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APPA

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May 20, 2004

The Honorable Dr. John Graham
Administrator
Office of Information and Regulatory Affairs (OIRA)
Office of Management and Budget (OMB)
Eisenhower Executive Office Building
Washington, D.C. 20503

Dear Dr. Graham:

The American Public Power Association (APPA) would like to thank you for this opportunity to suggest regulatory reforms that are important to our members.

Public power is the term used to describe the more than 2,000 municipal and other state and local community-owned electric utilities that provide electricity for approximately 40 million Americans. These public power systems are among the most diverse of the electric utility sectors, representing utilities in small, medium and large communities in 49 states (all but Hawaii). Seventy-five percent of public power systems are located in cities with populations of 10,000 or less. Overall, public power accounts for about 14 percent of all kilowatt-hour sales to consumers.

More than 90 percent of the APPA member municipal or state owned utilities meet the definition of small business under Small Business Enforcement Fairness Act (SBREFA).

APPA was created in 1940 as a non-profit, non-partisan organization. Its purpose is to advance the public policy interests of its members and their consumers, and provide member services to ensure adequate, reliable electricity at a reasonable price with the proper protection of the environment.

APPA urges the U.S. Office of Management and Budget to Review a number of regulations (existing rules and those anticipated to be promulgated within eight months)

- CWIS Phase III (Clean Water Act) (U.S. EPA)

- Revise IRS Circular 230 (U.S. Department of Treasury)
- SPCC Plans adjustment to reflect substation equipment issues (U.S. EPA)
- Mercury Monitoring (in anticipation of the EPA final rule whether for MACT or cap/trade) (U.S. EPA)
- Text methods and analytical procedures issues (Clean Water Act-U. S. EPA)

APPA appreciates the consideration of these suggestions by you and the OMB staff offered to reform and improve the regulatory process. We welcome an opportunity to meet with the EPA, IRS, or OMB staff if clarification of these issues is of value.

Sincerely,

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I. Cooling Water Intake Structures Phase III (expected to be proposed by Nov. 2004)

Regulatory Agency: U. S. EPA

Authority for rule, policy or guidance: Clean Water Act, Section 316(b)—"Phase II rule" anticipated to be proposed by November, 2004 (Court ordered deadline).

Description of what existing rule, policy or guidance does: While this rule has not yet been promulgated, this rule is expected (based upon Phase II rulemaking) to establish baseline studies, permitting changes, and technology requirements to reduce impingement and entrainment of aquatic organisms at the intake structures for < 50 MGD manufacturing facilities and electric utilities.

Affected small businesses: Between 50 and 120 electric utilities (50 of which are public power municipal utilities) and approximately 500 manufacturing facilities.

APPA's view:
Uniform standards are not necessary to prevent significant adverse environmental impact from cooling water intakes at these facilities. Such standards are unlikely to generate net benefits at individual facilities and certainly will not do so do so nationally. Moreover, the small size of our facilities and systems means that increases in costs are likely to be proportionally larger and more difficult to spread among facilities in our system – threatening our mission of providing low cost electricity to our communities.

EPA's existing record is sufficient to demonstrate that no further Federal action is necessary with respect to these facilities. EPA should promulgate a notice to this effect as part of its upcoming proposal for Phase III of the regulations implementing Section 316 (b) of the Clean Water Act. States would continue to have authority to regulate under state primacy if an adverse environmental need justified the installation of technology or use of restoration.

Background on 316(b) Phase II and III (and relationship between the two rules).

The Environmental Protection Agency (EPA) is in the midst of a three- phase process to promulgate standards for cooling water intake structures at all facilities subject the NPDES permitting program that withdraw cooling water from waters of the United States. EPA has completed phase I, which covers cooling water intake structures at new facilities. EPA has also completed and announced on its website the Phase II rule (although not yet published in the Federal Register) which covers existing electric generation facilities that withdraw more than 50 million gallons per day for cooling purposes. EPA faces a November 2004 deadline for proposal of its rule governing the remaining facilities in Phase III. Phase III covers municipal utilities, "peakers" for investor utilities and manufacturing facilities.

The phase I rule promulgated stringent technology standards for new facilities.

The phase II rule establishes stringent performance standards for facilities based on the type of water body from which they extract their cooling water.

