IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
EASTERN DIVISION

NATIONAL WILDLIFE FEDERATION and LONE TREE COUNCIL,	)	
Plaintiffs,	)	Case No. 06-12423
vs.	)	Judge Thomas L. Ludington
STEPHEN L. JOHNSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*.,	)	Magistrate Judge Binder
Defendants,	)	
and	)	
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, *et al*.,	)	
Intervenors-Defendants	)	

CONSENT DECREE

Based on the consent of the parties reflected below, the Court states as follows:

WHEREAS, this case involves claims by the National Wildlife Federation and the Lone Tree Council ("Plaintiffs") under the Clean Water Act, 33 U.S.C. § 1251 *et seq*. ("Act" or "CWA"), and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. ("APA"), challenging final agency action by Stephen L. Johnson, in his official capacity as Administrator of the United States Environmental Protection Agency, Mary A. Gade, in her official capacity as Regional Administrator of the United States Environmental Protection Agency Region V, and the United

States Environmental Protection Agency (collectively "EPA" or "Agency") to approve actions by the Michigan Department of Environmental Quality, specifically:

a. EPA's August 4, 2000, approval of the water quality variance, reasonable potential, and compliance schedule implementation procedures promulgated by the Michigan Department of Environmental Quality to implement certain provisions of the CWA, including CWA Section 118, 33 U.S.C. § 1268 ("2000 EPA Approval"); and

b. EPA's June 29, 2004, approval of a revision submitted by the Michigan Department of Environmental Quality to EPA for a multiple discharger variance from the EPA-approved Michigan Department of Environmental Quality water quality criterion for mercury pursuant to CWA Section 303(c), 33 U.S.C. § 1313(c), and EPA regulations at 40 C.F.R. 131.21 ("2004 EPA Approval");

WHEREAS, Plaintiffs seek declaratory relief and an order remanding the 2000 EPA Approval and 2004 EPA Approval to the Agency, and seek reasonable attorney's and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and in their Complaint allege:

a. the 2000 EPA Approval of the Michigan Department of Environmental Quality's variance implementation procedure is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; and

b. the 2004 EPA Approval of the Michigan Department of Environmental Quality's multiple discharger variance for mercury is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

WHEREAS, the Michigan Department of Environmental Quality, a department in the Michigan Executive Branch and Steven E. Chester, in his official capacity as Director of the Michigan Department of Environmental Quality (collectively, "MDEQ" or "Department"), moved to intervene in this litigation and the Court granted such motion on November 17, 2006;

WHEREAS, EPA regulations at 40 C.F.R. Part 132, Appendix F, Procedure 2: Variances From Water Quality Standards For Point Sources, section F.1., provide that, permits with conditions implementing variances shall, at a minimum, require compliance with an initial effluent limitation which, at the time the variance is granted, represents "the level currently achievable by the permittee" ("LCA"), and which is no less stringent than that achieved under the previous permit;

WHEREAS, MDEQ's multiple discharger variance for mercury that EPA approved on June 29, 2004, which had been submitted to EPA accompanied by a MDEQ permitting strategy ("2004 Mercury Permitting Strategy") and, under that 2004 Mercury Permitting Strategy and the approved variance, MDEQ would propose discharge permit limits for mercury at a level no more stringent than 10 nanograms per liter ("ng/L"), regardless of available discharge-specific mercury data, unless requested by the permittee;

WHEREAS, the Plaintiffs contend that a uniform permit limit of 10 nanograms of mercury per liter, for many permittees, likely will not represent the "level currently achievable by the permittee" and that many permittees currently achieve mercury levels lower than 10 ng/L based on discharge-specific mercury data;

WHEREAS, MDEQ has, as a result of this litigation, developed a technical procedure to calculate a permittee-specific LCA using available permittee-specific mercury data, and such procedure relies, in part, on existing MDEQ methodologies in the Part 8 Rules, Water Quality-

