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BEFORE THE ENVIRONMENTAL APPEALS BOARD 19 AM 9:51
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. ENVIR. APPEALS BOARD

ORAL ARGUMENT

IN THE MATTER OF: :
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: :
SAN JACINTO RIVER AUTHORITY, : NPDES Appeal
: No. 09-09
NPDES Permit No. TX0054186 :
: :
: :

Monday,
June 7, 2010

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, NW
Washington, DC

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN,
Environmental Appeals Judge
THE HONORABLE ANNA I. WOLGAST,
Environmental Appeals Judge
THE HONORABLE EDWARD E. REICH,
Environmental Appeals Judge

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ORIGINAL

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ALSO PRESENT:

Peggy Glass, SJRA Expert
Phillip Jennings, EPA Region VI Expert

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P-R-O-C-E-E-D-I-N-G-S

10:00 a.m.

THE CLERK: Environmental Appeals Board of the United States Environmental Protection Agency is now in session for oral argument In re: San Jacinto River Authority. NPDES Permit NO. TX0054186. NPDES Appeal No. 09-09.

The Honorable Judges Anna Wolgast, Kathie Stein, Ed Reich presiding.

Please turn off all cell phones and no recording device allowed.

Please be seated.

JUDGE STEIN: Good morning, counsel.

We are hearing oral argument this morning in the matter of San Jacinto River Authority, a permit appeal by the San Jacinto River Authority of a permit issued by EPA Region VI.

We will hear first from petitioner San Jacinto River Authority, who

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1 I understand would like to reserve five
2 minutes for rebuttal and would like to cede
3 five minutes of their time to the National
4 Association of Clean Water Agencies. Is
5 that correct?

6 MS. KALISEK: That's correct,
7 Your Honor.

8 JUDGE STEIN: Then we will hear a
9 30 minute presentation by the Region,
10 followed by five minutes of rebuttal by San
11 Jacinto River Authority.

12 Now I have one request for all
13 counsel, which is that this is a fairly
14 technical case. For those of us who don't
15 happen to be scientists or engineers, or
16 have PhDs in the acronyms of this
17 proceeding, even though we're fairly
18 familiar with the briefs it would benefit us
19 all if you would minimize your use of
20 acronyms so that we're all on the same page.

21 If counsel could state their
22 appearances now, and then we will begin.

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1 MS. KALISEK: Thank you, Your
2 Honor.

3 Lauren Kalisek representing San
4 Jacinto River Authority.

5 MR. GILLESPIE: David Gillespie
6 representing Region VI, respondent, along
7 with Mr. Sweeney, my co-counsel.

8 MR. ANDES: Frederic Andes for
9 the National Association of Clean Water
10 Agencies amicus.

11 JUDGE STEIN: Thank you.

12 You may proceed.

13 MS. KALISEK: Good morning.

14 May it please the Board, again
15 I'm Lauren Kalisek representing the San
16 Jacinto River Authority. With me today are
17 Dr. Peggy Glass with Alan Plummer &
18 Associates, Chris Pasch her associate and
19 Tojuana Cooper with San Jacinto River
20 Authority San Jacinto River Authority.

21 We're all very appreciative of
22 the opportunity to be here with you this

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1 morning.

2 As you mentioned, we are here for
3 our appeal of our modified NPDES permit
4 issued by Region VI.

5 And before I begin, I just wanted
6 to provide a quick explanation of San
7 Jacinto River Authority. It's a river
8 authority, a political subdivision of the
9 State of Texas. It provides regional water
10 and wastewater services to its customer
11 communities in The Woodlands, Texas which is
12 outside of Houston.

13 And we're focusing on the permit
14 for one of its three wastewater treatment
15 plants, The Woodlands Wastewater Treatment
16 Plant No. 1.

17 I would also like to mention at
18 the outset that SJRA's appeal is not a
19 challenge to the WET test method or the
20 methods used as an appropriate tool in
21 monitoring water quality, or even its use as
22 a permit limit in appropriate situations.

1 What our appeal does represent is an effort
2 to ensure that the regulatory framework by
3 which SJRA is governed is applied in a
4 manner that is reasonable and that is
5 consistent with Texas Surface Water Quality
6 Standards.

7 And we also want to ensure that
8 the scientific evidence that we provide the
9 Region in support of the Region's permitting
10 decision is given a fair evaluation and is
11 provided with an objective analysis by the
12 Region.

13 As noted in our petition, the
14 crux of SJRA's appeal is its objection to
15 the imposition of WET limits based on SJRA's
16 sublethal test results. And I highlight
17 sublethal because it is the Region's
18 reliance on sublethal results that
19 constitute such a significant shift from the
20 Region's previous interpretation of Texas
21 Water Quality Standards and its approval of
22 the Texas Commission on Environmental

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1 Quality's procedures to implement those
2 standards, a reversal for which the Region
3 really provides no adequate explanation or
4 support.

5 JUDGE STEIN: Aren't sublethal
6 limits within the definition of chronic
7 toxicity under the Texas Water Quality
8 Standards?

9 MS. KALISEK: Your Honor, I would
10 submit that definitely Water Quality
11 Standards do prohibit sublethal toxic
12 impacts, however the Water Quality Standards
13 themselves do not specify what type of
14 limits should be imposed to control
15 different types of toxicity. I think that
16 the Water Quality Standards in such a way
17 that it grants a great deal of discretion to
18 the permit writer to determine what those
19 types of limits should be.

20 JUDGE STEIN: But hasn't EPA
21 Region VI in exercising its veto of the
22 State of Texas' proposed permit and having

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1 exclusive authority to issue that permit,
2 exercised its discretion in a manner that
3 its determined is consistent with the Clean
4 Water Act and, in fact, is required to
5 impose such limits based on the number of
6 failures of the testing protocols?

7 MS. KALISEK: Correct. Well, our
8 argument and our concern with that while the
9 scenario is that previously Region VI
10 approved a WET policy in Texas that only
11 focused on lethal test results and on lethal
12 failures. And the reason that we have such
13 an issue between, I guess, the difference
14 between lethal test results and sublethal
15 test results is that sublethal impacts are
16 much more difficult to measure to identify
17 what the causes are and even really to
18 correlate whether or not there are truly in-
19 stream impacts that are demonstrated by
20 those test results.

21 The science behind the sublethal
22 test failures and sublethal impacts is much

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1 more tenuous, we believe, than relying on
2 lethal test failures to measure toxicity.

3 JUDGE REICH: Can a permitting
4 authority following the Texas implementation
5 procedures arrive at a place where they
6 impose a limit based on sublethal toxicity
7 only?

8 MS. KALISEK: I believe that
9 following the implementation procedures as
10 they are right now and as approved by Region
11 VI, the TCEQ, the permitting authority,
12 could after a full toxicity reduction
13 evaluation has been performed by the
14 permittee and if that evaluation shows that
15 there is no other control that is available,
16 then yes, I do believe that they can impose
17 a sublethal limit. But that's not the
18 situation that we have here.

19 JUDGE WOLGAST: Could I ask you,
20 the Texas code does preclude having chronic
21 total toxicity which talks about sublethal.

22 MS. KALISEK: That's correct.

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1 JUDGE WOLGAST: So if it
2 precludes it, you're saying that while it's
3 precluded under the Texas standard they
4 didn't go through the proper procedures to
5 arrive at a WET limit. And what I'm trying
6 to understand is did their failure in your
7 view, and again talking about bio-monitoring
8 and the toxicity reduction evaluation steps,
9 was that something that was mandated by the
10 Texas Water Quality Standards or separately
11 by the implementation procedures, or both?

12 MS. KALISEK: Both. The Texas
13 Water Quality Standards do require before
14 the imposition of a toxicity limit, that a
15 permittee perform a TRE. That's in the
16 language of the Standards.

17 JUDGE STEIN: Don't the Standards
18 also provide that where conditions may be
19 necessary to prevent or reduce effluent
20 toxicity, permit shall include a schedule
21 for achieving compliance with such
22 conditions? Why wouldn't that language

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1 authorize the Region to do what it has done
2 here, which is to allow for a three year
3 period of time for the San Jacinto River
4 Authority to do whatever studies are
5 necessary and come into compliance with this
6 limit?

7 MS. KALISEK: Because the
8 Standards also require that a sublethal TRE
9 be performed before that limit is imposed.

10 JUDGE STEIN: Can you direct me
11 to where --

12 MS. KALISEK: Yes, ma'am.

13 JUDGE STEIN: -- in the statute I
14 could find that?

15 MS. KALISEK: It's in Title 30 of
16 the Texas Administrative Code, Section
17 307.6(e)(2)(D). And it states "that if
18 toxicity bio-monitoring results indicate
19 that a discharge is exceeding the
20 restrictions on total toxicity in this
21 section, then the permittee shall conduct a
22 Toxicity Identification Evaluation and a

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1 Toxicity Reduction Evaluation." And then
2 the key language follows: "As a result of a
3 Toxicity Reduction Evaluation additional
4 conditions may be established in the permit
5 including total toxicity limits, chemical
6 special limits and/or best management
7 practices."