Specifically the Phase II rule, which may be viewed as an indicator of Phase III's possible impact, will require facilities to meet the following performance standards:

Waterbody Type	**Capacity Utilization Rate**	**Design Intake Flow**	**Type of Performance Standard**
Freshwater River or Stream	Less than 15 percent	N/A	Impingement mortality only
	Equal or greater than 15 percent	5 percent or less of mean annual flow	Impingement mortality only
		Greater than 5 percent of mean annual flow	Impingement mortality and entrainment
Tidal river, estuary, or ocean	Less than 15 percent	N/A	Impingement mortality only
	Equal or greater than 15 percent	N/A	Impingement mortality and entrainment
Great Lakes	Less than 15 percent	N/A	Impingement mortality only
	Equal or greater than 15 percent	N/A	Impingement mortality and entrainment
Lakes or Reservoirs	N/A	No disruption of thermal stratification except where it does not adversely affect the management of fisheries.	Impingement mortality only

For facilities required to meet impingement requirements (all facilities covered by the rule) impingement mortality of fish and shellfish must be reduced by 80 to 95 percent.

For facilities required to meet entrainment standards, entrainment must be reduced by 60 to 90 percent. Based upon discussions with the EPA staff, we believe that approximately sixty percent of the utilities in Phase III have cooling towers and thus would not likely need any additional controls. Facilities that already employ closed-cycle cooling are deemed to be in compliance.

The final rule also includes provisions for site-specific – less stringent – standards where the costs of meeting the performance standards cited above are either significantly greater than the costs estimated by the EPA or significantly greater than the benefits associated with meeting the performance standards.

Although these standards represented the most cost-effective alternative examined by the EPA, yet the costs still exceeded the quantifiable benefits by a large margin. Moreover, EPA's analysis assumes that benefits are proportional to intake flow, while costs have a significant fixed cost component. If these assumptions hold true, it should be more cost-effective to regulate large facilities than smaller facilities. **Given, the benefits as reported by the EPA, APPA believes that EPA has reached or passed the point of diminishing returns – as demonstrated by a net annual regulatory cost of $316 million**. APPA believes that installation of additional technologies by the average smaller public power utility facilities will not be cost-effective. EPA's own analysis demonstrates that a Phase III rulemaking would not be cost-effective.

APPA is not convinced that any additional Federally required controls are needed at the utilities in Phase III regardless of ownership (i.e. public/municipal power or investor-owned).

Why are uniform national standards unnecessary to protect the environment?

Section 316(b) of the Clean Water Act is self-implementing. All facilities that obtain a NPDES permit are required to address issues related to the design, construction, and operation of their cooling water intake structures. States will implement this requirement as a part of the permitting process.

As a result, state regulators have authority under this provision of the statute to address any unique situations regarding a small electricity generating unit. Therefore, even if a facility exists that is causing a disproportionate adverse environmental impact; those impacts can be addressed through the permit process. The state regulators have had this authority for more than 20 years and APPA's recommendations for reform would not alter this state authority to regulate.

Why are uniform national standards unlikely to generate net benefits at individual facilities?

First, utilities covered by phase III withdraw less than 50 million gallons per day of water. In most instances this is unlikely to result in significant takings of aquatic organisms. Although the EPA assumes that such aquatic losses are directly proportionate to flow, the social benefits may not be proportional to flow. Low levels of aquatic organisms killed or injured in smaller systems are more likely to be within the natural and seasonal range for an ecosystem. The marginal benefits of reducing this loss would be very low.

For example, according to EPA's case study analyses of Phase II facilities in the Inland Region—where two thirds of the facilities are located—annual yield losses due to impingement and entrainment average 45 pounds for each million of gallons per day of design flow. As a result, the largest possible yield reduction attributable to one of these smaller facilities of less than 50 million gallons per day is 2,200 pounds per year. Much of this yield loss is associated with entrainment which would not likely be addressed at facilities of this size in an EPA Phase III rulemaking. APPA wonders what the real environmental benefit would be for Phase III's smaller facilities.

