

April 11, 2011

Judith Enck, Regional Administrator
US EPA Region II
290 Broadway
New York, New York 10007-1866

Re: Request for EPA enforcement action at DuPont Pompton Lakes Works site [DuPont]

Dear Administrator Enck:

We appreciate recent positive developments in the U.S. Environmental Protection Agency Region II oversight at the DuPont site. Recent actions include: 1) formation of a Community Advisory Group (CAG); 2) EPA commitment of additional resources to respond to severe vapor intrusion risks; 3) EPA's May 20, 2010 RCRA permit Modified Compliance Schedule; 4) EPA oversight of NJDEP's proposed NJPDES permit by rule, which was withdrawn by the applicant; and 5) EPA's recent announcement of enhanced site inspection and field sampling oversight.

Those steps have begun to restore community trust in the Agency, but are not nearly sufficient.

Given the egregious harms inflicted on the Pompton Lakes community by DuPont, broader and more aggressive EPA regulatory responses are warranted to expedite cleanup, as we briefly outline below.

As you are aware, historical waste management and disposal practices at the DuPont Pompton Lakes site have resulted in the discharge and off site migration of hazardous substance and hazardous wastes. Discharges have contaminated soils, surface water, sediments, groundwater, ecosystems, and wildlife, both on the DuPont site and - to a yet unknown degree - off site throughout the surrounding region.

Volatile organic compounds (VOCs) from uncontrolled contaminated groundwater are migrating into at least 450 homes. The vapor intrusion forms a known complete exposure pathway. Actual or potential direct inhalation exposures to concentrations of contaminants in the basements of these homes present an unacceptable risk to occupants. Families are exposed to imminent and substantial health hazards. Yet, almost 3 years after the vapor intrusion problem was allegedly discovered, less than half of the homes have adequate vapor mitigation systems installed.

In December 2009, the NJ Department of Health and Senior Services issued a Report: "ANALYSIS OF CANCER INCIDENCE IN THE POMPTON LAKES NEIGHBORHOOD IMPACTED BY THE DUPONT GROUNDWATER CONTAMINATION" (DHSS Report)

The DHSS Report found statistically significant elevated incidence of kidney cancer in females and non-Hodgkin lymphoma in males

http://www.state.nj.us/health/eoh/cehsweb/documents/analysis_cancer_inc_pompton_lakes.pdf

These discharges and releases are subject to the requirements of CERCLA, RCRA and the Clean Water Act. Moreover, actual and threatened releases of hazardous substances from this site present a significant threat to public health and welfare (the standard under CERCLA). In addition, we believe that the facts currently in the record before EPA support a finding by EPA that the DuPont releases pose an imminent and substantial threat to public health and/or the environment (the standard under RCRA).

Thus far, remediation and restoration of the DuPont site have been governed by the terms of a 1988 Administrative Consent Order (ACO) between DuPont and the NJ DEP and a 1992 RCRA Corrective Action permit issued by US EPA Region II.

Yet more than 20 years later, contamination at the majority of some 200 RCRA "solid waste management units" ("areas of concern" under the ACO) has not been fully delineated or contaminant sources permanently remediated.

The groundwater plume has migrated off site and direct human exposures are not under control. Vapor mitigation systems have not been installed in all impacted buildings.

Given extremely high historic levels of lead (100,000 ppm) and mercury (5,000 ppm) in soils and sediments (since partially remediated); numerous floods and associated high groundwater tables; and bioaccumulation mechanisms; we don't need a fate/transport model to conclude that it is highly likely that contaminants have migrated far off site. The RCRA permit acknowledges these risks, in part by requiring that one factor that must be considered includes "*weather conditions that may affect the current levels of contamination*" (Module III. 7. c.Vii).

However, off site impacts have not been fully characterized. Fish, wildlife, and other natural resource injuries have not been fully documented and restored, and the public has not been compensated fully for lost uses of those natural resources.

Given current risk conditions and totally unacceptable cleanup delays and partial responses under the terms of the NJ DEP ACO and EPA RCRA permit, we are writing to urge EPA to take a series of steps, including enforcement action, to assure timely and protective cleanup and restoration of the site and impacted region.

