Pennsylvania Department of Environmental Protection
SOUTHEAST REGIONAL OFFICE
HSCA Group
484.250.5960

September 18, 2026

Bishop Tube HSCA Site
East Whiteland Township
Chester County

Proposed Consent Decree
Proposed Qualified Settlement Fund Agreement

**RESPONSE TO PUBLIC COMMENTS**

**Appendices**

| Appendix | Date(s) | Comment # | Description |
|---|---|---|---|
| **Appendix A** | 3/27/2026; 4/9/2026 | 2 | Written Comments received from Delaware Riverkeeper Network and others, including, but not limited to, Pennsylvania State Senator Katie Muth, Kate & Larry Stauffer Elizabeth Stauffer, Nicholas Stauffer, Cayley Dittmer, Michael Stauffer and Jessica Stauffer, individually and on behalf of minor Holly Stauffer, Maureen Connolly, Eileen Ryan Romano, Joseph Romano, Barbara D. Arnold, Carol Rapp, Maya K. van Rossum, Delaware Riverkeeper Network, Green Amendments For The Generations, Debra Mobile, Nick Mobile, Peggy Miros, Ron Miros, Rhonda Funk, Deanna Fedor, Baily Funk, Pete Goodman, Judy Goodman, Sharon Connor, and Carol L. Armstrong. |
| **Appendix B** | 3/27/2026; 4/9/2026 | 3 | Written Comments received from Delaware Riverkeeper Network and others, 3/27 version included 190 signatures, 4/9 version included the original signatures plus an additional 55. |
| **Appendix C** | 4/9/2026 | N/A | DEP response letter regarding the 60-day public comment period. |
| **Appendix D** | 5/13/2026 | 19 | Comments received from Debra J. Mobile and Nick J. Mobile. |
| **Appendix E** | 5/14/2026 | 25 | Comments received from Pennsylvania State Senator Katie Muth. |
| **Appendix F** | 5/14/2026 | 27 | Comments received from Green Amendments for the Generations. |
| **Appendix G** | 5/14/2026 | 29 | Comments received from the Delaware Riverkeeper Network. |
| **Appendix H** | 5/14/2026 | 30 | Comments received from East Whiteland Township. |

# APPENDIX A

**March 27, 2026**

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
**501 North 3rd Street**
**508 Main Capitol Building**
**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**

**From: We The People**

**Re: Bishop Tube Consent Decree Public Comment**

Since 1985, the Pennsylvania Department of Environmental Protection (PADEP) has known that the Bishop Tube Site located in East Whiteland Township, Chester County, PA was dangerously contaminated. Over the decades, the seriousness of the contamination and its dangers for the community and environment has been increasingly revealed as data has been collected and workers at the site have shared the horrifying disregard of site owners for the environment. Rather than take swift action to enforce existing laws and secure full cleanup of the site, the State allowed the site to languish in its toxic condition.

All the while, children played in the creek taking in the site's toxic contribution; neighbors naively enjoyed life unaware of the dangers located just next door; downstream communities fished and played in the flowing waters of Little Valley Creek, Valley Creek, and the Schuylkill River; and the people of Chester County and Pennsylvania naively believed their state environmental agency was looking out for the best interests of the people and environment of Pennsylvania, rather than the interests, profits, and goals of industry and developers.

Our eyes were opened in 2017 when we learned of an illegal sweetheart deal the state entered into with a developer seeking to construct more than 200 homes, bringing over 200 families, including children, to this toxic site while it remained in its toxic condition with no plan for its remediation. Worse yet, the deal was cut with a developer who, documents revealed, had itself contributed to the site's ongoing toxic condition by damaging infrastructure that had been installed in an attempt to clean up at least some of the toxins there.***[1]

Thanks to the vigilance and curiosity of Larry Stauffer, the first member of the General Warren Village community to notice activity at the site and start to question what was happening, and with the help of the Delaware Riverkeeper Network and Green Amendments For The Generations, the community exposed, challenged, and ultimately defeated the sweetheart deal with Constitution Drive Partners. Notably, Delaware Riverkeeper Maya van Rossum, the Delaware Riverkeeper Network, and 13 to-be-named neighbors were the target of a SLAPP suit by the developer, seeking to silence our opposition. In the end, justice prevailed and both the sweetheart deal and the SLAPP suits failed.

Imagine our surprise and disgust when, 8 years later, the community and environment were once again, the last to know and the ones sacrificed as PADEP sought to strike another sweetheart deal benefiting the corporations and developer responsible for the contamination at the Bishop Tube site.

With this foundation, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed, and Pennsylvania – write to urge, implore, plead and demand that PADEP – on its own or directed by Governor Shapiro who says he puts "People before Power" – give a more rational, realistic, and meaningful time for public comment** on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

The comment period should 1) last at least a full 6 months for written comment, and 2) include at least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and 3) hold 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

[1] *** This developer hired a contractor who, in the words of DEP, "destroyed the liquid boot while performing metals recovery activities within Building 8. Needless to say, **this action interfered with or impaired the SVE/AS system** that DEP had implemented **and potentially exacerbated the Existing Contamination at the site** in violation of the PPA and its two Amendments. DEP requested that CDP repair the liquid boot to allow for the continued operation of the SVE/AS system. This was never done, in continued violation of the PPA and its two Amendments."

The Bishop Tube toxic contamination has been under study for decades. And for at least the past decade and largely driven by community demand, the PADEP has been researching, considering, and developing approaches and plans for remediation of the site's toxic contamination.

Because of advocacy and legal action led by impacted community members, including the family of Larry and Kate Stauffer, the Delaware Riverkeeper Network, and Delaware Riverkeeper M. van Rossum, a remediation plan is finally being put forth.

However, at a glance, we find this plan severely and sorely lacking:

- It fails to ensure full remediation of the site that is driven by science, environmental protection, and the near term and long term safety of our community - instead it is a plan that is driven by dollars, political, and business objectives;
- It fails to fulfill the legal obligations of state law and the Pennsylvania Green Amendment, Article 1 Section 27, that protects our RIGHT to pure water, clean air, a quality environment and natural resources for present and future generations;
- It prioritizes persons and businesses with a vested interest in securing a quick outcome, rather than a full and protective clean up.

While PADEP, the responsible corporations, and the developer have had years to discuss, assess, debate, and negotiate the current remediation plan, *We The People* are being given a mere 60 days to review all the data and plans, and put forth meaningful and informed comments on an outcome that will impact the rest of our lives.

The toxic contamination at the Bishop Tube site has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families is heart wrenching.

Just on its face – without the time or opportunity to secure the expert and legal reviews essential for full, fair, and responsible review of a remediation and development proposal (and yes, this is very definitely a proposal for development, not just clean up) – the proposed consent decree puts the fox in charge of the henhouse, providing tremendous economic benefit and legal protection to the perpetrators of the harm and those who have economically benefitted from it at our expense. Providing for those who have every reason to shortcut the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

And so, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed and Pennsylvania who will bear the**

**environmental, health and economic burdens of a failed remediation and development plan at the Bishop Tube site demand:**

- 6 months - not just 60 days – to secure expert review and analysis, and provide full and informed comment on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site; and
- We should be provided with at least 2 public meetings where PADEP presents to us what is being proposed; and
- 2 public hearings where concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

Respectfully the undersigned individuals and organizations,

*Senator Katie Muth, Representing District 44 in Pennsylvania*
*Kate & Larry Stauffer*
*Elizabeth Stauffer (Brain Tumor Survivor)*
*Nicholas Stauffer*
*Cayley Dittmer*
*Michael, Jessica and Holly (their 1 year old daughter) Stauffer*
*Maureen Connolly*
*Eileen Ryan Romano*
*Joseph Romano*
*Barbara D. Arnold*
*Carol Rapp*
*Maya K. van Rossum, the Delaware Riverkeeper & Green Amendments Founder*
*Delaware Riverkeeper Network*
*Green Amendments For The Generations*
*Debra & Nick Mobile*
*Peggy & Ron Miros*
*Rhonda Funk*
*Deanna Fedor*
*Baily Funk*
*Pete & Judy Goodman*
*Sharon Connor*
*Carol L. Armstrong*

**April 9th, 2026**

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
**501 North 3rd Street**
**508 Main Capitol Building**
**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**
**From: We The People**

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All the while, children played in the creek taking in the site's toxic contribution; neighbors naively enjoyed life unaware of the dangers located just next door; downstream communities fished and played in the flowing waters of Little Valley Creek, Valley Creek, and the Schuylkill River; and the people of Chester County and Pennsylvania naively believed their state environmental agency was looking out for the best interests of the people and environment of Pennsylvania, rather than the interests, profits, and goals of industry and developers.

Our eyes were opened in 2017 when we learned of an illegal sweetheart deal the state entered into with a developer seeking to construct more than 200 homes, bringing over 200 families, including children, to this toxic site while it remained in its toxic condition with no plan for its remediation. Worse yet, the deal was cut with a developer who, documents revealed, had itself contributed to the site's ongoing toxic condition by damaging infrastructure that had been installed in an attempt to clean up at least some of the toxins there.***[1]

Thanks to the vigilance and curiosity of Larry Stauffer, the first member of the General Warren Village community to notice activity at the site and start to question what was happening, and with the help of the Delaware Riverkeeper Network and Green Amendments For The Generations, the community exposed, challenged, and ultimately defeated the sweet heart deal with Constitution Drive Partners. Notably, Delaware Riverkeeper Maya van Rossum, the Delaware Riverkeeper Network, and 13 to-be-named neighbors were the target ofa SLAPP suit by the developer, seeking to silence our opposition. In the end, justice prevailed and both the sweetheart deal and the SLAPP suits failed.

Imagine our surprise and disgust when, 8 years later, the community and environment were once again, the last to know and the ones sacrificed as PADEP sought to strike another sweetheart deal benefiting the corporations and developer responsible for the contamination at the Bishop Tube site.

With this foundation, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed, and Pennsylvania– write to urge, implore, plead and demand that PADEP – on its own or directed by Governor Shapiro who say she puts "People before Power"– give a more rational, realistic, and meaningful time for public comment** on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

The comment period should 1) last at least a full 6 months for written comment, and 2)include at least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and 3) hold 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

[1]*** This developer hired a contractor who, in the words of DEP, "destroyed the liquid boot while performing metals recovery activities within Building 8. Needless to say, **this action interfered with or impaired the SVE/AS system** that DEP had implemented **and potentially exacerbated the Existing Contamination at the site** in violation of the PPA and its two Amendments. DEP requested that CDP repair the liquid boot to allow for the continued operation of the SVE/AS system. This was never done, in continued violation of the PPA and its two Amendments."

The Bishop Tube toxic contamination has been under study for decades. And for at least the past decade and largely driven by community demand, the PADEP has been researching, considering, and developing approaches and plans for remediation of the site's toxic contamination.

Because of advocacy and legal action led by impacted community members, including the family of Larry and Kate Stauffer, the Delaware Riverkeeper Network, and Delaware Riverkeeper M. van Rossum, a remediation plan is finally being put forth.

However, at a glance, we find this plan severely and sorely lacking:

- It fails to ensure full remediation of the site that is driven by science, environmental protection, and the near term and long term safety of our community - instead it is a plan that is driven by dollars, political, and business objectives;
- It fails to fulfill the legal obligations of state law and the Pennsylvania Green Amendment, Article 1 Section 27, that protects our RIGHT to pure water, clean air, a quality environment and natural resources for present and future generations;
- It prioritizes persons and businesses with a vested interest in securing a quick outcome, rather than a full and protective clean up.

While PADEP, the responsible corporations, and the developer have had years to discuss, assess, debate, and negotiate the current remediation plan, *We The People* are being given a mere 60 days to review all the data and plans, and put forth meaningful and informed comments on an outcome that will impact the rest of our lives.

The toxic contamination at the Bishop Tube site has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families is heart wrenching.

Just on its face – without the time or opportunity to secure the expert and legal reviews essential for full, fair, and responsible review of a remediation and development proposal (and yes, this is very definitely a proposal for development, not just clean up) – the proposed consent decree puts the fox in charge of the henhouse, providing tremendous economic benefit and legal protection to the perpetrators of the harm and those who have economically benefitted from it at our expense. Providing for those who have every reason to shortcut the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

And so, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed and Pennsylvania who will bear the**

**environmental, health and economic burdens of a failed remediation and development plan at the Bishop Tube site demand:**

- 6 months - not just 60 days – to secure expert review and analysis, and provide full and informed comment on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site; and
- We should be provided with at least 2 public meetings where PADEP presents to us what is being proposed; and
- 2 public hearings where concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

Respectfully the undersigned individuals and organizations,

*Senator Katie Muth, Representing District 44 in Pennsylvania*

*Kate & Larry Stauffer*

*Elizabeth Stauffer (Brain Tumor Survivor)*

*Nicholas Stauffer*

*Cayley Dittmer*

*Michael, Jessica and Holly (their 1 year old daughter) Stauffer*

*Maureen Connolly*

*Eileen Ryan Romano*

*Joseph Romano*

*Barbara D. Arnold*

*Carol Rapp*

*Maya K. van Rossum, the Delaware Riverkeeper & Green Amendments Founder*

*Delaware Riverkeeper Network*

*Green Amendments For The Generations*

*Valley Forge Trout Unlimited*

*Debra & Nick Mobile*

*Peggy & Ron Miros*

*Rhonda Funk*

*Deanna Fedor*

*Baily Funk*

*Pete & Judy Goodman*

*Sharon Connor*

*Carol L. Armstrong*

# APPENDIX B

March 27, 2026

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
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**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**

**From: We The People**

**Re: Bishop Tube Consent Decree Public Comment**

***The below 191 signatures were collected by the Delaware Riverkeeper Network and Green Amendments For The Generations***

We, the undersigned, write to demand an extended, more equitable, and more accessible public review and comment process regarding the proposed Bishop Tube Consent Decree for toxic site remediation. We demand that, rather than 60 days with no communication between the community and the PADEP, we be given the following:

- At least a full 6 months for written comment,
- At least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and
- 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing

The toxic contamination at the Bishop Tube site is pervasive, saturating the soil and groundwater, and contaminating an Exceptional Value stream that receives surface and groundwater flows from the site. PADEP and the business interests responsible for its presence and clean up have known about this toxic contamination for decades. Community members have only been made more recently aware thanks to the vigilance and curiosity of Larry Stauffer, the first member of our community to notice activity at the site and start to question what was happening, and to the efforts of the Delaware Riverkeeper Network and Green Amendments For The Generations, which helped uncover the extent of this situation, and provided essential scientific and legal understanding.

The Bishop Tube site's toxic contamination has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families are heart wrenching, and the contamination has expanded beyond the site footprint which is inflicting daily environmental impacts past its boundaries.

On its face, the proposed consent decree provides tremendous legal protection and economic benefit to:

- The perpetrators of the harm,
- Those who have economically benefited from the site's contamination and the slow-moving process to secure its cleanup at the lowest price tag possible,
- Those who have been legally responsible for its cleanup for many years but failed to act, and
- Those who have every reason to circumvent the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

**But what about the community and the impacted environment?**

We are clearly an afterthought.

While PADEP, the responsible corporations, and the developer **have had years** to discuss, assess, debate, and negotiate the current remediation plan and consent decree, *We The People* are being given **a mere 60 days** to review all the data, complex plans, associated science, and applicable law, in order to attempt to put forth meaningful and informed comment on a matter that will directly impact our everyday lives and even those who are yet to come to our community.

This timeline for public review and comment is unacceptable. It denies *We The People* the opportunity to secure needed scientific and legal analysis, as well as denying us a fair amount of time to absorb the proposals, the volumes of associated data, and the complex combination of

strategies being proposed. The proposed timeline robs us of the opportunity to not only understand the information, but provide meaningful and informed comment to the PADEP.

And so, We the Undersigned:

- Residents of General Warren Village,
- Residents of East Whiteland Township,
- Residents of Chester County,
- Residents of the Schuylkill River Watershed
- Residents of the Commonwealth of Pennsylvania
- Organizations representing impacted ecosystems and community members;
- Real people who have borne the burdens of the existing toxic contamination at the site and who will bear the environmental, health, and economic burdens of a failed remediation and development plan at the Bishop Tube site moving forward;
- Real people standing up for the future generations this consequential decision will impact,

**demand the 6 months, 2 public meetings, and 2 public hearings as described above** in order to provide a more fair and accessible opportunity for the People of Pennsylvania to submit full and informed comments on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

Respectfully,

| **First Name** | **Last Name** | **City** | **State** |
|---|---|---|---|
| Adrienne | Rayna | New Ringgold | PA |
| Alex | Jackson | Blakeslee | PA |
| Allyson | Duncan | Malvern | PA |
| Alyssa | Mazzenga | Frazer | PA |
| Amanda | Cohen | Easton | PA |
| Amanda | Nickel | Paoli | PA |
| Amy | Brown | Malvern | PA |
| Andrea | Schran | Malvern | PA |
| Andrew | Kelly | Malvern | PA |
| Angel | Flores Jr | Villanova | PA |
| Angela | Clayton | Phoenixville | PA |
| Angela | Raftery | Malvern | PA |
| Angie | Bohn | Frazer | PA |
| Angie | Smith | Malvern | PA |

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|---|---|---|---|
| Annabelle | Stedman | Berwyn | PA |
| Anne | McCrory | Malvern | PA |
| Anne-Marie | Gincley | Philadelphia | PA |
| Annette | Bonner | West Chester | PA |
| Annsofie | Bjork | Glen Mills | PA |
| Arthur | Anderson | Philadelphia | PA |
| Barbara | Arnold | Malvern | PA |
| Barbara | Sonies | Narberth | PA |
| Barbara | Williams | Malvern | PA |
| Bea | Quaintance | Malvern | PA |
| Bernadette | Corsaro | Malvern | PA |
| Bernard | Greenberg | West Chester | PA |
| Blair | Blake | Upper Darby | PA |
| Boris | Dirnbach | Bryn Mawr | PA |
| Brett | Shallcross | Malvern | PA |
| Brian | Grant | Malvern | PA |
| Brian & Susan | Meehan | Malvern | PA |
| Bridget | S | Malvern | PA |
| Carla | Zambelli Mudry | Malvern | PA |
| Carol | Radich | Malvern | PA |
| Carol | Rapp | Malvern | PA |
| Carole | Buettner | Malvern | PA |
| Carolyn | Matthews | Malvern | PA |
| Cayley | Dittmer | Thornton | PA |
| Celeste | Dannunzio | Malvern | PA |
| Cheryl | Hendershott | Philadelphia | PA |
| Chris | King | Montoursville | PA |
| Christa | Melo | Malvern | PA |
| Christy | Norris | Malvern | PA |
| Ciaran | Rhodes | Philadelphia | PA |
| Cindy | Pinto | West Chester | PA |
| Connie | Black | Malvern | PA |
| Curt | Quaintance | Malvern | PA |
| Cynthia | Shallcross | Malvern | PA |
| Daniela | Ordonez | Bristol | PA |
| David | Fiedler | Bensalem | PA |
| Deborah | Gibase | Eddystone | PA |
| Dillan | Buettner | Malvern | PA |
| Donna | Morged | Malvern | PA |
| Donna | Saul | Malvern | PA |
| Doris | Adebanjo | Chester Springs | PA |
| Dorothy | Bedford | Phoenixville | PA |
| Douglas | Mason | Port Matilda | PA |
| Dustin | Frable | Palmerton | PA |
| Dylan | Matthews | Malvern | PA |

| | | | |
|---|---|---|---|
| Edith | Janik | Paoli | PA |
| Edward | Vandame | Malvern | PA |
| Eileen | Ryan | Allentown | PA |
| Elaine | Croft | Malvern | PA |
| Eliana | Sekkidou | Easton | PA |
| Elizabeth | Kadjeski | Malvern | PA |
| Elizabeth | Stauffer | Malvern | PA |
| Ema | Torres | Bryn Mawr | PA |
| Emily | Bachman | Nazareth | PA |
| Emily | Matthews | Malvern | PA |
| Emma | Derobertis | Malvern | PA |
| Eric | D’Armiento | Malvern | PA |
| Eric | Koper | Malvern | PA |
| Eric | Pavlak | Gaks | PA |
| Erica | Maar | Malvern | PA |
| Erica | Ryan | Malvern | PA |
| Erika | Hanks | Conshohocken | PA |
| Erin | Johnson, Mph, Msn, Rn | Rutledge | PA |
| Eunice | Alexander | West Chester | PA |
| Forrest | Gauker | Easton | PA |
| Frances | Conwell | Devon | PA |
| Ginny | Marcille-Kerslake | Exton | PA |
| Grace | Beal | Malvern | PA |
| Heather | Nelson | Douglassville | PA |
| Isaiah | Guenther | Philadelphia | PA |
| Jack | Binstead | Narberth | PA |
| Jacob | Thornburg | Norristown | PA |
| Jacqueline | Pickering | Jenkintown | PA |
| James | Steiner | Malvern | PA |
| Jason | Basore Sr | Malvern | PA |
| Jeanette | Hooven | Malvern | PA |
| Jen | Stewart | Wayne | PA |
| Jennifer | Glinski | Malvern | PA |
| Jennifer | Scheuer | West Chester | PA |
| Jennifer | Tabas | Malvern | PA |
| Jennifer | Tobin | Philadelphia | PA |
| Jill | Holsclaw | Malvern | PA |
| Joanne | Connolly | Avondale | PA |
| John | Bradlee | Malvern | PA |
| John | Hegarty | Malvern | PA |
| John | Kramer | Langhorne | PA |
| John | Rossi | Glen Mills | PA |
| Joseph | Wolfgang | Bally | PA |
| Judy | Fong | Malvern | PA |
| Julia | Schulz | Mechanicsburg | PA |

| | | | |
|---|---|---|---|
| K | Bailey | Langhorne | PA |
| Karen | Bedics | Coopersburg | PA |
| Karin | Goldman | Media | PA |
| Katelin | Dao | Bryn Mawr | PA |
| Kathleen | Stauffer | Malvern | PA |
| Kathy | Bosch | Malvern | PA |
| Kathy | Vannozzi | Pipersville | PA |
| Kathy | Wagner | Malvern | PA |
| Kirstin | Simmons | Malvern | PA |
| Kristen | Babcock | West Chester | PA |
| Kristen | Cosgrove | Malvern | PA |
| Laura | Fake | Womelsdorf | PA |
| Laura | Taddei | Malvern | PA |
| Lauri | Moon | Williamsport | PA |
| Lea | McCrone | Malvern | PA |
| Lela | Stanley | Philadelphia | PA |
| Leslie | Celia | West Chester | PA |
| Lily | Herron | Bristol | PA |
| Linda | Beavers | West Chester | PA |
| Lisa | Tull | Phoenixville | PA |
| Lois | Drumheller | Monroeville | PA |
| Lora | Snyder | Glen Mills | PA |
| Lucy | Lehman | Philadelphia | PA |
| Lynda | Holl | Malvern | PA |
| Lynnette | Granto | Malvern | PA |
| Lynnette | Saunders | Huntingdon Valley | PA |
| Mallory | Macaleer | Malvern | PA |
| Marina | Karulina | Malvern | PA |
| Mary | Black | Philadelphia | PA |
| Mary | Diguiseppe | Phoenixville | PA |
| Mary | More | Flourtown | PA |
| Mary | Tiebout | Pipersville | PA |
| Maryanne Rapp | Atterton | West Chester | PA |
| Melanie | Meade | Clairton | PA |
| Melissa | Macaleer | Malvern | PA |
| Melissa | Shelby | Malvern | PA |
| Meredith | Birtel | Malvern | PA |
| Meredith | Mueller | West Chester | PA |
| Michael | Moss | Philadelphia | PA |
| Michael | Rayer | Bryn Mawr | PA |
| Michael | Roberts | Whitehall | PA |
| Michael | Stauffer | Malvern | PA |
| Michelle | Mctague | Malvern | PA |
| Mike | Romanoff | Malvern | PA |
| Mikhail | Zapata-Rotz | Annville | PA |

| | | | |
|---|---|---|---|
| Nathaniel | Cain | Downingtown | PA |
| Nicholas | Stauffer | Malvern | PA |
| Nicole | Kellett | Phoenixville | PA |
| Noel | Petrie | Philadelphia | PA |
| Norman | Starr | Beach Lake | PA |
| Paige | Carlton | Malvern | PA |
| Patti | Smith | Conshohocken | PA |
| Paul | Stanley | West Chester | PA |
| Pauline | Toomey | Malvern | PA |
| Peggy | Miros | Malvern | PA |
| Peter | Hughes | Chester Springs | PA |
| Philip | Schwartz | Elverson | PA |
| Phillip | Potter | Philadelphia | PA |
| Ramya | Shetty | Malvern | PA |
| Raymond | Clarke | Malvern | PA |
| Regina | King | Malvern | PA |
| Rhonda | Anderson | Kennett Square | PA |
| Ricky | Ciccone | Malvern | PA |
| Robert | Adams | Effort | PA |
| Ryan | Dodson | Lancaster | PA |
| Sabriana | Pimentel | Catasauqua | PA |
| Sally | Doyle | Phoenixville | PA |
| Sarah | Caspar | Malvern | PA |
| Sarah | Gaffney | Easton | PA |
| Sarah | Loomis | Downingtown | PA |
| Sharon | Connor | Malvern | PA |
| Stephanie | Barbera-Waldeier | Malvern | PA |
| Stephanie | Mcnichol | Malvern | PA |
| Suzanne | Cutshall | Wayne | PA |
| Tara | Stoppa | Malvern | PA |
| Tara | Yerger | Pottstown | PA |
| Taylor | Magee | Norristown | PA |
| Thomas | Latzgo | Fogelsville | PA |
| Thomas | Rafetto | Malvern | PA |
| Tiana | Schade | Lehighton | PA |
| Tim | Caban | Malvern | PA |
| Tim | Matthews | Malvern | PA |
| Trayce | Carr | Malvern | PA |
| Vijaya | Vissapragada | Malvern | PA |
| Vincent | Prudente | Philadelphia | PA |
| Wim | Van Rossum | Bath | PA |
| Zy | Brandt | Norristown | PA |

*CC: East Whiteland Board of Supervisors*

*East Whiteland Planning Commission*

*Chester County Commissioners*

**April 9, 2026**

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
**501 North 3rd Street**
**508 Main Capitol Building**
**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**

**From: We The People**

**Re: Bishop Tube Consent Decree Public Comment**

***The below signatures include the original 190 signatures in our March 27th letter plus an additional 55, were collected by the Delaware Riverkeeper Network and Green Amendments For The Generations***

We, the undersigned, write to demand an extended, more equitable, and more accessible public review and comment process regarding the proposed Bishop Tube Consent Decree for toxic site remediation. We demand that, rather than 60 days with no communication between the community and the PADEP, we be given the following:

- At least a full 6 months for written comment,
- At least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and
- 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing

The toxic contamination at the Bishop Tube site is pervasive, saturating the soil and groundwater, and contaminating an Exceptional Value stream that receives surface and groundwater flows from the site. PADEP and the business interests responsible for its presence and clean up have known about this toxic contamination for decades. Community members have only been made more recently aware thanks to the vigilance and curiosity of Larry Stauffer, the first member of our community to notice activity at the site and start to question what was happening, and to the efforts of the Delaware Riverkeeper Network and Green Amendments For The Generations, which helped uncover the extent of this situation, and provided essential scientific and legal understanding.

The Bishop Tube site's toxic contamination has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families are heart wrenching, and the contamination has expanded beyond the site footprint which is inflicting daily environmental impacts past its boundaries.

On its face, the proposed consent decree provides tremendous legal protection and economic benefit to:

- The perpetrators of the harm,
- Those who have economically benefited from the site's contamination and the slow-moving process to secure its cleanup at the lowest price tag possible,
- Those who have been legally responsible for its cleanup for many years but failed to act, and
- Those who have every reason to circumvent the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

**But what about the community and the impacted environment?**

We are clearly an afterthought.

While PADEP, the responsible corporations, and the developer **have had years** to discuss, assess, debate, and negotiate the current remediation plan and consent decree, *We The People* are being given **a mere 60 days** to review all the data, complex plans, associated science, and applicable law, in order to attempt to put forth meaningful and informed comment on a matter that will directly impact our everyday lives and even those who are yet to come to our community.

This timeline for public review and comment is unacceptable. It denies *We The People* the opportunity to secure needed scientific and legal analysis, as well as denying us a fair amount of time to absorb the proposals, the volumes of associated data, and the complex combination of

strategies being proposed. The proposed timeline robs us of the opportunity to not only understand the information, but provide meaningful and informed comment to the PADEP.

