and is preparing modifications for a number of reasons. First, the language in the Permit regarding the definition of "No Observed Effect Concentration" (NOEC) requires clarification for consistency with the intention of the permit writer (as reflected in the Response to Comments), specifically, to clarify that any "test failure" below the NOEC merely requires a report to EPA Region 6 and would not constitute a violation of the applicable permit limit. Second, because the permit writer apparently was aware of the subsequently-developed copper data identified in SJRA's "Motion to Supplement the Administrative Record," EPA Region 6 intends to incorporate that data into the administrative record and re-evaluate and explain its decision regarding any copper monitoring and reporting requirement in the Permit. Third, EPA Region 6 recently received information from the Texas Commission on Environmental Quality regarding the flow of the receiving water relative to the effluent flow volume, which would alter the "critical dilution" used to determine the water quality-based requirements of the Permit. In the interests of administrative efficiency, EPA Region 6 also intends to invite public comment on the remaining issues of concern raised in the SJRA Petition, including but not limited to the limitations for *E. coli* bacteria, and the various issues concerning whole effluent toxicity. As required under 40

[1] Pursuant to 40 CFR § 122.63, EPA Region 6 already has modified the Permit to address the concerns identified (and permit conditions contested) in SJRA Petition at pp. 51 (definition of 24-hour composite sampling) and 55 (agreed change regarding annual sludge report provisions, Permit Part I., section C.3, page 4 of Part I). See Exhibit 2 (modification and cover letter dated January 24, 2008). The remaining challenged permit provisions identified in SJRA Petition at p. 55 (critical dilution and definitions for reporting) are withdrawn as explained in points #5 and #6, *supra*.

CFR §124.19, EPA will invite public comment on all aspects of the Permit proposed for modification.

III. REQUESTED RELIEF

Accordingly, EPA Region 6 moves that the EAB dismiss the SJRA Petition as moot. In the alternative, EPA Region 6 moves that the matter be stayed until the permit modification process is complete. The process for modification requires several steps. As a matter of practice, EPA will send a preliminary draft to the applicant and the Texas Commission on Environmental Quality for review. At the end of that review, EPA will then issue a draft permit modification, publish public notice, invite public comment, and request State certification. If there are comments, EPA will prepare a response, and incorporate necessary changes and any requirements from the State certification issuing the final permit at the end of the process. Given the notice requirements the entire process is estimated to take approximately 4 to 6 months.

Respectfully submitted this 14th day of March, 2008.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Region 6

Stephen T. Sweeney for

Thomas David Gillespie
Assistant Regional Counsel
Arkansas Bar No. 96210

1445 Ross Ave.
Suite 1200
Dallas, Texas 75202-2733

cc: Lauren Kalisek, Esq. (Attorney for SJRA)
Stephen Sweeney, Esq. (EPA, Office of General Counsel (2355A))

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2008, copies of the foregoing were served upon Lauren Kalisek, attorney for the San Jacinto River Authority, by FedEx delivery, properly addressed and with sufficient postage affixed thereto to ensure proper delivery, and to the Clerk of the Board, Environmental Appeals Board, by hand delivery.

Thomas David Gillespie

MAILING LIST

VIA FEDEX

Lauren Kalisek, Esq.
Lloyd Gosselink Blevins Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

VIA HAND DELIVERY

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Exhibit 1

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: San Jacinto River Authority	)	**NPDES Appeal No. 07-19**
NPDES Permit No. TX0054186	)	

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 6
NOTIFICATION OF WITHDRAWAL OF PORTIONS OF NPDES PERMIT

Pursuant to 40 CFR § 124.19, EPA is exercising its authority to withdraw the challenged permit terms in NPDES Permit No. TX0054186. EPA intends to prepare draft permit modifications, as appropriate, to address the portions so withdrawn, as discussed in the attached Memorandum.[1]

3/13/08
Date

Miguel I. Flores, Director
Water Quality Protection Division
EPA Region 6

[1] The Authority to issue and condition permits has been delegated from the Regional Administrator to the Water Division Director. See Regional Delegations: 2-5 issued 3/15/1985 and 2-20, updated June 2003.