8 So --

9 JUDGE STEIN: But you're reading
10 that language which proceeds the language I
11 pointed out, to be a condition precedent.
12 And I guess my question is couldn't you read
13 the language of the statute to also provide
14 that you don't need to go through that
15 procedure? Isn't that a plausible reading,
16 perhaps not the reading that San Jacinto
17 River Authority is urging in this case?

18 MS. KALISEK: I would not agree
19 that that's a plausible reading --

20 JUDGE STEIN: You would not? I
21 can't hear you.

22 MS. KALISEK: I'm sorry, Your

1 Honor.

2 No, I do not agree that that's a
3 plausible reading because at the only point
4 in the Texas Surface Water Quality Standards
5 where the imposition of a toxicity limit is
6 mentioned, it comes in this clause where it
7 talks about that it should be imposed at the
8 conclusion of a WET limit. And the further
9 interpretation that's provided in the
10 implementation procedures supports this
11 analysis.

12 JUDGE STEIN: As I understand it,
13 the State of Texas waived certification of
14 this permit. And in failing to waive
15 certification, didn't they in effect waive
16 any concerns they might have as to this
17 particular permit and its imposition of the
18 limits using this procedure?

19 MS. KALISEK: Well, Your Honor, I
20 do not agree with that approach for the
21 simple fact that this case has a very long
22 history. And if you look at where this case

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1 stated, which was actually a permitting
2 process at the state level, where in the
3 State of Texas a permittee is afforded the
4 right to an evidentiary hearing if it has
5 any objections to a permit that the
6 permitting authority is proposing, in this
7 case TCEQ.

8 Back in the late '90s early
9 2000s, the TCEQ was in the process of
10 preparing the renewal --

11 JUDGE STEIN: I'm well familiar
12 with the history, but I'm also struggling
13 with what then do the Veto Provisions that
14 were added in 1977 to the Clean Water Act
15 mean, given that the Veto Provisions were,
16 as I understand, designed to end the impasse
17 between the state and EPA who had a
18 disagreement about what the Clean Water Act
19 requires.

20 So while I agree that there's
21 been a long process, what meaning did the
22 Veto Provisions have if the Region can't

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1 effectively exercise that veto?

2 MS. KALISEK: Right. Well, going
3 back to your first question about the waiver
4 of certification. We believes that the
5 state's decision on this case is very well
6 established in the order that it issued, and
7 that's why it didn't go through the normal
8 certification process because it had already
9 had a very long and detailed record on its
10 position with respect that the WET limits
11 weren't required.

12 As far as what the Veto
13 Provisions means, you know certainly I do
14 not dispute that EPA does have the right and
15 the duty to ensure that state issued permits
16 are issued consistent with Water Quality
17 Standards. And in those types of situations
18 where a state has done something that's
19 inconsistent with protection of the Water
20 Quality Standards, then EPA does have
21 certainly the duty under the Clean Water Act
22 to issue its own permit. However, this

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1 situation is unique because the Region had
2 previously approved policies and basically a
3 WET policy for Texas that was totally
4 focused on lethality and lethal test results
5 as protective of Water Quality Standards and
6 its now and when suddenly upon
7 federalization of the permit and its
8 response to comments that they suddenly
9 announce that TCEQ's policy is no longer
10 protective of Water Quality. So they
11 completely reversed their legal
12 interpretation of the implementation
13 procedures and the Water Quality Standards
14 with respect to reliance on sublethal WET
15 testing. And that is the basis of our
16 complaint and the petition.

17 JUDGE STEIN: But isn't it more
18 accurate to state that the State of Texas
19 and EPA have been fighting about this issue
20 since approximately 2005? That it wasn't
21 just in 2009 when this permit was issued,
22 but that there's been a long history and

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1 that the state -- and I don't disagree with
2 you that EPA approved those procedures. And
3 we will have some questions for EPA when
4 they have their opportunity. But I don't
5 think it's fair to say that this showed up
6 for the first time in this permit. I think
7 it's been an issue of concern between the
8 Region and the state for a long number of
9 years.

10 MS. KALISEK: Well, but I think
11 it's also important to point out that that
12 history of the dispute also coincided with
13 SJRA's permit as it was moving through the
14 state and up through regional level. So,
15 it still is an issue of changing your
16 opinion in the midst of a permitting
17 decision that's coinciding at the same time.

18 JUDGE STEIN: Well what if EPA's
19 original approval was an error? If EPA made
20 a mistaken? That as more information came
21 out about whole effluent toxicity testing
22 and Headquarters pointed out to the regions

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1 what they needed to do, is EPA bound to
2 follow that mistake to the end of time
3 because it approved this document?

4 MS. KALISEK: What EPA is bound
5 to do is provide an adequate and reasonable
6 explanation for its shift in its
7 interpretation. I think that's well
8 established in the case law and in the EAB's
9 own decisions with respect to administrative
10 agency action. And that's what it has not
11 done in this case.

12 JUDGE STEIN: When I look at the
13 EAB cases, I look at *J&L Specialty Products*
14 which seems to me has a number of parallels
15 to this particular case and that it's a case
16 in which EPA vetoed a state permit, took
17 over a permit for, I believe, from the State
18 of Ohio. The State of Ohio waived
19 certification and in that circumstance the
20 Board deemed waiver of the certification to
21 be a relevant factor in determining that EPA
22 was free to go ahead and set the conditions

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1 of the permit as it saw fit in accordance
2 with the Clean Water Act.

3 MS. KALISEK: I think the key
4 distinction with *J&L Specialty Products* is
5 there was no discussion in that opinion of
6 the fact that the Region had previously
7 approved the process and the WET program at
8 the state level. And that's the distinction
9 that we have in this case is that in 2002
10 EPA provided its approval that the WET
11 program was fully protective of Water
12 Quality Standards. That was not an issue in
13 the *J&L Specialty Products* case, I don't
14 believe.

15 JUDGE REICH: Let me ask whether
16 the Region, in your view, could have
17 required the TIE and TRE in this case? I
18 mean, there is some predicate under (2) (d)
19 that they have to make a finding as to
20 exceeding total toxicity before they can do
21 that. Do you think that they could have
22 made the finding necessary to proceed with

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1 the TIE?

2 MS. KALISEK: Yes. I think they
3 could have required a TRE and, in fact, SJRA
4 as we discussed in detail in our petition
5 and its included in the record, we have
6 performed essentially a sublethal TRE. That
7 was the 2008 Sublethal Toxicity Evaluation
8 that we've also submitted to the Region.

9 JUDGE REICH: Do you think that
10 if they had performed a TIE and a TRE, that
11 they would have been bound to do it as laid
12 out in the implementation procedures? Are
13 they bound by those procedures or only
14 ultimately by the Water Quality Standards
15 themselves?

16 MS. KALISEK: Are you asking
17 whether the permittee or whether EPA is bound
18 by the --

19 JUDGE REICH: Whether EPA in
20 directing that the study be done is bound
21 only by the statute or by the greater detail
22 that's in the implementation procedures?

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1 MS. KALISEK: I don't believe
2 that EPA is bound by the implementation
3 procedures. I believe that EPA or the
4 Region approved those implementation
5 procedures in 2002. When it has a
6 reasonable basis for deviation from them and
7 it provides an adequate justification for
8 that, it can do that. But it needs to be a
9 pretty exceptional circumstance because
10 typically administrative law, the progress
11 of the administrative process is really
12 dependent upon reliance upon well settled
13 policies and so that the permittees, the
14 regulating community and the folks at the
15 Agency know how to deal with situations as
16 they come up. So it's really only in
17 extraordinary circumstances and for reasons
18 that are well developed and well considered,
19 and have a great support that well settled
20 principles such as those that are included
21 into the implementation procedures could be
22 cast aside for new process or program.

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1 JUDGE REICH: So putting aside
2 whether this was such a case or not, they
3 could on the facts of a particular case make
4 a determination not to follow the procedures
5 without having to go the next step and find
6 that the procedures as a whole are somehow
7 no longer valid?

8 MS. KALISEK: I agree with that,
9 yes.

10 JUDGE WOLGAST: And could I ask,
11 what in your view should have happened here?
12 How should this have proceeded before EPA
13 undertook the writing of the permit? I
14 mean, as you say, this has been going on a
15 long time. We have five years of sublethal
16 WET testing, in some instances actual in-
17 stream excursions of toxicity. And so if
18 there was this procedure as do you do this
19 step, and you do the TIE, you do the TRE,
20 then you establish either that you can find
21 the toxicity source or you impose WET limit,
22 why hadn't that happened in all this time?

