

PASSAIC RIVER COALITION

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Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code: 1103M
Washington, D.C. 20460-0001

Re: HSWA Permit for E.I. Du Pont De Nemours Company, Incorporated Pompton Lakes Facility, EPA ID# NJD002173946

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19 (a), the Passaic River Coalition petitions for review of the conditions of Resource Conservation and Recovery Act (RCRA) Corrective Action Permit United States Environmental Protection Agency (EPA) ID#NJ002173946, which was issued to Du Pont De Nemours Company, Incorporated (DuPont) on December 19, 2012, by the EPA. The permit at issue in this proceeding authorizes DuPont to remediate chemical contamination which has migrated from their Pompton Lakes Works Site (PLW) to the Acid Brook Delta of Pompton Lake in Pompton Lakes, NJ, as well as the nearby uplands area and downstream waterways.

Petitioner contends that because Region 2 EPA’s process for the public to participate in the Permit Modification was to hold a Public Information Session after issuing the modification and it was clearly stated at the Public Information Session that modifications to the permit could not occur, our only recourse is to appeal the permit. Specifically, petitioner challenges the following conditions:

1. The permit is not clear regarding the procedure for the removal of hotspots after testing is conducted on lower Pompton Lake and the Ramapo River. The Permit does not clearly state that DuPont shall dredge any hotspots that are found. This action should be included in the permitting procedures and clearly stated.
2. Because this action is being done under RCRA, the public participation component that EPA normally follows should be reinstated and that Community Advisory Group (CAG) should be brought back. Through that forum, the EPA and the public can converse over details of the permit during its formation and implementation. In the current form of public participation, the Public Information Session, nothing can be accomplished and the public cannot provide meaningful input.

* * *

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. See 40 C.F.R. § 124.19(a). We issued our comment, Re: Pompton Lake Sediment Cleanup Proposal/DuPont Works Site Permit Modification, dated January 13, 2012 (Exhibit A). This comment was submitted within the public comment period, dated November 20, 2011 to January 13, 2012.
2. In accordance with C.F.R. § 124.19(a), we are petitioning for administrative review of changes made from the draft to the final permit decision.

* * *

FACTUAL AND STATUTORY BACKGROUND

DuPont's Pompton Lakes Works Site operated from 1902 until closure in April 1994. While operational, the munitions facility manufactured lead azide, aluminum and bronze shelled blasting caps, metal wires, and aluminum and copper shells. As a result of DuPont's waste management practices, their operations contaminated soil and sediment with mercury and lead, as well as copper, barium, zinc, and selenium. Groundwater was contaminated primarily with volatile organic compounds (VOCs) such as the chlorinated solvents trichloroethylene (TCE) and tetrachloroethylene (PCE).

In 1988, DuPont entered into an Administrative Consent Order (ACO) with the New Jersey Department of Environmental Protection (NJDEP). DuPont was also issued a corrective action permit in 1992 by EPA Region 2 under the RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). The ACO and HSWA, which was revised in 1996, both require DuPont to investigate and remediate contamination resulting from their operations.

In 1926, DuPont moved their operations from the Wanaque River Valley to the Acid Brook Valley, where they operated for 68 years until the facility was closed. Manufacturing waste produced by DuPont's operations in the Acid Brook Valley drained into the Acid Brook, which weaves through a residential area before draining into Pompton Lake, an impoundment along the Ramapo River formed by the construction of the Pompton Dam at its southern end. While Acid Brook was remediated in the 1990s, Pompton Lake (and the Acid Brook Delta within the lake) has not yet been remediated.

In April 2011, DuPont submitted a Permit Modification application to propose final remedies for the Acid Brook Delta area. It required DuPont to dredge a 26 acre section of the Acid Brook Delta. As part of the permit modification process, EPA held an

Information Session at Pompton Lakes Borough Council Chambers on October 20, 2011, followed by public notice in two local newspapers on November 20, 2011. The public comment period began on November 20, 2011 and ended on January 13, 2012. Within that time, a public hearing was held at Pompton Lakes High School on January 5, 2012.

As a result of input received during the January 5, 2012 Public Hearing and from the United States Fish and Wildlife Service (FWS) in their February 9, 2012 permit review, EPA made alterations to the Permit Modification, which were released on December 19, 2012. A Public Information Session detailing this Permit Modification was held in Pompton Lakes, NJ on January 15, 2013, which falls in the middle of the 30-day appeal period (January 3 – February 3, 2013).