Based Effluent Limit Development For Toxic Substances, 1997 AC, R 323.1201 *et seq*., attached as Exhibit A ("Draft Policy to Calculate Level Currently Achievable for Mercury in Proposed NPDES Permits") ("Draft Policy");

WHEREAS, the Plaintiffs, EPA, and MDEQ believe that the Draft Policy represents a reasonable procedure to determine the level of mercury currently achievable by a permittee using available discharge-specific data for mercury;

WHEREAS, MDEQ has lead responsibility for the establishment of water quality standards, as well as methodologies, policies, and procedures for the implementation of those standards pursuant to CWA Section 303(c), 33 U.S.C. § 1313(c);

WHEREAS, MDEQ is the agency responsible for the implementation of the National Pollutant Discharge Elimination System ("NPDES") program for discharges into waters of the United States subject to the authority of the State of Michigan;

WHEREAS, the Plaintiffs, EPA, and MDEQ agree that MDEQ regulations at 1997 AC, R 323.1211 require MDEQ to determine whether a discharge causes, has the reasonable potential to cause, or contributes to non-attainment of a water quality standard so long as a single representative facility-specific effluent sample is available;

WHEREAS, the Plaintiffs, EPA, and MDEQ agree that MDEQ regulations at 1997 AC, R 323.1103(6)(a) preclude MDEQ from including a compliance schedule for an effluent limit that represents the level currently achievable by the permittee;

WHEREAS, the Plaintiffs, EPA, and MDEQ agree that MDEQ regulations at 1997 AC, R. 323.1103(6)(a) require a permittee to comply with an effluent limit that represents the level of

a pollutant currently achievable by the permittee at the time that a variance for that pollutant is granted;

WHEREAS, the Plaintiffs, EPA, and MDEQ agree that MDEQ regulations at R. 323.1213(1)(d) require semi-annual monitoring of potential sources and quarterly monitoring of the influent to a wastewater treatment system and do not allow for monitoring frequency reductions;

WHEREAS, Plaintiffs filed a second Complaint, No. 06-15256, that alleges that EPA failed to perform a duty that is not discretionary to review, and then approve or disapprove, a revision to the EPA-approved NPDES permitting program administered by MDEQ that Plaintiffs allege occurred as a result of the 2004 Mercury Permitting Strategy;

WHEREAS, Plaintiffs, EPA, and MDEQ have agreed to a settlement of this case, No. 06-12423, without any admission of any issue of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this action; and

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation, including a trial.

NOW, THEREFORE, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. MDEQ shall provide notice of and provide the opportunity for public comment on the Draft Policy to Calculate Level Currently Achievable for Mercury in Proposed NPDES Permits, attached as Exhibit A;

2. On or before October 1, 2008, MDEQ shall cease proposing, issuing, modifying, and re-issuing any NPDES permit that includes as a mercury limit the State-wide uniform level for mercury included within the multiple discharger variance for mercury in the 2004 EPA

Approval, or a mercury limit based on the State-wide uniform level of 10 ng/L for mercury included within the multiple discharger variance for mercury in the 2004 EPA Approval. This paragraph does not require the modification of permits issued prior to October 1, 2008, including where such a permit is modified for reasons unrelated to the mercury limit;

3. Until September 30, 2008, where an applicant for an NPDES permit seeks and is eligible for a multiple discharger variance from the water quality standard for mercury, MDEQ may issue or re-issue an NPDES permit that includes as a mercury limit the State-wide uniform level for mercury included within the multiple discharger variance for mercury in the 2004 EPA Approval, or a mercury limit based on the State-wide uniform level of 10 ng/L for mercury included within the multiple discharger variance for mercury in the 2004 EPA Approval. In issuing or re-issuing such permits after the date of entry of this Consent Decree, however, MDEQ shall require the mercury limit to be effective immediately;