And so, We the Undersigned:

- Residents of General Warren Village,
- Residents of East Whiteland Township,
- Residents of Chester County,
- Residents of the Schuylkill River Watershed
- Residents of the Commonwealth of Pennsylvania
- Organizations representing impacted ecosystems and community members;
- Real people who have borne the burdens of the existing toxic contamination at the site and who will bear the environmental, health, and economic burdens of a failed remediation and development plan at the Bishop Tube site moving forward;
- Real people standing up for the future generations this consequential decision will impact,

**demand the 6 months, 2 public meetings, and 2 public hearings as described above** in order to provide a more fair and accessible opportunity for the People of Pennsylvania to submit full and informed comments on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

Respectfully,

| First Name | Last Name | City | State |
|---|---|---|---|
| Vincent | Prudente | Philadelphia | PA |
| Sharon | Connor | Malvern | PA |
| Deborah | Gibase | Eddystone | PA |
| Barbara | Arnold | Malvern | PA |
| Jennifer | Tobin | Philadelphia | PA |
| Elizabeth | Stauffer | Malvern | PA |
| Michael | Rayer | Bryn Mawr | PA |
| Amanda | Cohen | Easton | PA |
| Carole | Buettner | Malvern | PA |
| Julia | Schulz | Mechanicsburg | PA |
| Ricky | Ciccone | Malvern | PA |
| John | Hegarty | Malvern | PA |
| Carol | Radich | Malvern | PA |
| Lily | Herron | Bristol | PA |

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|---|---|---|---|
| Regina | King | Malvern | PA |
| George | Spence | Norwood | PA |
| Peter | Tran | Bristol | PA |
| Mary | More | Flourtown | PA |
| Boris | Dirnbach | Bryn Mawr | PA |
| David | Fiedler | Bensalem | PA |
| Eric | Pavlak | Oaks | PA |
| Catherine | Folio | Effort | PA |
| Lois | Drumheller | Monroeville | PA |
| Linda | Granato | Philadelphia | PA |
| Mary | Tiebout | Pipersville | PA |
| Lynnette | Saunders | Huntingdon Valley | PA |
| Robert | Adams | Effort | PA |
| Kathleen | Stauffer | Malvern | PA |
| Norman | Koerner | Philadelphia | PA |
| Lauri | Moon | Williamsport | PA |
| Aggie | Perilli | Lancaster | PA |
| Joan | Farb | Newtown | PA |
| Bernard | Greenberg | West Chester | PA |
| Norman | Starr | Beach Lake | PA |
| Kathy | Vannozzi | Pipersville | PA |
| Ryan | Dodson | Lancaster | PA |
| Laura | Fake | Womelsdorf | PA |
| Heather | Nelson | Douglassville | PA |
| Karen | Bedics | Coopersburg | PA |
| Lisa | Tull | Phoenixville | PA |
| Arthur | Anderson | Philadelphia | PA |
| Zoe | Warner | Malvern | PA |
| Thomas | Latzgo | Fogelsville | PA |
| Wim | Van Rossum | Bath | PA |
| Chris | King | Montoursville | PA |
| Eliana | Sekkidou | Easton | PA |
| Peggy | Miros | Malvern | PA |
| Lela | Stanley | Philadelphia | PA |
| Angela | Clayton | Phoenixville | PA |
| Douglas | Mason | Port Matilda | PA |
| Emma | Dale | Philadelphia | PA |
| Carol | Rapp | Malvern | PA |
| Bob | Holliday | Chadds Ford | PA |
| Norma | Van Dyke | Philadelphia | PA |
| Eunice | Alexander | West Chester | PA |
| Alex | Jackson | Blakeslee | PA |
| Peter | Hughes | Chester Springs | PA |
| Barbara | Sonies | Narberth | PA |
| Isaiah | Guenther | Philadelphia | PA |

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|---|---|---|---|
| Noel | Petrie | Philadelphia | PA |
| Jacqueline | Pickering | Jenkintown | PA |
| Sally | Doyle | Phoenixville | PA |
| Paul | Stanley | West Chester | PA |
| Michael | Moss | Philadelphia | PA |
| Lora | Snyder | Glen Mills | PA |
| Anne-Marie | Gincley | Philadelphia | PA |
| Cheryl | Hendershott | Philadelphia | PA |
| Dorothy | Bedford | Phoenixville | PA |
| Erin | Johnson, Mph, Msn, Rn | Rutledge | PA |
| Patti | Smith | Conshohocken | PA |
| Tara | Yerger | Pottstown | PA |
| Sarah | Caspar | Malvern | PA |
| John | Bradlee | Malvern | PA |
| K | Bailey | Langhorne | PA |
| Forrest | Gauker | Easton | PA |
| Edith | Janik | Paoli | PA |
| Cayley | Dittmer | Thornton | PA |
| Doris | Adebanjo | Chester Springs | PA |
| Annsofie | Bjork | Glen Mills | PA |
| Raymond | Clarke | Malvern | PA |
| Andrew | Kelly | Malvern | PA |
| Erica | Maar | Malvern | PA |
| Carla | Zambelli Mudry | Malvern | PA |
| Elaine | Croft | Malvern | PA |
| Jill | Holsclaw | Malvern | PA |
| Emily | Bachman | Nazareth | PA |
| Taylor | Magee | Norristown | PA |
| Zy | Brandt | Norristown | PA |
| Joanne | Connolly | Avondale | PA |
| Dustin | Frable | Palmerton | PA |
| Celeste | Dannunzio | Malvern | PA |
| Sabriana | Pimentel | Catasauqua | PA |
| Sarah | Gaffney | Easton | PA |
| John | Rossi | Glen Mills | PA |
| Daniela | Ordonez | Bristol | PA |
| Sarah | Loomis | Downingtown | PA |
| Thomas | Rafetto | Malvern | PA |
| Jeanette | Hooven | Malvern | PA |
| Linda | Beavers | West Chester | PA |
| Frances | Conwell | Devon | PA |
| Tiana | Schade | Lehighton | PA |
| Erika | Hanks | Conshohocken | PA |
| Dillan | Buettner | Malvern | PA |
| Eileen | Ryan | Allentown | PA |

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|---|---|---|---|
| Anne | McCrory | Malvern | PA |
| Suzanne | Cutshall | Wayne | PA |
| Ema | Torres | Bryn Mawr | PA |
| Katelin | Dao | Bryn Mawr | PA |
| Elizabeth | Kadjeski | Malvern | PA |
| Jen | Stewart | Wayne | PA |
| Cindy | Pinto | West Chester | PA |
| Trayce | Carr | Malvern | PA |
| Karin | Goldman | Media | PA |
| Nicole | Kellett | Phoenixville | PA |
| Pauline | Toomey | Malvern | PA |
| Kathy | Bosch | Malvern | PA |
| Carolyn | Matthews | Malvern | PA |
| Dylan | Matthews | Malvern | PA |
| Emily | Matthews | Malvern | PA |
| Annabelle | Stedman | Berwyn | PA |
| Emma | Derobertis | Malvern | PA |
| Mallory | Macaleer | Malvern | PA |
| Philip | Schwartz | Elverson | PA |
| Jennifer | Glinski | Malvern | PA |
| Ginny | Marcille-Kerslake | Exton | PA |
| Amanda | Nickel | Paoli | PA |
| Brian | Grant | Malvern | PA |
| Jack | Binstead | Narberth | PA |
| Tara | Stoppa | Malvern | PA |
| Bridget | S | Malvern | PA |
| Annette | Bonner | West Chester | PA |
| Angela | Raftery | Malvern | PA |
| Joseph | Wolfgang | Bally | PA |
| Stephanie | Barbera-Waldeier | Malvern | PA |
| Jennifer | Tabas | Malvern | PA |
| Judy | Fong | Malvern | PA |
| Paige | Carlton | Malvern | PA |
| Andrea | Schran | Malvern | PA |
| Angie | Smith | Malvern | PA |
| Maryanne Rapp | Atterton | West Chester | PA |
| Leslie | Celia | West Chester | PA |
| Allyson | Duncan | Malvern | PA |
| Kristen | Cosgrove | Malvern | PA |
| Ramya | Shetty | Malvern | PA |
| Tim | Caban | Malvern | PA |
| Lynnette | Granto | Malvern | PA |
| Marina | Karulina | Malvern | PA |
| Kristen | Babcock | West Chester | PA |
| Adrienne | Rayna | New Ringgold | PA |

| | | | |
|---|---|---|---|
| Bea | Quaintance | Malvern | PA |
| Michael | Stauffer | Malvern | PA |
| Alyssa | Mazzenga | Frazer | PA |
| Lea | McCrone | Malvern | PA |
| Mike | Romanoff | Malvern | PA |
| Meredith | Birtel | Malvern | PA |
| Grace | Beal | Malvern | PA |
| Donna | Saul | Malvern | PA |
| Cynthia | Shallcross | Malvern | PA |
| Curt | Quaintance | Malvern | PA |
| Brian & Susan | Meehan | Malvern | PA |
| Angie | Bohn | Frazer | PA |
| Eric | D’Armiento | Malvern | PA |
| Melanie | Meade | Clairton | PA |
| Kirstin | Simmons | Malvern | PA |
| Melissa | Shelby | Malvern | PA |
| Amy | Brown | Malvern | PA |
| Nicholas | Stauffer | Malvern | PA |
| Jason | Basore Sr | Malvern | PA |
| Jennifer | Scheuer | West Chester | PA |
| Stephanie | Mcnichol | Malvern | PA |
| Blair | Blake | Upper Darby | PA |
| Donna | Morged | Malvern | PA |
| Jacob | Thornburg | Norristown | PA |
| Michael | Roberts | Whitehall | PA |
| Michelle | Mctague | Malvern | PA |
| Melissa | Macaleer | Malvern | PA |
| Mary | Black | Philadelphia | PA |
| Connie | Black | Malvern | PA |
| Phillip | Potter | Philadelphia | PA |
| Brett | Shallcross | Malvern | PA |
| Mary | Diguiseppe | Phoenixville | PA |
| Erica | Ryan | Malvern | PA |
| Eric | Koper | Malvern | PA |
| John | Kramer | Langhorne | PA |
| Angel | Flores Jr | Villanova | PA |
| Mikhail | Zapata-Rotz | Annville | PA |
| Vijaya | Vissapragada | Malvern | PA |
| Kathy | Wagner | Malvern | PA |
| Edward | Vandame | Malvern | PA |
| Bernadette | Corsaro | Malvern | PA |
| Meredith | Mueller | West Chester | PA |
| Nathaniel | Cain | Downingtown | PA |
| Lucy | Lehman | Philadelphia | PA |
| Christy | Norris | Malvern | PA |

| | | | |
|---|---|---|---|
| Tim | Matthews | Malvern | PA |
| Rhonda | Anderson | Kennett Square | PA |
| Ciaran | Rhodes | Philadelphia | PA |
| James | Steiner | Malvern | PA |
| Barbara | Williams | Malvern | PA |
| Lynda | Holl | Malvern | PA |
| Christa | Melo | Malvern | PA |
| Laura | Taddei | Malvern | PA |
| Jaclyn | Flail | Malvern | PA |
| Susan | Cronin | Malvern | PA |
| David | Brittingham | Malvern | PA |
| Pete | Goodman | Malvern | PA |
| Keith | Schied | Malvern | PA |
| Michele | Cruise | Berwyn | PA |
| Aeran | Atlas | Malvern | PA |
| Sharon | Moran-Sallam | Malvern | PA |
| Jack | St. Amand | Bryn Mawr | PA |
| Renee | England | Hellertown | PA |
| Kathy | Shea | Frazer | PA |
| Rebecca | Cookerly | Malvern | PA |
| Skylar | Livengood | Ardmore | PA |
| Cynthia | Myers | Malvern | PA |
| Dilma | Riddell | Frazer | PA |
| Brian | Johnson | Malvern | PA |
| James | Rafetto | Malvern | PA |
| Louise | Troutman | Cresco | PA |
| Austin | Crouch | Coatesville | PA |
| Chris | Daly | Bryn Mawr | PA |
| Robin | Freisem | Coatesville | PA |
| Brian | Jones | Phoenixville | PA |
| John | Harrington | Wynnewood | PA |
| Candice | Lynn | Feasterville Trevose | PA |
| Mark | Best | West Chester | PA |
| Keith | Scholtz | Phoenixville | PA |
| Stephen | Grim | Glenmoore | PA |
| Thomas | Prokop | Green Lane | PA |
| Heidi | Streich | Springfield | PA |
| Ryan | Gettis | Morrisville | PA |
| Derek | Gertz | Philadelphia | PA |
| Timothy | Hough | New Hope | PA |
| Matthew | Young | Gilbertsville | PA |
| Ryan | Mcquillan | Reading | PA |
| Y | Mahoney | Malvern | PA |
| Jennifer | Yue | Wayne | PA |
| Joseph | Ellis | Downingtown | PA |

| | | | |
|---|---|---|---|
| Maryellen | Caldwell | Malvern | PA |
| Mai | Nguyen | Malvern | PA |
| Kristen | Klugh Cannella | Malvern | PA |
| Greta | Sharpley | Phoenixville | PA |
| Al | Sniezevage | Broomall | PA |

*CC: East Whiteland Board of Supervisors*

*East Whiteland Planning Commission*

*Chester County Commissioners*

# APPENDIX C

Pennsylvania
Department of Environmental Protection

April 9, 2026

***via email***

Anneke L.W. van Rossum
Advocacy and Advancement Coordinator
Delaware Riverkeeper Network
925 Canal Street, 7th Floor, Suite 3701
Bristol, PA  19007

Re: Proposed Consent Decree - Public Comment Period
Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. van Rossum:

Thank you for your letters, dated March 27, 2026, requesting that the Pennsylvania Department of Environmental Protection (DEP) extend the 60-day public comment period for the proposed consent decree and a proposed Qualified Settlement Fund Agreement between DEP, Whittaker Corporation (Whittaker), Johnson Matthey, Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) implementing and funding the Hazardous Sites Cleanup Act remedial response at the Bishop Tube HSCA Site (Site). The Delaware Riverkeeper Network (DRN) is requesting that DEP extend the public comment period on the consent decree to six months and convene public hearings and meetings regarding the proposed settlement.

Your letter conveys concern that a 60-day comment period will not provide adequate opportunity to secure scientific and legal analyses and to review the large amounts of data and the strategies that the parties are proposing. However, no work plans or data are contained in the proposed consent decree, and the proposed consent decree does not change the remedy that DEP selected in 2022. DEP offered an extended comment period in 2021–2022 on that proposed remedy at the request of DRN. DRN and many others commented on the remedy at that time. Accordingly, DEP believes that the 60-day public comment period is sufficient to analyze the funding, framework, and schedule for implementing the remedy chosen in 2022 as set out in the proposed consent decree. This will allow the cleanup of the Site to commence as soon as possible following the response to comments and subject to Court approval.

Although we are not extending the comment period, consistent with Section 1113 in HSCA, DEP is committed to transparency throughout the remediation process. DEP will be routinely sending community update emails and updating our website as reports and work plans become available. DEP also plans to hold a public meeting this summer following the completion of the ongoing pre-design investigation. In addition, as we have discussed, DEP is committed to holding additional public meetings and/or informal public comment opportunities at various stages throughout the remediation process.

Sincerely,

Patrick L. Patterson

Patrick L. Patterson
Regional Director
Southeast Regional Office

cc: Senator Katie Muth
Steve Brown, East Whiteland Township
Scott Lambert, Chair, East Whiteland Township
Peter Fixler, Vice Chair, East Whiteland Township
Clinton Smith, East Whiteland Township
C. D. Brown, P.G
B. McClennen
L. Strobridge, P.G.
D. Armstrong
A. Bram, Esq.
R. McDivitt, Esq.
Regional File

# APPENDIX D

Debra J Mobile
[redacted]
Malvern, PA, 19355

Concerning the : Bishop Tube HSCA Site
Consent Decree Key Provisions
March 6, 2026

1. We have concerns about the determination of the monetary amounts.

- The state agreed to settle amounts at the same time that they began drilling for testing. How can they determine the amount needed for clean-up when they don't know the extent of the damage?
- Only $8,985,000 has been set aside for clean-up. This figure was the same in proposed documents which are over 5 years old. Was there no concern for the cost of inflation?
- Even with the $2,500,000 slush fund this amount seems inadequate. This is a property with extensive damage and pollutants. You can't do much of anything for $11 millions dollars these days.
- Later in the provisions it states that if CDP runs out of money they should notify the state they couldn't complete the task. Then what? Do we stop clean up efforts? Does the state take control? Are we the tax payers now responsible?
- Additionally the state has already spent at least $4.2 million (as of 2022) of the tax payers money. Will the tax payers be reimbursed before The CDP begins to spend the rest.
- The document also allows for CDP to use these monies for demolition and site preparation. Are these not normal expenses in construction projects? Why are these expenses being paid for out of the limited clean-up fund?
- Furthermore the agreement allows CDP to use clean-up monies for legal fees. This does not make sense. Why do clean-up monies need to pay for CDP's lawyers?

2. This is an arbitrary agreement. It refers to clean-up efforts when there is not approved clean up plan in place or included within the document.

- How can you comment on an agreement that references a plan that does not exist? If there is a plan where is it?

- There is no provision to seek public input concerning clean up steps which will be determined as additional testing becomes available.
- There are no apparent safeguards for the local community in place.
- The state has asked for weekly reports, but there is no mention of monitoring for the health and safety of the residents of General Warren Village. The agreement does not identify who is responsible to determine if residents are at risks.
- Furthermore the DEP is ignoring the citizens legal right to "clean air and water," as defined by the PA Constitution.

3. The state has failed to meet with the residences to fully explain what is going on.

- Most of the residents of EW Township are not environmental engineers or lawyers and may have difficultly fully understanding the documents and reports.
- When asked for meeting the state said they could not until this settlement was reached. Now they just so "no" to requests for meetings.
- The consent decree has an overwhelming number of acronyms and initials. It is extremely difficult to understand without a reference key.
- How can we as residents make intelligent comments about a settlement we may not fully understand?

4. This agreement can be described as capricious. The language used within the document is vague and ill defined.

- The document uses phrases and conditions such as "best efforts," and "reasonable" or "not feasible" when referencing potential actions taken by CDP. The document does not define level of efficacy needed for CDP to achieve these levels.
- This document is so vague the DEP will have little recourse to challenge CDP if the need for court action should arise. This document is not enforceable.
- Under this agreement CDP can spend the monies with no enforceable boundaries or expectations.

4. By entering into this agreement the DEP is ignoring the legal rights of the citizens of East Whiteland Township.

- This agreement does not meet the conditions which CDP agreed to with the township in their Land Development Application.

- Agreements were made to insure the land was fully cleaned before any construct would begin. It now seems that they will leave contaminate on the site and use a method contrary to the one they agreed to with the township.
- Assurance that the site would be fully cleaned before any construction begins seems to be contrary to this agreement.
- In the past the DEP indicated that approvals for construction are the purview of the Township and zoning. Now DEP is entering in an agreement which overrides local authority.

5. I have strong concerns about CDP being left in charge of the clean-up effort.

- CDP has already violated convents with the state. Furthermore they tried to procure additional convents in a way that was later thrown out by the courts.
- CDP has already shown an animosity towards the resident of General Warren Village. They have issued slap suits to prevent residents from speaking at township meetings.
- CDP is a major stack-holder in this clean-up project. Their objective is to get the work done cheaply so they can make money on the site. They are about business first, not people.
- Under this agreement CDP could easily spend the clean-up monies as quickly as possible and then go to the state and day we have done the "best we can." CDP can spend clean-up money on a wide variety of construction related costs. CDP can blatantly be released of all responsibility relating to the actual clean-up. And the state will have no recourse.
- **Why would you put the fox in charge of the hen house?**

Debra J and Nick J Mobile
[redacted]
Malvern, PA. 19355

May 13, 2026

# APPENDIX E

44TH DISTRICT
STATE SENATOR
KATIE MUTH

SENATE BOX 203044
THE STATE CAPITOL
185 MAIN CAPITOL
HARRISBURG, PA 17120-3044
717-787-1398
FAX: 717-783-4587

338 MAIN STREET
ROYERSFORD, PA 19468
610-792-2137
FAX: 610-948-3037

Senate of Pennsylvania

COMMITTEES

VETERANS AFFAIRS & EMERGENCY PREPAREDNESS, DEMOCRATIC CHAIR
COMMUNITY, ECONOMIC & RECREATIONAL DEVELOPMENT
ENVIRONMENTAL RESOURCES & ENERGY
FINANCE
STATE GOVERNMENT

EMAIL: senatormuth@pasenate.com
FACEBOOK: @SenatorMuth
X: @SenatorMuth
INSTAGRAM: @SenatorMuth
WEBSITE: www.SenatorMuth.com

May 14, 2026

Dustin A. Armstrong
Environmental Protection Specialist
Pennsylvania Department of Environmental Protection
2 East Main Street
Norristown, PA 19401
*Sent by USPS and via email to darmstrong@pa.gov*

RE: Bishop Tube Consent Decree Public Comment

Dear Mr. Armstrong,

I am submitting this formal comment to the Pennsylvania Department of Environmental Protection (PA DEP) to express strong opposition to the proposed consent decree and proposed Qualified Settlement Fund Agreement between the PA DEP and Whittaker Corporation, Johnson Matthey Inc., Marcegaglia USA, Inc., and Constitution Drive Partners, L.P. to fund remediation efforts of the Bishop Tube site in Chester County.

The Bishop Tube site in East Whiteland Township in my Senate District has been a toxic site for decades – contaminated with toxic trichloroethylene chemicals (TCE), which can cause neurological, cardiac, reproductive and developmental health problems, as well as volatile organic compounds (VOCs), heavy metals, and polyfluoroalkyl substances (PFAS).

The proposed Consent Decree lays out some basic steps toward remediation, but it falls well short of identifying how the site will be remediated, what chemicals will be used, what equipment will be needed, and specific details about data collection, evaluations, and assessments. How is it appropriate for the DEP to enter into a legally binding agreement without the exact details about how the remediation will be completed and to ensure that any future use of this site is actually safe?

I am also disappointed in the lack of public involvement throughout this process and outlined in the Consent Decree. I signed onto a letter last month with several residents and advocacy groups to ask the DEP to extend the public comment period on the Consent Decree to a full six months and to host public meetings and public hearings to allow the impacted residents to better understand the proposed Consent Decree, and to voice their concerns directly to the DEP. These requests were denied. By limiting meaningful input while advancing a deal favorable to the developer, the PA DEP is failing in its responsibility to protect the community and the environment. The residents who live near this toxic site have already waited decades for meaningful cleanup. They should not now be denied the time necessary to ensure that the proposed remediation actually protects their health, their water, and their community.

As many others have also outlined, the proposed Consent Decree is not in the public interest, and instead prioritizes the interests of the developer. Under the proposal, Whittaker Corporation, Johnson Matthey., Marcegaglia, and Constitution Drive Partners, will contribute nearly $9 million to a trust fund to support the remediation efforts and an additional $2.5 million to a reserve fund. Constitution Drive Partners, the company looking to develop and make a profit off of future development of the property, will be able to determine how that money is spent to implement the elements of the outlined Remedial Action. Once the funds in this account are depleted, it would fall on DEP to finish and foot the cost for any remaining remedial actions. It is outrageous that a developer seeking to make a profit on this site will be able to use remediation funds for site prep and demolition that more closely align with their needs for future development, not for the health and safety of the public and our environment. The DEP cannot and should not agree to use taxpayer money to fund any unmet remediation needs at the Bishop Tube site. An additional note, the same developer, the President of Constitution Drive Partners, Brian O'Neill, is also the owner of several other real estate development companies that are proposing billions of dollars in artificial intelligence and hyper scale data center projects. Mr. O'Neill purchased this site knowing that it is listed on the PA DEP Hazardous Sites Cleanup Program due to contamination issues. Mr. O'Neill has received other state grant funding for other projects. Mr. O'Neill, a mega millionaire, can surely afford to pay for the full cleanup of this site, instead of taxpayers footing the bill for another property that will be redeveloped and sold off, making more money for a for-profit business entity.

The PA DEP has the right to withdraw its agreement to enter into the consent decree and/or the Qualified Settlement Fund Agreement if the comments disclose facts or considerations which indicate that either or both settlements are inappropriate, improper, or not in the public interest. I strongly believe that the information outlined in my public comment and the concerns raised by advocacy groups such as the Delaware Riverkeeper Network have unequivocally proven that this proposal is not appropriate, proper, nor in the public interest.

I urge the DEP to withdraw from its agreement to enter into the consent decree so that a more detailed, complete, and transparent remediation effort can be adopted to better protect the residents of East Whiteland Township, and to preserve the right to clean air, pure water, and the preservation of natural, scenic, historic, and aesthetic environmental values guaranteed by Article 1 Section 27 of the Pennsylvania Constitution.

In service,

Senator Katie J. Muth
Senate District 44

# APPENDIX F

Dustin A. Armstrong
Environmental Protection Specialist
Pennsylvania Department of Environmental Protection
2 East Main Street, Norristown, PA 19401

Submitted via email to: RA-EP-SEROECB@pa.gov & darmstrong@pa.gov

Submitted on: May 14, 2026

***Re: Bishop Tube Consent Decree Public Comment***

Respectfully to the Honorable Joshua D. Wolson and Dustin A. Armstrong,

*We begin by asking that this comment be shared in its entirety with Judge Wolson, rather than via a summary prepared by the Pennsylvania Department of Environmental Protection staff.*

Article I, Section 27 of the Pennsylvania Constitution, also known as the *Pennsylvania Green Amendment*, recognizes and protects the environmental rights of all the people of the Commonwealth, including future generations. It reads:

> *The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.*

Through its plain language and implementing court decisions, the Pennsylvania Green Amendment establishes a constitutional mandate that applies to all government officials within Pennsylvania. Pursuant to the amendment, the Pennsylvania Department of Environmental Protection ("PADEP") must ensure its actions do not directly, or through the actions of others, infringe on the rights of the people to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

Further, the Amendment establishes that Pennsylvania government, including the PADEP, serves as a trustee of the state's natural resources, which are owned by present and future generations. The Pennsylvania Supreme Court has made clear that the government's duty as trustee to conserve and maintain the state's natural resources "implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources." *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013) and subsequently in *PEDF v. Commonwealth of Pennsylvania* (Pa. 2017).

Among the PADEP's obligations to protect the environmental rights of the people and to fulfill its constitutional duties as trustee of the state's natural resources, the "Department has a constitutional duty to fully consider the environmental effects of any proposed action in advance of proceeding...." Clean Air Council, Delaware Riverkeeper Network , *et al.* v. DEP, EHB Docket No. 2017-009-L

(Opinion and Order on Motion for Summary Judgment, January 1, 2018); Center for Coalfield Justice v. DEP, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); Friends of Lackawanna v. DEP, EHB Docket No. 2015-063-L (Adjudication, Aug. 15, 2017).

The proposed Bishop Tube Consent Decree fails on all counts.

In addition to this comment submission, after careful review, Green Amendments For The Generations adopts, in full, all of the comments submitted by the Delaware Riverkeeper Network on the proposed Bishop Tube Consent Decree.

**The Consent Decree Fails to Ensure that Environmental Rights Shall Not Be Infringed Upon.**

The Consent Decree does not ensure the creation or implementation of a Remedial Action that will ensure the right of the people to pure water, clean air and the natural values of the environment will not be infringed upon. To the contrary, it is foreseeable that the Consent Decree put forth by PADEP will not result in full or appropriate remediation of the Bishop Tube site, failing to remediate the contamination in the soils and groundwater, and failing to prevent ongoing pollution impacts to the Exceptional Value Little Valley Creek and associated wetlands which continue to be the recipients of toxic contamination emanating from the site. As a result, historic infringement upon environmental rights due to toxic contamination at (and emanating from) the Bishop Tube site will continue into the future, including after the terms of the Consent Decree are deemed fulfilled.

The rights of impacted community members and the people of Pennsylvania to pure water, clean air and to the natural and aesthetic values of the environment have long been infringed upon by both the contamination at the Bishop Tube site, and the PADEP's intentional failure to enforce existing laws and regulations to ensure the site is cleaned up. The failure of the Consent Decree to articulate a clear, detailed, and understandable Remedial Action provides no assurance that the contamination at the site will be fully cleaned up to all applicable legal standards. In addition, it contains a variety of loopholes and limitations that make it impossible to ensure – by virtue of the Consent Decree as written – that environmental rights will be restored and protected. For example: the Consent Decree only mandates remedial action by the site owner, Constitution Drive Partners, L.P. ("CDP"), until the Trust funds run out and offers no clear plan for what happens thereafter; the Consent Decree repeatedly uses vague and subjective language such as "best efforts", "reasonable", "feasible" when describing critical elements of the anticipated remediation work and Consent Decree obligations leaving the amount of remediation effort, the measure of remediation success, and compliance with essential Remedial Action and Consent Decree elements wide open to CDP interpretation, advocacy and legal argument, and; the Consent Decree fails to require monitoring to assess whether the Remedial Action meets legal and constitutional standards and fails to establish a plan for ongoing remediation and clean up activities if monitoring demonstrates they are required to address ongoing environmental, legal, human health and safety, and constitutional obligations and concerns.

**The Consent Decree Does Not Fulfill PADEP's Constitutional Trustee Obligations.**

As trustee of the Commonwealth's natural resources, including those impacted by the Bishop Tube site, the PADEP has a duty to prevent and remedy the degradation, diminution, or depletion of the implicated natural resources. This Consent Decree fails to fulfill this constitutional obligation.

Quite simply, the Consent Decree fails to articulate a specific Remedial Action that addresses how the existing contamination and degradation of the site will be cleaned up and addressed. Instead, it merely lays out the steps that will be taken to eventually, hopefully, develop that plan. In the absence of a specific Remedial Action with clearly identified implementation steps and strategies, it is impossible for the PADEP to argue that it is ensuring the Remedial Action necessary to prevent and remedy the degradation, diminution and depletion of the natural resources harmed by the contamination at this site.

As written, the Consent Decree does not ensure the natural resources impacted by the Bishop Tube site are remediated, protected, or restored, at least to the degree required by all applicable statutes and regulations; and it provides no consideration of constitutional obligations. The natural resources located at, and/or impacted by, the Bishop Tube site, to which the state's constitutional trustee obligations apply, include: Little Valley Creek, which is an Exceptional Value stream entitled to a higher level of legal protection; the adjacent wetlands, which also have Exceptional Value status by virtue of their interconnectedness with Little Valley Creek; the soils located at the site, and; the groundwater that flows beneath, and emanates from, the site.

Among the PADEP's fiduciary obligations as the trustee of the natural resources impacted by the Bishop Tube site, is the duty of loyalty. This duty requires the PADEP to conserve and maintain the site's natural resources for the benefit of present and future generations of Pennsylvanians, who are the beneficiaries of the natural resource trust. In fulfilling its trustee obligations, the PADEP may not prioritize the economic interests of the site's responsible parties over the environmental rights and trustee entitlements of the people. And yet, at every turn, the terms of the Consent Decree clearly seek to advance the economic interests of CDP and the companies that are legally responsible for the site's contamination, including by limiting the scope of their financial obligations required to ensure the site is remediated fully, fairly and in compliance with all legal standards. The Consent Decree goes so far as to limit the remediation obligations of all of the responsible parties – CDP, Whittaker Corporation, Johnson Matthey Inc, Marcegaglia USA, Inc,– to the funds placed in the Trust established therein, even though the PADEP does not know the final Remedial Action steps or elements to be funded. How can the PADEP determine a fair representation of the costs of the Remedial Action that should be covered by the responsible parties if it does not know the steps actually to be carried out? As written, the goal of the Remedial Action is not to conserve and maintain the natural resources at the site for the benefit of present and future generations of Pennsylvanians. Instead, the elements of the Consent Decree are primarily focused on developing and implementing a Remedial Action that is ill-informed and unspecific, driven by a deficient and out-of-date costs calculation which was decided upon five years ago, and which limits the legal obligations and legal liability of the responsible parties.

In addition, the Consent Decree evidences a clear goal of helping to not only limit CDP's obligations with regards to remediation of the site (e.g. relieving CDP of the obligation to implement Remedial Action steps as soon as Trust funds are spent regardless of whether or not site remediation and legal standards have been achieved), but to allow CDP to advance its private development plans, goals, interests and profitmaking-objectives as soon as possible. Within this Consent Decree, PADEP even goes so far as to acquiesce to CDPs residential development plans as soon as certain elements of the Consent Decree are achieved despite there being conflict with the standards and obligations for development put in place by East Whiteland Township for CDPs project; and regardless of the potential for site remediation to faulter, fail or not be fully achieved and thereby expose future residents to dangerous toxic contamination while at the same time leaving current residents exposed.

It is notable that since at least 1985, the PADEP has been aware of the dangerous contamination at Bishop Tube and its migration beyond the site's property lines, delivering contamination to neighboring natural resources and communities. That means, for over 40 years the PADEP has been aware of the contamination at Bishop Tube and has not taken the action needed to address it. In that 40 years, some of those future generations the PADEP was constitutionally obligated to protect were actually born, and found themselves exposed to - or living next to – a toxic site the PADEP had known about but was taking no meaningful action to clean up or address. More than that, some individuals may have become ill from the site's contamination (see public comments from others), and/or had to live with the property value and/or mental stress and worry that living next to this site caused. The implications of the toxic contamination at this site and the legal authority the PADEP had for securing its remediation in order to protect all generations of Pennsylvanians, including those yet to be born, seemed to have no effect on PADEP. If the PADEP had any sense of urgency or obligation to the people of Pennsylvania, it could have protected those exposed to the contamination emanating from this site. Instead, we know from our experience and the lengthy legal record that the PADEP prioritized finding pathways to help CDP develop the site while it remained contaminated, neglecting to take action towards the site's remediation and restoration.

**The Consent Decree Fails to Fulfill the Constitutional Obligation of Appropriate Review.** Along with the substantive rights and duties articulated by the Pennsylvania Green Amendment, the Amendment creates a constitutional obligation on government officials to undertake an "appropriately thorough environmental review" and to consider the constitutional implications and obligations regarding the people's environmental rights and its own duties as a trustee of impacted natural resources. This review must take place prior to rendering the proposed action or decision the PADEP is seeking to advance. Here, we see no evidence of the PADEP considering the environmental rights implications or constitutional trustee implications of this Consent Decree–not in its individual elements nor the proposal as a whole.

In point of fact, the Consent Decree acknowledges that there is a lack of information to perform an informed and deliberative pre-decisional review by repeatedly calling for more information, studies, and samples to be performed to inform the development and implementation of a Remedial Action for the site. This is, perhaps, because the previously issued Analysis of Alternatives and Remedial Response ("AOA"), which forms the basis of the Consent Decree, was itself deficient.

The AOA, upon which the selected remedy was supposed to be based, recognizes the fundamental failings and inaccuracy of its information. The AOA repeatedly calls for additional data collection, sampling, and studies in order to determine the nature and extent of the contamination on site to determine steps that need to be taken. *See, e.g.*, AOA at p.12 fn. 3, p. 14, p. 15, p. 16, p. 22.

The inadequacy of the selected remedial response from the AOA, and therefore the Consent Decree, is evidenced by the following:

- While the plan assumes a clear boundary for the pollution plume, there is a lack of monitoring wells to support this assertion/assumption.
- Mapping fails to clearly articulate the differences in the pollution plume between the overburdened soils and the bedrock aquifers.
- The site has been determined to be a source of PFOS/PFAS contamination, which was not known at the time the AOA was put out for public comment. The failure to test for, and address, this contamination in advance of selecting a remedial alternative represents a constitutional, legal, and moral failing of the PADEP's proposal. Further, the public had no opportunity to provide comment on this known carcinogen.
- The reports relied upon to create the plan used a modeling approach that is not adequate to evaluate the movement of TCE, a known human carcinogen at the site, and therefore cannot be used to inform or support the plan put forth by the PADEP for consideration.

Based on the amount of analysis yet to be performed, it is clear the PADEP did not base its Consent Decree or the Remedial Action process it advances on a constitutionally adequate, deliberate, pre-decisional process that assessed the implications for environmental rights and natural resource trustee obligations. In addition to the lacking data and information, we do not see any reference to environmental rights or trustee obligation review anywhere within the Consent Decree or supporting documentation.

Further, it is clear that the PADEP did not fulfill its trustee duty of prudence given the lack of critical information.

The PADEP has already locked itself into a selected alternative when it does not have anywhere near the quality nor quantity of information required to understand the true site conditions and the potentially disastrous implications of an underdeveloped Remedial Action.

**We Urge That This Consent Decree Be Rejected.**
This Consent Decree–in both its development and implementation–fails to protect the Article I, Section 27 environmental rights of the people of Pennsylvania, and fails to fulfill the obligations of the PADEP to serve as trustee of the state's natural resources for the benefit of present and future generations of Pennsylvanians.

We urge the court to reject the proposed Consent Decree as being arbitrary, capricious, and not in the public interest, and for its failure to fulfill the constitutional obligations as articulated in Article I, Section 27 of the Pennsylvania Constitution.

Respectfully Submitted,

Maya K. van Rossum

Maya K. van Rossum
Founder/Leader

# APPENDIX G

DELAWARE RIVERKEEPER NETWORK

**May 14, 2026**

Pennsylvania Department of Environmental Protection
Dustin A. Armstrong, Environmental Protection Specialist
2 East Main Street
Norristown, PA 19401

email: RA-EP-SEROECB@pa.gov &
darmstrong@pa.gov

Email & Letter Subject: Bishop Tube Consent Decree Public Comment

*We begin by asking that this comment be shared in its entirety with Judge Wolson, rather than via a summary prepared by the Pennsylvania Department of Environmental Protection staff.*

Respectfully to the Honorable Joshua D. Wolson and Dustin A. Armstrong,

We urge the court to **REJECT** the Consent Decree being proposed by the Pennsylvania Department of Environmental Protection (PADEP) in order to settle claims pursuant to the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, No. 108, 35 P.S. § 6020.101 et seq. ("HSCA"); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101 et seq. ("Solid Waste Management Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq. ("Clean Streams Law"); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. §§ 9601-9675 ("CERCLA"); the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2, 35 P.S. Section 6026.101 et seq. ("Act 2"); and the Uniform Environmental Covenants Act, the Act of December 18, 2007, P.L. 450, No. 68, as amended, 27 Pa. C.S. § 6501 et seq. ("UECA"); and Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder.

