

# Midwest Environmental ADVOCATES

*pro bono publico*

## VIA ELECTRONIC MAIL

July 28, 2005

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**RE: COMMENTS ON PROPOSED MODIFICATION OF  
WPDES PERMIT NO. WI-0029581-07-1, CITY OF LA  
CROSSE.**

Dear Ms. Parkhurst:

Thank you for the opportunity to comment on the Wisconsin Department of Natural Resources' Proposed Wisconsin Pollutant Discharge Permit ("WPDES") No. WI-0029581-07-1 ("Proposed Permit") for the City of La Crosse ("City").

Midwest Environmental Advocates, Inc. is a nonprofit environmental law center that provides technical assistance and legal representation to communities and groups working to protect the public's right to clean air and water. We are submitting this letter on behalf of ourselves and the Coulee Region Group of the Sierra Club, John Muir Chapter.

**A. The DNR is Using the Incorrect Procedures for Determining Whether A Mercury Effluent Limitation is Necessary under Wis. Admin. Code NR § 106.145(2).**

**Comment:** The Permit should be modified to require 30 consecutive days of mercury monitoring in the City's effluent so that a water quality based effluent limit can be imposed that will ensure compliance with human health and wildlife criteria in Chapter NR 105.

Section 5.1 of the Proposed Permit identifies procedures for determining the need for mercury effluent limit for the City that are inconsistent with Wis. Admin. Code NR §§ 106.145(2) and 106.05. Specifically, Section 5.1 requires the City to submit at "least 12 monitoring results spaced over a period of at least 24 months" to the DNR by August 1, 2006. Proposed



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Permit Section 5.1. The Proposed Permit further requires that the City request that the DNR “make a preliminary determination of the need for a mercury effluent limitation according to the requirements of NR 106.145(2).”

Section NR 106.145(2)(a) provides that the DNR “shall determine whether a mercury effluent limitation is necessary using the procedures in s. NR 106.05.”

Section 106.05 requires that the DNR establish water quality based effluent limitations for point sources, such as the City, whenever the discharges from those point sources contain “toxic or organoleptic substances at concentrations or loadings which do not, *as determined by any method in this section*, meet applicable water quality standards specified in chs. NR 102 to 105.” Wis. Admin. Code NR § 106.05(1)(a) (emphasis added).

Section 106.05(3) requires the DNR to impose a water quality based effluent limit for mercury when the average discharge concentration for 30 consecutive days of mercury monitoring exceeds the wild criteria or human health criteria. Wis. Admin. Code NR § 106.05(3)(c). Specifically, Wis. Admin. Code NR § 106.05(3) provides:

[i]f representative discharge data are available for a toxic or organoleptic substance being discharged from a point source, limitations shall be established in accordance with any of the following conditions:...(c) the arithmetic average discharge concentration of the substance for any 30 consecutive days...exceeds the limitations based on the wildlife, human threshold, or human cancer criteria...

Wis. Admin. Code NR § 106.05(3)(c).

The “human threshold” water quality criterion for mercury is .0015 micrograms per liter (“ug/L”) or 1.5 nanograms per liter (“ng/L”). Ch. NR 105, Table 8.<sup>1</sup> The “wildlife” criterion is 1.3 ng/L. Ch. NR 105, Table 7.<sup>2</sup> The Mississippi River, at the point where the City discharges its effluent, is officially “impaired” for mercury contamination, meaning that ambient water quality does not currently meet water quality standards.

Section 106.05(3)(c) requires 30 consecutive days of mercury monitoring to establish the need for a water quality based effluent limit for mercury. Wis. Admin. Code NR § 106.05(3)(c). Because Section 5.1 only calls for a summary of 12 monitoring results

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<sup>1</sup> The human threshold criterion is “the maximum concentration of a substance established to protect humans from adverse effects resulting from contact with or ingestion of surface waters of the state and from ingestion of aquatic organisms taken from” public waters. Wis. Admin. Code NR § 105.08(1).

