



December 8, 2020

VIA ELECTRONIC MAIL

New Jersey Department of Environmental Protection
Division of Water Quality – Mail Code 401-02B
Bureau of Nonpoint Pollution Control
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**Re: Petition to Require Delaware River Partners, LLC to Apply for Individual NJDPES Permits Implementing the TMDL for PCBs in Zone 4 of the Tidal Delaware River
Permits NJG0263541, NJG0304042 & NJG0299201**

To Whom it May Concern,

Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, (collectively, “DRN”) hereby petition the New Jersey Department of Environmental Protection (“NJDEP”) in accordance with N.J.A.C. 7:14A-6.13(l) and N.J.A.C. 7:14A-24.3(b) to take action under N.J.A.C. 7:14A-6.13(e) requiring permittee Delaware River Partners, LLC (“DRP”) to apply for and obtain individual New Jersey Pollutant Discharge Elimination System (“NJDPES”) permits for stormwater discharges associated with the construction of the Gibbstown Logistics Center¹ and for stormwater discharges associated with the operation of the Gibbstown Logistics Center.² DRN makes this request based on evidence that DRP’s discharges may be a significant contributor of pollutants based on the location of the discharges, the nature of the pollutants known to be present at that location, and the impaired quality of the tidal Delaware River, for which a Total Daily Maximum Load (“TMDL”) has been established by the United States Environmental Protection Agency (“EPA”) to control discharges of polychlorinated biphenyls (“PCBs”).³

¹ Currently authorized under General Permit 5G3, at Permit Nos. NJG0263541 & NJG0304042.

² Currently authorized under General Permit 5G2, at Permit No. NJG0299201.

³ See N.J.A.C. 7:14A-6.13(e)(1).

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Petitioners' Interest in the Petition

The Delaware Riverkeeper Network was established in 1988 to protect and restore the Delaware River, its tributaries and habitats. To achieve these goals, Delaware Riverkeeper Network organizes and implements stream restoration projects, volunteer water quality and ecosystem monitoring, educational programs, community technical assistance projects, environmental advocacy initiatives, community/member action and involvement projects, recreational activities, and environmental litigation throughout the entire Delaware River watershed, including the Delaware Estuary and Delaware Bay, and at a state or national level when necessary to advance the organization's mission. The watershed includes portions of New Jersey, New York, Pennsylvania, and Delaware. Delaware Riverkeeper Network is a not-for-profit membership organization with over 25,000 members, including members who live in, work in, and/or recreate in the State of New Jersey. Delaware Riverkeeper Network members fish, canoe, kayak, boat, swim, birdwatch, hike, bike, and participate in other recreational activities in the Lower Delaware River Watershed, including in the State of New Jersey. Delaware Riverkeeper Network undertakes numerous activities and initiatives that take place in, directly benefit from, and/or directly impact State of New Jersey waters, habitats, ecosystems, and communities.

Maya van Rossum, the Delaware Riverkeeper, works full-time for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates and works for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its estuary, bay, tributaries, and habitats. The Delaware Riverkeeper regularly visits the Delaware River for professional reasons. The Delaware Riverkeeper is the chief executive officer of the Delaware Riverkeeper Network.

The Delaware Riverkeeper Network was instrumental, through litigation and advocacy, in the securing of the PCBs TMDL for the Delaware Estuary – in fact it was litigation advanced by the Delaware Riverkeeper Network, when an affiliate of the American Littoral Society, that provided the underpinning driving the entire process. Thereafter, the Delaware Riverkeeper Network, represented by van Rossum, served on the Delaware River Basin Commission ("DRBC") Toxics Advisory Committee and PCBs Implementation Advisory Committee involved in the development of the PCBs TMDL and associated implementation plans. In addition to being an instigator for the creation of the PCBs TMDL, the Delaware Riverkeeper Network has been active through the TMDL development and implementation process – not only serving on the aforementioned DRBC committees deeply involved in the TMDL development, but providing expert reviews, comment, community engagement and input on its implementation in a variety of case-specific situations.

The TMDL for PCBs in the Tidal Delaware River

The Gibbstown Logistics Center is located at 200 North Repauno Avenue, Gibbstown, New Jersey, and occupies a portion of the former DuPont-Repauno facility, one of the top ten

sources of PCB point source discharges to the Delaware River.⁴ The location of the Gibbstown Logistics Center and the site's historic and ongoing contribution of PCBs to the Delaware River must not be ignored, and any potential new discharges must be carefully evaluated through NJDEP's individual permit process to ensure compliance with the TMDL and EPA regulations.

