

February 17, 2006

New Jersey Department of Environmental Protection
Alice A. Previte, Esq., Legal Specialist
ATTN: DEP Docket No.40-05-11/565
Office of Legal Affairs
PO Box 402
Trenton, New Jersey 08625

Via email and US mail

Dear Ms. Previte:

Please accept the following comments on the subject proposal. Comments are submitted on behalf of the NJ Environmental Federation; Sierra Club, NJ Chapter; NJPIRG; NJ Audubon Society, and the NJ Chapter of PEER.

We are disappointed that the proposal appears to signal a retreat from - and serve as an alternative to - adoption of the November 2002 proposed wildlife criteria. Even if the Department goes forward with the proposal, implementation and federal law will still require the adoption of revised criteria. We urge the Department to reconsider and move forward to re-proposal and adoption of the wildlife criteria.

We support the proposed requirement that major facilities discharging to PCB-impaired impaired waters monitor their discharge for PCBs by using Method 1668A, which is a sensitive method capable of measuring PCBs at levels that previous methods were unable to detect. However, the monitoring provisions of the proposal need to be strengthened as follows:

- The frequency and number of samples in the proposed monitoring should be increased and based on criteria of statistical validity (reliability, accuracy, precision), not cost as proposed. Frequency and sample size should be at least equivalent with EPA NPDES Guidance in the TSD and should not be relaxed unless compliance with SWQS criteria has been demonstrated by at least 4 quarters of data;
- The scope and applicability of the proposed effluent monitoring needs to be expanded to include all NJPDES dischargers on a statewide basis. Additional toxic parameters known or suspected of being present in the discharge should also

be included due to limitations in the “Whole Effluent Toxicity” (WET) protocol. This recommendation is justified because there are statewide issues of concern with respect to PCBs and toxics. For example, USFWS has issued a Biological Opinion that current NJ Surface Water Quality Standards are not adequately protective of certain species. All waters of the state are threatened or impaired by PCB and toxic discharges, as evidenced by statewide and localized fish and shellfish consumption advisories. The discharge of PCBs and other toxics also threaten human health via ingestion of drinking water. All of these impairments and threats are documented in the Department’s 2004 Clean Water Act Section 303(d)/305(b) Report, which is incorporated by reference;

- The proposed effluent monitoring should be expanded to include water column monitoring, sediment, and toxics in biota monitoring for the receiving water.

As discussed below, we oppose the “Pollution Minimization Plan” (PMP) provisions of the proposal, to the degree that they provide relief from numeric “water quality based effluent limits” (WQBELs) mandated by the Clean Water Act and the NJ Water Pollution Control Act and implementing regulations. Existing regulations provide procedure for granting variance relief from WQBELs on a site-specific basis, if technically justified and subject to public participation and EPA oversight. The proposal ignores these case by case science based regulatory requirements in favor of blanket statewide relief that lacks adequate public review or factual basis.

We believe that the proposal violates not only the Act’s WQBEL requirements, but also conflicts with the criteria and procedures for issuing site-specific variances to WQBELs. In allowing PMP’s in lieu of calculated WQBELs by rule, the proposal also conflicts with procedures and criteria for establishing waterbody specific “Total Maximum Daily Loads” (TMDLs) pursuant to the provisions of state and federal law.

Because the proposal specifically applies to dischargers to “impaired waters”, WQBELs for PCB are triggered. Applicable regulations require end of pipe WQBELs, based on numeric PCB SWQS criteria. For the same reason, TMDLs have been triggered and are legally applicable to all NJPDES permitted discharges of PCBs and all other individual toxic pollutants present in the discharge. Accordingly, the Department, via rule, may not substitute the proposed effluent monitoring and PMP approach for applicable WQBEL and TMDL requirements.

For the following reasons, we oppose the remainder of the proposal.