We urge you to directly review and consider all public comments submitted – including this one – and not accept a Pennsylvania Department of Environmental Protection (PADEP) summary that may represent a distorted version of what is being said by public commenters. PADEP already had the opportunity to present its distorted version of the facts in the Consent Decree itself. The agency should not be again allowed to put forth its own fabricated version of what the public is seeking to say to this court. The public deserves to have their stories heard, exactly how they want to tell it.

As we will set forth in this comment, the proposed Consent Decree, given the totality of the facts and what is being proposed, is arbitrary, capricious, not reasonable, not fair, not equitable, not rational, not consistent with public policy, does not serve the public interest, and fails to fulfill the constitutional rights of the people to clean water and air, and a healthful environment, and in so fails to fulfill the trustee duty of the PADEP and the state of Pennsylvania to protect the natural resources of Pennsylvania for both present and future generations. To approve this Consent Decree would itself be arbitrary, capricious, not in accordance with law, nor would it serve the public interest.

We urge you to reject the arguments we know PADEP and the responsible corporations who are party to this ill-conceived sweetheart deal will make, which is that time is of the essence and this Consent Decree must be approved in order to address the toxic contamination that has, for decades, saturated this site and is spreading beyond this boundary.

> Please note, it took litigation advanced by the Delaware Riverkeeper Network (DRN) to spark, spur and prioritize proactive efforts by PADEP to simply begin to negotiate a Remedial Action plan for this site. Up until DRN's intervention, PADEP's efforts towards site clean-up had been lackadaisical at best, with the responsible parties investing in lawyers to prevent progress rather than advance it. As a result, it is RICH, to say the least, that PADEP and the responsible parties would now be advancing a time-is-of-the-essence argument. Rather, we see it as just another mechanism for once again ignoring and silencing community concerns, participation, priorities, needs, goals and comments as pertains to this ill-conceived proposal.

When viewed in its totality, this proposed Consent Decree will <u>not</u> assure responsible and/or legally complete site remediation; will <u>not</u> assure that all remediation steps will be undertaken in a timely fashion, if at all; and will <u>not</u> assure that it is the responsible parties who are paying for the work as opposed to *We The People* who are the taxpayers of Pennsylvania and have already borne the burdens of harm created by the irresponsible behaviors of the wealthy corporations responsible.

This Consent Decree - from the misrepresentations presented in the Introductory provisions, all the way through to its end including the pitiful requirements that will <u>not</u> ensure full, fair or meaningful accountability for implementation of Remedial Action at the Bishop Tube site – is nothing short of a travesty, another sweetheart deal giveaway to the wealthy businesses involved. As written, this Consent Decree represents a betrayal of the public interest and the public trust by advancing a sweetheart deal designed to achieve the economic and profit goals of the wealthy businesses involved, at the expense of the public interests of impacted communities, our environment, or the People of Pennsylvania.

> You may think the language set forth above and throughout this comment is hyperbolic and extreme. But given the history and facts of this case, DRN's involvement first hand with PADEP and the responsible parties, and what the provisions of the Consent Decree will make the community face, there are not words extreme enough to fully and meaningfully describe what has been perpetrated by PADEP and the responsible parties with regards to this site; and the multitude of ways the community and our environment have been victimized and harmed. As they will continue to be if this Consent Decree is approved. And so we ask you to embrace this strong language as reflective of the experience of all who have been involved intimately with this site and situation.

In sum, we urge you to **REJECT** this proposed Consent Decree and all the elements it advances as being arbitrary, capricious, and not in the best interests of the public.

## <u>**Introduction**</u>

Since 1985, the Pennsylvania Department of Environmental Protection (PADEP) has known that the Bishop Tube Site located in East Whiteland Township, Chester County, PA, was dangerously contaminated. Over the decades, the seriousness of the contamination and its dangers for the community and environment has been increasingly revealed as data has been collected and workers at the site have shared the horrifying disregard for the environment demonstrated by site owners. In response, rather than take swift action to enforce existing laws and secure remediation of the site in full compliance with the law by the known - and very wealthy – responsible parties, the PADEP allowed the site to languish in its toxic condition.

All the while, children played in the water exposed to the site's toxic contribution; neighbors naively enjoyed life unaware of the dangers located just next door seeping in to their environment; downstream communities fished and played in and around the flowing waters of Little Valley Creek, Valley Creek, and the Schuylkill River, and; the people of Chester County and Pennsylvania naively believed their state environmental agency, PADEP, was looking out for the best interests of the people and environment of Pennsylvania, rather than the interests, profits, and goals of industry and developers. It was largely because of strong advocacy by the community and legal action by the Delaware Riverkeeper Network that PADEP was finally forced to prioritize addressing contamination at the site, rather than continue to help Constitution Drive Partners (CDP) advance its development plans as the priority for the site.

The most recent manifestation of the advocacy and legal action which finally forced PADEP to take seriously its legal and constitutional obligations to address the toxic contamination at the Bishop Tube site is this travesty of a Consent Decree being put before the public and the Pennsylvania legal system for consideration and presumed acceptance.

Despite so many decades of PADEP awareness regarding the existing and spreading toxic condition of the Bishop Tube site, we still don't know the true nature and extent of the contamination as further testing needs to be done. What we do know is the contamination is vast, dangerous, has persisted for decades, and has spread well beyond the boundaries of the site. This dangerous and expanding toxic condition is not simply the result of the careless activities of Johnson Matthey Inc. (previously known as J. Bishop, Matthey Bishop), Whittaker Corporation, Christiana Metals Corporation, Alloy Steel Corporation, Marcegaglia USA, Central & Western Chester County Industrial Development Authority (Responsible Parties) and Constitution Drive Partners, but also because of the decades of inaction taken by PADEP. From heavy metals to fluoride to PFAS to cancer-causing TCE, Bishop Tube is the whole package when it comes to a textbook example of a toxic site.

According to Consent Decree provision PP, if the Court approves this Consent Decree, it is finding that, among other things, "*...the Consent Decree is fair, reasonable, equitable* and consistent with public policy….."[1] (emphasis added). Nothing could be further from the truth. Approval of this proposed Consent Decree is <u>not</u> reasonable, <u>not</u> fair, <u>not</u> equitable, <u>not</u> rational, <u>not</u> consistent with public policy, and does <u>not</u> serve the public interest. Instead, it is a carefully structured document designed to give money and power to those legally responsible for this site's contamination and the devastating consequences it has had on our environment and neighboring communities; and to leave neighboring and downstream community members, as well as the Pennsylvania taxpayer at large, left to cover the costs (economic, environmental, in health and safety) of ongoing contamination and additional remediation that this agreement inevitably fails to address.

> ***Approval of this Consent Decree would be Arbitrary, Capricious, a Violation of the Public Trust, and Result in a continuation of Inequity and Harm that is Unfair, Unreasonable and Against the Public Interest.***

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[1] *COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION v. WHITTAKER CORPORATION, JOHNSON MATTHEY INC., MARCEGAGLIA USA, INC., and CONSTITUTION DRIVE PARTNERS, L.P.,* No. 08-cv-6010 , Consent Decree at 14 (U.S. DC Eastern District of Pennsylvania, March 6, 2026).

The Consent Decree is the result of a truncated comment and review period of just 60 days with no opportunity for the public to hear from the DEP directly, to ask questions, and benefit from direct answers. When the public requested an extension[2] they were met with a swift and unfounded rejection[3] asserting that because previous extended public comment periods on the proposed Bishop Tube remediation resulted in the PADEP making NO changes, that there was no need for additional time on this Consent Decree period. The message? DEP ignored the community in all past comment periods and fully intends to do so this time around as well.

Furthermore, the Consent Decree currently is structured so that the public will never get a meaningful say in the final outcome. In fact, as written, the final Remedial Action:

- ➔ is unknown;
- ➔ will be the result of multiple decisions yet to be made;
- ➔ will have a final outcome that will be driven by a pre-determined dollar figure that cannot be related to the actual final remediation plan because that is still unknown;
- ➔ will have a final outcome that will be driven by the decisions of responsible parties who have an economic interest in this process being achieved as quickly as possible rather than as thoroughly as possible, and;
- ➔ that provides no opportunity for the public to weigh in - in any legally meaningful way – with input, science, and expertise, on key decisions and features that will determine whether the community benefits from a quality remediation or a shoddy one.

Not only does the Consent Decree agree to a wholly unknown remediation plan that may or may not be successful, but it leaves the public on the hook to cover the costs of an unquantified and unquantifiable level of additional remediation, in addition to millions of dollars of public money already spent by PADEP on remediation costs incurred to date. This sets up bad precedent for future Consent Decrees on similar issues that will not be in the interest of the public.

One may be tempted to adopt the assertions of PADEP and the responsible parties that this Consent Decree should be swiftly approved in order to get any remedial action underway and thereby start to address the toxic contamination at this site. But we disagree. It would set a dangerous precedent for the Court to approve, and PADEP thereby agree, to a Remedial Action that is 1) unknown and yet to be determined; 2) that may never be fully implemented according to multiple terms within the Consent Decree; 3) that is largely driven and dictated by a pre-determined cost that was calculated years ago during different economic circumstances; 4) that alleviates the responsible parties of their moral, legal, and economic obligation to fully and fairly remediate this site; 5) that is overseen by a responsible party with a clear conflict of interest; and 6) that foists an unknown level of cost on PADEP and ultimately the public. If approved, this

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[2] *See* Attachments 1 and 2.
[3] *See* Attachment 3.

travesty of a proposal will set a pitiful precedent that can then be repeated at brownfield sites across the Commonwealth, with them all pointing to this agreement as the rationale.

It is notable that the final outcome envisioned by PADEP and the responsible parties is that new families will be enticed to buy a home at the Bishop Tube site. Given this proposed final use, one would expect greater vigilance, attention, and objective oversight of its remediation. Instead, we have seen the opposite. Not only have we seen PADEP work so hard to disenfranchise and disregard the public, but we have seen everyone, other than the courts, stand idly by while the major industry player now entrusted with overseeing the entire Remedial Action uses threatening and bullying tactics to further silence the community prior. None of this bodes well for those who will be convinced to buy a home at this location where, according to the terms of the Consent Decree, the as-of-yet unknown Remedial Action will be in an unknown state of play.

We urge this court to **REJECT** this Consent Decree because it is unfair to all stakeholders; is not reasonable; is not equitable; is not in the public interest; fails to fulfill the constitutional rights of the people to clean water and air, and a healthful environment; and fails to fulfill the constitutional trustee duty of the PADEP and the state of Pennsylvania to protect the natural resources of Pennsylvania for both present and future generations.

If the court were inclined to allow this decree to advance - an outcome we think is in violation of applicable standards and law – we urge you to recraft the Decree to:

- ➢ provide additional time for public review and expert comment;
- ➢ require a recalculated, up-to-date demonstration of cost;
- ➢ provide for a reopener clause to address issues of cost;
- ➢ remove day to day oversight from CDP and place it instead within the authority of an independent, disinterested, and objective oversee, and;
- ➢ ensure that at every decision-making point there is an open public comment period inviting written comment and verbal testimony that will be submitted to the PADEP and the court, and that will require the court to sign off on any and all future decision-making associated with this decree.

***Approval of This Consent Decree Is Clearly Arbitrary and Capricious and Does Not Serve the Public Interest Because of The Overwhelming Lack of Information and Yet to Be Determined or Undertaken Assessments, Plans, Analyses & Elements.***

The Remedial Action process laid out in the Consent Decree is not only insufficient, but is highly deficient through its proposing a yet-to-be-developed plan for Remedial Action rather than an actual Remedial Action plan that can be understood, evaluated, and assessed.

In addition, it: lacks proper public engagement and independent oversight; places the remediation of the site in the irresponsible and conflict-laden hands of Constitution Drive Partners, and; fails to require the monitoring necessary to assess its ultimate success or failure and ensure appropriate responsive future action if needed.

The Consent Decree is filled with actions, elements, implementation steps, data collection, evaluations, assessments, analyses, and plans that have not been developed or determined. As such, the Consent Decree is a document laying out the steps towards remediation. But the substance of those steps, what will happen when and where, what chemicals or concentrations will be used, what equipment is needed, what will the cost actually be, what will happen if things go awry, and more, is not included in this Consent Decree. Meaning the *public does not actually know* what the remediation being proposed will involve.

Therefore, it is impossible for the public, experts, PADEP or the courts to evaluate the Remedial Action proposed - its elements, effectiveness, or costs - because nobody knows what is actually being proposed. In fact, there are over 9 pages within the Consent Decree that outline a series of plans, designs, proposals, elements, analyses, criteria, controls, practices, declarations, data collection, studies, investigations, next step reports, etc. that have yet to be developed for anyone's review or consideration – none of which the public will be given the opportunity to assess, consider, review or comment upon once the Consent Decree is approved. The public is only being afforded the opportunity to comment on the idea of a plan, but not the actual Remedial Action Plan.

Among the elements that have yet to be determined or developed but will, eventually, define what the actual Remedial Action is, includes, but is not limited to:

1. A finalized Data Gap Pre-Design Investigation
2. A Health & Safety Plan
3. A Sampling and Analysis Plan
4. A Quality Assurance Project Plan
5. Preliminary Institutional Control/Engineering Control Remedial Design Work Plan
6. Preliminary Institutional Control/Engineering Control and Operable Unit 1 Remedial Design Investigation Work Plan
    a. It should be noted this section uses "combined" which to us is unclear if it is two separate documents or one document with defined features.[4]
7. Operable Unit 1 Soils Remedial Design Investigation
8. Operable Unit 1 Remedial Action for soils
9. Operable Unit 1 Soils Remedial Design, which includes the creation of 3 other components
    a. Basis of Design

[4] *Id.* at 16.

    b. 90% Remedial Design
    c. 100% Remedial Design
10. Operable Unit 1 Soils Final Report
11. Operable Unit 2 Groundwater Remedial Design Investigation Work Plan
12. Operable Unit 2 Remedial Action for groundwater
13. Operable Unit 2 Groundwater Remedial Design, which includes the creation of 3 other components
    a. Basis of Design
    b. 90% Remedial Design
    c. 100% Remedial Design
14. Final Report
15. Post Remedial Care Plan
    a. This item may be legally replaced by a Declaration of Inability to Complete the Remedial Action Report, if required.

It should be taken into consideration that starting on page 18, section titled *OU1 Soils Remedial Action,* the Operable Unit 1 Soils Body of Design "shall include, but not necessarily be limited to, a preliminary design submittal containing, as applicable." These inclusions by our count are approximately 17 additional items. One of these items in subsection (a) is "an in situ amendment alternatives analysis." An alternatives analysis is a whole swath of information and factors the public MUST be able to see and provide comment on to PADEP and the courts. The results, analysis, and options proposed and created by the alternatives analysis could change the entirety of the remediation plan and will have implications for the final state of the Bishop Tube site. Which, again, is proposed to be the site of hundreds of peoples' homes, where they should feel the safest.

Each of these yet to be determined steps will define what the Remedial Action actually includes. We are not just talking about an item or two that has not yet been determined. We are talking about over 9 pages and no less than 15 elements – that, in fact, are *the* plan. Each one of these elements, once determined, injects uncertainty and a need for objective review and oversight. None of these steps will be subject to public review and comment, nor oversight by an independent body, such as the Court or a trusted third party.

In addition, the Consent Decree includes multiple loopholes which allow the elements, once defined, to be changed in potentially significant ways. For example, in provisions 8(b) and (d) on page 17 under *PRELIMINARY IC/EC & OU1 REMEDIAL DESIGN INVESTIGATION*, the Remedial Design Investigation Work Plan to address Institutional Controls and Engineering Controls opens the door to Engineering Controls and stormwater practices that "to the extent that the [Engineering Controls/Stormwater Best Management Practices] can be implemented without being damaged by subsequent remediation" or development, as is the case in 8(b), seemingly discharges CDP and others from responsibility for said future damage.[5] The very acceptance of future harm that would undermine the ongoing effective operation of key elements of the Remedial Action intended to ensure its ongoing success of a checklist, rather than meaningful progress, is inconceivable and alleviates CDP and others of what should be their ongoing obligations to ensure a remediation that remains effective and protective.

There are so many undeveloped elements of the Remedial Action that are wrapped up in this Consent Decree and are essential to the development of an effective remediation, essential to its successful implementation, that it borders on the absurd for PADEP to assert that it has in fact put forth a remedial action plan for public comment with enough information to make it worthy of court review or approval.

***Elements of the Consent Decree that are Focused on the Actual Remediation Contain Loose Terminology and Standards that are Subjective and can Defy Enforceability or Accountability.***

While the Consent Decree is very firm on the amount of money that is to be contributed by the wealthy, responsible parties and developer for this Remedial Action, when it comes to other elements of the Consent Decree that are focused on the actual remediation, we often find loosey goosey terminology and standards that are immensely subjective and therefore can defy enforceability or accountability; and/or, at the very least, provide a powerful foundation from which CDP can argue for relief from their obligations (if you can call them that, at that point). For example:

A “best efforts” standard is used in 3 places, sometimes for commitments that should be absolute given the nature of the obligation:

- Paragraph 41: “*CDP shall use best efforts to achieve the remedial action objectives as set forth in the SOD or any Amended SOD.”* This use is too subjective to be enforceable.
- Paragraph 54: “*CDP shall use its best efforts to assist and cooperate with the Department to obtain access agreements and/or easements….”* Best efforts to assist and cooperate? This too is so subjective as to render it unenforceable.
- Paragraph 121: “*Upon request by the Department, each Settlor will make best efforts to make available to the Department such records or copies of such records or, at the Settlor’s discretion, deliver the documents to the Department in lieu of destruction.”* Why is this <u>not</u> simply an absolute obligation? Why is there a “best efforts” standard for something as base level as making records available?

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[5] *Id.* at 17.

With regards to performance obligations, the Consent Decree frequently uses the term "reasonable" or "reasonably" as the measure by which CDP or responsible actions are to be guided at essential junctures critical to the effectiveness of the Remedial Action. In these instances, if there is a concern about performance of these terms, it would be very difficult, given the construct of this entire agreement, for the public or PADEP to secure accountability:

- Paragraphs 56 to 58 use the term "reasonable" 5 times to describe CDPs obligations regarding access agreements necessary to carry out the Remedial Action, *e.g.*, "*CDP will use reasonable efforts to obtain all known, necessary access agreements to all properties…."*
- Paragraph 58 goes on to provide an off ramp for CDP in situations where access to properties necessary for implementation of the Remedial Action: CDP is let off the hook if CDP and PADEP are not able to "reasonably modify" the actions required. In this instance the 'reasonableness' standard provides an easy argument for CDP to evade its Remedial Action obligation by arguing that the modification PADEP is proposing is not "reasonable".

Paragraph 13 allows CDP to unilaterally make substantial modifications to the implementation of the Remedial Action – specifically the Preliminary Institutional Control/Engineering Control Remedial Design Work Plan– without prior approval by PADEP if prior approval from PADEP "*is not feasible*." Here again, we have a significant issue subject to a weak and undefined standard that is wide open to subjective definition and interpretation, lacking any essential guidance necessary to ensure it is not abused. The word "feasible" is clearly open to subjective interpretation. The provision lacks any effort at a more objective standard other than to reference modifications made in the field, nor does it offer any sort of protocol that should be followed in order to avoid situations where CDP is making unilateral adjustments to the Remedial Action that could have serious and/or precedential consequences down the line. What efforts must be attempted in order to secure prior approval? Is there a special phone number or protocol that should be followed? Does there need to be time sensitivity for this term to apply (and by whose standard is something time sensitive? The Developer who wants to finish the remediation as quickly as possible in order to realize profit or the future citizens that will call this land their forever home?) - or is it a question that can just as easily be answered tomorrow as today?

It is striking that the Consent Decree provides zero discussion of the PFAS contamination that has been identified at the site, to what degree the responsible parties may be liable for addressing this contamination, and what might be any adverse (or positive) impact of the proposed remediation activities on the release or circulation of this known contamination (though the extent of which is still to-be-determined). The public was denied the opportunity to comment on the presence of PFAS during the Statement of Decision public comment as the presence of PFAS was only identified after the record closed. PADEP has essentially boxed the public out from ever being able to voice its opinion on the presence and, hopefully, the remediation of the extremely toxic and persistent PFAS that is now known to be on site and leaching into Little Valley Creek.

Speaking of Little Valley Creek, the Consent Decree also fails to recognize that Little Valley Creek, a receiving stream from this site, is an exceptional value stream, entitled to higher levels of protection and special reviews with regards to proposed adjacent development. In addition, the wetlands associated with Little Valley Creek are also considered exceptional value, and entitled to a higher level of review and care. Nowhere in the Consent Decree does PADEP directly address the exceptional value status of the creek or the wetlands or the need for additional review of site activities that may implicate and impact these public natural resources. Resources, by the way, which PADEP has a constitutional duty to conserve and maintain for the benefit of *all* people, including generations yet to come.

Additionally, while the timeline for the current proposed remediation is just about four and a half (4.5) years, when PADEP was discussing this plan at a September 12, 2023, public meeting, it was articulating an iterative process that would take place over a 20+ year time frame for implementation. How is it possible that a 20+ year remediation plan has been so quickly, and quietly, negotiated down to a mere 4.5 years for implementation? This dramatic change in implementation itself is worthy of additional public disclosure, scrutiny, and expert review.

In fact, there is no way for even DEP - let alone the Court or the public – to determine if this Consent Decree and the Remedial Action it posits, is appropriate, rational, will be effective and is in the public interest because all of the most essential elements are yet to be assessed, developed, evaluated, or determined.

Given the overwhelming lack of information and detail, with so many steps that are yet to be carried out, approving this Consent Decree would clearly and unequivocally be arbitrary and capricious.

As written, it is IMPOSSIBLE for the court, the public, the PADEP, or the responsible parties to evaluate the potential effectiveness of this Remedial Action or the appropriateness of the responsible party financial obligations this Consent Decree puts in place - because, quite simply, **we have no idea what is being proposed.**

***This Consent Decree is Funded by a Cost That was Determined Over 5 Years Ago and Therefore May Not be Based on the Best Estimates in Current Economic Reality Regarding the Costs of the to be Determined Remediation Activities.***

An $8,985,000 price tag for a body of work that will have such serious implications for the public, the environment, and future generations, and that is yet to be determined could be an abject giveaway to those responsible. Given that this figure is calculated based on costs and financial conditions in place over 5 years ago, and that the PADEP has already spent nearly half this amount (a full $4,233,483 with PADEP with additional PADEP costs still unaccounted for), it is unlikely that the $8,985,000 reflects a reasonable or accurate price assessment for legally appropriate remediation.

Even the financial assurance provision lacks the detail necessary to evaluate its appropriateness. Provision 86(d) creates a financial assurance fund of $2,500,000 to serve as a reserve the PADEP may use to undertake Remedial Action activities to address areas of contamination discovered during the Data Gap Pre-Design Investigation – an investigation that began in the Winter of 2025-2026. This investigation has just begun. There is no information provided in the Consent Decree regarding what contamination may or will be found, and therefore no way at all to assess what remedial actions, or associated costs, will be required. It is impossible for the PADEP, the public, or this court to make any determination as to the appropriateness of the $2,500,000 figure given that there is not full information on what those funds need to address or the strategies needed to address them.

***This Consent Decree is Overwhelmingly Biased Towards the Best Interest of the Developer and Responsible Parties, Not the Public.***

Every aspect of this proposal is biased towards the best interests of CDP, the responsible party who is seeking to develop this site with residential homes that will be put up for private-profit sale. In addition, the Consent Decree is clearly designed to serve the interests of the other responsible parties - Whittaker Corporation and Johnson Matthey Inc – by limiting the extent of their legal obligation to a limited financial figure that bears no clear relationship with the costs of a final remediation, given that the final remediation has yet to be determined or designed.

The Consent Decree, as written, clearly and obviously does not serve the best interests of the public or the environment; does not serve the best interests of neighboring community members or those that live, recreate, work or own a business downstream; and does not serve the best interests of Pennsylvania taxpayers that have already funded over $4 million of remedial response activity for this site and will be on the hook for an unquantified or unquantifiable additional sum of money that could also range in the millions.

It is the developer who is responsible for overseeing almost every aspect of the Remedial Action, for identifying associated costs and for implementation. If securing full remediation of the site is more costly than anticipated, the developer doesn’t have to pay a single additional penny. This provides no incentive for the developer to ensure funds are invested to secure the best remediation response for the public or the environment, because as soon as the funds are spent, the developer can request and secure release from further Remedial Action responsibilities and shift the full activity and economic burden to the PADEP, the Pennsylvania Government, and, ultimately, the Pennsylvania taxpayers.

In paragraphs 49 - 50, it is the developer who will prepare the Final Report that is to demonstrate that the Remedial Action has been implemented in accordance with the Statement of Decision (SOD), but if the "[PADEP] determines that the Remedial Action has not been completed in accordance with [the] Consent Decree" and that additional work is required, CDP is only responsible for undertaking the activities necessary to comply if there are funds remaining in the Trust that is part of this agreement. *See* page 27, paragraph 50(a). Paragraphs 51 - 53 affirm that CDP is only being held accountable for remediation of the site until the Trust monies agreed upon run out and/or, to the degree that additional funds are placed in the Trust by other parties, Paragraph 52 reads "but in no event shall CDP be required to perform any further Remedial Action activities unless there are sufficient funds actually on deposit in the Trust to cover the anticipated remaining cost of the specific Remedial action activities required for performance by CDP….". Paragraph 53 reads:

> "If … [PADEP] determines … that not all Remedial Action called for by the SOD or any Amended SOD have been completed because there are insufficient funds remaining in the Trust or may be added into the Trust … to implement all such remaining Remedial Action, the [PADEP] shall provide to CDP a Statement of No Further Remedial Action Obligations…."

The failure to hold the responsible parties – CDP, Whittaker Corporation, Johnson Matthey Inc, Marcegaglia USA, Inc, Christiana Metals Corporation – accountable to ensure full remediation of the site, regardless of the pre-determined monies, denies the public any assurance that the site will in fact be remediated and that they, their families, and the environment they cherish and rely upon, will be protected. How does this serve the public interest? It does not.

In the final analysis, CDP appears to have no incentive – economic, legal, or otherwise – to ensure full and complete implementation of the Remedial Action because they are let off the hook as soon as the money runs out. In fact, as drafted, there is an opposite incentive – an incentive to spend the money as quickly as possible in order to alleviate CDP of the obligations of the Consent Decree and Remedial Action.

> *The failure of the Consent Decree to require CDP to ensure full implementation of a Remedial Action Plan that ensures the site - including soils, groundwater and surface waters – fully comply with all applicable legal standards demonstrates that this Consent*

*Decree cannot and will not serve the public interest, and as written cannot provide a rational basis for PADEP, public or court approval. This Consent Decree only ensures that the Trust monies are spent without actually requiring a legally full and complete remediation of the site.*

It is not acceptable to have allowed the responsible parties to walk away, scot free, without ensuring that the toxins at this site have been fully and fairly addressed at their own cost and in full compliance with all applicable legal standards – rather than the cost of the public taxpayer and certainly not at the cost of additional environmental harm and health exposure by the neighboring and downstream communities.

*The failure of the Consent Decree to require post-remediation monitoring, and an obligation to carry out any additional Remedial Action steps necessary should the original Remedial Action not fully address the contamination issues at the site further demonstrates that this Consent Decree cannot and will not serve the public interest and as written cannot provide a rational basis for DEP, public or court approval.*

Paragraph 54 absurdly only obligates CDP to ensure PADEP has access to the site in order to perform response actions as long as CDP retains an ownership interest. While CDP has to use "best efforts" to help DEP obtain access agreements, easements, or other means to access the property in order to perform response actions, as soon as CDP wants out, they can sell their interest and it appears as though the guarantees of access are gone.

*The failure of the Consent Decree to absolutely require CDP to ensure PADEP has legal access, in perpetuity, to the site in order to perform response actions – either by retaining ownership, or ensuring an access agreement or easement obligation travels with the land upon sale, further demonstrates that this Consent Decree cannot and will not serve the public interest. While later provisions reference the duty to notify future land owners of the Consent Decree, the relevant paragraph absurdly applies a "best efforts" standard, creating a clear pathway for CDP to absolve itself of responsibilities it should continue to bear. It is irresponsible for PADEP to agree to a Consent Decree that allows CDP to sell and walk away from its responsibilities.*

With regards to access for properties other than the Source Property which are owned by others not related to the site, the Consent Decree requires CDP to use best efforts to secure access in order to implement the Remedial Action, including work plans or Remedial Designs. If CDP is unable to ensure access and the PADEP is unable to secure access to implement elements of the Remedial Action, then the Consent Decree asserts that CDP is no longer required to perform the elements of the Remedial Action that required access. This means that there are essential elements of the Remedial Action that may never be implemented. This is unacceptable. Given that the Remedial Action and all of its elements are not even designed or developed, the public has no way of assessing what might be the significance or seriousness of this foreseeable failure. Again, pointing out the absurdity of the proposed Consent Decree that is requiring all parties to sign off with no future opportunity for assessment or comment.

PADEP wrongly greases the wheels for CDP's residential development proposal – doing so in a way that undermines clear steps and obligations laid out for CDP by the municipal decisionmakers. Notably, throughout this entire process over several years, PADEP has taken the position that decisions regarding development of the site are to be left to the municipality. When members of the public challenged this end use of the site and its implications for the Remedial Action selected – PADEP quickly and firmly shut the public down, rejecting even consideration of concerns regarding end use of the site with regards to the selection of Remedial Action – repeatedly saying it was up to the municipality to make all land use decisions.

> *E.g*., from series of April 11, 2017, letters, attached, where PADEP is responding to community comments stating over and over again:
> *"While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues."*[6]

But now, in this Consent Decree, PADEP suddenly has found its voice and offers an unnecessary nod to residential development as an appropriate use for the site by stating in paragraph 63: "*The Department acknowledges that CDP is proposing future development of the Source Property for residential purposes. The Department does not oppose development activities that occur after the Department approves the OU1 Soils Final Report…".* While this may seem a small acquiescence to what was likely a significant demand by CDP, it is a huge deal for the neighboring community who has been advocating - based on municipal code and other legal obligations – that residential development at this site in a still contaminated condition is wholly inappropriate.

PADEP's repeated refusal to receive information and engage with the community regarding the issue of residential development at the site means that the public never got its opportunity to weigh in on this critical issue regarding the end use of the site and what that means for the Remedial Action selected. Even at the September 12, 2023, public meeting, when this issue was raised by community members before the PADEP, it took the same stance. And now, suddenly, in this Consent Decree PADEP weighs in, after years of refusing to hear from the community on

[6] Attachment 4.

this critical issue, PADEP weighs in using language that cannot be interpreted as anything other than supportive.

PADEP's newfound position regarding residential development of the site does not just deny the community any opportunity to meaningfully comment to PADEP on this issue, but it is an inappropriate undercutting of the decision-making of the Municipal Board of Supervisors who are currently being asked to render a decision on residential development of this site. Additional detail and perspective on this critical issue is provided below. But here we highlight that this is yet another giveaway to CDP that undermines the equity of the Consent Decree and further demonstrates that it was never intended to serve, nor does it serve, the public interest.
Instead, we see once again how PADEP is using the Consent Decree proposal and process to benefit CDP and the responsible parties while undercutting protection for the community and denying full, fair and equitable access on issues of fundamental concern and importance.

This is of even greater concern, because as DRN pointed out in previous comments to PADEP:

> *Analyses key to PADEP decisionmaking are based on the assumption that present and future use of the Site will be* ***non-residential*** *only.*[7] *The failure by PADEP to address a residential end use of the site while investigating the feasibility of various remedial alternatives is a fundamental failing. This is especially true where, as here, Statewide Health Standards are being utilized as part of the cleanup standards for the remediation. Statewide Health Standards vary based on whether the end use is residential or nonresidential. Thus, a cleanup plan selected based on its ability to achieve Statewide Health Standards for a nonresidential end use will not meet the standards required for a residential end use.*

It is significant that the Consent Decree allows CDP to challenge, through a defined process, the decisions made by PADEP throughout the implementation of this consent decree, and yet there is no role for the public - the public that will be directly impacted through their environment, their health, their safety, their property values, their quality of life, and their sense of security – to even review and comment upon, let alone challenge or oppose, the many, many, many critical elements of this agreement that are yet to be developed and determined.

[7] See Feasibility Study Report, January 13, 2021: "As agreed with DEP, both this FS Report and the 2021 RIR assume that present and future use of the Property will be non-residential only." While the discussion goes on to assert that PADEP's "final proposed remedial response action will consider current allowable end uses for the property" given that the Remedial Action fails to propose an actual remediation plan with clear implementation steps and elements, this future use consideration is not demonstrated in the Consent Decree and the "Remedial Action" it proposes.