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1 MS. KALISEK: Well, certainly
2 once the permit became federalized and EPA
3 indicated that it was going to be relying on
4 our sublethal test results rather than the
5 lethal test results, then certainly SJRA
6 back in 2005 started doing additional
7 testing on its sublethal test results to try
8 to understand what's going on, what's the
9 case. Because quite frankly before then all
10 of the permittees in Texas had only been
11 focusing on lethal test results because
12 that's what the program really focused on.

13 So, as we saw EPA moving away
14 from that and dealing with our own
15 permitting process, we undertook the comment
16 of an investigative study for our sublethal
17 test results. And what should have happened
18 in this case is that as we identified and
19 gathered all the information as a part of
20 the study and submitted it to EPA, that EPA
21 we believe should have given it an objective
22 and thorough analysis and understood the

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1 conclusion that we're drawing that the cause
2 of the sublethal toxicity that's evidence in
3 SJRA's effluent is the ionic imbalance of
4 the source water and not a specific
5 toxicant.

6 The three year study was very
7 detailed. Much toxicity characterization
8 identification studies, different types of
9 studies that went on, SJRA was just not
10 finding anything. It wasn't finding
11 intoxicants. So it went through additional
12 steps and levels to determine what else
13 could be going on here. And as detailed in
14 that 2008 study what we see is a similar
15 failure rate between the effluence for
16 Plants 1 and 2 that have the same source
17 water. And we see also a similar failure
18 rate in mock effluent that was prepared to
19 mimic the ionic imbalance that's found in
20 SJRA's effluent.

21 And also, those study results are
22 supported by an independent study that's

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1 cited in our STE that also finds that water
2 quality with that type of ionic imbalance
3 can generate just those types of results.
4 Basically a 60 percent pass rate.

5 JUDGE WOLGAST: And that was the
6 2008 study?

7 MS. KALISEK: That's the 2008
8 study. That's correct.

9 JUDGE STEIN: I have a couple of
10 questions for you. In the ordinary course
11 would a permit applicant submit to the
12 permitting authority its plan for conducting
13 a toxicity reduction evaluation before
14 proceeding to conduct that?

15 MS. KALISEK: If it's required by
16 the permit, yes it would.

17 JUDGE STEIN: Now in this case am
18 I correct in understanding that San Jacinto
19 River Authority did its own three year study
20 and then submitted the results to the Region
21 afterwards, but the Region was not involved
22 in or have an opportunity to comment on the

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1 scope of that evaluation?

2 MS. KALISEK: We did try to
3 involve the Region in the study. We did
4 provide progress reports, information on the
5 testing that we were doing as it was going
6 on. And then we provided all the underlying
7 data on disks to the Region prior to
8 preparing the written report. And then
9 ultimately we did prepare the written
10 report to kind of consolidate the
11 information and to make easier for the
12 region to review and take a look at our
13 findings.

14 JUDGE STEIN: And is that
15 reflected in the record, the progress
16 reports and the other information?

17 MS. KALISEK: I don't believe it
18 is, Your Honor, because I don't think it was
19 ever raised as an issue. I think for the
20 first time it was mentioned in EPA's reply.
21 And we can certainly submit, you know
22 supplement the record with that information.

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1 JUDGE STEIN: Well, we couldn't
2 supplement the record given that we need to
3 be looking at the permit based on the record
4 that the Region had before it. If it's in
5 the record, of course, that would be helpful
6 for us to know.

7 MS. KALISEK: Well, certainly if
8 it was information that the Region had
9 available to it at the time it was drafting
10 the permit, then presumably it would fit
11 that description.

12 JUDGE STEIN: Well, it would
13 depend upon whether it's in the
14 administrative record or not.

15 Secondly, with respect to this
16 salt water exclusion that you alluded to,
17 would you agree that San Jacinto River
18 Authority has the burden of establishing
19 that that exclusion applies?

20 MS. KALISEK: Yes, I believe that
21 it does. It's the permittee.

22 JUDGE STEIN: Thank you.

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1 MS. KALISEK: And I will, just at
2 one point on that exclusion language, I
3 think the EPA in its reply has a discussion
4 that the preamble, which this Water Quality
5 Standards on the exclusion for salt water
6 and toxicity, has some discussion that that
7 that exclusion is only limited to certain
8 Texas streams. That citation to the
9 preambling, which I think is incorrect; when
10 we pulled the preambling which we didn't see
11 that discussion there on that particular
12 page. There is some discussion in the
13 preambling which related to salt water
14 issues in some Texas streams, but that
15 discussion doesn't come under a discussion
16 of the definition of toxicity. It comes
17 under a discussion of other provisions in
18 the Water Quality Standards. So it's really
19 not applicable to the exclusion that we're
20 specifically talking about in our case.

21 JUDGE STEIN: When EPA
22 federalizes the permit, as I understand the

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1 regulations, EPA is required to follow Parts
2 124 and I believe also 122. Let me just
3 check the regulations: 121, 1222 and 124.
4 And I'm looking at Section H(1) of 123.44.

5 Do those regulations in effect
6 require EPA then to follow federal
7 procedures rather than state procedures in
8 proceeding with a permit that it has
9 federalized?

10 MS. KALISEK: Yes, I believe so,
11 Your Honor. And I don't think that we
12 dispute that EPA is required to follow
13 federal procedures.

14 For example, we don't submit that
15 the Region has to hold an evidentiary
16 hearing or all those types of processes that
17 are included at the state level. I don't
18 think that's directly on point to our
19 argument today, which is that the WET
20 program in Texas was previously approved by
21 the Region and now suddenly it's not. And an
22 adequate explanation for that shift or that

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1 reversal really hasn't been provided in this
2 record.

3 JUDGE STEIN: But leaving aside
4 what the code provides, wouldn't that
5 provision also say to the Region that it
6 doesn't need to follow the state
7 implementation guidance procedures but
8 instead should be looking at Part 122, Part
9 121, Part 124 and any other guidelines that
10 are part of the federal Clean Water Act,
11 like the Texas Water Quality Standards
12 rather than the implementation procedures?

13 MS. KALISEK: And I think I
14 understand what you're asking is basically
15 doesn't EPA have to provide its own
16 reasonable potential analysis under
17 122.44(d). And, yes, absolutely. But our
18 argument, as its explained in the petition,
19 is that that reasonable potential analysis,
20 the framework for that was established in
21 EPA the Region's approval of the 2002
22 implementation procedures. The WET program

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1 focused on lethal test results and lethal
2 test failures and lethal WET limits. And
3 that was the regional potential analysis
4 that was in place for Texas since 2002 and
5 it's only now that the Region is shifting
6 its interpretation of that.

7 JUDGE STEIN: Can sublethal
8 failures lead to lethality? In other words,
9 if the initial impacts you see are on growth
10 and reproduction as I understand the state
11 standards for chronic toxicity, doesn't it
12 include both?

13 MS. KALISEK: There are two
14 separate tests. You're measuring two
15 different end points. You're measuring the
16 end point for lethality; how many of the
17 test organisms die over a particular test
18 period. And then you're also measuring how
19 many are reproduced during that test period.

20 So, I believe that those are two
21 different end points and so it's not
22 subsumed one within the other.

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1 JUDGE REICH: I have one last
2 question. The 2008 STE, it was technically a
3 TRE but from the standpoint of how it was
4 conducted would it have been conducted
5 significantly differently if it were a TRE?

6 MS. KALISEK: No, Your Honor.
7 Our intent was to follow all of the normal
8 TRE procedures just as if it were a TRE,
9 formally a TRE imposed by a permit.

10 JUDGE REICH: Okay. Thank you.

11 JUDGE STEIN: I have one final
12 question, which is much more a technical
13 question. But I'm trying to understand the
14 dispute, and I'm going to ask both parties
15 this question, over Part 2(e)(3(B) the WET
16 limit reporting provisions and arguments
17 over what's an average, what's the minimum,
18 what's the daily average minimum. Is that
19 still a live issue and if so, could someone
20 explain to me what the concern is?

21 MS. KALISEK: The concern is,
22 Your Honor, and I do believe it's a live

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1 issue, is that the definitions that are
2 provided in the permit really to us just
3 don't make a whole lot of sense. It seems
4 like those definitions are conflicting with
5 one another. And I would defer to our
6 petition for a better explanation of it than
7 I can probably give you right now. But for
8 example, the language used for -- we have
9 definitions for -- and this all relates to
10 having to report your WET test results and
11 what you put on the DMR, on the Discharge
12 Monitoring Report.

13 And so as permittee trying to
14 figure out, well, if we do have WET limits
15 how are we going to report those on the DMR,
16 we're dealing with definitions for the 30
17 day average NOEC, the 7 day minimum NOEC,
18 the daily average minimum NOEC and the 30
19 day average minimum NOEC.

20 And there are other terms in
21 there that are used that seemed to overlap
22 and contradict.

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1 JUDGE STEIN: Are these defined
2 anywhere else? For example, in the NPDES
3 program in general?

