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 AMICUS CURIAE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES TO STRIKE RESPONDENT REGION 6'S RESPONSE TO AMICUS CURIAE, OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' AMICUS CURIAE REPLY BRIEF; AND MOTION TO PARTICIPATE IN ORAL ARGUMENT

The National Association of Clean Water Agencies ("NACWA"), by and through its undersigned attorneys, respectfully requests that the Environmental Appeals Board (the "Board") strike the Response Brief to NACWA's Amicus Curiae Brief filed by the U.S. Environmental Protection Agency Region 6 ("Region 6" or the "Region"), or, in the alternative, grant NACWA leave to file an Amicus Curiae Reply Brief to address the arguments raised in Region 6's Response Brief. In either case, NACWA also moves the Board to allow NACWA to participate in oral argument in this case, which is scheduled for June 10, 2010, allowing NACWA five (5) minutes of oral argument. In support of its Motions, NACWA states the following:

MOTION TO STRIKE REGION 6'S RESPONSE TO NACWA'S AMICUS CURIE BRIEF, OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE AMICUS CURIAE REPLY BRIEF

1. On March 30, 2010, the Board granted leave to allow NACWA to file its Amicus Curiae Brief. NACWA filed its Amicus Curiae Brief in support of the Petitioner, the San Jacinto River Authority ("SJRA").

2. In its three-page Amicus Curiae Brief, NACWA raised two issues: (1) Region 6 changed its position as to the validity of the Texas whole effluent toxicity ("WET") permitting procedures without any explanation or basis; and (2) Region 6 improperly sought to substitute its own view of Texas water quality standards in place of the State's interpretation of its own standards.

3. Without leave of the Board, on April 14, 2010, Region 6 filed a six-page Response to NACWA's Amicus Curiae Brief, in which Region 6 argued, as a general matter, that "neither of [NACWA's] arguments supports NACWA's urging that that [sic] Board grant review in the above-captioned matter." Region 6 Resp., at 2.

4. As an initial matter, Region 6's Response Brief should be stricken, as the Region failed to request leave of the Board to file its Brief. The Board's rules do not contemplate that a party can file a response to an amicus curiae brief. Therefore, the Region was required to request leave from the Board to file its response to NACWA's Amicus Curiae Brief. *See e.g. In re: Steel Dynamics, Inc.*, 9 EAD 165, 173-74 (EAB, June 22, 2000) (The Board considered and granted requests for leave to file responses to an amicus brief.); *In re: West Suburban Recycling and Energy Center, L.P.*, 6 EAD 692, 693 n. 2 (EAB, Dec. 11, 1996) (The Board considered and granted motions for leave to file responses to an amicus curiae brief.). Because it failed to request and obtain leave, the Region's Response Brief to NACWA's Amicus Curiae Brief should be stricken as a procedural matter.

5. In the alternative that the Board does not strike Region 6's Response Brief, NACWA requests leave to file an Amicus Curiae Reply Brief to address the arguments raised in Region 6's Response Brief.

6. In its Response Brief, Region 6 argues that "the Board should reject amicus curiae NACWA's arguments regarding this permit challenge and uphold the Region's decision challenged in SJRA's Petition for Review." Region 6 Resp., at 7. In order to address Region 6's arguments that NACWA's positions should be rejected, NACWA should be allowed to defend its positions as stated in its Amicus Curiae Brief.

7. Attached to this Motion is a proposed, short Amicus Curiae Reply Brief that addresses Region 6's arguments from its Response Brief.

8. None of the parties in this matter, including Region 6, will be prejudiced if NACWA is allowed leave to file the attached Amicus Curiae Reply Brief, as the Reply Brief only addresses the arguments raised in Region 6's Response Brief.

9. NACWA would suffer prejudice if it is not allowed leave to file its Amicus Curiae Reply Brief. Specifically, Region 6'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's members' states. It could also set a precedent that governs when EPA may reverse legal positions concerning the validity of state rules, and when EPA may substitute its own reading of a state water quality standard in the place of the State's own interpretation of that standard. Given the important precedents that may be set by Region 6's actions in this matter that will directly affect NACWA's members, NACWA should be able to address Region 6's arguments in its Response Brief by filing the attached Amicus Curiae Reply Brief.

MOTION TO PARTICIPATE IN ORAL ARGUMENT

10. On April 14, 2010, the Board ordered that this matter be set for oral argument on June 10, 2010. The Board allocated sixty (60) minutes total for the oral argument, with thirty (30) minutes for SJRA and thirty (30) minutes for Region 6.

11. Due to its participation as Amicus Curiae and the important issues involved in its briefing, NACWA requests that it be allowed to participate in the oral argument set for June 10, 2010, and present oral argument for five (5) minutes. If NACWA is allowed to present five (5) minutes of oral argument, it would not object and would agree to allowing Region 6 a reciprocal five (5) additional minutes to respond to NACWA's oral argument.

