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Robert Moser, MD, Acting Secretary

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Sam Brownback, Governor

January 31, 2011

Ms. Karen Flournoy, Acting Director  
Water, Wetlands, and Pesticides Division  
USEPA Region 7  
901 North 5th Street  
Kansas City, Kansas 66101

Re: EPA's December 22, 2010 draft permit interim objection letters  
Kansas City Kaw Point Plant - KS0038563  
Independence Plant - KS0095486  
Garden City Plant - KS0038962

Dear Ms. Flournoy:

The Kansas Department of Health and Environment (KDHE) is in receipt of EPA Region 7's letters dated December 22, 2010 providing interim objections to the referenced draft permits public noticed on November 25, 2010. Since the primary issue in each interim objection letter is the same, KDHE will address the issue in this common response.

#### Average Weekly Bacteria Limits

In each objection letter, EPA Region 7 contends that POTWs are required to have bacteria limits based upon average weekly and average monthly discharge limitations pursuant to 40 CFR Part 123.44(d). However, 40 CFR Part 123.44(d) states in pertinent part: "...all permit effluent limitations .... shall unless **impracticable** [emphasis added] be stated as .... (2) average weekly and average monthly discharge limitations for POTWs." Weekly average bacteria limits are neither practicable nor necessary for the following reasons:

1. EPA's current criteria are based on long term exposures. There is no epidemiological correlation between health risk and weekly average bacteria limits.
2. EPA's Beach Monitoring guidance states that short term criteria only need to be used for beach notification purposes. They do not need to be used for NPDES permits or 303d listings. EPA also acknowledged that short term criteria are not mandatory and may be used only for beach notification purposes in guidance jointly developed by EPA and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA).
3. The Kansas monthly geometric mean is more stringent than the EPA criteria which are based on a recreation season (90-day) geometric mean. EPA elaborated in the Beach Act and in joint guidance developed by EPA and ASIWPCA that the EPA bacteria criteria are based on long term averaged data, i.e. a recreation season. To quote from the EPA-approved ASIWPCA guidance:

*"The States and EPA are in agreement the bacteria standard is a general indicator of the sanitary condition of a waterbody. Therefore, the expression of the criterion can, and perhaps should be, expressed as a long term geometric mean without regard to the number of samples collected..."*

Since KDHE has adopted the “long term geometric mean” as a monthly standard, the standard is already inherently more stringent than EPA guidance calls for states to adopt.

4. EPA is under court order to develop and publish new bacteria criteria by October 2012. Those criteria and their implementation may radically differ from the bacteria criteria in place today. EPA has promised to issue implementation guidance for permitting and assessment concurrent with the criteria. It would be prudent to wait the 20 months until that implementation guidance is published to see if the latest science supports short term limits for NPDES permits. If it does, short term limits can be implemented in Kansas permits. If it does not, we will not have unnecessarily saddled Kansas communities with the unwarranted burden of weekly limits.
5. Kansas collects sufficient treatment plant operating data to assess compliance with water quality standards by requiring year round disinfection and monitoring – not just during the recreation season as is the case with many states.

While EPA Region 7 has only objected to these three permits, KDHE assumes Region 7 will propose to require weekly limits for all Kansas NPDES permits requiring E. coli limits. Our rationale for not including weekly limits in these three permits holds for all Kansas NPDES permits. We would also point out that EPA's six-hour holding time for bacteria samples requires most facilities to have city staff drive samples to the commercial laboratories to meet holding times. In many cases, the round trip to the laboratory takes the better part of a staffer's day. Thus, requiring weekly sampling, as is implied in EPA Region 7's interim objections letters, would create an even greater hardship on small communities for no benefit.

Therefore, KDHE concludes that weekly average bacteria limits are impracticable because they have no epidemiological tie to a health risk, are not supported by their originating document and create an unnecessary burden and additional expenses especially for small communities. An equally compelling argument for not imposing weekly limits at this time is the fact EPA will be publishing new bacteria criteria and their implementation guidance in less than two years. The criteria and implementation may or may not support short term limits - why jump the gun? The only purpose for a statistically calculated weekly average bacteria limit, at this time, is to increase the number of paper violations while providing no additional protection to public health and the environment.

#### **Monitoring Frequency**

EPA Region 7 also questioned if the twice monthly sampling frequency is adequate for a monthly limit “as well as any average weekly limit for bacteria”. The records for the Independence and Garden City facilities show the monitoring frequency is appropriate to obtain representative samples of the effluent and yet also show the variability that occurs in the normal operations of the facilities. The use of geometric averages for determining compliance with the permit limits acknowledges the variability of the test method, sampling techniques and the fact that the wastewater treatment plant is reducing the bacterial concentration by a factor of  $10^5$  from influent to effluent.

The EPA letters appear to suggest that by placing a weekly average limit in the permit, the permit writer should also increase the monitoring frequency. This supposition is contrary to the standard practice of basing the monitoring frequency on the facility's operating record and the facility's and receiving stream's characteristics. In fact, in EPA's discussions of monitoring frequency, EPA states that a good operating record is grounds for reducing monitoring frequency.

**Kaw Point Plant – No Feasible Alternative Analysis**

In addition to the objections discussed above, EPA Region 7 required information showing that the “no feasible alternative analysis” for monitoring location 001C1 satisfies the requirements of 40 CFR Part 122.41(m)(4). 40 CFR Part 122.41(m)(4) consists of three parts:

- a) The bypass was unavoidable to prevent .....severe property damage. As stated in the Fact Sheet accompanying the draft permit, the CSO policy defines loss of solids from the secondary treatment units as severe property damage. The Fact Sheet and permit clearly state that use of 001C1 is contingent upon avoiding the loss of solids from the secondary treatment units.
- b) No feasible alternatives studies. As stated in the Fact Sheet, the parties to the consent decree, EPA, DOJ, UG and KDHE agree that the current Long Term Control Plan addresses, and the updated Long Term Control Plan will address the no feasible alternatives requirement.
- c) Submittal of proper notice. As stated in the Fact Sheet and the draft permit, the permittee is required to submit proper notice of the use of 001C1.

Therefore, KDHE concludes that all the parts of 40 CFR Part 122.41(m)(4) have been satisfied as explained in the Fact Sheet and the draft permit.

If the responses provided herein do not satisfy EPA Region 7's interim objections to the Kaw Point draft permit, KDHE requests that EPA issue a formal objection to the draft permit so it can proceed to hearing and/or EPA issuance of the permit. If you have questions regarding this letter, please contact Mike Tate of my staff at 785.296.5504.

Sincerely,



Karl Mueldener, PE, Director  
Bureau of Water

C : Bob Roddy - UG  
RG - Permit File  
Mike Tate