

# NORTHWEST ENVIRONMENTAL ADVOCATES



August 6, 2013

Spencer Bohaboy  
Policy Development Specialist  
Oregon Department of Environmental Quality  
811 S.W. Sixth Ave.  
Portland, OR 97203

*Via email only:* Bohaboy.Spencer@deq.state.or.us

Re: **Proposed Water Quality Permit Renewal for the Oak Lodge Water Reclamation Facility – ADDENDUM**

Dear Spencer:

Although the public comment period has expired, Northwest Environmental Advocates would like to expand on one of the comments regarding mercury and methylmercury made in our earlier comment letter.

In that letter we explained why, given the Willamette Mercury Total Maximum Daily Load (TMDL), DEQ could not issue a permit without a water quality-based effluent limit (WQBEL) that was consistent with the assumption of that TMDL (as well as complying with existing standards). We further stated that the public should have an opportunity to comment on Oak Lodge's future Mercury Minimization Plan (MMP) because DEQ was not likely to conduct an adequate review of it. What we neglected to state was this: given that DEQ is requiring an MMP in lieu of a WQBEL for mercury, the public is entitled to comment on the MMP. Put another way, when a plan constitutes a WQBEL, public comment is required. *See Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003) and *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d at 486, 502 (2<sup>nd</sup> Cir. 2005) ("any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which [were] discharged from point sources" is an effluent limit and the "requirement to develop [a plan] constitute[d] a restriction . . . that should have been included in the permits.").

Here, DEQ's reasonable potential analysis for mercury concluded Oak Lodge contributes to the impaired status of the Willamette River. *See* Fact Sheet at 47. The TMDL used fish tissue data to "estimate the relative ratio of dissolved methyl mercury to total mercury in the water column. This translator was used to establish water column guidance values based on units of total mercury[.]" TMDL at 3-8. According to DEQ, it compared values found in the TMDL to the 0.3 mg/kg tissue criterion adopted but not yet approved by EPA at the time the TMDL was completed, concluding that "[t]he overwhelming majority (>90%) of the mercury found in fish tissue is in the methylated form (Ullrich et al., 2001). *The average fish tissue concentration for [methyl] mercury in a number of fish species in the Willamette Basin currently exceeds the 0.3 mg/kg [methylmercury] criterion.*" *Id.* at 3-12 (emphasis added). Therefore, DEQ must likewise conclude that the average fish tissue concentration in the Willamette River exceeds the now

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www.NorthwestEnvironmentalAdvocates.org

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existing, EPA-approved human health tissue criterion of 0.04 mg/kg which is far lower than the 0.3 to which DEQ conducted the earlier comparison. In other words, based on the TMDL itself, DEQ is not free to conclude that it cannot evaluate compliance with its new EPA-approved criterion and avoid the issue of reasonable potential. Moreover, there is no rationale for a mixing zone for a tissue-based criterion because fish tissue contamination is a far-field problem.

While we disagree that DEQ can avoid both a reasonable potential finding and a numeric WQBEL, in doing so DEQ has concluded the NPDES permit requires an MMP in lieu of WQBELs for mercury and methylmercury. That MMP constitutes permit limits upon which the public is entitled to comment. Therefore, upon receipt of the proposed MMP, DEQ must reopen the permit for public comment.

Finally, the 0.07  $\mu\text{g/l}$  estimated maximum effluent concentration for mercury is greater than the aquatic life chronic criterion of 0.012  $\mu\text{g/l}$ . Because there is no rationale for using a mixing zone for a pollutant, particularly a bioaccumulative pollutant such as mercury, *see* EPA Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion (April 2010) at 67, when it is being discharged to a water quality limited stream, there is reasonable potential for Oak Lodge to contribute to violations of mercury in the Willamette River and a WQBEL for mercury is required.

Thank you for your consideration of these additional comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell". The signature is fluid and cursive, with a large loop at the end.

Nina Bell  
Executive Director