I) Applicable regulatory framework – WQBELs and TMDLs

In accordance with the federal Clean Water Act, the Department implements federally approved, delegated, and funded State programs, governed by the following regulations: NJPDES (NJAC 7:14A-1 et seq.); Surface Water Quality Standards (SWQS) (NJAC 7:9B-1 et seq.); and Water Quality Management Planning (WQMP) (NJAC 7:15-1 et seq.).

At the outset, it is important to note that EPA approved State TMDL requirements established pursuant to NJAC 7:9B, NJAC 7:14A, and NJAC 7:15 include mandatory implementation requirements, while federal EPA requirements @ 40 CFR 130 do not. Therefore, NJ's requirements are broader and more stringent than analogous federal requirements per 40 CFR 130. Similarly, NJ WQBEL and NJPDES requirements are more stringent than federal counterparts. With this regulatory hierarchy in mind, the comments below incorporate by reference applicable federal requirements that govern these State programs.

The applicable NJ SWQS include policies (NJAC 7:9B-1.5); WQBEL requirements (NJAC 7:9B-1.6) and numeric and narrative water quality criteria for PCBs and toxic pollutants (N.J.A.C. 7:9B-1.14(c)). The SWQS regulations require that the Department shall establish water quality based effluent limits for PCBs and/or toxic pollutants, in addition to or more stringent than, technology based effluent standards in N.J.A.C. 7:9-5.7, as necessary to meet water quality criteria. SWQS also mandate that existing and designated uses shall be maintained.

Additionally, in accordance with the NJPDES rules @ N.J.A.C 7:14A-13.5(a), water quality based effluent limitations (WQBELs) are required when a pollutant or pollutants,

“...are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above the Surface Water Quality Standards.”

Any discharge containing PCBs or toxic pollutants that discharges to a waterbody segment included on the 303(d) list for exceeding the numerical or narrative PCB and/or toxics criteria, or for failure to attain existing and/or designated uses, meets the conditions set forth at N.J.A.C. 7:14A-13.5(a) for requiring a WQBEL for PCBs or toxic pollutants.

In accordance with N.J.A.C. 7:14A-13.6,

“When the Department determines pursuant to N.J.A.C. 7:14A-13.5 that a discharge causes, has the reasonable potential to cause, or contributes to an excursion above a Surface Water Quality Standard, a water quality based effluent limitation for each pollutant ... shall be determined in accordance with the USEPA “Technical Support Document For Water Quality-based Toxics Control” (TSD) EPA/505/2-90-001, March 1991.”

The water quality based effluent limitation calculation procedure is contained in section 5.4 of the TSD. The Department sets the average monthly limit (AML) equal to the calculated WLA. Therefore, for dischargers to waterbodies listed as impaired on the 303(d) list for PCBs, toxic pollutants, or for toxic effects or failure to attain existing or designated uses (e.g. which toxics in biota based fish or shellfish consumption advisories have been issued), the AML equals the WLA, which, based on the equation in Section 7.2.4 of the TSD. Therefore, an effluent limitation equal to the surface water quality

criteria for affected discharges to a 303(d) listed waterbody is mandated by N.J.A.C. 7:14A-13.5(a) and 13.6(a).

The above analysis conclusion is consistent with the Department own interpretation of applicable rules:

“The [end of pipe criteria applicability as WQBEL] approach is fully consistent with USEPA’s position as discussed in the adoption of revisions to the National Pollutant Discharge Elimination System (NPDES) Program Rules and the Federal Antidegradation Policy (see the Federal Register, 65 FR 43638, July 13, 2000). Excerpts from that document which support the Department’s position include the following:

“...further degradation of already impaired waterbodies should be prevented and that progress toward the attainment of water quality standards should be made in the interim period between the identification of an impaired waterbody and the establishment of a TMDL.” center column, center, page 43640 “...EPA expects to achieve progress toward the attainment of water quality standards in impaired waters in the absence of a TMDL.” center column, top, page 43641 “For discharges to an impaired water...including background pollutant concentrations in all permit limit calculations will result in water quality-based effluent limits based on a wasteload allocation that attains the applicable criteria or a lower pollutant concentration in the effluent (i.e., “criteria end of pipe” or better).” left column, bottom, page 43642 Since the Department is utilizing existing rules for water quality based effluent limitations, existing water quality criteria for [PCBs & toxic pollutants], and is taking existing 303(d) designations into account, a rule change to authorize the inclusion of the [SWQS criteria] as an effluent limitation for [PCBs and toxic pollutants] is not required” [PCB and toxic pollutant inserts, mine].