4. Beginning on October 1, 2008, where an applicant for an NPDES permit seeks and is eligible for a multiple discharger variance from the water quality standard for mercury, MDEQ may either propose, issue, or re-issue an NPDES permit that includes: (1) a mercury limit derived using the Draft Policy, modified or unmodified after public comment, submitted to and approved by EPA pursuant to the CWA and applicable EPA regulations, to calculate the "level currently achievable by the permittee"; or (2) a mercury limit which is a site-specific derivation of the "level currently achievable by the permittee" that is otherwise submitted to and approved by EPA pursuant to the CWA and applicable EPA regulations. In issuing or re-issuing such permits, MDEQ shall require the mercury limit representing the level currently achievable to be effective immediately. This Consent Decree does not require any additional

EPA approval of the Policy described in (1) above or any LCA developed under it, other than the approval required by the CWA and applicable EPA regulations. Nothing in this Consent Decree limits EPA's discretion to approve or disapprove any State submission under the CWA and applicable EPA regulations.

5. The provisions of this Consent Decree apply only to the 2004 EPA Approval of MDEQ's multiple discharger variance for mercury.

6. EPA's action approving the State-wide uniform level of 10 ng/L for mercury as the "level currently achievable by the permittee" (which was included within the 2004 EPA Approval of MDEQ's multiple discharger variance for mercury) is vacated effective on October 1, 2008, and such vacatur applies prospectively only for permits issued or re-issued on or after October 1, 2008;

7. Effective Date. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Decree are null and void.

8. Scope of Judicial Review. Nothing in the terms of this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA or MDEQ pursuant to this Decree, except for the purpose of determining EPA's or MDEQ's compliance with this Decree, and nothing in this Consent Decree alters or affects the standards for judicial review of final agency actions by EPA or MDEQ.

9. Release. Upon approval and entry of this Consent Decree by the Court, this Decree shall constitute a complete and final settlement of all claims which were asserted, or could have been asserted, by Plaintiffs against EPA or MDEQ in their Complaint. Except as provided in the next sentence, Plaintiffs hereby release, discharge, and covenant not to assert (by

way of the commencement of an action, the joinder of EPA or MDEQ in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which they may have had, or may now have, against EPA and MDEQ based upon matters which were asserted, or could have been asserted by Plaintiffs in the Complaint filed in this case, No. 06-12423. Plaintiffs do not release, discharge, or covenant not to assert claims that MDEQ may not adopt in the future, and EPA may not approve in the future, a multiple discharger variance which authorizes MDEQ to issue or re-issue NPDES permits that include as a mercury limit a State-wide uniform level for mercury, or a mercury limit based on a State-wide uniform level, or claims that MDEQ may not adopt in the future, and EPA may not approve in the future, a multiple discharger variance which does not require MDEQ to issue or re-issue NPDES permits that require compliance with an effluent limit that represents the level currently achievable by the permittee at the time the variance is granted.

10. Dismissal of related case. Within 5 days after entry of this Decree, Plaintiffs will voluntarily dismiss the complaint in National Wildlife Federation v. Johnson, No. 06-15256 (E.D. Mich.). Such dismissal shall be without prejudice, and each party shall bear its own costs and fees. Such dismissal being without prejudice shall have no impact on the dismissal of the complaint in this case, No. 06-12423, with prejudice, or the previous dismissal of claims 3 and 4 of the complaint in this case, No. 06-12423, with prejudice.

11. Reservation of Rights. Plaintiffs reserve their rights to challenge in a separate lawsuit or administrative action the merits of any final action taken by EPA or MDEQ pursuant to this Consent Decree including, but not limited to, the merits of any final action by EPA respecting the Draft Policy (including as may be subsequently modified by MDEQ after the

opportunity for public comment), except to the extent such final action approves an ultimate version that is the same as the Draft Policy. The parties recognize that changes to the substance of the Draft Policy may occur as a result of the MDEQ process to invite public comment. EPA and MDEQ reserve any and all defenses to any such suits or administrative actions. Nothing in this Consent Decree shall be construed to expand whatever rights Plaintiffs may otherwise have under State and federal law. Nothing in this Consent Decree shall be construed to require MDEQ to undertake rule-making or to promulgate a rule, although Plaintiffs take no position on whether the law of the State of Michigan requires MDEQ to undertake rule-making or promulgate a rule to give effect to the Draft Policy or any variation of it adopted by MDEQ or approved by EPA. Nothing in this Consent Decree shall be construed to limit the ability of MDEQ to revise, in whole or in part, any policy or rule because of a change in the requirements of Federal law or regulation, or of any State law or regulation which is at least as stringent as Federal law or regulation.

