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FROM: Lauren Kalisek

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COMMENTS: In the Matter of San Jacinto River Authority, Permit No. TX0054186,
Appeal No. NPDES 07-19

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March 20, 2008

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
(MC 1103B) - Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001VIA FACSIMILE
& U.S. MAIL
(202) 233-0121Re: San Jacinto River Authority; NPDES Permit No. TX0054186,
Appeal No. NPDES07-19

Dear Clerk of the Board:

Enclosed please find the original and five copies of San Jacinto River Authority's Response to and Motion for Clarification of United States Environmental Protection Agency Region 6 Notification of Withdrawal of Portions of NPDES Permit; Objection to Dismissal and Motion to Stay Proceedings.

Sincerely,

A handwritten signature in cursive script that reads "Lauren Kalisek".

Lauren Kalisek
Counsel for the San Jacinto River AuthorityLJK:tkj
1197/06/080320

Enclosure

cc: Certificate of Service
Mr. Reed Eichelberger
Mr. Don R. Sarich
Dr. Peggy Glass
Mr. Martin C. Rochelle

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

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

NPDES Appeal No. 07-19

**SAN JACINTO RIVER AUTHORITY'S RESPONSE TO AND MOTION FOR
CLARIFICATION OF UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6 NOTIFICATION OF WITHDRAWAL OF PORTIONS OF NPDES PERMIT;
OBJECTION TO DISMISSAL AND MOTION TO STAY PROCEEDINGS**

San Jacinto River Authority ("SJRA"), Petitioner in the above-referenced matter, hereby files this response to Region 6 of the U.S Environmental Protection Agency (the "Region")'s Notification of Withdrawal of the challenged portions of SJRA's NPDES Permit No. TX0054186 (the "Permit") and accompanying memorandum filed March 14, 2008 (the "Response").¹ In this Response, SJRA requests clarification of the specific issues and permit conditions the Region is withdrawing and proposing to modify and moves that the Environmental Appeals Board ("EAB") order the Region to provide such clarification before dismissing or staying this appeal for the reasons discussed below.

¹ See United States Environmental Protection Agency Region 6 Notification of Withdrawal of Portions of NPDES Permit, executed March 13, 2008 by Miguel I. Flores, Director, Water Quality Protection Division, EPA Region 6 ("Notification") and 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 filed March 14, 2008 ("Memorandum").

In addition, SJRA objects to dismissal of its Petition² as moot and moves that the EAB stay this appeal during the Region's modification process.

I. NOTICE OF WITHDRAWAL

After several unopposed extensions of its deadline to respond to SJRA's Petition, the Region, rather than responding, has issued a notice of withdrawal of the contested portions of SJRA's permit pursuant to 40 C.F.R. § 124.19(d). The Region is taking the permit back for what SJRA believes is much needed modification. SJRA certainly is encouraged and appreciates the Region's decision to withdraw and consider modification of "the challenged permit terms in NPDES Permit No. TX0054186."³ As noted in the Region's accompanying Memorandum, the Region has recognized that the permit language fails to carry out the intent of the permit writer, that the permit writer failed to consider available effluent data in setting permit conditions, and that the critical dilution used in drafting the permit was incorrect.⁴ The Memorandum also states that the Region is withdrawing the remaining challenged portions of the permit, including the *E. coli* limit and the Whole Effluent Toxicity ("WET") provisions to invite public comment "in the interests of administrative efficiency."⁵ The Region's recognition of the need for an opportunity for additional public comment is a departure from its previous position at the time it was preparing the final permit that additional public comment was unnecessary.⁶

² Petition for Review of NPDES Permit Issued by Region 6 on September 28, 2007 filed with EAB on October 29, 2007 (the "Petition").

³ Notification.

⁴ Memorandum, p.3.

⁵ *Id.*

⁶ See letter from Claudia V. Hosch, Region 6 to Donald R. Sarich, SJRA dated March 12, 2007 attached at Attachment A.

The Region's withdrawal of the WET provisions for additional public comment now after reviewing SJRA's Petition underscores the important policy issues inherent in its permitting decision in this case and the need for review by the EAB. As the Region proceeds with the modification process, the EAB should ensure that there is clarity with respect to the permit conditions that are withdrawn and the policy issues that will be the subject of this renewed public comment period. In addition, the EAB should stay, rather than dismiss this appeal.

II. NEED FOR CLARIFICATION

The Region's Notification and accompanying Memorandum do not provide enough specificity with regard to the permit provisions it is withdrawing and modifying. In its Petition, SJRA challenged specific provisions of its Permit and listed these by section, page and item number in its Petition. (See for example Petition, Part IV, C. at p. 26 listing provisions that include the "No Observed Effects Concentration" definition). In the Memorandum, the Region provides a list of challenged permit conditions by section and page number, but does not include the specific item numbers. SJRA is unclear as to whether the Region intends to only withdraw and modify those specific items listed in SJRA's Petition, rather than entire pages as would appear from reading the text of its Memorandum. (See for example, Memorandum at p.2 items 5 & 6 listing "Permit Part II, section D pages 3-11," even though SJRA did not object to *all* of the provisions contained in pages 3-11). SJRA requests that the EAB order the Region to provide clarification of its Notification and confirm that it is only withdrawing and modifying those specific permit conditions challenged by SJRA in its Petition. Such

clarification is necessary so that SJRA knows what specific permit provisions continue to govern the operation of its facility.⁷