Consistent with this analysis, in response to comments on the phosphorus WQBEL initiative, the Department concluded:

“Many of the commenter’s suggestions concerning the criteria, including Dr. Ferrara’s, would require the development of new regulations, which would only further delay the implementation of phosphorus controls in the State. The Department believes that the existing criteria, with the options they contain, are adequate for moving forward to address phosphorus now in a meaningful way.”

The same WQBEL regulations and policies that apply to the pollutant phosphorus also apply to PCBs and toxic pollutants. However, the Department is not applying these applicable requirements in the subject proposal.

The proposal explicitly acknowledges that it is an alternative to the above applicable WQBEL requirements. The Department has no authority to waive WQBEL requirements and substitute PMP requirements.

The subject proposal is inconsistent with and violates applicable federal and state regulations by attempting to substitute limited effluent monitoring and PMPs

requirements in lieu of applicable site specific end of pipe WQBELs and/or TMDLs. The proposal also fails to propose WQBELs for PCBs and all other toxic pollutants.

Other applicable provisions of NJ SWQS state:

7:9B-1.6 Establishment of water quality-based effluent limitations

(b) For Category Two waters, as defined in N.J.A.C. 7:9B-1.4, draft water quality-based effluent limitations shall be assigned to a point source discharge so as to:

- 1. Maintain water quality characteristics that are generally better than or equal to the water quality standards at a level that will protect the existing and designated uses; and*
- 2. Bring water quality characteristics that are generally worse than the water quality criteria, except as due to natural conditions, up to the water quality criteria or to levels corresponding with wasteload allocations established pursuant to N.J.A.C. 7:15-7.6.*

These rules clearly mandate WQBELs (i.e. “shall be assigned”) under two conditions: to protect existing and designated uses, and to implement a WLA established pursuant to NJAC 7:15-7.6. Again, rules require that the Department calculate and impose WQBELs for discharges to “impaired waters”.

The subject proposal is in conflict with these requirements, because the proposal applies to dischargers to “impaired waters” in the absence of compliance with all requirements applicable to dischargers such “impaired waters”, including SWQS, NJPDES, and WQMP/TMDL/WLA requirements. The Department may not waive and develop alternative compliance methods (i.e. the proposed effluent monitoring and PMP in lieu of criteria end of pipe WQBEL and TMDL), without following these applicable regulatory requirements.

II) Availability of Treatment technology

Existing rules establish a specific procedure to develop alternatives to WQBELs or to relax WQBELs based on costs, level of analytical detection, non-availability of treatment technology, or technological infeasibility (NJAC 7:9B-1.6).

In essence, the subject proposal seeks to develop alternatives to WQBELs and to relax WQBEL requirements on these same economic and technological grounds, but it does not do so in accordance with the requirements of NJAC 7:9B-1.6.

Specifically, rules allow the Department to consider costs in establishing WQBELs and in allocating the burden, but only AFTER the Water Quality Standards have been attained:

NJAC 7:9B-1.6(e) *Water quality-based effluent limitation policies are as follows:*

- 1. Water quality-based effluent limitations may be established so as to minimize total expenditures, subject to social and environmental constraints, so that the provisions of the water quality standards (which includes the antidegradation policies) are met. This policy may result in the assignment of different levels of treatment to different dischargers where this proves more beneficial on a study area basis....*

Similarly, applicable rules anticipate and govern issue related to criteria that mandate calculated WQBELS that are below analytical detection limits. In contrast, the subject proposal is justified in part on issues relating to detection, but it does not comply with these requirements because it fails to impose “nondetectable” in NJPDES effluent limits. Instead the proposal would allow a PMP as a “permit condition” expressly in lieu of an WQBEL:

