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

In re:	)	
San Jacinto River Authority	)	NPDES Appeal No. 09-09
NPDES Permit No. TX0054186	)	

MOTION OF NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

The National Association of Clean Water Agencies ("NACWA"), by and through its undersigned attorneys, respectfully requests leave of the Environmental Appeals Board ("Board") to participate as an *amicus curiae* and file a short brief in the above-captioned appeal of the National Pollutant Discharge Elimination System ("NPDES") permit issued by the United States Environmental Protection Agency, Region 6 ("Region 6") to the San Jacinto River Authority wastewater treatment facility ("SJRA"). In support of its motion, NACWA states the following:

1. The Texas Commission on Environmental Quality ("TCEQ") issued a Texas Pollution Discharge Elimination System ("TPDES") permit to SJRA in January 2006 under authority given by the United States Environmental Protection Agency ("EPA").
2. EPA Region 6 ("Region 6") disagreed that TCEQ's permit to SJRA was adequate to protect water quality, and subsequently issued its own National Pollutant Discharge Elimination System ("NPDES") Permit (No. TX0054186) to SJRA on September 28, 2007. That permit included limits on Whole Effluent Toxicity ("WET").

3. On September 28, 2007, SJRA filed a request for review with this Board as to the permit issued by Region 6. Subsequently, Region 6 withdrew the contested portions of the permit, and the petition for review was dismissed as moot on March 28, 2008.
4. On July 24, 2009, Region 6 modified SJRA's NPDES permit ("Modified Permit") to include WET permit limits that apply to SJRA's wastewater effluent.
5. SJRA appealed the Modified Permit on August 21, 2009 with respect to the WET limits included by Region 6.
6. EPA's decision to include WET limits in SJRA's Modified Permit was based on EPA's interpretation of Federal NPDES regulations and guidance. Those requirements apply directly in some States, where EPA issues NPDES permits. In other States, which have delegated NPDES authority, EPA could object to permits that do not meet EPA's interpretation of those regulations and guidance (as happened to SJRA) and issue its own permits to replace the State-issued permits.
7. NACWA is a trade association representing nearly 300 publicly owned treatment works located throughout the country, and serving the majority of the sewered population in the United States. A central function of NACWA is to represent the interests of its members in the legislative, regulatory, and litigation arenas.
8. Like SJRA, many NACWA members are required to have NPDES permits for their wastewater effluents, so are potentially subject to the EPA regulations and guidance regarding WET limits that are at issue in this appeal.
9. NACWA believes that Region 6 has committed at least two major legal errors in including WET limits in SJRA's NPDES permit: (1) it has reversed its position as to the validity of the TCEQ's WET permitting procedures, without any justification for that

reversal; and (2) it has effectively substituted a Federal water quality standard for a State water quality standard without following the required procedure in Section 303(c) of the Clean Water Act.

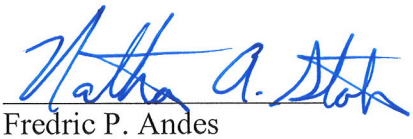
10. EPA's improper addition of WET limits to the SJRA permit could set precedent for how EPA and states address WET issues in future NPDES permit renewals and new permits in all of NACWA members' states. It could also set precedent as to when EPA may reverse legal positions as to the validity of State rules, and as to when EPA may replace a State water quality standard with a Federally-issued standard.
11. NACWA believes that the perspective of the hundreds of municipalities potentially impacted by those EPA actions would be relevant to the Board's deliberations.

WHEREFORE, NACWA respectfully asks the Board for leave to participate as an *amicus curiae* and accept the attached short *amicus* brief for filing.

Respectfully submitted,

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

By its Attorneys,



Fredric P. Andes
BARNES & THORNBURG LLP
One North Wacker Dr.
Suite 4400
Chicago, IL 60606
(312) 214-8310
(312) 759-5646 Fax

BARNES & THORNBURG LLP
Nathan A. Stokes, Esq.
750 17th St. NW, Suite 900
Washington, DC 20006-4675
(202) 371-6376
(202) 289-1330 Fax

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
Keith J. Jones, Esq.
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803
(202) 833-4657 Fax

DATED; March 25, 2010

CERTIFICATE OF SERVICE

I, Nathan A. Stokes, hereby certify that on March 25, 2010 I caused to be mailed true and accurate copies of the National Association of Clean Water Agencies' Motion for Leave to File an Amicus Curiae Brief and Amicus Curiae Brief of National Association of Clean Water Agencies in the Matter of NPDES Appeal No. 09-09 via the methods indicated below to:

Via Federal Express Standard Overnight Delivery

Lauren Kalisek
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, TX 78701
(512) 322-5847
Attorneys for Petitioner San Jacinto River Authority

