

September 3, 2010

Dear Regional Administrator Enck:

I am writing regarding the NJ DEP draft NJPDES discharge to groundwater (DGW) "permit by rule" (PBR) for the DuPont Pompton Lakes groundwater pump and treat groundwater remediation system.

As you know, the DuPont facility is subject to RCRA Corrective Action requirements, including closure and post closure care.

"Additional *remedial action*" is required at the facility (among other things as per 40 CFR 265.121 (b)(2) as discussed below). Extensive delays in remediation have led to direct contact exposures via vapor intrusion and off site soil, sediment and groundwater migration that have adversely impacted human health and the environment.

We believe that issuance of the proposed PBR would violate RCRA requirements and therefore may not be approved by NJ DEP and US EPA, as set forth below.

Accordingly, we request your immediate intervention in the matter to enforce RCRA requirements and to advise NJ DEP that the proposed PBR is in violation of RCRA and not federally approvable. In fact, NJDEP NJPDES regulations require RCRA compliance, thus the proposal also does not meet state requirements.

NJDEP and DuPont entered into 1993 Administrative Consent Order (ACO) which, among other things, governs the pump and treat system. The discharge to groundwater from that system is permitted pursuant to NJPDES regulations.

Applicable New Jersey DEP NJPDES regulations (@ NJAC 7:14A-1 et seq) and Guidance require:

***"All hazardous waste facilities shall obtain an individual NJPDES-DGW permit issued pursuant to N.J.A.C. 7:14A-10 to conduct ground water monitoring and corrective action unless exempted as described above which is based on N.J.A.C 7:14A-2.5(a)9 and 10.***

***NJPDES Rules - exemptions: NJAC 7:14A-2.5(a):***  
[http://www.state.nj.us/dep/dwq/7\\_14a/Sub02rule.pdf](http://www.state.nj.us/dep/dwq/7_14a/Sub02rule.pdf)

9. Discharges to ground water at a facility for which a Hazardous Waste Facility permit is issued under the Department's Hazardous Waste Rules at N.J.A.C. 7:26G-12, where that permit includes ground water monitoring and remediation conditions as applicable; and

**10. Discharges to ground water at a hazardous waste facility, as defined by N.J.A.C. 7:26G-8 and 9, that is undergoing closure and/or post-closure care under the terms of an enforceable document.** For the purposes of this paragraph, the terms "closure" and "post-closure" have the meanings set forth at 40 C.F.R. 264 and 265, as incorporated by reference at N.J.A.C. 7:26G-8.1 and 9.1, respectively, and the term "enforceable document" has the meaning set forth at **40 C.F.R. 270.1(c)7, as incorporated by reference at N.J.A.C. 7:26G-12.1.**

Applicable federal RCRA regulations @ 40 CFR 270.1(c)7 mandate an "**enforceable document for closure and post closure care**", including compliance with the minimum requirements of 40 CFR 265.121; and 40 CFR 271.16(e). These requirements include, among other things, the following:

§ 265.121 *Post-closure requirements for facilities that obtain enforceable documents in lieu of post-closure permits.*

(a) Owners and operators who are subject to the requirement to obtain a post-closure permit under 40 CFR 270.1(c), **but who obtain enforceable documents in lieu of post-closure permits, as provided under 40 CFR 270.1(c)(7), must comply with the following requirements:**

(1) The requirements to submit information about the facility in 40 CFR 270.28;

(2) **The requirements for facility-wide corrective action in §264.101 of this chapter;**

(3) The requirements of 40 CFR 264.91 through 264.100.

**(b)(1) The Regional Administrator, in issuing enforceable documents under §265.121 in lieu of permits, will assure a meaningful opportunity for public involvement which, at a minimum, includes public notice and opportunity for public comment:**

(i) *When the Agency becomes involved in a remediation at the facility as a regulatory or enforcement matter;*

**(ii) On the proposed preferred remedy and the assumptions upon which the remedy is based, in particular those related to land use and site characterization; and**

**(iii) At the time of a proposed decision that remedial action is complete at the facility. These requirements must be met before the Regional Administrator may consider that the facility has met the requirements of 40 CFR 270.1(c)(7), unless the facility qualifies for a modification to these public involvement procedures under paragraph (b)(2) or (3) of this section.**

**(2) If the Regional Administrator determines that even a short delay in the implementation of a remedy would adversely affect human health or the environment, the Regional Administrator may delay compliance with the requirements of paragraph (b)(1) of this section and implement the remedy immediately. However, the Regional Administrator must assure involvement of the public at the earliest opportunity, and, in all cases, upon making the decision that additional remedial action is not needed at the facility.**

**(3) The Regional Administrator may allow a remediation initiated prior to October 22, 1998 to substitute for corrective action required under a post-closure permit even if the public involvement requirements of paragraph (b)(1) of this section have not been met so long as the Regional Administrator assures that notice and comment on the decision that no further remediation is necessary to protect human health and the environment takes place at the earliest reasonable opportunity after October 22, 1998.**

We argue that the 1993 ACO and proposed PBR do not satisfy "enforceable documents" requirements. Specifically, among other thing:

1. by design, the PBR extinguishes formal NJPDES permit procedures, including public notice and opportunity for public hearing and public comment. As such, it does not assure "meaningful opportunity for public involvement which, at a minimum, includes public notice and opportunity for public comment". Even if DEP grants the Pompton lakes community's request to hold a public hearing on this PBR, that will be a one time event. The PBR would eliminate future public notice and comment procedures and opportunity for meaningful public involvement.

2. DEP Supervisor Steve Maybury has narrowed the scope of the

PBR proceeding. In reply to my objection with DEP's efforts to narrow the scope of the hearing, in a 9/3/10 email, Maybury wrote:

***It is important to recognize that the public notice only pertains to the NJPDES Discharge to Groundwater permit to recharge treated water. The permit does not address the remediation as you can see from reading the permit. The remediation/pump & treat is governed by the RAW. In fact if DuPont did not discharge to GW they would not need this permit. So in summary, the scope of the applicable comments is the permit/permit by rule.***

***While the scope of this hearing is limited to the permit, the DEP & EPA have committed to conduct additional general public meetings/information sessions to both inform the public and provide an opportunity for public input as we work through the remediation and make remedial decisions. The next likely public meeting will be held to address the cleanup of the Pompton Lake sediments. Following that I foresee that will also have to do public outreach on off site groundwater pilot test. The Environmental Community Advisory Group is now established. I fully expect and will encourage the CAG to provide recommendations regarding the timing and type of public involvement offered as we move forward.***

On its face, this violates 40 CFR 265.121(b)(1) ii, which requires full public comment on all aspects of the remediation.

3. The NJPDES DGW permit contains only 10 effluent limits. We do not believe that this complies with RCRA Corrective Action, groundwater remediation, and closure/post closure care requirements.

4. We have not reviewed the 1993 ACO, but request that EPA Region II and EPA Office of General Counsel in EPA HQ review this entire matter to determine whether NJDEP actions at the DuPont site meet 40 CFR 271.16(e) and other mandatory federal enforcement requirements, including RCRA Corrective Action, financial assurance, and closure/post closure care.

5. Because additional remediation is required to protect human health and the environment, and there have been extensive delays in remediation since October 22, 1998, the PBR is not approvable pursuant to 40 CFR 265.121(b)(3).

I appreciate your timely and favorable reply to this request. I may

be reached at (609) 397-4861 to clarify.

Sincerely,

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(Public Employees for Environmental Responsibility)

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