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TCEQ

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Maquias, *Commissioner*
Larry R. Bowers, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 30, 2005

Water Docket, EPA Docket Center
Environmental Protection Agency
Mail Code 4101T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
Attention: Docket ID No. OW-2004-0037

Re: Proposed Guidance on National Whole Effluent Toxicity (WET) Implementation Under the NPDES Program

Dear Sirs:

Thank you for the opportunity to comment on the proposed guidance on National Whole Effluent Toxicity (WET) Implementation under the National Pollutant Discharge Elimination System (NPDES) Program, as released for public comment in December 2004, with a comment period concluding on March 31, 2005. As the permitting authority for NPDES permits in Texas, the Texas Commission on Environmental Quality (TCEQ) offers the following comments.

We agree in principal that it is appropriate and useful for states to incorporate the framework of the national guidance in state implementation procedures. However, as stated in the draft document, federal regulations contain basic requirements but many specific procedures are more appropriately based on individual state water quality standards.

In Texas, the toxics control program to protect aquatic life and attain water quality standards is described in detail in *Procedures to Implement the Texas Surface Water Quality Standards*, January 2003 (IPs). The IPs are updated in accordance with revisions to the water quality standards and are approved by the Environmental Protection Agency (EPA). This review and approval process includes formal public comment and response to those comments. The TCEQ recognizes that the EPA regulations and policy may potentially affect the EPA's approval of the next revision of the IPs, but federal guidance documents should not be construed as "requirements" that supersede formal implementation procedures that have been publicly reviewed and approved by the EPA and the State. These implementation procedures are tailored to provide flexibility in addressing regional conditions while achieving the objectives of the regulations. The TCEQ recommends that the EPA continue to provide this flexibility and not treat the proposed guidance as a de facto rule.

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The TCEQ is particularly concerned about the EPA's proposed procedures for evaluating reasonable potential and imposing WET limits. The TCEQ currently requires WET testing in permits for approximately 835 facilities, and about 65 of those permits contain WET limits. A preliminary review indicates that the EPA's proposed guidance might result in as many as 50% of the applicable permits having enforceable WET limits, a formidable number. The TCEQ recommends permittees continue to be afforded an opportunity to conduct toxicity reduction evaluations to identify sources of toxicity. Enforceable limits invoke an administrative and legal burden for permittees but do not necessarily improve the overall process of identifying and controlling effluent toxicity. In addition, the new procedures for evaluating individual permits for reasonable potential and for conducting enforcement actions for toxicity test failures would mandate a substantial increase in state resources.

If you have any questions regarding these comments, please contact Dr. Jim Davenport at 512-239-4585, email at jdavenport@tceq.state.tx.us and for written correspondence please include MC 150 in the letterhead address. Thank you for the opportunity to comment on the proposed guidance.

Sincerely,



Glenn Shankle, Executive Director
Texas Commission on Environmental Quality

TCEQ

Kathleen Hartnett White, *Chairman*
R. E. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 13, 2006

Mr. Miguel L. Flores, Director
Water Quality Protection Division, 6WQ
United States Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Revisions to Whole Effluent Toxicity (WET) Components of the Texas Pollutant Discharge Elimination System Program (TPDES)

Dear Mr. Flores:

Thank you for forwarding the U.S. Environmental Protection Agency (EPA) Region 6 WET Permitting Strategy with a letter dated March 9, 2006. In that letter, you requested that the Texas Commission on Environmental Quality (TCEQ) provide a status update, by April 1, 2006, on initiating the EPA Region 6 WET Permitting Strategy. The update is to include identification of milestones that will allow the TCEQ to implement the revisions in TPDES permits by January 2007.

Major components of the EPA Region 6 WET Permitting Strategy are (1) imposition of sublethal testing for all phases of the WET process, and (2) imposition of WET limits based on "reasonable potential," in accordance with EPA's 1991 guidance document entitled *Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001*.

As the TCEQ staff have indicated in earlier discussions, we have concerns about the impacts and feasibility of implementing this policy. The TCEQ expressed similar concerns in the attached comment letter, dated March 30, 2005, on EPA's proposed National Whole Effluent Toxicity Implementation Guidance.

The appropriate venue for TCEQ to evaluate and consider implementing the EPA Region 6 WET Permitting Strategy will be during the upcoming review of the TCEQ *Procedures to Implement the Texas Surface Water Quality Standards, RG-194, January 2003* (IPs). This review will be conducted in conjunction with a major review of the Texas Surface Water Quality Standards rule (Title 30, Chapter 307 of the Texas Administrative Code). The review will include substantial input from an advisory workgroup and opportunities for public written and oral comment. The TCEQ may have additional specific comments on the EPA Region 6 WET Permitting Strategy as we conduct a public review of our current permitting process.

P.O. Box 19087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tceq.state.tx.us

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Mr. Miguel I. Flores, Director

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The TCEQ has started the review process by requesting preliminary public comment on the existing IPs in the Texas Register on January 27, 2006, with a comment period that closed on March 1, 2006. The TCEQ has also received comments on the IPs from the EPA Region 6 in a letter dated March 9, 2006. The TCEQ staff are currently evaluating the comments that were received on the IPs. Over the next several months, the TCEQ staff will request to initiate rulemaking to review and revise the Texas Surface Water Quality Standards and IPs. There will be a more defined schedule when rulemaking is formally initiated by the TCEQ, and we expect the review to be well underway by January 2007. However, the overall revision process will still be ongoing during most of 2007.