The Consent Decree is dependent upon no less than 9 pages and 15 actions, elements, reports, analyses, and decisions yet to be developed and determined and yet includes no opportunity for the impacted public to officially, formally and meaningfully review and comment upon these elements. In addition, according to provision 66, modifications to work plans and schedules are entirely between CDP and PADEP. Given the history of this site and that so many facets of the plan are yet to be determined, it is wholly inappropriate that the public be provided no opportunity to review or comment upon each and every one of these to-be-determined elements and actions, including their potential modification. And if the modifications explicitly allowed for in this Consent Decree are realized, then the opportunity to comment here is meaningless. This is not actual, meaningful public engagement, but the illusion of it.

In the event there is the need for an emergency response during the performance of the Remedial Action – an action that is being designed by CDP as per the terms of this Consent Decree – which causes or threatens a release of hazardous substances and/or contaminants which may present an immediate threat to public health or welfare or the environment, and such emergency response exceeds the funds available in or remaining in the Trust, the end result is that CDP can request and receive a Statement of No Further Remedial Obligations. Yet again, as soon as the money runs out, CDP and the other responsible parties, are able to walk away from a hazardous condition they caused or contributed to by virtue of their decisions and actions both before and pursuant to the implementation of this Consent Decree, while the impacted public is left to bear the burden of ongoing harm, and the public taxpayer the burden of additional remediation costs.

It is simply outrageous that at every turn the wealthy corporations who created and/or perpetuated this toxic condition in the first place, and invested heavily in fighting their responsibility to clean it up, are given loophole after loophole to walk away, scot free, without any responsibility, and in the case of CDP, with a huge opportunity for windfall profits from the sale of the homes made possible by this inequitable, deficient, arbitrary, capricious and irresponsible Consent Decree.

To add insult to injury, Paragraph 83 of the Consent Decree specifically entitles CDP to use the very limited funds included in the agreed upon Trust that is supposed to be intended to secure remediation of this site, to carry forward his profit-making residential development project! Specifically, the Consent Decree allows the remediation Trust funds to be used for "*amounts expended by CDP*" for costs that are "*including but not limited to, building demolition, site preparation …*"

Demolition and site preparation are part of the development process, and are a cost of development and doing business that CDP has to incur as part of any development. These are not costs that are unique to the Bishop Tube site, nor are they activities that are only being undertaken as part of the Remedial Action. Demolition of existing buildings and site preparation are part of every development project - they are a cost of doing business for all residential development projects where there are pre-existing buildings that are not needed for the project. And yet, in this Consent Decree, the PADEP has specifically agreed to allow the Consent Decree Trust funds to be used for these aspects of the CDP development.

> *Allowing Trust funds to be used for demolition and site preparation will reduce CDP's development costs, thereby increasing the profit margin on their proposed development project, while at the same time reducing the Trust funds available to carry out genuine remedial action activities. This diversion of funds from remediation activities for use in advancing development of the site for a for-profit venture does not serve the public interest.*

Agreeing to this use of remediation Trust funds to further a profitmaking venture by CDP demonstrates that a goal of this Consent Decree is to further and advance the business priorities, goals, and profits of CDP and the other responsible parties, not to prioritize the best interests of the community or environmental protection. The benefits this Consent Decree seeks to advance on behalf of the responsible parties includes, but is not limited to: unburdening them from their legal and financial obligations to the impacted communities that have been so deeply burdened and harmed by the contamination at the Bishop Tube site; minimizing the costs of development for CDP, and; maximizing the profit margin CDP will gain from the CDP proposed residential development project (a development that the community opposes because it will inflict additional environmental burdens and may exacerbate the existing site conditions and inhibit site remediation). Providing the responsible parties assurance they can walk away from their obligations regarding this site for a set price tag, regardless that the community is given no such assurance regarding their ability to count on full remediation and protection as a result of this Consent Decree.

The Trust created by this Consent Decree – as unjustified as it seems – is supposed to be for the remediation of the toxic contamination at this site and ensuring the health, safety, welfare and protection of the community and environment – but instead it may be used to cover the costs of the residential development that will yield tremendous income and profits for CDP.

Furthermore, according to the Consent Decree paragraph LL, between May 19, 2000, and April 30, 2022, the PADEP incurred response costs in connection with the site in the amount of $4,233,483. Since that time (from May 1, 2022, and onward), the PADEP "has continued and will continue to incur recoverable response costs." And yet, nowhere in this agreement is the government – which is funded by the taxpayers of this Commonwealth - reimbursed for the **$4,233,483 it has incurred, at public expense**. These are costs incurred to respond to the toxic contamination and condition CDP, Whittaker Corporation, Johnson Matthey Inc, Marcegaglia USA, Inc, and Christiana Metals Corporation are responsible for. This actually means that the responsible parties – CDP, Whittaker Corporation, Johnson Matthey Inc, Marcegaglia USA, Inc, Christiana Metals Corporation – have been ***gifted*** over $4 million of public monies towards remediation of the toxic contamination they are responsible for with no responsibility to pay it back.

> *How can this be in the public interest? It is not.* To the contrary, it is another give away to the wealthy corporations that have inflicted so much harm on our communities and environment.

This Consent Decree, as proposed, is a slap in the face to the communities who have suffered so deeply and so long from the contamination at the Bishop Tube site and PADEP's failure to prioritize protection of the community, the exceptional value stream Little Valley Creek, associated wetlands and downstream communities.

***The Consent Decree Too Often Skews or Misrepresents the Facts, Injecting Additional Bias into the Comment and Review Process for the Public and the Court.***

In key ways, the draft Consent Decree seeks to misrepresent the history of the Bishop Tube site in a seeming effort to suggest CDP comes to this agreement with clean hands. That is not the case. This history draws into question the validity of the decision to entrust leadership for the development, implementation, and reporting on the Remedial action to CDP; particularly given the inadequate, and often absent, and that there is NO opportunity for community oversight and engagement in a formal, ongoing public comment and review process entrusted to court oversight.

Introduction Paragraph V early on in the document suggests that with regards to damage done to the liquid boot at the site that resulted in a potential release of contamination in violation of the Prospective Purchaser Agreement (PPA) then in place on July 27, 2011, that CDP was in innocent bystander. This rewriting of history is a clear effort to mislead the court into accepting the Consent Decree which places so much trust and power into the hands of CDP. In fact, there are numerous documents on the record, including a 2014 Pennsylvania Environmental Hearing Board (EHB) decision, which makes clear that CDP was not the innocent victim of "vandals" who quickly and compliantly cleaned up the released contamination and sought to restore function and operation to the liquid boot. In fact, the damage that caused the potential re-release of contamination was due to the actions of a CDP contractor.[8] When CDP was asked to repair the damaged equipment so it could be restarted to allow for continued use to clean up site contamination, according to the DEP "this was never done".[9] The actions and behaviors of CDP were so alarming that the PADEP voided the covenant not to sue granted to CDP in the PPA. When CDP challenged that decision before the PA Environmental Hearing Board, the PADEP

[8] Attachment 5 at page 2.

[9] *See* Attachment 6, PADEP letter dated January 28, 2014.

vigorously defended its decision, recounting the bad acts of CDP in its request that the appeal be dismissed. The EHB agreed with the PADEP and dismissed CDP's appeal.[10]

In addition, the recitation of the history of this case fails to include the efforts by Constitution Drive Partners, along with J. Brian O'Neill, and O'Neill Properties Group, L.P., to threaten community members exercising our first amendment rights to oppose and/or engage around the remediation proposal and development of the Bishop Tube site. This threat of legal aggression has tainted the public process from its inception. At no point did PADEP take any steps to assure the safety of the public process for members of the public who sought to engage but were made to fear legal retaliation.

Notably, the Consent Decree fails to acknowledge that on June 27, 2017, CDP, joined by J. Brian O'Neill, and O'Neill Properties Group, L.P, filed suit in the Court of Common Pleas in Chester County claiming the education and advocacy activities of the Delaware Riverkeeper, Maya van Rossum, and Delaware Riverkeeper Network resulted in defamation/commercial disparagement, interference with contractual or business relations, and amounted to a civil conspiracy.[11] CDP, J. Brian O'Neill, and O'Neill Properties Group, L.P, sought a judgement that would silence van Rossum, the organization, and a named individual, and mandate they pay over $50,000 in damages plus fees. In an effort at widespread community intimidation, the suit also threatened to target up to ten additional residents, naming them as defendants to the suit. The clearly concerning and abusive nature of the lawsuit is well demonstrated in the multiple court opinions addressing and dismissing the original June 27, 2017, SLAPP suit filing and the multiple appeals.[12] (See attached)

> Notably, Judge J. Sommers presiding over the case at the Court of Common Pleas dismissed the suit on August 22, 2017, determining that van Rossum and the Delaware Riverkeeper Network were engaged in "***constitutionally protected free speech under the First Amendment of the United States Constitution and the Pennsylvania Constitution" and that the defendants are "immune from Plaintiff's tort claims."***
>
> CDP, J. Brian O'Neill, and O'Neill Properties Group, L.P, immediately appealed the decision. Judge Sommers issued a follow-up opinion in which the judge stated that the complaints filed "lack merit." The court also questioned the complaint itself, saying "**While we question the "good faith" of Appellants in bringing the instant lawsuit and subsequent appeal**, we will address the complaints,..." The opinion also stated that Mr. O'Neill et al had "**commenced this action as a means of intimidation and harassment**, not because Appellants believe in the success of their claims."

[10] Attachment 7.
[11] Attachment 8.
[12] Attachment 9; Attachment 10; Attachment 11; Attachment 12.

CDP, joined by J. Brian O'Neill, and O'Neill Properties Group, L.P, then appealed to the Pennsylvania Superior Court. In its decision issued September 6, 2018, dismissing the appeal, the Superior Court did not agree with CDP et. al. that there were any procedural problems with the lower court ruling that would require its decision be overturned. Substantively the Superior Court judges also found no grounds to overturn the Court of Common Pleas decision and in fact stated:

- "However, the trial court observed that Appellants' 'characterization of the statements as false is belied by the other allegations of Appellants' [c]omplaint[,]' and we agree."
- "Accordingly, Appellants admit that they plan to conduct only a partial cleanup of the site — namely to the soils above the water table — and, thus, the groundwater at the site, where the townhouses are planned to be built, would remain contaminated. As a result, **we do not consider [DRN's] statements** that Appellants intended to conduct only a partial cleanup, and planned to build over 200 homes on contaminated land, **to be false**. Similarly, because the contaminated groundwater could continue to pollute surrounding areas, **it is not false that the community could be exposed to more toxins**."
- "As the trial court aptly discerned, '[t]hroughout the [c]omplaint, Appellants note that [DRN] desire[s] the full remediation of the site for purposes of constructing a public park on the land. **Moreover, it is clear from the pleadings that [DRN is] concerned about the spreading of contaminated soil and groundwater throughout the community**.' TCO at 16 (citation omitted). We agree, and do not view [DRN's] conduct as a sham given the allegations in the complaint detailing the environmental issues at play. As such, **we conclude that [DRN] has immunity** …."
- "…the trial court did not err in dismissing Appellants' complaint."

Given this history of intimidation and misuse of the legal process, if the Consent Decree were approved – which we do not believe is supportable by the law or the facts – court intervention and oversight at every step of the implementation of this Consent Decree, is essential for ensuring the public has a full and fair opportunity to engage and exercise their rights to free speech, freedom of assembly and to participate in any associated municipal, county or other state decision-making processes, and to do so free from the kind of intimidation or worry inflicted upon them in the past.

***This Consent Decree Places the Fox in Charge of the Hen House.***

The Consent Decree places full faith in the actions and decisions of CDP in Paragraph 6:

> "*The Settlor Work Party is CDP, which has agreed to perform certain aspects of the Remedial Action in accordance with the SOD … and any amendments thereto or replacements thereof …. CDP shall be entitled to have the Qualified Settlement Trust… pay its reasonable and necessary or appropriate costs that it incurs in connection with*

*the planning for, implementation of, and administration of the Remedial Action that it performs (or causes to be performed) .”*

The decision and agreement to place CDP in charge of the implementation of this Consent Decree and Remedial Action is - based on the history of this site and CDP’s actions – not just insulting, but abusive to the community that CDP and its Principal, Mr. O’Neill, has sought to silence by threatening and filing legal action in an effort to prevent the public from exercising its 1st amendment rights with regards to this site, CDP, and its principals.

Quite simply, Constitution Drive Partners and its principal Brian O’Neill are an irresponsible choice for overseeing the implementation of the Remedial Action and all of the associated economic and legal facets of the Consent Decree.

Even without the history demonstrating CDP and Mr. O’Neill’s seeming disregard for their legal and ethical responsibilities with regards to this site (see discussion above regarding the Liquid Boot and the disregard that prompted DEP to void the Covenant Not To Sue), the demonstrated disregard of the impacted and concerned community members compounded by the threatening misuse of the courts seeking to silence us (see discussion above of the SLAPP suits), along with the information to come later in this comment advancing other concerns regarding financial management by CDP and/or Mr. O’Neill, it is irresponsible to entrust the development, implementation, money management, and assessment of this entire proposal into the hands of one of the responsible parties that has a very vested interest in expending Trust funds and absolving itself of continuing obligation for the implementation of the Remedial Action as quickly as possible so it/he can advance a profit making development venture at the very site that is at issue.

Despite the very obvious self-interested and conflict-laden interests of CDP with regards to this site and the Remedial Action, the Consent Decree, as written, fails to provide any independent and objective oversight for the many critical elements of the Remedial Action development, over the use of the Trust funds responsible for the Remedial Action implementation, and offers zero transparency for the impacted and concerned public.

Objectively speaking – a Consent Decree that, among other things: places all of the key decision-making and oversight authority into the hands of a party that has a vested self-interest and economic-interest in an outcome that may not align with the interests of the public who is ultimately to be the beneficiary of the action; places all of the key decision-making and oversight authority into the hands of a party that would benefit from the quick use of Trust funds regardless of the efficacy in the use of those funds because full expenditure results in release from the Remedial Action obligations; allows Trust funds which are the only source of financing for the remediation of the site to be used on non-remediation activities such as the costs of demolition and site preparation, and attorneys fees; fails to include objective and transparent oversight, and; fails to ensure the public can be informed and engaged throughout the process including key decision-making junctures, is unreasonable, indefensible, arbitrary, irrational and capricious and clearly does not serve the public interest.

Furthermore, CDP, and its owner, Brian O'Neill, have a history with this site and other projects that are alarming and inject a serious and warranted level of distrust for the outside observer, particularly when combined with the woeful lack of transparency in future Remedial Action reporting and decision-making.[13]

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[13] Mr. O'Neill is identified as:

Founder/CEO of MLP Ventures
Founder/CEO of O'Neill Properties
Executive Chairman of the Board, Discovery Labs
Chief Executive Officer of Recovery Centers of America (RCA)
Principal/President of Constitution Drive Partners
Principal, Brandywine Partners, LLC

Other documentation demonstrating Mr. O'Neill's leadership of CDP includes:

The site's current owner is Constitution Drive Partners L.P., which has submitted a plan to build housing at the location but did not cause pollution. Developer Brian O'Neill is president of Constitution Drive Partners." https://www.inquirer.com/real-estate/commercial/bishop-tube-cleanup-settlement-chester-county-20260313.html#:~:text=Other%20chemicals%20also%20were%20found,commercial%20sites%20ready%20for%20redevelopment.&text=A%20contractor%20is%20already%20at,will%20not%20pay%20toward%20cleanup

"The principal of Constitution Drive Partners, LP is Brian O'Neill, and the principal of 9 Malin Road Development is John Benson." https://cms2.revize.com/revize/eastwhitelandtownshippa/Documents/Government/Departments/Planning%20And%20Development/Land%20Developments%20Applications/Bishop%20Tube/Constitution%20Drive%20Partners%20Decision%20042517.pdf#:~:text=4.%20The%20principal%20of%20Constitution%20Drive%20Partners%2C,9%20Malin%20Road%20Development%20is%20John%20Benson

"Brian O'Neill
President - Constitution Drive Partners,
Acquisition Corporation, General Partner for
Constitution Drive Partners L.P."
https://files.dep.state.pa.us/RegionalResources/SERO/SEROPortalFiles/Community%20Info/Bishop%20Tube/Consent%20Decree/20260306%20DEP%20Consent%20Decree%20-%20Executed.pdf

Judge John T. Bender upheld the county court decision to dismiss a lawsuit filed by developer J. Brian O'Neill and his partners at Constitution Drive Partners. https://vista.today/2018/09/court-rules-in-favor-of-residents-activists-in-defamation-case-in-east-whiteland-township/

"In 2005, Brian O'Neill of O'Neill Property Group purchased the site for $700,000 through his affiliate, Constitution Drive Partners." https://chestercountyramblings.com/wp-content/uploads/2017/02/for-bishop-tube-workers-danger-lurked-for-decades.pdf

***CDP Has a History that Undermines Trust and Should Prevent Its Role in Overseeing the Development and Implementation of the Remedial Action.***

Paragraph W on page 10 of the Consent Decree describes a March 2016, complaint regarding earth moving activities taking place at the Bishop Tube site. Upon DEP investigation, it was determined that soil from an unknown location but had been imported to the Bishop Tube site by a former development partner of CDP. This soil had not received required analysis, nor received a clean fill certification. CDP contended they did not have knowledge of this disposal of soil at the site. By April, when DEP conducted a follow up investigation, the soil had been removed. The illegal dumping of untested soil at the site was not reported to PADEP by CDP, it came to the attention of PADEP through an incident report by a third party. This situation raises serious questions about why the soils were brought to the site, who knew about the disposal and when they knew about it, who approved of the disposal, who was responsible for its removal once the activity was reported and exposed, why did CDP NOT report the dumping to PADEP, and how is possible that site security was so lax that access for such illegal purposes could happen in the first place. Like so many other facets of this Consent Decree, there seems to be an intentional effort to direct concerns away from the responsible parties involved - here CDP - and so we do not have the answer to questions like these. But these are serious questions raising red flags of concern when talking about placing the entire remediation plan, and all associated finances, in the hands of CDP, the very same actor that pleaded ignorance to this illegal dumping of potentially contaminated – certainly unanalyzed or certified – soil. At the very least, this situation demonstrates a cavalier disregard for site security, and the obligation to report to PADEP.

Further, we reiterate that according to public documents - see Attachment 6:

> "*In the early summer of 2011, a contractor for CDP destroyed the liquid boot while performing metals recovery activities within Building 8. Needless to say, this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the existing contamination at the site in violation of the PPA and its two Amendments. DEP requested that CDP repair the liquid boot to allow for the continued operation of the SVE/AS system. This was never done; in continued violation of the PPA and its two Amendments."*

The letter goes on to recount:

> *Last spring, in the context of other discussions relating to potential redevelopment of the site, CDP informed DEP that it was looking into demolishing the buildings on the site in order to enhance the potential for redevelopment. Because demolition of the buildings would simplify implementation of Roux Associates' proposed field study, DEP indicated its support for demolition of the buildings in lieu of repair to the liquid boot, even so far*

*as sending a letter to East Whiteland Township in support of CDP's application for a demolition permit. DEP also met with representatives of VIST Bank back in September in order to encourage them to concur with CDP's demolition of the buildings, something that later became moot once a new investor was secured by CDP. Lastly, during a meeting in mid-December, Regional Director Cosmo Servidio was assured by Mr. O'Neill that the demolition was going forward [illegible word] immediately. Notwithstanding that assurance, nothing has occurred at the Bishop Tube site, and CDP continues to be in violation of the PPA and its Amendments."*

The actions of CDP were so irresponsible and egregious that PADEP voided the Covenant Not To Sue that had been granted to CDP. When CDP challenged this rescission before the PA Environmental Hearing Board, the PADEP vigorously defended its actions, recounting the bad acts of CDP in its request the appeal be dismissed. The EHB agreed with the PADEP and dismissed CDPs appeal.[14]

It is notable that CDP chose to enter into the PPA agreement with PADEP. And it got a significant benefit from doing so – a Covenant Not To Sue and help on its path to developing the site. And still, CDP could not be counted upon to fulfill its obligations and/or be forthcoming with the truthful information needed to assess its compliance.

> So why should we now trust CDP to fully, fairly, earnestly, honestly and objectively fulfill the terms of this agreement?

CDP has not demonstrated itself a trustworthy actor that can be counted on to fully disclose the facts and information needed to assess its actions and activities, or those taking place by entities or on properties over which CDP has direct control and responsibility.

In addition, given the threatening behavior towards the public and impacted community members – as demonstrated by its SLAPP suit and other statements directed at the public that seemed designed to be threatening – it is irresponsible to place the future of this site, and the well-being of the community – in the hands of a person who has demonstrated his own self-interests to be the priority, and has demonstrated a penchant to use verbal and legal mechanisms available as a means to evade its responsibilities to the law, the public, and by virtue of the very legal agreements it has chosen to enter into with the PADEP.

The participation of PADEP in this Consent Decree does not give reason for comfort, but in fact gives additional cause for concern. It required investigation and legal action by the Delaware Riverkeeper Network to uncover a 2017 sweetheart deal with CDP that violated the law and the rights of impacted communities to be informed and engaged around a PPA designed to advance

[14] Attachment 13; Attachment 14.

development of this site. Much like is happening here, CDP entered into agreements with PADEP in order to secure protection from legal liability for environmental contamination at the site, so the company was free to advance residential development on the Bishop Tube site despite its highly contaminated condition. Discovering a blatant violation of law perpetrated by PADEP on the public, on February 21, 2018, the Delaware Riverkeeper Network filed an appeal with the Environmental Hearing Board, challenging the DEP's ratification of two amended Prospective Purchaser Agreements (PPA) between the agency and the builder.

> DEP entered into its first PPA with CDP for cleanup and development of the Bishop Tube Site in 2005. When the cleanup obligations proved difficult, it then amended the PPA agreement twice, once in 2007 and once in 2010, but did not, as the law requires, publish notice of the amendments and seek public comment prior to finalizing the agreements. Public notice was issued only in 2017, in reaction to steps DRN had taken to reveal problems at the site and with the PPA agreements. During the intervening years since 2005, there had been significant changes at the site and regarding the PPA agreements; for example, the proposed development had changed from commercial to residential, the covenant not to sue element of the PPA had been voided by DEP in reaction to violations of a key element of the agreement, and the limited cleanup requirements that were mandated by the agreement had been altered and proven unsuccessful. DEP approved the outdated 2007 and 2010 amendments only years later, and after-the-fact, in 2018. DRN discovered the illegality perpetrated, and challenged the PADEP as being a rubber stamp on the two amendments.
>
> The EHB rendered its ruling on April 26, 2019. The EHB determined that the steps taken by the DEP to provide notice and secure comment on the proposed PPA amendments were "woefully inadequate" and as such the DEP acted "arbitrarily and capriciously" in finalizing the proposed PPAs in 2018. The EHB also noted that the DEP was "not at all forthcoming" in revealing the lateness of the public notice or the changed circumstances that had taken place in the intervening years. The EHB declared the PPAs void.

The current Consent Decree similarly bypasses essential concerns and changed conditions – for example the fact that when PADEP first started to negotiate with the developer regarding a PPA and associated Covenant Not To Sue, it was for a more limited commercial development at the site. Now the developer is talking about a residential development of nearly 100 new homes. As addressed above, in the past approximately 5+ years since the Trust fund figures were first calculated, there have been tremendous changes in the economy, and likely any costs that might be a part of the Remedial Action, and yet those changed conditions are not discussed or addressed with the final selected cost in the Consent Decree being closely aligned with the calculations from years before. Because of the nature of this Consent Decree negotiation, and after years of stating it would not involve itself in municipal development decisions, PADEP has sent a clear message to the township that residential development is not a concern, staging an end-run around the public's legitimate ability to question this end use with DEP and the municipality.

And in the final analysis, there is no meaningful accountability in terms of interpretation. CDP - the developer with a vested interest in accomplishing these tasks and using up the limited monies provided as quickly as possible – is only tasked with using "best efforts" to achieve the Statement of Decision – which, by the way, can be Amended (note paragraph 41 references an "Amended SOD").

This Consent Decree is nothing but a win win for the developer. CDP is being given full responsibility to develop and implement all aspects of the remediation with little government oversight and no public oversight; and has no incentive to ensure he develops and implements the most effective and responsible plan possible because this decree gives him the green light to develop this property with residential housing, putting in place a Covenant Not To Sue that offers significant legal protection should the remediation prove unsuccessful. In addition, CDP has no obligation to contribute additional funds even if the remediation plans, proposals, assessments, analyses, decisions, etc. prove deficient from an environmental, health or safety perspective.

***History of Financial Concerns Should Prevent CDP's Role in Overseeing Remedial Action on the Bishop Tube Site.***

Paragraph 6 of the Consent Decree states that: *"CDP shall be entitled to have the Qualified Settlement Trust, as defined in Paragraphs 82 through 85 (entitled "Assurance of Performance") (the "Trust") pay its reasonable and necessary or appropriate costs that it incurs in connection with the planning for, implementation of, and administration of the Remedial Action that it performs (or causes to be performed) at the direction or approval of the Department in the manner set forth in this Consent Decree and the Trust documents."*

Given what we see as a troubling history around business financials and litigious inclinations, we believe that entrusting the Trust funds to the immediate direction and discretion of CDP - regardless of the need for after the fact PADEP approval – is ill-advised and foreseeably raising a host of future questions, issues, concerns and potential legal entanglements.

> In the mid-2000s, Brian O'Neill (who we understand to be the principal and president of CDP) and another one of his companies, Brandywine Partners LLC (Brandywine), bought a portion of industrial property in Delaware intending to develop it for a residential purpose. This site however also had some serious environmental issues so a plan was made to destroy the existing buildings and start from scratch. O'Neill and his

company turned to HSBC who agreed to give a $15.9 million loan pursuant to a project loan agreement between the two entities. From what we can see in the public reporting, Brian O'Neill acknowledged that HSBC would not lend Brandywine any funds unless the loan's repayment was guaranteed unconditionally, to which O'Neill signed an "absolute personal guarantee for the loan" and he had status as "primary obligor". An $8.1 million guarantee was made, which HSBC later demanded be made good on because Brandywine defaulted on their repayment obligations. HSBC had to file suit on the guarantee agreement because of what is described as O'Neill turning "a deaf ear" to the matter, which he returned by filing 18 defenses and 8 counterclaims. O'Neill attempts to make claims of ambiguity and claiming a lacking in real estate sophistication, amongst other claims, which the First Circuit denied in his appeal and affirmed the decision of the District Court. The work O'Neill did to not follow through on this agreement is best summed up by the First Circuit saying "What O'Neill has done is pull his reading of the provision out of thin air, relying on mental gymnastics inconsistent with the guaranty's actual words (and with common sense)."[15]

In February of this year, the union, Sheet Metal Workers Local 19 were out protesting and handing out flyers stating that Brian O'Neill, and another one of his companies - MLP Ventures – had failed to pay them for their work. The Facebook post on the event stated:

> "Local 19 members are out protesting today in the freezing cold because our signatory contractor is still waiting to be paid — years after the work was completed. The job at Discovery Labs was done. Our contractor held up their end of the bargain. Billionaire Brian O'Neill and MLP Ventures have not."[16]

Five companies initiated legal action against MLP Ventures for unpaid invoices.[17] Over 30 contractors also collectively filed for approximately $100 million in mechanics liens between April 2023 and February 2025 for projects at Innovation 411, a core business at the Discovery Labs development.[18] In the article reporting the lawsuit, Brian O'Neill stated he was continuing "to work on a complex $1 billion financing package that would recapitalize Innovation 411 and Discovery Labs, allowing the contractors to be paid."[19]

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15 *HSBC Realty Credit Corp. (USA) v. O'Neill*, 745 F.3d 564 (2014) at 574.
16 https://www.facebook.com/share/p/1FVARej4MR/
17 John George, *Contractors sue Discovery Labs builder seeking hundreds of thousands of dollars in unpaid invoices,* Philadelphia Business Journal, August 3, 2025, https://www.bizjournals.com/philadelphia/news/2025/08/03/us-roofing-discovery-labs-mlp-kop-taylor-wiseman.html

18 *Id.*
19 *Id.*

But the fact remains, the work had been completed for at least two years and contractors and businesses remain unpaid.

In 2009, it was reported that a $60.9 million judgement was secured by Citizens Bank against Brian O'Neill involving the money borrowed for the Uptown Worthington construction project in Malvern, PA.[20] An $85.5 Million loan was arranged between O'Neill with Citizens Bank through Malvern Hill Associates and "other O'Neill-affiliated entities for the acquisition and site improvements to Uptown Worthington".[21] The loan was guaranteed by O'Neill. In a statement given by O'Neill where he talked about Citizens commencing suit and claiming Citizens was in default, not him or his company, O'Neill went on to say "Citizens commenced suit. We are not in default. Citizens is in default. They are having their own internal problems which caused this and their inability to live up to their contractual commitments. We are hopeful that [Citizens] will acknowledge the error of their position and reverse course. Alternatively, ***we will go to war***."[22] The loan matured on June 23rd of 2009, and a letter was sent from Citizens' attorney to O'Neill's attorney, where Citizens was willing to wait until September 28th for O'Neill to accept terms from Citizens to temporarily change the loan agreement. But the terms O'Neill offered were unacceptable to Citizens. Of great public concern is that one of the terms O'Neill offered was to use money from a Pennvest loan to pay "for certain expenses associated with the loan such as legal fees, appraisals and recording fees on the forbearance agreement".[23] Pennvest loans are made by the Pennsylvania Infrastructure and Investment Authority (PIIA) to secure, serve and advance initiatives to benefit the public. The PIIA website describes the Pennvest program as follows:

> "PENNVEST is a financing authority that provides low-cost financial assistance to address water, wastewater, stormwater, and non-point source pollution problems that impact public health, safety, the environment, regulatory compliance, and economic development.
>
> PENNVEST focuses on two goals for the betterment of the Commonwealth - ensuring all Pennsylvanians have access to clean water and supporting the Commonwealth's economic development. PENNVEST's low-cost financial assistance helps to make the water, consumed daily by thousands of Pennsylvanians, safe to drink. This funding is also a key component in the Commonwealth's efforts to purify rivers and streams, protecting the health of our citizens and natural resources. The projects funded by PENNVEST induce

[20] Natalie Kostelni, *O'Neill facing $61M ruling,* PHiladelphia Business Journal, December 21, 2009, https://www.bizjournals.com/philadelphia/stories/2009/12/21/story1.html
[21] *Id*.
[22] *Id, emphasis added.*
[23] *Id*.

> businesses to locate and expand their operations in Pennsylvania to create permanent, lucrative jobs for our workers."[24]

While the exact details and requirements of the particular Pennvest loans and funding given to O'Neill is unknown, it does still appear to Delaware Riverkeeper Network that O'Neill was attempting to misuse for his own economic benefit, government funds intended to secure initiatives beneficial to the public. After O'Neill brought a counter suit, both parties reached a settlement agreement the terms of which are unknown.

The Trust funds are very limited and, likely, woefully inadequate. If this Consent Decree were approved, the Trust funds would be the only funds the impacted community could count on for securing any sort of remediation at this site. It is irresponsible to agree to place these funds under the control of a person who has a demonstrated history of what appears to us to be financial mismanagement, a failure to honor financial commitments (including failing to pay debts and workers), an overall ease with using litigation to secure outcomes beneficial to him/it and unfairly detrimental to others, and a willingness to direct public dollars to advance private business interests not in keeping with the source of the funds.

This Consent Decree has many facets dependent upon trust - trust of the DEP and trust of the public in the actions and activities of CDP. And yet the history of this site - a history with PADEP and a history with CDP – does not validate the PADEP decision to place so much trust in CDP, or to require the public to count on PADEP to prioritize the needs and goals of the public and environment. At the very least, public transparency and engagement, and independent court oversight are needed but not provided for.

***Responsible Parties Should Pay Full Cost of Clean Up.***

For over 5 decades PADEP has been aware of the serious contamination issues at the Bishop Tube site and has been uncovering those who are responsible for its clean up – including CDP. In response, rather than taking needed action to develop and implement remediation, responsible corporations have been investing in lawyers and legal battles. And inexplicably, based on the public record and our experience, we see that PADEP has prioritized working to support development of the site with one sweetheart deal after another, rather than prioritizing securing site remediation to address the existing pollution, or to stop the spread of a known pollution plume emanating from the site.

The public has paid dearly for the toxic contamination at Bishop Tube. Before they even knew it, they were being exposed to the toxins emanating from the site. There is reason to believe that contamination at the site has had serious health ramifications for those exposed, there is reason to

[24] https://www.pa.gov/agencies/pennvest

believe that existence of this toxic site neighboring existing residences has had implications for property values and/or the sense of safety of neighboring residents. And now the DEP is proposing a Consent Decree that will not assure full remediation in compliance with all legal standards, and would foist uncovered out of pocket costs for remediation on to the public, which includes the very community members who have been deeply harmed in a very personal way by the toxic contamination at the Bishop Tube site.

There are known responsible parties - very wealthy companies – who are and should be accountable for the full clean-up of this site. In order to ensure there is no interference and no limitation on securing and ensuring a complete and successful clean up, PADEP should not be out there publicly okaying the site's development for residential use - which is what it cleverly attempts to do with this agreement.

This proposed deal is an abject failure from the perspective of the public, and another sweetheart giveaway to the industries involved in the contamination of this site. For PADEP to propose a Consent Decree that would foist an unknown – and possibly very expensive – bill for this site's cleanup on to the public while at the same time openly okaying residential development as an option, including going so far as to allow remediation dollars to be used on facets of the site's development – is a travesty.