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

JAN 24 2008

CERTIFIED MAIL: RETURN RECEIPT REQUESTED (P 7004 1160 0003 0359 7552)

REPLY TO: 6WQ-NP

[redacted]

Exhibit 2

San Jacinto River Authority
Donald R. Sarich, Division Manager
P.O. Box 7537
Woodlands, TX 77387

Re: Administrative Changes to Permit No. TX0054186, San Jacinto River Authority, Woodlands Wastewater Treatment Plant No. 1

Dear Mr. Sarich:

The final permit issued on September 28, 2007, contains several administrative changes previously agreed to in the Response to Comments that were not fully corrected. In accordance with regulations listed at 40 CFR 122.63(a), EPA is making the following minor permit modifications. Enclosed are revised Pages 2 and 4 of Part I and Page 15 of Part II for NPDES Permit No. TX0054186, San Jacinto River Authority, Woodlands Wastewater Treatment Plant No. 1.

The first correction is on Page 2, Footnote No. 4 of Part 1 of the Permit Table, defining the "24-Hour Composite Sample." Footnote No. 4 of the Permit Table has been changed to match the language contained in Part III, Item F (22) (c) of the permit. Footnote No. 4 shall be changed to: "24-hour composite sample consists of a minimum of 12 effluent portions collected at equal time intervals over the 24-hour period and combined proportional to flow or a sample collected at frequent intervals proportional to flow over the 24-hour period." The second correction is to change the date for the annual sludge report on Page 4, Section C. No. 3, of Part I of the permit to match the sludge reporting date that was changed in Part IV of the permit. The date will be changed to September 1, in Section C of Part I of the permit, to reflect the agreed upon date made in Part IV of the permit. The third correction is made on Page 15, Part II, Section E. 3 (b) of the Permit. The terms "30-Day Average Minimum" and "7-Day Minimum" have been changed to "30-Day Avg NOEC" and "7-Day Minimum NOEC" respectively, to correspond with the terms used in Part I, Page 2 of the Permit Table.

Please accept our apologies for any inconvenience this may have caused. If you should have any questions, please do not hesitate to contact me at (214) 665-8460.

Sincerely yours,

Willie Lane Jr.
Chief
Permits & Technical Section

Enclosures

cc (with enclosures):

L'Oreal Stepney, Water Quality Director, TCEQ

PART I – REQUIREMENTS FOR NPDES PERMITS

SECTION A. LIMITATIONS AND MONITORING REQUIREMENTS

1. Final Effluent Limits – Outfalls 001 and/or 002 - 7.8 MGD Design Flow

During the period beginning the effective date of the permit and lasting until the expiration date, unless otherwise noted, the permittee is authorized to discharge treated wastewater to either Panther Branch, thence Spring Creek or Lake "B", the upper portion of Harrison Lake, thence to a tributary of Panther Branch, thence to Panther Branch, thence to Spring Creek, both in Segment 1008 of the San Jacinto River Basin. Such discharges shall be limited and monitored by the permittee as specified below:

EFFLUENT CHARACTERISTICS		DISCHARGE LIMITATIONS mg/l unless noted		MONITORING REQUIREMENTS	
POLLUTANT	STORET CODE	MINIMUM	MAXIMUM	MEASUREMENT FREQUENCY	SAMPLE TYPE
Ph, standard units	00400	6.0	9.0	Five Days/Week (*1)	Grab
Dissolved Oxygen (*2)	00300	4.0 (*2)	N/A	Five Days/Week (*1)	Grab
Dissolved Oxygen (*3)	00300	5.0 (*3)	N/A	Five Days/Week (*1)	Grab