In 2003, EPA Regions II and III established a TMDL for PCBs in Zones 2 through 5 of the Delaware River.⁵ A TMDL is a calculation defining the level of a certain pollutant "necessary to attain and maintain the applicable narrative and numerical [water quality standards]" established under the federal Clean Water Act.⁶ It is "[t]he sum of the individual [wasteload allocations ("WLAs")] for point sources and [load allocations ("LAs")] for nonpoint sources and natural background."⁷

Relevant to this petition, WLAs are "the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of *water quality-based effluent limitation*."⁸ The Stage 1 TMDLs for Total PCBs in Zone 4 of the tidal Delaware River is 56.71 milligrams per day (mg/d), 6.54 mg/d of which is allocated to WLAs, 47.34 mg/d to LAs, and with a margin of safety of 2.84 mg/d.⁹ "Reasonable assurance" of meeting the TMDL is provided by "[e]ffluent quality data and source minimization plans required through NPDES permits issued by state permitting authorities will provide the basis for assessment regarding consistency with the WLAs developed or issued in Stage 1"¹⁰

As a part of the Stage 1 implementation of the TMDL, NPDES permitting authorities are to impose non-numeric water quality-based effluent limitations on point source discharges in the tidal Delaware River.¹¹ In accordance with the implementation plan, NPDES permit requirements for certain dischargers, including existing point source discharges from the DuPont-Repauno site currently operated by the Chemours Company, must "include waste minimization and reduction programs and additional monitoring with

⁴ U.S. Env'tl. Prot. Agency Regions II & III, Total Maximum Daily Loads for Polychlorinated Biphenyls (PCBs) for Zones 2 - 5 of the Tidal Delaware River at Appx. Table 3-4 (Dec. 15, 2003) (hereinafter, "TMDL") (Attachment A); Cavallo, Gregory J., Del. River Basin Comm'n, Evaluation of PCB TMDL Efforts in the Delaware Estuary (2015); Cavallo, Grejory J., Delaware River Basin Comm'n, Implementation of the PCB TMDLs in the Delaware Estuary and Bay (Feb. 20, 2018).

⁵ See TMDL. The Gibbstown Logistics Center is located in Zone 4 of the tidal Delaware River.

⁶ 40 C.F.R. § 130.7(c)(1); see also 33 U.S.C. § 1313(d)(1)(C).

⁷ 40 C.F.R. § 130.2(i).

⁸ 40 C.F.R. § 130.2(h).

⁹ TMDL at xi. On December 4, 2013, DRBC amended its Water Quality Regulations, Water Code, and Comprehensive Plan to establish a water quality criterion of 16 picograms per liter for Zones 2 through 6 of the Delaware Estuary and Bay. DRBC Res. No. 2013-8. Implementation of this criterion will be incorporated in the Stage 2 TMDLs. *Id.*

¹⁰ TMDL at 11. See also *Am. Farm Bureau Fed'n v. U.S. Env'tl. Prot. Agency*, 792 F.3d 281, 299 (3d Cir. 2015) ("'[T]otal maximum daily load' is broad enough to include allocations, target dates, and reasonable assurance.").

¹¹ See TMDL at 10

Method 1668A.”¹² Waste minimization and reduction programs have been implemented by the DRBC for discharges containing PCBs—these programs are known as pollutant minimization plans (“PMPs”).¹³ Upon issuance of an NPDES permit by a Clean Water Act permitting authority, the permitting authority either incorporates the PMP as an effluent limitation, or imposes a more stringent state or federal requirement.¹⁴

As of 2005, the DuPont-Repauno site’s point source discharges were contributing 463 mg/d—more than *eight times* the entire TMDL for Zone 4—which by 2016 had been reduced by 61% through the implementation of a PMP approved by DRBC and incorporated in an NJPDES permit.¹⁵ As DRP proposes to create several new point sources at this very same site, any NJPDES permit issued for these discharges must incorporate water quality-based effluent limitations in accordance with the TMDL and EPA regulations.

Clean Water Act Regulations Governing the NPDES Permitting Process

EPA’s Clean Water Act regulations governing National Pollutant Discharge Elimination System (“NPDES”) permits contain provisions specifically addressing how a TMDL affects the permitting process. First, states are prohibited from issuing such permits to “a new source or discharger where the discharge from its construction or operation will cause or contribute to the violation of water quality standards.”¹⁶ Specifically, where a new source or discharge is proposed in a water segment subject to a TMDL, the permit applicant “must demonstrate, before the close of the public comment period, that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.”¹⁷ Effluent limitations included in a NJPDES permit must also be consistent with approved WLAs.¹⁸

Currently, DRP’s discharges are authorized under NJPDES general permits 5G3 and 5G2. These permits do not specifically address whether the permitted discharges cause or contribute to violation of a water quality standard, nor do they contain a condition prohibiting such discharges. Furthermore, because the amount of PCBs being discharged has not been evaluated, there is no determination of consistency with approved WLAs, or any water quality-based effluent limitations such as a PMP specifically targeting PCB pollution.