***Cost of Remediation is Inadequate, Not Justified as Adequate, and Not Appropriately Supervised.***

Within the consent decree, PADEP agrees to a total cost of $8,985,000 to be used and managed by CDP for remediation of the highly contaminated condition at the Bishop Tube site. The costs that appear to be the basis of this figure were put forth in documents that are on the order of 5 years old. That means the actual costs themselves could be based on figures secured over the preceding year or few. Over the past 5 years there have been steep cost increases on many fronts. No where does the Consent Decree take into consideration such increases – whether they are the result of inflation, tariffs or other real-world conditions – or demonstrate that they do not apply to the remediation strategies embodied in the proposed Consent Decree. While we are sure the responsible parties will argue that they are entitled to certainty - it is actually the public who is entitled to certainty including the certainty that the property that is their neighbor (whether it be adjacent neighbor or upstream neighbor) and that is oozing toxins into groundwater and surface waters, and has been harming their environment for decades, will finally be fully, fairly and responsibly cleaned up at the cost of those who are responsible. This Consent Decree, and its dated cost assumptions and assertions, on its face does not seem economically supported or justified.

According to the Consent Decree paragraph LL, between May 19, 2000, and April 30, 2022, the DEP had already incurred response costs in connection with the site in the amount of $4,233,483. Since that time (from May 1, 2022, and onward), the DEP "has continued and will continue to incur recoverable response costs." Nowhere in this agreement that we have seen is the government – which is funded by the taxpayers of this Commonwealth - reimbursed for the $4,233,483 it has incurred, at public expense! This actually means that the responsible parties, including the developer CDP, have been given over $4 million towards remediation of the toxic contamination JMI, Whittaker, CDP and the other responsible parties are responsible for.

But even more striking, the DEP has incurred over $4 million of expense before any remediation – other than the damaged liquid boot – has taken place at the site. And now the DEP and the wealthy responsible parties including JMI, Whittaker and CDP expect the public and this court to believe that just over twice that amount – $8,985,000 – will be enough to develop, monitor and implement a Remedial Action plan that will clean the extensive soil and water contamination that saturates this site and has been spreading offsite for years?

Outrageously, according to Consent Decree Paragraph 83, CDP is entitled to use Trust funds to pay for building demolition and site preparation. Building demolition and site preparation are part of the cost of the development - a development from which CDP expects to secure a significant amount of income when it sells the developed properties. These are costs associated with every development project. They are not costs of remediation. Allowing Trust funds to be spent inappropriately on non-remediation activities like these, means there will be less money available to advance Remedial Action steps. It is wholly inappropriate for Trust funds that are intended to fund the Remedial Action to be allowed to be used by the developer to carry out elements of his development proposal and thereby advance his profitmaking development venture, a venture not intended to serve the public but instead intended to serve CDP.

> If CDP is to be reimbursed for these aspects of site development, then it should rescind its proposal and plans to develop the site. CDP should not get it both ways. In other words:
>
> - If CDP plans to pursue developing the site with residential homes for sale, then it should not be entitled to reimbursement of the costs of demolition or site preparation.
> - If CDP wants to be reimbursed for these costs, then it should waive its right to seek approval for development of the site.

At every turn, with regards to the financial elements of the Consent Decree, there are provisions on the use of funds should the Trust and/or the Financial Assurance Fund prove adequate, but if the funds prove <u>in</u>adequate the Consent Decree provisions repeatedly allow the responsible parties and the developer off the hook for the additional needed costs. *See e.g.*, Paragraph 86(i).

This leaves the public to be the ones left holding the bag for the costs of clean up, and/or paying with their health, their safety, their property values, and their environment.

The suggestion that CDP shall seek Industrial Sites Reuse Program (ISRP) grant funds to add to the Trust does not, in any way, make this Consent Decree more palatable - it makes it worse. ISRP and Pennsylvania Department of Community and Economic Development (DCED) funds are public pots of money - so all this mandate in Paragraph 90 is calling for, is for CDP to find more ways for the public to relieve CDP and the other responsible parties of their obligation to fully and fairly contribute to the remediation of this site. What is worse, we know from previous grant funds sought by CDP for this very site, those funds will likely also be available to CDP to cover its costs of construction, including demolition and site preparation, – so in fact, this just becomes another source of revenue to feed CDP's project and reduce its costs for the construction of this private, profit-making development venture, thereby increasing CDPs profit margin if the site is developed and sold.

We also see that Trust funds can be used by CDP to pay the cost of attorney fees and legal costs associated with obtaining access agreements or easements for purposes of advancing the remediation. This diversion of the limited Trust funds available away from actual remediation activities results in even less money being available for the actual remediation effort. In addition, and once again, demonstrating the level of self-dealing this Consent Decree embraces on behalf of CDP and the other responsible parties, Paragraph 54 states: "*CDP shall use its best efforts to assist and cooperate with the Department to obtain access agreements and/or easements or otherwise gain access to any properties owned by principals or affiliates of CDP necessary to perform response actions at or related to the Source Property."* This means that CDP can use Trust fund resources to pay for the legal fees associated with securing access agreements and/or easements from CDP principals or affiliates. Use of Trust funds to cover the cost of legal negotiations, fees and costs associated with CDP Principals or affiliates providing easements or access agreements related to this Remedial Action should be prohibited as a misdirection of funds that should be spent on the actual Remedial Action itself.

In another grotesque malformation of equity, Paragraph 58 allows CDP off the hook for implementing Remedial Action requirements on properties for which CDP has failed to secure access. That means that critical aspects of the Remedial Action may go unimplemented. The only requirement for CDP to be the beneficiary of such largess, is that it has to fail to secure access and then argue that it is unable to propose a modification to activities or location that it deems to be *reasonable* (relevant language in Paragraph 58 reads: "*...CDP shall not be required to perform the Remedial Action for which such access was required unless the Department and CDP are able to reasonably modify the activities or location to allow performance to occur without such access, subject to the financial limitations on the ability to perform activities set forth in Paragraphs 40 through 85.).* The perpetual reliance upon a "reasonableness" standard provides a myriad of ways for CDP to argue that it cannot be held accountable for fully implementing the Remedial Action that will ultimately be developed - Paragraph 58 is one such example.

> It should go without saying, it is not reasonable that the neighbors or environment have had to endure the costs and harms of this toxic site, and it is not reasonable that PADEP would settle on a decree that provides repeated pathways to alleviate the responsible parties, including CDP, of their obligation to develop, advance, implement and pay for a Remedial Action that protects the health and safety of the people of Pennsylvania, rather than the bank accounts and profits of the wealthy responsible corporations and developer that are party to this environmentally devastating situation.

It is striking that Paragraph 83 identifies PADEP as the beneficiary of the financial Trust being created in this Consent Decree ("*[PADEP] shall be the principal beneficiary of the trust*"), rather than the community who has been so deeply impacted by the site's contamination and will continue to suffer harm if full remediation is not achieved - which it very well may not be; quite simply we have no way of knowing because so much is left undeveloped, undecided and undetermined.

***The Penalty Provisions are Inadequate and Fail to Provide Incentive to Act Accordingly and Responsibly.***

The penalties for late payment of Trust funds is a drop in the bucket for the wealthy responsible parties involved in this deal. $1,000 a day for late payment is a mere .0136% of what JM and Whittaker owe; and .08% for CDP. These penalty rates fall far below the industry standard for late payment of funds owed. Late fees tend to be in the 5% to 10% per month range. A late fee of 0.8% totals to a mere 2.4% per month, while .0136% adds up to less than half a percent (.408%) for a month. These miniscule late fees are not only out of line with standard business practice, but they provide no incentive whatsoever for the responsible parties - who are very wealthy - to want to assure they pay on time. The penalty provisions are themselves arbitrary and capricious and not truly designed to ensure timely payment.

***Serious Scientific and Expert Comments Regarding Remediation Remain Ignored and Unaddressed.***

Given that PADEP has stated that there has been NO change in the previous proposal it put forth, and has not provided the public the requested extension in order to allow the time and ability needed to engage new experts for additional review based on today's site conditions and facts (***for example, the identification of PFAS contamination at the site that is nowhere addressed in the proposed remediation plan***), and currently available information on remediation strategies and costs, we attach for the court the comments submitted previously to verify the genuine nature of our concerns regarding the remediation proposal and that a complete – 100% – disregard by PADEP is alarming. [25]

Our comments, as well as those submitted by the Valley Creek Trustee Coalition[26] and those submitted by East Whiteland Township[27] - also attached – are still applicable and demonstrate that the DEP proposed remediation - now housed in this Consent Decree – is wholly inadequate, does not serve the public interest, and the whole cloth adoption of this proposal, without any modifications in response to the expert and public concern submitted during the previous public comment period, further confirms that acceptance of this Consent Decree is in fact arbitrary and capricious.

To highlight a few of the points raised in these comments:

- PADEP's chosen options would leave substantial TCE in place by failing to treat a number of known areas of contamination and by failing to fully treat/remove TCE in the locations that are treated. Leaving TCE on site ensures that there will continue to be ongoing contamination, and fails to provide the remediation or protection required by law or needed by the community and our environment. In addition, this proposal includes the injection of as-of-yet unknown chemicals that could themselves become problematic or react with contamination on site that will result in additional releases of contamination.
- The Little Valley Creek is classified as an exceptional value stream. Pursuant to regulation, its associated wetlands are also given this same exceptional value designation and associated protections. As a result of this special protection waters designation, the Little Valley Creek and Associated wetlands are the subject of heightened antidegradation protections and standards. In Pennsylvania, "[t]he water quality of Exceptional Value Waters shall be maintained and protected." …. Rather than consider these antidegradation protections as mandatory ARARs, PADEP treated these standards and this EV protection as something simply "To Be Considered." As a result, PADEP neither mandated nor recommended a plan that will achieve the appropriate exceptional value regulatory standards applicable to Little Valley Creek and its wetlands.
- The RIR and FS on which the AOA is based, however, expressly states that the analysis is based on the assumption that present and future use of the Site will be non-residential only. ….The failure by PADEP to address a residential end use of the site while investigating the feasibility of various remedial alternatives is a fundamental failing. This is especially true where, as here, Statewide Health Standards are being utilized as part of the cleanup standards for the remediation. Statewide Health Standards vary based on 5 whether the end use is residential or nonresidential. Thus, a cleanup plan selected based on its ability to achieve

[25] Attachment 15.
[26] Attachment 16.
[27] Attachment 17.

Statewide Health Standards for a nonresidential end use will not meet the standards required for a residential end use.

- The reports relied upon to create the plan use a modeling approach that is not adequate to evaluate the movement of TCE….
- The AOA itself recognizes the fundamental failings in terms of the inaccuracy of its information. The AOA repeatedly calls for additional data and study in order to determine the extent of the contamination and steps that need to be taken. See, e.g., AOA at p.12 fn. 3, p. 14, p. 15, p. 16, p. 22. As a result of the misinformation and missing information, it cannot be determined nor demonstrated that the Remedial Response could or would address the site contamination to the degree required by law. In addition, absent this information, this is not a proposal that experts or community members can fully understand and comment upon. This proposal more closely resembles a draft interim set of ideas than a remedial action plan intended to comply with the requirements of the law.
- Underlying modeling, amongst other things, fails to account for variation in quantities and timings of TCE releases and thereby invalidates the methodology used for estimating TCE decay half-lives. It also assumes no continuing source of TCE present at the site, despite acknowledging the presence of DNAPL in deep bedrock, thereby invalidating the effects of the predicted future plume behavior so that the modeling applied is inaccurate. The model itself is contradicted by the earlier, more complex model used at the site.
- In evaluating the growing and future pollution plume, PADEP conveniently fails to evaluate VOCs other than TCE, even though they are present and have different subsurface transport behaviors. Amongst our many concerns in this regard, is the failure to consider vinyl chloride, a confirmed, and potent, cause of cancer in humans and other animals that may be carried by groundwater four times faster than TCE.
- An option for OU2 proposed by PADEP involves the injection of chemicals, yet it is not clear what chemicals would be used, nor was there the needed consideration of the discharge of new/additional contaminants that could result from this approach, and how the chemicals break down and/or react with other contaminants. The environmental ramifications of this have not been assessed as part of the proposed remedial action plan.
- In addition, the additives that will be used to treat saturated and unsaturated soils are as-of-yet unknown, so it is impossible for PADEP, let alone the public, to comment or assess the ramifications of this proposed remediation.
- Also missing are assessments of risk from other potential offsite uses of groundwater, such as irrigation, or commercial and industrial uses. There are downstream business operations such as Uhler seed, for whom this evaluation is important.
- It is notable that concentrations of hexavalent chromium in Little Valley Creek were found to have exceeded the PADEP Fish and Aquatic Life criteria in 2018 when it was measured under low flow conditions, yet the Ecological Risk Assessment fails to consider hexavalent chromium. Additional data should have been collected and ecological risk assessment

evaluations undertaken. The failure to pursue this threat based on a lack of existing data cannot be legally justified.

- The reports relied upon: are based on the assumption that soil on the site will be removed when that is not in fact being proposed; fail to consider other potentially hazardous VOCs that are known to be present in the pollution plume and of environmental and human health concern, and; the assumption that present and future use of the site will be non-residential only.
- The RIR and FS assume that contaminated unsaturated soils above the water table will be removed, thereby removing one of the contaminant sources that will leach into the groundwater long term. This assumption, which directly impacts the entire analysis and remediation proposal, is fundamentally incorrect because the proposal for soils remediation would leave substantial COCs in the soil.
- There are significant sources of TCE in the bedrock on the site which dissolve and desorb from fractures into the groundwater that will not be addressed by the proposal.
- Much of the site will have trenches excavated to install utilities. Some of this excavation will be 20 feet deep and more in proximity to known contamination. If the remediation is not adequate, this material will be excavated and there is no requirement or guidance on the approved land development plans of how to protect workers and the public, or keep potentially contaminated materials contained on site.
- The TCE plume exceeds 3,000 feet in length and has been found to be greater than 400 feet deep into the earth, including in bedrock. Yet, the remediation plan focuses only on shallow groundwater contamination, less than 120 feet deep. In fact, most of the source contamination is in the bedrock and deeper soils. That means there will continue to be TCE source material that will feed into the environment, completely undermining any proposed remediation.
- The failure of PADEP to consider a combination of alternatives is an obvious failing of the analysis and proposal.
- There is not enough monitoring in the area northeast of the site in the bedrock. While PADEP acknowledges a substantial amount of TCE in the overburden and shallow bedrock groundwater, it has relatively few wells in the intermediate and deep bedrock. MW-44C has quite high concentrations of TCE in deep bedrock. As a result, TCE in bedrock is not adequately characterized. If there is a substantial amount of TCE there, additional groundwater alternatives could be necessary. At present PADEP plans to use MNA in that area regardless of the choice for clean-up at the site. Doing nothing but monitoring is not an acceptable solution given the high degree of contamination, impact, and the years communities and the natural environment have been harmed by site contamination. Active treatment is essential to address all contamination at, and emanating from, this site.
- See attached comments from technical experts submitted to PADEP for additional expert and scientific comment and analysis.

***The Consent Decree Too Often Skews or Misrepresents the Facts, Injecting Additional Bias into the Comment and Review Process for the Public and the Court. Public Comment Opportunities on Proposed Consent Decree is Now–and Has Been Through its Life Cycle–Deficient and Biased Towards the Interests of the Responsible Parties, Developer, and PADEP to the Detriment of the Public, the Courts, and the Interests of Fairness and Equity.***

On March 27th, DRN and the public submitted two letters to PADEP requesting extension to the 60 day period of the comment letter.[28] While PADEP, the responsible parties, and the developer have had years to discuss, assess, debate, and negotiate the terms of the Consent Decree, the public was only given a mere 60 days to review all the complex elements of the proposal and to develop meaningful and informed comment on a proposal that will directly impact the environment and the everyday lives of neighboring and downstream residents and businesses who have already been burdened by the toxic contamination at this site for over 40 years (most of that time the community was unaware of the toxic land, water and body burden this site was exposing them to).

On April 9, 2026, PADEP denied the requests for extension. PADEP noted in their April 9th letter that the request of extra time was unnecessary because "no work plans or data are contained in the proposed consent decree, and the proposed Consent Decree does not change the remedy that DEP selected in 2022."[29] It additionally asserted that since "DEP offered an extended comment period in 2021–2022 on that proposed remedy at the request of DRN", they believe no comment extension is necessary now, four to five years later for a Consent Decree related to the legal implementation of site remediation.

PADEP's assertion that the public needs no additional time to review the detailed and complex elements of the Consent Decree because it made no changes to the Remedial Action proposal first put forth in 2022, despite the significant, scientific and substantive information that had been provided back then, is troubling to say the least. While PADEP asserts that: "... no work plans or data are contained in the proposed consent decree, and the proposed Consent Decree does not change the remedy that DEP selected in 2022"[30], it fails to recognize that there have been significant and meaningful changes that have serious implications for the Remedial Action proposed – even in its current truncated and outline form.

> There has been the opportunity for scientific advancement, there is new information about PFAS contamination at the site, there is increased scientific understanding regarding the implications of PFAS for the environment and human health, and the

[28] Attachment 18.
[29] Attachment 3.
[30] *See* Attachments 1-3.

economic conditions of today that will drive how much of this proposal can in fact be implemented (i.e. a dollar does not go as far today as it did 4 years ago due to changing economic conditions) is dramatically different today than in 2022.

Further, what is being proposed in the Consent Decree includes very significant legal elements that were not part of the Remedial Action and need careful and due consideration with both legal and scientific insights brought to bear on the evaluation. The Consent Decree itself is both legally and scientifically detailed and confusing. The implementation activities and layout of remedial activities and requirements is vast, contains repetitions in different sections that appear slightly modified but in significant ways, and contains convoluted legal jargon that can and is difficult for the public to decipher let alone understand in a way to be able to provide substantive comment. The *Index of Selected Terms In Consent Decree* alone creates a page turning nightmare. It contains 44 terms and acronyms in a chart that does not include their definition or expanded form, but a paragraph and page to reference which forces the reader and/or commentator to take time flipping back and forth between content and index to even base-level understand what is being referenced in the Consent Decree.

The public should have been be afforded the proper time and opportunity to review this detailed and complex proposal, including the time needed to seek out and secure legal, scientific and economic experts to help evaluate the sufficiency or insufficiency of the unchanged remediation methods, to evaluate the implications of an $8-9 million dollar Trust fund that has not been meaningfully altered despite changing economic conditions over the past 4 years, and to evaluate the implications of to-be-developed works plans, remedial designs for soils, water and groundwater, evaluations, alternatives analyses, as well as all the other essential elements that are to be determined and will be the basis of how and to what degree the Remedial Action will address the conditions at, and emanating from, this site.

There have been serious health impacts experienced by neighbors and people who formerly worked at Bishop Tube there is reason to believe it is related - in whole or in part – to the toxins at this site. For PADEP to refuse additional time to review and comment on this Consent Decree - after all these years, despite all this exposure, and despite the legal, economic, factual and scientific intricacies of this proposal is unconscionable and confirms the biased and politically manipulated nature of this process.

There are so many undeveloped elements of the Remedial Action that are wrapped up in this Consent Decree and are essential to the development of an effective remediation, and essential to its successful implementation, that it borders on the absurd for PADEP to assert that it has in fact put forth a Remedial Action for public review and comment. In truth, PADEP put forth an ill-conceived outline of a plan with all the essential details left absent. And now, if the court were to review this Consent Decree as proposed, because these elements are all wrapped up in this

Consent Decree that provides no opportunity for public and expert review and comment after the close of this current comment period, it means that **the public has never, and will never, get an opportunity to review and comment upon the essential specifics and elements of the Remedial Action or its implementation.**

While the PADEP has included opportunities for itself to review and comment upon some - but not all – elements of the future remedial action steps – given the history of this site and the multiple times the PADEP has crafted and agreed upon deals and terms that are beneficial to the developer but are either harmful to the community[31] or have denied the public their legal entitlement to review and comment upon PADEP proposals related to this site – review and comment by PADEP cannot and should not be seen as an effective replacement for the public's scrutinizing review.

In addition, when CDP is released from the obligation to fully carry out Remedial Action steps - perhaps because the Trust funds run out – the implementation burden then shifts to PADEP. If this happens and there is additional work to be done (which we fully expect there will be given the limited funds provided for by this Consent Decree), there will be no one to oversee PADEP's actions, decisions, implementation or next steps. Given that there is no public comment opportunity for any aspect of the Remedial Action as contrived in this Consent Decree, and there is no court oversight, once PADEP becomes responsible for implementation, there will be no party to report to, no party to review and comment upon actions taken, and no party to hold PADEP accountable should there be concerns with the actions it proposes, takes or fails to take.

DRN has serious concerns on how the remediation process is laid out in the consent decree with so many key aspects and elements to be designed, determined and/or assessed in the future. If this Consent Decree were to be approved - a decision we do not believe is supportable under either an arbitrary and capricious standard and a public best interests standard — it must be modified in numerous serious and significant ways:

> The public should be given a formal opportunity to review and comment after each stage of the proposed Remedial Action process, including the opportunity to review and respond to every Work Plan prepared, every Remedial Design prepared, every alternatives analysis developed, every assessment undertaken, every data set gathered and every report generated.
>
> A judge should oversee every decision-making step, ensuring there is full transparency, compliance with the terms of the plans, and that all public input has been given full, fair and meaningful consideration.

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[31] *See* Attachment 7, in which DRN successfully intervened challenging PADEP's failure to provide appropriate and timely public notice regarding PPA agreement.

There must be an independent auditor overseeing the expenditure of all funds, with quarterly reports released for public review.

A non-interested expert should be placed in charge of the Remedial Action design and key decisions.

The requirements included in the preliminary land development plan approval from the municipality must be reflected in the terms of the Consent Decree so as not to undermine the authority, nor place undue pressure upon the municipal decisionmakers, including the two following:

> "Until the remediation of the three (3) soil hot spot areas is fully completed, which shall include post-excavation samples and approval of the remediation by DEP, the Applicant shall not start the construction of any residential units or appurtenances thereto on the Property. The only permitted activity during this time shall be the installation of temporary roads to support the remediation process."
>
> "Prior to any construction occurring at the Property, the Property must be remediated by Applicant, or by any other party".[32]

No releases from liability, as contemplated by Act 2, shall be granted unless full and complete remediation of the Site has occurred.

***Legal Precedent Confirms that Approvals of this Consent Decree Violates the Arbitrary and Capricious Standard.***

"HSCA's Declaration of Policy expressly declares that the cleanup of properties contaminated with hazardous materials is vital to the economic development of the Commonwealth and that the Department should be provided with flexible and effective means to enter into various settlement agreements with responsible parties at contaminated sites."[33] However, in situations where, as here, the Department is using its authority to enter into a settlement agreement with a responsible party that does not require remediation to be fully completed in order to obtain a complete waiver of liability, and where said settlement agreement undercuts agreements previously relied upon by other legal authorities to justify approvals, that Department flexibility

[32] *See* Attachment 19 at para. J(13), and para. K(1).
[33] *Chirico v. DEP*, 2002 EHB 25, 32 (citing 35 P.S. §§ 6020.102(12)(vii) and (ix)).

has been overstepped. These situations are exactly what the arbitrary and capricious standard aims to prevent.

***Approval of the Consent Decree Would Represent a Failure of PADEP to Meet the Standards and Expectations that the Court of Common Pleas Relied Upon in Approving CDP's Preliminary Plans.***

In 2021, DRN sought to challenge East Whiteland Township and its Board of Supervisors' resolution granting preliminary land development approval to CDP.[34] Following an unsuccessful attempt to develop the Bishop Tube property for industrial use that would have been in conformance with the zoning requirements applicable to the Bishop Tube property at the time, CDP opted to pursue a residential development of the Property in 2014. This required a text and map amendment to the zoning ordinance of the Township.[35] Apparently unaware that the Covenant Not To Sue had been rescinded by the PADEP as the result of the egregious actions recounted above (neither CDP nor PADEP had informed the Township of these developments) – the Township rezoned the Property from its industrial classification in June of 2014.

By 2016, CDP had finally submitted a revised plan for residential redevelopment of the Property, but still required certain variance relief from the Township's Steep Slope ordinance and Height of Retaining Wall ordinance. Because the proposed relief required disturbance of steep slopes and the construction of retaining walls in contaminated areas of the Property, the Zoning Hearing Board issued a lengthy decision along with a partial approval of the variance. This partial approval included ten very specific conditions that were imposed upon CDP. Following additional redevelopment plans by CDP in an attempt to meet the conditions imposed upon it, a final version of a preliminary plan was produced on October 18, 2020, with the Township adopting a resolution granting the preliminary approval of the plan in February of 2021.

The 2020 Resolution expressly adopted ten environmental conditions which were previously enumerated in the zoning hearing board's 2016 decision. This included condition J(13), which provides that "[u]ntil the remediation of the three (3) soil hot spot areas is fully completed . . . the Applicant shall not start the construction of any residential units or appurtenances thereto on the Property. The only permitted activity during this time shall be the installation of temporary roads to support the remediation process."[36] Additional conditions, however, were needed to address the numerous environmental concerns that were raised throughout the decisionmaking process.

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[34] *The Delaware Riverkeeper Network v. East Whiteland Township*, No. 2021-01586, (Chesco. Dec. 17, 2021), slip. Op. at 1.
[35] *Id*. at 2.
[36] Attachment 19 at 5.

Specifically, condition K(1) states that *prior* to *any* construction occurring at the Property, the Property must be remediated by either CDP, or by any other party."[37]

To be clear, the proposed Consent Decree fails to impose these same requirements, instead adopting conditions that directly contradict the conditions imposed on CDP by the Township. Conditions which ultimately allowed CDP to obtain the conditional approval necessary for this project in the first place, something that would not have happened had those conditions not been imposed.

Yet somehow, in paragraph 63 of the proposed consent decree, after recognizing that proposed development would be residential (thereby bringing people, families and children to this site) PADEP expressly states that it "does not oppose development activities that occur after the Department approves the OU1 Soils Final Report."[38] Pursuant to the consent decree, however, addressing the contaminated soils is just the first part of the remediation plan.[39] If approved, the Consent Decree would allow around twenty-four (24) months for the parties to investigate, design, and implement a remediation of soils at the Site.[40] Once this remediation has been approved by the Department, the parties then have another twenty-eight (28) months to investigate, design, and implement a remediation of the groundwater at the Site. Thus, while East Whiteland Township's Preliminary Plan Approval was granted on the basis that "*prior to any construction occurring at the Property*, the Property must be remediated by either CDP, or by any other party," PADEP presumes to grant the authority to begin construction before the remediation is even halfway completed; thereby signing off on residential construction that will bringing children, families and people to a site still suffering from toxic contamination.

The egregiousness of this rationale is further compounded by the fact that PADEP doesn't even guarantee that the remediation itself will ever actually be completed. PADEP has expressly conditioned the remediation of the Site on the finite amount of resources it is requiring the responsible parties to contribute for causing the contamination in the first place:

> If . . . the Department determines that the Remedial Action has been implemented in accordance with the SOD or any Amended SOD, . . . and that not all Remedial Action called for by the SOD or any Amended SOD have been completed because there are insufficient funds remaining in the Trust or may be added into the Trust in no more than eighteen (18) months, to implement all such remaining Remedial Action, *the Department shall provide*

[37] *Delaware Riverkeeper Network v. East Whiteland Township*, No. 2021-01586, (Chesco. Dec. 17, 2021), slip. Op. at 4-5 (emphasis added) (quoting A Resolution for Preliminary Land Development Plan Approval for Constitution Drive Partners, L.P. for the Malin Road Development).
[38] Consent Decree at 30.
[39] *See id*. at 18-20, paras. 15-23.
[40] *Id*.

> *to CDP a Statement of No Further Remedial Action Obligations under this Consent Decree*.[41]

The end result of the system imposed by PADEP through this Consent Decree is that, so long as CDP spends all of the money in the Trust, CDP will obtain all of the liability benefits provided under Act 2 as if the remediation had been fully completed, without having to actually complete it. This structure does not benefit the environment, and it certainly does not benefit the community; all it does is benefit CDP.

PADEP further challenges and undermines the Township's lawfully exercised authority. The Township originally stipulated in the Preliminary Land Development Plan Approval Resolution that the contaminated soils be excavated and removed from the Site in order to achieve a residential Statewide Health Standard. In the consent decree, however, PADEP and CDP instead opt to implement an "In Situ Chemical Oxidation/In Situ Chemical Reduction . . . coupled with soil mixing in select areas of concern . . ..".[42]

The contradiction between the conditions imposed by PADEP and the conditions imposed by East Whiteland Township calls into question the due diligence that PADEP undertook in pursuing this consent decree and/or its motivation for undermining the Township's authority in a way that directly benefits CDP and its development plan. The requirements that no construction may occur on site prior to the completion of remediation and that soil excavation take place have been in existence since 2020. Now, six years later, PADEP is telling the Township and its residents that they don't matter–either through its deliberate decision to ignore the conditions imposed by the Township, or through a willful ignorance of the condition's existence in the first place. Regardless of which is applicable to the situation at hand, it is wholly inappropriate and inexcusable, and provides more confirmation that this Consent Decree does not serve the public good, and its approval would be arbitrary and capricious.

***Approval of the Consent Decree Would Represent a Massive Failure to Uphold and Abide by Pennsylvania's Green Amendment.***

Pursuant to Article 1, § 27 of the Pennsylvania Constitution:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Through its plain language and implementing court decisions, the Pennsylvania Green Amendment establishes a constitutional mandate that applies to all government officials within

[41] Consent Decree at 28, para. 53 (emphasis added).
[42] *Id*. at 12, para. GG.

Pennsylvania. Pursuant to the amendment, the Pennsylvania Department of Environmental Protection must ensure its actions do not directly, or through the actions of others, infringe on the rights of the people to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

The Supreme Court has further made clear that the government's duty, as trustee, to conserve and maintain the state's natural resources, "implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources."[43] A part of this duty includes that the "Department has a constitutional duty to fully consider the environmental effects of any proposed action in advance of proceeding . . ."[44]

The Analysis of Alternatives and Remedial Response ("AOA"), upon which the selected remedy was supposed to be based, itself recognizes the fundamental failings of the inaccuracy of its information. The AOA repeatedly calls for additional data collection, sampling, and studies in order to determine the nature and extent of the contamination on site to determine steps that need to be taken.[45] Further highlighting the inadequacy of the selected remedial response, and therefore the Consent Decree itself, which is based on the remedial response:

- While the plan assumes a clear boundary for the pollution plume, there is a lack of monitoring wells to support this assertion/assumption
- Mapping fails to clearly articulate the differences in the pollution plume between the overburden soils and the bedrock aquifers
- The site has been determined to be a source of PFOS/PFAS contamination, which was not known at the time the AOA was put out for public comment. The failure to test for, and address, this contamination in advance of selecting a remedial alternative to allow for public comment on this carcinogenic pollutant, represents a constitutional, legal, and moral failing of PADEP's proposal
- The reports relied upon to create the plan used a modeling approach that is not adequate to evaluate the movement of TCE and therefore cannot be used to inform or support the plan put forth by PADEP for consideration

This same lack of information is echoed in the Consent Decree, where it repeatedly calls for more information, studies, and samples to be performed.[46] How can it be said that PADEP based its remedial alternative on a pre-decisional, deliberate process when much of the analysis is yet

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[43] *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013) and subsequently in *PEDF v. Commonwealth of Pennsylvania* (Pa. 2017).
[44] Clean Air Council, Delaware Riverkeeper Network , *et al.* v. DEP, EHB Docket No. 2017-009-L (Opinion and Order on Motion for Summary Judgment, January 1, 2018); Center for Coalfield Justice v. DEP, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); Friends of Lackawanna v. DEP, EHB Docket No. 2015-063-L (Adjudication, Aug. 15, 2017).
[45] *See*, *e.g.*, AOA at p.12 fn. 3, p. 14, p. 15, p. 16, p. 22.
[46] *See above*, p. 7.

to be performed? PADEP has already locked itself into a selected alternative when it doesn't have anywhere near the amount of information necessary to know the true conditions on site?

The AOA also considered the antidegradation protections of Little Valley Creek as something merely "To Be Considered," rather than mandatory ARARs. This, despite the fact that Little Valley Creek is classified as an exceptional value stream.[47] In Pennsylvania, "[t]he water quality of Exceptional Value Waters shall be maintained and protected."[48] Further, any:

> person proposing a new, additional or increased discharge to . . . Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost effective . . .. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.[49]

This, again, is evidence of the PADEP's failure to uphold its constitutional obligation to *prevent and remedy* the degradation, diminution, or depletion of our public natural resources, as well as its failure to fully consider the environmental effects of any proposed action in advance of proceeding.

Clearly, it cannot be said that PADEP based its remedial alternative on a constitutionally adequate pre-decisional, deliberate process assessing the environmental rights and natural resource trustee obligations of this proposed Consent Decree the remediation of the Bishop Tube site when much of the analysis is yet to be performed. In short, PADEP has already locked itself into a selected alternative when it doesn't have anywhere near the quality of information needed to know the true site conditions and to understand the implications of a remedial action that has yet to be developed in so many essential ways.