Thomas David Gillespie
U.S. Environmental Protection Agency, Region 6
Office of Regional Counsel
1445 Ross Avenue, Suite 1200
Mail Code 6RCM
Dallas, TX 75202
(214) 665-7467

Via U.S. First Class Mail

Stephen J. Sweeney
U.S. Environmental Protection Agency
Office of General Counsel
Water Law Office
1200 Pennsylvania Avenue, N.W.
Mail Code 2355A
Washington, DC 20460
(202) 564-5491

Date: March 25, 2010

Nathan A. Stokes

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AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

The National Association of Clean Water Agencies ("NACWA") submits this brief in support of the San Jacinto River Authority ("SJRA"), and urges the Board to accept the SJRA permit appeal for review. This appeal presents several issues that involve important policy considerations warranting review. NACWA wants to emphasize two particular issues that have substantial relevance on a national scale, where EPA's action in this case was both legally erroneous and inconsistent with the basic structure of the Clean Water Act.

The first of those two policy-related errors relates to EPA's dramatic shift in position as to the legal validity of the Texas method for regulating "whole effluent toxicity" (WET) in NPDES permits. In 2002, EPA explicitly approved the TCEQ's "Procedures to Implement the Texas Surface Water Quality Standards" [hereafter the "Implementing Procedures"]. In its approval letter, EPA specifically stated that a few aspects of the Implementing Procedures were not covered by the approval: the WET implementation procedures were not among those few non-covered aspects. So, EPA had clearly determined at that time that the Texas WET implementation procedures were legal and consistent with the Clean Water Act and EPA's

governing regulations. Yet, in 2009, EPA stated a completely different position when opining as to the SJRA permit, finding (in the Response to Comments document at page 13) that the TCEQ "does not have an EPA-approved method of determining reasonable potential for WET compliant with its [Implementing Procedures]." EPA gave absolutely no explanation for its change in legal interpretation as to the State procedures that it had already approved. This is clearly contrary to the basic legal principle, enunciated by the U.S. Supreme Court in *Motor Vehicle Manufacturers Association vs. State Farm Insurance Co.*, 463 U.S. 29 (1983), that an agency may not reverse a previously-held position without some rationale for the change. Because EPA has not given such a rationale here, the Agency's issuance of WET limits in the SJRA permit was invalid and should be overturned.

The second error committed by EPA relates to the Agency's decision to take over the job of interpreting State water quality standards. The Texas standards contain a general provision precluding "[c]hronic total toxicity, as determined from biomonitoring of effluent samples." 30 Tex. Admin. Code 307.6(e)(1) (2000). Another general provision defines "chronic toxicity" to include "sub-lethal effects." The State of Texas, in its Implementation Procedures, has determined how those aspects of its rules should be interpreted. EPA, after approving those procedures, now has decided that those procedures are illegal, and that EPA must substitute its own interpretation of the State's water quality standards. This action, in essence, replaces the State's standards, as interpreted by the State, with a completely different standard designed by EPA.

Under the Clean Water Act, that substitution of a Federal standard for a State standard can only be done under the authority of Section 303(c). That provision requires EPA to promulgate a revised or new water quality standard for a State if EPA determines that "a revised

or new standard is necessary to meet the requirements of this chapter [i.e., the Clean Water Act]." In doing so, EPA must first publish a proposed standard for public comment. That has not been done in this situation. Nor has EPA cited any part of the Clean Water Act that could serve as the basis for a determination that the Texas standards, as interpreted by the State in its Implementing Procedures, violate the Act, such that a Federal standard, replacing the State standard and procedures, is "necessary to meet the requirements" of the Act. By effectively replacing the State standards without properly invoking its 303(c) authority, EPA has itself violated the Act.

Both of these legal errors by EPA – the reversal in legal position without explanation, and the replacement of a State standard without the needed demonstration – involve important policy considerations that warrant review by this Board. EPA should not be free to reverse its legal positions as to the validity of State rules without explanation. Nor should the Agency be allowed to effectively replace State water quality standards with Federal standards without following the procedures required in the Act. Further pursuit of these policies by EPA would have a dramatic effect on Clean Water Act programs. It would not only affect the issuance of WET limits; it would also have a profound impact on broadly applicable policies as to the proper roles of EPA and the States, and as to how limits are set in NPDES permits generally. Therefore, NACWA urges the Board to accept the SJRA case for review.

Respectfully submitted,

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

By its attorneys,

BARNES & THORNBURG LLP
Fredric P. Andes, Esq.
Suite 4400
One N. Wacker Drive
Chicago, Illinois 60606-2809
(312) 214-8310
(312) 759-5646 Fax

BARNES & THORNBURG LLP
Nathan A. Stokes, Esq.
750 17th St. NW, Suite 900
Washington, DC 20006-4675
(202) 371-6376
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