4 MS. KALISEK: I believe that we
5 rely on the permit to define them primarily.

6 JUDGE STEIN: Okay.

7 MS. KALISEK: Thank you very
8 much.

9 JUDGE STEIN: Thank you.

10 Mr. Andes?

11 MR. ANDES: Your Honors, my name
12 is Frederic Andes. I'm counsel for amicus
13 the National Association of Clean Water
14 Agencies. We're here to emphasize two
15 particular points as to this permitting
16 decision that we believe of national import.
17 One of them which we've already been
18 discussing, has been the reversal of
19 position by EPA on the states whole effluent
20 procedures without any basis. And I want to
21 respond in particular to a couple of points
22 that were just raised because they do go to

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1 points that were in our brief.

2 We did mention the *J&L Specialty*
3 *Products* case, which is clearly significant.
4 We believe that one of the key points to
5 keep in mind about *J&L Specialty Products* is
6 that the state's position, the state
7 agency's position on a provision at issue
8 there was identical to EPA's. When the
9 state had drafted a permit, it contained the
10 same provision that EPA later included. So
11 we know there was no disagreement between
12 the state EPA on the issue.

13 Here, in a different situation,
14 while the state may not have certified, I
15 think probably because the state sort of
16 wanted to wash its hands of this whole issue
17 after five years, here we know the state
18 disagreed. We know the state's position was
19 not to issue the limit. So we believe that
20 the deference paid in *J&L Specialty Products*
21 where the state had the identical position
22 to EPA was a stronger case for deference

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1 than here.

2 JUDGE REICH: In *J&L Specialty*
3 *Products* did the Board cite the fact that it
4 was the same position as the state as the
5 basis for its conclusion?

6 MR. ANDES: It cited it as one of
7 the basis, yes.

8 The other point that I think is
9 important about --

10 JUDGE STEIN: Before you get to
11 your second point, as I understand the
12 procedural history the State of Texas put
13 lethal WET limits into the permit that went
14 through the evidentiary hearing. I am
15 unaware, and again this is a very big record
16 so it may be in the record, that the State
17 of Texas took the position that it was
18 opposed to these particular WET limits. As
19 I understand it, that it declined to put
20 them in and it declined to certify.

21 So, is there something more
22 affirmative that you can point me to in the

1 record that shows me that they in fact as
2 opposed to these limits as opposed to
3 acquiescing in the Region's action?

4 MR. ANDES: Well, I'll leave it
5 to counsel for San Jacinto River Authority
6 to deal with, except I will point out that
7 in the state process they clearly did not
8 put these limits in and then EPA did.
9 Whereas, in *J&L Specialty Products* the state
10 put the provisions into the permit and then
11 EPA said we're going to put those same
12 provisions into our permit.

13 JUDGE STEIN: But then why did
14 EPA veto the *J&L Specialty Products*? I
15 mean, that was a vetoed permit?

16 MR. ANDES: I'm not aware of why
17 that happened. But I may have dealt with
18 other issues in the permit in terms of why
19 that one was vetoed. But it appears there
20 was no disagreement between EPA and the
21 state on this particular issue.

22 JUDGE WOLGAST: Although the

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1 basic tenet of *J&L Specialty Products* is to
2 say that the Region has discretion to
3 determine what conditions are necessary to
4 meet Water Quality Standards, is it not? I
5 mean, the key here is whether the Region can
6 decide the conditions on its own as to
7 what's necessary to meet Water Quality
8 Standards?

9 MR. ANDES: Well, that principle
10 is there. We would say it's conditions by,
11 among other others in *J&L Specialty*
12 *Products*, the fact that the state's
13 provision was identical.

14 We would say here this is a
15 different situation where while there is
16 some deference, it is not completely up to
17 EPA to decide whatever it wants. Here where
18 EPA approved a state procedure, and there's
19 no question that this procedure was approved
20 and that both parties understood the state's
21 implementing procedures would be used to
22 issue permits in Texas.

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1 JUDGE WOLGAST: And so your
2 position is that -- I'm trying to understand
3 what you see as the Region's constraints in
4 this sort of circumstance where they take
5 over the permit.

6 One can read to regs to say they
7 do it in a manner consistent with the State
8 Water Quality Standards. Now we've heard
9 that the State Water Quality Standards also
10 includes some of the provisions of the
11 implementation procedures. But does that
12 mean that in addition to those Water Quality
13 Standards in your view the Region was bound
14 to implement the implementation procedures
15 as well?

16 MR. ANDES: I would say they were
17 bound to consider those implementing
18 procedures because the Memorandum of
19 Agreement between EPA and the state makes it
20 clear that the implementation procedures
21 describe how Water Quality Standards are
22 implemented in the State of Texas. So for

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1 EPA, while EPA could have said here's what
2 in this procedure and we don't agree with
3 it, in this case EPA had already agreed with
4 the procedure in 2002. So this process
5 starts in 2005, EPA without any basis at no
6 point ever explaining: They never said we
7 made a mistake, they never said here's our
8 rationale for why what we approved in 2002
9 is no longer valid instead simply says
10 there's no legal basis and we're going to do
11 something different. I would say they are
12 not free to totally disregard a procedure
13 that they had already approved.

14 JUDGE REICH: But do you agree as
15 I think counsel for SJRA did, that in the
16 appropriate case which this may or may not
17 be, they could make a finding for a
18 particular case that the procedures were not
19 to be followed for a particular reason
20 without having to go the next step and
21 determine that the procedures as a whole
22 needed to be reversed or overturned?

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1 MR. ANDES: I believe EPA would
2 have some discretion in that regard, but
3 they haven't applied in this situation.

4 So, we believe it's clear, first,
5 that EPA reversed position without basis.
6 We also believe that in essence EPA has
7 replaced the State Water Quality Standard by
8 simply saying, again, without any
9 explanation of why the state is wrong.

10 And we believe, again, that while
11 EPA certainly has discretion to interpret
12 State Water Quality Standards, they can't
13 just arbitrarily substitute their views for
14 the states without providing a rationale.
15 We think in some ways this case has
16 something common *Upper Blackstone*, which
17 this Board has recently decided and which
18 I'm very familiar with, where on the co-
19 permittee issue this Board said EPA had
20 failed to enunciate a ruled decision or
21 interpretation. Again, it was an issue of
22 rationale: If you're going to do something,

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1 particularly when you're going to do
2 something that is overruling the state on an
3 issue where you have agreed on the state's
4 procedure, you need to provide a clear
5 rationale. We believe this case should be
6 remanded so EPA does provide that rationale
7 in terms of what is its view of the State
8 Water Quality Standard, why is it different
9 than what EPA itself had provided in 2002
10 and agreed in the MOA. We think San Jacinto
11 River Authority deserves that.

12 JUDGE STEIN: Didn't the state
13 have an opportunity through the
14 certification process to state its view? I
15 mean, I understand that you've kind of slide
16 over that, but isn't that the formal
17 procedure that the Clean Water Act provides
18 in circumstances where EPA is interpreting
19 State Water Quality Standards to say that
20 no, you're not interpreting them correctly?
21 I mean, leaving aside the implementation
22 procedures, couldn't the State of Texas have

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1 come in and say our Water Quality Standards
2 as applied to this permit do not require the
3 conditions that you're imposing?

4 MR. ANDES: Yes, they could have.
5 And actually, again, this is similar in some
6 circumstances to the *Upper Blackstone* case
7 where Massachusetts decided not to certify.
8 And in both cases, I believe and I've seen
9 this before, is sometimes the state where it
10 believes that EPA is more stringent, is
11 taking a position more stringent than the
12 state, the state will simply say we're not
13 going to bother because they don't believe
14 that their statement -- all they can do at
15 that point is say we believe you're doing
16 something more stringent than we're
17 requiring. My experience has been in this
18 cases, EPA just moves ahead anyway. States
19 feel that's sort of a useless process to
20 even both to certify, so they simply
21 decline. That happened in the *Upper*
22 *Blackstone* case and it happened here.

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1 So I don't think we should pay
2 too much attention to the fact that they've
3 waived certification because the reason why
4 they waived certification is not clear. And
5 in this kind of situation, I think it's
6 taken away simply because it feels the
7 certification or lack of there has no
8 impact.

9 JUDGE STEIN: How do you square
10 the Veto Provisions and the regulations
11 under the Veto Provisions with your theory
12 of these implementation procedures and
13 Texas' rights?

14 I mean, at this point Texas and
15 EPA have been fighting about whole effluent
16 toxicity limits for a good four or five
17 years. So at what point do we look at the
18 Veto Provisions as a vehicle for resolving
19 this impasse, at least as to this particular
20 permitter?