Furthermore, among PADEP's fiduciary obligations, is the duty of loyalty; to ensure it is conserving and maintaining the site's natural resources for the benefit of present and future generations of Pennsylvanians who are the beneficiaries of the natural resource trust. This fiduciary obligation also prohibits PADEP from prioritizing the economic interests of the responsible parties associated with this site, over the environmental interests of the people. The terms of the Consent Decree, at every turn, are seeking to advance the economic and limited liability interests of CDP and the companies legally responsible for the site's contamination. The goal of the Remedial Action is not to conserve and maintain the natural resources at the site for the benefit of present and future generations of Pennsylvanians. Instead, the elements of the

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[47] *See* 25 Pa. Code § 93.9f.
[48] 25 Pa. Code § 93.4a(d).
[49] 25 Pa. Code § 93.4c(b)(1)(i)(A).

Consent Decree seem primarily focused on developing and implementing a remedial action that is driven by cost and limiting the legal obligations of the responsible parties.

This Consent Decree – in both its development and implementation - fails to protect the Article 1 Section 27 environmental rights of the people of Pennsylvania, nor the obligation of the PADEP to serve as trustee of the state's natural resources.

**In conclusion, this Consent Decree does not serve the public interest, its approval would be arbitrary and capricious, and represents a betrayal of the public trust in favor of private enrichment.**

Respectfully Submitted,

Maya K. van Rossum

Maya K. van Rossum
the Delaware Riverkeeper

# ATTACHMENT 1

**April 9, 2026**

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
**501 North 3rd Street**
**508 Main Capitol Building**
**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**

**From: We The People**

**Re: Bishop Tube Consent Decree Public Comment**

***The below signatures include the original 190 signatures in our March 27th letter plus an additional 55, were collected by the Delaware Riverkeeper Network and Green Amendments For The Generations***

We, the undersigned, write to demand an extended, more equitable, and more accessible public review and comment process regarding the proposed Bishop Tube Consent Decree for toxic site remediation. We demand that, rather than 60 days with no communication between the community and the PADEP, we be given the following:

- At least a full 6 months for written comment,
- At least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and
- 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing

The toxic contamination at the Bishop Tube site is pervasive, saturating the soil and groundwater, and contaminating an Exceptional Value stream that receives surface and groundwater flows from the site. PADEP and the business interests responsible for its presence and clean up have known about this toxic contamination for decades. Community members have only been made more recently aware thanks to the vigilance and curiosity of Larry Stauffer, the first member of our community to notice activity at the site and start to question what was happening, and to the efforts of the Delaware Riverkeeper Network and Green Amendments For The Generations, which helped uncover the extent of this situation, and provided essential scientific and legal understanding.

The Bishop Tube site's toxic contamination has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families are heart wrenching, and the contamination has expanded beyond the site footprint which is inflicting daily environmental impacts past its boundaries.

On its face, the proposed consent decree provides tremendous legal protection and economic benefit to:

- The perpetrators of the harm,
- Those who have economically benefited from the site's contamination and the slow-moving process to secure its cleanup at the lowest price tag possible,
- Those who have been legally responsible for its cleanup for many years but failed to act, and
- Those who have every reason to circumvent the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

**But what about the community and the impacted environment?**

We are clearly an afterthought.

While PADEP, the responsible corporations, and the developer **have had years** to discuss, assess, debate, and negotiate the current remediation plan and consent decree, *We The People* are being given **a mere 60 days** to review all the data, complex plans, associated science, and applicable law, in order to attempt to put forth meaningful and informed comment on a matter that will directly impact our everyday lives and even those who are yet to come to our community.

This timeline for public review and comment is unacceptable. It denies *We The People* the opportunity to secure needed scientific and legal analysis, as well as denying us a fair amount of time to absorb the proposals, the volumes of associated data, and the complex combination of

strategies being proposed. The proposed timeline robs us of the opportunity to not only understand the information, but provide meaningful and informed comment to the PADEP.

And so, We the Undersigned:

- Residents of General Warren Village,
- Residents of East Whiteland Township,
- Residents of Chester County,
- Residents of the Schuylkill River Watershed
- Residents of the Commonwealth of Pennsylvania
- Organizations representing impacted ecosystems and community members;
- Real people who have borne the burdens of the existing toxic contamination at the site and who will bear the environmental, health, and economic burdens of a failed remediation and development plan at the Bishop Tube site moving forward;
- Real people standing up for the future generations this consequential decision will impact,

**demand the 6 months, 2 public meetings, and 2 public hearings as described above** in order to provide a more fair and accessible opportunity for the People of Pennsylvania to submit full and informed comments on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

Respectfully,

| First Name | Last Name | City | State |
|---|---|---|---|
| Vincent | Prudente | Philadelphia | PA |
| Sharon | Connor | Malvern | PA |
| Deborah | Gibase | Eddystone | PA |
| Barbara | Arnold | Malvern | PA |
| Jennifer | Tobin | Philadelphia | PA |
| Elizabeth | Stauffer | Malvern | PA |
| Michael | Rayer | Bryn Mawr | PA |
| Amanda | Cohen | Easton | PA |
| Carole | Buettner | Malvern | PA |
| Julia | Schulz | Mechanicsburg | PA |
| Ricky | Ciccone | Malvern | PA |
| John | Hegarty | Malvern | PA |
| Carol | Radich | Malvern | PA |
| Lily | Herron | Bristol | PA |

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|---|---|---|---|
| Regina | King | Malvern | PA |
| George | Spence | Norwood | PA |
| Peter | Tran | Bristol | PA |
| Mary | More | Flourtown | PA |
| Boris | Dirnbach | Bryn Mawr | PA |
| David | Fiedler | Bensalem | PA |
| Eric | Pavlak | Oaks | PA |
| Catherine | Folio | Effort | PA |
| Lois | Drumheller | Monroeville | PA |
| Linda | Granato | Philadelphia | PA |
| Mary | Tiebout | Pipersville | PA |
| Lynnette | Saunders | Huntingdon Valley | PA |
| Robert | Adams | Effort | PA |
| Kathleen | Stauffer | Malvern | PA |
| Norman | Koerner | Philadelphia | PA |
| Lauri | Moon | Williamsport | PA |
| Aggie | Perilli | Lancaster | PA |
| Joan | Farb | Newtown | PA |
| Bernard | Greenberg | West Chester | PA |
| Norman | Starr | Beach Lake | PA |
| Kathy | Vannozzi | Pipersville | PA |
| Ryan | Dodson | Lancaster | PA |
| Laura | Fake | Womelsdorf | PA |
| Heather | Nelson | Douglassville | PA |
| Karen | Bedics | Coopersburg | PA |
| Lisa | Tull | Phoenixville | PA |
| Arthur | Anderson | Philadelphia | PA |
| Zoe | Warner | Malvern | PA |
| Thomas | Latzgo | Fogelsville | PA |
| Wim | Van Rossum | Bath | PA |
| Chris | King | Montoursville | PA |
| Eliana | Sekkidou | Easton | PA |
| Peggy | Miros | Malvern | PA |
| Lela | Stanley | Philadelphia | PA |
| Angela | Clayton | Phoenixville | PA |
| Douglas | Mason | Port Matilda | PA |
| Emma | Dale | Philadelphia | PA |
| Carol | Rapp | Malvern | PA |
| Bob | Holliday | Chadds Ford | PA |
| Norma | Van Dyke | Philadelphia | PA |
| Eunice | Alexander | West Chester | PA |
| Alex | Jackson | Blakeslee | PA |
| Peter | Hughes | Chester Springs | PA |
| Barbara | Sonies | Narberth | PA |
| Isaiah | Guenther | Philadelphia | PA |

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|---|---|---|---|
| Noel | Petrie | Philadelphia | PA |
| Jacqueline | Pickering | Jenkintown | PA |
| Sally | Doyle | Phoenixville | PA |
| Paul | Stanley | West Chester | PA |
| Michael | Moss | Philadelphia | PA |
| Lora | Snyder | Glen Mills | PA |
| Anne-Marie | Gincley | Philadelphia | PA |
| Cheryl | Hendershott | Philadelphia | PA |
| Dorothy | Bedford | Phoenixville | PA |
| Erin | Johnson, Mph, Msn, Rn | Rutledge | PA |
| Patti | Smith | Conshohocken | PA |
| Tara | Yerger | Pottstown | PA |
| Sarah | Caspar | Malvern | PA |
| John | Bradlee | Malvern | PA |
| K | Bailey | Langhorne | PA |
| Forrest | Gauker | Easton | PA |
| Edith | Janik | Paoli | PA |
| Cayley | Dittmer | Thornton | PA |
| Doris | Adebanjo | Chester Springs | PA |
| Annsofie | Bjork | Glen Mills | PA |
| Raymond | Clarke | Malvern | PA |
| Andrew | Kelly | Malvern | PA |
| Erica | Maar | Malvern | PA |
| Carla | Zambelli Mudry | Malvern | PA |
| Elaine | Croft | Malvern | PA |
| Jill | Holsclaw | Malvern | PA |
| Emily | Bachman | Nazareth | PA |
| Taylor | Magee | Norristown | PA |
| Zy | Brandt | Norristown | PA |
| Joanne | Connolly | Avondale | PA |
| Dustin | Frable | Palmerton | PA |
| Celeste | Dannunzio | Malvern | PA |
| Sabriana | Pimentel | Catasauqua | PA |
| Sarah | Gaffney | Easton | PA |
| John | Rossi | Glen Mills | PA |
| Daniela | Ordonez | Bristol | PA |
| Sarah | Loomis | Downingtown | PA |
| Thomas | Rafetto | Malvern | PA |
| Jeanette | Hooven | Malvern | PA |
| Linda | Beavers | West Chester | PA |
| Frances | Conwell | Devon | PA |
| Tiana | Schade | Lehighton | PA |
| Erika | Hanks | Conshohocken | PA |
| Dillan | Buettner | Malvern | PA |
| Eileen | Ryan | Allentown | PA |

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|---|---|---|---|
| Anne | McCrory | Malvern | PA |
| Suzanne | Cutshall | Wayne | PA |
| Ema | Torres | Bryn Mawr | PA |
| Katelin | Dao | Bryn Mawr | PA |
| Elizabeth | Kadjeski | Malvern | PA |
| Jen | Stewart | Wayne | PA |
| Cindy | Pinto | West Chester | PA |
| Trayce | Carr | Malvern | PA |
| Karin | Goldman | Media | PA |
| Nicole | Kellett | Phoenixville | PA |
| Pauline | Toomey | Malvern | PA |
| Kathy | Bosch | Malvern | PA |
| Carolyn | Matthews | Malvern | PA |
| Dylan | Matthews | Malvern | PA |
| Emily | Matthews | Malvern | PA |
| Annabelle | Stedman | Berwyn | PA |
| Emma | Derobertis | Malvern | PA |
| Mallory | Macaleer | Malvern | PA |
| Philip | Schwartz | Elverson | PA |
| Jennifer | Glinski | Malvern | PA |
| Ginny | Marcille-Kerslake | Exton | PA |
| Amanda | Nickel | Paoli | PA |
| Brian | Grant | Malvern | PA |
| Jack | Binstead | Narberth | PA |
| Tara | Stoppa | Malvern | PA |
| Bridget | S | Malvern | PA |
| Annette | Bonner | West Chester | PA |
| Angela | Raftery | Malvern | PA |
| Joseph | Wolfgang | Bally | PA |
| Stephanie | Barbera-Waldeier | Malvern | PA |
| Jennifer | Tabas | Malvern | PA |
| Judy | Fong | Malvern | PA |
| Paige | Carlton | Malvern | PA |
| Andrea | Schran | Malvern | PA |
| Angie | Smith | Malvern | PA |
| Maryanne Rapp | Atterton | West Chester | PA |
| Leslie | Celia | West Chester | PA |
| Allyson | Duncan | Malvern | PA |
| Kristen | Cosgrove | Malvern | PA |
| Ramya | Shetty | Malvern | PA |
| Tim | Caban | Malvern | PA |
| Lynnette | Granto | Malvern | PA |
| Marina | Karulina | Malvern | PA |
| Kristen | Babcock | West Chester | PA |
| Adrienne | Rayna | New Ringgold | PA |

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|---|---|---|---|
| Bea | Quaintance | Malvern | PA |
| Michael | Stauffer | Malvern | PA |
| Alyssa | Mazzenga | Frazer | PA |
| Lea | McCrone | Malvern | PA |
| Mike | Romanoff | Malvern | PA |
| Meredith | Birtel | Malvern | PA |
| Grace | Beal | Malvern | PA |
| Donna | Saul | Malvern | PA |
| Cynthia | Shallcross | Malvern | PA |
| Curt | Quaintance | Malvern | PA |
| Brian & Susan | Meehan | Malvern | PA |
| Angie | Bohn | Frazer | PA |
| Eric | D'Armiento | Malvern | PA |
| Melanie | Meade | Clairton | PA |
| Kirstin | Simmons | Malvern | PA |
| Melissa | Shelby | Malvern | PA |
| Amy | Brown | Malvern | PA |
| Nicholas | Stauffer | Malvern | PA |
| Jason | Basore Sr | Malvern | PA |
| Jennifer | Scheuer | West Chester | PA |
| Stephanie | Mcnichol | Malvern | PA |
| Blair | Blake | Upper Darby | PA |
| Donna | Morged | Malvern | PA |
| Jacob | Thornburg | Norristown | PA |
| Michael | Roberts | Whitehall | PA |
| Michelle | Mctague | Malvern | PA |
| Melissa | Macaleer | Malvern | PA |
| Mary | Black | Philadelphia | PA |
| Connie | Black | Malvern | PA |
| Phillip | Potter | Philadelphia | PA |
| Brett | Shallcross | Malvern | PA |
| Mary | Diguiseppe | Phoenixville | PA |
| Erica | Ryan | Malvern | PA |
| Eric | Koper | Malvern | PA |
| John | Kramer | Langhorne | PA |
| Angel | Flores Jr | Villanova | PA |
| Mikhail | Zapata-Rotz | Annville | PA |
| Vijaya | Vissapragada | Malvern | PA |
| Kathy | Wagner | Malvern | PA |
| Edward | Vandame | Malvern | PA |
| Bernadette | Corsaro | Malvern | PA |
| Meredith | Mueller | West Chester | PA |
| Nathaniel | Cain | Downingtown | PA |
| Lucy | Lehman | Philadelphia | PA |
| Christy | Norris | Malvern | PA |

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|---|---|---|---|
| Tim | Matthews | Malvern | PA |
| Rhonda | Anderson | Kennett Square | PA |
| Ciaran | Rhodes | Philadelphia | PA |
| James | Steiner | Malvern | PA |
| Barbara | Williams | Malvern | PA |
| Lynda | Holl | Malvern | PA |
| Christa | Melo | Malvern | PA |
| Laura | Taddei | Malvern | PA |
| Jaclyn | Flail | Malvern | PA |
| Susan | Cronin | Malvern | PA |
| David | Brittingham | Malvern | PA |
| Pete | Goodman | Malvern | PA |
| Keith | Schied | Malvern | PA |
| Michele | Cruise | Berwyn | PA |
| Aeran | Atlas | Malvern | PA |
| Sharon | Moran-Sallam | Malvern | PA |
| Jack | St. Amand | Bryn Mawr | PA |
| Renee | England | Hellertown | PA |
| Kathy | Shea | Frazer | PA |
| Rebecca | Cookerly | Malvern | PA |
| Skylar | Livengood | Ardmore | PA |
| Cynthia | Myers | Malvern | PA |
| Dilma | Riddell | Frazer | PA |
| Brian | Johnson | Malvern | PA |
| James | Rafetto | Malvern | PA |
| Louise | Troutman | Cresco | PA |
| Austin | Crouch | Coatesville | PA |
| Chris | Daly | Bryn Mawr | PA |
| Robin | Freisem | Coatesville | PA |
| Brian | Jones | Phoenixville | PA |
| John | Harrington | Wynnewood | PA |
| Candice | Lynn | Feasterville Trevose | PA |
| Mark | Best | West Chester | PA |
| Keith | Scholtz | Phoenixville | PA |
| Stephen | Grim | Glenmoore | PA |
| Thomas | Prokop | Green Lane | PA |
| Heidi | Streich | Springfield | PA |
| Ryan | Gettis | Morrisville | PA |
| Derek | Gertz | Philadelphia | PA |
| Timothy | Hough | New Hope | PA |
| Matthew | Young | Gilbertsville | PA |
| Ryan | Mcquillan | Reading | PA |
| Y | Mahoney | Malvern | PA |
| Jennifer | Yue | Wayne | PA |
| Joseph | Ellis | Downingtown | PA |

| | | | |
|---|---|---|---|
| Maryellen | Caldwell | Malvern | PA |
| Mai | Nguyen | Malvern | PA |
| Kristen | Klugh Cannella | Malvern | PA |
| Greta | Sharpley | Phoenixville | PA |
| Al | Sniezevage | Broomall | PA |

*CC: East Whiteland Board of Supervisors*

*East Whiteland Planning Commission*

*Chester County Commissioners*

# ATTACHMENT 2

**April 9th, 2026**

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
**501 North 3rd Street**
**508 Main Capitol Building**
**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**
**From: We The People**

**Re: Bishop Tube Consent Decree Public Comment**

Since 1985, the Pennsylvania Department of Environmental Protection (PADEP) has known that the Bishop Tube Site located in East Whiteland Township, Chester County, PA was dangerously contaminated. Over the decades, the seriousness of the contamination and its dangers for the community and environment has been increasingly revealed as data has been collected and workers at the site have shared the horrifying disregard of site owners for the environment. Rather than take swift action to enforce existing laws and secure full cleanup of the site, the State allowed the site to languish in its toxic condition.

All the while, children played in the creek taking in the site's toxic contribution; neighbors naively enjoyed life unaware of the dangers located just next door; downstream communities fished and played in the flowing waters of Little Valley Creek, Valley Creek, and the Schuylkill River; and the people of Chester County and Pennsylvania naively believed their state environmental agency was looking out for the best interests of the people and environment of Pennsylvania, rather than the interests, profits, and goals of industry and developers.

Our eyes were opened in 2017 when we learned of an illegal sweetheart deal the state entered into with a developer seeking to construct more than 200 homes, bringing over 200 families, including children, to this toxic site while it remained in its toxic condition with no plan for its remediation. Worse yet, the deal was cut with a developer who, documents revealed, had itself contributed to the site's ongoing toxic condition by damaging infrastructure that had been installed in an attempt to clean up at least some of the toxins there.***[1]

Thanks to the vigilance and curiosity of Larry Stauffer, the first member of the General Warren Village community to notice activity at the site and start to question what was happening, and with the help of the Delaware Riverkeeper Network and Green Amendments For The Generations, the community exposed, challenged, and ultimately defeated the sweet heart deal with Constitution Drive Partners. Notably, Delaware Riverkeeper Maya van Rossum, the Delaware Riverkeeper Network, and 13 to-be-named neighbors were the target ofa SLAPP suit by the developer, seeking to silence our opposition. In the end, justice prevailed and both the sweetheart deal and the SLAPP suits failed.

Imagine our surprise and disgust when, 8 years later, the community and environment were once again, the last to know and the ones sacrificed as PADEP sought to strike another sweetheart deal benefiting the corporations and developer responsible for the contamination at the Bishop Tube site.

With this foundation, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed, and Pennsylvania– write to urge, implore, plead and demand that PADEP – on its own or directed by Governor Shapiro who say she puts "People before Power"– give a more rational, realistic, and meaningful time for public comment** on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

The comment period should 1) last at least a full 6 months for written comment, and 2)include at least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and 3) hold 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

[1]*** This developer hired a contractor who, in the words of DEP, "destroyed the liquid boot while performing metals recovery activities within Building 8. Needless to say, **this action interfered with or impaired the SVE/AS system** that DEP had implemented **and potentially exacerbated the Existing Contamination at the site** in violation of the PPA and its two Amendments. DEP requested that CDP repair the liquid boot to allow for the continued operation of the SVE/AS system. This was never done, in continued violation of the PPA and its two Amendments."

The Bishop Tube toxic contamination has been under study for decades. And for at least the past decade and largely driven by community demand, the PADEP has been researching, considering, and developing approaches and plans for remediation of the site's toxic contamination.

Because of advocacy and legal action led by impacted community members, including the family of Larry and Kate Stauffer, the Delaware Riverkeeper Network, and Delaware Riverkeeper M. van Rossum, a remediation plan is finally being put forth.

However, at a glance, we find this plan severely and sorely lacking:

- It fails to ensure full remediation of the site that is driven by science, environmental protection, and the near term and long term safety of our community - instead it is a plan that is driven by dollars, political, and business objectives;
- It fails to fulfill the legal obligations of state law and the Pennsylvania Green Amendment, Article 1 Section 27, that protects our RIGHT to pure water, clean air, a quality environment and natural resources for present and future generations;
- It prioritizes persons and businesses with a vested interest in securing a quick outcome, rather than a full and protective clean up.

While PADEP, the responsible corporations, and the developer have had years to discuss, assess, debate, and negotiate the current remediation plan, *We The People* are being given a mere 60 days to review all the data and plans, and put forth meaningful and informed comments on an outcome that will impact the rest of our lives.

The toxic contamination at the Bishop Tube site has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families is heart wrenching.

Just on its face – without the time or opportunity to secure the expert and legal reviews essential for full, fair, and responsible review of a remediation and development proposal (and yes, this is very definitely a proposal for development, not just clean up) – the proposed consent decree puts the fox in charge of the henhouse, providing tremendous economic benefit and legal protection to the perpetrators of the harm and those who have economically benefitted from it at our expense. Providing for those who have every reason to shortcut the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

And so, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed and Pennsylvania who will bear the**

**environmental, health and economic burdens of a failed remediation and development plan at the Bishop Tube site demand:**

- 6 months - not just 60 days – to secure expert review and analysis, and provide full and informed comment on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site; and
- We should be provided with at least 2 public meetings where PADEP presents to us what is being proposed; and
- 2 public hearings where concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

Respectfully the undersigned individuals and organizations,

*Senator Katie Muth, Representing District 44 in Pennsylvania*

*Kate & Larry Stauffer*

*Elizabeth Stauffer (Brain Tumor Survivor)*

*Nicholas Stauffer*

*Cayley Dittmer*

*Michael, Jessica and Holly (their 1 year old daughter) Stauffer*

*Maureen Connolly*

*Eileen Ryan Romano*

*Joseph Romano*

*Barbara D. Arnold*

*Carol Rapp*

*Maya K. van Rossum, the Delaware Riverkeeper & Green Amendments Founder*

*Delaware Riverkeeper Network*

*Green Amendments For The Generations*

*Valley Forge Trout Unlimited*

*Debra & Nick Mobile*

*Peggy & Ron Miros*

*Rhonda Funk*

*Deanna Fedor*

*Baily Funk*

*Pete & Judy Goodman*

*Sharon Connor*

*Carol L. Armstrong*

# ATTACHMENT 3

Pennsylvania
Department of Environmental Protection

April 9, 2026

***via email***

Anneke L.W. van Rossum
Advocacy and Advancement Coordinator
Delaware Riverkeeper Network
925 Canal Street, 7th Floor, Suite 3701
Bristol, PA 19007

Re: Proposed Consent Decree - Public Comment Period
Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. van Rossum:

Thank you for your letters, dated March 27, 2026, requesting that the Pennsylvania Department of Environmental Protection (DEP) extend the 60-day public comment period for the proposed consent decree and a proposed Qualified Settlement Fund Agreement between DEP, Whittaker Corporation (Whittaker), Johnson Matthey, Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) implementing and funding the Hazardous Sites Cleanup Act remedial response at the Bishop Tube HSCA Site (Site). The Delaware Riverkeeper Network (DRN) is requesting that DEP extend the public comment period on the consent decree to six months and convene public hearings and meetings regarding the proposed settlement.

Your letter conveys concern that a 60-day comment period will not provide adequate opportunity to secure scientific and legal analyses and to review the large amounts of data and the strategies that the parties are proposing. However, no work plans or data are contained in the proposed consent decree, and the proposed consent decree does not change the remedy that DEP selected in 2022. DEP offered an extended comment period in 2021–2022 on that proposed remedy at the request of DRN. DRN and many others commented on the remedy at that time. Accordingly, DEP believes that the 60-day public comment period is sufficient to analyze the funding, framework, and schedule for implementing the remedy chosen in 2022 as set out in the proposed consent decree. This will allow the cleanup of the Site to commence as soon as possible following the response to comments and subject to Court approval.

Although we are not extending the comment period, consistent with Section 1113 in HSCA, DEP is committed to transparency throughout the remediation process. DEP will be routinely sending community update emails and updating our website as reports and work plans become available. DEP also plans to hold a public meeting this summer following the completion of the ongoing pre-design investigation. In addition, as we have discussed, DEP is committed to holding additional public meetings and/or informal public comment opportunities at various stages throughout the remediation process.

Sincerely,

Patrick L. Patterson

Patrick L. Patterson
Regional Director
Southeast Regional Office

cc: Senator Katie Muth
Steve Brown, East Whiteland Township
Scott Lambert, Chair, East Whiteland Township
Peter Fixler, Vice Chair, East Whiteland Township
Clinton Smith, East Whiteland Township
C. D. Brown, P.G
B. McClennen
L. Strobridge, P.G.
D. Armstrong
A. Bram, Esq.
R. McDivitt, Esq.
Regional File

# ATTACHMENT 4

pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

April 11, 2017

Ms. Alice Young
5 Lantern Lane
Malvern, PA 19355

Re: Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. Young:

Thank you for your letter dated March 24, 2017 addressed to Acting Secretary Patrick McDonnell. We appreciate your concern regarding the proposed development of the Bishop Tube HSCA Site by the current owner of the property, Constitution Drive Partners L.P. (CDP).

While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues.

With regard to the cleanup of the Bishop Tube Site itself, the Department's responsibility, under the Hazardous Sites Cleanup Act, is to select and assure a remedy that is protective of human health and the environment and otherwise complies with all statutory and regulatory requirements. As part of that process, the Department is presently under binding agreement with Johnson Matthey, Inc. and Whitaker Corporation to complete a comprehensive study of the entire Site, including all impacts to groundwater and surface waters, and to propose alternative ways to clean the Site up. We expect this study (referred to as a Remedial Investigation/Feasibility Study or RI/FS) to be completed by Summer 2017. Once the RI/FS is complete, the Department will select a final remedy for the Site. The selection process will involve both a written public comment period and a local public hearing. We look forward to hearing from any and all members of the public as a part of that process.

In the meantime, CDP has expressed their intent to apply for a grant under the Industrial Sites Reuse Program (ISRP) administered by the Department of Community and Economic Development (DCED). The proposal under the grant is to excavate the most highly contaminated areas of the Bishop Tube Property, transport these contaminated soils to an off-site disposal facility, and backfill the areas with clean fill.

While DCED will ultimately decide whether or not to issue the grant, the Department's responsibility in this process is to review the Scope of Work (SOW) to determine if the proposed activities will comply with all of the environmental statutes the Department administers. To date, we have reviewed and commented on versions of the SOW but have not yet issued any approval. Please know that we will be closely scrutinizing the SOW to ensure that all activities, including such issues as fugitive dust emissions, are conducted in a responsible and lawful manner. In addition, if an ISRP Grant is awarded, the Department will be overseeing remediation work to assure that it is conducted in a manner that conforms to the approved SOW.

Once again, please understand that any excavation and off-site disposal of contaminated soils conducted by CDP under an approved SOW pursuant to the proposed grant would not be a final remediation of the Site but would only be one potential step towards a final cleanup. As I said above, we are nearing completion of the final RI/FS for this Site and will be selecting final remedial action later in the year through a very public Administrative Record process.

We are also working to develop a public webpage where we can keep up to date information the Department's oversight of the Site. We hope that it will go live within the next week or so.

Thank you for your interest in this matter. I hope this information is helpful. If you have any questions or require additional information, please do not hesitate to contact Dustin Armstrong at 484.250.5723 or by e-mail at darmstrong@pa.gov.

Sincerely,

Anderson Lee Hartzell
Acting Regional Director

cc: Senator Andrew Dinniman
Representative Duane Milne
Mr. Nagle - East Whiteland Twp.
East Whiteland Twp. EAC
Chester County Health Department
Re 30(rw17ecb)095.8

RECEIVED
APR 17 2017
CHESTER COUNTY
HEALTH DEPARTMENT

April 11, 2017

Ms. Barbara D. Arnold
31 Fahnestock Road
Malvern, PA 19355

Re: Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. Arnold:

Thank you for your letter dated March 24, 2017 addressed to Acting Secretary Patrick McDonnell. We appreciate your concern regarding the proposed development of the Bishop Tube HSCA Site by the current owner of the property, Constitution Drive Partners L.P. (CDP).

While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues.

With regard to the cleanup of the Bishop Tube Site itself, the Department's responsibility, under the Hazardous Sites Cleanup Act, is to select and assure a remedy that is protective of human health and the environment and otherwise complies with all statutory and regulatory requirements. As part of that process, the Department is presently under binding agreement with Johnson Matthey, Inc. and Whitaker Corporation to complete a comprehensive study of the entire Site, including all impacts to groundwater and surface waters, and to propose alternative ways to clean the Site up. We expect this study (referred to as a Remedial Investigation/Feasibility Study or RI/FS) to be completed by Summer 2017. Once the RI/FS is complete, the Department will select a final remedy for the Site. The selection process will involve both a written public comment period and a local public hearing. We look forward to hearing from any and all members of the public as a part of that process.

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Sincerely,

Anderson Lee Hartzell
Acting Regional Director

cc: Senator Andrew Dinniman
Representative Duane Milne
Mr. Nagle - East Whiteland Twp.
East Whiteland Twp. EAC
Chester County Health Department
Re 30(rw17ecb)095.9

RECEIVED

APR 17 2017

CHESTER COUNTY
HEALTH DEPARTMENT

April 11, 2017

Ms. Jenifer Murray
115 Spring Road
Malvern, PA 19355

Re: Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. Murray:

Thank you for your letter dated March 24, 2017 addressed to Acting Secretary Patrick McDonnell. We appreciate your concern regarding the proposed development of the Bishop Tube HSCA Site by the current owner of the property, Constitution Drive Partners L.P. (CDP).

While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues.

With regard to the cleanup of the Bishop Tube Site itself, the Department's responsibility, under the Hazardous Sites Cleanup Act, is to select and assure a remedy that is protective of human health and the environment and otherwise complies with all statutory and regulatory requirements. As part of that process, the Department is presently under binding agreement with Johnson Matthey, Inc. and Whitaker Corporation to complete a comprehensive study of the entire Site, including all impacts to groundwater and surface waters, and to propose alternative ways to clean the Site up. We expect this study (referred to as a Remedial Investigation/Feasibility Study or RI/FS) to be completed by Summer 2017. Once the RI/FS is complete, the Department will select a final remedy for the Site. The selection process will involve both a written public comment period and a local public hearing. We look forward to hearing from any and all members of the public as a part of that process.

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Sincerely,

Anderson Lee Hartzell
Acting Regional Director

cc: Senator Andrew Dinniman
Representative Duane Milne
Mr. Nagle - East Whiteland Twp.
East Whiteland Twp. EAC
Chester County Health Department
Re 30(rw17ecb)095.10

pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

April 11, 2017

Ms. Pauline Heizenroth
6 Woodview Road
Malvern, PA 19355

Re: Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. Heizenroth:

Thank you for your letter dated March 29, 2017 addressed to Acting Secretary Patrick McDonnell. We appreciate your concern regarding the proposed development of the Bishop Tube HSCA Site by the current owner of the property, Constitution Drive Partners L.P. (CDP).

While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues.

With regard to the cleanup of the Bishop Tube Site itself, the Department's responsibility, under the Hazardous Sites Cleanup Act, is to select and assure a remedy that is protective of human health and the environment and otherwise complies with all statutory and regulatory requirements. As part of that process, the Department is presently under binding agreement with Johnson Matthey, Inc. and Whitaker Corporation to complete a comprehensive study of the entire Site, including all impacts to groundwater and surface waters, and to propose alternative ways to clean the Site up. We expect this study (referred to as a Remedial Investigation/Feasibility Study or RI/FS) to be completed by Summer 2017. Once the RI/FS is complete, the Department will select a final remedy for the Site. The selection process will involve both a written public comment period and a local public hearing. We look forward to hearing from any and all members of the public as a part of that process.

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Sincerely,

Anderson Lee Hartzell
Acting Regional Director

cc: Senator Andrew Dinniman
Representative Duane Milne
Mr. Nagle - East Whiteland Twp.
East Whiteland Twp. EAC
Chester County Health Department
Re 30(rw17ecb)096.2

RECEIVED

APR 17 2017

CHESTER COUNTY
HEALTH DEPARTMENT

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

April 11, 2017

Mr. Ronald Smith
16 Fahnestock Road
Malvern, PA 19355

Re: Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Mr. Smith:

Thank you for your letter dated March 27, 2017 addressed to Acting Secretary Patrick McDonnell. We appreciate your concern regarding the proposed development of the Bishop Tube HSCA Site by the current owner of the property, Constitution Drive Partners L.P. (CDP).

While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues.