<sup>2</sup> The wildlife criterion is “the concentration of a substance which if not exceeded protects Wisconsin’s wildlife from adverse effects resulting from ingestion of surface waters of the state and from ingestion of aquatic organisms taken from” public waters. § NR 105.07(1). The bald eagle, kingfisher, herring gull, mink, and otter are representative of avian and mammalian species to be protected by wildlife criteria. Wis. Admin. Code NR § 105.07(2)(c).

spaced over 24 months, rather than 30 consecutive days, the DNR will not collect the sufficient data upon which to establish a water quality based effluent limit to meet the human health water quality criterion or the wildlife criterion for mercury. This violates Wis. Admin. Code NR § 106.05(3)(c).

Further, Section 3.2.1 only requires monthly mercury monitoring, rather than 30 consecutive days. This, too, violates Wis. Admin. Code NR § 106.05(3), because it does not require data collection sufficient to establish a water quality based effluent limit for human health and/or wildlife criteria for mercury.

The DNR must modify Section 5.1 of the Proposed Permit to require 30 consecutive days of monitoring in order to establish a mercury effluent limit to meet the human health and wildlife criteria for mercury. Alternatively, the DNR should modify Section 3.2.1 to require daily mercury monitoring to provide the needed data.

**B. The DNR has Already Collected Sufficient Mercury Monitoring Data Upon Which to Conclude that a Mercury Effluent Limit is Necessary.**

**Comment:** The DNR should impose a water quality based effluent limit for mercury based on the past five years of sampling data that shows that the City has exceeded the human health or wildlife criteria for mercury.

Section 5.1 of the Proposed Permit allows the City to collect another 12 mercury samples over 24 months. Paradoxically, these samples results are due to the DNR on August 1, 2006, which is thirteen months from now. This suggests that the City has already begun mercury monitoring.

In fact, the City has been sampling its effluent for mercury once per month for almost five years. Most of the City's samples taken at "Outfall 001" have exceeded the human criterion or the wildlife criterion for mercury in Chapter NR 105, Tables 7 and 8, 1.5 ng/L or 1.3 ng/ L, respectively. Most recently, the City's discharge doubled those levels. Those sample results, self-reported by the City, are recorded below.<sup>3</sup>

001	Mercury, Total Recoverable	04/05/2005	3.2	ng/L
001	Mercury, Total Recoverable	03/09/2005	3	ng/L
001	Mercury, Total Recoverable	02/10/2005	2	ng/L
001	Mercury, Total Recoverable	01/26/2005	2.9	ng/L
001	Mercury, Total Recoverable	12/07/2004	2.9	ng/L
001	Mercury, Total Recoverable	11/16/2004	2.5	ng/L
001	Mercury, Total Recoverable	10/18/2004	2	ng/L
001	Mercury, Total Recoverable	09/07/2004	1.6	ng/L
001	Mercury, Total Recoverable	08/10/2004	2.4	ng/L
001	Mercury, Total Recoverable	07/06/2004	1.4	ng/L
001	Mercury, Total Recoverable	06/07/2004	2.1	ng/L

<sup>3</sup> Please note that because of the conversion from ug to ng, 1 ug/L is equivalent 1000 ng/L. For example, .0032 ug/L is equivalent to 3.2 ng/L.

