



Paula Goodman Maccabee, Esq.

Just Change Law Offices

1961 Selby Ave., St. Paul, Minnesota 55104, pmaccabee@justchangelaw.com

Ph: 651-646-8890, Fax: 651-646-5754, Cell 651-775-7128

<http://justchangelaw.com>

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Katrina Kessler (Katrina.Kessler@state.mn.us)
Minnesota Pollution Control Agency
520 Lafayette Road N
St. Paul, MN 55155-4194

Jeff Udd, P.E. (Jeff.Udd@state.mn.us)
Minnesota Pollution Control Agency
Duluth Regional Office
525 Lake Avenue South – Suite 400
Duluth, MN 55802

Lawrence Pry (larry.pry@state.mn.us)
Bremer Tower, Suite 900
445 Minnesota Street
St. Paul, MN 55101-2127

RE: Aitkin Agri-Peat draft/proposed NPDES/SDS Permit MN0055662

Dear Ms. Kessler, Mr. Udd, Mr. Pry:

Thank you for meeting with representatives of WaterLegacy on August 18, 2011 to discuss the Aitkin Agri-Peat draft/proposed NPDES/SDS permit. WaterLegacy is also discussing the proposed Aitkin Agri-Peat draft NPDES/SDS permit with staff at the U.S. EPA. We remain concerned that removal of the mercury effluent limit as peat mining is resumed at the Cromwell facility is likely to degrade mercury-impaired receiving waters and is contrary to anti-backsliding provisions of the Clean Water Act.

WaterLegacy reiterates our request that the Aitkin Agri-Peat draft permit be amended to include a mercury effluent limit and provide effective monitoring of mercury discharge, including greater frequency, specificity of months for sampling and location of monitoring sites to capture mercury sources from peat mining activities. Further proceedings at the Minnesota Pollution Control Agency (MPCA), including a meeting with the Commissioner, a contested case proceeding and/or a hearing before the Citizens' Board are requested if these permit modifications cannot be made as a result of our informal discussions with MPCA staff.

The current NPDES/SDS permit for the Aitkin Agri-Peat facility was modified on August 10, 2006. This existing permit, attached to this letter as Exhibit I, limits mercury effluent to 0.007 µg/L as a calendar month average and 2.4 µg/L as a daily maximum, consistent with mercury water quality standards in Minnesota Rules 7050.0222. The existing permit requires grab sampling in April and July, months where mercury drainage from peat mining is likely. (Aitkin Agri-Peat NPDES/SDS Permit MN0055662, August 10, 2006, pp. 6, 7). A test result that is "non-detect" or "less than" the approved analytical detection limit was deemed in the existing permit to be in compliance with standards. (Aitkin Agri-Peat NPDES/SDS Permit MN0055662, August 10, 2006, p. 10).

Discharge Monitoring Report (DMR) summaries provided by the MPCA include several results where the reported values seem to be below detection limits and would be deemed in compliance with standards. However, there are reported results at or above 0.08 µg/L of mercury at one or both discharge points on the following dates: April 2000, July 2000, April 2001, July 2001, April 2002, July 2002, and April 2003. These DMRs appear to reflect exceedance of the permitted monthly average of 0.007 µg/L for mercury. (Aitkin Agri-Peat DMR Summaries sorted for mercury, attached as Exhibit J).

During the past several years, the DMRs reflect more specific mercury data, possibly due to an update in testing methods. On several more recent dates (April 2008, July 2008, April 2009, April 2010) reported mercury discharge exceeds the 0.007 µg/L mercury effluent limit. In July 2010, reported mercury levels are 0.19 µg/L at outfall SD001 and 0.14 µg/L at outfall SD002. Both reports are more than an order of magnitude above the effluent limit and neither appears to be an artifact of measurement. (Aitkin Agri-Peat DMRs, Exhibit J). These DMRs raise serious questions about the MPCA's apparent conclusion that the Aitkin peat mining facility has no reasonable potential to exceed mercury standards or to degrade mercury-impaired receiving waters.

Whether the methods used for mercury detection at the Aitkin Agri-Peat facility were EPA Method 245.1 or EPA Method 245.7, both methods were approved under federal regulations and use of neither qualifies as a "technical mistake." If the MPCA were to desire additional data, appropriate procedure would require maintaining existing mercury effluent limits while the regulated party gathers additional or more sensitive mercury data.

WaterLegacy's research has confirmed that the Clean Water Act would not permit removal of the mercury effluent limit and that none of the exceptions to anti-backsliding law are applicable.

The MPCA's Statement of Basis for the draft Aitkin Agri-Peat NPFDES/SDS permit asserts:

Removal of the mercury limit is justified under the Clean Water Act Section 402(2)(B)(ii) which states in part "a permit may be reissued to contain a less stringent effluent limitation applicable to a pollutant if the Administrator determines that technical mistakes or mistaken interpretations of the law were made". The mercury limit appears to have been required in the previous permit without data to support the limit. This is considered a technical mistake and anti-backsliding does not apply for removal of this limit. (MPCA, Aitkin Agri-Peat Statement of Basis, p. 4).

