



RIVERKEEPER

July 10, 2008

Lehigh Cement Company – Corporate Office
7660 Imperial Way
Allentown, PA 18195

c/o C T Corporation System
111 Eighth Avenue
New York, NY 10011

RE: Notice of Intent to Sue Lehigh Cement Company for Clean Water Act and Resource Conservation and Recovery Act Violations at its Facility at 120 Alpha Road in Catskill, NY.

Dear Sirs & Madams:

This letter constitutes Riverkeeper's NOTICE OF INTENT TO SUE Lehigh Cement Company ("LCC"), as owner and operator of the facility located at or about 120 Alpha Road, Catskill, NY, for violations of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 *et seq.* Specifically, this letter gives notice of our intent to seek redress for the illegal discharge of landfill leachate from LCC's Catskill/Alsen cement facility, located at 120 Alpha Road, Catskill, NY, into the Hudson River and surrounding wetlands.

Riverkeeper protects and safeguards the ecological integrity of the Hudson River, its tributaries, and the New York City watershed. On behalf of Riverkeeper's members, we routinely patrol the region's waters and, when necessary, file citizen suits under the CWA, RCRA and other appropriate statutes to prevent and remediate pollution problems. Many of our members and constituents live near Catskill and recreate in that region of the Hudson River.

LCC Is Discharging Landfill Leachate into the Hudson River and Surrounding Wetlands.

According to documents collected from the New York State Department of Environmental Conservation ("DEC") and the United States Environmental Protection Agency ("EPA"), LCC's Catskill, NY facility is comprised of two contiguous properties—Lehigh-Cementon and Lehigh-Alsen directly to the north. The Cementon property contains LCC's current operations while the Alsen property contains the Alsen cement plant, which is no longer in operation, and the Alsen Dust Disposal facility ("landfill"), which underwent a phased closure between 1987 and 1997, and contains approximately 1.4 million cubic yards of cement kiln dust ("CKD").

Riverkeeper has obtained evidence consisting of water quality samples and aerial and on-ground photographs of the Lehigh-Alsen property which document leachate from the closed Alsen landfill discharging into adjacent wetlands and the Hudson River. These un-permitted discharges violate the CWA, RCRA, and New York state solid waste disposal regulations.

The un-permitted discharges Riverkeeper has documented are located east of the Alsen landfill and south of Duck Cove. Leachate collects in a channel of riprap stone which encircles the landfill and is discharged from two discreet riprap spillways into two separate ponds whose water is golden-bronze in color. These ponds are located within a marshy wetland area and appear to be hydrologically connected to each other. Aerial photography shows a third pond with golden-bronze colored water located east of the two wetland ponds. Leachate-laden water in the wetland ponds cascades over earthen dams which form the ponds' edges. This water then flows into the surrounding wetlands which consist of a large muddy/submerged area full of Phragmites and other wetland grasses. The wetland is connected to the Hudson River at Duck Cove. (see exhibit A)

On the following dates, Riverkeeper observed discharges of pollutants from the Alsen landfill: November 27, 2006; November 28, 2007; April 24, 2008; May 14, 2008; and June 21, 2008. In addition, Catskill, NY, where the LCC facility is located receives on average 40 inches of rainfall, and 45 inches of snowfall, per year. This precipitation occurs over an average of 88 days.¹ Upon information and belief, every time there is precipitation, additional leachate is generated by the Alsen landfill, much of which is discharged through the riprap spillways into the wetland ponds and the Hudson River.

LCC is Violating the Federal Clean Water Act.

Pursuant to sections 505(a) and (b) of the CWA, 33 U.S.C. sections 1365(a) and (b), Riverkeeper intends to sue LCC for violating, and continuing to violate, effluent standards and limitations as defined under section 505(f) of the CWA, 33 U.S.C. § 1365(f), by discharging pollutants into waters of the United States without a permit required by CWA section 301(a), 33 U.S.C. § 1311(a).

