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Federal Water Quality Coalition

August 30, 2024

VIA E-MAIL

Ms. Emily Schnick
Industrial Division
Minnesota Pollution Control Agency
200 Lafayette Road N
St. Paul, Minnesota 55155

Re: Comments on Public Notice of Intent to Reissue Wastewater Permit for 3M Chemical Operations, Cottage Grove, MN Wastewater Permit No. MN0001449

Dear Ms. Schnick:

The Federal Water Quality Coalition (the FWQC) submits the following comments on the Public Notice of Intent to Reissue Wastewater Permit for the 3M Chemical Operation facility in Cottage Grove, Minnesota (“the Notice” concerning “the Draft Permit”) issued by the Minnesota Pollution Control Agency (“the Agency”) on July 1, 2024. The comment period on the Notice was originally scheduled to end on August 15, 2024, and has been extended to August 30, 2024.

The FWQC is a group of industrial companies, municipal entities, agricultural parties, businesses, and trade associations that are directly affected, or that have members that are directly affected, by regulatory decisions made by EPA and States under the federal Clean Water Act (CWA or Act). FWQC membership includes entities in the aluminum, agricultural, automobile, chemicals, coke and coal chemicals, electric utility, food products, home building, iron and steel, mining, municipal, paper, petroleum, pharmaceutical, rubber, and other sectors. FWQC members, for purposes of these comments, include: The Aluminum Association; American Chemistry Council; American Coke and Coal Chemicals Institute; American Petroleum Institute; Association of Idaho Cities; Auto Industry Water Quality Coalition; Cargill, Incorporated; City of Pueblo (CO); City of Superior (WI); City of Tempe (AZ); Corn Refiners Association; Eli Lilly and Company; Freeport McMoRan Inc.; Hecla Mining Company; Mid America CropLife Association; National Association of Home Builders; National Oilseed Processors Association; Portland Cement Association; Shell; Treated Wood Council; U.S. Tire Manufacturers Association; Utility Water Act Group; and Western States Petroleum Association.



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FWQC member entities or their members own and operate facilities located throughout the country. Those facilities operate pursuant to permits that impose control requirements with respect to wastewater discharges. Many of those discharges include or may include PFAS, and the PFAS-related requirements included in the Draft Permit may serve as a precedent for how PFAS issues are addressed in permits for FWQC members in Minnesota and in other States. Therefore, the FWQC and its members have a direct interest in the Notice and in the Draft Permit.

The FWQC has substantial legal, policy and scientific concerns regarding the PFAS-related requirements in the Draft Permit, particularly to the extent that these requirements serve as precedents for how other facilities will be regulated. Our concerns are laid out in detail below. We urge the Agency to address these concerns before finalizing this permit.

1. Use of Site-Specific Criteria Without a Rulemaking is Inappropriate.

The PFAS requirements in the Draft Permit are based on water quality criteria that have been derived by the Agency without following any rulemaking process. While those criteria are subject to review and comment as they apply to the Draft Permit, there has been no process followed up till this point. Subjecting those numbers to comment in a permit-specific context cannot substitute for following a standard rulemaking process, with all of the procedural steps that are involved. We recognize that the State's rules allow the Agency to take this action, but that does not mean that this process complies with basic due process protections – and it does not. Due process requires that regulated parties “know what is required of them so they may act accordingly.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). There is a reason that agencies have to undertake rulemakings in order to develop binding, enforceable requirements. Forsaking such a process, and instead developing numbers within the agency that will then only be subject to review on an individual permit basis creates a substantial risk of inconsistent, arbitrary decisions on issues that should be addressed within one rulemaking, where all potential affected parties can comment at once, and all of the issues raised can be addressed in that context. Water quality criteria for PFAS should be developed within a single rulemaking, not imposed on a permit-by-permit basis.

2. Any Water Quality-Based Limits Must be Attainable.

The water quality-based effluent limits (WQBELs) for PFAS that are included in the permit are extremely stringent. The levels are lower than the levels that have been identified as present as “background” in locations with no major PFAS sources. Moreover, our understanding is that there are no available control technologies that will reduce PFAS to the proposed levels. Yet in the Draft Permit and the accompanying Fact Sheet, there is no analysis of whether the WQBELs can be met, even with the treatment systems that are being installed at this particular facility. If the limits cannot be attained, then the Agency must determine what levels are attainable. The Clean Water Act establishes a clear focus on meeting designed uses that are attainable. *See* 40 CFR 131.2 (“[W]ater quality standards should, wherever attainable, provide water



quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water...”). If the proposed limits are not attainable, which likely means that the uses that they are based on are also not attainable, then the Agency should not include these limits in the permit. *See In the Matter of the Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 for Vacaville’s Easterly Wastewater Treatment Plant*, SWRCB/OCC File A-1375 (Oct. 3, 2002). (“In general, the Board agrees that, where [an agency] has evidence that a designated use does not exist and likely cannot be feasibly attained, it is unreasonable to require a discharger to incur control costs to protect that use.” Instead, it should determine what is attainable, and derive limits from that determination.

