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June 3, 2003

Daniel R. Dertke, Esquire  
U.S. Department of Justice  
Environment & Natural Resources Div.  
Environmental Defense Section  
P.O. Box 23986  
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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: *Western Coalition of Arid States (WESTCAS) v. EPA***  
**Case No. 03-1087 (Consolidated with Nos. 96-1062,**  
**03-1091 and 03-1094 -- 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 Western Coalition of Arid States (WESTCAS), 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. We look forward to your comments.

Sincerely,



John C. Hall

Enclosure

cc: Fredric Andes, Esquire  
David E. Evans, Esquire  
James N. Christman, Esquire

## WESTCAS SETTLEMENT PROPOSAL FOR WHOLE EFFLUENT TOXICITY (WET) METHODS

The Western Coalition of Arid States (WESTCAS) proposes the following changes to the application of Part 136 WET methods in arid and semi-arid areas for receiving streams that are zero flow or low flow but effluent dominated. These streams present unique issues and do not fit any database EPA has developed with respect to the appropriateness of the methods to represent instream conditions and impacts or the interferences encountered in conducting such tests for facilities discharging to such waters. As such, flexibility is required to ensure that WET procedures are appropriately applied in such environments.

1. Consistent with Part 136.2 Appendix B, as the equivalent MDL and PQL for chronic survival, growth, and reproduction evaluated using hypothesis testing and point estimate testing, the pass/fail effluent limit shall be no less than 2 TUc (i.e., no chronic toxicity in 50% effluent). Rationale: This effluent limit reflects the two dilutions variability of the test as documented in standard reference toxicant testing and blank analysis. This limit is also appropriate as the PQL for point estimate testing in lieu of the confidence intervals deleted by EPA and to reflect the greater than 25% difference between control and effluents, as is necessary to approximate the 99<sup>th</sup> percent confidence level referenced in Appendix B. Moreover, for low flow effluent dominated streams, the instream waste concentration (IWC) is at or very near the 100% effluent concentration. This makes it impossible to bracket the IWC with higher and lower concentrations as recommended by EPA and to demonstrate the dose-response curves necessary for evaluating the reliability of the test results.

2. The Green Alga, *Selenastrum Capricornutum*, acute and chronic tests shall be amended in the Scope and Application sections to reflect that it is not applicable to Western arid and semi-arid low flow and effluent dominated streams. Rationale: No field testing has been performed to demonstrate whether or not use of this species is representative of this environment or provides a reasonable surrogate for expected impacts.

3. Biomass and reproduction as the chronic endpoint shall not be applied in Western arid and semi-arid streams and growth and reproduction impacts shall be calculated based upon the number of surviving organisms. Rationale: These endpoint changes, significantly affecting the stringency of the test were never correlated to instream impacts in Western arid and semi-arid streams.

4. Where natural ionic concentrations in the receiving water that are significantly different than the culture water, the development of site-specific procedures and adjustments for daphnid testing shall be required prior to use of daphnid testing in a pass/fail permitting format. Rationale: The change reflects this limitation on applicability of daphnid tests to certain naturally present ion concentration/combinations in Western arid and semi-arid streams. Ionic inhibition to proper performance of the daphnid test is well recognized but cannot be currently corrected. Until some type of appropriate adjustment is developed, this test is not applicable to

such waters for pass/fail consequences but may be used for screening. Screening will not penalize for natural conditions that interfere with and disable the functions of these test species.

The following changes in implementation of these methods must be made in permitting Western facilities.

1. DMR certification shall not be to "accuracy" but to conducting the test in general consistency with the mandatory requirements and with adjustments designed to seek completion of test artifacts. The DMR format shall enable explanations by the laboratory of observations made. Opinions of the experts conducting the tests on the variability, interferences, adjustments to complete the tests, reliability of the test results, etc. shall be given great weight in assessing whether the test reflects an enforceable test failure.

2. Permits shall require that two consecutive excursions of 2 TUc occur before a TIE/TRE process must begin. Such TIE/TRE shall be part of an automatic compliance schedule in the permit. Excursions found in the follow up confirmation testing and TIE process shall not be enforceable violations because of the compliance schedule.

3. Where toxicity is confirmed and new numeric effluent limits for specific parameters result from TIE/TREs or numeric toxicity limits are adopted, a reasonable period of time to construct treatment processes or otherwise implement control measures shall be given in the permit through a compliance schedule, where authorized in state law and not in an enforcement order.