



April 30th, 2010

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Ms. Teresa Diehsner
NYSDEC Headquarters
Division of Environmental Permits
625 Broadway, 4th Floor
Albany, New York 12233-1750

Dear Ms. Diehsner:

Enclosed you will find written comments regarding NYSDEC's pursuit of a Department Initiated Modification (DIM) to the SPDES Permit # NY 007 2061, ID # 9-2934-00022/00049, CWM Chemical Services, LLC facility.

Please accept the attached memorandum prepared by Buffalo Niagara Riverkeeper regarding the above referenced permit modifications. If there are any questions, please contact me directly at (716) 852-7483, or email jedlicka@bnriverkeeper.org.

Sincerely,

Jill Jedlicka
Director of Ecological Programs

BB;jsj;kw

CC: Julie Barrett O'Neill – Buffalo Niagara Riverkeeper
Barry Boyer – Buffalo Niagara Riverkeeper
Katherine Winkler – Buffalo Niagara Riverkeeper

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**Comments of Buffalo Niagara Riverkeeper
On SPDES Permit Modification
CWM Chemical Services LLC No. NY 007 2061**

Buffalo Niagara Riverkeeper previously raised a variety of issues with respect to the proposed permit in its comments filed on January 15, 2008. DEC addressed these contentions in its Responsiveness Summary dated September 1, 2009.¹ While we do not intend to waive or concede any of the points we have previously raised, we submit that “issue has been joined” on these matters, and that further comment by us would not produce a better record for judicial review. Therefore, we will use this opportunity to raise two points, one general and one technical, which we feel have not been adequately addressed by the prior proceedings.

- Our general concern is less with the specifics of the permit, than with the fact that the permit renders increasingly hollow the promises of the Clean Water Act, the Great Lakes Water Quality Agreement, and the Four-Party Agreement. All of these documents say, in somewhat different language, that the release of toxic materials to Great Lakes waters will be phased out within a short but reasonable time, and that the relevant laws will be implemented so as to achieve “zero discharge” and “virtual elimination” of persistent toxic substances. This permit does very little to move toward that goal. That is not explicitly illegal, in the sense of violating a particular statutory mandate—as the court noted in *American Iron and Steel Institute v. EPA*, 115 F.3d 979, 1001 (DC Cir. 1997), the relevant words in the Water Quality Agreement are “goals, not mandates,” and the same conclusion is true in varying degrees true of the other official documents mentioned above. But even though these terms in domestic law and international agreements do not establish enforceable bright-line legal rules, this does not mean they are totally without effect.

According to DEC’s “Permit Limit Fact Sheet,” sixty-two (62) of the permit’s limitations on effluent discharges are based on “BPJ”—Best Professional Judgment. In other words, they are discretionary agency determinations as to what permit limits will best carry out the mandates of the Clean Water Act, implementing state statutes, and the relevant international agreements. Other parameters, such as the R or “rollover” provisions carried forward from prior permits (an additional 100 permit limits), embody a discretionary determination that each of the limits in question remains relevant and appropriate for this facility. Given the size, hazard, and unique nature of this facility in New York State, it is not surprising that agency discretion plays a large part in framing the permit limits. But we do have a problem with the way discretion is being exercised in writing the permit. To the limited extent that this permit goes beyond black-letter regulatory mandates such as EPA’s Great Lakes Water Quality Guidance, it appears to set limits that have been established by the permittee, rather than by NYSDEC. The fact sheet indicates that most of the BPJ limits are driven by “DMR data”—which, according to page 21 of the SPDES Permit Factsheet, means that permit limits were adjusted “to reflect actual discharge levels (from DMR data).” In other words, DEC is not independently setting lower permit limits; rather, it is effectively delegating that decision to the permittee by adjusting the limits to reflect what the permittee has already been accomplishing. That is like a teacher letting students grade their own performance—in short, an abdication of responsibility. We submit that when DEC

¹ Responses to Comments on Draft SPDES Permit Modification, CWM Chemical Services LLC, SPDES Permit No. NY 007 2061 (Sept. 1, 2009) at 4-13.

exercises its discretion in writing a permit that affects the waters of the Great Lakes Ecosystem, it is required to take some account of the “zero discharge” and “virtual elimination” goals of the Water Quality Agreement, and the comparable provisions of the Clean Water Act and the Four Party Agreement. Failure to take account of those obligations, and to explain how and why those factors have been taken into account in making the decision, is arbitrary, capricious, and an abuse of discretion. In short, in accord with the general principle of administrative law that “the proponent of a rule or order has the burden of proof,” the onus is on DEC to show how its exercise of discretion in this permit is consistent with the Great Lakes Water Quality Agreement, the Four-Party Agreement, and the Clean Water Act.

- In addition to this general concern, Buffalo Niagara Riverkeeper would like to express its more specific concern regarding the monitoring requirements for stormwater runoff, in relation to persistent toxics such as PCBs. The relevant monitoring requirements for internal and external sampling points mostly call for grab samples. Even if conducted in accord with EPA guidance for storm-event-based sampling,² monthly or weekly grab samples provide a snapshot (which may or may not be representative) of a dynamic process. The need for more than a snapshot is highlighted by the hazardous nature of the materials stored in the landfill, the history of contaminated runoff, and the huge volume of runoff that is permitted. The 73.4 mgd permitted for outfalls 002, 003, and 004 is equivalent to about 225 acre-feet of water—enough to fill a one-acre column of water more than 225 feet high (20% higher than the drop of the Horseshoe Falls at Niagara). This may be a plausible value of maximum likely runoff for a facility of some 700 acres that is structured to prevent infiltration of precipitation, but it underscores the fact that at these volumes, it doesn’t take much concentration of persistent toxics to create a significant mass loadings problem downstream. In other area waterways, such as the Buffalo River watershed, DEC has used the Pisces sampling device to provide a calculation over time of the amount of lipophilic toxics being discharged to surface waters. This relatively simple and inexpensive sampling device seems to be well suited to getting at least a rough idea of the volume of PCBs and other toxics that are moving off of the CWM landfill and toward surface waters. We urge the Department to consider using this device at least for screening-level assessment of toxics mass loadings in stormwater.

Thank you for your consideration of these comments.

² USEPA, NPDES Storm Water Sampling Guidance Document, EPA 833-B-92-001