



## RIVERKEEPER.

### VIA CERTIFIED MAIL

September 4, 2008

NYCON Supply Corporation – Corporate Office  
Arthur G. Reis, Chief Executive Officer  
47-17 27th Street  
Long Island City, New York 11101

RE: Notice of Intent to Sue NYCON Supply Corporation for Clean Water Act and Resource Conservation and Recovery Act Violations at its Facility on the Dutch Kills in Long Island City, New York.

Dear Mr. Reis:

This letter constitutes Riverkeeper's NOTICE OF INTENT TO SUE New York Concrete Supply Corporation ("NYCON"), as owner and operator of the concrete supply facility located at or about 47-17 27th Street in Long Island City, New York, 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 concrete waste from the NYCON facility into the Dutch Kills of Newtown Creek, which drains into the East River, a tributary of the Hudson River.

Riverkeeper is a non-profit, environmental watchdog organization that protects and safeguards the ecological integrity of the Hudson River, its tributaries, and the New York City drinking water supply. On behalf of our 10,000 members, we routinely patrol Newtown Creek and the Dutch Kills and, when necessary, file citizen suits under the CWA and RCRA to prevent and remediate environmental pollution problems. Many of our members and constituents live near, and routinely recreate in and on, the Dutch Kills and Newtown Creek. Riverkeeper's contact information is 828 South Broadway, Tarrytown, New York 10591, (914) 478-4501.

### NYCON IS DISCHARGING CONCRETE WASTE INTO THE DUTCH KILLS.

NYCON owns and operates the above-referenced concrete supply facility on the northwest corner of the Dutch Kills waterway in Long Island City, New York. The facility is located at or about 47-17 27th Street in Long Island City, New York. According to the City of New York, NYCON's property is identified as Block number 115 and Lot number 56.

Upon information and belief, NYCON sells concrete products citywide for various construction projects. NYCON uses elevators, forklifts, and trucks to move concrete and other solid materials that NYCON stores on the property in piles. NYCON uses large amounts of water to clean both its fleet of concrete trucks and its property. Some of this water flows into the Dutch Kills through pipes and bulkhead fissures, carrying concrete waste and other solids into the Dutch Kills.

NYCON owns the bulkhead at the northwest corner of the Dutch Kills and NYCON's bulkhead is approximately 20 feet above the Dutch Kills at mid-tide. Stretching from the south end of NYCON's bulkhead to the northwestern corner ("Stretch A"), NYCON uses numerous pipes and weep holes – small openings that serve as outlets in the bulkhead – to dispose of stormwater and site wastewater into the Dutch Kills. At the northwest corner of the bulkhead, NYCON uses a fissure in the bulkhead ("Fissure A") to dispose of stormwater, site wastewater, and solids including gravel and concrete, into the Dutch Kills. Approximately thirty feet east of that corner along NYCON's property, NYCON also uses a second gap in the bulkhead ("Fissure B") for the discharge of stormwater, site wastewater, and solids including gravel and concrete, into the Dutch Kills. Stretching from Fissure B to the east end of NYCON's bulkhead ("Stretch B"), NYCON uses several pipes and weep holes to dispose of stormwater and site wastewater into the Dutch Kills.

Riverkeeper observed discharges of liquid concrete from NYCON into the Dutch Kills as well as the presence of discharged liquid concrete on the bed of the Dutch Kills on the following dates:

*July 7, 2006:* Riverkeeper observed liquid concrete discharging into the Dutch Kills from a series of weep holes along Stretch A. Riverkeeper also observed solid concrete and gravel materials that had been dumped into the Dutch Kills at Fissure A, so much so that a "beach" of material has accumulated in the Dutch Kills at the fissure. At Fissure B, NYCON was discharging a significant amount of liquid concrete and turbid washwater from the Fissure, down an embankment, through a patch of wetlands grasses and into the Dutch Kills. As at Fissure A, a beach of this concrete material has accumulated at Fissure B. Riverkeeper also observed liquid concrete discharging into the Dutch Kills along Stretch B. These discharges had turned this section of the Dutch Kills a white color.

*October 13, 2006:* Riverkeeper observed solid concrete and gravel materials that had been dumped into the Dutch Kills at Fissure A, so much so that a "beach" of material has accumulated in the Dutch Kills at the fissure. Also at Fissure A, NYCON was discharging a significant amount of liquid concrete and turbid washwater from the fissure into the Dutch Kills. At Fissure B, NYCON was again discharging a significant amount of liquid concrete and turbid washwater from the fissure, down an embankment, through a patch of wetlands grasses and into the Dutch Kills.

*June 26, 2008:* Riverkeeper observed concrete stains below the weep holes and pipes protruding out of NYCON's bulkhead at Fissures A and B. Riverkeeper again observed piles of gravel and layers of concrete covering the bed of the Dutch kills at Fissures A and B. Riverkeeper collected samples of the riverbed from within a few feet of Fissures A and B,

which we believe to be nearly pure concrete. We measured the pH of the surrounding surface water at 10.24 – a highly alkaline reading. Half-an-hour earlier, we measured the background pH of the water where the Dutch Kills merges with Newtown Creek to be 7.37.

### NYCON IS VIOLATING THE FEDERAL CLEAN WATER ACT.

Pursuant to sections 505(a) and (b) of the Clean Water Act (“CWA”), 33 U.S.C. sections 1365(a) and (b), we hereby place NYCON Supply Corporation on notice that Riverkeeper intends to sue the company for violating, and continuing to violate, effluent standards and limitations defined by section 505(f) of the CWA, 33 U.S.C. section 1365(f), by discharging pollutants into waters of the United States without a permit required under CWA section 301(a), 33 U.S.C. section 1311(a).