21 MR. ANDES: Well I think, Your
22 Honor, that in fact that's part of the

1 larger importance of this case is that we
2 see increasing exercise by EPA of vetoes and
3 threats of veto. So we think enunciating
4 the rules under which EPA can or cannot do
5 that, or what they have to do when they veto
6 is important. And I think that part of what
7 we're saying is when EPA decides to veto,
8 both their decision to veto and their
9 determination of the proper permit limits
10 should not be completely unconstrained by
11 what the state did in its Water Quality
12 Standards and interpretations that EPA
13 bought off on.

14 So, part of I think what this
15 case is about is trying to enunciate there
16 are some constraints on EPA when it vetoes a
17 permit in terms of what's the rationale for
18 vetoing, is it contrary to a clear approval
19 it has provided before, and when it issues
20 permit determinations and limits is it bound
21 to consider what the state has said as to
22 how its Water Quality Standards should be

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1 interpreted?

2 Yes, EPA has a broad authority to
3 veto, but it's not unconstrained. And we
4 think this case is important in terms of
5 identifying the nature and scope of those
6 constraints.

7 Thank you.

8 JUDGE STEIN: Thank you.

9 MR. ANDES: Thank you.

10 JUDGE STEIN: Mr. Gillespie?

11 Now am I correct that you're
12 splitting your argument with Mr. Sweeney?

13 MR. GILLESPIE: Yes, Your Honor.
14 The intention is that I will take 20 minutes
15 and my co-counsel Mr. Sweeney will take the
16 remaining ten minutes.

17 JUDGE STEIN: Okay.

18 MR. GILLESPIE: I will be mainly
19 discussing the legal arguments. Mr. Sweeney
20 will get more into the technical arguments
21 that we have today.

22 Today I would like to emphasize a

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1 few very important points as to why we
2 believe the Region properly made the
3 decision to include whole effluent
4 toxicities in San Jacinto River Authority
5 permit.

6 First, I'd like to go to the
7 implementation of Water Quality Standards.
8 And you all have raised this issue during
9 San Jacinto's argument. And I want to
10 emphasize that Clean Water Act Section
11 301(b)(1)(C) requires NPDES permits to
12 include effluent limitations as necessary to
13 meet Water Quality Standards, and this
14 includes narrative Water Quality Standards.

15 So when you look at the Texas
16 Water Quality Standards they provide a
17 narrative standard in 30 Texas
18 Administrative Code Section 307.6 that whole
19 effluent toxicity of permitted discharges
20 will be sufficiently controlled to preclude,
21 and I believe that was an issue that was
22 brought up, acute total toxicity that's

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1 lethal and chronic total toxicity in all
2 water in the state with existed or
3 designated aquatic life uses.

4 JUDGE REICH: Is it not correct
5 that 307.6(e)(2)(D) is also part of the Water
6 Quality Standards?

7 MR. GILLESPIE: Do you mean the
8 dissolved salt issue?

9 JUDGE REICH: I mean you
10 referenced 6(e) where it talks about
11 toxicity and (2)(D) of that is the provision
12 that SJRA referred to earlier as the trigger
13 for the TIE and the TRE. And I'm wondering
14 whether in your view that provision is also
15 part of the Water Quality Standards?

16 MR. GILLESPIE: Well, we look at
17 the Water Quality Standards and we look at
18 the preclude; that means none, that means
19 limits.

20 JUDGE REICH: So everything that
21 follows that is not really part of the Water
22 Quality Standards?

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1 MR. GILLESPIE: Well, no. But if
2 you want to look at it that way, we believe
3 here, and San Jacinto has admitted that in
4 their oral argument, they've done TRES.
5 They've done them. And it's time now to
6 provide a limit for sublethal toxicity.

7 JUDGE REICH: But I guess what
8 I'm trying to understand is you're quoting
9 from, I guess, 6(e)(1) and you have another
10 provision in 6(e)(2). And I'm trying to
11 understand why I should not be trying to
12 read those provisions in harmony with each
13 other and recognize that arguably the
14 language in 6(e)(2) elaborates on what it
15 means in 6(d)(1); that I don't just stop
16 with the word "precludes" and ignore
17 everything else that follows.

18 MR. GILLESPIE: I understand your
19 point. And we would take the position that
20 we provide a three year compliance schedule
21 so that the limits kick in after three
22 years. During those three years they can do

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1 the toxicity reduction evaluation.

2 JUDGE REICH: But isn't that
3 backwards? I mean, you've already imposed
4 the limit. I mean, it seems to me that the
5 way this is worded, arguably, you're
6 supposed to do it before you impose the
7 limit. What you're basically saying to me
8 is I can lock someone in a room with a
9 ticking time bomb and tell them they got
10 three hours to figure a way out of the room.
11 And that's just fine. I mean, they're
12 already under the gun, the burden is on them
13 to figure a way to get out from under,
14 whereas the provision itself seems to
15 contemplate that this study would be done
16 before the limit is even imposed. I don't
17 know that those are the same thing.

18 MR. GILLESPIE: And I would
19 argue, no, you can read them together. And
20 if you read them together and we give them a
21 three year compliance schedule and they can
22 do the TRE and if the TRE is successful, we

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1 can modify the permit and remove that limit.

2 JUDGE WOLGAST: But let me --

3 MR. GILLESPIE: Second, we would
4 argue that they've already done TRES, as has
5 been mentioned, they have been going through
6 this study process for sublethal WET limits
7 for many, many years. And we just believe
8 that these studies are not effectively
9 controlling sublethal effects and it's time
10 for us to put a limit in the permit,
11 although we're giving them three year
12 compliance schedule.

13 JUDGE WOLGAST: So to follow-up
14 on that, does the record reflect that the
15 Region considered the 2008 toxicity report
16 that San Jacinto did in arriving at the
17 limit?

18 MR. GILLESPIE: Yes.

19 JUDGE WOLGAST: And where would I
20 find that?

21 MR. GILLESPIE: Excuse me, Your
22 Honor, let me find my administrative here.

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1 JUDGE WOLGAST: Well, you can
2 provide --

3 MR. GILLESPIE: Can I provide
4 that later?

5 JUDGE WOLGAST: Later. Okay.

6 But also to follow-up on Judge
7 Reich's point if the three year compliance
8 window in part was a vehicle for complying
9 with 6(e)(2)(D) TIE/TRE requirements, then
10 why wasn't that written into the permit?

11 MR. GILLESPIE: Because we
12 believe, again, that they have done the
13 TRE/TIEs, they've been doing them for years.
14 And they cannot give us a result.

15 JUDGE REICH: Is the record clear
16 which TRES and TIES you're relying on? Are
17 you relying on the 2008? Are you relying on
18 earlier ones? Is it clear from the record
19 which of the TIES and TRES they've been
20 doing for years that the permit is actually
21 based on?

22 MR. GILLESPIE: I believe it's in

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1 the record, but certainly the 2008 is in the
2 record. And I can look into what other exact
3 studies that we did look at.

4 JUDGE STEIN: In the Texas Water
5 Quality Standards in Section (D) that we've
6 been talking about there's language that
7 says "As a result of a toxicity reduction
8 evaluation additional conditions may be
9 established in the permit."

10 Now if I understand the 2008
11 study, this was done by the company. It
12 arrived at the Region on the eve of your
13 proposal of the permit. And according to
14 San Jacinto River Authority that study,
15 which the Region disputes, establishes the
16 high saline content of the water is the
17 cause for these toxicity exceedances. If
18 that's the case, how can you impose
19 additional conditions as a result of that
20 toxicity reduction evaluation? How would
21 you square the language of the statute with
22 what appears to be your contention and

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1 argument, which is that the 2008 toxicity
2 reduction evaluation allows you to proceed?

3 MR. GILLESPIE: That's a very
4 good question, Your Honor.

5 The high salinity exclusion that
6 you refer to that they rely on on their 2008
7 TRE is in fact an exemption that if you look
8 at the Texas Register that came out, akin to
9 a preamble in Texas, here's where they came
10 to when they created that exemption.

11 Some streams in Texas have
12 natural in-stream concentrations of
13 dissolved salts that are relatively high.
14 And they may themselves exert lethal or
15 sublethal effects on organisms that inhabit
16 the water, thereby causing the stream to
17 exceed the total toxicity provisions.
18 However, natural organisms inhabiting those
19 streams have had a long term exposure and
20 have either adapted or they have moved
21 habitats.

22 So, we think, okay, if you have a

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1 high salt intake and you're putting it back
2 into a high salt stream, the organisms are
3 going to be okay.

4 JUDGE STEIN: But my question
5 really --

6 MR. GILLESPIE: San Jacinto,
7 they're study says that their water is low
8 salinity, low dissolved salts, which we
9 don't believe that this exception was meant
10 to cover.

11 JUDGE STEIN: My question
12 pertains less to whether or not they qualify
13 for that exclusion, although that it's
14 clearly an issue in the case, so much as if
15 that 2008 study was focused on -- at least
16 the study according to San Jacinto River
17 Authority reached a conclusion that they did
18 qualify for the exclusion, how can that same
19 study then be relied upon by the Region as a
20 basis for imposing whole effluent toxicity
21 limitations?