The current permit modification calls for more extensive work than just the dredging of 26 acres from the Acid Brook Delta. The Acid Brook Delta will still be dredged, but the dredge area has been expanded from 26 acres to 40 acres. In addition, the new modification acknowledges that contamination from DuPont's operations exists beyond the Acid Brook Delta and that some of DuPont's prior investigations are inconclusive. As a result, the following items were included in the updated permit modification:

- Sediment cores taken from Pompton Lake show that the majority of the mercury released into Pompton Lake has settled in the Acid Brook Delta. However, Lower Pompton Lake (below the Lakeside Avenue Bridge) is contaminated with elevated levels of mercury which EPA claims "can almost exclusively be attributed to PLW historical mercury discharges to Pompton Lake via Acid Brook." DuPont is now required to sample Lower Pompton Lake extensively to characterize mercury concentrations and identify any hotspots that may be present.
- A comparison of Pompton Lake bathymetry surveys from 2007 and 2011 indicates that mercury has been transported to sections of the Ramapo River beyond the Pompton Dam. DuPont is now required to sample sediments in the Ramapo River for approximately 3 miles past the Pompton Dam.
- The FWS found that the Ecological Risk Assessment DuPont conducted "does not accurately or adequately predict risk to ecological resources from exposure to contaminants released from the DuPont PLW." In order to properly predict risk to biota, DuPont must now perform a new Ecological Risk Assessment two years after dredging of Pompton Lake is complete. This is to be done in close coordination with the FWS.
- Despite being remediated in the 1990s, testing in November 2011 and February 2012 found sections of the Acid Brook have been recontaminated. While EPA states it is unclear why this stretch of Acid Brook has elevated mercury concentrations, DuPont must investigate and, if warranted, perform the necessary remediation of this section.
- DuPont must design and implement a Remediation and Restoration Plan to address ecological exposure to contaminants within a 2.6 acre section of upland soil adjacent to the Acid Brook Delta. As an alternative, DuPont can develop an updated "ecological soil delineation criteria" for the soils which would then be used to design the excavation plan.

- The permit modification also requires DuPont to design and implement a Long-Term Monitoring Program of the Pompton Lake system to confirm remedial efforts adequately addressed both human and ecological exposure to upland soils and lake sediment. As part of this program, DuPont must establish baseline conditions of Pompton Lake as a point of comparison to evaluate the effectiveness of remedial efforts.

* * *

ARGUMENT

1. Removal of Hotspots

The current Permit Modification, “III. Module III Supplement Corrective Action Requirements Related to Acid Brook Delta Sediments and Upland Soil Areas,” outlines DuPont’s remedial action requirements, including a Sediment Sampling Plan of areas which are not located within the ABD, which is defined as being west of the RAO line. Section E. (1) (d) (1) (a) states DuPont must:

Delineate the mercury concentration in the sediment for the area east of the “RAO Line” (i.e. the area of the lake that is not targeted for dredging), and along the channel down to the Pompton Lake Dam; and (b) characterize the sediment quality for the portion of the Ramapo River from the Pompton Lake Dam downstream to the wetlands adjacent to Riverside Park, Wayne, New Jersey (“Riverside Park”). Subsequent remedial activity shall be determined based on the findings of the [Sediment Sampling Plan].

Section E. (1) (d) (4) claims that “Upon EPA approval of the [Sediment Sampling Plan] report, including any modifications to the report resulting from EPA comments, the report will be used by EPA to determine whether any areas east of the “RAO line” require remedial activity.”

However, the permit modification, as currently written, does not clearly state that DuPont must remove hotspots found during the Sediment Sampling Plan via dredging. As quoted above, Section E. (1) (d) (1) (a) claims areas east of the RAO line are “not targeted for dredging.” Section E. (1) (d) (4) states “The removal area consists of the area within (west of) the “RAO line” centered at the discharge point of Acid Brook into Pompton Lake.” As currently worded, the permit modification does not explicitly allow for dredging east of the RAO line. It should explicitly state areas to be sampled under the Sediment Sampling Plan (i.e. not the Acid Brook Delta, as defined as being west of the RAO line) are areas that should be dredged should the Sediment Sampling Plan indicate there are hotspots which warrant removal.

2. Public Participation

EPA became involved in remediation of DuPont's PLW under the RCRA in 1992. Since then, the way in which EPA Region 2 has fulfilled its public participation responsibilities has been subject to change. First, the EPA addressed the public in an open forum, but talks were considered unproductive. To address this issue, members of a local community group met with Judith Enck, EPA Region 2 Administrator, and her advisors to request that the remediation of DuPont's PLW be conducted under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). EPA Region 2 chose not to do so, but they honored the public's request for improved communication.

EPA Region 2 then hired E² Inc. via a Technical Assistance and Services for Communities (TASC) contract to facilitate the formation of a Community Advisory Group (CAG) in Pompton Lakes. Typically used in CERCLA sites, a CAG served as a formal medium for community stakeholders to regularly engage EPA and NJDEP with their concerns. The CAG operated in this fashion from October 2010 until May 31, 2012 when EPA Region 2 issued a statement informing the public it would no longer participate in the CAG. Instead, they would now hold Public Information Sessions as necessary. The Permit Modification's Statement of Basis, issued December 19, 2012, erroneously states "EPA and NJDEP have participated in the Pompton Lakes Community Advisory Group (CAG) since October 2010." This statement does not acknowledge that neither agency has attended a CAG meeting since May 2012.