EFFLUENT CHARACTERISTICS		DISCHARGE LIMITATIONS lbs/day, unless noted			DISCHARGE LIMITATIONS mg/l, unless noted			MONITORING REQUIREMENTS	
POLLUTANT	STORET CODE	30-Day Avg	7-Day Avg	Daily Max	30-Day Avg	7-Day Avg	Daily Max	MEASUREMENT FREQUENCY	SAMPLE TYPE
Flow, MGD	50050	N/A	N/A	N/A	Report	Report	Report	Continuous	Totalizing Meter
Carbonaceous Biochemical Oxygen Demand (5-day)	80082	651	976	N/A	10	15	N/A	Five Days/Week (*1)	24-Hr Composite (*4)
Total Suspended Solids	00530	976	1627	N/A	15	25	N/A	Five Days/Week (*1)	24-Hr Composite (*4)
E. coli Bacteria (*5)	51040	N/A	N/A	N/A	Report	N/A	Report	Daily	Grab
E. coli Bacteria (*6)	51040	N/A	N/A	N/A	126 (*7)	N/A	394 (*7)	Daily	Grab
Total Residual Chlorine	50060	N/A	N/A	N/A	N/A	N/A	0.1	Daily	Instantaneous Grab (*8)
Ammonia Nitrogen (Total As N)	00610	195	391	N/A	3	6	N/A	Five days/Week (*1)	24-Hr Composite (*4)
Copper, Total	01042	Report	N/A	Report	Report	N/A	Report	Once/Two Weeks	Grab

EFFLUENT CHARACTERISTICS	DISCHARGE MONITORING		MONITORING REQUIREMENTS	
Whole Effluent Toxicity Monitoring (7-Day NOEC) (See Part II, Section D) (*9)	30-DAY AVG	7-DAY MINIMUM	MEASUREMENT FREQUENCY	SAMPLE TYPE
Pimephales promelas (*9)	Report	Report	Once/Quarter	24-Hr Composite (*4)

EFFLUENT CHARACTERISTICS	DISCHARGE MONITORING		MONITORING REQUIREMENTS	
Whole Effluent Toxicity Monitoring (7-Day NOEC) (See Part II, Section E) (*9)	30-DAY AVG	7-DAY MINIMUM	MEASUREMENT FREQUENCY	SAMPLE TYPE
Ceriodaphnia dubia (*10)	Report	Report	Once/Quarter	24-Hr Composite (*4)

EFFLUENT CHARACTERISTICS	DISCHARGE MONITORING		MONITORING REQUIREMENTS	
Whole Effluent Toxicity Limit (PCS 22414) (7-Day NOEC) (See Part II, Section E) (*11)	30-DAY AVG 69%	7-DAY MINIMUM 69%	MEASUREMENT FREQUENCY	SAMPLE TYPE
Ceriodaphnia dubia (*11)	Report	Report	Once/Quarter	24-Hr Composite (*4)

Footnotes:

*1 Five Days/Week means at least one sample each normal workday; Monday through Friday. The first sample of any day shall be at least sixteen (16) hours after the first daily sample of the previous day.

*2 Outfall 001.

*3 Outfall 002.

*4 24-hour composite sample consists of a minimum of 12 effluent portions collected at equal time intervals over the 24-hour period and combined proportional to flow or a sample collected at frequent intervals proportional to flow over the 24-hour period.

*5 Requirements for E. coli bacteria are effective during the period beginning the effective date of the permit and lasting through one (1) day prior to three (3) months from the effective date of the permit.

*6 Requirements for E. coli bacteria are effective during the period beginning three (3) months from the effective date of the permit and lasting through the expiration date of the permit.

*7 Colony forming units per 100 ml.

*8 The chlorine residual shall be monitored daily by instantaneous grab sample. Regulations at 40 CFR Part 136 define "instantaneous grab" as analyzed within 15 minutes of collection.

*9 Monitoring and reporting requirements begin on the effective date of this permit. Measurement and reporting frequency shall be by calendar quarters. Quarterly biomonitoring test results are due on or before April 20, July 20, October 20, and January 20 for biomonitoring conducted during the previous calendar quarter. See PART II, Whole Effluent Toxicity Testing Requirements for additional WET monitoring and reporting conditions.