12. Anti-Deficiency Act. The parties recognize that the performance of this Consent Decree is subject to fiscal and procurement laws and regulations of the United States, which include but are not limited to the Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq*.

13. Force Majeure. The possibility exists that circumstances outside the reasonable control of MDEQ could delay compliance with the timetables contained in this Consent Decree. For MDEQ, such situations include, but are not limited to, an occurrence or nonoccurrence arising from causes not foreseeable, beyond the control of, and without the fault of the MDEQ, such as: an Act of God; and acts or omissions of third parties that could not have been avoided or overcome by MDEQ's diligence and that delay the performance of an obligation under this Consent Decree. The parties agree that force majeure does not relieve MDEQ from complying

with the provisions set forth in paragraph 4 of this Consent Decree, regarding MDEQ's proposal, issuance, or re-issuance of NPDES permits after September 30, 2008, which include a mercury limit.

14. Dispute Resolution. In the event of a disagreement between the parties concerning any aspect of this Consent Decree, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties agree to attempt to reach an agreed resolution for at least thirty (30) days after receipt of the notice by the other party. After the expiration of this 30-day period, any party may move the Court to resolve the dispute.

15. Extensions and Modifications. Any dates or deadlines set forth in this Consent Decree may be extended by written agreement of the parties and notice to the Court. To the extent the parties are not able to agree to an extension, EPA or MDEQ may seek a modification of this Consent Decree in accordance with the procedures specified below. Except for agreed upon extensions of dates, this Consent Decree may be modified only by written agreement of Plaintiffs, EPA, and MDEQ, and approval by the Court. Nothing in this Consent Decree, or in the parties' agreement to its terms, shall be construed to limit the equitable powers of the Court to modify those terms upon a showing of good cause by any party. Good cause includes, but is not limited to, changes in the law affecting EPA's commitments under this Decree. If the Court denies a motion to modify a date established by this Consent Decree, then the date for performance for which modification had been requested shall be such date as the Court may specify.

16. Continuing Jurisdiction. The Court retains jurisdiction for the purposes of resolving any disputes arising under this Consent Decree, and issuing such further orders or directions as may be necessary or appropriate to construe, implement, modify, or enforce the terms of this Consent Decree, and for granting any further relief as the interests of justice may require.

17. Termination. This Consent Decree shall terminate and Plaintiffs' complaint in this case, No. 06-12423, shall be dismissed with prejudice on October 1, 2008, with respect to EPA, and this Consent Decree shall terminate and Plaintiffs' complaint in this case, No. 06-12423, shall be dismissed with prejudice on October 1, 2009, with respect to MDEQ. The parties shall file the appropriate notice with the Court so that the Clerk of the Court may close the file.

18. Notice. Any notice required or made with respect to this Consent Decree shall be in writing and shall be effective upon receipt. For any matter relating to this Consent Decree, the contact persons are:

For Plaintiffs:

Neil S. Kagan, Senior Counsel
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, MI 48104

For EPA:

Associate General Counsel, Water Law Office
Office of General Counsel, 2355 A
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

and

Maria Gonzalez
Office of Regional Counsel, Region V
U.S. Environmental Protection Agency
77 W. Jackson
Chicago, IL 60604

and

Chief, Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

For MDEQ:

Todd Adams
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
G. Mennen Williams Building, 6th Floor
525 West Ottawa Street
P.O. Box 30755
Lansing, Michigan 48909

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Consent Decree.

19. Mutual Drafting and Construction. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiffs, EPA, and MDEQ. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Decree. This Decree shall be governed and construed under the laws of the United States.

20. Effect of Decree. This Consent Decree shall not constitute an admission or evidence of any issue of fact or law, wrongdoing, misconduct, or liability on the part of any party.