The CWA prohibits the discharge of pollutants from a point source to the waters of the United States except when pursuant to and in compliance with a permit.² See 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. The Act defines "pollutant" to include chemical wastes, biological materials, rock, sand, and industrial waste discharged into water. 33 U.S.C. § 1362(6). Leachate from the Alsen landfill qualifies as a pollutant because it contains cement kiln dust runoff, turbidity, settleable solids, suspended solids, and is highly alkaline.

¹ See, Sperling's Best Places, http://www.bestplaces.net/city/Catskill-New_York.aspx#6

² The State of New York was delegated authority by the Environmental Protection Agency to administer the National Pollution Discharge Elimination System ("NPDES") permit program pursuant to 33 U.S.C. section 1342(b). The State Pollution Discharge Elimination System ("SPDES") permit program is the functional equivalent of NPDES.

Riverkeeper has documented elevated pH levels in the landfill leachate, golden-bronze colored ponds, and wetlands adjacent to Duck Cove and the Hudson River. Riverkeeper obtained water quality samples which revealed a pH of 12.33 in the leachate flowing from the landfill, 11.54 in the water of the southernmost wetland pond, 9.81 at the northernmost pond—closest to Duck Cove, and 9.67 in the tidal wetlands adjacent to Duck Cove. This contrasts with a pH reading of 7.76 taken in the Hudson River near the Catskill facility, and 7.53 for a sample of Town of Catskill drinking water. In addition to the high alkalinity and other pollutants documented by Riverkeeper, cement kiln dust is known to contain metals including antimony, arsenic, barium, lead, chromium, and mercury, all of which are also pollutants under the CWA.³

“Point source” is defined by the CWA as “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The leachate discharged from the Alsen landfill collects in the riprap channel which encircles the landfill’s base and flows into the spillways which discharge leachate into the ponds. The landfill, leachate collection channel, and spillways thus clearly fit within the CWA § 1362(14) definition of “point source.”

The United States Supreme Court has defined the phrase “waters of the United States” under the CWA to include, at its most basic, all waters “navigable in fact, or readily susceptible of being rendered so.” *Rapanos v. United States*, 547 U.S. 715, 723 (2006). This definition clearly includes the Hudson River and Duck Cove. The Supreme Court further elaborated that the phrase also encompasses more waters than those simply navigable in fact. Specifically, it held that wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right are adjacent to such waters and therefore covered under the CWA. *Rapanos*, 547 U.S. at 742. LCC’s wetland boasts a continuous surface connection to Duck Cove and the Hudson—both “waters” in their own right—and as such is a “water of the United States” under the CWA.

Not only does the CWA require that LCC obtain a permit for the leachate being discharged from the Alsen landfill, New York State law requires such a permit as well. Pursuant to New York state solid waste regulations, 6 NYCRR § 360 *et seq.*, “all solid waste facilities” must be “operated and closed in a manner that minimizes leachate” and “prevents migration of leachate into surface and groundwater.” 6 NYCRR 360-1.14(b)(2). Leachate is defined as “any solid waste in the form of a liquid, including any suspended components in the liquid, that results from contact with or passage through solid waste.” 6 NYCRR 360-1.2(b)(98). “Solid waste management facility” is defined to include landfills. 6 NYCRR 360-1.2(b)(158). Furthermore, the discharge of any leachate requires a SPDES permit. 6 NYCRR 360-1.14(b)(2).

LCC does not possess a permit for this discharge pursuant to the Clean Water Act. LCC’s Catskill facility operates under SPDES permit #NY0007242. A diligent search through DEC documents, supplemented by conversations with DEC staff, revealed that LCC’s SPDES permit currently permits the discharge of effluent through one outfall at the facility—outfall #001. This outfall is permitted to discharge non-contact cooling water and material storage pile runoff.

³ EPA Technical Background Document on Ground Water Controls at CKD Landfills (Draft) (1998), <http://www.epa.gov/epaoswer/other/ckd/ckd/ckdp0102.pdf>

Photographs of the leachate discharges clearly show that this leachate is flowing directly into the wetland ponds and is in no way being pumped or otherwise conveyed for discharge through outfall #001. This outfall is located in the vicinity of LCC's current operations on the Lehigh-Cementon portion of the Catskill property, more than 800 yards from the Alsen landfill. All other discharges from LCC's facility are non-permitted discharges under the CWA and are thus illegal.