22 MR. GILLESPIE: And, Your Honor,

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1 that is because the Region looked at that
2 study and concluded that it did not prove
3 under this exception for the dissolved
4 salts, you have to prove that the dissolved
5 salts is the sole one and only cause of
6 toxicity. And when the region looked at the
7 data, and I know San Jacinto says rates of
8 60 percent average or something like that
9 for a dilution or effluent versus lab water.
10 However, there's a variability that we have
11 seen in the test results.

12 For example, in August 2004 they
13 failed at 23 percent effluent dilution. So
14 23 percent of the water in the test was from
15 the Plant and the rest was from lab water --

16 JUDGE STEIN: Is that in the 2008
17 study or is that an independent testing by
18 the Region?

19 MR. GILLESPIE: It is. It's in
20 the 2008 study.

21 And again, in June 2006 they
22 failed at 27 percent.

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1 Now when you have dissolved salts
2 as a problem for toxicants, there will be
3 threshold where you fail. They say well we
4 think it's 60 percent. But when we're seeing
5 these failures at rates lower than that;
6 again in November 2006 23 percent effluent
7 failure, these are very variable results and
8 we cannot conclude based on the study that
9 the dissolved salts is the sole problem of
10 toxicity.

11 JUDGE REICH: Can you help me
12 with the history here a little bit. There
13 was a permit issued in 2007, was there not,
14 which was then subsequently, at least in
15 part, withdrawn? Is that correct?

16 MR. GILLESPIE: That's correct
17 because we felt that we needed to supplement
18 the administrative record and because Texas
19 informed that there was an error in some
20 information they sent us regarding what is
21 called the critical dilution. That is how
22 much effluent versus lab water causes

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1 failure.

2 JUDGE REICH: Were there WET
3 limits in the 2007 permit?

4 MR. GILLESPIE: There were.

5 JUDGE REICH: And what were they
6 based on since obviously they could not have
7 been based on the 2008 STE?

8 MR. GILLESPIE: They were based
9 on earlier sublethal failures in many, many
10 test results. In fact, in five years, the
11 fifth year being 2008 but in the previous
12 four years if you add 2008, they had
13 approximately 25 percent test failure rate
14 failures. Twenty-five percent.

15 JUDGE REICH: Are the WET limits
16 in the current permit different from those
17 that were in the 2007 permit?

18 MR. GILLESPIE: I believe they
19 are the same.

20 JUDGE STEIN: I want to call your
21 attention to the time at the moment.
22 Because you've got about six minutes and

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1 we'll allow a little more time since we
2 allowed opposing counsel to go over. And I
3 don't now whether you had wanted to allot
4 MR. Sweeney some time.

5 Let me double check something.
6 Oh, never mind. You're fine. We're all set.

7 MR. GILLESPIE: I can keep going?

8 JUDGE STEIN: You may keep going,
9 But I do have a question for you.

10 MR. GILLESPIE: Yes.

11 JUDGE STEIN: There's been a lot
12 of discussion about these implementation
13 procedures and the Region's approval of them
14 and the Region's current stance and the lack
15 of explanation that the Region has had for
16 its so called flippant position. Could you
17 give us the Region's view of that?

18 MR. GILLESPIE: That is
19 definitely something I wanted to address
20 today.

21 Prior to 2002 we authorized Texas
22 to implement the NPDES permit program. At

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1 the time, unfortunately, sublethal WET
2 testing was not a priority at EPA. We were
3 trying to move forward with lethal testing.
4 And so when Texas provided us with these
5 implementation procedures, and this was
6 previous to the *Edison Electric* case that
7 upheld WET lethal and sublethal testing,
8 that case upheld it. So this was prior to
9 where we had a firm court decision upholding
10 or methods.

11 So we decided let's take a step
12 forward. And these implementation
13 procedures required monitoring and studies,
14 and that was more than anybody was doing
15 previously. So we thought, okay, that's a
16 good step forward. It's the state's
17 authority to issue permits, and we have the
18 discretion under 123 whether or not to
19 object to a state permit. It is completely
20 within EPA's discretion. So using that
21 discretion we decided, okay, let's move
22 forward. That was 2002.

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1 Then we come to 2005 and EPA
2 tells our states, okay, it's been three
3 years. It's time to fully start implementing
4 procedures for sublethal. And we sent
5 letters and we held meetings, had workshops.
6 And Texas attended. And I believe SJRA
7 representatives attended. And that is in
8 the administrative record that numbers 110
9 through 116 is all that documentation. So
10 we have fully informed everybody that it's
11 time to fully implement WET limitations for
12 sublethal. And, in fact, Headquarters to us
13 and told us, yes, we agree it's time for you
14 to start doing this and get your states to
15 start doing this. So that was in '05.

16 And then '06 Texas sent us a
17 permit without sublethal WET limits. And we
18 said look, we've informed you that this is
19 going to be what's required. It's required
20 under the Clean Water Act. It's required
21 under your Water Quality Standards. And so
22 that's when we objected to their permit.

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1 So the implementation procedures
2 were guidance. In fact, the implementation
3 procedures actually say, and I quote, "This
4 is a guidance document and should not be
5 interpreted as a replacement to the rules."
6 And that administrative record Exhibit 13.

7 JUDGE STEIN: Well I understand
8 that the procedures say that they're
9 guidance. But aren't these procedures
10 required under the planning provisions of
11 the Clean Water Act?

12 MR. GILLESPIE: The procedures
13 cannot supersede the Water Quality
14 Standards, and that's what EPA based its
15 decision on. That we have to follow the
16 Water Quality Standards. Yes, the
17 implementation procedures were a useful tool
18 during that time that we had used them, but
19 especially when we objected and Texas did
20 not fix the permit to require sublethal
21 limits, we felt as EPA we had a duty to
22 follow the federal regulations.

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1 JUDGE STEIN: Have you ever
2 subsequently disapproved these
3 implementation procedures?

4 MR. GILLESPIE: No, we have not.
5 The implementation procedures are actually
6 submitted by the state. And we certainly
7 have asked them to change their ways and to
8 move to sublethal limits. And as I believe
9 you mentioned earlier, we've been in
10 arguments with Texas over that issue for
11 many years.

12 JUDGE REICH: In approving the
13 procedures when you did, did you have to
14 affirmatively conclude that the procedures
15 were not inconsistent with Water Quality
16 Standards?

17 MR. GILLESPIE: No, we did not.
18 In fact, we did not mention Water Quality
19 Standards at all --

20 JUDGE REICH: So you could
21 approve the procedures even though the
22 procedures could have been inherently

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1 incompatible with meeting Water Quality
2 Standards?

3 MR. GILLESPIE: Well, Your Honor,
4 we did. We approved them as a continuing
5 planning process change under Clean Water
6 Act 303(e). And that was the decision at
7 the time. But I want to emphasize that it
8 was not in anyway articulated as a change to
9 Water Quality Standards. It was just a tool
10 that we thought would help us move forward.

11 JUDGE REICH: Can I ask just to
12 clarify a point we talked about before if I
13 understood you, you seemed to be suggesting
14 that the current limits did take into
15 account the 2008 STE as in essence a TRE
16 even though formally it wasn't. And that
17 the 2007 limits, which were the same, took
18 into account prior TIEs and TRES. Is it
19 necessary for us to conclude that there was
20 some underlying TRE or TIE to tie these
21 standards back to be able to uphold them, or
22 do you think you could establish these

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1 standards without any TIE or TRE at all?

2 MR. GILLESPIE: We would argue
3 first that if you believe the standards have
4 some inconsistencies, that the prevailing
5 part of the standard shall preclude
6 toxicity. In the alternative if you believe
7 that we need to mesh the TRE requirements,
8 yes, we would argue that before 2007 there
9 were many, many TREs, TIEs tests, sublethal
10 test failures that indicated that they
11 needed a permit.

12 And then for the 2008 we believe
13 that was more to try to establish that they
14 met the exemption for high dissolved salts,
15 which again we believe they do not because
16 they are arguing low dissolved salts. And
17 again, we believe that their studies were
18 inclusive.

19 JUDGE REICH: Thank you.

20 JUDGE WOLGAST: Just to follow-up
21 on NACWA's point on providing inadequate
22 rationale even just looking initially at the

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1 Water Quality Standards in the provisions,
2 not only the 307(6) provisions that you must
3 preclude sublethal chronic effects, but also
4 that then the (e)(2)(D) provisions of how
5 you go about doing that to the extent:

6 (1) You know, I guess what I'm
7 struggling with is there a sufficient
8 rationale that either what was considered is
9 consistent with (e)(2)(D) or it's
10 inconsistent and the Region provides a
11 rationale as to why they think the limits
12 imposed are necessary to make the (6)(e)(1)
13 Water Quality Standards?

