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May 30, 2003

Via E-Mail and Overnight Delivery

Daniel R. Dertke, Esquire
U.S. Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986

Stephen J. Sweeney, Esquire
U.S. Environmental Protection Agency
Office of General Counsel
Ariel Rios Building, MC 2355A, Room 7507F
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: *Edison Electric Institute et al. v. United States Environmental Protection Agency et al.*,
No. 96-1062 and Consolidated Cases — Settlement Proposal

Dear Messrs. Dertke and Sweeney:

As discussed a few weeks ago, several of the petitioners in the above-referenced matter are interested in discussing settlement of the Whole Effluent Toxicity (WET) litigation. On behalf of the WET Coalition, the Municipal Parties and API, we submit the enclosed measures that, if taken by EPA, would adequately address our concerns with the recently promulgated WET test methods and would provide a basis for settlement. The measures are divided into two topics: (A) writing NPDES permit limits that would be enforceable and (B) changes to the WET methods themselves.

In brief, those measures are the following:

Permit Writing and Enforcement

- Require a “tiered” approach for both compliance testing and “reasonable potential” determinations.
- Make risk-based WET permit decisions for special situations like storm water.

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- Provide that the failure of one acute WET test is not a permit violation unless there is an instream effect.
- Provide that failure of two acute tests is not a violation if they are remote in time.
- Provide that failure of two consecutive acute tests can be a permit violation unless certain facts are established by the permittee.
- Provide that failure of a chronic test is not a violation except where other evidence indicates environmental toxicity.
- Provide that failure to comply with accelerated testing or a TIE/TRE is a violation.

Changes to the WET Methods

- Specify a detection limit for each WET test and each endpoint.
- Abandon hypothesis testing as a stand-alone or primary determinant of WET.
- Develop parametric point-estimation models and generate reliable confidence intervals.
- Require a dose-response relationship.
- Withdraw the recommendation of unapproved "West Coast" methods.
- Restore the 1989 method for calculating growth endpoints.
- Add Data Quality Objectives to the WET methods.

The parties are especially concerned that NPDES permit limits based on WET tests could be set so as to create frequent "violations" of the permit without effluent toxicity or instream impacts. Many companies have adopted environmental compliance policies that commit to avoiding permit violations, and even a single violation is a serious matter. Several states have enacted mandatory penalty policies for permit violations; these policies, along with the possibility of citizen suits, also make toxicity violations a serious matter, even if EPA is willing to exercise enforcement discretion.



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We recognize EPA's interest in primarily addressing implementation, and we have tried to limit method changes to the minimum practical. Our requested implementation and enforcement provisions are drafted in specific terms. However, they are intended as a starting point and we would be willing to consider alternate trigger levels or specific provisions. Similarly, we are open to considering alternative approaches to address our concerns with the methods.

We look forward to discussing this proposal with you in the days ahead.

Sincerely,

A handwritten signature in black ink that reads "James N. Christman".
James N. Christman

Enclosures

cc: Fredric Andes, Esquire
David E. Evans, Esquire
John C. Hall, Esquire