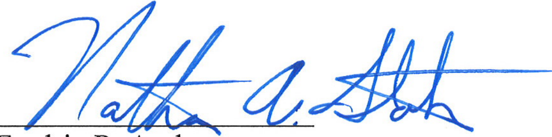
12. In the alternative that the Board does not allow an additional five (5) minutes for NACWA to present oral argument, NACWA has conferred with SJRA, and SJRA would be willing to cede five (5) minutes of its allotted thirty (30) minutes to NACWA, so that NACWA would have five (5) minutes to present its oral argument on June 10, 2010, while SJRA would present twenty-five (25) minutes of argument.

WHEREFORE, NACWA respectfully requests that the Board grant NACWA's Motions, strike EPA's Response to Amicus Brief that was filed on April 14, 2010 or, in the alternative, grant leave to NACWA to file the attached Amicus Curiae Reply Brief; and allow NACWA to participate in the oral argument scheduled in this case on June 10, 2010 and present five (5) minutes of argument.

Respectfully submitted,

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

By its Attorneys,



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DATED: May 5, 2010

CERTIFICATE OF SERVICE

I, Nathan A. Stokes, hereby certify that on May 5, 2010 I caused to be mailed true and accurate copies of the **MOTION OF AMICUS CURIAE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES TO STRIKE RESPONDENT REGION 6'S RESPONSE TO AMICUS CURIAE, OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' AMICUS CURIAE REPLY BRIEF, AND MOTION TO PARTICIPATE IN ORAL ARGUMENT** via the methods indicated below to:

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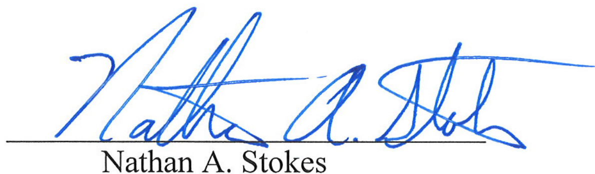

Date: May 5, 2010

Nathan A. Stokes

ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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San Jacinto River Authority	)	NPDES Appeal No. 09-09
	)	
	)	
NPDES Permit No. TX0054186	)	
	)	

REPLY IN SUPPORT OF AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

On March 25, 2010, the National Association of Clean Water Agencies ("NACWA") submitted its *amicus curiae* brief in this matter, which was accepted for filing by the Environmental Appeals Board (the "Board") on March 30, 2010. *See* Order Granting Leave to File Amicus Brief. That brief raised two issues: (1) EPA has changed position as to the validity of the Texas whole effluent toxicity ("WET") permitting procedures, without any explanation or basis; and (2) EPA has improperly sought to substitute its own view of the Texas water quality standards in place of the State's interpretation of its own standards. On April 14, 2010, the U.S. Environmental Protection Agency ("EPA" or the "Agency") filed a response to that NACWA brief ("Response"). In its response, EPA tries to argue that it did not shift position on the Texas WET procedure, and that it appropriately interpreted the state standards. Those arguments, though, misstate key facts, cite key authority in a misleading manner, and ultimately do not actually dispute the primary contentions made by NACWA.

In contending that it did not shift its position on the State's WET procedures, EPA appears to rest its argument primarily on a contention that the Texas procedures that were approved by EPA are meaningless, so any position that EPA took as to them was irrelevant. This stance is belied by the language of those procedures, the language of the Memorandum of Agreement between the State and EPA ("MOA") under which those procedures were approved by EPA, and the EPA approval letter itself.

EPA argues that the State's document entitled "Procedures to Implement Water Quality Standards" ("Implementation Procedures") was intended to be a non-regulatory, non-binding document that does not reflect the State's interpretation of its own water quality standards. Resp. at 4. However, the Implementation Procedures document states clearly, on page 1, that it specifies the procedures that the State will use when applying water quality standards to permits. SJRA Petition for Review, Ex. C at p. 1. Also, the section of that document that addresses WET issues explicitly references the Federal and State rules that govern the conditions to be put in permits when there is potential for toxicity. Pet., Ex. C at p. 101. Moreover, the MOA under which the Implementation Procedures were approved specifies that Texas will issue permits using the EPA-approved procedures. Pet., Ex. C at Appendix D.

