



Little River Band of Ottawa Indians Office of the Tribal Ogema

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COMMENT ORIGINAL SUBMITTED VIA ELECTRONIC MAIL

February 16, 2004

Mr. Jeff Fischer
Permits Section, SWQD
Department of Environmental Quality
P.O. Box 30273
Lansing, MI 38909

**RE: Proposed NPDES Permit for Packaging Corporation of America,
Permit No. MI0001171**

Dear Mr. Fischer:

The Little River Band of Ottawa Indians (Tribe) respectfully submits these comments in connection with Packaging Corporation of America-Filer City Mill's (PCA) NPDES permit application (Application No. MI0001171) to discharge wastewater from Outfalls located in both Manistee Lake and Lake Michigan.

The Tribe historically and currently utilizes and values the natural resources of the Manistee River watershed and Lake Michigan. Any activities that may alter or impair the fish, wildlife, and flora of the watershed are of great concern to the Tribe. The proposed discharges into Manistee Lake and Lake Michigan will impact resources within the Tribe's Reservation and Ceded Waters of Lake Michigan watershed upon which the Tribe depends. The Tribe is greatly concerned about the effects that these discharges will have on the water quality, fishery, and recreational opportunities of the area. Below please find a list of concerns, and a recommended course of action, regarding the proposed permit.

Request for a Public Hearing on the Proposed Permit and an Extension of the Public Comment Period

By this letter, the Tribe petitions the Michigan Department of Environmental Quality to hold a public hearing in the Manistee area concerning the proposed permit.

We further request that this public hearing be held in the evening at a readily accessible location in the Manistee area.. In addition, we ask that your agency continue the comment period on the proposed permit through the time of the public hearing and to a final comment deadline no earlier than 14 days following the date of the public hearing we're requesting.

The pollution of both Lake Michigan and Manistee Lake by effluents from the Packaging Corporation of America are highly controversial matters in this community.¹ At a public hearing you can expect that the public will be indicating in detail how these effluents affect the quality of life and environment in the Manistee area. We expect that most comments to be made at such a hearing would focus on most or all of the matters indicated in the balance of this letter. In particular, however, the pre-existing water quality standard violations (notably for color), the failure of PCA to remedy these problems and the unlawful failure of the proposed permit to properly regulate these matters would be the principle matters in contention at such a public hearing.

Please note that all other narrative comments of this letter should be considered as being incorporated into the public hearing request as demonstrating controversial aspects of the proposed permit and objectionable failures of the proposed permit to resolve pre-existing water quality problems.

Water Quality Standard Violations in the Manistee Lake Watershed and in Near-shore Areas of Lake Michigan

The record shows that Michigan's water quality standards are presently being violated in both Manistee Lake and in the near-shore areas of Lake Michigan. In this section we discuss three specific matters of water quality standard violations that are germane to specific failures of the proposed permit to properly regulate effluents from PCA.

¹ See, for example, articles at

<http://www.detnews.com/2003/metro/0304/10/d08w-133277.htm>

<http://www.record-eagle.com/2003/feb/02discha.htm> (Note picture of dark color plume in Lake Michigan.

<http://www.lakemichigan.org/newsletter/TLE-O3Winter.pdf> (See page 2)

Color

It is the understanding of the Tribe that the proposed permit is being written to support, among other things, the Narrative Standard of the State of Michigan Water Quality Standards. The Narrative Standard states, in part,

“The receiving water shall contain no unnatural turbidity, color, oil films, floating solids, foams, settleable solids, or deposits as a result of this discharge which are or may become injurious to any designated use.”

The draft permit states that it is being written to “reduce the volume and color of the effluent.” While reducing the volume and color of the effluent is a laudable goal, it clearly does not fit with the Narrative Standard of “no unnatural ... color.”

The Tribe seeks a public hearing in order that the public may place on the record supplemental information on the factual basis of the pre-existing violation of Michigan’s water quality standards for color in receiving waters; in addition, the Tribe wishes the opportunity to supplement the technical comments of this letter after having an opportunity to review MDEQ files in both Cadillac and Lansing concerning this facility..