This assertion reflects an erroneous understanding of anti-backsliding law. The "technical mistake" exception in Section (2)(B)(ii) does not apply to state water quality-based effluent limits (WQBELs) established under state permit authority. New testing methods, which seem to be the primary basis for the MPCA's concern about prior mercury data, are also not intended to provide an exception to anti-backsliding.

More broadly, anti-backsliding exceptions do not apply to non-attainment waters unless there is assurance that water quality will be attained with the revised effluent limitation. Also "technical mistake" anti-backsliding exceptions apply only where the effects of effluent limit revisions are to reduce pollutant load. Removal of the Aitkin Agri-Peat mercury WQBEL does not meet these requirements for an exception to anti-backsliding prohibitions.

Anti-backsliding statutes are provided below with italics and notes applicable to the Atkins Agri-Peat Cromwell draft NPDES/SDS permit.

33 U.S.C. § 1342. National pollutant discharge elimination system

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314 (b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. *In the case of effluent limitations established on the basis of section 1311 (b)(1)(C) or section 1313 (d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313 (d)(4) of this title.*

NOTE: Effluent limits established in the permit for the Aitkin peat mine were based on state mercury water quality standards enacted under 1313 (d) and (e). The new permit can only contain less stringent effluent limits if compliance with 1313(d)(4) is demonstrated.

33 U.S.C. § 1313. Water quality standards and implementation plans

(d)(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) *where the applicable water quality standard has not yet been attained*, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if

(i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation *will assure the attainment of such water quality standard*, or

(ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

NOTE: Receiving waters for Aitkin Agri-Peat are impaired for mercury. No demonstration has been made that attainment of the fish tissue mercury standard in these receiving waters is assured if the WQBEL for mercury is removed. Thus, under Section 1313(d)(4) an anti-backsliding exception cannot apply.

33 U.S.C. § 1342. National pollutant discharge elimination system

(o) Anti-backsliding

(2) Exceptions

(B) (i) information is available which was not available at the time of permit issuance (*other than revised regulations, guidance, or test methods*) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for

reasons otherwise unrelated to water quality.

NOTES:

- New test methods for mercury explicitly do *not* provide an exception to anti-backsliding law.
- The Section (o)(2)(B)(ii) “technical mistake” exception to anti-backsliding law only applies to Section (a)(1)(B) permits issued under federal authority. The prior mercury effluent limit was a WQBEL in a permit issued pursuant to state authority under Section (b), not to Section (a)(1)(B). The U.S. EPA’s *NPDES Permit Writers’ Manual*, an excerpt of which is attached to this letter as Exhibit K, confirms “the exceptions for technical mistakes or mistaken interpretations and permit modification, which are described above, would not apply to WQBELs.” (p. 7-3).
- Subparagraph B exceptions to anti-backsliding only apply when the cumulative effect of revised effluent limitations results in the decrease of pollutants discharged into the concerned waters. No such showing has been made for removal of a mercury effluent limit from the Aitkin Agri-Peat NPDES/SDS permit.

The existing permit and the DMR summaries provided by the MPCA support the need for a mercury effluent limit, seasonal monitoring (such as during April and July) and monitoring locations based on the proposed reopening of peat mining activities to ensure compliance with the mercury water quality standards in Minnesota Rules.

The Clean Water Act’s anti-backsliding provisions do not authorize the proposed removal of mercury effluent limits from the Aitkin Agri-Peat permit.

We look forward to working with you to restore the 6.9 ng/L (0.007 µg/L) calendar month average and 2.4 µg/L daily maximum limit for mercury to the draft/proposed Aitkin Agri-Peat NPDES/SDS permit, consistent with water quality standards in Minnesota Rules, and to modify permit requirements to ensure that monitoring is frequent, seasonal and appropriate to characterize mercury discharges and enforce permit limits.

Sincerely,



Paula Goodman Maccabee

Enclosures

cc: Kevin Pierard NPDES Branch Chief, U.S. EPA Region 5 (Pierard.Kevin@epa.gov)
Tinka Hyde Water Division Director for EPA Region 5 (Hyde.Tinka@epa.gov)

AITKIN AGRI-PEAT NPDES/SDS FOLLOW-UP LETTER EXHIBITS

WaterLegacy expressly reserves the right to submit additional exhibits and provide testimony of expert witnesses should a contested case be required in order to resolve our concerns regarding the Aitkin Agri-Peat NPDES/SDS Permit.

The following Exhibits are attached with WaterLegacy's follow-up comments dated August 31, 2011 and are incorporated in this record.

- Exhibit I MPCA, Aitkin Agri-Peat NPDES/SDS Permit MN0055662, August 10, 2006.

- Exhibit J MPCA, Aitkin Agri-Peat Discharge Monitoring Report Summaries, sorted for mercury (1999- 2011).

- Exhibit K U.S. EPA, NPDES Permit Writers' Manual (September 2010), excerpt.