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pro bono publico

March 11, 2005

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WCR Headquarters
1300 W. Clairemont Ave.
Eau Claire, WI 54702

**Re: COMMENTS ON PROPOSED WPDES PERMIT NO.
WI-0022642-08-0**

Dear Ms. Parkhurst:

I am writing to you on behalf of Midwest Environmental Advocates, a non-profit environmental law center in Madison, Wisconsin. Our concern for the health and vitality of our region's waterways has prompted us to submit the following comments on Proposed Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit No. WI-0022642-08-0 ("Proposed Permit") for Ellsworth Coop Creamery located at 232 Wallace St., P.O. Box 610, Ellsworth, WI 54011.

Thank you for the opportunity to comment on the proposed permit. We understand that the DNR is proposing to issue Ellsworth Coop Creamery a new WPDES permit and will revoke the old permit because of substantial changes in the operations of the facility. Ellsworth Co-op currently pretreats its wastewater for subsequent discharge to the Village of Ellsworth. The new permit proposes to discontinue Ellsworth Co-op's existing practice of sending wastewater to the Village of Ellsworth for further treatment and discharge. The Co-op is proposing to send its wastewater to the Co-op's wastewater treatment system in the future and discharge through a new outfall.

We hope that the Department finds the following comments for Proposed WPDES Permit No. WI-0022642-08-0 helpful and uses them in its consideration in the issuance of the new WPDES permit to Ellsworth Coop Creamery.



Organizations listed for identification purposes only.

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COMMENT: Ellsworth Co-op is not entitled to a chloride variance because it is establishing a new discharge of chloride into Isabelle Creek.

According to permit section 4.2 the DNR approved and granted a chloride variance to the Ellsworth Coop Creamery ("Coop") on January 26, 2005. The variance consists, in part, of a chloride target value of 750 mg/L, which does not become effective until March 31, 2010. We believe granting the chloride variance to the Co-op was erroneous.

Ellsworth is proposing a new discharge of chloride to Isabelle Creek that was not previously authorized under any WPDES permit. Wis. Admin Code § NR 106.93 states that "any point source which has not been authorized under a WPDES permit prior to February 1, 2000, shall be required to meet the calculated limitation." Ellsworth Coop is proposing to locate a discharge pipe (outfall 001) that will discharge chloride and other pollutants directly into Isabelle Creek. Outfall 001 is a "point source" under Wis. Stat. § 283.01(12). The discharge of chloride into Isabelle Creek from outfall 001 or any other point source was not authorized under a previous WPDES permit prior to February 1, 2000.

There is no calculated limitation for chloride in the Proposed Permit. The target value in the Proposed Permit does not require the Coop to meet the calculated limitation, and is not an enforceable limitation under the terms of the Proposed Permit. Wis. Adm. Code NR 106.82(8).

Ellsworth Co-op cannot reasonably argue that it is relocating an existing discharge. Before the Proposed Permit, Coop never had a pipe that previously discharged chloride to Isabelle Creek or any other water of the state. Coop was an indirect discharger that discharged pollutants to a publicly owned wastewater treatment plant. And, the previous WPDES permit for Coop did not include an effluent limit or any other conditions for the discharge of chloride to the wastewater treatment plant.

Since Coop proposes a new discharge of chloride, a variance is not applicable. Therefore, the Coop must meet the calculated limit.

COMMENT: Even if Ellsworth Coop is entitled to a chloride variance, the tentative variance determination should be made available for public notice and comment.

According to the chart, labeled "Proposed Permit Monitoring Limitations" the WDNR approved and granted a chloride variance to the Coop on January 26, 2005. Granting the Coop a chloride variance was one of two possible monitoring decisions established by the regulation of chloride discharges under NR 106.83. The other option was to establish a chloride target limit. Wis. Adm. Code NR 106.83. The proposed permit should present the variance as a tentative determination and then present it to the public for commenting, but the DNR approved the variance on its own volition. Wisconsin Statutes section 283.39 states that the public should receive notice of each complete application for a permit, where interested persons may submit their written view (comment) on the tentative determinations with respect to the permit application, and the Department shall

consider those comments in the formulation of the final determinations for the permit application. Wis. Stat. §283.39 (2004). Whether to grant a variance or to set a limit is part and parcel of this permit, therefore the public should receive notice of the tentative decision and opportunity to comment before it is finalized. We question whether the WDNR's approval of the chloride variance meets the requirements set out in Wis. Stat. 283.39.