14 MR. GILLESPIE: Again, I would
15 say we argued both in the alternative?

16 (a) We believe that "shall
17 preclude" is the dominating part of the
18 Water Quality Standards, and;

19 (b) In the alternative we
20 believe that TRES and TIES have already been
21 done and because they couldn't find an
22 answer to toxicity, then according to the

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1 Water Quality Standards we have to put in a
2 limit.

3 We also argue that with a three
4 year compliance schedule, again, that they
5 have the opportunity to do a TRE. Nobody
6 says they can't. And if they come out and
7 find the problem and can correct it, we can
8 certainly modify the permit and not impose
9 any WET limits in the future.

10 JUDGE STEIN: Any more questions?

11 I don't think we have any further
12 questions at the moment.

13 Mr. Sweeney.

14 MR. GILLESPIE: Thank you very
15 much, Your Honors.

16 JUDGE STEIN: Thank you.

17 MR. SWEENEY: Good morning, Your
18 Honors.

19 My name is Stephen Sweeney and
20 I'm here to address some of the technical
21 issues related to the permit provisions,
22 specifically about the long term average.

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1 But if I could address the Court's questions
2 regarding the harmonizing interpretation of
3 the Water Quality Standards.

4 Looking through the
5 administrative record and response to
6 comment document as well as the comment,
7 that particular issue wasn't raised during
8 the comment period.

9 JUDGE WOLGAST: What particular
10 issue?

11 MR. SWEENEY: I'm sorry. The
12 issue about harmonizing the state regulation
13 307.6 with the provision about toxicity
14 reduction evaluations and (e)(2).

15 JUDGE WOLGAST: Okay. And in
16 your mind does that preclude an argument
17 that the Region's actions may or may not
18 have been consistent with the Water Quality
19 Standards that include (e)(2)(D)? I mean,
20 inconsistencies with the Water Quality
21 Standards was why the Region undertook to
22 issue this permit in the first place?

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1 MR. SWEENEY: Your Honor, I
2 understand and agree with your point. I
3 believe, however Your Honor, that what the
4 Region interpreted as the Water Quality
5 Standards where Water Quality Standards
6 include designated uses, criteria to protect
7 those uses and anti-degradation would not
8 have included this predicate requirement for
9 a toxicity reduction evaluation. But if it
10 would have --

11 JUDGE WOLGAST: So I need to make
12 sure I understand what you're saying. Are
13 you saying that because it wasn't part of
14 that three tier aspect of Water Quality
15 Standards, that (e)(2)(D) isn't part -- it
16 may be part of the Texas Code, but not part
17 of the Texas Water Quality Standard?

18 MR. SWEENEY: It was approved as
19 part of the Water Quality Standards, Your
20 Honor.

21 JUDGE WOLGAST: Okay.

22 MR. SWEENEY: I believe in the

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1 Region's decision making based on the record
2 here, I believe the Region was focused on
3 that reference to protecting the Water
4 Quality Standards, the narrative water
5 quality criterion that chronic toxicity be
6 precluded.

7 The record does demonstrate,
8 though, and there were questions about
9 assuming that (e)(2) requires a predicate
10 demonstration of toxicity, where was that
11 predicate demonstration? Today in oral
12 argument we heard that the 2008 sublethal
13 toxicity evaluation was something that
14 counsel for San Jacinto River Authority
15 thought would have satisfied total toxicity
16 reduction evaluation requirements, that said
17 I believe that the Region and the record
18 would demonstrate that the Region viewed the
19 STE study more as about evaluating toxicity
20 and perhaps disproving the points about
21 toxicity rather than trying to identify or
22 reduce toxicity. This three year study and

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1 Judge Wolgast had asked about where in the
2 record is that indication of the Region's
3 review of that study. In the response to
4 comment document on pages 9 and 10 the
5 Region provides its response to the issues
6 raised during the comment period and SJRA's
7 comments on page 7. There are two
8 paragraphs that explain the study.

9 We know the study was a three
10 year study. There are data points upon
11 which the Region relied in determining that
12 chronic toxicity was not precluded. And
13 those are in Appendix G of the comment
14 response document. There are charts on
15 Appendix G that indicate toxicity in June of
16 2008, October 2007, July of 2006, I believe
17 which would cover the three year period.
18 And so that toxicity would have been
19 occurring during the period of this 2008
20 study.

21 JUDGE STEIN: But these Appendix
22 G results that you're referring to, these

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1 are tests that were or were not part of that
2 study? You're just saying they were
3 occurring the same time?

4 MR. SWEENEY: I assume that they
5 would have been part of the study if they
6 were part of the evaluations that SJRA was
7 conducting to determine the source of the
8 toxicity. And so I explained, the Region's
9 review of the 2008 study doesn't go into the
10 level of detail as the arguments presented
11 today. But the record doesn't demonstrate
12 that the Region considered these data points
13 which were generated in that preceding three
14 year period that those data points within
15 the STE study might have been considered or
16 precluded by SJRA itself.

17 Just to get to the arguments I
18 was preparing to explain about the long term
19 average proposal. In their comments on the
20 technical issues SJRA urged that the WET
21 limit be included, if it was included at
22 all, it should be expressed as a long term

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1 median average rather than as a limit that
2 could be violated if a single test indicated
3 toxicity. The Region's conclusion regarding
4 that question was that if a single test
5 indicated a toxicity and if it was a valid
6 test that met the test acceptability
7 requirements that were upheld in the D.C.
8 Circuit decision, that would indicate
9 toxicity under Texas Water Quality
10 Standards, the requirement Texas say that it
11 be precluded.

12 And moreover, an annual average I
13 think which would be as the Region explained
14 on page 24 in the response to comment
15 document, would not meet Texas Water Quality
16 Standards even if those standards were
17 interpreted to mean a longer term toxicity
18 was supposed to be protected. Because long
19 term averaging would mask actual sublethal
20 toxic failures discounting rates of test
21 failures.

22 The data in the record here

1 indicates that the effluent indicated
2 sublethal toxicity at levels below the
3 target level in 14 out of 58 tests between
4 2003 and 2008. That's a failure rate of
5 approximately 25 percent.

6 Averaging over a long term period
7 for as long as a year when the testing is
8 conducted three days a quarter, 12 days out
9 of the year is three percent of the days of
10 the year.

11 So it would undermine the
12 protectiveness of the Water Quality
13 Standards to conclude that these 25 percent
14 of the days tested actually would not have
15 indicated toxicity.

16 SJRA has not tested any of the
17 individual single test failures as an
18 invalid measurement of toxicity, it
19 challenges all of them. The permittees can
20 challenge test results, and SJRA has.

21 In the earlier state court
22 proceeding in front of the State

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1 Administrative Law Judge two of the test
2 failures were challenged and rejected by the
3 Administrative Law Judge. And like the
4 State of Ohio in the *J&L Specialty Products*
5 case, the state permit writers were actually
6 seeking to rely on those demonstrations of
7 toxicity. It was the State Administrative
8 Law Judge who had overturned their finding.

9 The Region in this decision to
10 include the sublethal test limits did not
11 rely on those two rejected tests. And
12 actually of the sublethal test failures in
13 the testing period, one of those tests was
14 excluded by the Region as being anomalous,
15 which is described on page 55 of our
16 petition at footnote 20.

17 SJRA's generalized challenge to
18 the variability of test methods and that
19 have otherwise been demonstrated as reliable
20 measurements of toxicity is an argument
21 that's precluded now. That issue was raised
22 and adjudicated by the D.C. Circuit in the

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1 *Edison Electric* case. This test variability
2 and reliability questions are one of the
3 reasons that SJRA urges that there be a long
4 term averaging period.

5 There's also an argument that
6 toxicity just cannot be controlled, which we
7 don't interpret as a serious argument.
8 Public on treatment works across the country
9 and across the State of Texas have
10 controlled toxicity that they've measured or
11 eliminated that source. In any event, the
12 Clean Water Act does not provide that
13 technological infeasibility is a means to
14 ignore or interpret around a Water Quality
15 Standard.

16 Here the approved and applicable
17 Water Quality Standard requires that
18 toxicity be precluded.

19 Finally, under generalized
20 challenged to the variability of the test
21 methods, SJRA argues that the Region has not
22 demonstrated an in-stream correlation to the

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1 toxicity measures from these WET tests and
2 the adverse effects in their receiving
3 water. That argument is technically
4 accurate. The Region did not rely on an in-
5 stream correlation which was otherwise
6 established by the state establishing the
7 Water Quality Standards in the first place.

8 What the Region relied on were
9 the measurements of toxicity conducted by
10 SJRA itself. But regardless, these
11 generalized challenges like the challenge to
12 an in-stream correlation when toxicity is
13 measured using an indicator test organism to
14 serve as a proxy for aquatic life, it can't
15 be challenged at this time because those
16 challenges were raised and argued in the
17 D.C. Circuit case *Edison Electric*.