¹² TMDL Appx. 3 at ii.

¹³ See DRBC Water Quality Regulations at 4.30.9 (codified at 18 C.F.R. Part 410).

¹⁴ See *id.* at 4.30.9(I).

¹⁵ Cavallo, Gregory J., Delaware River Basin Comm’n, Implementation of the PCB TMDLs in the Delaware Estuary and Bay (Feb. 20, 2018); see also Parsons, PCB Pollutant Minimization Plan 2019 Annual Report Repauno Site Gibbstown, NJ (Apr. 2020) (Attachment B).

¹⁶ 40 C.F.R. § 122.4(i).

¹⁷ *Id.* The permitting authority may waive this requirement if it “determines that [it] already has adequate information to evaluate the request.” *Id.* at § 122.4(i)(2).

¹⁸ See 40 C.F.R. § 122.44(d)(1)(vii)(B).

DRP's Stormwater Pollution Prevention Plan and PCB Sampling Plan

As a part of the required Stormwater Pollution Prevention Plan (“SPPP”) submitted under the 5G2 Basic Industrial Stormwater Permit, DRP proposes a years-long evaluation process to determine the permitted discharges’ effect on water quality. As explained above, this process must occur *before* an NPDES permit is issued, not after. According to NJDEP, permit authorization under General Permit 5G2 is intended for “light industries” that can easily eliminate exposure through the implementation of Best Management Practices (BMPs)” such as “covering [sources of pollution] with a roof or tarp, moving source materials inside, or simple housekeeping procedures.”¹⁹ Indeed, the SPPP submitted to NJDEP by DRP includes BMPs such as designating certain areas as loading/unloading areas to contain spills and paving those areas, inspecting transloading system equipment to ensure no leaks are present, and training employees how to handle source materials.²⁰

Potential PCB discharges are not discussed in the SPPP BMPs, but are instead included in a section dedicated to coordination of the SPPP with other environmental management plans, where DRP states that it has “developed and will implement a PCB stormwater sampling plan as stormwater outfalls become operational.”²¹ The PCB stormwater sampling plan, attached to the SPPP as Appendix E, provides that “[s]amples will be collected within one year of completion of construction activities and during a qualifying precipitation event. Monitoring will continue at a frequency of one sample per year for three years.²² Finally, after *all three years of data* has been collected for *each* outfall (which will be more than three years from now, since half of the outfalls have a start-of-operation date labeled “TBD”), DRP will prepare “recommendations regarding future PCB sampling and the possible need for DRP to develop a PMP for its operations,” which will then be reviewed with NJDEP and DRBC.²³ This multi-year sampling plan and some-day intent to discuss whether a PMP is appropriate does not comply with the TMDL implementation plan or EPA’s regulations, which require a determination of consistency with approved WLAs, and any effluent limitations required to achieve consistency, *prior* to issuance of a NPDES permit.

Conclusion

In sum, if DRP is not required to apply for and obtain individual permits for its stormwater discharges, then from March 2017²⁴ to some yet-to-be-determined date after 2023, DRP will have been discharging into the Delaware River without any data showing whether those discharges are consistent with WLAs nor whether they contain an amount of PCBs that will cause or contribute to the violation of water quality standards. This

¹⁹ N.J. Dep’t of Env’tl. Prot., Bureau of Nonpoint Pollution Control, Div. of Water Quality, Basic Industrial Stormwater General Permit Guidance Document, NJPDES Permit No. NJ0088315 (rev. Feb. 1, 2013).

²⁰ See SPPP Form 4 – Best Management Practices, submitted June 30, 2020 (Attachment C).

²¹ See SPPP Form 7 – Coordination of SPPP with Other Existing Environmental Management Plans, submitted June 30, 2020.

²² SPPP Appx. E at 8.

²³ SPPP Appx. E at 10.

²⁴ See Permit No. NJG0263541.

information is a *prerequisite* to issuing an NPDES permit.²⁵ To remedy this defect, DRN requests that NJDEP require DRP to apply for and obtain individual NJPDES permits for its construction-related and operational stormwater discharges so that NJDEP can evaluate their consistency with the TMDL and impose enforceable water quality-based effluent limitations to control PCB discharges.

Respectfully submitted,

Maya K. van Rossum



the Delaware Riverkeeper
Delaware Riverkeeper Network

Enclosures

cc: Delaware River Partners, LLC (*via electronic and first-class mail*)
Delaware River Basin Commission (*via electronic mail*)

²⁵ See 40 C.F.R. §§ 122.4(i), 122.44(d)(1)(vii)(B).