



August 15, 2012

Robert Underwood  
Section Manager  
DNREC, Division of Water Resources  
Surface Water Discharges Section  
89 Kings Highway  
Dover, DE 19901

Re: NPDES Permit for Delaware City Refinery

Dear Mr. Underwood,

I write to urge you to include a 316(b) requirement in the NPDES Permit for the Delaware City Refinery that is currently in preparation. Since 2002 the Delaware City Refinery has been operating under an expired permit, and has not been required to comply with the requirements of 316(b) that have been a part of the Clean Water Act for 4 decades. It is time to ensure the Delaware City Refinery come into full compliance with the Clean Water Act, including operating under an up-to-date NPDES permit that ensures full compliance with the 316(b) requirements of the Clean Water Act.

As you are, I'm sure, aware, both the Second Circuit Court of Appeals and the United States Supreme Court have issued detailed rulings with regards to section 316(b) of the Clean Water Act. Both decisions, when read together and with the plain language of the Clean Water Act, provide ample guidance on how section 316(b) should be applied to existing facilities such as the Delaware City Refinery. The fact that the US Environmental Protection Agency has determined it needs one more year to issue regulations that provide additional guidance for the implementation of 316(b) should not be used by DNREC as a reason to further delay issuing a permit that ensures Delaware City Refinery compliance with this section 316(b) of the Clean Water Act.

The impacts of the Delaware City Refinery (DCR), coupled with the findings in the two court decisions make clear that compliance with 316(b) would mandate a technology that would significantly reduce/avoid the fish kills that currently take place at DCR. The Court decisions also make clear that mitigation activities are not an appropriate or legal way to come into compliance with the 316(b) requirements of the Clean Water Act. That being said, we at the

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Delaware Riverkeeper Network do believe that DCR has an obligation to make up for the decades of harm it has inflicted on the fish populations and habitats of the Delaware Estuary. As such, any NPDES permit issued should require the best technology available on the cooling water intake structures of the facility so as to minimize/avoid its present and future fish kills, as well as a suitable mitigation activity that can help make up for the past damage inflicted by the facility. (But I want to be clear, we do not believe that a wetlands project that involves the application of herbicides could appropriately fulfill this mitigation obligation as such a project inflicts its own set of environmental and human risks and harms.)

DNREC has all of the information, evidence, and legal backing it needs to issue a permit requiring closed cycle cooling at the DCR facility, or some technology that would similarly reduce/avoid fish kills at the facility by over 95%.

The Delaware Estuary and our region's communities have put up with DCR's failure to comply with 316(b) of the Clean Water Act long enough.

I urge you not to await EPA issuance of a new body of regulation before enforcing the Clean Water Act at the Delaware City Refinery. The fact of the matter is, DNREC has been using the excuse of waiting for EPA regulatory guidance for many years. The guidance EPA is on track to issue next year may be further delayed either by EPA itself, by an extended public process, and/or by subsequent legal challenges. It is time for DNREC to take responsibility and to act in implementing 316(b) of the Clean Water Act in a new NPDES permit issued for the Delaware City Refinery forthwith.

Respectfully,



Maya K. van Rossum  
the Delaware Riverkeeper