18 JUDGE STEIN: I have just one
19 question which is the same question that I
20 posed to San Jacinto River Authority about
21 these arguments over definitions about a
22 daily average minimum NOEC and a 30 day

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1 average NOEC, and daily average minimum
2 NOEC. Is there someplace I could look to
3 where those terms are defined or are they
4 all to be defined in the permit?

5 MR. SWEENEY: They are defined in
6 the permit, Your Honor. The purpose behind
7 those different articulations of numbers to
8 be reported is primarily when additional
9 testing is conducted beyond what the permit
10 requires, there is some averaging allowed in
11 the permit. For example, in determining
12 compliance with the quarterly limit that
13 involves the average of three months.

14 And one of the questions was the
15 30 day average minimum. So you have a 30
16 day average number that's reported for
17 what's used in determining the quarterly
18 average. The minimum concentration, which
19 is the most toxic event, gets reported in
20 addition to that 30 day average.

21 JUDGE STEIN: You report both?

22 MR. SWEENEY: You report both.

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1 JUDGE STEIN: And is that clear
2 on the permit?

3 MR. SWEENEY: We think it's clear
4 on the permit, Your Honor.

5 If there are no further
6 questions, I see my time has expired.

7 Thank you, Your Honors.

8 MS. KALISEK: Thank you, Your
9 Honor. Just a couple of quick follow-up
10 points that we wanted to make.

11 First of all, getting back I
12 think to the original discussion that we
13 were having at the outset of the oral
14 argument, I think Judge Wolgast at one point
15 you mentioned that SJRA's testing had shown
16 an actual in-stream excursion. And we just
17 wanted to clarify that that's not the case.
18 That all of the testing that's been
19 performed is lab testing there hasn't been a
20 direct correlation between sublethal test
21 results of SJRA's effluent and any kind of
22 evidence in the receiving stream itself of

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1 toxicity.

2 And that gets me, I think, to an
3 additional point that was addressed a little
4 bit by Mr. Sweeney toward the end, which is
5 the problem with sublethal testing and
6 direct correlation with in-stream impacts.
7 There is a discussion of this in the
8 briefing and I think underlies, I guess,
9 SJRA's argument that the Region really needs
10 to provide a good justification for its
11 deviation from its approval of the WET
12 program in 2002 to now and its focus on
13 sublethal testing. It would have that
14 justification if it could show a clear
15 correlation between sublethal test results
16 and actual in-stream impacts. We believe
17 that there is not such a very valid or
18 substantial correlation. The EPA studies
19 that are addressed in the petition in the
20 replies and the response to comments and in
21 the comments really lump chronic testing
22 together and don't call out specific results

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1 for evaluation of sublethal testing and
2 sublethal impacts in the stream.

3 SJRA has gone back and as we've
4 detailed in our petition, we've tried to go
5 back and look at the underlying data for
6 those studies. And we're unable to pull out
7 from that data what was lethal testing, what
8 was sublethal testing and clearly see the
9 in-stream impacts from the sublethal tests.
10 And so if we had that evidence, I think it
11 would definitely -- or be more supportive of
12 the Region's shift here. We're just not
13 seeing it.

14 JUDGE STEIN: And do the Texas
15 Water Quality Standards not make the
16 distinction that you're talking about when
17 they define chronic toxicity as including
18 both lethal and sublethal?

19 MS. KALISEK: They do, they do
20 prelude sublethal impacts in streams,
21 certainly. And they say that that is
22 measured by bio-monitoring testing. But

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1 what these standards do not do is define
2 toxicity or sublethal toxicity by a single
3 test failure. They don't say, okay, we're
4 going to assume toxicity is there in the
5 stream if you have these specific WET test
6 results. They only indicate that toxicity is
7 measured generally by bio-monitoring on
8 effluent samples. But they don't zero in on
9 a specific type of test and a specific type
10 of test failure.

11 The other thing I wanted to
12 follow-up on was the 2002 letter and the
13 import of that. The letter from the Region
14 to the TCEQ approving the implementation
15 procedures.

16 I believe Mr. Gillespie indicated
17 that was just kind of a step forward in the
18 continuing planning process for the state.
19 That's not what the letter says. The letter
20 doesn't say it's a step forward, we think
21 you're moving in the right direction. Hey,
22 Texas. It says "the implementation

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1 procedures are approved." And if that
2 doesn't mean the implementation procedures
3 are protected of Texas Surface Water Quality
4 Standards, then I don't really what else it
5 could mean. That's what at all the
6 permittees in the State of Texas rely on.
7 That's, quite frankly, what TCEQ relies on.
8 And TCEQ needs that certainty as it goes
9 through drafting these permit. If it
10 doesn't have some indication from the Region
11 that the implementation procedures that its
12 using are going to be satisfactory to it,
13 then we'd be going through that veto process
14 that Judge Stein, you know you keep raising.
15 We'd be on it with every permit. And that's
16 not how we want the regulatory program in
17 Texas to work, certainly. And no
18 administrative process, hopefully, should
19 become that burdensome.

20 And also to point and to note
21 that the Memorandum of Agreement also
22 clearly contemplates that the implementation

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1 procedures will be used in conjunction with
2 the standards in drafting permit limits.
3 Page 24 of the MOA states that "Water
4 qualify based limitations and toxic controls
5 will be developed in according Texas
6 Administrative Code Chapter 307 and Water
7 Quality Standards implementation procedures.
8 So it's clear in the agreement between the
9 Region and Texas itself that the
10 implementation procedures are going to be an
11 integral part of part of drafting Texas
12 permits.

13 Getting to your questions, Judge
14 Reich, about the compliance schedule and
15 whether or not the TRE was performed prior
16 to the wet limit being imposed in the
17 permit, I would just indicate or note that a
18 compliance schedule is not the same thing as
19 a TRE. You could have a WET limit imposed
20 in a permit to go into effect for three
21 years, you could go through three years of
22 testing and have no failures, you'd have

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1 nothing to study. So that's the reason why
2 I believe Texas' approach is important that
3 a permittee be allowed to go through a
4 toxicity reduction evaluation study on the
5 front end to try to identify what's going on
6 before the measure of the imposition of a
7 permit limit is imposed.

8 Just again, a quick point on the
9 issue of the application of the exclusion
10 for salts under the Texas Water Quality
11 Standards that Mr. Gillespie was reading to
12 you about the circumstance for some Texas
13 streams with respect to dissolved salts.
14 Again, that language is provided in response
15 to comments that TCEQ received on
16 definitions for ambient and background in
17 the water quality terms, "ambient" and
18 "background." And it was not raised in, I
19 guess, a discussion of the actual definition
20 of toxicity, which is what's at issue in our
21 arguments.

22 With respect to the 2008 STE and

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1 the validity of the results of that,
2 certainly what it comes down to and the
3 evidence that SJRA relied on in coming to
4 the conclusion that the reason for the
5 sublethal test results are in an ionic
6 imbalance in the source water, that is
7 clearly laid out we believe in the
8 conclusion of that study. That study was
9 attached to our comments. It was previously
10 provided to the Region and it was really
11 only fully addressed -- or not fully
12 addressed, but begun to be addressed by the
13 region in their response to comments on the
14 modified permit.

15 And essentially what it comes
16 down to is SJRA after years of testing
17 additional toxic identification evaluations,
18 lots of characterizations for studies trying
19 to find some kind of toxic, something that
20 would be causing these sublethal effects
21 because it's SJRA's best interest to find
22 something and to fix it. Because that's

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1 going to solve the problem. It has no
2 interest in maintaining years and years of
3 study and fighting with EPA on this issue.
4 So if something had been there, we would
5 have pounced on it. The problem was we
6 weren't finding anything.

7 So SJRA went back in consultation
8 with two of the most preeminent labs in the
9 country that it was using, labs that EPA has
10 relied on in providing this public outreach
11 on the WET program to try to go back and
12 figure out well what else can we do. You
13 know, what else could it be and took a look
14 at the failure rates, started comparing the
15 effluent from Plant 2, taking a look at the
16 impacts from the mock effluent, and then
17 also testing the source water to see if
18 itself would pass the toxicity tests, which
19 it did not. And all of that information --

20 JUDGE STEIN: You'll have to wrap
21 up now because you're out of time.

22 MS. KALISEK: Okay. I appreciate

1 your time. Thank you, Your Honors.

2 JUDGE STEIN: Thank you.

3 At this point I want to commend
4 all counsel on the quality of their
5 arguments. It's been very helpful to us.
6 And we will take this matter under
7 advisement.

8 And the hearing is now adjourned.

9 THE CLERK: All rise.

10 (Whereupon, at 11:28 the hearing
11 was adjourned.)

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CERTIFICATE

This is to certify that the foregoing transcript
in the matter of: San Jacinto River Authority

Before: Hon. Kathie A. Stein
Environmental Appeals Judge

Date: June 7, 2010

Place: Washington, D.C.

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

Sam Wojack
Sam Wojack