

**STATE OF NORTH DAKOTA
BEFORE THE NORTH DAKOTA DEPARTMENT OF HEALTH
ENVIRONMENTAL HEALTH SECTION, WATER QUALITY DIVISION**

IN THE MATTER OF:

The present North Dakota Pollutant Discharge Elimination System (NDPDES) permit no. ND-0026247 for the Devils Lake Outlet expires June 30, 2008. The North Dakota State Water Commission (SWC) submitted a request on December 14, 2007 for reissuance of the Devils Lake Outlet permit. The reapplication is for an intermittent discharge of surface water diverted from West Bay of Devils Lake (Round Lake) to the Sheyenne River. Included with the reapplication was a request for clarification on select items in the NDPDES permit. The request included: (1) updating the description of the intake structure screen and gravel filter, (2) allowing for water quality values at the outlet from the previous day be subtracted from the values at Bremen and (3) considering increases to the sulfate limit. The North Dakota Department of Health allowed the first request relating to the screen and filter. However, the department denied the second and third parts relating to the sulfate concentrations in their request.

On April 14, 2008, the North Dakota Department of Health (department) gave notice of a hearing seeking comment and testimony concerning a proposed NDPDES permit reissuance pursuant to the Devils Lake outlet project in Benson County, North Dakota, under the authority provided in North Dakota Century Code Section 61-28-04; and

A public hearing was conducted to receive comment and testimony on May 20, 2008, at Lake Region State College, Devils Lake, N.D.; and

The record of the hearing remained open for written comments on the proposed NDPDES permit reissuance through May 20, 2008, with written documents having been submitted into the record; and

Written or oral comments were submitted into the hearing record for department review.

Comments in the record were evaluated by department personnel for applicability to the proposed permit reissuance with written response provided as appropriate.

Having considered the comments and testimony submitted to the record, the hearing officer makes the following:

FINDINGS AND CONCLUSIONS

Jurisdiction

- 1.0 The department has been delegated authority by the U.S. Environmental Protection Agency to implement the National Pollutant Discharge Elimination System (NPDES) as part of the federal Clean Water Act in the state of North Dakota. The department implements the NPDES under the authority granted in state law (NDCC 61-28) and rule (NDAC 33-16-01 and 33-16-02.1) which identify the limits by which discharges are permitted.

Findings

- 2.0 The NDPDES permit for the Devils Lake Outlet was issued in 2003. The permit was challenged in State District Court and appealed to the State Supreme Court in 2004. The matters raised in that litigation are final and may not be re-litigated.
- 3.0 The State Water Commission submitted a request in December 2007 to reissue the NDPDES permit. The new Devils Lake Outlet permit includes clarification of the intake structure and EPA boiler plate language. These are the only changes from the 2006 Permit modification that was previously upheld in the North Dakota State Supreme Court.
- 4.0 The regulated activities associated with this permit are neither a new or expanded source of pollutants to Category I waters so an antidegradation review is not required.
- 5.0 Several comments raised in the Devils Lake Outlet permit reissuance were previously raised in the 2003 permit issuance and 2006 permit modification which was upheld by the State Supreme Court and do not require response by the department.

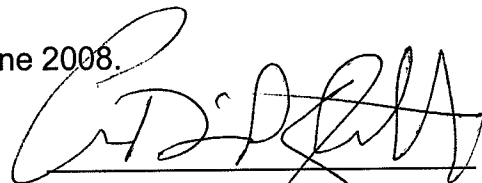
- 6.0 The U.S. Environmental Protection Agency (EPA) is issuing a regulation to clarify that water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program (40 CFR Part 122). This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements. This final rule is effective on August 12, 2008.
- 7.0 As a result of this federal regulation, the Devils Lake Outlet permit will become void (non-enforceable) on August 12, 2008, unless revived by a governing court decision that strikes down the rule. Since water transfers are not subject to NPDES permits, a Memorandum of Agreement may be finalized with the State Water Commission that outlines the operation conditions of the Devils Lake Outlet while maintaining beneficial uses of waters of the state.

RECOMMENDATIONS

The following recommendation is provided:

The Devils Lake outlet NDPDES permit reissuance should be approved as proposed.

Dated at Bismarck, North Dakota, this 30 day of June 2008.



L. David Glatt, Chief
Environmental Health Section