Enforcement response is consistent with EPA's National Enforcement Strategy for RCRA Corrective Action (NESCA), which encourages the use of CERCLA at RCRA sites and outlines the advantages of CERCLA. As outlined in NESCA, those advantages include **(text boldface mine)**:

<http://www.jjkeller.com/wcsstore/CVCatalogAssetStore/references/hazmat/2010/052610RCRAGoal.pdf>

C. Use of CERCLA or Equivalent State Tools to Facilitate RCRA CA

*As part of NESCA, **Regions and States are strongly encouraged to consider using CERCLA enforcement authorities or the State equivalent (where possible) to help further the 2020 CA Goal. Although traditional RCRA permits and CA orders may fully address CA issues at typical facilities, CERCLA can be a useful enforcement supplement in many cases. Various CERCLA tools, including information gathering, settlement authorities, and cost recovery provisions, can, in appropriate cases, support RCRA CA and enhance and speed the cleanup process. EPA has long recognized the close relationship of cleanups conducted under RCRA and CERCLA.***

1. Advantages of CERCLA

a. Procedural

CERCLA contains a number of potential advantages when bringing enforcement actions to require cleanups. EPA has identified some of the specific procedural advantages of using CERCLA at facilities that might otherwise be addressed under RCRA. In some cases, CERCLA provides for higher penalties than RCRA as well as the availability of punitive damages. CERCLA's express statutory provisions addressing pre-enforcement review provide the ability to avoid disputes over the timing and scope of judicial review when bringing an enforcement action.

d. Cost Recovery Agreements

*CERCLA's cost recovery provisions, and the ability to establish Superfund special accounts, **provide extremely useful tools that may be used to help achieve the 2020 CA Goal.** Although EPA does not routinely seek to recover costs incurred in overseeing or otherwise implementing RCRA CA, **courts have on many occasions approved the use of CERCLA cost recovery authorities to recover costs incurred in complying with RCRA obligations.***

Under CERCLA section 122(b)(3), funds recovered under an agreement with a potentially responsible party may be placed into a Superfund special account to carry out the purposes of that agreement (i.e., to conduct or finance site-specific response actions). For example, funds from an agreement to collect payment on an insurance performance bond could potentially be placed in a special account to fund investigatory CERCLA work necessary to implement work originally ordered under a RCRA CA permit or order at a RCRA facility.

In light of the lengthy delays, ongoing problems, and limitations of the RCRA Corrective Action permit, we urge you to take the following steps:

I) Conduct RCRA Compliance Investigation and permit enforcement

The original 1992 RCRA permit included a compliance schedule in Appendix C. Compliance deadlines were established for interim measures, reporting, notification, remedial investigation, remedial workplan implementation, and corrective measures. These deadlines ran on 30-60 day timeframes.

More than, 20 years later, these compliance deadlines have not been met or enforced by EPA. EPA owes the public an explanation of why these deadlines were not met, and EPA must take enforcement action in the event Dupont is responsible for failure to comply with compliance schedule deadlines

It should be noted that the 1992 DuPont RCRA HSWA permit requires DuPont to:

*"determine the nature, extent, direction, and rate of migration of hazardous waste, including hazardous constituents, in soils, groundwater, surface water/sediment, **subsurface gas**, and or air"*

I highlighted "**subsurface gas**" to emphasize various specific affirmative duties and compliance obligations, which began in 1992, with respect to disclosure, detection monitoring, notification, reporting, compliance with guidance, and corrective action with respect to **vapor intrusion**.

The RCRA permit is based on certain key assumptions that have been called into question:

*"**based on the assumption** that the information provided in the Permittee's applications, and all succeeding revisions and data submissions, **is accurate**. ... The Permittee's failure in the application or during the permit issuance process **to disclose fully all relevant facts**, or the permittee's **misrepresentation of any relevant fact** at any time may be grounds for termination, revocation and reissuance, or modification of this permit (see 40 CFR parts 270.41, 270.42, and 270.43) and **potential enforcement action**."*

We urge EPA to test and validate those assumptions and investigate facts to determine compliance. We direct EPA's attention to the following specific conditions of the RCRA permit that apply:

1. Duty to comply (Module I. F. 1)
2. Duty to mitigate (I.F.5)
3. Duty to provide information (I F.7)
4. Immediate reporting of release (I.F.9)

5. Twenty four hour reporting (I.F.15)

We specifically note that the permit includes an important and extremely broad definition of "**action levels**". Please note that "action levels" not only establish jurisdiction and authorize EPA actions, they **also trigger several duties and compliance obligations on the part of DuPont**. The definition of "action level" expressly provides:

"When such promulgated standards are not available, action levels are media specific, hazardous constituent concentrations derived from non-promulgated human health based levels and environmental based levels. An action level may be set at the background level for a hazardous constituent for which data are inadequate to set a human health or environmental health based level."

Accordingly, enforceable requirements include "action levels" that DuPont currently is and was always subject to. Action levels are identified in, but are not limited to, various screening levels in NJ DEP Vapor Intrusion Guidance (2003, 2005 versions); EPA Vapor Intrusion Guidance (2001; 2002 versions), and numerous other NJ DEP and EPA human health guidance values and ecological screening levels.

Expanding on the related issues of compliance obligations, the RCRA permit specifically requires compliance with "Guidance documents":

*"**Guidance Documents.** When preparing the submissions described in the Module, **the Permittee shall follow** applicable guidance documents issued by EPA and the NJDEPE (sic) in a manner reflecting reasonable technical considerations." (Module III. B.4)*

Thus, the EPA RCRA Vapor Intrusion Guidance became an enforceable requirement upon issuance (December 2001) and the NJDEP Vapor Intrusion Guidance became an enforceable requirement upon release (2003).

Given that VI and ecological Guidance were applicable and enforceable requirements, DuPont was reasonably expected to be aware of the various duties and compliance obligations and to act to put in place compliance programs with respect to Guidance and action levels.

Furthermore, the RCRA permit prescribes various procedures DuPont must comply with that apply, in addition to Guidance and Action Levels, to a release **or threatened release** and to risks **and potential risks**:

*"In the event that the Permittee discovers a release or a threatened release of hazardous wastes, including hazardous constituents, ...**that poses a threat to human health or th environment, the permittee shall identify interim corrective measures to mitigate this threat. The Permittee shall immediately summarize the nature and magnitude of the actual or potential threat ... and notify the Regional Administrator verbally within 24 hours and in writing within 5 days.**"*

Additional and more specific notification and corrective action requirements are established in Module III, including for off site, subsurface gas, and air releases

We ask EPA to conduct a compliance investigation to document when DuPont provided this notice and complied with other duties and obligations under the RCRA permit with respect to discovery of vapor intrusion and all other off site releases to soils, surface waters, sediments, groundwater, and vapor intrusion.

II) Deploy CERCLA Authorities

EPA deferral to state voluntary clean-up efforts, as at the DuPont site, has long been the subject of criticism. As early as 1998, an EPA Office of Inspector General (OIG) audit entitled “State Deferrals: Some Progress, But Concerns For Long-Term Protectiveness Remain”

[<http://www.epa.gov/oig/reports/1998/8100234.pdf>] outlined concerns that remain true today. At that time, the OIG made a series of recommendations which we would urge you to revisit. In that regard, there are several actions under CERCLA that EPA should immediately apply to the DuPont site:

1. Conduct a hazard ranking score (HRS) for the facility and disclose the results to the community
2. Based on the results of the HRS, proceed in accordance with the requirements of 40 CFR Part 300, to consider NPL listing for the site
3. Issue a Unilateral Order under CERCLA
4. Create a "special fund" under CERCLA Section 122 - apply money to these, and possibly other necessary tasks:
 - a) EPA oversight costs;
 - b) EPA contractor support costs;
 - c) Baseline scientific studies to determine community-wide and regional off site impacts and natural resource injuries;
 - d) Epidemiological research and community health surveillance programs;
 - e) A revamped and unified EPA lead vapor intrusion program; and
 - f) Technical assistance grants.

We urge your prompt and favorable consideration of this proposal.

Sincerely,

Bill Wolfe, Director
New Jersey Public Employees for Environmental Responsibility (PEER)

