

September 25, 2007

Alan J. Steinberg
Regional Administrator
United States Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Re: Oversight and enforcement of Clean Water Act requirements in New Jersey Surface Water Quality Standards - Wildlife criteria for PCBs, mercury, and DDT 1996 US Fish and Wildlife Service Biological Opinion Endangered Species Act consultation with US Fish and Wildlife Service

Dear Administrator Steinberg:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER). PEER is a national support group for environmental professionals in state and federal agencies.

We are writing regarding the longstanding failure of the State of New Jersey to comply with federal Clean Water Act and Endangered Species Act requirements to adopt state surface water quality standards that are protective of wildlife (“wildlife criteria”).

For more than 10 years, the U.S. Environmental protection Agency (EPA) has consistently and repeatedly advised New Jersey of its compliance obligations and of its failure to comply. EPA has threatened to promulgate federal water quality standards if the State fails to act. In response, New Jersey proposed wildlife criteria on November 18, 2002. However, despite express guidance from EPA, the New Jersey Department of Environmental Protection (NJDEP) abandoned that proposal and has yet to adopt protective wildlife criteria.

Given persistent and longstanding State non-compliance and failure to heed EPA guidance, we urge EPA to act to enforce federal requirements.

Below, we summarize the basis and chronology of this failure to comply with federal requirements in NJ’s federally delegated Clean Water Act programs. Based upon this chronology and the current situation, we request that EPA take steps to enforce federal requirements in New Jersey.

Specifically, at a minimum, we advise EPA and request the following actions be taken:

1. NJDEP recently proposed revisions to State surface water quality standards (NJAC 7:9B-1 et seq.) in the May 21, 2007 *NJ Register*. The public comment period closed on July 20, 2007 and those proposed revisions are pending adoption by NJDEP. The proposed revisions are subject to federal EPA review and approval, and are not federally enforceable in the absence of EPA approval. We urge that EPA approval of these proposed state water quality standards revisions be conditioned upon compliance with prior EPA guidance on wildlife criteria. Specifically, EPA should not approve the NJDEP May 21, 2007 proposed revisions. EPA should condition any approval upon proposal and adoption of wildlife criteria by a date certain.
2. New Jersey's state Surface Water Quality Standards (NJAC 7:9B-1 et seq.; SWQS) are scheduled to expire on March 19, 2008 pursuant to Executive Order No. 66 (1978). NJDEP currently is conducting an "interested party review" (IPR) to solicit recommendations from NJDEP selected stakeholders regarding revisions. The NJDEP deadline for submission of "interested party review" (IPR) recommendations is October 5, 2007. We request that EPA participate in the IPR process and advise NJDEP of compliance obligations with respect to wildlife criteria. Specifically, EPA should direct NJDEP to propose wildlife criteria in the upcoming re-adoption and revision of current SWQS that are slated to expire on March 19, 2008.
3. Under Section 303(c) of the Clean Water Act (CWA), 33 U.S.C. 1313(c), states are required to submit revised or new water quality standards to EPA for approval no less frequently than every three years. Federal regulations at 40 C.F.R. 131.21 and 131.22 implement these requirements. We request that EPA include wildlife criteria in NJ's triennial review pursuant to these requirements.
4. EPA and NJDEP have executed a National Performance Partnership Agreement. That agreement provides guidance with respect to federal funding and oversight of NJDEP's federally delegated programs. We request that EPA impose conditions on any federal clean water funding to require adoption of wildlife criteria.
5. EPA should establish a compliance schedule for the State to adopt wildlife criteria revisions to surface water quality standards. In the event that the State fails to meet compliance schedule's adoption deadline, EPA should promulgate and impose federal water quality standards based upon the state's November 18, 2002 proposal.

Background and Chronology

After six years of foot-dragging, US EPA initially directed NJDEP to adopt protective wildlife criteria - and pledged that EPA would promulgate and impose federal water quality standards if the State failed to do so - in a March 17, 2000 letter. [See attachment 1 for full chronology. EPA's March 17, 2000 letter is incorporated by reference.]