[2-4 cut]

- 5. Where the effluent limitations developed pursuant to N.J.A.C. 7:14A-13.6 are below the level of detectability of the procedures in N.J.A.C. 7:18 the Department will use an effluent limitation of nondetectable in any NJPDES permit.*

Similarly, applicable rules anticipate and govern the timing of implementation of upgrades to existing treatment to achieve calculated WQBELS. In contrast, the subject proposal vaguely mentions implementation, by it but does not mandate a compliance schedule as required:

- 6. Compliance schedules may be issued in accordance with N.J.A.C. 7:14A-6.4 when it is demonstrated by a discharger that new or revised water quality-based effluent limitations, based on ambient criteria adopted or revised after July 1, 1977, cannot be consistently met with the facility's existing treatment process.*

The proposal relies upon a prior EPA funded study of proposed wildlife criteria as a basis to justify the substitution of monitoring and PMP requirements in lieu of end of pipe WQBELS:

“To assist the Department in developing its implementation plan, USEPA Region 2 obtained contractor support to conduct an evaluation of the technical feasibility of wastewater treatment at NJPDES point sources to meet these very stringent criteria. Science Applications International Corporation (SAIC) concluded that treatment to meet the criteria proposed in 2002 is not readily available and that additional testing of available end-of-pipe treatment technologies is necessary to ensure that installation of a particular technology will achieve the proposed criteria. Pollution prevention was found to be a potentially more cost-effective strategy and could produce gains toward achieving standards without imposing the costs of unproven end-of pipe technologies. These findings were published in a report entitled Technological Feasibility of Proposed Water Quality Criteria for New Jersey, dated March 2005 prepared for USEPA Region 2 by SAIC (EPA contract No. 68-C-99-252).”

The Department inappropriately applies this 2005 EPA study as the basis for the proposal. Reliance on this EPA study is not legally or scientifically valid because the EPA funded contractor's study examined the Department's November 2002 proposed wildlife criteria, not the current applicable SWQS criteria for PCBs. The current PCB criteria are higher than the proposed wildlife criteria, thus any findings regarding treatment technology must be reconsidered in light of the current SWQS criteria. A new study must be conducted and subject to public review.

Legally, the EPA study was a cursory examination limited in scope to technology and economics. It was not issued in accordance with applicable regulatory requirements (see NJAC 7:9B-1.6). The EPA study did not address regulatory compliance, and it was not approved by USEPA to satisfy all applicable Clean Water Act requirements, which include more stringent state requirements that impose WQBELs in this case. The Department may not now rely on that study to end run compliance requirements.

At the time of the EPA study, the context that informed the basis of the study was completely different than current conditions. At the time of the study, EPA and the Department were contemplating a variance mechanism to provide relief from end of pipe WQBELs. A rule proposal to provide relief via that variance mechanism was drafted by the Department, but never proposed for public comment (see all documents included in the following links, which are hereby made a part of the record:

http://www.peer.org/news/news_id.php?row_id=573
http://www.peer.org/docs/nj/05_15_8_chemistry_presentation.pdf
http://www.peer.org/news/news_id.php?row_id=550

It is inappropriate to now propose PMP requirements as a means of essentially providing and disguising this same variance from the WQBELs. The proposal constitutes a backdoor variance in conflict with applicable variance standards and procedures.

It is also important to note that proposal is not fully accurate and creates misleading impressions regarding the genesis and purpose of the EPA study. Based on a review of numerous internal DEP and EPA emails, it is clear that the EPA study was conducted at the request of NJDEP. This study was not originated by EPA. Given EPA's longstanding position in support of the wildlife criteria, EPA Region II also had to secure EPA HQ approval for this study. The Department sought the study as a means of establishing a basis to avoid compliance with EPA's mandate to adopt the proposed wildlife criteria. Furthermore, the Department's request that EPA conduct the study was driven by and based upon specific requests from the discharger community presented to the Department in improper "*ex parte*" power point presentations. The discharger community's objectives were to obtain regulatory relief from end of pipe WQBELs. These industry arguments were based primarily on economic compliance costs, not technological infeasibility or water quality (reserve opportunity to document these facts, or the Department may refer to the documents cited in:

http://www.peer.org/news/news_id.php?row_id=573.