The CWA prohibits the discharge of pollutants from a point source into the navigable waters of the United States except when such discharge is pursuant to and in compliance with a permit.<sup>1</sup> 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. See 33 U.S.C. § 1362(6). Discharges from NYCON’s property qualify as pollutants under the CWA because such discharges contain liquid concrete, rock particles, suspended solids, settleable solids, turbidity, and alkalinity.

The CWA defines “point source” 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 pipes and bulkhead gaps through which NYCON is discharging pollutants, as described above, constitute “point sources” under the CWA. See *id.*

The CWA defines “navigable waters” as “waters of the United States.” 33 U.S.C. § 1362(7). 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). 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. The Dutch Kills is navigable in fact and is therefore a navigable water under the CWA.

Upon information and belief, NYCON does not have an individual State Pollution Discharge Elimination System (“SPDES”) Permit, which is required by the CWA for such discharges.

Upon information and belief, NYCON’s discharges are continuous and ongoing. Each day of unpermitted discharges comprises a series of separate violations of the CWA, with a discrete

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<sup>1</sup> The State of New York was delegated authority by the United States 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.

violation for each pollutant illegally discharged from each point source. NYCON Supply Corporation will remain in violation of the Act each day that the company discharges concrete without a CWA permit. The CWA and 40 C.F.R. section 19.4 authorizes penalties of up to \$32,500 per day for each violation of the act over a five year statute of limitations.

### NYCON IS VIOLATING THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT.

Pursuant to the Resource Conservation and Recovery Act ("RCRA") citizen suit provision, 42 U.S.C. section 6972, we hereby place NYCON on notice that Riverkeeper intends to sue NYCON as present or past owners or operators of the concrete supply facility on the Dutch Kills in Long Island City, New York, for disposing of solid waste in a manner that presents an imminent and substantial endangerment to health or the environment. See 42 U.S.C. § 6972(a)(1)(B). Liability under RCRA is retroactive, and NYCON's discharges are illegal and subject to liability under RCRA. See 41 U.S.C. § 6972(a)(1)(b); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Fdn., Inc.*, 484 U.S. 49 (1987).

RCRA subjects owners or operators of facilities to liability for "contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment..." 42 U.S.C. § 6972(a)(1)(B).

NYCON's discharges of concrete waste constitute a disposal of solid waste under RCRA. Solid waste is defined under RCRA as that which is a "discarded material...resulting from industrial, commercial, mining and agricultural operations." 42 U.S.C. § 6903(27). RCRA defines "disposal" to include the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C § 6903(3); 40 CFR § 260.10. 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). NYCON's discharges of concrete waste are therefore subject to RCRA's requirements.

NYCON's concrete waste discharges pose an "imminent and substantial endangerment" to health and environment under RCRA. Concrete is highly alkaline, and high pH levels pose a substantial risk of harm to aquatic life. Our pH findings confirm that NYCON's concrete waste discharges are elevating the pH level of the Dutch Kills, thereby posing an imminent and substantial endangerment to aquatic life. The Second Circuit Court of Appeals has adopted an expansive reading of the 42 U.S.C. section 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, 213-214 (3d. Cir. 1982)) *rev'd on other grounds*, 505 U.S. 557 (1992). In addition, when Congress amended 42 U.S.C. section 6973 to clarify RCRA's Imminent

Hazard provision, Congress 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 relief.” S. Rep. No. 284, 98th Cong., 1st Sess., at 59 (Oct. 28, 1984).

NYCON is in violation of RCRA’s imminent and substantial endangerment provisions until such time as it ceases to dispose of pollutants in such a manner and until such pollutants are remediated. RCRA also authorizes the EPA Administrator to assess 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.

#### SUMMARY OF NOTICE OF INTENT TO SUE.

Riverkeeper believes that this Notice of Intent to Sue sufficiently states grounds for filing suit under both the Clean Water Act and Resource Conservation and Recovery Act. The discharges referenced above and NYCON’s failure to obtain required SPDES permits for the illegal discharges constitute ongoing violations of the CWA and RCRA. As described above, each day of unpermitted discharge constitutes a series of separate violations under applicable regulations, and NYCON will remain in violation until all discharges cease or they obtain permits therefor.

At the close of the 60-day CWA notice period, Riverkeeper intends to file a citizen suit under section 505(a) of the CWA against NYCON Supply Corporation as owners and operators of the above-referenced property. We intend to seek penalties and injunctive relief for these CWA violations as well as attorney’s fees and costs. This Notice of Intent to Sue covers all CWA violations by the party during the five years preceding the date of this letter and covers all future violations arising from its continued operations.

At the close of the 90-day RCRA notice period, we intend to file a citizen suit under 42 U.S.C. section 6972(a)(1)(B) against NYCON Supply Corporation for violating RCRA. We intend to seek injunctive relief for the creation of an imminent and substantial endangerment as well as attorney’s fees and costs. This Notice of Intent to Sue covers all RCRA violations by NYCON preceding the date of this letter and covers all future violations arising from its continued operations.

During both the 60-day CWA notice period and the 90-day RCRA notice period, we will be willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of litigation, 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 notice periods. At the close of each notice period, unless significant progress is made in remedying these violations, we intend to file above referenced citizen suits.

If you wish to discuss these matters further, please do not hesitate to contact Craig Michaels at (914) 478-4501 x 242.

Sincerely,



Bryan Hurlbutt  
Legal Intern



Craig Michaels  
Investigator



Basil Seggos, Esq.  
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