21. Scope of Decree. Except as expressly provided in this Consent Decree, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have. Nothing in the terms of this Consent Decree shall be construed to limit or modify the discretion accorded EPA or MDEQ under the Clean Water Act or by general principles of administrative law.

Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.

22. Costs and Attorney Fees. EPA agrees to settle Plaintiffs' claim for costs and attorneys' fees by paying $27,273.00 as soon as reasonably practicable after entry of this Consent Decree. This amount shall be paid by Fed Wire Electronic Funds Transfer to the National Wildlife Federation. Plaintiffs agree to accept payment of $27,273.00 in full satisfaction of any and all claims for costs and attorneys' fees with respect to this case, except that Plaintiffs reserve the right to seek fees for enforcement of the Consent Decree. EPA does not concede that plaintiffs have the right to seek fees for enforcement of the Consent Decree and reserves all defenses to such a motion.

22. Representative Authority. Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Consent Decree and to legally bind such party to this Consent Decree. By signature below, all of the parties consent to entry of this Consent Decree.

Accordingly, it is **ORDERED** that the parties' joint motion for entry of their proposed consent decree [dkt #39] is **GRANTED**.

It is further **ORDERED** that, upon consideration of the foregoing, the Court hereby finds that this Consent Decree is fair and reasonable, both procedurally and substantively, consistent with applicable law, in good faith, and in the public interest. The foregoing Consent Decree is hereby **APPROVED AND ENTERED** by the Court.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: November 30, 2007

For Plaintiffs:

s/ Neil S. Kagan
NEIL S. KAGAN
Senior Counsel
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street
Suite 200
Ann Arbor, MI 48104
(734) 887-7106
kagan@nwf.org
Michigan Bar No. P58948

For MDEQ:

s/ with consent of Steven E. Chester by permission given to Todd B. Adams
STEVEN E. CHESTER
Director
Michigan Department of Environmental Quality

MICHAEL A. COX,
Attorney General

By: s/ with consent of Todd B. Adams
TODD B. ADAMS
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
G. Mennen Williams Building, 6th Floor
525 West Ottawa Street
P.O. Box 30755
Lansing, Michigan 48909
(517) 373-7540
adamstb@michigan.gov
Michigan Bar No. P36819

For EPA:

s/ with consent of David A. Carson
DAVID A. CARSON
United States Department of Justice
Environment and Natural Resources Division
1961 Stout Street - 8th Floor
Denver, CO 80294
(303) 844-1349
David.A.Carson@usdoj.gov
Colorado Bar No. 29234

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on November 30, 2007.

s/Tracy A. Jacobs
TRACY A. JACOBS

Index of Exhibits

A Draft Policy to Calculate the Level Currently Achievable (LCA) for Mercury in Proposed NPDES Permits

Exhibit A

Draft Policy to Calculate the Level Currently Achievable (LCA) for Mercury in Proposed NPDES Permits

This draft policy was developed to resolve litigation filed by the National Wildlife Federation and the Lone Tree Council challenging the action by the U.S. Environmental Protection Agency (USEPA) to approve the submission by the Michigan Department of Environmental Quality (MDEQ) of variances from the water quality standard for mercury. In 2004, MDEQ submitted, and USEPA approved, portions of MDEQ's Mercury Permitting Strategy that would establish a "level [of mercury discharge] currently achievable by the permittee" at a uniform, State-wide level of 10 ug/L. The term "level currently achievable by the permittee" appears in MDEQ variance regulations at R 323.1103(6)(a) and EPA regulations at 40 C.F.R. Part 132, Appendix F, Procedure 2, section F.1. MDEQ regulations at R 323.1103(9) authorize multiple discharger variances under specified circumstances. Today's draft policy would phase out the State-wide LCA approach currently used by Michigan in NPDES permits, and would proceed to a discharge-specific LCA calculation process. This draft policy would represent a more technical, practicable, and appropriate for the development of NPDES permit limits representing the level currently achievable by a specific permittee, particularly given the continued generation of low level mercury data from many such individual discharges. To date, EPA has not developed or provided guidance regarding how to calculate the "level currently achievable by the permittee," so the draft policy would represent an important step forward. The draft policy describes the process that MDEQ would use to develop a discharge-specific LCA limit to be included in an NPDES permit. The draft policy envisions that the current (2004) mercury strategy will continue to be used until the transition to a discharge-specific LCA calculation approach beginning in FY2009, which would allow adequate time for public comment and approval by the USEPA. This