Upon information and belief, the discharges of cement kiln dust, turbidity, settleable solids, suspended solids, and high alkalinity from the landfill are continuous and ongoing.

LCC Is Violating the Federal Resource Conservation and Recovery Act.

Pursuant to 42 U.S.C. § 6972 of RCRA, Riverkeeper intends to sue LCC for disposing of solid waste in a manner that presents an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B). Liability under RCRA is retroactive, and LCC's ongoing landfill discharges—regardless of the operational status of the landfills themselves—are illegal and subject to liability under RCRA. 41 U.S.C. § 6972(a)(1)(b); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Fdn., Inc.*, 484 U.S. 49 (1987).

LCC's placement of CKD in the Alsen landfill constitutes a disposal of solid waste under RCRA. "Disposal" under RCRA is defined to include the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste...into or on any land." 42 U.S.C. §6903(3). Courts have noted that the "broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment" as opposed to the more narrow regulatory definition of disposal. *Connecticut Coastal Fisherman's Ass'n v. Remington Arms, Co.*, 989 F.2d. 1305, 1315 (2d. Cir. 1993). CKD is currently deemed a "special waste" by the EPA,⁴ and is subject to RCRA's requirements as a "solid waste" because it is a "discarded material...resulting from industrial, commercial, mining and agricultural operations." 42 U.S.C. § 6921(b)(3)(A)(iii); 42 U.S.C. § 6903(27).

The leachate discharges from the Alsen landfill introduce elevated alkalinity, turbidity, and metallic concentrations into the wetlands and ponds which feed into Duck Cove and the Hudson River. These discharges likely cause aquatic biota in the receiving waters to be exposed to a substantial risk of harm. As noted above, Riverkeeper has documented elevated pH levels in the landfill leachate, golden-bronze colored ponds, and wetlands adjacent to Duck Cove and the Hudson River. The water quality samples obtained by Riverkeeper found a pH of 12.33 in the landfill leachate, 11.54 in the southernmost wetland pond, 9.81 in the northernmost pond—closest to Duck Cove, and 9.67 in the tidal wetlands which connect to the Hudson River at Duck Cove.

LCC's highly alkaline leachate discharges create a serious risk of harm to the adjacent wetlands, Duck Cove, and the Hudson River. The EPA's 1993 Report to Congress on Cement Kiln Dust which characterized risks associated with CKD leachate discharges, found that:

High pH levels in ground water and surface water may result in a variety of adverse effects, including the mobilization of certain metals and other constituents that could pose

⁴ See EPA Cement Kiln Dust Waste, <http://www.epa.gov/epaoswer/other/ckd/>

toxicological problems, human tissue burns (at pH levels above 12.5 or more), corrosion in pipes, and objectionable taste in drinking water. In addition, high pH levels could cause a wide variety of adverse ecological effects.⁵

In addition, the EPA's 1998 Technical Background Document on Ground Water Controls at CKD Landfills (draft) ("CKD Technical Document") found that storm water runoff that contacts CKD waste piles typically has a pH that exceeds 12.5, which is the federal standard for the corrosivity characteristic for hazardous wastes. See 40 CFR § 261.22. The CKD Technical Document also found that ground water releases and surface water runoff from CKD piles can have significant impacts on aquatic environments. A study referenced in the CKD Technical Document, which was performed by Washington State, involved placing rainbow trout in an aquarium with 1,000 ppm of CKD for 96 hours. The test found that "[o]f the ten nonneutralized bioassays conducted, four of the tests exceeded the toxicity criteria for dangerous waste. Two fish bioassay tests had pH values exceeding 10.5 SU and had 97 percent and 100 percent mortality rates. Four of the tests had pH values equal to 10.5, but the two of these tests that failed the toxicity criteria showed mortality rates of 100 percent."⁶