*10 Requirements for Whole Effluent Toxicity Monitoring are effective during the period beginning the effective date of the permit, and lasting through three (3) years after the permit effective date. Measurement and reporting frequency shall be by calendar quarters. Quarterly biomonitoring test results are due on or before April 20, July 20, October 20, and January 20 for biomonitoring conducted during the previous calendar quarter.

*11 Requirements for Whole Effluent Toxicity Limits are effective during the period beginning three (3) years after the permit effective date, and lasting through the expiration date of the permit. Measurement and reporting frequency shall be by calendar quarters. Quarterly biomonitoring test results are due on or before April 20, July 20, October 20, and January 20 for biomonitoring conducted during the previous calendar quarter.

NARRATIVE LIMITATIONS

Discharges shall be such that the following narrative standards are maintained in the receiving waters.

The effluent shall contain no visible film of oil or globules of grease on the surface or coat the banks or bottoms of the watercourse.

Surface water shall be essentially free of floating debris and suspended solids that are conducive to producing adverse responses in aquatic organisms or putrescible sludge deposits or sediment layers which adversely affect benthic biota or any lawful uses.

Surface waters shall be essentially free of settleable solids conducive to changes in flow characteristics of stream channels or the untimely filling of surface water in the state.

Waste discharges shall not cause substantial and persistent changes from ambient conditions of turbidity or color.

There shall be no foaming or frothing of a persistent nature.

SAMPLING LOCATION

Samples taken in compliance with the monitoring requirements specified above shall be taken at the discharge from the final treatment unit prior to the receiving stream.

B. SCHEDULE OF COMPLIANCE

The permittee shall comply with the following schedule of activities for the attainment of Whole Effluent Toxicity.

a. Determine exceedance cause(s);
b. Develop control options, if needed;
c. Evaluate and select control mechanisms;
d. Implement corrective action; and
e. Attain final effluent limitations no later than three (3) years after the permit effective date.

The permittee shall submit quarterly progress reports to EPA, in accordance with the following schedule. The requirement to submit quarterly progress reports shall expire three (3) years after the permit effective date. No later than three (3) years after the permit effective date or 15 days after compliance has been achieved, whichever occurs first, the permittee shall submit a written final report to EPA, stating that compliance has been completed. If at any time during the compliance period the permittee determines that full compliance will not be met within the time

allowed, a separate report shall be sent to EPA and the State stating the explanation for this delay and proposed remedial actions.

PROGRESS REPORT DATES
January 1
April 1
July 1
October 1

Send progress and final reports to the following address:

EPA:
Compliance Assurance and Enforcement Division
Water Enforcement Branch (6EN-W)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

C. MONITORING AND REPORTING (MAJOR DISCHARGERS)

The permittee shall effectively monitor the operation and efficiency of all treatment and control facilities and the quantity and quality of the treated discharge.

Monitoring information shall be on Discharge Monitoring Report Form(s) EPA 3320-1 as specified in Part III.D.4 of this permit and shall be submitted monthly.

1. Reporting periods shall end on the last day of the month.

2. The first Discharge Monitoring Report(s) shall represent facility operations from the effective date of the permit through the last day of the month.

3. Thereafter, the permittee is required to submit regular monthly reports as described above postmarked no later than the 25th day of the month following each reporting period. The annual sludge report required in Part IV of the permit is due on September 1 of each year and covers the previous calendar year from August 1 through July 31.

4. If any 7-day average or daily maximum value exceeds the effluent limitations specified in Part I.A, the permittee shall report the excursion in accordance with the requirements of Part III.D.