schedule should ensure that the robust data sets for mercury will be available to calculate the discharge-specific LCA based on a reasonable projection of worst case scenario discharges using available data from that discharge.

Draft Facility specific LCA calculation approach:

1. Calculate the average projected effluent quality (PEQ) using either the R323.1211(3)(a) (10 or more data points) or (3)(b) (fewer than 10 data point) approach using individual (vs. twelve month rolling average (TMRAV)) mercury data points. Round the PEQ value up to the next whole number. If the average PEQ is l0 ng/l or less, then the PEQ is the LCA. If the average PEQ is greater than 10, then proceed to number 2.

This step uses the average, rather than maximum, PEQ because using the maximum PEQ would result in higher LCAs reflective of high outlier mercury data points.

Based on experience to date, available data indicates that the vast majority of mercury discharges will fall into this category for LCA calculation.

2. If the PEQ value calculated in 1 is greater than 10 ng/l, then review the number of data points available for the facility.

> **a.** If data representative of a 12 month period are available to calculate at least one TMRAV, compute the LCA using the following approach:
>
> > **i.** If there are 10 or more TM AVs, then calculate the PEQ using the TMRAV data points following the reasonable potential approach described in R 323.1211(3)(a).

Compare the maximum PEQ to the highest TMRAV (the maximum PEQ is used because the calculation process uses averages, e.g. TMRAVs). This approach may result in a PEQ lower than the highest TMRAV, therefore, the LCA is the higher of the two values. Round the LCA up to the next whole number.

ii. If there are less than 10 TMRAVs, then calculate the LCA using the individual data points following the reasonable potential calculation process described in R 323.1211(3)(b). Compare the average PEQ to each TMRAV (the average PEQ is used because the calculation process uses individual, rather than TMRAV, data points). The LCA is the higher of the PEQ or highest TMRAV, rounded up to the next whole number.

b. If data representative of a 12 month period are not available to calculate at least one TMRAV, then compute the LCA using the following approach:

i. If each value is less than 10 ng/l, then set the LCA at 10 ng/l. This value would function as a "cap" because the vast majority of facilities in Michigan are able to meet this level. The 10 ng/L cap would prevent unnecessarily high LCAs that may result from the R323.1211(3)(b) reasonable potential approach for datasets with less than 10 individual data points.

ii. If any value is equal to or greater than 10 ng/l, then MDEQ and/or the permittee would develop the LCA using site-specific considerations including the raw data, facility treatment type, any mercury issues in the receiving water (e.g. fish consumption

advisory) and facility and receiving water flows. Available information and experience to date indicate that this situation will be very rare.

This draft policy explains how MDEQ intends to derive the LCA for mercury that would be included in NPDES permits proposed for public comment. MDEQ's purpose in developing a standardized procedure for the LCA is to obtain USEPA approval in advance of individual permit proceedings, i.e., on a case-by-case basis. MDEQ and NPDES permittees are not bound by this procedure because, upon request by the permittee, MDEQ would include a LCA value that is lower than what would result from this draft policy. In addition, permitees are free to develop and present to a LCA that is different from what would result from this draft policy, which MDEQ would evaluate on a case-by-case basis and, if demonstrated to be reasonable, would submit to EPA for approval or disapproval on a case-by-case basis. Today's draft policy merely illuminates MDEQ's intentions regarding how it would develop a discharge-specific LCA using facility-specific information. Finally, each LCA included in a permit as a limit would be subject to notice-and-comment again during the public comment period on that permit.