Even if EPA's estimates are taken at face value, one would have to put a very high value on such losses even to justify the cost of permitting, let alone the cost of additional control technology. **In fact, using EPA's estimate of use benefits, the total value of baseline losses from a 50 MGD facility would be less than $2,300.00. APPA believes that this demonstrates how ineffective a national Phase III rule would be for <50 MGD facilities. These EPA cost estimates are low and do not include the costs of the purchased power by municipal utilities that must purchase power during the planned outage for retrofit of traveling screens or other control devices. Often a modest retrofit means a downtime of 30-90 days. Most public power communities would see an increase in electric rates ranging between 5 and 15 percent during this time of purchased power from the bulk power market. EPA's estimates on costs in Phase II (and in Phase III) have not identified this additional cost.**

Based upon available information, APPA estimates that the average design flow of our facilities that could be regulated under a Phase III rule is about 35 MGD. Using a weighted average (based on EPA's baseline values for E and I losses) of $400 per MGD, we can calculate that the expected baseline losses at one of these facilities are less than $14,000. If the ratio of benefits to baseline losses holds from the Phase II rule to the Phase III rule, **expected benefits of these standards is expected to be about $5,300 per facility**. APPA believes that it is hard to imagine that these benefits will justify the cost of any standard given the costs of permitting and administration at the state agencies (Unfunded Mandates) and the costs to the permitted facility. **Appendix A of the EPA's**

prepublication final phase II rule places annual compliance costs for facilities with design flows in the range of 50 million gallons per day between $20,000 and $150,000 per year.

A rule that presumes that such facilities must meet performance standards would force operators of these facilities into a very complicated and expensive demonstration to show that increasing yields by less than 200 pounds per year is not likely to be cost-effective.

Why are uniform national standards unlikely to generate net benefits in the aggregate for this category of facilities?

The universe of municipal utilities that will be covered by these standards is simply insignificant in terms of its impacts on the environment.

We estimate that approximately 50 and 120 facilities are likely to be covered by the phase III rule. Of these facilities, EPA says that approximately 60 percent already employ some type of closed-cycle cooling. That leaves fewer than 50 facilities covered by national performance standards. **The public power industry's cumulative, nationwide withdrawals are lower than some of the individual facilities regulated in phase II.** In fact, the 50 million gallon per day cutoff is lower than the make up water requirements for some facilities with cooling towers that are automatically deemed to be in compliance.

APPA's suggested reform for CWIS Phase III:
APPA believe that the costs to implement a national Phase III rule requiring technology controls exceed the environmental benefits.

- APPA believes that the EPA's should cover utilities >50 MGD only;
- APPA believes that the proposed rule should be based upon controls for impingement only;
- APPA believes that the EPA final rule for Phase III should defer to state permitting authorities for Phase III controls unless there is an Endangered Species Act concern and, finally:
- APPA believes that If the EPA is determined to regulate the <50 MGD utilities, APPA urges the EPA to stagger the compliance date to five years after Phase II kicks in (which is in 2007). Staggering the effectiveness date for NPDES reviews to include 316 (b) requirements will minimize the regulatory burden on public power utilities by allowing the technology to be scaled down to smaller intake sizes and for the marketplace to provide more contractors (at lesser costs) for public power communities across the country. Currently there are only a dozen qualified contractors to implement Phase II—if the timing is not staggered for Phase III, too many Phase III facilities will be "chasing" the same contractors needed for far more sophisticated, expensive work for NPDES and 316(b) engineering and retrofit work in Phase II.

II. Regulations Governing Practice Before the Internal Revenue Service

Regulating agency: Office of the Secretary, Department of Treasury

Authority for rule, policy or guidance: Section 330 of title 31 of the United States Code.

Description of what existing rule, policy or guidance does: Modifies regulations governing practice before the Internal Revenue Service (Circular 230). Among other things, subjects opinions on municipal bonds to the disclosure requirements of Circular 230 for the first time and brings such opinions under the definition of "tax shelters."

Affected small businesses: Municipal public power electric utility systems

Regulatory burden(s) imposed: The proposed regulation estimates an additional 8 minutes for disclosing practitioners, but the industry agrees that such a radical change in regulation of the municipal bond sector will require a significantly greater burden on public power systems and other municipal entities issuing bonds. As described below, this burden could translate into higher power costs for public power customers and additional legal costs for bondholders.

Proposed burden reduction: Reduced electric rates for consumers. If tax exempt bonds were more desirable to the market, presumably the burden level to tax paying entities would be reduced. Less desirable tax-exempt bonds can result in higher costs to consumers.