The Memorandum is also unclear with regard to whether the Region intends to withdraw and modify the permit provisions imposing WET limits in SJRA's permit for the reasons discussed in Section IV.B of SJRA's Petition. Section IV.B. of SJRA's Petition discusses the errors underlying the Region's inclusion of WET limits for lethality and sublethality with a three-year compliance period. Such errors include the Region's reversal of its previous determination regarding the legality of WET policy implemented in Texas, the Region's disregard for Texas' evidentiary hearing process for permitting, and the Region's misinterpretation of Texas' Surface Water Quality Standards, among others.⁸ The Memorandum, however, never references Section IV.B of SJRA's Petition in relation to these permit conditions (found at Permit Part I, Section A, Page 2), but only the compliance schedule provisions at Part I, Section B. The Region should clarify whether or not it is withdrawing and modifying the provisions imposing WET limits as discussed in Section IV.B of the Petition to provide a clear scope of the modification and public comment process to be conducted as described in its Memorandum.

III. MOTION TO STAY PROCEEDINGS

Given the Region's recognition that additional consideration and public input needs to be provided, it is apparent that the appeal brought by SJRA in this case is substantive and with merit. The Region's action confirms that this Petition raises

⁷ See 40 C.F.R. §§ 124.16 (providing that the effect of contested permit conditions are stayed during an appeal to the EAB); 124.19(d) (providing that any portions of the permit which are not withdrawn or stayed continue to apply).


⁸ Petition, pgs. 15-25.

important policy considerations necessitating review by the EAB. In addition, SJRA may have many of the same objections and arguments after the modification process as were raised in its Petition, and this appeal will continue. Therefore, the EAB should stay these proceedings rather than dismiss them as moot.

Wherefore, premises considered, Petitioner respectfully requests the Board grant this Motion and order the Region to confirm that it is only withdrawing and reconsidering those specific permit conditions identified in the Petition, rather than whole pages, and that it is also withdrawing and reconsidering the inclusion of WET limits in SJRA's permit for the reasons stated in Section IV. B. of SJRA's Petition. Finally, SJRA objects to dismissal of its Petition as moot, and moves that the EAB stay this proceeding until the Region's permit modification process is complete.

Respectfully submitted,

LLOYD GOSSELINK BLEVINS
ROCHELLE & TOWNSEND, P.C.
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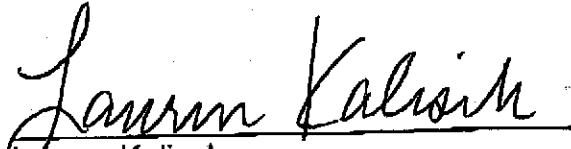

LAUREN KALISEK

Attorneys for the San Jacinto River Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2008, a copy of the foregoing was served upon Thomas David Gillespie, Counsel for the U.S. Environmental Protection Agency, via facsimile.

Thomas David Gillespie
Assistant Regional Counsel, EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733


Lauren Kalisek



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE
DALLAS, TEXAS 75202-2733

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

Re: Request for a Public Hearing and Extension of Public Comment Period, San Jacinto River Authority (SJRA), Woodlands Wastewater Treatment Plant No. 1, TX0054186

Dear Mr. Sarich:

Thank you for your letter of February 19, 2007, providing comments on the draft permit and requesting both an extension of the public comment period and a request for a public hearing.

The draft permit was publicly noticed on December 7, 2006, with comments due by January 8, 2007. In a letter dated December 18, 2006, you asked for an extension of the public comment period to February 20, 2007. In this request SJRA cites the need to "raise all reasonably ascertainable issues and submit all reasonable ascertainable arguments" as justification for the extension. This request was granted by EPA on January 4, 2007. In your letter of February 19, 2007, SJRA requested an extension to provide an opportunity to respond to other comments. EPA has provided a 30-day public comment period, followed by a 43-day extension of the public comment period. We believe that this provided sufficient opportunity for public comment. Thus EPA denies SJRA's request for another extension of the public comment period.

SJRA also requested a public hearing on this draft permit. EPA regulations at 40 CFR §124.12 state that the Director "shall hold a public hearing when he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." SJRA was the only party to comment on this draft permit and the only member of the public to request a hearing. Thus, EPA finds there is not a "significant degree of public interest" in the proposed draft permit to warrant a public hearing.

Attachment A

Mr. Donald Sarich
Page 2

Should you have any questions, please feel free to contact me at 214-665-6565 or Willie Lane, Chief of the NPDES Permits and Technical Section, at (214) 665-8460, by fax at (214) 665-2191, or e-mail at lane.willie@EPA.gov.

Sincerely yours,



Claudia V. Hosch
Chief
NPDES Permits Branch

cc: Lauren Kalisek
816 Congress Ave, Suite 1900
Austin TX 78701