The EPA study rationale as a basis to justify the subject proposal also conflicts with the Department's prior regulatory decisions concerning treatment technology and compliance cost. Previously, the Department found:

“Many of the commenters stated that consistent compliance with the 0.1 mg/L total phosphorus effluent limit might not be technically possible. Others stated that compliance with the limit could cause significant increases in the discharge of total dissolved solids (TDS), metals, and the quantity of sludge generated. It was also suggested that the TDS criteria should be increased or not applied at all if phosphorus requirements are implemented.

Response: The Department does not agree that the limit is not achievable. Information submitted by a commenter provides examples of facilities that either are or will be required to consistently achieve a total phosphorus effluent concentration of 0.1 mg/L or less, including a 25 MGD facility in Durham, North Carolina and an 80 MGD facility in Syracuse, New York. They are/will be utilizing various combinations of existing wastewater treatment technology to do so.”

The same regulation and policies regarding technological achievability that apply to the pollutant phosphorus also apply to PCBs and toxic pollutants. The subject proposal relies upon on flawed and illegal “technological infeasibility” assumption and study. The proposal fails to mandate WQBELs for PCBs and toxic pollutants, and attempts to implement limited effluent monitoring and PMPs in lieu of applicable WQBELs.

III) Compliance costs

Rules specifically govern and control how the Department may consider costs in NJPDES permitting, including allowing site specific variances from WQBELs on the basis of costs. The proposal would violate these requirements.

The proposal improperly relies upon EPA comments and cost considerations. In the stated basis for the proposal, the Department cites USEPA response to industry comments on the DRBC Delaware estuary PCB TMDL

“An NPDES condition to eliminate the sources of the PCBs is a more effective and efficient method by which to reduce PCB loadings to the Delaware River than codifying end-of-pipe wastewater treatment to meet a numeric limit. [Response-To-Comment Document for the Proposed Total Maximum Daily Loads for PCBs for Zones 2-5 of the Tidal Delaware River, December 15, 2003, p. 12]”

The proposal takes this EA comment out of context and improperly relies upon an unsubstantiated, undocumented, and informal EPA response to an industry comment on the Delaware TMDL.

First, we note that the above quoted EPA comment was based on site-specific facts and TMDL procedures. The comment does not constitute binding federal regulation or EPA policy or Guidance. The Department may imply that it is or not use it as such.

The technical basis supporting this comment was developed pursuant to federal TMDL regulations. The DBC PCB TMDL was developed by DRBC, pursuant to DRBC policies. In contrast, the subject proposal attempts to rely upon site specific technically supported EPA comments to justify a statewide rule to waive WQBELs in the absence on any NJ specific technical or legal basis.

This EPA case specific comment applies only to the Delaware estuary PCB TMDL developed by DRBC. It does not technically or legally apply to all estuarine or fresh waters of the State of NJ or United States, to all NJ dischargers subject to all Clean Water Act NJPDES WQBEL requirements, to all State of NJ SWQS, or to all toxic pollutants. Applicable NJ SWQS, NJPDES, and WQMP requirements are more stringent and/or inconsistent with EPA federal TMDL or DRBC requirements which formed the basis of the Delaware estuary PCB TMDL. Therefore, the subject proposal can not rely on this EPA comment as a technical basis, or as a governing federal EPA or DRBC requirement, or as a rationale to waive more restrictive NJ State requirements, (e.g. NJ WQBEL, SWQS and TMDL/WQMP rule requirements).

The EPA comment reflects a TMDL program decision that has not been subject to federal rulemaking, and thus lacks a technical basis or legally valid status as EPA policy. The EPA TMDL comment is not binding or enforceable as National EPA policy on Clean Water Act mandated WQBELs. It is not legally valid or appropriate for the Department to rely on such informal and out of context statements at the basis for state rulemaking.

