

Midwest Environmental ADVOCATES

pro bono publico

VIA ELECTRONIC MAIL

March 15, 2006

Joseph Graham
Wisconsin Department of Natural Resources
101 S. Webster St.
P.O. Box 7921
Madison, WI 53707

Re: Comments on WPDES Permit No. WI-0025038-07-0

Dear Mr. Graham:

Midwest Environmental Advocates, Inc. is a nonprofit environmental law center that provides technical assistance and legal representation to communities and working for clean air, clean water, and clean government. We appreciate the opportunity to comment on the proposed variance for a mercury Water Quality Based Effluent Limitation in WPDES permit no. WI-0025038-07-0. We are submitting these comments on behalf of Wisconsin Environmental Law Advocates.

As an initial matter, we note that Lake Butte des Morts and Lake Winnebago are listed on Wisconsin's 2004 303(d) list as impaired by mercury. Further, the Fox River which connects the two lakes, and which carries the City's of Oshkosh's discharge of mercury to Lake Winnebago, is impaired by aquatic toxicity.

Mercury can cause reproductive failure, behavioral abnormalities and death in animals. *See* <http://www.dnr.state.wi.us/org/caer/cea/mercury/impact.htm#Human> (last visited March 15, 2006). Mercury exposure can also lead to memory loss, speech disabilities and impaired development of fetuses. *Id.*

Against this backdrop, it is absurd that the DNR is proposing to allow one of the state's largest POTW's to discharge up to 33 nanograms per liter (ng/L) of mercury, when the water quality criterion for mercury for protection of wildlife is 1.3 ng/L and the criterion for the protection of humans is 1.5 ng/L. It is dangerous to allow the discharge of this volume of mercury considering that it is a bioaccumulative toxin. It is also unnecessary to grant a variance of this magnitude given that 51 out of 55 effluent samples, gathered monthly from Oshkosh's POTW over the past five years, have been below 5 ng/L (still more than four times the protective criterion). Only 2

were above 15 ng/L, and only 1 was above 33 ng/L. The 33 ng/L variance is simply not needed, does not protect the designated uses, and is improper.

A. The DNR has not Shown that the Increased Risk Associated with the Higher Variance Limit Still Adequately Protects the Public Health, Safety and Welfare.

State and Federal law allow variances to water quality standards, but federal regulations make clear that such variances must still ensure that the public health, safety and welfare are fully protected. 58 Fed. Reg. 20802, 20923 (1993) (codified at 40 CFR part 132, appendix F, procedure 2(C)(2)(b) (2005).

States may adopt water quality variance procedures only if certain steps are taken that comply with federal standards. The EPA's Great Lakes Guidance states that

The Great Lakes States or Tribes may adopt water quality standards (WQS) variance procedures and may grant WQS variances for point sources pursuant to such procedures. *Variance procedures shall be consistent with (as protective as) the provisions in this procedure.*

40 CFR part 132, appendix F, procedure 2 (emphasis added). One of the federal provisions with which states must comply provides that

[The State must] characterize the extent of any increased risk to human health and the environment associated with granting the variance *compared with compliance with WQS absent the variance*, such that the State or Tribe is able to conclude that any such increased risk is consistent with the protection of the public health, safety and welfare.

40 CFR part 132, appendix F, procedure 2(C)(2)(b). The crucial comparison is between the proposed limit under the variance and the limit that would be imposed under current water quality standards. In this case, the comparison must be between the 1.3 ng/L and 33 ng/L limits, and the DNR must find that the increased risk associated with that difference still protects public health and welfare.

While Oshkosh has analyzed its requested variance in terms of economic infeasibility, as required by § NR 106.145, neither it nor the DNR has made a finding that the risk associated with allowing a discharge of 25 times the protective standard for mercury is consistent with the protection of the public health, safety and welfare. Indeed, such a finding would be difficult to make considering the extreme toxicity and bioaccumulative nature of mercury.

For these reasons, and because it is one of the most prevalent bioaccumulative chemicals of concern in the Great Lakes region, the Great Lakes Initiative set a wildlife protective criteria for mercury at 1.3 ng/L. 40 CFR part 132, appendix D, table D-1. As shown by DNR's promulgation of a water quality based effluent limit of 1.3 ng/L for Oshkosh, DNR recognizes that this limit is necessary to adequately protect wildlife in the Fox River. DNR may not raise

this limit through a variance without finding that the variance limit will still protect the public health, safety and welfare.

