



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 6**

**1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733**

April 14, 2010

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

Re: San Jacinto River Authority NPDES permit appeal no. 09-09

Dear Clerk of the Board:

Attached for electronic filing in the above referenced matter is Respondent Region 6's Memorandum in Opposition to San Jacinto River Authority's Petition for Review, Response to Amicus Curiae.

A handwritten signature in black ink, appearing to read "T. D. Gillespie", is written over a horizontal line.

Thomas David Gillespie  
Assistant Regional Counsel, Region 6



## RESPONSE TO AMICUS CURIAE

The U.S. Environmental Protection Agency Region 6 (Region 6 or the Region) respectfully submits this response to the National Association of Clean Water Agencies (NACWA) Amicus Curiae brief (Amicus Brief) dated March 25, 2010. The Environmental Appeals Board (EAB) granted NACWA's Motion for Leave to File such brief on March 30, 2010. NACWA filed the Amicus Brief in support of the Petitioner, San Jacinto River Authority (SJRA), in the above captioned matter. NACWA alleges two errors by the Region in this case. *See Amicus Brief* at 1. First, NACWA alleges that there was a "dramatic" and unexplained shift in the Region's legal position regarding the "legal validity of the Texas method for regulating 'whole effluent toxicity' (WET)." *Id.* Second, NACWA argues that the Region substituted a federal water quality standard for a State water quality standard in violation of Clean Water Act (CWA) section 303(c). *See Amicus Brief* at 2-3. As described in greater detail below, neither of these arguments supports NACWA's urging that that Board grant review in the above-captioned matter.

**1. The Region Did Not Make a Dramatic or Unexplained Shift in Position Regarding the Legality of Texas' Methods for Implementing Applicable Water Quality Standards for WET**

As explained in the Region's Response to the Petition in this matter, the Region determined the need for and derived the water quality-based effluent limit in SJRA's National Pollutant Discharge Elimination (NPDES) permit for WET based on the Texas water quality standards. *See Respondent Region 6's Response in Opposition to San Jacinto River Authority's Petition for Review (Response)* at 24-27 (citing Fact Sheet).

The CWA section 301(b)(1)(C) requires NPDES permits to include effluent limitations as necessary to meet water quality standards. Federal NPDES regulations provide that a permit must contain effluent limits as necessary to protect state water quality standards, “including State narrative criteria for water quality.” 40 C.F.R. §§ 122.44(d)(1), 122.44(d)(5). Texas water quality standards have narrative criteria to protect against toxicity, which specify the use of WET limits as a tool to implement these criteria. *See* 30 Tex. Admin. Code § 307.4 (General Criteria) (“Surface waters will not be toxic ... to ... aquatic life”); *See also* 30 Tex. Admin. Code § 307.6(b)(2) (Toxic Materials, General provisions) (“Water in the state with designated or existing life uses shall not be chronically toxic to aquatic life”). The Region explained why these water quality standard provisions are the relevant standards for NPDES permitting, as well as its interpretation of these standards in determining the need for and deriving the WET limits. *See Response* at 24-27 (citing Fact Sheet).

The Region also explained why it was not bound by the State’s “Procedures to Implement the Texas Surface Water Quality Standards” (Implementation Procedures) in determining the need for and deriving water quality-based effluent limits to meet the relevant EPA-approved Texas water quality standards. *See Response* at 27-33 (citing Fact Sheet and Response to Comment document). As is particularly relevant to NACWA’s first argument, the Region responded to SJRA’s argument that the Region had arbitrarily reversed its position on interpretation of the federal regulation applicable to determining the need for and deriving water quality-based effluent limits.<sup>1</sup> *See*

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<sup>1</sup> SJRA argued that under the Implementation Procedures, an effluent limit for WET “is only appropriate” after demonstrations of “persistent significant lethality,” including after a time period during which toxicity reduction studies are conducted. *See Petition* at 12-13 & n15. Neither SJRA nor NACWA offer an interpretation of the Implementation Procedures as it relates to sub-lethal toxicity, though language on

*Response* at 30. Though noting that the Region “approved” the Implementation Procedures,<sup>2</sup> SJRA did not and could not argue that the Implementation Procedures represented Texas water quality standards, much less water quality standards approved by the Region.

NACWA now expands on SJRA’s argument<sup>3</sup> arguing that the Region reversed a previous position that the Texas Implementation Procedures were “legal and consistent” with the Clean Water Act and EPA regulations. *See Amicus Brief* at 1-2. NACWA is incorrect. As discussed above, to the extent the Region has changed its position, the Region fully explained and justified the position it took in the issuance of the SJRA permit. It is worth noting, however, that the Region’s action in 2002 approved the State’s Implementation Procedures for purposes of satisfying the State’s obligation to update its “continuing planning process,” i.e., “plans” pursuant to CWA section 303(e). The Implementation Procedures document was not and is not a Texas water quality standard, but rather, a non-binding, non-regulatory guidance document, even as it relates to the State’s own permitting. *See Implementation Procedures* at p. 2 [Ex. # 13, AR # 78] (“[T]his is a guidance document and should not be interpreted as a replacement to the rules.”); *RTC* at p. 12 [Ex. # 11, AR # 121]. The EAB has specifically rejected the argument that a State policy document controls the Region’s determination of what

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pp.113-114 of the document suggests that the State may consider development of a WET limit, presumably for a lethal or sub-lethal endpoint.