EPA also tries to paint its approval of Texas' WET procedures as not particularly important – just something that EPA did as part of the Continuing Planning Process ("CPP") under Section 303(e) of the Clean Water Act (33 U.S.C. § 1313(e)). Resp. at p. 4. In fact, the approval was much more than just a simple administrative act. For one thing, the letter does not say that it represents action taken under 303(e) or the CPP process – neither the term "303(e)" nor the term "Continuing Planning Process" are even

used in the letter. *See* Pet., Ex. D. Instead, the letter is replete with indications that it is intended to govern how the State applies its water quality standards in the permitting process. The letter states that all of the procedures in the Implementation Procedures are conditionally approved, "with the exception of the following permitting issues." *Id.* at p. 1. There were two permitting issues as to which EPA did not issue an approval (neither of which are relevant here), and on those particular issues, EPA cited particular aspects of its own permitting and water quality standards regulations that it felt the State's procedures did not meet. *Id.* at 1-2. EPA stated that it would address those two issues on a permit-by-permit basis, and that other aspects of the Implementation Procedures would be reviewed when EPA conducts its review of the State's water quality standards. *Id.* at 2.

It is clear, therefore, that EPA's approval letter was not some kind of trivial EPA opinion concerning state planning details: it was EPA's explicit approval of the method that the State would use to interpret and implement its water quality standards when it issues permits, including those concerning WET. Those procedures actually were used by the State to issue the SJRA permit, which EPA then vetoed and superseded by issuing its own permit. That action did constitute a complete reversal of EPA's position on the State's WET procedures, as signified by EPA's letter approving those procedures.

In support of its arguments, EPA cites the Board's decision in *J&L Specialty Products Corp.,* 5 EAD 31 (EAB 1994). EPA states that the *J&L* ruling upheld an EPA decision to include Toxicity Reduction Evaluation ("TRE") requirements in a permit to implement State water quality standards, even though a State guidance document would have required only monitoring. Resp. at 5. But EPA fails to mention critical facts that

make the *J&L* case irrelevant to deciding the SJRA appeal. Most importantly, the State in the *J&L* case had waived its right to issue a certification as to the federal permit's compliance with state water quality standards. *J&L*, 5 EAD at 62. The Board concluded that because the State had waived certification, EPA could use its own judgment to determine the permit conditions needed to meet the State's water quality standards. *Id.*

The SJRA situation is completely different: Based on the results of an administrative evidentiary hearing, Texas applied the EPA-approved Implementation Procedures and affirmatively disagreed with the position that EPA took on the inclusion of WET limits in SJRA's permit. The State declined to issue the permit as EPA demanded, which then led to EPA issuing the permit itself. Thus, the discretion in interpreting state water quality standards that was given to EPA in the *J&L* situation is not applicable here. In addition, it is important to note that in the *J&L* case, the biomonitoring provisions that were being appealed had also appeared in the State permit that had been prepared and submitted to EPA. *Id.* at 38-39. That fact was specifically cited by the EAB in its opinion. Thus, the SJRA permit appeal has almost nothing in common with the *J&L* appeal, and the EAB's decision in the *J&L* case has no bearing on how the Board should rule here.

EPA also contends that the Board should not hear NACWA's argument that EPA has improperly reinterpreted the State's water quality standards, substituting its views as to the State standards for the views of the State. Resp. at pp. 6-7. EPA states that this argument was not raised by SJRA, so cannot be raised as an initial matter by an amicus party, such as NACWA. *Id.* at p. 6. However, SJRA did, in fact, raise the issue that

EPA has made the wrong decision as to whether the State's WET procedures are protective of the State water quality standards:

> The Region's response is also legally flawed in concluding that the Implementation Procedures are not fully protective of TSWQS [Texas Surface Water Quality Standards]. As discussed above, the Implementation Procedures are consistent with the language of the TSWQS in that they call for the imposition of WET limits at the conclusion of a TRE. With respect to sublethal toxicity, nowhere in the 2009 Fact Sheet or the 2009 RTC does the Region explain why the measures outlined in the Implementation Procedures, such as enhanced monitoring and TRE work in response to sublethal effects, cannot serve to control toxic impacts and be protective of the TSWQS, as the Region presumably concluded when it formally approved the Implementation Procedures in 2002.

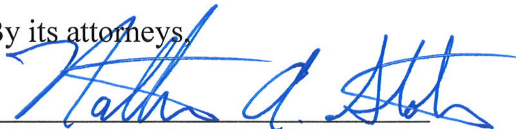
Pet. at p. 26. NACWA raises this same basic issue in its *amicus* brief, augmenting the argument with additional citations to legal authority. As this Board recognized in *In Re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 8 (EAB, Nov. 13, 2008), the ability for interested persons to submit amicus briefs to the Board "implies that the Board may consider some augmentation of arguments when making its decision after granting review of a permit decision." The same should be true when an amicus brief is submitted (after leave was granted by the Board) with regard to the Board's decision as to whether to grant review in the first place.

Again, NACWA respectfully urges the Board to grant review of the SJRA permit appeal. As should be evident from EPA's actions in filing a response to NACWA's amicus brief (a response that was longer than the NACWA brief itself), there are substantial issues being raised here as to EPA's authority in reviewing and issuing State NPDES permits. The Board should accept this case for review, so it can issue a definitive ruling on these important issues.

Respectfully submitted,

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

By its attorneys,



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