001	Mercury, Total Recoverable	05/14/2004	2.3	ng/L
001	Mercury, Total Recoverable	04/19/2004	2.1	ng/L
001	Mercury, Total Recoverable	03/22/2004	2.1	ng/L
001	Mercury, Total Recoverable	02/26/2004	2.1	ng/L
001	Mercury, Total Recoverable	01/30/2004	2.1	ng/L
001	Mercury, Total Recoverable	12/19/2003	2.1	ng/L
001	Mercury, Total Recoverable	11/18/2003	2.1	ng/L
001	Mercury, Total Recoverable	10/27/2003	2.1	ng/L
001	Mercury, Total Recoverable	09/24/2003	0.0021	ug/L
001	Mercury, Total Recoverable	08/27/2003	0.0021	ug/L
001	Mercury, Total Recoverable	07/15/2003	0.0021	ug/L
001	Mercury, Total Recoverable	06/30/2003	0.0021	ug/L
001	Mercury, Total Recoverable	05/20/2003	0.0042	ug/L
001	Mercury, Total Recoverable	04/28/2003	0.0048	ug/L
001	Mercury, Total Recoverable	03/20/2003	0.0037	ug/L
001	Mercury, Total Recoverable	02/26/2003	0.015	ug/L
001	Mercury, Total Recoverable	01/29/2003	0.015	ug/L
001	Mercury, Total Recoverable	12/20/2002	0.015	ug/L
001	Mercury, Total Recoverable	11/21/2002	0.015	ug/L
001	Mercury, Total Recoverable	10/24/2002	0.019	ug/L
001	Mercury, Total Recoverable	09/24/2002	0.015	ug/L
001	Mercury, Total Recoverable	08/19/2002	0.015	ug/L
001	Mercury, Total Recoverable	07/25/2002	0.015	ug/L
001	Mercury, Total Recoverable	06/25/2002	0.015	ug/L
001	Mercury, Total Recoverable	05/28/2002	0.015	ug/L
001	Mercury, Total Recoverable	04/25/2002	0.015	ug/L
001	Mercury, Total Recoverable	03/21/2002	0.015	ug/L
001	Mercury, Total Recoverable	02/20/2002	0.015	ug/L
001	Mercury, Total Recoverable	01/15/2002	0.015	ug/L
001	Mercury, Total Recoverable	12/10/2001	0.015	ug/L
001	Mercury, Total Recoverable	11/15/2001	0.015	ug/L
001	Mercury, Total Recoverable	10/31/2001	0.015	ug/L
001	Mercury, Total Recoverable	09/26/2001	0.015	ug/L
001	Mercury, Total Recoverable	08/21/2001	0.01	ug/L
001	Mercury, Total Recoverable	07/19/2001	0.01	ug/L
001	Mercury, Total Recoverable	06/21/2001	0.01	ug/L
001	Mercury, Total Recoverable	05/23/2001	0.01	ug/L
001	Mercury, Total Recoverable	04/18/2001	0.01	ug/L
001	Mercury, Total Recoverable	03/22/2001	0.01	ug/L
001	Mercury, Total Recoverable	02/22/2001	0.016	ug/L
001	Mercury, Total Recoverable	01/26/2001	0.01	ug/L
001	Mercury, Total Recoverable	12/07/2000	0.01	ug/L
001	Mercury, Total Recoverable	11/14/2000	0.01	ug/L
001	Mercury, Total Recoverable	10/19/2000	0.01	ug/L

Even without 30 consecutive days of sampling, the DNR has more than adequate data based on the past five years on which to determine that a water quality based effluent limit for mercury should be imposed to meet the human health and wildlife criterion for mercury.

**C. The DNR May Not Issue a WPDES Permit Which Does Not Ensure Compliance with Applicable Water Quality Standards.**

**Comment:** As shown above, the City's discharge exceeds the human health and wildlife criteria for mercury. Therefore, the DNR must impose more stringent effluent limitations to meet those criteria in issuing the Proposed Permit.

Section 402 of the Clean Water Act requires that all NPDES/WPDES permits meet water quality standards. 33 U.S.C. § 1342(a)(1). Section 301(b)(1)(C) requires that all permitted discharges contain any more stringent controls necessary to comply with water quality standards. 33 U.S.C. § 1311(b)(1)(C).

The City is discharging mercury at Outfall 001 at levels that far exceed the human health and wildlife criteria in Chapter NR 105, Tables 7 and 8. As a result, the DNR may not issue the permit or make this modification unless it imposes controls sufficient to meet those criteria. The DNR has not done so here, instead electing to require additional monitoring before a PMP is submitted and implemented by the City. This violates the basic tenet of the Clean Water Act, and, at a minimum shows that a mercury effluent limit should be imposed immediately and the PMP should be implemented more quickly under Section 5.1 of the Proposed Permit.

**D. The DNR Must Move Up the Date for Submittal and Implementation of the PMP.**

**Comment:** Because the DNR already has five years of data showing that a mercury effluent limit is necessary, the DNR must move up the date for submittal and implementation of the PMP.

There is no need for the DNR to wait for 12 more samples over 24 months (or thirteen months) to establish a mercury effluent limit by August 1, 2006. *See* Proposed Permit Section 5.1. And, there is no need to wait until July 1, 2007 to require submittal of a PMP from the City. *See* Proposed Permit Section 5.1. Finally, there is no need for the DNR to wait until January 1, 2008 for implementation of the PMP. *See* Proposed Permit Section 5.1. The DNR has collected more than adequate information upon which to determine that a water quality based effluent limit is necessary.