Pulping effluent from PCA causes significant plumes of excessively dark colored water in near shore areas of Lake Michigan. At times when PCA discharges pulping effluent to outfall 009A, similar problems are observed to occur in Manistee Lake. Such dark colored polluted plumes of PCA effluent are known to reach the shoreline at times. Whether the plumes stay out in Lake Michigan and Manistee Lake or reach the shoreline, the such highly colored effluent plumes causes visual blight of the beauty of area water resources and creates deterrents to public recreational use of such water resources.

This pre-existing color water quality standard violation is a situation posing serious public nuisance, an abrogation of the public’s trust in Michigan’s water resources, pollution, impairment and destruction of water resources and a source of economic damages both to property values and to the area’s interest in maintaining a natural resources/recreation-based economy.

We also remain seriously concerned about the effect of PCA effluents on the biological integrity of aquatic systems in both Manistee Lake and Lake Michigan.

Mercury, Polychlorinated Biphenyls and Pathogens

The most recent report of the MDEQ Water Division for year 2002 under Clean Water Act Section 303(d) for Michigan’s impaired water bodies shows the area of Manistee Lake near Filer City as impaired for mercury, PCBs and pathogens.

Accordingly, we cite here MDEQ's acceptance of the fact that there are pre-existing water quality standard violations for these pollutants in this area of Manistee Lake.

Process Description and the Pollutants Cited Above

The facts indicate that color effluents from PCA are a serious problem the facility's pulping process. Given that PCA received landfill leachate from a municipal solid waste landfill, discharges of pathogens can also be expected in the final effluent. PCA receives paper waste materials for recycling and such plants have been known to receive wastes contaminated with PCBs.

Because of long ago industry practice on the use of mercury compounds as slime control agents in paper machines, there is some potential for discharge of mercury from groundwater cleanup aqueous wastes from past uncontrolled lagoon operations (in the absence of irrefutable information that such compounds were never used at PCA). (Similarly, there should be inquiry by MDEQ on past use of pentachlorophenol and tributyl tin at this site as a result of past industry practice in the use of those compounds).

Of concern to the Tribe is fact that PCA apparently contracts with Shoreline Waste Management, which utilizes PCA's Outfall 001 for disposal of wastewater from Shoreline's landfill. This is particularly troublesome to the Tribe in light of the fact that a 425 megawatt coal-fired power plant is currently proposed for Manistee County which will generate approximately 2.5 tons/hour of bottom ash, 4 tons/hour of scrubber ash and 10 tons/hour of fly ash. The applicant proposing to construct that power plant is proposing to dispose of the scrubber ash and fly ash at this same landfill. Permit materials available to the Tribe provide no assurances that PCA discharge to Outfall 001 will not include toxicants from such power plant waste streams. Co-disposal coal burning wastes with municipal solid waste cannot ensure that high pH conditions that would lessen leaching of metals can be maintained. As a result, coal burning waste containing mercury, arsenic and iron may become a significant concern from the flow of landfill leachate directed to the PCA wastewater system.

Federal and State Statutory and Regulatory Requirements Applicable to the PCA NPDES Decision Concerning Technology-Based Effluent Limitation Requirements

The Clean Water Act defines "effluent limitation" as:

"The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are **discharged from point sources** into Navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 USC §1362(11) (emphasis added)

Federal regulations at 40 CFR §122.2 define “effluent limitations” as:

“any restriction imposed by the Director on quantities, discharge rates, and concentrations of ‘pollutants’ which are ‘**discharged**’ from ‘point sources’ into ‘waters of the United States,’ the waters of the ‘contiguous zone,’ or the ocean.”

A principle feature of the Act is to apply certain technology-based effluent limitations and, when there is a problem with ambient water quality standard violations, to apply more stringent “water quality-based” effluent limitations to protect water quality.

In the present case, **the proposed PCA NPDES permit contains no effluent limitations at all for the pollutants color, mercury, polychlorinated biphenyls and pathogens.** No such limitations are contained in the Final Effluent Limitations table for points 001A (Permit at P. 2) and 009A (Permit at P. 6). Nothing contained in Part 1, Section A, #7 on the Color Minimization Program can be construed in any way to be an effluent limitations for color.

Color and pathogen discharges are non-conventional pollutants which are required to be controlled by effluent limitations reflecting...

“best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator...” 33 USC §1311(b)(2)(A)

EPA has issued regulations requiring that best available technology (BAT) be determined by best professional judgement (BPJ) as it is applicable to color as a non-conventional pollutant; the rule specifies:

“For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT....for permits issued on a case-by-case (BPJ) basis under section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989.” 40 CFR §125.3(a)(2)(v)(B)

Mercury and polychlorinated biphenyls would be subject to toxic effluent standards set under 42 U.S.C. §1317 and require application of the best available technology economically achievable.

