

**Congress of the United States**  
**Washington, DC 20515**

June 13, 2011

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington D.C., 20460

Dear Administrator Jackson:

For almost two decades, the EPA has required permit applicants to conduct whole effluent toxicity (WET) tests and has required that permits issued in accordance with the National Pollutant Discharge Elimination System (NPDES) comply with Title 40 Code of Federal Regulations Part 122.44(d) with respect to WET. There has been no change in this regulation. However, EPA Region 6 has recently made significant changes in its requirements with respect to how the WET program is implemented pursuant to this regulation. The changes are a requirement to include a sublethal WET permit limit based on the results of sublethal WET tests and a requirement to do studies to identify the cause of failures and corrective programs when only sublethal effects are present.

While we understand, and share, EPA's goal of protecting our waterways from instream toxicity caused by pollutant discharges, we are concerned that the costs and regulatory burden of implementing EPA's policy with regard to sublethal WET test failures is not justified given the apparent lack of environmental benefits based on the following:

- Implementing this policy could cost Texas communities in excess of \$20 million per year.
- EPA's own studies indicate that there is no demonstrated correlation between sublethal WET testing in the laboratory and actual instream impacts.
- Toxicity investigations attempting to identify the causes of test failures when only sublethal effects are present can cost hundreds of thousands to millions of dollars, and to the limited extent that such studies have been attempted; they have typically been unsuccessful in identifying, and eliminating the causes of sublethal WET test failures.
- Sublethal WET permit limits subject a permit applicant to potential enforcement by state agencies, EPA and to third-party citizen suit liability for test failures that may simply be the result of the statistical error rate of the test.

Given that the regulatory burden imposed in meeting a sublethal WET limit can be substantial, we urge you to revisit this EPA policy and work with representatives of the regulated community and the Texas Commission on Environmental Quality to refine the policy in a manner that meets the requirements of the federal Clean Water Act but provides more flexibility to the State and takes into consideration the environmental significance and the technical challenges posed by sublethal WET permit limits.

Possible approaches include the following:

- Suspend the imposition of sublethal WET limits until additional studies are conducted that clearly demonstrate a correlation between sublethal test results and instream sublethal toxicity
- Only impose a sublethal WET limit after a permit applicant has conducted a successful study to identify the cause of, and corrective measures to eliminate, test failures.

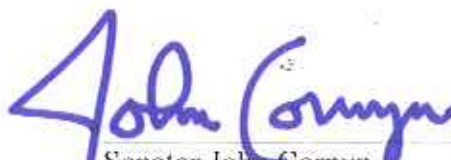
It is our understanding that TCEQ is supportive of alternatives such as these. In addition, there may be other approaches that reflect the unique challenges of sublethal WET testing while providing adequate protection against instream sublethal toxicity.

We see this not as a request to lessen the regulatory commitment to clean water, but rather an opportunity to refocus our public entities' limited resources in a manner that will most effectively protect water quality. In this challenging economic time of budget cuts and identification of cost-saving opportunities, we seek your help in ensuring that tax-payer and rate-payer funded scientific investigations and capital investments go to measures that clearly result in water quality protection and enhancement.

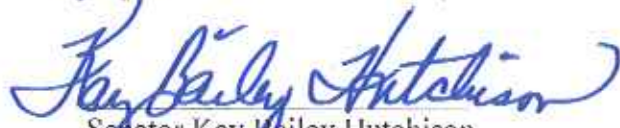
Thank you for your attention to this matter.



Rep. John R. Carter (TX-31)



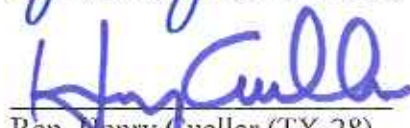
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Rep. Henry Cuellar (TX-28)



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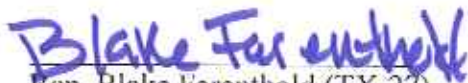
  
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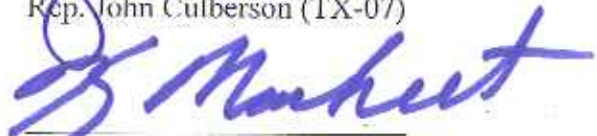
  
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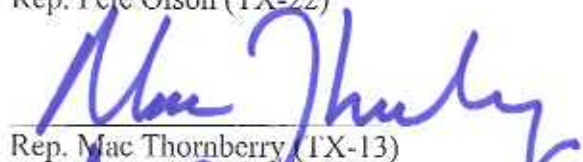
  
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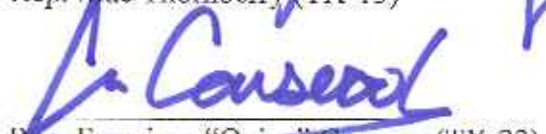
  
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