COMMENT: The DNR should enforce source reduction activities that Coop must implement as part of the chloride variance.

Section 2.2.1.1 of the proposed permit requires that Coop “implement source reduction measures.” These source reduction measures, and the requirement to implement them, are effluent limitations for purposes of federal law. 33 U.S.C. § 1362(11). The source reduction measures must be included in the permit, whether by reference or by incorporation. See *Waterkeeper Alliance v. EPA*, Docket No. 03-4470 (L), Slip. Op. 24-25 (February 25, 2005) (requiring that the terms of nutrient management plans be included in NPDES permits). The permit does not specify what source reduction measures Coop is required to implement, or the timelines by which they must be implemented. Without this information, it will be impossible to know whether Coop has complied with the requirement to “implement chloride source reduction measures.”

COMMENT: The DNR should not waive annual progress reports on Coop's compliance with the chloride target value.

Under the chart, labeled "Required Action," the proposed permit would allow the Coop to waive further annual chloride progress reports after the submission of the first annual chloride progress report. This is contrary to the Clean Water Act. Waiving the requirement to submit annual progress reports prevents the public from reviewing WPDES permits. See 33 U.S.C. § 1342(j) (requiring that copy of each permit application and each permit be available to the public). Further, it prevents the public from enforcing Coop's compliance with the source reduction measures it is required to implement as a condition of its chloride variance. See 33 U.S.C. § 1365(a). Finally, without submission of the annual progress report, there will be no way for the DNR to know whether Coop has complied with the requirement to “implement chloride source reduction measures” and further whether those source reduction measures have been effective. Courts have stricken down NPDES permit regulations that exempt from state review of plans similar to the annual progress report required under Proposed Permit. *Waterkeeper Alliance*, Slip Op. at 17-23, citing *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003).

The DNR has committed in an email to me dated today that it will change this section to require annual chloride progress reports. We urge the DNR to follow through on this in the final permit.

COMMENT: The DNR must perform an antidegradation analysis to determine whether additional water quality based effluent limits are required to protect the Trimble River.

The Coop is proposing to be a new discharger of Chloride, and proposes to discharge Chloride into Isabelle Creek. Isabelle Creek is a limited aquatic life water that ultimately discharges to Trimble River, an Exceptional Resource Water. Coop is proposing a new discharge of chloride to Isabelle Creek, and ultimately, the Trimble River. As such, Ellsworth Coop is subject to the antidegradation implementation procedures of Chapter NR 207. We are not aware of any antidegradation analysis of the new chloride discharge to Isabelle Creek and the Trimble River.

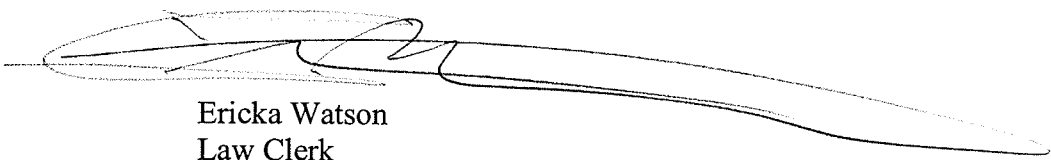
Conclusion:

Thank you once again for the opportunity to provide comments on the Proposed WPDES Permit No. WI-0022642-08-0 for Ellsworth Co-op Creamery. We hope you will consider our comments and use them in drafting a new permit that most adequately protects the environment and safeguards our waterways.

If you have any questions or concerns, please do not hesitate to contact me at (608) 251-5047, ext. 1.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



Ericka Watson
Law Clerk

Andrew C. Hanson
Supervising Attorney