As indicated previously, the proposal is based on undue consideration of the cost of compliance with applicable WQBELs and conflicts with similar prior DEP regulatory decisions. In considering this issue, the Department found:

Many commenters stated that the cost of complying with a total phosphorus effluent limitation of 0.1 mg/L would be excessive when compared to the water quality benefit achieved. Some indicated that even if the point source discharges were to fully comply with a 0.1 mg/L total phosphorus effluent limitation, there might be little or no benefit to the receiving waters, especially if non-point source discharges were not controlled.

Response: The Department recognizes that significant costs will be incurred by permittees in meeting a 0.1 mg/L effluent limitation for total phosphorus. The Department will work with the permittees to explore means and options to reduce their costs. These include low interest financing through the New Jersey Environmental Infrastructure Trust (NJEIT) and alternate compliance means such as trading between point sources as well as between point and nonpoint sources. The optional demonstrations regarding the limiting nutrient and use impairments will help ensure that a treatment plant upgrade would only be required if the permittee is unable to demonstrate that phosphorus is not the limiting nutrient and that there is no use impairment of the receiving waters due to phosphorus. In such circumstances, the Department believes there would be an

environmental benefit to undertaking the treatment plant upgrade to achieve WQBELs for Phosphorus. None of the comments that were submitted to the Department identified a specific case where a discharger decreased the concentration of total phosphorus to 0.1 mg/L or less in their effluent and yet no environmental benefit was realized.

The same regulation and policies regarding compliance costs that apply to phosphorus also apply to PCBs and toxic pollutants. As documented in Attachment I, the Department improperly considered compliance costs in the subject proposal. Therefore, the subject proposal violates applicable regulations by failure to propose WQBELs for PCBs and toxic pollutants, and in attempting to implement limited effluent monitoring and PMPs in lieu of applicable WQBELs.

IV) applicability of TMDL requirements

According to the Department:

TMDLs are required, under Section 303(d) of the federal Clean Water Act, to be developed for waterbodies that cannot meet surface water quality standards after the implementation of technology-based effluent limitations....A TMDL establishes Waste Load Allocations and Load Allocations for point and nonpoint sources, respectively. Regulations concerning TMDLs are contained in EPA's Water Quality Planning and Management Regulations (40 CFR 130). "A TMDL is established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (40 CFR 130.7(c)). The federal TMDL rules have recently been revised but are not yet effective...

A TMDL is considered "proposed" when NJDEP publishes the TMDL Report as a proposed Water Quality Management Plan Amendment in the New Jersey Register (NJR) for public review and comment.[Note: in accordance with NJAC 7-15] A TMDL is considered to be "established" when NJDEP finalizes the TMDL Report after considering comments received during the public comment period for the proposed plan amendment and formally submits it to EPA Region 2 for thirty (30)-day review and approval. The TMDL is considered "approved" when the NJDEP-established TMDL is approved by EPA Region 2. The TMDL is considered to be "adopted" when the EPA-approved TMDL is adopted by NJDEP as a water quality management plan amendment and the adoption notice is published in the NJR.

Based on the Department's most recent 303(d) list, applicable NJ regulations, and the Clean Water Act, TMDL requirements have been triggered for dischargers to "impaired waters". The subject proposal explicitly applies to specific discharges to some of these "impaired waters".

However, the Department has not adopted TMDLs, calculated and allocated WLA's, and otherwise imposed WQBELs for the "impaired waters" for which the proposal would allow an alternative compliance approach (i.e. effluent monitoring and PMP in lieu of criteria end of pipe as WQBELs)

V) implementation procedures - modification of existing permits

Under current rules, the Department has an obligation to revise a NJPDES permit to incorporate a new or revised WQBEL based on a waste load allocation established through a TMDL. WQBELs become immediately applicable upon “impairment” listing, or reasonable potential determination. The Department reserves the right to modify a NJPDES permit at any time to reflect current rules, regulations, policies or establishment of a TMDL and such an action may result in an equivalent or more stringent PCB limitation. We urge the Department to comply with these obligations and implement TMDLs in toxic and PCB “impaired waters”.