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Southeast Regional Office
2 East Main Street | Norristown, PA 19401-4915 | 484.250.5960 | Fax 484.250.5961 | www.depweb.state.pa.us

While DCED will ultimately decide whether or not to issue the grant, the Department's responsibility in this process is to review the Scope of Work (SOW) to determine if the proposed activities will comply with all of the environmental statutes the Department administers. To date, we have reviewed and commented on versions of the SOW but have not yet issued any approval. Please know that we will be closely scrutinizing the SOW to ensure that all activities, including such issues as fugitive dust emissions, are conducted in a responsible and lawful manner. In addition, if an ISRP Grant is awarded, the Department will be overseeing remediation work to assure that it is conducted in a manner that conforms to the approved SOW.

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Sincerely,

Anderson Lee Hartzell
Acting Regional Director

**cc:** Senator Andrew Dinniman
Representative Duane Milne
Mr. Nagle - East Whiteland Twp.
East Whiteland Twp. EAC
Chester County Health Department
Re 30(rw17ecb)096.1

April 11, 2017

Ms. Debra J. Mobile
42 Village Way
Malvern, PA 19355

Re: Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. Mobile:

Thank you for your letter dated March 25, 2017 addressed to Acting Secretary Patrick McDonnell. We appreciate your concern regarding the proposed development of the Bishop Tube HSCA Site by the current owner of the property, Constitution Drive Partners L.P. (CDP).

While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues.

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Sincerely,

Anderson Lee Hartzell
Acting Regional Director

**cc:** Senator Andrew Dinniman
Representative Duane Milne
Mr. Nagle - East Whiteland Twp.
East Whiteland Twp. EAC
Chester County Health Department
Re 30(rw17ecb)096

RECEIVED
APR 17 2017
CHESTER COUNTY
HEALTH DEPARTMENT

April 11, 2017

Ms. Kathleen Stuaffer, M.ED.
64 Fahnestock Road
Malvern, PA 19355

Re: Bishop Tube HSCA Site
East Whiteland Township, Chester County

Dear Ms. Stauffer:

Thank you for your letter dated March 23, 2017. We appreciate your concern regarding the proposed development of the Bishop Tube HSCA Site (Site) by the current owner of the property, Constitution Drive Partners L.P. (CDP).

While we understand that CDP is proposing residential development at the Site, CDP has not yet submitted any permit applications related to proposed development activities such as storm water management, etc. Moreover, we consider any local land development issues, such as zoning or other local ordinance matters, to be exclusively within the purview of East Whiteland Township. Please know that the Department takes no position with regard to how the Township responds to those issues.

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Sincerely,

Anderson Lee Hartzell
Acting Regional Director

cc: Senator Andrew Dinniman
Representative Duane Milne
Mr. B. Eckert, DCED
Mr. Nagle - East Whiteland Twp.
East Whiteland Twp. EAC
Chester County Health Department
Re 30 (rw17ecb)096.3

# ATTACHMENT 5

2014 Pa. Envirn. LEXIS 31

Pennsylvania Environmental Hearing Board

July 17, 2014, Issued

Docket No. 2014-019-M

**Reporter**
2014 Pa. Envirn. LEXIS 31 *

# CONSTITUTION DRIVE PARTNERS, L.P. v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

## Core Terms

covenant, void, terminate, site, contamination, alleged violation, final action, notice of violation, enforcement action, motion to dismiss, reservation of rights, sole discretion, set forth

## Action

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

## Syllabus

SYNOPSIS

The Board finds that a Department letter informing the appellant that the Department is terminating a covenant not to sue and considering whether to subsequently take enforcement action is not an appealable action under the terms of the Consent Order and Agreement entered into by the parties.

## Counsel

[*1]
Jonathan H. Spergel, Esquire, Lynn R. Rauch, Esquire, MANKO GOLD KATCHER & FOX, LLP, 401 City Avenue, Suite 901, Bala Cynwyd, PA 19004, for Appellant

Anderson Lee Hartzell, Esquire, Office of Chief Counsel -- Southeast Region, for Appellee

**Opinion By:** By RICHARD P. MATHER, SR., Judge

## Opinion

**OPINION**

In 2005, appellant Constitution Drive Partners, L.P. (CDP) purchased property known as the Bishop Tube ***HSCA*** [1] site in East Whiteland Township, Chester County, which had at one time been operated as a precious metals processing and stainless steel fabricating facility. The former operations on the site resulted in soil contamination

---

[1] Hazardous Sites Cleanup Act (***HSCA***), Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. § 6020.101 et seq.

and groundwater contamination that has migrated offsite. On March 17, 2005, CDP entered into a Prospective Purchaser Consent Order and Agreement (the COA) [2] with the Department of Environmental Protection (Department) in **[*2]** which CDP agreed to undertake certain performance measures at the site in exchange for protection from liability. The COA consists of the original agreement and two amendments.

Of particular note are paragraphs 6, 7 and 23 of the COA. Paragraph 6 sets forth CDP's duty of non-interference:

> **6. Non-Interference:** Developer shall not interfere with or impair any response actions taken by the Department, or any other person or entity under the auspices of the Department with regard to the Existing Contamination or any other contamination identified at the Site. ...

(Exhibit B to Department's Motion)

Paragraph 7 sets forth the Department's covenant not to sue:

> **7. Department's Covenant Not to Sue:** Subject to the Reservation of Rights provided in Paragraph 8 below, the Department covenants not to sue or take any administrative or judicial action against Developer for response costs, **[*3]** response actions, civil penalties, natural resource damages, or injunctive relief, including encumbering the Property (through lien or otherwise), arising from or relating to the release and/or threatened release of hazardous substances defined as Existing Contamination at the Site. These covenants extend only to Developer, except as they may be transferable as stated below and may terminate at the Department's sole discretion upon Developer's failure to meet any of the requirements of the CO&A. These covenants shall take effect upon the effective date of this CO&A.

(*Id.*)

Finally, Paragraph 23 sets forth the parties' agreement as to when a decision under the COA becomes appealable:

> **23. Decisions Under Consent Order:** Any decision that the Department makes under the provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board or to any Court until such time as the Department enforces this CO&A or pursues equitable, administrative, civil or criminal action based on the belief that Developer has failed to comply with any material provision of this CO&A. At no time, however, may the parties **[*4]** challenge the content or validity of this CO&A or challenge the Findings agreed to in this CO&A.

(*Id.*)

In 2011, an independent contractor retained by CDP damaged piping and protective covering on a soil vapor extraction and air sparging system (the SVE/AS system) while conducting salvage operations at the site. According to CDP, the Department agreed that repairs to the system could be delayed until such time as the Department intended to operate the system or CDP intended to commence site redevelopment activities. (CDP Response to Motion, page 3)

On January 28, 2014, the Department issued the letter that is the subject of this appeal (the January 28, 2014 letter). The letter references the damage that occurred in 2011 and states that "this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the [COA] and its two Amendments." (Exhibit 1 to Department's Motion) The letter states that CDP's failure to repair the protective covering of the SVE/AS system constitutes a violation of the COA and its amendments. The letter also contains the following paragraph:

> This is **[*5]** to advise you that DEP now considers the CDP's violation of the PPA [COA] to void the Covenant Not To Sue set forth in Paragraph 7, which states: "These covenants . . . may terminate at the sole discretion of the Department upon [CDP's] failure to meet any of the requirements of the CO&A." Please be advised that

---

[2] The COA is also sometimes referred to in the parties' filings as "CO&A" or as the Prospective ***Purchaser Agreement*** or PPA.

> this determination is not intended as an appealable action, and DEP will consider whether to exercise its enforcement options related to this determination as matters progress at the site. Immediate demolition of the buildings as CDP has repeatedly proffered will directly impact DEP's consideration of such enforcement options...

(*Id.*)

CDP appealed the letter to the Environmental Hearing Board (Board) on February 27, 2014. The Department has moved to dismiss the appeal on the grounds that the letter is not an appealable action. CDP filed a response to the motion on June 6, 2014, and the Department filed a reply on June 23, 2014.

We evaluate a motion to dismiss in the light most favorable to the non-moving party. *Harvilchuck* v. DEP, EHB Docket No. 2013-202-M (Opinion and Order issued April 1, 2014), *slip op.* at 7; *Teska v. DEP*, 2012 EHB 447, 452. A motion **[*6]** to dismiss may be granted where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. *Id.*

**Discussion**

The Department contends that the January 28, 2014 letter is not appealable under the terms of Paragraph 23 which states that any decision made under the COA is not final or appealable until such time as the COA is enforced or the Department pursues action against CDP. The January 28, 2014 letter specifically states that the Department "will consider whether to exercise its enforcement options. . .as matters progress at the site. " The Department argues that the purpose and intent of the letter was simply to notify CDP of the Department's determinations relating to Paragraph 6 of the COA (impairment of response actions) and Paragraph 7 (covenant not to sue) and not to initiate any enforcement action. .

In support of its argument, the Department directs the Board to our decision in *Chesapeake Appalachia, LLC v. DEP*, which was recently affirmed by the Commonwealth Court. See, *Chesapeake Appalachia, LLC v. DEP,* 2013 EHB 447, *aff'd,* No. 1570 C.D. 2013 (Pa. Cmwlth. April 3, 2014). Like the **[*7]** present case, the appellant in *Chesapeake* had entered into a COA that contained language similar to that of Paragraph 23:

> **Decisions Under Consent Order and Agreement.** Except for Paragraph 16.c., above [relating to transfers of interest in gas wells], any decision which the Department makes under the provision of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa.C.S. § 101. Any objection which Chesapeake may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

2013 EHB at 455 (quoting Paragraph 24 of the Consent Order and Agreement). The Department letter at issue in that case involved an evaluation of a corrective action plan submitted by the appellant in connection with the remediation of gas wells and directed the appellant to begin work on certain gas wells and to assess others. The Board found that the letter was not an appealable action because it did not create any new rights or obligations **[*8]** beyond those set forth under the COA. Additionally, the Board pointed to the language of the COA that preserved any appeals until such time as the Department enforced the COA:

> If we were to hold that the Department's letter is appealable, we would have effectively rendered Paragraph 24 meaningless. The letter undeniably expresses a "decision under the COA." By consent, such decisions were not supposed to be appealed. If this letter can be appealed, we are effectively nullifying the agreement. . . . A holding that the letter is appealable by Chesapeake is the same as a holding that the Board will not recognize the terms of a COA even though that COA, by definition, was not appealed and cannot now be appealed. We will have disregarded the parties' bargain, which normally would not be done even in an enforcement or contract action absent fraud, accident, or mistake.

*Id.* at 465-66 (*citing* Com. v. U.S. Steel, 325 A.2d 324, 328 (Pa. Cmwlth. 1974); *Global Eco-Logical Services v. DEP*, 2001 EHB 99, 102).

CDP argues that the Department's reliance on *Chesapeake* is misplaced because *Chesapeake* involved a letter requiring corrective action, [*9] and not the termination of a covenant not to sue. Similarly in *Consol Pennsylvania Coal Co. v. DEP and Citizens Coal Council*, 2013 EHB 683, *appeal docketed*, No. 2257 CD 2013 (Pa. Cmwlth. Jan. 27, 2014), which relied heavily on the *Chesapeake* decision, the Board found that two letters requiring corrective action under a COA were not appealable actions under the terms of the COA. In the present case, CDP argues that, whereas the letter in *Chesapeake* was nothing more than a request with which the appellant could choose to comply or ignore, the voiding of a covenant not to sue carries significant consequences, including interfering with CDP's ability to attract investors or to secure financing or local land approvals for the redevelopment project. In CDP's opinion, the voiding of the covenant is itself the penalty, and forestalling the right to challenge it until some unspecified time in the future violates CDP's right to due process. The question before us then is whether the Department's letter which announced the termination of the covenant not to sue is an appealable action under the terms of the COA.

In determining whether a letter or other [*10] communication by the Department is an appealable action, the Board looks at whether the communication affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." *Chesapeake, supra* at 461; *Felix Dam Pres. Ass'n. v. DEP*, 2000 EHB 409, 421-22 (citing 25 Pa. Code § 1021.2). Department "decisions" are appealable when they are "determination[s] which can be classified as quasi-judicial in nature and which affect rights or duties." *Sayreville Seaport Assocs. Acquisition Co., LLC v. DEP, 60 A.3d 867, 872 (Pa. Cmwlth. 2012)* (citing *DER v. New Enterprise Stone and Lime Co., Inc., 359 A.2d 845, 847 (Pa. Cmwlth. 1976)).*

CDP argues that it is adversely affected by the January 28, 2014 letter because the Department's letter voiding the covenant not to sue may have significant, far reaching circumstances, such as exposing CDP to claims by third parties and affecting its ability to attract investors or obtain land use approvals. However, these concerns are purely speculative, and the Department's letter places no new obligations, duties [*11] or liabilities on CDP. Moreover, one can make an argument that *any* decision by the Department under the COA can have a significant or far reaching effect. That is the reason that parties enter into an agreement of this type, in order to avoid piecemeal litigation each and every time the Department makes a decision or issues a letter related to the project in question.

We see no material difference between the January 28, 2014 letter and a notice of violation, which is generally not appealable. *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 375 ("We have consistently held that an NOV containing a listing of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action."), citing, *inter alia, Beaver v. DEP*, 2002 EHB 666, 674; *Lower Providence Twp. Mun. Auth. v. DEP*, 1996 EHB 1139, 1140-41; *The Oxford Corp. v. DER*, 1993 EHB 332, 333-34. A notice of violation merely serves to notify the recipient that the Department considers it to be in violation of some statutory provision or regulation, sets forth actions that the recipient must take in order to come into compliance, and may [*12] mention the possibility of future enforcement action. Similarly, the January 28, 2014 letter does not require anything of CDP. It simply notifies CDP that the Department considers it to be in violation of Paragraph 6 of the COA and states that the Department will *consider* future enforcement action.

In addition, Paragraph 7 contains the covenant not to sue in which the Department agrees, subject to the Reservation of Rights in Paragraph 8, "not to sue or take any administrative or judicial action against Developer ..." The provision further provides that the "covenant . . . may terminate at the Department's sole discretion upon Developer's failure to meet the requirements of the CO&A." The termination is contingent upon the Developer's violation of the COA and it is subject to the sole discretion of the Department according to the COA that CDP executed with the Department. At this point, the Department has announced in a letter that it has terminated the covenant not to sue as a result of an alleged violation of the COA and that it now believes it is entitled to sue CDP in the future, although no action to sue has begun. The Department's announcement of the termination of the covenant [*13] not to sue is therefore quite similar to the Department's announcement of violations in a notice of violations. The termination of the covenant not to sue alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations of the COA. CDP can challenge the termination and the underlying violations in the future when the Department decides to sue CDP.

Even if we accept CDP's argument that the Department's termination of the covenant not to sue has adversely affected its rights, privileges, immunities, duties, liabilities or obligations, Paragraph 23 of the COA, which CDP negotiated with the Department, deprives CDP of the opportunity to appeal it now. Paragraph 23 clearly states that *any* decision the Department makes under the COA shall not be treated as a final action of the Department and shall not be appealable to the Board until the COA is enforced. If the parties had wished to treat the voiding of the covenant not to sue differently than other decisions made under the COA, they very easily could have excluded it from the coverage of Paragraph 23. For example, in *Chesapeake*, the parties included an exception in the COA that would **[*14]** have allowed the appellant to appeal certain types of decisions. The language stated, "*Except for Paragraph 16.c., above [relating to transfers of interests in gas wells]*, any decision which the Department makes under the provisions of the Consent Order and Agreement . . . is intended to be neither a final action . . . nor an adjudication . . ." (emphasis added). In the present case, the parties could just have easily included similar language in Paragraph 23. [3] They did not do so, and the Board is loath to read language into the COA that the parties did not include. As we held in *Chesapeake*, the parties "should honor their agreement, and so should we." 2013 EHB at 464.

CDP argues that the Department should not have sole discretion to terminate the covenant not to sue without some meaningful opportunity for challenge **[*15]** or review of that decision. But isn't that precisely what CDP has agreed to? Paragraph 7 gives the Department the right to unilaterally void the covenant not to sue, and Paragraph 23 prohibits CDP from challenging this decision until such time as the COA is enforced. CDP argues that if the Department is allowed to terminate a covenant not to sue without any opportunity for the other party to challenge the decision, it will significantly undermine the Department's credibility in negotiating with redevelopers in the future. CDP may be correct; the Department's actions in this case may very well have a negative effect on its negotiations with future redevelopers wishing to avoid a similar fate as CDP. However, the Department assumes that risk, and it is not up to the Board to protect the Department, in any future negotiations with other parties, from any potential consequences of its actions in this matter involving CDP.

Finally, CDP disputes the Department's finding that it has exacerbated the existing contamination on the property and has interfered with the Department's response actions at the site. CDP asserts that the Department knew of its plans and appeared to be in agreement **[*16]** with them. While this may be a legitimate argument if and when the Department enforces the COA, it is premature at this stage of the proceeding.

Because we conclude that the Department's January 28, 2014 letter is not appealable, we will enter an order granting the Department's motion to dismiss.

**ORDER**

AND NOW, this 17th day of July, 2014, it is hereby **ORDERED** that the Department of Environmental Protection's Motion to Dismiss is **granted** and this appeal is marked closed and discontinued.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND, Chief Judge and Chairman**

**MICHELLE A. COLEMAN, Judge**

**BERNARD A. LABUSKES, JR., Judge**

**RICHARD P. MATHER, SR., Judge**

**Dissent By:** BECKMAN

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[3] For example, the language of Paragraph 23 could have been drafted as follows: "*Except for Paragraph 7 [relating to the Department's Covenant Not to Sue]*, any decision that the Department makes under the provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board . . ."

**Dissent:**

**DISSENTING OPINION OF JUDGE BECKMAN**

**By Steven C. Beckman, Judge**

The posture of this case is a pending motion to dismiss by the Department. The Majority identifies the standard for evaluating a motion to dismiss; that is, the Board evaluates the motion in the light most favorable to the non-moving party and will grant the motion only where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. *See* Majority Op. at 4. An important **[*17]** corollary of that standard is that *all reasonable inferences must be drawn in favor of the nonmoving party. See Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. When reasonable inferences favorable to Constitution Drive Partners, L.P. ("CDP") are properly drawn in this case, the inevitable conclusion is that the Department's motion must be denied at this stage of the litigation.

In my opinion, the issue presented by the Motion to Dismiss raises two questions. The first is whether the Department's January 28, 2014 letter ("Letter") constitutes an appealable action. The second question is, if the Letter is appealable, what is the impact of Paragraph 23 of the Prospective Purchaser Consent Order and Agreement ("COA")?

In the Letter, the Department noted its finding that a contractor for CDP destroyed a liquid boot that capped the Soil Vapor Extraction/Air Sparging ("SVE/AS") system and stated that "[n]eedless to say, this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the PPA." The Department requested that CDP repair the damaged boot but that effort was apparently **[*18]** delayed while CDP considered demolishing buildings at the site. The Department concludes this section of the Letter by stating that "nothing has occurred at the Bishop Tube site, and CDP continues to be in violation of the PPA and its Amendments." Had the letter stopped there, I would agree with the Majority that there was "no material difference between the January 28, 2014 letter and a notice of violation, which is generally not appealable. " Majority Op. at 7. The Letter, however, goes further. In the next paragraph, it advises CDP that, as a result of the alleged violations, the Department has determined that the Covenant Not to Sue ("Covenant" ) found in Paragraph 7 of the COA is void. It is this determination memorialized in the Letter that is the main subject of CDP's appeal.

As the Majority states in its opinion, in evaluating whether a letter from the Department is an appealable action, the Board looks at whether the action outlined in the communication affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." Majority Op. at 6 (citing *Chesapeake Appalachia v. DEP*, 2013 EHB 447, 461). In applying this standard, the **[*19]** Majority dismisses CDP's concerns about the impact of the voiding of the Covenant as "purely speculative" and finds that the Letter places no new obligation, duties or liabilities on CDP. They assert that the Letter is akin to a notice of violation in that it simply notifies CDP of the alleged violations and that the Department will consider future enforcement. Specifically addressing the termination of the Covenant, the Majority states that "the termination of the covenant not to sue alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations of the CO&A." Majority Op. at 8.

Dismissing CDP's concerns as speculative and treating the Department's decision to void the Covenant as a simple notification ignores the reality of the agreement between the parties set forth in the COA and the real impact of that decision. At the time the COA was executed, CDP represented that it had not caused or contributed to, and was not responsible for any of the identified contamination on the site and the Department agreed that it was not aware of any information contrary to CDP's representation. Despite having no legal responsibility for the contamination **[*20]** issues at the site, CDP agreed, pursuant to the COA, to be legally bound to conduct certain work to address the contamination at the site. In return for its willingness to take on this work, CDP received the Covenant along with the contribution protection found in Paragraph 9 of the COA.

The Covenant (along with the contribution protection) was the major benefit of the bargain for CDP in entering the COA in the first place. Even the Majority recognizes this fact when it states that CDP entered into a COA with the Department "in which CDP agreed to undertake certain performance measures at the site *in exchange for protection from liability*" Majority Op. at 2 (emphasis added). This protection from liability is the key to allowing development of these types of brownfield sites and plays a significant role in the ability of developers like CDP to obtain the financing necessary to bring these sites back in to productive use. The Department's decision to void the Covenant directly eliminates the central benefit that it provided to CDP under the COA. The Board must draw inferences in favor of CDP, and in doing so, it cannot so readily dismiss CDP's alleged injuries as speculative, or **[*21]** find that this action by the Department was analogous to a mere notification of violation. In my opinion, the Department's decision set forth in the Letter to void the Covenant clearly *enforces* the terms of the COA, and affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations" of CDP. As such, under our prior rulings, the Letter is a final action of the Department that is subject to appeal to the Board.

The conclusion that the voiding of the Covenant is a final action subject to Board jurisdiction is supported by a review of another provision of the COA. The Majority states that the Department's action simply "alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations," but fails to note that the Department did *not* need to void the Covenant in order to put CDP on notice of the alleged violations and allow for future enforcement. Under the terms of the COA, the Department already has the authority to bring a future enforcement action for any alleged violations. Under the Reservation of Rights found at paragraph 8 of the COA, CDP and the Department agreed that the Covenant Not to Sue **[*22]** "*shall not apply* to the following claims by the Department against Developer for: (1) Failure to meet the requirements of this CO&A" (emphasis added). In light of that reservation, the decision to void the Covenant is clearly more than a notification of alleged violations of the COA and the potential for future enforcement related to those violations. If it is only intended as a notice of violation, why void the Covenant in the first place and not just rely on the reservation of rights provided in Paragraph 8?

It certainly would have been less problematic to have relied on the clear authority under the reservation of rights. It is not difficult to surmise, particularly when viewing the matter in the light most favorable to CDP--as we are required to do--that the Department knew the value of the Covenant to CDP and that voiding it would have a significant impact on CDP even without any further enforcement. It is reasonable to further draw the inference that the Department chose this course of action; that is, *enforcing* a distinct provision of the COA, to pressure CDP to complete the work requested by the Department. Under the terms of the COA, the Department had a clear right **[*23]** to unilaterally terminate the Covenant upon its determination that CDP failed to meet certain requirements of the COA as a result of the alleged violations. I am not questioning the Department's strategic decision to void the Covenant; however, the decision to do so should not be shielded from Board review simply by a claim that the Department's action was only advisory.

Because I find that the voiding of the Covenant as set forth in the Department's Letter is an appealable action, it is necessary to consider the second question posed by the issue in this case, that is, what is the impact of Paragraph 23 of the COA on CDP's current appeal? The relevant part of Paragraph 23 provides that "[A]ny decision that the Department makes under the provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board or to any Court until such time as the Department *enforces this CO&A or pursues equitable, administrative, civil, or criminal action* . . . ." (emphasis added). The Department's voiding of the Covenant is clearly a decision of the Department within the meaning of this paragraph and none of the parties **[*24]** appear to seriously dispute that fact. Further, I agree with the Majority that the parties could have drafted the language of this provision to specifically exclude the decision to terminate the Covenant, but the fact that they did not do so here is not determinative in my opinion.

The issue, as I see it, is whether any of the triggering actions by the Department that would lift the prohibition on an appeal have taken place. In other words, has the Department enforced the COA or otherwise pursued equitable, administrative, civil or criminal action? Given that the Majority finds the Letter to be analogous to a notice of violation, the inference they draw is that no enforcement action has taken place. This view is consistent with a narrow interpretation of what constitutes enforcement under Paragraph 23. The Majority apparently reads "enforcement" in that paragraph to simply mean the type of enforcement typical of the Department, that is, pursuing administrative or civil action against a party.

While I do not disagree that that reading is plausible, it essentially discards one clause from the Paragraph and ignores the use of the conjunction "or" in the key phrase. From the actual wording **[*25]** of the clause agreed to by the parties, it is just as plausible to draw the inference that the parties intended to distinguish between "enforc[ing] this CO&A" and "pursu(ing) equitable, administrative, civil or criminal action. " Under this reading, enforcing the COA would not involve the Department's typical enforcement action as the Majority finds, but rather incorporates the Department's exercise of its contractual right to void the Covenant. Given that the Board must evaluate this Motion in the light most favorable to CDP, this approach to the meaning of Paragraph 23 should be taken where there is nothing in the record to indicate that another interpretation was intended by the parties. In the end, both questions raised by the issue in this Motion to Dismiss are close calls. Our standard of review, however, should lead the Board to resolve close questions in favor of the non-moving party where reasonable inferences support that result. Therefore, because I conclude that doing so in this case requires that the Motion be denied, I dissent from the Majority's decision to grant the Department's Motion.

**ENVIRONMENTAL HEARING BOARD**

**STEVEN C. BECKMAN**
**Judge**

**DATED: July [*26] 17, 2014**

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"enforcement" in that paragraph to simply mean the type of enforcement typical of the Department, that is, pursuing administrative or civil action against a party.

While I do not disagree that that reading is plausible, it essentially discards one clause from the Paragraph and ignores the use of the conjunction "or" in the key phrase. From the actual wording **[*25]** of the clause agreed to by the parties, it is just as plausible to draw the inference that the parties intended to distinguish between "enforc[ing] this CO&A" and "pursu(ing) equitable, administrative, civil or criminal action. " Under this reading, enforcing the COA would not involve the Department's typical enforcement action as the Majority finds, but rather incorporates the Department's exercise of its contractual right to void the Covenant. Given that the Board must evaluate this Motion in the light most favorable to CDP, this approach to the meaning of Paragraph 23 should be taken where there is nothing in the record to indicate that another interpretation was intended by the parties. In the end, both questions raised by the issue in this Motion to Dismiss are close calls. Our standard of review, however, should lead the Board to resolve close questions in favor of the non-moving party where reasonable inferences support that result. Therefore, because I conclude that doing so in this case requires that the Motion be denied, I dissent from the Majority's decision to grant the Department's Motion.

**ENVIRONMENTAL HEARING BOARD**

**STEVEN C. BECKMAN**
**Judge**

**DATED: July [*26] 17, 2014**

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# ATTACHMENT 6

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SOUTHEAST REGIONAL OFFICE

January 28, 2014

Mr. Brian M. Kroker
Vice President, Asset Management & Operations
O'Neill Properties Group
OPG Property Management Corporation
2701 Renaissance Boulevard, 4th Floor
King of Prussia, PA 19406

Dear Mr. Kroker:

As you know, the Department of Environmental Protection (DEP) has been working with Roux Associates, as contractor to Johnson Matthey and Whitaker Corporation, under a federal Consent Decree, to address the release or threatened release of hazardous substances associated with the former Bishop Tube facility now owned by Constitution Drive Partners, LLC (CDP). This work has entailed both remedial investigatory work and implementation of in situ interim response actions within the building areas. As you also know, DEP formally authorized Roux Associates to implement a field study last winter for an anaerobic remediation process within Building 8 in the location of the Soil Vapor Extraction/Air Sparging (SVE/AS) system that was previously installed at the site and capped with a liquid boot. The SVE/AS system was installed in the context of an original Prospective Purchaser Agreement (PPA) with CDP and two Amendments thereto. The last Amendment to the PPA allowed CDP to cash-out of its potential liability to DEP for releases associated with Bishop Tube under certain conditions. One of those conditions, applicable to both the original PPA and the subsequent Amendments, states that CDP "shall not contribute to or otherwise exacerbate . . . any Existing Contamination attributable to the Site". Another condition states that CDP "shall not interfere with or impair any response actions taken by the Department or any other person or entity under the auspices of the Department."

In the early summer of 2011, a contractor for CDP destroyed the liquid boot while performing metals recovery activities within Building 8. Needless to say, this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the PPA and its two Amendments. DEP requested that CDP repair the liquid boot to allow for the continued operation of the SVE/AS system. This was never done, in continued violation of the PPA and its two Amendments. Last spring, in the context of other discussions relating to potential redevelopment of the site, CDP informed DEP that it was looking into demolishing the buildings on the site in order to enhance the potential for redevelopment. Because demolition of the buildings would simplify implementation of Roux Associates' proposed field study, DEP indicated its support for demolition of the buildings in lieu of repair to the liquid boot, even so far as sending a letter to East Whiteland Township in support of CDP's application for a demolition permit.



Ex. A

DEP also met with representatives of VIST Bank back in September in order to encourage them to concur with CDP's demolition of the buildings, something that later became moot once a new investor was secured by CDP. Lastly, during a meeting in mid-December, Regional Director Cosmo Servidio was assured by Mr. O'Neill that the demolition was going forward immediately. Notwithstanding that assurance, nothing has occurred at the Bishop Tube site, and CDP continues to be in violation of the PPA and its Amendments.

This is to advise you that DEP now considers the CDP's violation of the PPA to void the Covenant Not To Sue set forth in Paragraph 7, which states: "These covenants . . . may terminate at the sole discretion of the Department upon [CDP's] failure to meet any of the requirements of the CO&A." Please be advised that this determination is not intended as an appealable action, and DEP will consider whether to exercise its enforcement options related to this determination as matters progress at the site. Immediate demolition of the buildings as CDP has repeatedly proffered will directly impact DEP's consideration of such enforcement options. In this regard, please be advised that DEP has instructed Roux Associates to schedule drilling activities in Building 8 for implementation of the field study identified above by the fourth week in February.

Please notify us by February 7, 2014, of your intention and schedule for the demolition of the building. Depending on your response, we may schedule a meeting to coordinate the remedial activities at the site.

If you have any questions, please feel free to contact Mr. Dustin Armstrong at 484.250.5723.

Sincerely,

Stephan Sinding
Regional Manager
Environmental Cleanup and Brownfields

cc: Mr. Servidio
Andy Hartzell, Esq.
Mr. R. Patel
Mr. Armstrong
Re 30 (eh14ecb)023-5

# ATTACHMENT 7

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Constitution Drive Partners, L.P., Petitioner | : | |
| | : | No. 643 C.D. 2019 |
| v. | : | |
| | : | Argued: June 9, 2020 |
| Department of Environmental Protection, Respondent | : | |

BEFORE: HONORABLE P. KEVIN BROBSON, Judge[1]
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION BY
JUDGE McCULLOUGH FILED: March 5, 2021

Constitution Drive Partners, L.P. (Constitution Drive) petitions for review from the April 26, 2019 order and adjudication of the Environmental Hearing Board (Board), declaring that the 2007 and 2010 amendments (2007 Amendment and 2010 Amendment, respectively, the Amendments, collectively) to a 2005 prospective purchaser agreement (2005 PPA) between Constitution Drive and the Department of Environmental Protection (Department) were null and void. Specifically, the Board concluded that the Amendments were arbitrary and capricious pursuant to section 1113 of the Hazardous Sites Cleanup Act (HSCA),[2] 35 P.S. §6020.1113.[3]

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[1] This case was assigned to the opinion writer before January 4, 2021, when Judge Brobson became President Judge.

[2] Act of October 18, 1988, P.L. 756, *as amended,* 35 P.S. §§6020.101-6020.1305.

**(Footnote continued on next page...)**

In part, section 1113 of the HSCA states that "[w]hen a settlement is proposed in any proceeding brought under this act, notice of the proposed settlement shall be sent to all known responsible persons and published in the *Pennsylvania Bulletin* and in a newspaper of general circulation in the area of the release." 35 P.S. §6020.1113.[4] Section 1113 of the HSCA also provides that a proposed settlement may be set aside as void if the Board finds that it is "arbitrary and capricious on the basis of the administrative record." *Id.* Here, the Department did not publish and open for comments the 2007 Amendment and 2010 Amendment until the spring and early summer of 2017, and the Amendments did not become final until the Department issued its response to the comments in January 2018. The predominant legal issue is whether the Board erred in determining that "[t]he Amendments were never properly noticed and made final in accordance with [s]ection 1113 of the HSCA and are,

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[3] The Delaware Riverkeeper Network, and Maya van Rossum, the Delaware Riverkeeper (Riverkeeper), appealed the Amendments to the Board and are participating as intervenors in this appeal.

[4] In full, section 1113 of the HSCA, titled "Notice of proposed settlement," provides as follows:

> When a settlement is proposed in any proceeding brought under this act, notice of the proposed settlement shall be sent to all known responsible persons and published in the *Pennsylvania Bulletin* and in a newspaper of general circulation in the area of the release. The notice shall include the terms of the settlement and the manner of submitting written comments during a 60-day public comment period. The settlement shall become final upon the filing of the [D]epartment's response to the significant written comments. The notice, the written comments and the [D]epartment's response shall constitute the written record upon which the settlement will be reviewed. A person adversely affected by the settlement may file an appeal to the [B]oard. The settlement shall be upheld unless it is found to be arbitrary and capricious on the basis of the administrative record.