Anticipated benefit(s) for small entities: These are detrimental to small entities because of added legal costs and diminished marketability of tax-exempt bonds. Tax exempt bonds would be less desirable to the market because they would be inappropriately labeled as "tax shelters" and accompanied by lengthier opinions providing less clarity than conventional "unqualified opinions" and requiring multiple legal reviews. These factors would translate into higher electric bills for customers of public power systems because public power would have to pay its bondholders a higher interest rate to make up for the diminished marketability of the bonds and pay higher legal fees. These costs would have to be captured in rates collected from power customers. Bondholders would also likely incur additional legal fees.

APPA's suggested reform: he proposed regulations on Circular 230 should be revised to preserve the historic exception for the municipal bonds from the definition of tax shelter and from the application of Circular 230.

III. Clean Water Act's Section 112.1 (b) and related requirements under the Spill Prevention, Control, and Countermeasure Plan Requirements for Onshore Oil-Filled Electrical Equipment

Regulatory Agency: U. S. EPA

Authority for rule: Clean Water Act; Section 112.1

Description of what existing rule does:
Manufacturing, service and municipal electric utilities (of which 90% meet the definition of SBREFA) must update their SPCC plans by August 17, 2004. The SPCC plan requirements, which are generally flexible and fair, require oil spill contingency plans and certification by licensed professional engineers (PE's). These plans are based upon the threshold at a facility. This SPCC plan includes oil-filled equipment at electric utility, manufacturing, and commercial facilities where the equipment does not pose a risk. (APPA's expertise is limited to electric utilities but APPA is aware that some manufacturers share some of the same concerns about electrical equipment that is not hydraulically connected at manufacturing facilities).

Generally speaking, the EPA has worked to minimize the regulatory burden in a number of areas in its final SPCC rule issued in 2002. However, the EPA has overstated the risks from electrical equipment that pose virtually no risk of discharge to the environment. The inclusion of all the electrically connected substation equipment has increased the regulatory burden of the SPCC requirement dramatically despite the EPA's general desire to make the SPCC rule fair, reasonable, and able to be implemented by the hundreds of thousands of manufacturing companies, service companies and several hundred APPA members' utility operations that must comply with this rule.

Affected small businesses: Utilities affected: 1,000 municipal utilities (APPA members) and probably 800 rural co-operative utilities and many thousands of manufacturing companies have 394,000 oil-fired electrical equipment containing greater than 55 gallons of oil and 274,000 are below the 1320 gallons level. It is the inclusion of the many thousands of pieces of electrical equipment to comprise the threshold that brings so many municipal utilities into the program. These pieces of oil-filled equipment are electrically connected but not hydraulically interconnected. Failure of one piece of equipment is extremely unlikely to cause the failure of any other piece of equipment at the same substation.

Proposed burden reduction: The proposed burden reduction by amending the SPCC final rule to follow the suggestions by the Utility Solid Waste Act Group (USWAG), which includes APPA as a member, to amend the rule to classify oil-filled electrical equipment differently from higher risk oil-filled equipment.

The USWAG comments (submitted on several occasions since the early 1990s) have addressed the technical components of the manner of treating substation and other utility substation equipment. The universe of electrical equipment used in distribution of electricity includes transformers, circuit breakers, voltage regulators, switches, capacitors, as well as the urban networks of underground dielectric fluid-filled transmission cable systems. The USWAG comments from 1991 estimated that approximately 2 million pieces of electrical equipment at 48,000 electrical substations could be affected by amending the SPCC rule. These range in size from two gallons to approximately 100,000 gallons (although most APPA members' size would be range of between 2 and 1,000 gallons). USWAG has also estimated a universe of 50,000 distribution transformers (often at a utility customer's location such as a parking lot, shopping mall, municipal governmental building, community college, etc). These numbers represent USWAG's estimate for the total electric utility sector. APPA does not have estimates for impact in the municipal utility subset.