5. Any 30-day average, 7-day average or daily maximum that is in excess of the effluent limitation specified in Part I A may constitute evidence of a violation of such effluent limitation and of this permit and must be reported in the required

(B) the test indicating receiving water toxicity has been carried out to completion (i.e., 7 days);

(C) the permittee includes all test results indicating receiving water toxicity with the full report and information required by Item 3.a below; and

(D) the synthetic dilution water shall have a pH, hardness, and alkalinity similar to that of the receiving water or closest downstream perennial water not adversely affected by the discharge, provided the magnitude of these parameters will not cause toxicity in the synthetic dilution water.

d. Samples and Composites

i. The permittee shall collect a minimum of three flow-weighted composite samples from the outfall(s) listed at Item 1.a above.

ii. The permittee shall collect second and third composite samples for use during 24-hour renewals of each dilution concentration for each test. The permittee must collect the composite samples such that the effluent samples are representative of any periodic episode of chlorination, biocide usage or other potentially toxic substance discharged on an intermittent basis.

iii. The permittee must collect the composite samples so that the maximum holding time for any effluent sample shall not exceed 72 hours. The permittee must have initiated the toxicity test within 36 hours after the collection of the last portion of the first composite sample. Samples shall be chilled to 6 degrees Centigrade during collection, shipping, and/or storage.

iv. If the flow from the outfall(s) being tested ceases during the collection of effluent samples, the requirements for the minimum number of effluent samples, the minimum number of effluent portions and the sample holding time are waived during that sampling period. However, the permittee must collect an effluent composite sample volume during the period of discharge that is sufficient to complete the required toxicity tests with daily renewal of effluent. When possible, the effluent samples used for the toxicity tests shall be collected on separate days if the discharge occurs over multiple days. The effluent composite sample collection duration and the static renewal protocol associated with the abbreviated sample collection must be documented in the full report required in Item 3 of this section.

3. REPORTING

a. The permittee shall prepare a full report of the results of all tests conducted pursuant to this section in accordance with the Report Preparation Section of EPA-821-R-02-013, or the most current publication, for every valid or invalid toxicity test initiated whether carried to

completion or not. The permittee shall retain each full report pursuant to the provisions of PART III.C.3 of this permit. The permittee shall submit a copy of each full report to EPA for every test initiated during the monitoring period, including any test which fails, is considered invalid or which is terminated early for any reason.

b. The permittee shall report the Whole Effluent Toxicity values for the 30-Day Average NOEC and the 7-Day Minimum NOEC under Parameter No. 22414 on the DMR for that reporting period in accordance with PART III.D.4 of this permit.

If more than one valid test for a species was performed during the reporting period, the test NOEC's may be averaged arithmetically and reported as the DAILY AVERAGE MINIMUM NOEC for that reporting period.

The permittee shall report the LOWEST 30-Day Average Minimum NOEC and the lowest 7-Day Minimum NOEC for Whole Effluent Toxicity.

A valid test must be reported on the DMR during each reporting period specified in PART I of this permit. Only ONE set of biomonitoring data for each species tested is to be recorded on the DMR for each reporting period. The data submitted should reflect the LOWEST lethal and sub-lethal effects results for each species during the reporting period. All invalid tests, repeat tests (for invalid tests), and retests (for tests previously failed) performed during the reporting period must be attached to the DMR for EPA review.

c. The permittee shall submit the results of the valid toxicity test on the DMR for that reporting period in accordance with PART III.D.4 of this permit, as follows below. Submit retest information clearly marked as such with the following month's DMR. Only results of valid tests are to be reported on the DMR.

i. Ceriodaphnia dubia

A. If the NOEC for toxicity is less than the critical dilution, enter a "1"; otherwise, enter a "0" for Parameter No. TLP3B

B. Report the NOEC value for survival, Parameter No. TOP3B

C. Report the LOEC value for survival, Parameter No. TXP3B

D. Report the NOEC value for reproduction, Parameter No. TPP3B

E. Report the LOEC value for reproduction, Parameter No. TYP3B

F. If the No Observed Effect Concentration (NOEC) for reproduction is less than the critical dilution, enter a "1"; otherwise, enter a "0" for Parameter No. TGP3B