In response to that EPA guidance, NJDEP formally responded by proposal of the following as the basis for the wildlife criteria in the November 18, 2002 NJ Register:

“As part of the 1994 approval of the New Jersey SWQS triennial review process, the USEPA, in collaboration with the USFWS, indicated that the human health based criteria for PCBs were not protective of the threatened and endangered species bald eagle, peregrine falcon, and dwarf wedge mussel. As a result, the Service prepared a Biological Opinion document in 1996 (Biological opinion on the effects of the U.S. Environmental Protection Agency’s approval of the state of New Jersey’s surface water quality standards on the bald eagle, peregrine falcon, and dwarf wedge mussel U.S.Department of the Interior, Fish & Wildlife Service, New Jersey Field Office, Pleasantville, New Jersey. 1996). The lack of wildlife criteria for DDT and its metabolites, mercury, and PCBs was a concern to the USFWS. DDT and its metabolites, mercury, and PCBs are bioaccumulative pollutants that are persistent in the environment, accumulate in biological tissues, and biomagnify in the food chain. Due to these characteristics, the concentration of these contaminants may increase as they are transferred up through various food chain levels. As a result, adverse impacts to non-aquatic, piscivorous (fish-eating) organisms may arise from low surface water concentrations. The peregrine falcon is not a piscivorous species. However, it feeds on other piscivorous bird species. Therefore, biomagnification may be of even greater concern for the peregrine falcon.”

More recently, EPA again warned NJDEP in an October 15, 2003 letter (attachment 2). EPA directed DEP to propose and adopt the criteria by stating:

“It is my understanding that the State’s ‘sunset date’ for the final adoption of these criteria is November 18, 2003. If these criteria are not officially adopted by this date, the proposal will lapse and the Department will be required to repurpose... EPA strongly supports the adoption of these wildlife criteria as soon as possible... If for some reason the NJDEP is unable to complete the final adoption of these criteria by the November 18, 2003 deadline, EPA expects the Department to expedite the proposal process, consistent with NJDEP’s expressed intent, such that the wildlife criteria are adopted in the least amount of time possible.” http://www.peer.org/docs/nj/05_12_7_epaltr.pdf

The US Fish and Wildlife Service reiterated their concerns expressed in the 1996 Biological Opinion, most recently in a July, 20, 2007 comment letter on NJDEP proposed revisions to state water quality standards:

“Our agencies jointly developed protective Wildlife Criteria for DDT, PCBs and mercury.... Staff from the Service, USEPA, and NJDEP worked together closely in the derivation of Wildlife Criteria and agreed that...a set of three protective and defensible criteria based upon the best and most appropriate science available should be adopted by the State.

These criteria ...have not been implemented by the State of New Jersey and have not been promulgated by USEPA. The NJDEP should address this protection deficiency since existing numeric State of New Jersey Water Quality Standards remain unprotective for mercury and DDT. Total PCB criteria adopted in 2006 have closed the gap from previous unprotective criteria and while this new human health based criterion (64 ug/L) is less a concern today than previously, regarding wildlife protection, attainment of New Jersey's numeric PCB standards is stalled due to implementation issues that need clear and decisive resolution, regardless of the actual criterion

“The USEPAA and the State continue to be in noncompliance with the Service's Biological Opinion and may be vulnerable to legal challenges” (emphasis added)”

We trust EPA has been apprised on the above NJDEP and USFWS actions with respect to the wildlife criteria and the NJDEP SWQS.

We appreciate your prompt and favorable response to this request.

Sincerely,

Bill Wolfe, Director

C: Diane Lynch, Acting Supervisor, USFWS NJ Field Office
Lisa P. Jackson, Commissioner, NJDEP

Attachment 1 - Chronology

1. December 1993 (25 NJR 5569), NJDEP adopted revised surface water quality standards (SWQS) and submitted them to USEPA Region 2 for review and approval pursuant to the Clean Water Act.
2. EPA requested formal consultation with USFWS pursuant to the Endangered Species Act.
3. On June 26, 1996, USFWS issued a Biological Opinion (BO) of EPA's proposed approval of NJ's adopted SWQS. The BO concluded that certain NJ SWQS would result in an "incidental take", and required that EPA implement "reasonable and prudent measures", which include establishing wildlife criteria for PCBs, DDT, and mercury at levels that will minimize adverse effects on bald eagle and peregrine falcon.

4. April 1999 - EPA, DEP, and USFWS agreed to jointly participate and develop NJ specific wildlife criteria. Collaborative scientific work was initiated in April 1999.
5. April 5, 2001 NJDEP letter to USEPA - DEP completed review of the draft report "Derivation of New Jersey Specific Wildlife Values as Surface Water Quality Criteria for PCBs, DDT, and Mercury"
6. May 25, 2001 EPA Region 2 letter to NJDEP - EPA confirms understanding that NJDEP "does not have any concerns regarding the derivation of the draft wildlife criteria"
7. July 2001 - EPA/USFWS/DEP joint basis for Wildlife Criteria "Derivation of New Jersey-Specific Wildlife Values as Surface Water Quality Criteria for: PCBs, DDT, and Mercury" at <http://www.state.nj.us/dep/wmm/bfbm/sgwqt.html>
8. August 23, 2001 EPA letter to NJDEP - EPA provides NJDEP with final Report "Derivation of New Jersey Specific Wildlife Values as Surface Water Quality Criteria fr PCBs, DDT, and Mercury".
9. 11/18/02 DEP proposed wildlife criteria <http://www.state.nj.us/dep/wmm/sgwqt/7-9Bprop2002.pdf>
10. 5/19/03 DEP proposed wildlife criteria not adopted, but on the record commitment to adopt "later in 2003". Commitment not honored, and proposal allowed to expire without formally being withdrawn, thereby frustrating public accountability and dodging a hit. <http://www.nj.gov/dep/rules/adoptions/042203a.pdf>