The strongest evidence that electrical equipment poses a low risk to surface waters is the history of extremely infrequent discharges to water. The 1991 estimate of <u>the number of discharges to navigable waters from the two million pieces of electrical equipment at nearly 50,000 substations was between 10 and 15 per year and most of these discharges involved very small quantities of oil. The rate of discharge from electrical equipment is far below one percent.</u>

IV. Proposed Mercury MACT or cap and trade monitoring requirements for Mercury (anticipated to be finalized resulting from the pending rulemaking Docket No. OAR-2002-0056)

Regulatory Agency: U. S. EPA

Authority for rule: Clean Air Act's Section 111 and 112 authority (pending rulemaking, Docket No. OAR-2002-0056)

Description of proposed rule: EPA's proposed rules for reducing mercury emissions from electric utilities (as proposed for either Mercury MACT or cap and trade approach) require monitoring before the technology is ready for smaller municipal utilities. The costs for these technologies will be enormous because the technologies are not "off the shelf" and are not ready to be used by smaller, municipal utilities. In all fairness, the use of these "not ready for prime time" mercury monitoring technologies would be almost as difficult at larger utilities that have larger technical staffs and considerably larger budgets than municipal utilities.

Mercury is a trace element in coal. Mercury is released from the coal during combustion and generally exits the boiler in the flue gas. Mercury is contained in coal-fired flue gas in concentrations on the order of parts per **billion (ppb)** – not parts per million like other criteria pollutants such as SO_2. Because of these minute flue gas concentrations, making accurate measurements of mercury emissions has proven to be extremely difficult.

Compliance monitoring at smaller systems should be on a quarterly basis using ASTM coal sampling/testing procedures or other approved methodology. Small plants would be defined to include plant/unit configurations as of the effective date of the new rules. Any new units built at small plants would be subject to mercury emission regulations, but existing small plant units would remain exempt.

The EPA should promulgate a rule with specific language acting as a "place holder" for newer, less expensive, less burdensome monitoring (whether QCEM, CEMs, or other yet to be designed technologies) to be used by smaller systems. APPA recognizes that there are not enough proven monitoring devices or systems to supply the utility sector in approximately two years when the requests for bids and contracts must be in place to meet the CAA requirements as anticipated for either MACT compliance date or cap/trade Phase I requirements. While there has been much focus on the debate over Section 112 v. 111 and trading versus MACT, this mercury monitoring issue has been ignored. It is a very significant issue for utilities of all sizes, ownership type and in all locations in the U. S. regardless of coal type.

APPA believes that the EPA's final rule should emphatically state that the smaller utility systems (particularly those that meet the SBREFA definition) should be able to work with their state agencies and permit writers to determine the most practical and reliable method to perform monitoring functions at lowest cost (considering capitol expense, operating and maintenance, and on-going staff training expenses). Many public power utilities simply don't have the personnel skills to perform these highly sophisticated monitoring runs.

Also many public power communities are two hours away from major metropolitan areas or regional airport hubs so that frequent visits by CEM manufacturers or service personnel would be prohibitively expensive. This may sound like a peculiar statement but to APPA's knowledge, there are only about six companies in the U. S. that can design or build mercury CEMs. Most of these companies are in the Pacific Northwest or Northeast (far from most coal generation plants are located) and the expenses associated with having contractors fly 1,000 miles to meet with a municipal utility manager two hours by car from O'Hare, Atlanta, or Dallas-Fort Worth airport, is not a laughable matter. Unlike many other aspects of the Clean Air Act, there are not many CEM technology companies and they are not located throughout the U. S. Design and installation of the CEM is expected to take far more time than the CEMs used effectively in the Acid Rain program.

A typical municipal utility may need to purchase two or three of these CEMs while an IOU may need to purchase 15-20 CEMs (and perhaps with other engineering needs at the same time). It would be completely understandable that these scarce contractors with CEM technology skills would gravitate toward the largest number of prospective buyers and this would continually place municipal utilities located in more remote locations "on the back burner" than their IOU counterparts at or near major hubs. APPA urges the EPA to recognize this reality when setting the CEM requirements in the final rule to optimize mercury emissions data monitoring performance and minimize costs to municipal or other smaller utilities.

Based on all the studies contained in EPA's rulemaking docket, it is clear that mercury continuous emission monitors (CEMS) are simply not ready for "prime time" regardless of the statutory deadlines of the Clean Air Act.

This technology would present a particular hardship on municipally owned utilities, as they generally employ neither the quantity nor the technically skilled personnel to deal with the monitoring challenges set forth in EPA's proposed rules. This mercury monitoring challenge exists for all affected sources; however, investor owned utilities tend to have more resources to commit to these monitoring challenges.

