



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

OCT 15 2003

Mr. Gary Sondermeyer
Chief of Staff
New Jersey Department of
Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

Dear Mr. Sondermeyer:

I am writing as a follow-up to our October 7, 2003 meeting. Specifically, this is in regard to the issues associated with the New Jersey Department of Environmental Protection's (NJDEP) current efforts to complete its adoption of wildlife criteria for mercury, PCBs and DDT. These criteria were proposed by NJDEP on November 18, 2002, and were jointly developed by NJDEP, the U.S. Fish and Wildlife Service (FWS), and the U.S. Environmental Protection Agency (EPA) as a result of the FWS's concerns regarding the effects of these pollutants on the Bald Eagle (*Haliaeetus leucocephalus*), and the Peregrine Falcon (*Falco peregrinus*).

It is my understanding that the State's "sunset" date for the final adoption of these criteria is November 18, 2003, one year after the date of proposal. If these criteria are not officially adopted by this date, the proposal will lapse and the Department will be required to re-propose and public notice these criteria before it can again move forward with the final adoption. It is my further understanding that there is concern within the Department regarding the implementation of these criteria. These concerns stem from that fact that the original proposal did not include a specific implementation plan for these criteria. Such a plan would be used, in part, to judge the economic and social impacts associated with the adoption of these criteria.

EPA strongly supports the adoption of these wildlife criteria as soon as possible, preferably before the November 18, 2003 "sunset" date. To this end, my staff has been working with staff from NJDEP to identify the elements of a mutually acceptable implementation plan. As a result of these efforts, EPA believes that we have identified an approach which would result in a reasonable, mutually acceptable, implementation plan. This implementation plan would be based on the approach which is being proposed as part of the first stage of the TMDL for PCBs in the Delaware Estuary. The plan is consistent with 40 C.F.R. Part 122.44(k)(4), which allows the use of non-numeric effluent limits in National Pollutant Discharge Elimination System (NPDES) permits, in the form of best management practices (BMP) where "[t]he practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Clean Water Act." EPA believes that in certain circumstances, such as the case of regulating the discharge of mercury, PCBs, and DDT, that it is appropriate to include a BMP-based approach as a water quality-based effluent limit (WQBEL) in a NPDES permit.

A BMP approach to address these criteria which would include sensitive monitoring, pollutant trackdown, and pollution prevention is the appropriate means to protect water quality and achieve the goals of the Clean Water Act. Therefore, EPA Region 2 would support the use of a non-numeric, WQBEL for mercury, PCBs and DDT, which would consist of a pollutant minimization plan in a NPDES permit. The development and implementation of the plan itself would be the enforceable WQBEL. Milestones for plan development and specific accomplishments could be included in the permit conditions. Failure to meet these permit conditions would be a violation of the Clean Water Act.

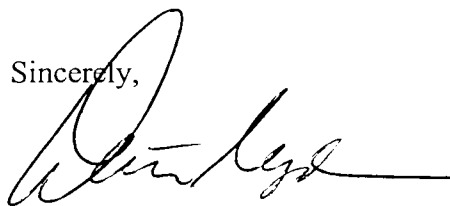
It appears that NJDEP staff is initially optimistic about using such an approach to implement the wildlife criteria. If this is the case, it is EPA's position that NJDEP should move forward with the final adoption of the wildlife criteria prior to the November 18, 2003 "sunset" date. The above-referenced implementation approach could be incorporated into the response to comment document that is currently being completed, so that the public is fully aware of how NJDEP intends to implement these criteria. We believe that this common sense approach to the water quality-based regulation of these three pollutants would enjoy broad-based support in the discharger community.

If for some reason NJDEP is unable to complete the final adoption of these criteria by the November 18, 2003 deadline, EPA expects the Department to expedite the re-proposal process, consistent with NJDEP's expressed intent, such that the wildlife criteria are adopted in the least amount of time possible.

Please be aware that the views and opinions expressed in this letter are comments and recommendations, and do not constitute administrative determinations or decisions, approvals, or disapprovals. In particular, these views and opinions do not constitute a determination by the Agency, the Administrator, or a delegate of the Administrator within the scope of the Clean Water Act, §303(c), 33 U.S.C. §1313(c).

EPA Region 2 looks forward to continuing to work with NJDEP on this effort. If you have any questions, please call me at (212) 637-3725 or have your staff contact Mr. Wayne Jackson, or my staff, at (212) 637-3807.

Sincerely,



Walter Mugdan, Director
Division of Environmental Planning
and Protection

cc: Leslie McGeorge, NJDEP
Debra Hammond, NJDEP
Steven Lubow, NJDEP