<sup>2</sup> By letter dated November 22, 2002, the Region took action under CWA section 303(e) to approve the Implementation Procedures consistent with section 303(e) of the CWA. *See Response* at 29 n5. [A.R. #128]; *see also* Petitioner’s Exhibit D (2002 Letter).

<sup>3</sup> NACWA expands on the argument presented by SJRA at pp. 22-23 and n77. Board precedent regarding amicus curiae indicates that “the Board may consider some augmentation of arguments,” *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 8 (EAB Nov. 13, 2008), 14 E.A.D. \_\_\_, though amicus curiae briefs may not “raise an issue outside the scope of” the petition supported by amicus curiae. *In re: Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 22 n48 (EAB Sept. 26, 2006), 13 E.A.D. \_\_\_\_.

permit conditions are necessary to ensure attainment of State water quality standards for WET. *See J&L Specialty Products Corp.*, 5 E.A.D. 31, 62 (EAB 1994) (upholding EPA's decision to include TRE requirements in a permit to implement state water quality standards, even though state policy document cited by petitioners would specify only monitoring).

Under federal regulations, what ultimately controls the Region's determination of what permit conditions are necessary is what is required by the state water quality standards. *See* 40 C.F.R. § 122.44(d)(1)(v). As discussed in the Region's Response at pp. 23-26, the Texas water quality standards require protection against both lethal and sub-lethal toxicity. The Region did not and, indeed, cannot relax these requirements based on a state guidance document. *See American Cyanamid Co.*, 4 E.A.D. 790, 799 (EAB 1993) ("We do not believe ... that EPA can or should presume to relax an otherwise clear State water quality standard, and thereby risk violating its own obligations under the Clean Water Act, unless there are very compelling reasons to conclude that the State standard does not mean what it says").

NPDES permits must include WET limits where necessary to meet state water quality standards. The Region has never considered the Implementation Procedures to represent new or revised water quality standards and has never approved them as such, either as law or "policy." *See Fact Sheet* at pp. 3-4 [Ex. 6, AR # 60], *RTC* at p. 12 [Ex. 11, AR # 121]. Though the Region did comment on and "conditionally approve"<sup>4</sup> the Implementation Procedures, it did so only as part of the Continuing Planning Process required under CWA section 303(e) and 40 C.F.R. § 130.5(c) and the Memorandum of

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<sup>4</sup> EPA's approval was conditional on certain permitting provisions unrelated to WET. *See Letter from Miguel Flores, EPA Region 6, to Mark Vickery, Texas Commission on Environmental Quality*, Nov 22, 2002. [AR # 128]

Agreement between the Texas Natural Resource Conservation Commission (State administrative predecessor to TCEQ for administration of the NPDES program) and EPA Region 6. Because the Region's 2002 action did not result in any revisions to Texas water quality standards, the Region's action in 2009 did not represent a "change in legal interpretation" or "reversal of a previously held position" as insinuated by NACWA. *See Amicus Brief* at 2. Even if the Region did change its position regarding the utility and validity of Implementation Procedures, the Region did not approve revisions to the previously approved underlying State water quality standards (either via its "approval" of the Implementation Procedures or otherwise), which are the legal basis for the challenged permit limits. Therefore, the Board should reject NACWA's assertions on this argument.

## **2. The Region Appropriately Interpreted Texas Water Quality Standards**

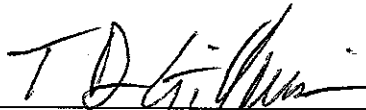
Second, NACWA wrongfully argues that the Region misinterpreted the Texas water quality standards, substituting its own "federal" standard. *See Amicus Brief* at 2. As a threshold matter, the Region notes that SJRA did not argue that the Region had established a federal water quality standard (rather only that the Region had "federalized" the permit, *see Petition* at 25). Under Board precedent, amicus curiae may not "raise an issue outside the scope of" the petition supported by amicus curiae. *In re: Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 22 n48 (EAB Sept. 26, 2006), 13 E.A.D. \_\_\_\_\_. As such, the Board should not consider this argument as part of its decision on the Petition. *Id.* For the Board's information, however, the Region refers to its response to the preceding argument – that the Region did not previously "approve" the State's proffered intent to apply certain permit conditions as a means to response to

measured whole effluent toxicity as any sort of interpretation of the State's water quality criteria for toxicity, much less approve the Implementation Procedures as revisions to EPA-approved water quality standards under CWA section 303(c). More importantly, the Implementation Procedures do not represent the State's interpretation of the applicable water quality standards, but rather only the State's stated intention to begin reducing toxicity through permit requirements. Nothing in the Implementation Procedures indicates that the State believed that it was interpreting its approved water quality standards, nor did the State indicate to the Region that it intended to so interpret its standards. Therefore, NACWA's argument that EPA has replaced the State standards "as interpreted by the state," must fail.

### **3. Conclusion**

For the foregoing reasons, 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.

Respectfully submitted,



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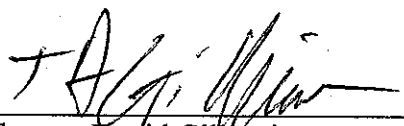
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Counsel for Respondent  
U.S. Environmental Protection Agency, Region 6

Date: April 14, 2010

### CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2010, copies of the foregoing were served upon Lauren Kalisek, attorney for the San Jacinto River Authority, Fredric P. Andes, Nathan A. Stokes, and Keith J. Jones, attorneys for the National Association of Clean Water Agencies, and to the Clerk of the Board, Environmental Appeals Board, as indicated below.

  
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Thomas David Gillespie

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