This decision came without warning and surprised municipal officials and the community. There was now no formal medium for dialogue where the public could provide meaningful input to the EPA. EPA's new form of public participation, the Public Information Session, is not a means for the public to provide the EPA with constructive suggestions. Instead, these meetings are held after the decision making process has concluded as a means to inform the public what has been decided.

More importantly, by not consulting with the public before deciding to leave the CAG, EPA Region 2 has violated its Congressional Mandate for public participation as outlined in RCRA §7004 (b) (1), which states:

Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.

Failure to engage the public in their decision to significantly change the method of public participation is a clear violation of this statute.

The issuance of the Acid Brook Delta permit modification is another example of how the EPA has eliminated the public from their decision making process and failed to meet their public participation requirements. EPA held a public hearing on January 5, 2012 so the public could voice their concerns regarding remediation of the Acid Brook Delta and

Pompton Lake. Public comments submitted during the Public Hearing, in conjunction with commentary from the FWS, clearly led EPA to significant changes to the Permit Modification. These changes were not announced until December 19, 2012. In the eleven month period between the public hearing and issuance of the new permit modification, EPA did not allow the public to participate in the formation of the revised permit, nor did they provide the public with any information. Within the eleven month period from the Public Hearing to the issuance of the Permit Modification, EPA held a Public Information Session on July 31, 2012 and has an “Informal Drop-In Session” on October 11, 2012. At both events EPA officials would not discuss the Acid Brook Delta Permit Modification. In fact, the public was unaware that changes were being made until the day the Permit Modification was issued. Despite not engaging the public during that eleven month period, EPA has indicated they were in open communication with DuPont regarding alterations to the permit modification.

After issuing the permit modification on December 19, 2012, the EPA held their Acid Brook Delta Public Information Session on January 15, 2013. This was the only opportunity for the public to communicate with the EPA about the permit modification since the initial Public Hearing on January 5, 2012. January 15, 2013 is also the approximate midpoint of the public comment period (January 3 – February 3, 2013). Therefore, anyone wishing to issue meaningful public comment regarding the permit modification would logically wait until the opportunity to discuss the permit with EPA officials on January 15. This leaves the public with 19 days to provide input. Furthermore, the only method the public has to provide input is to issue an appeal with the Environmental Appeals Board. Clearly the way EPA has structured public participation forces the public to issue an appeal to the Environmental Appeals Board within a short time frame.

Had the EPA been involved in the CAG during the formation of the revised permit modification, the public would have had monthly opportunities to engage EPA in a dialogue. The public would have been treated similarly to DuPont, who was allowed to provide ample input during EPA’s modification of the permit. Telling the public what remedial actions will be taken via Public Information Sessions held after the decision making process is complete does not constitute appropriate public participation and involvement as required under RCRA.

This appeal calls for the reestablishment of the CAG so that the public has every opportunity to be directly involved in the cleanup process of Pompton Lake.

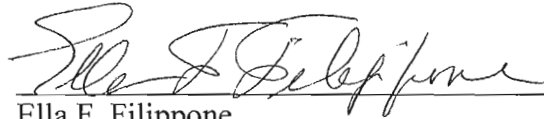
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CONCLUSION

As currently worded, the permit modification in question does not overtly state hotspots found as a result of the Sediment Sampling Plan can or will be removed via dredging. The Passaic River Coalition seeks to have the wording of the permit modification changed to clearly state that DuPont shall dredge any hotspots that are found outside of

the designated 40 acre area. Thus, this permit shall allow additional dredging in order to clean up Pompton Lake without the requirement of additional permits and time delays.

Furthermore, we request that the EPA reinstate the CAG which they had founded. The current method of public participation, periodic Public Information Sessions, is ineffective and undemocratic. Following the January 5, 2012 public hearing, EPA made significant alterations to the permit modification. These alterations were not published until December 19, 2012 and were done so in coordination with DuPont. Meanwhile the public was not provided any information regarding the permit modification, despite meeting with the public twice during that period. Clearly the public was removed from the formation of the permit modification during the eleven months between the Public Hearing and the issuance of the permit modification. Reinstating monthly CAG meetings where the public and the EPA can engage in dialogue regarding remedial progress would allow the public to provide meaningful input and foster greater trust and understanding between the two parties.



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Date: February 1, 2013

LIST OF EXHIBITS

EXHIBIT A: January 13, 2012. Re: Pompton Lake Sediment Cleanup Proposal/DuPont Works Site Permit Modification. Passaic River Coalition.