EPA should consider delaying the mercury monitoring requirements for de minimis sources until 2010 when the mercury CEMS technologies are more fully developed and demonstrated

APPA urges the EPA to allow <100 mw units to be excluded from the mercury monitoring requirements until 2010 unless the facilities or utilities desire to participate.

EPA estimates the capital cost of mercury CEMS to range between $95,000 to $135,000; annual operating and maintenance costs are estimated to range between $45,000 to $65,000.[1] Looking at the upper end of the range, it is clear that the EPA's cost estimate ignores the immaturity of the technology. **The first year's monitoring cost is equal to $200,000 per utility year. Yet, many of the APPA member units emit less that 10 pounds of mercury per year. Thus, the cost of monitoring mercury emissions ($20,000 per pound) is on the same order of magnitude as the value of the mercury allowances.**

APPA estimates that the costs of the monitoring program would be equal to **$200,000 per municipal utility** (x approximately 356 utilities) and **<u>estimates this cost to be approximately $71 million dollars</u>**. Since most APPA members emit <50 pounds of mercury annually, this $200,000 cost is extremely expensive

[1] 69 Fed. Reg., 4694 (January 30, 2004).

for small utilities with typical emissions of 5, 10 or 20 pounds of mercury emissions annually.

Proposed burden reduction: APPA's members typically provide Payment in Lieu of Taxes (PILOT) funds to the community to provide for the general funds for the community to offset taxes. APPA does not have a full accounting of the PILOT funds provided by public power utilities but knows that the largest 522 public power utilities are required to file information with the DOE's Energy Information Administration (Form 412). These utilities account for >75 percent of the public power market. Of those 522 public, 394 make payments in lieu of taxes of over $200,000 (FY 2002). If one counts net contributions (street lights, tree trimming, water systems, funding for public schools), the number of public power utilities that contribute $200,000 annually is 414. **APPA points this out to show that $200,000 costs in monitoring, especially of dubious quality, is a very wasteful expense. If APPA members do not pay this $200,000 to the community then the taxes would have to be increased or services in the community cut.**

There are many non-municipal or investor owned utilities that have the same concerns about the maturity, reliability, and cost of mercury CEMs. Recognition of this problem by OMB during the rulemaking process would be helpful to all concerned. <u>Recognition does not mean a blanket exemption—just a realistic phasing in of facilities</u>. Obviously, if a cap and trade program is selected by the EPA then there will be an even greater need for accurate mercury emissions data than with a MACT standard. APPA's comments apply to both approaches to reduce mercury from power plants. <u>APPA's suggestions to set realistic expectations about CEMs or other monitoring methods is not intended to jeopardize the credibility of the proposed mercury cap-and-trade program or to weaken the proposed MACT rule (whichever is selected).</u>

V. Analytical methods, procedures and NPDES permits (Clean Water Act).

Regulating Agency: U. S. EPA

Authority: Clean Water Act (existing rule and pending guidance)

Description The EPA method of measuring certain water pollutants is inaccurate, incomplete and leads to incorrect permit limits.

- Whole Effluent Toxicity (WET) method needs validation; and
- EPA needs to review its analytical methods and develop new criteria for its approved water criteria methods

Affected businesses affected: Approximately 500 APPA municipal utilities as NPDES permit holders and <u>many</u> <u>thousands</u> of industrial/commercial NPDES permit holders. (This issue does not just affect electric utilities).

Regulatory burden(s) imposed: Poor data quality and "false positives" lead to incorrect permit limits. The burden relief, if these methods were corrected, would benefit both the regulated and the regulatory agencies. Poor data quality and incorrect NPDES permit limits drive up the cost of regulation and compliance without benefiting human health or the environment. APPA believes that NPDES permit limits should reflect true environmental concerns. Continuing disputes about data quality is a tremendous waste of state regulatory resources.

Reform/Corrective Steps recommended:
APPA is a member of the Utility Water Act Group. APPA endorses the comments submitted by **Utility Water Act Group (UWAG) and Inter-Industry Analytical Group (IIAG),** (submitted to Ms. Lorraine Hunt, OIRA) regarding the analytical procedures issues and how incorrect analytical methods and incorrect Whole Effluent Toxicity (WET) methods drive for incorrect permit limits.

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Submitted: May 20, 2004