B. DNR Has Not Shown that, Despite the Variance, Reasonable Further Progress Will be Made Toward Achieving Water Quality Standards.

Federal regulations and guidance make it clear that states may only grant water quality variances when a permit will still ensure that “reasonable progress be made toward attaining the water quality standards for the water body as a whole through appropriate conditions.” 40 CFR Part 132, Procedure 2(F)(2); *see also*, EPA Water Quality Standards Handbook, Second Edition, p. 5-12 (1993), available at <http://www.epa.gov/waterscience/standards/handbook/>, (requiring state variance procedures to ensure that “reasonable progress is being made toward meeting the [water quality] standards”). DNR has not shown that reasonable further progress will be made toward attaining the 1.3 ng/L standard in the Fox River as a whole despite the 33 ng/L limit in Oshkosh’s proposed permit. Perhaps this could be shown through expected reductions due to the Pollutant Minimization Plan, except that the Plan has not yet been established. Failure to establish a PMP before issuance of the variance, along with failure to show other ways in which reasonable progress is being made toward meeting standards, means that the DNR has not fulfilled its mandate to ensure progress toward water quality standards.

C. The DNR May Not Approve a Mercury Variance Before Oshkosh Submits a Pollutant Minimization Plan.

State law requires that a permittee who requests an Alternative Mercury Effluent Limitation must submit a Pollutant Minimization Plan along with its request for the variance. Wis. Adm. Code NR 106.145(8)(a)(3). State regulations only allow the DNR to grant a mercury variance *after* “the permittee and the department agree upon the alternative mercury effluent limitation and the *specific permit language requiring implementation* of the pollution minimization program.” Wis. Adm. Code NR 106.145(6)(a)(2). Simply stating that a PMP will be drafted in the future does not meet this standard.

This requirement serves to protect public involvement and also to ensure that, despite the variance, reasonable further progress is being made toward attainment of the standards. Because an “alternative mercury effluent limitation represents a variance to water quality standards,” federal regulations provide that approval of such variances must have the same level of public notice and participation as would any other revision or downgrading of water quality standards. Wis. Admin. Code §106.145 (containing the quoted material above); 40 CFR Part 132, Procedure 2(E) (requiring public notice and comment).¹ Further, federal guidance shows that EPA expects public notices to “contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.” EPA Water Quality

¹ Further, the EPA Water Quality Standards Handbook, Second Edition, p. 5-12 (1993) states that “state variance procedures, as part of State water quality standards, must be consistent with the substantive requirements of 40 CFR 131 . . . [including that] the variance was subjected to public notice, opportunity for comment, and public hearing.”

Standards Handbook, Second Edition, p. 5-12 (1993). This requirement also ensures full public disclosure of the consequences of the variance.

Because this variance was publicly noticed without the completed Pollutant Minimization Plan, the public cannot adequately assess the potential risk the variance poses to human health and welfare. Similarly, the public cannot be assured that, despite the variance, the PMP will lead to reasonable further progress toward attainment of standards, as required by federal regulations and guidance. The PMP is the heart of the variance procedure, and the public is entitled to know what requirements will be imposed on the permittee in order to ensure reduction of mercury loading and effluent. Being able to comment only on the 33 ng/L limit and a promise of a future PMP with concomitant mercury reductions does not provide for full public participation, nor does it comply with state law.

Conclusion

Granting a variance would allow Oshkosh to discharge up to its permitted limit of 33 ng/L, which is far above what the EPA and the DNR have found to be a protective level 1.3 ng/L. Further, this limit would go into effect before a Pollutant Minimization Plan was even approved, much less in effect.

DNR cannot grant a variance unless it first finds that the variance limit will still protect the public health, welfare and safety. Further, state law requires that a Pollutant Minimization Plan be submitted and approved by the DNR *before* a variance is granted. For the forgoing reasons, Midwest Environmental Advocates believes that a 33 ng/L variance is inappropriate and that a more protective limit should be applied.

Thank you for the opportunity to comment on the proposed permit for Oshkosh's POTW, WPDES number WI-0025038-07-0. We hope that DNR will take these comments into consideration when issuing the final permit.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Andrew C. Hanson