We urge the DNR to re-propose the City's WPDES permit with a water quality based effluent limit for mercury, require submittal of the PMP within 6 months of the effective date of the final permit, and require implementation of the PMP within 1 year of the effective date of the WPDES permit.

**E. Approval of the PMP Constitutes a Permit Modification that Requires Public Notice and Comment.**

**Comment:** The DNR's approval of a PMP is a modification to the City's WPDES Permit, and requires that the DNR prepare a public notice of the permit modification.

The DNR may modify a WPDES permit “on the basis of any information available to it” that there is cause for modifying, suspending or revoking the permit. Wis. Stat. § 283.53(2). The DNR is required to notify “any interested members of the public of its intention to modify, suspend or revoke a permit.” Wis. Stat. § 283.53(2)(c). The DNR must comply with public notice procedures in Wis. Stat. § 283.39(1) in proposing the permit modification. Wis. Stat. § 283.53(2)(c).

Under Wis. Admin. Code NR § 106.145(7), the PMP is a detailed plan for controlling and minimizing the sources of mercury in the City’s waste stream. The implementation of a PMP substantially changes the terms of the City’s WPDES permit. Further, the terms of the WPDES permit are “effluent limitations” under the Clean Water Act, and therefore are part of the City’s permit itself. 33 U.S.C. § 1362(11), *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 502-503 (2<sup>nd</sup> Cir. 2005). Because the PMP contains effluent limits that are part of the permit, the DNR’s approval of the PMP is a permit modification subject to public notice.

However, the public will not have the opportunity to comment on the DNR’s approval of the PMP because it will not get public notice of that proposed approval. Even if citizens of La Crosse are provided with an opportunity for public input regarding the development of the PMP as part of city government, citizens outside of (and downstream of) La Crosse will not be afforded the opportunity to participate in the DNR’s approval of the PMP. This violates the Clean Water Act. 33 U.S.C. § 1251(e); 33 U.S.C. § 1342(a), (b)(3); *Waterkeeper Alliance*, 399 F.3d at 503.

Therefore, DNR has a duty imposed by state law and the Clean Water Act to provide interested parties an opportunity to comment on the finalized version of the PMP. The DNR may not circumvent the public process by approving the PMP, and modifying the permit, without public notice.

**F. The Proposed Permit Must Comply with Wis. Stat. § 281.17 and Chapter NR 100.**

**Comment:** Regardless of the water quality based effluent limit established under Wis. Admin. Code NR §§ 106.145(2) and 106.05(3)(c), the City must still comply with requirements in Wis. Stat. § 281.17 and Ch. NR 100. These requirements must be incorporated into the Proposed Permit.

Regardless of whether the PMP is adopted in the Proposed Permit, whether an alternative mercury effluent limitation is applied for by the City of La Crosse, or whether the DNR approves the alternative mercury effluent limitation, the Proposed Permit must comply with Wisconsin State Law and the Wis. Admin. Code NR § 106.15, which provides that:

Regardless of the effluent limitations determined under this chapter, the discharge of organic mercury compounds, inorganic mercury compounds, and metallic mercury shall not exceed the requirements in s. 281.17 (7), Stats., and ch. NR 100.

Wis. Admin. Code NR § 106.15. The limits for mercury in Wis. Stat. § 281.17(7) and Wis. Admin. Code NR § 100, therefore, must be incorporated into the Proposed Permit.

Without incorporating these requirements into the Proposed Permit, the Proposed Permit fails to comply with state law.

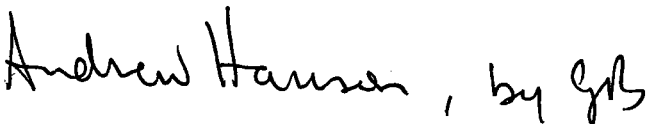
Thank you again for the opportunity to comment on the Proposed WPDES Permit No. WI-0029581-07-1. I look forward to your written response.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**



Gregory Berlowitz  
Law Clerk



Andrew Hanson  
Supervising Attorney

On behalf of the Coulee Region Group of the Sierra Club, John Muir Chapter.

cc: Caryl Terrell, Sierra Club, John Muir Chapter  
Patrick Wilson, Chair, Coulee Region Group, Sierra Club, John Muir Chapter