The deadlines under the federal act for application of BAT-BPJ technology-based effluent limitations, at least for color and pathogens, has long since passed. All such

effluent limitations reflecting technology-based controls are expressed only through application of final effluent limitations.

“Technology-based treatment requirements are applied prior to or at the point of discharge.” 40 CFR §125.3(e)

As a result, the failure of the proposed permit to include effluent limitations for problematic unconventional pollutants clearly violates statutory and regulatory requirements that NPDES permits incorporate BAT-BPJ technology-based requirements that have been in place for many years.

While it is possible to obtain a federal variance from BAT technology requirements under 33 USC 1311(c) and (g), and pursuant to 40 CFR §125.3(a)(2)(v), a source may not have more than a 3 year extended time for compliance (and it is possible that a source may not gain any extended compliance date after March 31, 1989).

To our knowledge, PCA has not made an explicit written request for a BAT variance or modification of compliance timetable request in the present permit proceeding. Under 33 USC 1311(c), such variance/modification requests can only be granted:

“...upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.” 33 USC §1311(c)

To our knowledge, PCA has made no 33 USC §1311(c) showings in their application.

Further, under 33 USC §1311(g)(2)(C), PCA must show that the modification of technology-base color requirements will meet the following condition:

“Such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.”

It is our view that PCA could not make adequate showings under a number of the statutory criteria articulated above.

In doing future technology-based effluent evaluations, the Tribe requests that Michigan Department of Environmental Quality (DEQ) consider a wastewater recycling program for the Packaging Corporation of America - Filer City Mill. Where feasible, all water should be reused within the plant process and not discharged to the receiving waters. The Tribe understands that there may be technical and economic limits on the feasibility of such recycling operations; however, the permit information made available to the Tribe does not address this issue. The Tribe respectfully requests that the applicant be required to fully describe the alternatives analysis conducted to evaluate wastewater recycling options, including technologies considered, engineering feasibility review and cost-benefit analyses. If the applicant has conducted such analyses, the Tribe requests the opportunity to obtain and evaluate that information, together with any conclusions reached by PCA and DEQ regarding the same.

In addition, the facility should be required to ensure that all best management practices associated with internal spill control measures be made an enforceable permit condition of any future permit.

**Federal and State Statutory and Regulatory Requirements Applicable to the PCA
NPDES Decision Concerning Water Quality-Based Effluent Limitation
Requirements**

In addition to the failure to incorporate technology-based effluent limitations for color, mercury, polychlorinated biphenyls and pathogens, the presence of actual water quality standard violations for these pollutants triggers additional requirements.

When a state water quality standard violation exists, as it does in the case of color in Lake Michigan and mercury, PCBs and pathogens in Manistee Lake, a water quality-based effluent limitation must be applied that will have the effect of limiting such ambient violations. Water quality-based effluent limitations can be more stringent as necessary than technology-based effluent limitations. The Clean Water Act provides:

“In order to carry out the objective of this chapter there shall be achieved....not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.” 33 USC §1311.(b)(1)(C)

EPA regulations also explicitly require a numerical effluent limitation that is effective in NPDES permits in cases where water quality standards are violated:

“In addition to the conditions established under §122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable:

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria with a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.” 40 CFR 122.44(d)(1)(iii)

In the present case, the PCA permit as proposed cannot comply with this regulatory requirement because it utterly fails to provide for any effluent limitation at all for the nonconventional pollutants for which water quality standard violations exist.

To the extent the MDEQ sees fit to remedy this serious defect as this comment brings to light by inserting a water quality based effluent limitation, we ask that such a future determination be subject to public notice and comment as the setting of such a water quality based effluent limitation is a substantial matter worthy of such comment.

In summary, the PCA permit as proposed is fatally flawed because it fails to incorporate a water quality based effluent limitation that is an absolute requirement of the Federal Clean Water Act and EPA federal regulations.