Routine expiration of NJPES permits may result in facilities that operate with “old” permit effluent limits, despite the need and requirement to incorporate applicable PCB and toxics WQBELs. Delay works against water quality and slows the rate of advance in implementation on necessary treatment technology. We urge the Department to process these NJPDES permits in a timely fashion and establish WQBELs. We urge the Department to go further, and not wait until permit expiration before incorporating applicable WQBELs in NJPDES permits. This would require that certain permits be called re-opened and modified to include WQBELs.

As noted above, WQBELs for PCBs and toxic pollutants have been triggered. The Department should not wait until NJPDES permits are up for renewal before complying with applicable WQBEL requirements. Instead the Department should call and modify all NJPDES permits to incorporate applicable WQBELs for PCBs and toxic pollutants. Instead of this implementation approach, the proposed implementation schedule is inconsistent with applicable WQBEL requirements which could be implemented via discretionary permit modification procedures.

VI) additional specific comments on the subject proposal:

1. Based on the foregoing, the subject proposal violates the Clean Water Act and the Department’s own regulations. The Department may not substitute effluent monitoring and “pollutant minimization plan” requirements in lieu of applicable water quality based effluent limitations in NJPDES permits.
2. In addition to failure to impose applicable WQBELs for PCBs and toxic pollutants, the proposal fails to propose or incorporate mandatory revisions to the SWQS criteria for PCBs, mercury, and DDT, as mandated by USEPA and USFWS Biological Opinion.

Through this proposal, the Department has abandoned USEPA mandated wildlife criteria for bio-accumulative toxics, PCBs, mercury & DDT. Proposal of these wildlife standards has been mandated for over 10 years by USEPA to protect bald eagle and peregrine falcon. These toxic compounds bioaccumulate in fish and harm wildlife and human health by poisoning the food supply.

The documents provided in links reveal that the 2002 DEP wildlife proposal was harshly criticized by behind the scenes lobbying by the chemical industry and sewage treatment plants. Based on these improper “*ex parte*” meetings with the regulated community, the Department not only agreed to abandon the proposed wildlife criteria, but also developed a wholesale statewide “variance” rules. These variance rules were never proposed.

But now, over 3 years later, the subject proposal provides the equivalent form of relief sought by the discharger community via the “variance” mechanisms. The proposal is a transparent and improper mechanism to provide the variance relief requested by the discharger community.

3. The subject proposal would require new PCB monitoring for only 39 facilities, and there are several loopholes and gaps in enforcement and implementation which make this proposal far weaker than the prior 2002 wildlife criteria proposal withdrawn by DEP.

On its face, and compared with the 2002 wildlife criteria proposal, the subject proposal suffers from the following serious defects:

- a) the proposal would apply to PCBs only, and not to mercury and DDT/metabolites as initially proposed by DEP in 2002. As noted above, the Department is legally required to impose WQBELs for all toxics pollutants that exceed SWQS criteria; or have the reasonable potential to do so.
- b) the proposal would only apply to 39 industrial and POTW facilities discharging to DEP listed "impaired waters". The proposal would not apply to the entire state and to all the facilities discharging these toxic pollutants, as would have occurred under the prior wildlife criteria proposal, which set uniform statewide standards that could be enforced in Clean Water Act discharge permits.
- c) effective enforcement of the proposal is undermined because it is implemented via narrative "permit conditions" instead of Clean Water Enforcement Act mandatory numeric "effluent [discharge] limitations". This lets polluters off the hook.
- d) implementation is not mandatory – The proposal states:

“Based on the results of the monitoring described above, the Department will determine whether each facility subject to the rule will be required to develop and implement a PCB pollutant minimization plan (PMP).”