In the interim, the TCEQ will continue to develop and issue TPDES permits in accordance with the existing IPs until subsequent revisions are approved by the TCEQ and by the EPA. If the EPA requires elements of the EPA Region 6 WET Strategy to be included in TPDES permits prior to revising the IPs, the TCEQ will have several concerns. An example is the EPA's requirement to include a sublethal toxicity reduction evaluation as one of the provisions for issuing a recently drafted TPDES permit.

During the upcoming review of the IPs, TCEQ staff intend to conduct a thorough evaluation of the EPA Region 6 WET Permitting Strategy, the EPA's guidance on WET in the 1991 Technical Support Document, and the EPA Region 6 comment letter on the IPs. Past revisions of the IPs have exercised flexibility in addressing the EPA guidance, in order to establish procedures that are in accordance with other TPDES procedures and rules. We recognize that procedures must meet the requirements of the EPA regulations and the federal Clean Water Act, but we anticipate that EPA will afford similar appropriate flexibility in future revisions of the IPs. As in past revisions of the IPs, TCEQ staff intend to coordinate closely with staff at EPA Region 6 to develop mutually acceptable WET procedures.

I look forward to continuing dialogue on these important water quality issues. I will be glad to further discuss our overall coordination and WET testing approaches with you or you may contact L'Oreal Stepony, of my staff at (512)-239-1321 or if by correspondence, include MCI48 in the letterhead address below.

Sincerely,



Dan Eden, Deputy Director
Office of Permitting, Remediation and Registration
Texas Commission on Environmental Quality

Enclosures

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 31, 2007

Miguel Flores, Director
Water Quality Protection Division
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

RE: Revisions to Whole Effluent Toxicity (WET) Components of the Environmental Protection Agency (EPA) National Pollutant Discharge Eliminations System (NPDES) Program

Dear Mr. Flores:

In your May 16, 2007 letter regarding revisions to the WET Components of the EPA NPDES program, you requested a response including all pertinent actions we have completed to date and a timeline including dates and activities by which these tasks will be performed. Your letter also stated that these changes must be implemented by June 30, 2008.

As mentioned in my previous letter to the EPA dated April 13, 2006 and in our continued discussions, we have concerns about the impacts and feasibility of implementing The EPA Region 6 WET Permitting Strategy as well as the "Draft" National Whole Effluent Toxicity Implementation Guidance Document. The appropriate approach for the Texas Commission on Environmental Quality (TCEQ) to evaluate and consider implementing changes to the overall WET program is during our current review of the TCEQ Procedures to Implement the Texas Surface Water Quality Standards, RG-194, January 2003 (IPs). This review is being conducted along with the major review of our Texas Surface Water Quality Standards rule. We are encouraged by an email from Ms. Claudia Hosch on June 6, 2007, that mentions that states may elect to develop their own reasonable potential method for WET as long as it provides an equivalent level of aquatic life protection. TCEQ understands from this email that EPA will allow each state to develop a revised program that is different from EPA's approach and to establish procedures that are in accordance with other Texas Pollutant Discharge Elimination System procedures and rules. To date, we have completed the following steps in that process:

1. Solicited preliminary public comments
2. Reviewed and evaluated preliminary comments from numerous stakeholders including EPA
3. Held a stakeholder workgroup meeting specifically on the WET issues on June 26, EPA attended this meeting.
4. Developed an EPA approved methodology for a sub-lethal toxicity abatement study (STAS) to control sub-lethal toxicity when warranted for a specific permit.
5. We are reviewing EPA's proposed interim approach received during the TPDES program review on July 26, 2007 and will provide comments to EPA.

Miguel Flores, Director

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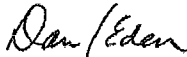
As demonstrated from the discussion above, we are actively engaged in this process to review our WET program, but the June 30, 2008 date is an unlikely completion date. The overall agency revision process will extend into 2009 excluding time for EPA's final review and approval.

Finally, you state in your letter that EPA will continue to object to permits where a WET limit is not included in the permit and reasonable potential exists based on an effluent toxicity history of reported multiple lethal and/or sublethal WET test failures. We do not believe that handling these issues case by case, permit by permit is the appropriate forum. The TCEQ IPs and Water Quality Standards have been approved by the TCEQ and EPA with a great deal of stakeholder involvement and this approach has been a long standing process for handling programmatic issues. We believe that this process is important and should not be short circuited. We would like to work with EPA on an interim approach for those permits where we believe additional steps are necessary.

We hope that EPA will agree that this approach will accommodate our mutual goals for ensuring protection of water bodies during the interim period while our Water Quality Standards and IPs are still under development. We urge EPA to remove their objection related to sub-lethal WET permit provisions for the multiple permits submitted for EPA review. This will allow both agencies to meet their respective performance measures.

I look forward to continuing the dialogue on these important water quality issues. I will be glad to further discuss our overall coordination and WET testing approaches with you or you may contact L'Oreal Stepney of my staff at 512-239-1321.

Sincerely,



Dan Eden, Deputy Director
Office of Permitting, Remediation and Registration
Texas Commission on Environmental Quality

LWS/LH/jp