Although there are certain variance procedures available to allow a source an exemption from the requirements for a water quality based effluent limitation, we are unaware that PCA has, in fact, made any application or showing that such an exemption should be applied. We would strenuously object to any application of rule 40 CFR §122.21(m)(5), which would allow PCA to submit a federal variance request 5 minutes before the close of the public comment period and still have it considered. The rule provides:

“(5) Water quality related effluent limitations. A modification under section 302(b)(2) of requirements under section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment

period under §124.10 on the permit from which the modification is sought.” 40 CFR §122.21(m)(5)

This rule, if applied in such a manner, would deny the commenting public due process in evaluating the record and deliberately frustrates the intent of the Clean Water Act to explicitly foster and encourage public participation. We strenuously object if PCA submits such a variance request anytime after the prior announcement of the public notice, hearing and proposed permit. The contents and justification of such a variance request is an important matter for public examination and comment and allowing the applicant to submit such a variance request on the eve of the public comment deadline ensures that no adverse public comment on such a request will be received.

Under Circumstances When MDEQ Has Not Incorporated Technology and Water Quality-Based Effluent Limitations in the Proposed PCA NPDES Permit, MDEQ Cannot Allow PCA to Use a Diffuser-based Color Effluent Dilution Strategy to Attempt to Reach Michigan Water Quality Standards

MDEQ is proposing to allow PCA’s use of diffuser methods rather than enforceable color effluent limitations in an attempt to meet Michigan water quality standards for color. Such methods involve mixing water with effluent before discharge and/or spreading out the field of discharge points in an attempt to decrease color water concentrations immediately after wastewater discharge.

Such diffuser methods constitute flow augmentation/dilution methods that are explicitly addressed in applicable federal regulations.

MDEQ and PCA are prohibited from using flow augmentation/dilution methods as a substitute for technology-based color effluent limitations:

“(f) Technology-based treatment requirements cannot be satisfied through the use of ‘non-treatment’ techniques such as flow augmentation and in-stream mechanical aerators.” 40 CFR §125.3(f)

MDEQ’s proposed permit in its present form is an explicit and deliberate attempt to violation this federal regulatory requirements as well as the technology-based effluent limitation requirements of the Clean Water Act.

A flow augmentation/dilution scheme to achieve color water quality standard compliance is not absolutely prohibited by the Clean Water Act and EPA clean water regulations.

Techniques of flow augmentation....

“... may be considered as a method of achieving water quality standards on a case-by-case basis when:

(1) the technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards; (2) The discharger agrees to waive any opportunity to request a variance under Section 301(c), (g) or (h) of the Act; and (3) The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.” 40 CFR §125.3(f)

Since PCA has not complied with a BAT-BPJ technology-based effluent limitations for color, MDEQ is prohibited from issuing a permit authorizing PCA to use a flow augmentation scheme for dilution because they have not accepted and complied with any sort of technology-base effluent limitation required under long passed deadlines of the Clean Water Act. To our knowledge, PCA has not waived an opportunity for a variance under 33 USC §1311c, (g) or (h) of the Act, PCA has made no environmental and/or economic demonstration to justify such an exemption and PCA has not implemented advanced waste treatment methods and has not changed their process in all technically feasible ways to otherwise achieve a color effluent reduction.

The Proposed Permit Fails to Incorporate Both Effluent Limitations and Monitoring Requirements for Acute and Chronic Whole Effluent Toxicity

Given the discharge of the PCA facility to Lake Michigan, such a discharge and the associated permit should be subject to procedures and standards for water quality guidance for the Great Lakes system. In general, these procedures and standards found at 40 C.F.R. §132 strongly embrace whole effluent toxicity (WET) testing for both acute and chronic exposure scenarios. At this writing, the Tribe is not aware if a consistent program of WET testing has been conducted of the PCA effluent.

However, there is a strong presumption that effluent from a semi-chemical pulping plant such as PCA’s facility has a serious potential to cause damaging effects in aquatic systems. Recent research shows that strong endocrine disruption effects in fish and other aquatic creatures are not simply limited to pulp and paper plants that employ chlorine bleaching systems.

Pulp mill effluent (whether chlorinated or not) is known to contain naturally occurring phytoestrogens which can have strong endocrine disruption effects on fish,

including changes in the secondary sexual development characteristics in fish.² The permit should include provisions to test the effluent for these compounds and to determine if the effluent from Outflow 001 and 009 is impacting whitefish or other spawning populations in Lake Michigan. The Tribe would strongly suggest that these impacts be assessed before the proposed permit or any authorized increase in discharge volumes is approved. In addition, if studies support the conclusion that endocrine impacts on spawning populations are occurring, the permit should be conditioned upon PCA's implementation of mitigation measures to eliminate such impacts.