3. Limits That Are Below What Can be Measured Are Not Proper.

Besides being unattainable, the proposed WQBELs are also well below the levels that can be accurately measured. This violates basic due process rights, by subjecting a facility to possible enforcement actions for alleged violations, even though there is no way to actually know what levels are actually being discharged. . . *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29, 1333–34 (D.C. Cir. 1995) (permit writers must give permittees fair notice of their compliance obligations, so that permittees are “able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform[.]” The Agency tries to deal with that issue by also including interim limits based on the limit of quantification (LOQ), but that does not solve the problem. Test methods can change, and new methods can be developed with lower limits of detection and quantification. A facility cannot make plans that disregard low final WQBELs included in its permit, simply because compliance with those limits is not measurable with current methods.

4. The Method-Based Limits Are Also Not Appropriate.

The Agency’s only answer to the problem of having to meet unattainable, unmeasurable WQBELs seems to be to set interim, higher numbers that are in the vicinity of the LOQ. But even with those interim limits, there is no determination that compliance with the limits is attainable. Method 1633 itself indicates that USEPA’s estimates of the sensitivity that should be achievable in a well-prepared laboratory resulted in a range of LOQs between 1 ng/L and 4 ng/L for aqueous matrices. Method 1633, Table 9, p 59 (<https://www.epa.gov/system/files/documents/2024-01/method-1633-final-for-web-posting.pdf>). Therefore, it is not clear that every laboratory will be able to achieve an LOQ consistent with the proposed “compliance limits” of 2.1 ng/L and 2.2 ng/L. In addition, those numbers are not appropriate as binding limits – even at the LOQ, there is a substantial amount of variability, and even if a test result is above the limit, it is entirely possible that the true value is below the limit. This is especially troubling in the PFAS situation. USEPA, in its new drinking water standards, set limits for PFOA and PFOS of 4 ppt, which were based in part on a determination that lower numbers were not appropriate based on detection/quantification concerns. *See* [2024-07773.pdf \(govinfo.gov\)](#) at pp. 32573-32576. The Agency’s interim limits in the Draft Permit are below that EPA level, and are not appropriate as binding, enforceable limits.



5. The Agency Must Provide Relief From Unattainable Limits.

Given the attainability issues with the PFAS limits in the Draft Permit, the Agency needs to carefully look at all available means for relief. Those tools include compliance schedules, Use Attainability Analyses (UAAs) and variances. Ultimately, the end result of this process needs to be an attainable set of requirements. Looking at PFAS issues in a broader context than this one permit, and considering how widespread the PFAS issues will be when limits are imposed, we think that the Agency should seriously consider developing a statewide variance. This mechanism has been used successfully, including with other ubiquitous pollutants such as mercury, in other Midwest/Great Lakes states. See, e.g., https://www.in.gov/idem/cleanwater/files/permit_wastewater_smv_faqs.doc (Indiana) and H:\RulePolicyGuid_Effective\Guidance\Guidance_Manual\permit10_new.wpd ([ohio.gov](https://www.ohio.gov)) (Ohio). Similarly, but at a smaller scale, watershed variances have been developed, such as for winter chloride issues in Illinois. See [Board Adopts Illinois' First "Time-Limited Water Quality Standard".pdf](#). This mechanism can allow for addressing the situation differently for different source categories, while ensuring that each type of facility is addressed with pollutant minimization programs (PMPs) and management practices that implement progress toward meeting water quality goals, in a way that is appropriate for that facility type.

6. The Agency Should Consider Non-Numeric Limits As An Alternative Approach.

To the extent that the Agency concludes that effluent limits are necessary and appropriate for PFAS discharges, it should seriously consider using non-numeric limits as an alternative, which does not raise the attainability, measurability and process problems raised above as to the stringent numeric limits in the Draft Permit at issue here. In other, similar situations, such as with mercury, requiring PMPs instead has proven to be a much more effective approach. See, e.g., <https://dam.assets.ohio.gov/image/upload/epa.ohio.gov/Portals/35/guidance/permit7.pdf>. It focuses the attention of the regulated facility on assessing practical options, determining the steps that are most effective in reducing loadings, and then implementing those steps over time on a schedule that makes sense from an operational perspective. Moreover, because public reports are filed as to progress in implementing the PMP (generally on an annual basis), the process is transparent and allows for ongoing input by the agency and other stakeholders. This process promises to yield better results than a numeric-focused approach, which has all of the legal, technical and policy problems laid out above, and which has a high potential for extended legal proceedings over the numeric limits that can significantly delay implementation of the measures that would actually improve water quality.



CONCLUSION

For all of the reasons set forth above, the FWQC recommends that the Agency reconsider the PFAS-related requirements in the Draft Permit, withdraw those requirements, and reissue the Draft Permit, with revised requirements, for further comment. Please feel free to contact us if you have any questions concerning the issues addressed in these comments. Thank you.



Fredric P. Andes
FWQC Coordinator and Counsel