The proposal lacks procedures, criteria or standards to trigger mandatory or enforceable implementation of the "pollutant minimization plan" (PMP) provisions. It lacks standards and criteria for how the public and DEP will evaluate and review monitoring data; how DEP will determine who is required to develop PMP's; what will be in a PMP; or how a PMP will be implemented and enforced; et al.

Pollutant loading will likely be from contaminated areas. The pollutant prevention and pollutant source track down and source control aspects are totally unclear and therefore are unenforceable. For example, suppose a sewage treatment plant targets a significant PCB source from an industrial facility or contaminated site, what happens then? Would new SIU or pretreatment requirements be established and enforced? If so, how and by whom? Would additional site remediation (e.g. soil excavation) or groundwater treatment be required? If so, by whom and how, pursuant to what authority? These implementation requirements must be established in rules in order to be legally valid, implemented, and enforced.

Implementation is also phased in a vague, unspecified manner that lacks enforceable milestones or commitments. The proposal states:

“This rule will serve as the initial component of an implementation plan which will be developed further in the future.”

This is not acceptable as a matter of policy and conflicts with applicable Clean Water Act requirements.

- e) there are no specific content requirements for what constitutes an acceptable "pollutant minimization plan". Although the proposal indicated that the DRBC PCB TMDL PMP Technical Manual will be published for public review simultaneously, we have been unable to locate that document and do not comment on it here.

We note that back in February 1996, the Department proposed, and subsequently abandoned, rules describing detailed water quality study, effluent characterization, pollution prevention, and PMP content requirements. These provisions of the Feb. 1996 proposal was not adopted. However the proposal appears to attempt to implement PMPs, which concern very similar content as the Feb, 1996 proposal, but in the absence of rules, technical manuals, or guidance documents that define PMP content requirements, public participation, and Department review procedures.

- f) The proposal would limit effluent (wastewater) monitoring to just 6 samples solely to reduce costs. Sample size is not based on statistically robust sampling data sets or statistical decision rules. The proposal allows facilities to get off the hook from even these minimal monitoring requirements.
- g) The proposal does not mandate ambient water quality monitoring, fish tissue sampling, or other biological sampling to gauge the environmental impacts of the discharges of PCBs. The Department needs to re-propose a rule with these critical sampling requirements in order to set science based standards and WQBELs.

- h) The proposal states: “For facilities that discharge PCBs in concentrations at or close to background levels, PMPs will not be required because it is unlikely that those facilities would be able to identify any discrete sources of PCBs.”

The Department is required to establish effluent limits and NJPES permit conditions as necessary to comply with the SWQS criteria. The Department may not take “background levels” into consideration as a basis for relaxing NJPDES permit effluent and monitoring requirements. This is in conflict with applicable rules. PCBs and toxic pollutants are ubiquitous. This should not be used to create loopholes to allow a wastewater treatment facility to avoid treatment and monitoring requirements.

- i) It is not clear whether and how the proposal would apply to ocean discharges. The Department needs to clarify this issue, as ocean resources are adversely impacted by toxic discharges and they are subject to the SWQS as well.

VII) Federal consistency and federal review and approval

Although the Department claims that the proposal is based upon the EPA approved Delaware TMDL for PCBs, it is not clear whether it is fully approvable by USEPA and USFWS under the federal Clean Water Act, given the above flaws, and the prior EPA mandate based upon the USFWS prior Biological Opinion under the Endangered Species Act. The USFWS BO was what triggered federal requirements in 1994 for DEP to adopt more restrictive State water quality standards for PCBs, mercury and DDT & metabolites. The limited PCB proposal doesn't get us there.

We will submit these comments to USEPA and USFWS to request federal review of the proposal.

We appreciate the opportunity to submit these comments and request that the proposal be withdrawn and re-proposed, consistent with the above concerns and applicable requirements.

Sincerely,

Dena Mottola, NJPIRG

Dave Pringle, NJEF

Eric Stiles, NJ Audubon

Jeff Tittel, Sierra Club, NJ Chapter

Bill Wolfe, NJ PEER