Any whole effluent testing protocol used should ensure that it is capable of detecting damaging effects on fish associated with phytoestrogen exposure and subsequent endocrine disruption.

The proposed permit cannot be approved because it does not appear to comply with either 40 C.F.R. §132 Great Lakes water quality system requirements for both monitoring and effluent limitation on whole effluent toxicity. Given the published effects associated with phytoestrogen aquatic exposures there is a strong likelihood that WET requirements should be imposed, including effluent limitations for both acute and chronic whole effluent toxicity.

Comments Concerning Other Special Conditions and Provisions of the Proposed Permit

The draft permit proposes to authorize the permittee to discharge up to 7.6 million gallons per day (mgd) to Outfall 001 in Lake Michigan. Based upon permit data relative

² See, for example:

<http://www.nccos.noaa.gov/documents/techmemo149.pdf> (URL list continued next page)

<http://www.nbenrenb.elements.nb.ca/environews%20files/media/mediaarchives/96/wood.htm>

http://www.ec.gc.ca/eds/fact/eds_e.pdf

<http://www.unbsj.ca/sase/biology/fishlab/research.html>

<http://oasys2.confex.com/acs/225nm/techprogram/P617995.HTM>

http://www.cheec.uiowa.edu/conferences/edc_2000/davis.html

http://www.unb.ca/cri/dlm_publications.html

to Outfall 001, the historical maximum daily output for this Outfall is 5.9 mgd. The Tribe questions the need for this excess capacity to be written into the permit.

The Tribe requests that MDEQ lower the volume of permitted discharge from Outfall 001 and 009 to more closely reflect the actual volumes of historical discharge. Further, if the MDEQ should choose to permit excess volume to Outfall 001 and 009, the Tribe requests that this excess volume of discharge be detailed in terms of how much volume is being budgeted to each specific type of discharge. The Tribe requests that this water budget be written into the permit along with provisions to enforce the water budget.

The draft permit states the noncontact cooling water will be dechlorinated “if necessary”. The Tribe requests that an estimated and maximum amount of noncontact cooling water that will require dechlorination be stated in the permit. The Tribe also requests that the frequency of testing for chlorine be stated in the permit. If the frequency of testing is not defined, and the action level is not defined, then the dechlorination procedure may never be activated.

The draft permit requires a short-term waste characterization study. This study would consist of eight (8) quarterly samples taken over a two year period. Due to the low number of total samples proposed to be collected under this study, the Tribe requests that all sampling be done by an independent firm, with the results reported to the permittee and to the MDQ. The Tribe also requests that consideration be given to more frequent sampling. In addition, the Tribe requests that all samples be taken in two locations, one before the sludge enters the discharge system, and the second immediately after it is discharged. The Tribe requests that these requirements be written into the discharge permit.

The draft permit requires a thermal plume study. This study, however, is stayed until the volume of discharge reaches 18 mgd. The Tribe requests that this study be performed regardless of the level of discharge, and that the study be performed by an independent firm, and not by the permittee. The Tribe requests that these requirements be written into the discharge permit.

Summary Conclusions

In conclusion, the Tribe requests that the draft permit not be issued as written. It is our view that several significant changes must be made to the permit and that the permit should then be re-noticed for public comment after it has been amended to conform to Federal Clean Water Act requirements. In any event, we request a public hearing as noted in this letter. It is our hope that MDEQ makes such changes so as to avoid the need for a formal process to contest issuance of the permit as proposed.

The present version of this permit continues the decades of longstanding non-compliance by PCA of clear technology and water quality-based effluent limitation requirements of the Federal Clean Water Act. In particular, if the non-enforcement posture proposed by MDEQ in this permit continues, PCA will be allowed to evade these clear requirements of the Act in a manner that has caused pollution, impairment and destruction of Michigan water resources and violation of the public's trust in these water resources.

A revised discharge permit, when written, should fully support the State of Michigan Water Quality Standards, including water quality standards for the Great Lakes System..

Thank you for your willingness to consider our views on this matter.

Sincerely,

LITTLE RIVER BAND OF OTTAWA INDIANS

Lee Sprague
Ogema