"The Department has determined it is not necessary to delay the adoption of the Category 1 upgrades while the committee reviews the technical comments on the wildlife criteria. Therefore, the Department will adopt the proposed wildlife criteria, the applicable design flow, and the definitions later in 2003".

DEP caved into the major polluters who opposed adoption, including: Amtrack, Camden County MUA, DuPont, Exelon Power, Motiva Enterprises LLC, Occidental Chemical Corp., PSEG Services Corp., Rohm & Haas Co., Sunoco, Inc., and Valero Energy Corp., CHEMISTRY COUNCIL OF NJ, DUPONT ENGINEERING, HOFFMANN-LaROCHE, INC., NJ PETROLEUM COUNCIL, Association of Metropolitan Sewerage Agencies (AMSA) PSE&G, COLORITE SPECIALITY RESINS, ROHM AND HAAS COMPANY, BAYWAY REFINING COMPANY

11. June 13, 2003 - NJDEP letter to EPA Region 2 seeking EPA assistance in responding to technical comments on the proposed wildlife criteria. Letter pledges to adopt the wildlife criteria before November 15, 2003.

12. October 1, 2003 - EPA Region 2 letter to NJDEP. EPA approves portions of NJ SWQS, but avoids any discussion of the status of proposed wildlife criteria pending adoption by DEP prior to November 15, 2003

13. October 7, 2003 - EPA Region 2 and NJDEP meet to complete adoption of the proposed criteria prior to NJDEP's November 15, 2003 commitment.

14. October 15, 2003 - EPA Region 2 letter to NJDEP following-up on the October 7, 2003 meeting. "EPA strongly supports the adoption of these wildlife criteria as soon as possible, preferably before the November 18, 2003 "sunset" date."

15. November 18, 2003 - proposed wildlife criteria legally expire under NJ law.

16. December 2003 - EPA Region 2 and 3 adopt Phase 1 TMDL for lower Delaware River for PCBs. PCB criteria is lower than DEP proposed wildlife criteria (links to the EPA TMDL are found in the link to the DRBC toxics control initiative)

17. May 18, 2005 - Delaware River Basin Commission adopts regulations designed to reduce PCB and toxic discharges to lower Delaware by 50% over 5 years. DRBC action due in part to delay in NJ implementation of toxics controls required by USEPA Phase 1 PCB TMDL.

Rule for Establishing Toxic Pollutant Minimization Plan (PMP) Requirements

<http://www.state.nj.us/drbc/Res2005-9final.htm>

WHEREAS, EPA recommended in particular that when reissued or renewed, the NPDES permits for a group of 60 point source dischargers labeled "Group 1" should be required to develop and implement waste minimization and reduction programs (sometimes called "pollutant minimization plans" or "PMPs") and to perform additional monitoring with Method 1668A; EPA further recommended that a group of 82 dischargers labeled "Group 2" should be required to perform monitoring with Method 1668A for an additional two years and that Group 2 dischargers should be required in year three to develop and implement waste minimization and reduction programs (also called "pollutant minimization plans" or "PMPs"); and

WHEREAS, the states in their capacity as NPDES program administrators determined that they would not reopen the large number of permits that in accordance with the Clean Water Act and the TMDL must include PMP requirements, but instead would add the requirements as appropriate at the time of each permit renewal; and

WHEREAS, because NPDES permits ordinarily are reissued only once every five years, it was proposed that the DRBC should consider imposing a pollutant minimization plan (PMP) requirement earlier, since doing so would ensure that steps to improve the estuary's water quality begin sooner; and

18. May 16, 2005 - (37 NJR 1887) - NJDEP issues public notice of Acting Governor Codey's extension of the 5 year expiration date of Surface Water Quality Standards from April 17, 2005, until August 17, 2005. The Notice lists specific issues that will be addressed in upcoming amendments, but does NOT mention wildlife criteria that were allowed to lapse in 2003.

19. NJDEP proposed and adopted certain PCB "Pollutant Minimization Plan" (PMP) requirements as an alternative to wildlife criteria.