The leachate discharges from LCC's Alsen landfill clearly present an imminent and substantial endangerment to health and the environment. The Second Circuit has adopted an expansive reading of the 42 U.S.C. § 6972(a)(1)(B) "imminent and substantial endangerment" requirement, noting that it is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d. Cir. 1991) (citing *United States v. Price*, 688 F.2d 204, 213-14 (3d. Cir. 1982)), *rev'd on other grounds*, 505 U.S. 557 (1992). In addition, Congress in amending 42 U.S.C. § 6973 to clarify the application of RCRA's Imminent Hazard provision⁷ stated that, "[a]n endangerment means a risk of a harm, not necessarily actual harm, and proof that the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste *may* present an imminent and substantial endangerment is grounds for an action seeking equitable injunctive relief." S. Rep. No. 284, 98th Cong., 1st Sess., at 59 (Oct. 28, 1984).

The ongoing leachate discharges and resulting golden-bronze wetland ponds, documented by Riverkeeper, show that the wetlands, Duck Cove, and the Hudson River are currently put at risk and are likely damaged.

Summary

The observed leachate discharges at the LCC facility constitute the un-permitted discharge of pollutants from a point-source into waters of the United States and are thus illegal under the CWA. Furthermore, the discharges suggest that LCC has violated New York regulations

⁵ See EPA Report to Congress on Cement Kiln Dust, 6-4 (1993), <http://www.epa.gov/epaoswer/other/ckd/rtc/chap-6.pdf>

⁶ EPA Technical Background Document on Ground Water Controls at CKD Landfills (Draft) (1998), <http://www.epa.gov/epaoswer/other/ckd/ckd/ckdp0102.pdf>

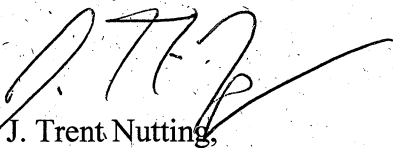
⁷ The Second Circuit has held that the "regulatory language referring to § 7003 must also apply to § 7002(a)(1)(B) because the two provisions are nearly identical." *Connecticut Coastal Fisherman's Ass'n v. Remington Arms, Co.*, 989 F.2d 1305, 1315 (2d. Cir. 1993).

governing waste disposal by failing to minimize solid-waste landfill leachate, and disposing of said leachate without a SPDES permit. Finally, the observed landfill leachate discharges are illegal under RCRA's requirement that landfill owners and operators must handle solid waste in a manner that does not present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B).

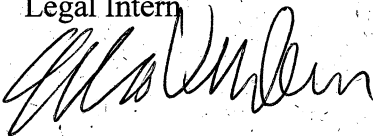
Riverkeeper believes that this Notice of Intent to Sue sufficiently states grounds for filing suit. The discharges referenced above and LCC's failure to obtain required SPDES permits for the illegal discharges constitute ongoing violations of the CWA and RCRA. Each day of unpermitted discharge constitutes a series of separate violations under applicable regulations, and LCC will remain in violation until all discharges cease or they obtain permits therefor. The CWA and 40 C.F.R. § 19.4 authorizes penalties of up to \$32,500 per day for each violation of the act over a five year statute of limitations. In addition, RCRA authorizes penalties of up to \$32,500 per day for each violation of the act. 42 U.S.C. § 6928(g); 40 C.F.R. § 19.4. At the close of the 60-day CWA notice period and the 90-day RCRA notice period, we intend to file a citizen suit against LCC as owner and operator of the Catskill/Alsen, NY cement facility for violations discussed above. We intend to seek penalties and injunctive relief, as well as attorneys' fees and costs, for these violations.

During the 60-day and 90-day notice periods, we will be willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue a settlement, we suggest that you initiate those discussions within ten (10) days of receiving this notice so that a meeting can be arranged and negotiations may be completed before the end of the 60-day and 90-day notice periods. Please do not hesitate to contact the undersigned at 914-478-4501 x247 if you wish to further discuss these matters.

Sincerely,



J. Trent Nutting,
Legal Intern



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