35 P.S. §6020.1113.

therefore, void because the Department's attempt to notice and finalize the Amendments in 2018 were inadequate, untimely[,] and failed to identify and account for the changed circumstances and conditions at the [s]ite." (Board's Conclusion of Law (C.O.L.) No. 6.)

Upon review, we conclude that the Department's significant delay—eight years, on average—in publishing notice of and finalizing the 2007 Amendment and the 2010 Amendment, in and of itself, does not render the Amendments arbitrary and capricious. Instead, the delay only served to postpone the date on which the Amendments became final for purposes of section 1113 of the HSCA. Nonetheless, we conclude that the changed circumstances that occurred at the site during this delay, and the fact that the Amendments failed to account for them, coupled with the resulting effect of depriving the public of the opportunity to provide meaningful comment on the Amendments, constituted a sufficient basis for the Board to declare the Amendments arbitrary and capricious and a legal nullity. Accordingly, we will affirm the Board.

**Background**

The facts and procedural history of this case are summarized as follows:

> [The Riverkeeper has] appealed the Amendments to the 2005 PPA entered into by [the Department] and [Constitution Drive]. The 2005 PPA was executed on March 17, 2005, in the form of a consent order and agreement [CO&A] and addressed an abandoned steel tube manufacturing facility located in East Whiteland Township, Chester County, known as the Bishop Tube HSCA Site ("Site"). The Site has a history of contamination with hazardous waste, primarily trichloroethene ("TCE"). Constitution Drive bought the contaminated property originally with the intent of redeveloping it for commercial purposes. Pursuant to the 2005 PPA, Constitution Drive agreed by March 1, 2009, to undertake an investigation and/or remediation of soils at the

Site necessary to demonstrate attainment with a nonresidential statewide health standard or site-specific standard . . . in accordance with a remedial action work plan that was attached and incorporated into the PPA. In exchange for Constitution Drive's work relating to the existing contamination at the site, the Department entered into a covenant not to sue Constitution Drive and agreed that Constitution Drive was afforded contribution protection pursuant to [the] HSCA . . . .

The 2005 PPA was amended twice, the first time on January 22, 2007, and the second time on June 4, 2010. The 2007 Amendment "amended and restated" Constitution Drive's remedial obligations established under the 2005 PPA. The 2007 Amendment mostly concerned the installation of an air sparging/soil vapor extraction system ("AS/SVE system"), which was intended to expedite the remediation of soils and groundwater at the Site. Among other things, Constitution Drive was required to operate the system for 60 days under certain specifications while removing an average of ten pounds of volatile organic compounds (VOCs) per day in order to complete its remedial obligations. After Constitution Drive had fulfilled these obligations, it would be released of its remedial obligations at the Site and the Department would then assume operation of the AS/SVE system. Unfortunately, the AS/SVE system never worked as planned and Constitution Drive could not get it to meet the agreed-upon performance standards.

The Department and Constitution Drive then entered into a second amendment to the 2005 PPA in June 2010 that again "amended and restated" Constitution Drive's remedial obligations. Under the 2010 Amendment, Constitution Drive was to repair the AS/SVE system and get it to operate continuously without incident for 72 hours (a significantly shorter time than the 30-day startup period and 60-day operational period called for under the 2007 Amendment). Constitution Drive was also required to pay the Department $30,000, repair a road, and install some security fencing. Constitution Drive completed its remedial obligations under the 2010 Amendment, and in December 2010, the Department released Constitution Drive from all further remedial obligations established in the 2005 PPA and the Amendments.

A number of additional events involving Constitution Drive have taken place at the Site after the remedial tasks were completed and the Department's release letter was issued in December 2010. In June 2011, the Department discovered that a contractor for Constitution Drive had damaged the AS/SVE system and rendered it inoperable. In July 2011, the Department requested that Constitution Drive repair the AS/SVE system. Constitution Drive and the Department appear to have conducted discussions regarding the continuing necessity and viability of the AS/SVE system but, as of January 2014, the AS/SVE system had not been repaired. In a January 2014 letter, the Department declared the covenant not to sue to be void because of Constitution Drive's failure to repair the AS/SVE system. The covenant not to sue was important to Constitution Drive and its efforts to redevelop the Site and formed part of the consideration for the 2005 PPA and the Amendments. Constitution Drive appealed the January 2014 letter to the Board, but the Board ruled that the letter was not an appealable action by the Department. Also, in 2014, East Whiteland Township changed the zoning at the Site from industrial to residential at the request of Constitution Drive, which decided to pursue a residential development at the Site after being unsuccessful in redeveloping it for commercial purposes. Finally, in 2016/2017, the Department reviewed and commented on a new remediation workplan for the Site proposed by Constitution Drive that provided for targeted soil excavation that Constitution Drive claimed would reduce or eliminate the risk of exposure to the compounds of concern for the future occupants. In addition to these post-2010 actions involving Constitution Drive, there also were other remediation activities and [the] Department['s] actions at the Site that did not directly involve Constitution Drive based on documents included in the administrative record.

* * *

Although the Amendments were drafted and signed in 2007 and 2010, due to what the Department[,] without any record support[,] terms an "inadvertent administrative oversight,"

> the notice required under [s]ection 1113 was not published for either the 2007 Amendment or the 2010 Amendment until 2017, seven and ten years after the fact. A notice for both of the Amendments was published in the *Pennsylvania Bulletin* on April 1, 2017, and notice was published in *The Daily Local News* on March 18, April 1, April 29, and June 14, 2017. In response to the Department's notice, extensive comments were submitted, including by the Riverkeeper, East Whiteland Township, local residents, and potentially responsible parties [(PRPs)]. The Department issued its response to those comments on January 26, 2018. Accordingly, even though Constitution Drive and the Department [had already undertaken] performance pursuant to the 2007 and 2010 Amendments, the Amendments did not legally become final until the Department issued its comment response document in January 2018.

(Board's decision at 18-19) (internal citations omitted).

On February 21, 2018, the Riverkeeper filed an appeal with the Board challenging the Amendments. After conducting a conference and issuing orders pertaining to case management and discovery requests, the parties agreed upon the contents of the administrative record, and the Board accepted that record as the basis for its review.

At the conclusion of its review of the record and consideration of the arguments and written submissions of the parties, the Board issued its April 26, 2019 order and adjudication. In its adjudication, the Board first stated that it "ha[d] not previously addressed the issue presented in this case by the Riverkeeper's claim of untimely and inadequate notice of a HSCA settlement agreement." *Id.* at 23. Acknowledging that the Department "identified" *Chirico v. Department of Environmental Protection* (Pennsylvania Environmental Hearing Board, 2002 EHB 25, No. 2001-048-MG, filed January 28, 2002),[5] "as the only prior case in which the Board

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[5] The Board's decision in *Chirico* is available at:

**(Footnote continued on next page...)**

has considered a challenge to a similar agreement," and the Department cited that case as controlling authority, the Board disagreed, finding that "[t]he facts in *Chirico* regarding the Department's actions in finalizing the agreement under [s]ection 1113 of [the] HSCA are completely different." (Board's decision at 23.) In distinguishing its decision in *Chirico*, the Board stated:

> In *Chirico*, the agreement was entered into on May 24, 2000, and notice of the agreement was published in the *Pennsylvania Bulletin* a month later on June 24, 2000. There is nothing in the Board's opinion in *Chirico* to suggest that the challengers raised inadequate wording in the public notice as an issue in the case. Further, there is no indication that any significant changes took place at the site in *Chirico* in the one month of time that elapsed between the execution of the agreement and the publication of the required notice in the *Pennsylvania Bulletin*.

(Board's decision at 23-24.)

The Board also considered other cases, namely those that "have involved challenges to permitting actions by the Department and have raised both untimely notice and inadequate notice issues." *Id.* at 24. However, the Board stated that it was "not convinced that these permitting cases are a good analog for [the] current case because of their different and distinct notice requirements when compared to those in [s]ection 1113." *Id.*

The Board continued:

> [T]he Riverkeeper's notice arguments have merit under the relevant HSCA statute and the unique facts present in this case. The notice and public comment process play a key role in HSCA settlements under the terms of [s]ection 1113 of [the] HSCA. The legislature expressly provided that a settlement agreement is not final until certain enumerated

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http://ehb.courtapps.com/content/adjudications/Adjudications&Opinions-2002-Vol%201%20(pp.1-334).pdf (last visited February 23, 2021).

> steps are completed including: (1) notice is sent to all responsible parties and published in the *Pennsylvania Bulletin* and a local newspaper; (2) a 60-day window for public comment is completed; and (3) the Department responds to the significant written comments. Consistent with the central role that the notice and comment procedures created by the legislature play in HSCA settlements, we conclude that the Department is required to provide a timely and meaningful notice and comment process in order to finalize HSCA settlements under [s]ection 1113. The steps taken by the Department in this case were woefully inadequate in satisfying this requirement.

(Board's decision at 24-25.)

After providing this commentary, the Board concluded:

> [T]he Department's egregiously late public notice is a clear violation of the requirement that notice of a HSCA settlement be published when it is proposed. There is no reasonable reading of the [s]ection 1113 language that allows for publication seven and ten years later and the Department's excuse—that there was an "inadvertent administrative oversight"—finds no support in the administrative record and in any event is hardly a legitimate excuse. This is not a case where the required notice was a few weeks or even a few months late, a circumstance where any impact from the late notice might be negligible and/or readily mitigated by subsequent publication. The Department's action initially placed the public, and now places the Board, in a bizarre situation of evaluating the propriety of the Department finalizing the Amendments to the 2005 PPA years removed from the execution of those Amendments with Constitution Drive. The lapse in time presents obvious challenges for the public's ability to provide timely and meaningful comment on the Amendments.

(Board's decision at 25.)

In addition, the Board found that "[t]he problems created by the unacceptably late publication of the notice [were] compounded . . . by the shortcomings in the content of the notice and how it fail[ed] to address the changed circumstances at the Site between 2010 and 2017." *Id.* at 25. The Board then engaged in a discussion of those circumstances, namely with respect to issues regarding the AS/SVE system and the fact that zoning of the Site had changed from industrial to residential in 2014:

> The Riverkeeper's comment says that the AS/SVE system "will not protect the public health, safety and welfare and the natural resources of this Commonwealth from the short-term and[ ]long-term effects of the release of hazardous substances and contaminants into the environment from the . . . [S]ite." The AS/SVE system, of course, was not part of the 2005 PPA and only became part of the remediation during the 2007 Amendment. The Department deals with this comment in its response by saying the actions taken pursuant to the 2005 PPA and the Amendments are just an interim response and a final response action is forthcoming . . . . However, this is a bit of a dodge that is not particularly helpful in evaluating whether the Amendments should have been finalized by the Department. The AS/SVE system was almost a complete failure and appears to have not materially advanced the cleanup of the [S]ite, yet the Department seems unwilling to acknowledge this reality . . . . The Amendments are premised on basic assumptions that have not existed for years.
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> * * *
>
> One commenter noted that "[n]owhere in the 2007 [Amendment] did the parties address whether these remediation measures were appropriate for property that would later be rezoned for residential use." . . . [T]he Department [did not] make any mention in the comment response document of the ongoing discussions between itself and Constitution Drive regarding the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation that appears related to the zoning change and revised development plans. While zoning decisions themselves are largely outside of the Department's authority, that is not to say that zoning decisions do not influence the cleanup for the [S]ite. The 2007 Amendment makes clear that remediation must be consistent with the Site's intended use after redevelopment. . . . The Department could have changed the

> Amendments in light of its understanding of the proposed use of the property in 2018. The Department never explains why, based on its understanding of the zoning now, and the apparent ongoing efforts surrounding the 2016/2017 Remediation Scope of Work, these Amendments are still appropriate to finalize. The Department cannot . . . respond[] to the public comments it did receive as though nothing had changed at the Site or relative to the provisions of the Amendments since 2010.

*Id.* at 26-30. Ultimately, the Board found that, in light of the information that the Department provided in the notice in the *Pennsylvania Bulletin* and *The Daily Local News*, "the notice [would be] wholly unhelpful to anyone who was not paying close attention to the developments over the course of the last decade." *Id.* at 26.

Next, the Board determined that "[t]he Department's response to [the] comments [was] at times [] frustrating." *Id.* Notably, the Board found that "the Department repeatedly trie[d] to minimize the importance of the Amendments by assuring the commenters that further investigation and cleanup is needed and a final response action will come someday." *Id.* at 27. Based on the overall nature and substantive content of the Department's response, the Board believed that "[t]he Department [went] through the motions but [did] not earnestly address some of the comments, and its response almost treats it as a foregone conclusion that the Amendments would be finalized, without modification or further consideration." *Id.* at 28. Moreover, and in a similar vein, the Board determined that "[t]he Department's response to extensive comments about the change in zoning of the . . . [S]ite from industrial to residential [was] unsatisfying." *Id.* In this regard, the Board reviewed and discussed some of the Department's comments and stated: "There is very little support in the administrative record to show that the Department gave serious consideration to the change in zoning from industrial to residential." *Id.* at 29.

Accordingly, for these reasons, the Board sustained the appeal of the Riverkeeper. The Board concluded that "[t]he Department's action to finalize the Amendments in the face of the unique circumstances of this case [was] arbitrary and capricious" and declared that "the 2007 Amendment and the 2010 Amendment [were] void." *Id.* at 30.

**Discussion**

On appeal,[6] Constitution Drive contends that the Board erred in concluding that the Amendments were arbitrary and capricious. As an overarching theme, Constitution Drive asserts that "the Department complied with the requirements of [the] HSCA and presented a reasoned explanation for its decision to finalize the 2007 and 2010 Amendments." (Constitution Drive's Br. at 15.) Constitution Drive breaks down its thesis into three separate arguments.

In its first contention, Constitution Drive asserts that, "[a]lthough the Department failed to provide public notice of the 2007 and 2010 Amendments at the time that they were entered, the agency cured that failure when it published public notice in 2017 and opened the Amendments to public comment." (Constitution Drive's Br. at 15-16.) For support, Constitution Drive places heavy reliance on *Groce v. Department of Environmental Protection*, 921 A.2d 567 (Pa. Cmwlth. 2007). Constitution Drive further states that "it is [] important to note that no development occurred at the [] Site between the date the Amendments were entered and the date that

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[6] "Our appellate review of the [Board's] adjudications is limited to determining whether the [Board] committed an error of law, [whether it] violated constitutional rights, or whether its material findings of fact are supported by substantial evidence. On issues of law, our standard of review is *de novo* and our scope of review is plenary." *Sunoco Partners Marketing and Terminals, L.P. v. Clean Air Council*, 219 A.3d 280, 286 n.17 (Pa. Cmwlth. 2019) (internal citation omitted).

the Department published notice of the Amendments." (Constitution Drive's Br. at 21.)

For its part, the Department argues that it acted within its authority and discretion when it entered into the Amendments and furthered the purpose of the HSCA. In particular, the Department contends that the intent of—and reasons underlying—the Amendments were to successfully remove source contamination from the subsurface of the Site, which directly furthered the HSCA's goal to "protect public health and safety and the environment." (Department's Br. at 15.) The Department thus maintains that the Amendments were not arbitrary or capricious because its decisions to enter into the Amendments were based on rational reasons.

Further, the Department argues that the Board's "holding fundamentally misapplie[d] the standard of review set forth in the language of [s]ection 1113 and overlook[ed] the fact that the obligations imposed on [Constitution Drive] by the two Amendments had already been fulfilled years earlier." (Department's Br. at 20.) In asserting that the Board misapplied the arbitrary and capricious standard, the Department posits: "Nowhere does the Riverkeeper contend that the Amendments *themselves* were arbitrary and capricious at the time they were entered." *Id.* (emphasis in original). Rather, the Department argues, "both the Riverkeeper and Board cloud the issue of whether the settlements . . . were reasonable and instead focus on the Department's procedural mistake in failing to publish notice at the time the Amendments were signed." *Id.*

Here, the Board based its decision on section 1113 of the HSCA and, as such, we begin with an examination of that statute. Titled "Notice of proposed settlement," section 1113 of the HSCA provides as follows:

> When a settlement is proposed in any proceeding brought under this act, notice of the proposed settlement shall be sent

> to all known responsible persons and published in the *Pennsylvania Bulletin* and in a newspaper of general circulation in the area of the release. The notice shall include the terms of the settlement and the manner of submitting written comments during a 60-day public comment period. The settlement shall become final upon the filing of the [D]epartment's response to the significant written comments. The notice, the written comments and the [D]epartment's response shall constitute the written record upon which the settlement will be reviewed. A person adversely affected by the settlement may file an appeal to the [B]oard. The settlement shall be upheld unless it is found to be arbitrary and capricious on the basis of the administrative record.

35 P.S. §6020.1113.

It is a well-settled maxim that where the words of a statute are clear and free from ambiguity, the legislative intent is to be gleaned from those very words, and the plain language is not to be disregarded under the pretext of pursuing its spirit. *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 664 A.2d 84, 87 (Pa. 1995); *Coretsky v. Board of Commissioners of Butler Township*, 555 A.2d 72, 74 (Pa. 1989). Viewing the plain language of the statute in a commonsense fashion, we agree with the Board that there are three requisites that need to be satisfied before a settlement agreement can be deemed final and/or valid: (1) notice must be sent to all responsible parties and published in the *Pennsylvania Bulletin* and a local newspaper; (2) a 60-day window for public comments must be provided; and (3) the Department must issue a response to the written comments.

Regarding the first requisite, *i.e.*, notice, the phrases in section 1113 of the HSCA, "[w]hen a settlement is proposed" and "notice of the proposed settlement," clearly envision that the terms and conditions of the settlement agreement have been memorialized in writing. In unambiguous words, the statute makes plain that the notice requirements are intended to provide the public with the opportunity to comment upon the settlement agreement at a point when the settlement agreement is merely a "proposal" and not set in stone. The language of section 1113 also leaves no room for doubt that the terms and obligations of a settlement agreement do not take effect or become final until the comment period has passed, at which point the settlement agreement is subject to an appeal by an aggrieved party to the Board. While the Department argues that "the obligations imposed on [Constitution Drive] by the two Amendments had already been fulfilled years earlier," (Department's Br. at 20), this contention effectively bypasses the procedure for attaining finality in section 1113 of the HSCA and reduces the statute to a mass of superfluous words. Stated differently, the entire mechanism of section 1113 would be defeated if the duties and obligations of a settlement agreement could be completed before the settlement agreement goes through the notice, comment, and response phases and becomes final, valid, and effective for purposes of section 1113.

Moreover, even if the terms and conditions of the Amendments were "reasonable," as the Department asserts, this is beside the point because the reasonableness of a settlement agreement cannot serve as a substitute for the requirement that proper notice be made to the public. Indeed, notice to the public is designed to permit the public to contest and challenge whether the settlement agreement is in fact reasonable. Here, the 2005 PPA complied with the procedure in section 1113 of the HSCA; however, the 2007 Amendment and the 2010 Amendment altered the "work obligations" of Constitution Drive and thereby modified the 2005 PPA. (Board's Findings of Fact (F.F.) Nos. 22-39.) Notably, in exchange for Constitution Drive's assumption of remediation duties, "the Department in the 2005 PPA covenanted not to sue Constitution Drive for any claims relating to the historic contamination at the Site" and "provided . . . that Constitution Drive was entitled to contribution protection pursuant to [s]ection 705 of [the] HSCA, 35 P.S. §6020.705." (Board's F.F. Nos. 33-34.)

Presumably, the Department believed that, due to evolving circumstances, the 2005 PPA had to be changed and that these changes were substantive and material—so much that the 2005 PPA needed to be formally amended through the Amendments. In its adjudication, the Board found that Paragraph 3 of the 2005 PPA imposed remediation duties on Constitution Drive; "[t]he 2007 Amendment 'amended and restated' Paragraph 3 of the 2005 PPA in several key respects"; and "[t]he 2010 Amendment [also] 'amended and restated' Paragraph 3 of the 2005 PPA in several key respects." (Board's F.F. Nos. 18, 26, 36.) Notably, Constitution Drive and the Department do not challenge these findings on the ground that they are not supported by substantial evidence, and it is well-settled that "[u]ndisputed findings of fact are binding on this Court." *West Perry School District v. Pennsylvania Labor Relations Board and West Perry Educational Support Personnel Association, PSEA/NEA*, 752 A.2d 461, 465 n.5 (Pa. Cmwlth. 2000).

Nonetheless, in an apparent attempt to downplay or minimize the effect of these findings, Constitution Drive argues that it is significant "that no development occurred at the [] Site between the date the Amendments were entered and the date that the Department published notice of the Amendments." (Constitution Drive's Br. at 21.) However, this argument overlooks or disregards the fact that remediation had occurred during this timeframe; the Amendments altered the duties of Constitution Drive with respect to remediation; and remediation (not development) was the primary subject matter of the 2005 PPA and the Amendments. Consequently, at the end of the day, the 2007 Amendment and 2010 Amendment resulted in a different settlement agreement for purposes of section 1113 of the HSCA, and each Amendment required its own notice to the public and opportunity for comment.

By its very nature, the concept of "notice" and "comment" entail a "meaningful opportunity to be heard," and an opportunity to be heard can only be "meaningful" if the public is afforded "a fair opportunity" to challenge and make comments to the Amendments. *See Snyder Brothers, Inc. v. Pennsylvania Public Utility Commission* (Pa. Cmwlth., No. 1043 C.D. 2015, filed February 6, 2020) (unreported), slip op. at 11.[7] Here, the Department did not provide notice of either the 2007 Amendment or the 2010 Amendment to the public until it published notice in the *Pennsylvania Bulletin*, 47 Pa.B. 1902 (2017), on April 1, 2017. This is extremely troubling for two primary reasons.

First, because both the 2007 Amendment and the 2010 Amendment were published at the same time, the public was necessarily divested of an opportunity to submit comments and lodge a timely challenge to the 2007 Amendment, in and of itself. If the public had had the opportunity to do so, it is possible that the Board would have determined that the 2007 Amendment was null and void, which could have fundamentally changed the course and posture of this case, *e.g.*, resulting in the 2010 Amendment being unnecessary or unfeasible, and, potentially, transforming the entire outcome of these proceedings. The simple fact that the public lost this opportunity is what matters and, standing alone, the deprivation of that opportunity unquestionably flouts the commands of section 1113 of the HSCA. After all, the statute unconditionally grants the public the legal rights to notice and comment. It does not,

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[7] We cite *Snyder Brothers, Inc.*, an unreported decision, for its persuasive value in accordance with section 414(a) of the Commonwealth Court's Internal Operating Procedures, 210 Pa. Code §69.414(a).

however, qualify the exercise of those rights based upon a percentage evaluation of the public's likelihood of success on the merits.

Second, despite the fact that the Amendments were conjoined for published notice in the *Pennsylvania Bulletin*, the Department and Constitution Drive entered into the 2007 Amendment on January 22, 2007, and the 2010 Amendment on June 4, 2010. (Board's F.F. Nos. 25, 34.) By the time the public received notice of the Amendments on April 1, 2017, and the Department issued its comment response and finalized the Amendments on January 26, 2018, Constitution Drive was already performing (or had completely performed) the modified and remodified obligations and duties contained in the Amendments. Stated differently, when the Department issued notice to the public on April 1, 2017, the public did not receive "notice of [a] proposed settlement," as required by section 1113 of the HSCA. Instead, the public obtained notice of settlement agreements that the Department and Constitution Drive previously put into motion and, for all practical intents and purposes, that were already considered to be valid, final, and binding.

Conceptually, the sole functional purpose of section 1113 of the HSCA is to allow the public to comment on a proposed settlement agreement and, based on the comments and the Department's response, to later mount a challenge before the Board, seeking to have the settlement agreement set aside. The entire principle and rationale embodied within and comprising section 1113 would be eviscerated if the public issued comments at a point when the parties to a settlement agreement have performed (or have taken prefatory measures to perform) the accompanying obligations and duties. An absurd result would also occur because, in the event the Board was to set aside an agreement in these circumstances, the parties would have assumed and undertaken duties and obligations that they never should have. And, since it is likely that what has been done—in terms of remediation—cannot be undone, but even if it is determined that it can be undone, a legal dilemma will almost inevitably ensue between the parties to the settlement agreement with respect to issues such as fault, who is responsible for incurred expenses, and how and through what means corrective measures will be implemented.

In its adjudication, the Board briefly discussed, and adequately distinguished, its decision in *Chirico*, which in any event is not binding on this Court. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 107 (Pa. Cmwlth. 2004). But utilizing that case as a general guidepost, this Court notes that the Board correctly stated that, unlike the situation presented here, in *Chirico*, "the agreement was entered into on May 24, 2000"; the "notice of the agreement was published in the *Pennsylvania Bulletin* a month later on June 24, 2000"; and "there [was] no indication that any significant changes took place at the site . . . in the one month of time that elapsed between the execution of the agreement and the publication of the required notice in the *Pennsylvania Bulletin*." (Board's decision at 23-24.) While delay between a proposed settlement and published notice to the public, alone, is not enough to set aside a settlement agreement, we are nonetheless confident that, in the specific and unique context of this case, the delay of approximately eight years is more than troublesome. This is because, within the period that comprises the delay, there have been substantial changes not only at the Site itself, but also with respect to the obligations of the parties in the Amendments vis-à-vis the 2005 PPA, and, also, the 2007 Amendment vis-à-vis the 2010 Amendment. On this note, we conclude that changes in factual circumstances from the original 2005 PPA onward, combined with changes in the corresponding obligations of the parties throughout this matter, were a sufficient foundation upon which the Board could determine that the Amendments were arbitrary and capricious.

Placing full reliance on *Groce*, Constitution Drive asserts that the Department cured its noncompliance with section 1113 of the HSCA when it eventually followed the statutory procedure in 2017 and 2018 and, thus, the Amendments are valid. However, *Groce* is a permitting case, and the Board dismissed such cases as unpersuasive, finding that they are not "a good analog for [the] current case because of their different and distinct notice requirements when compared to those in [s]ection 1113." (Board's decision at 24.) In any event, in *Groce*, "[a]fter the [Department] realized that its initial notice failed to include the degree of increment consumption for [the permittee], it promptly corrected this defect by sending out a supplemental notice which afforded the public and the [petitioner] an opportunity for effective public participation." 921 A.2d at 580. In *Groce*, the period of time that passed from the published notice to the amended notice was from December 17, 2005, to January 14, 2006 (approximately one month), and the defect that was cured was a numerical omission that was filled in with the appropriate number that designates the allowable increments for pollutants under the applicable statute. Here, by way of stark contrast, the 2007 Amendment was published 10 years later and the 2010 Amendment was published 7 years later; the changes reflected in the Amendments were substantive in nature and related to affirmative representations governing Constitution Drive's obligations at remediation; and, finally, as mentioned above, the public was deprived of the opportunity to lodge comments to the Amendments in a fair, effective, and fully-informed manner. Given the very character of these deficiencies, they are ones that cannot be "cured," and, therefore, we conclude that *Groce* is distinguishable on its facts.

Nevertheless, since the Amendments violated the express dictates of section 1113 of the HSCA, it is irrelevant whether the Department pursued a course of conduct in accordance with the general intent and spirit of the HSCA. Rather, the proper inquiry is whether the Board erred in determining that the Amendments were "arbitrary and capricious on the basis of the administrative record." 35 P.S. §6020.1113. Our precedent states as a general rule that something "is arbitrary and capricious where it is unsupportable on any rational basis because there is no evidence upon which [it] may be logically based." *Cary v. Bureau of Professional and Occupational Affairs, State Board of Medicine*, 153 A.3d 1205, 1210 (Pa. Cmwlth. 2017) (en banc) (internal citation omitted).

Here, the Department has not proffered any rational reason or articulated a supportable and logical basis explaining why the Amendments were effectively converted into finalized settlement agreements, and the parties undertook performance of their duties pursuant to those agreements, when section 1113 clearly mandates that a "proposed" settlement agreement must first undergo publication, comment, and response, before it can attain the formal status of being final and binding. *See* Black's Law Dictionary 238 (9th ed. 2009) (defining "capricious," in part, as being an order or decree that is "contrary to . . . established rules of law"); *cf. Ngou v. Schweiker*, 535 F. Supp. 1214, 1216-17 (D.D.C. 1982) (concluding that a federal agency's delay in publishing notice and public comment, along with the agency's decision to change benefits in the meantime, constituted arbitrary and capricious administrative action). Contrary to the Department's argument, it does not matter how broad its statutory authority and/or discretion is with respect to entering into settlement agreements, because section 1113 of the HSCA circumscribes that authority and/or discretion by mandating that the Amendments shall not be arbitrary and capricious. Succinctly put, the essential requirements of section 1113 were not satisfied in this case, and, in essence, the Amendments were unilaterally implemented on their own accord, in obvious contravention of the statute. By any person's measure, there is no rationalization as to why the Amendments were publicized at a point when the terms of the Amendments no longer adequately accounted for the changed circumstances at the Site, and in the process, deprived the public of the opportunity to provide meaningful comment on the Amendments.

For the above-stated reason, and having concluded that Constitution Drive and/or the Department have failed to establish that the Board erred in declaring that the Amendments were void as arbitrary and capricious, we affirm the Board. Due to our disposition, we need not address the arguments of Constitution Drive and the Department pertaining to the content and sufficiency of the Department's publicized notice to the public or the adequacy of the Department's response to the public's comments.

Accordingly, we affirm the Board's order.

*s/ Patricia A. McCullough*
PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Constitution Drive Partners, L.P., Petitioner | : | |
| v. | : | No. 643 C.D. 2019 |
| Department of Environmental Protection, Respondent | : | |

***ORDER***

AND NOW, this 5th day of March, 2021, the April 26, 2019 order of the Environmental Hearing Board is hereby affirmed.

*s/ Patricia A. McCullough*
PATRICIA A. McCULLOUGH, Judge

Certified from the Record

MAR 05 2021

And Order Exit

# ATTACHMENT 8

**For Immediate Release:**
July 26, 2017

**Contacts:**
Maya van Rossum, The Delaware Riverkeeper, Delaware Riverkeeper Network, 215-801-3043 (cell)
Adam Cirucci, Director of Communications and Media, State Senator Andy Dinniman, 610-692-2112
Steve Hoenstine, Spokesperson, Office of Senator Daylin Leach, 717-683-3110
John Preston, impacted resident, 484-410-6793

# Senator Andy Dinniman Joins Residents as They Stand Up Against Lawsuit Threatened by Developer to Silence Opposition

***East Whiteland, Chester County, PA:*** Responding to a lawsuit intended to silence opposition to proposed development at a highly contaminated brownfields site, the Delaware Riverkeeper Network and members of the East Whiteland community were joined by Senator Andy Dinniman[1] and a representative from Senator Daylin Leach's office at a press conference on Wednesday morning, July 26. The Senator and representative, residents, and the environmental organization asserted and defended their First Amendment rights to speak in opposition to the development proposal and the woefully inadequate response they were receiving from the Pennsylvania Department of Environmental Protection (PADEP) with regards to the high level of toxins at the site. In strong statements they also outed developer Brian O'Neill for his lawsuit threat.

"Pennsylvanians have a Constitutionally protected right to clean air, pure water, and the preservation of the natural environment. Citizens also have a right to voice their opinions, views, and concerns on decisions regarding our public natural resources and to be involved in the processes be they at the local, state or federal levels. The bottom line is Chester County has a long history of standing up for our environmental resources and to stand up, we need to speak out," said state **Senator Andy Dinniman.**

[1] Senator Dinniman was called back to Harrisburg just before this event and was unable to attend.

Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007
Office: (215) 369-1188
fax: (215)369-1181
drn@delawareriverkeeper.org
www.delawareriverkeeper.org

"Lawsuits have an important purpose, but when they are wielded as a bludgeon by wealthy interests to silence advocates and communities, they harm the principles that form the foundation of our country," said State **Senator Daylin Leach** (D-Delaware/Montgomery). "Free speech is a right held by all Americans – wealthy or not—and it's our job to protect it."

Residents and the Delaware Riverkeeper Network have been actively challenging a proposal by O'Neill, O'Neill Developers and Constitution Drive Partners to initiate partial clean up of the highly contaminated Bishop Tube site in order to accommodate construction of a more than 200 unit housing development.

Developer O'Neill, along with his corporate counter parts O'Neill Developers and Constitution Drive Partners, filed a lawsuit on June 27 in the Chester County Court of Common Pleas against the Delaware Riverkeeper Network; Maya van Rossum, the Delaware Riverkeeper; and one named resident. It also threatens to target up to ten additional residents, naming them as defendants to the suit.

"The lawsuit is what is known as a SLAPP suit, a strategic lawsuit against public participation," explains **Maya van Rossum, the Delaware Riverkeeper and leader of the Delaware Riverkeeper Network**. "The suit is clearly designed to silence our opposition to this proposed partial clean up and associated development plan and is obviously meant to send a chilling effect to all the residents who are opposed to this project. While I think it is fundamentally wrong to be misusing the law to target and seek to silence me and my organization, I think it is horrifically abusive to target private individuals who are simply exercising their First Amendment rights to try to protect themselves, their families, friends, homes and communities from a project and proposal they oppose."

"For decades, our institutions and officials have failed to address the extreme public health and environmental dangers emanating from the Bishop Tube landsite. Since the 1950s, the public has been endangered by toxic chemicals from the Bishop Tube landsite while PADEP has sat by and allowed the contamination to spread. The people of East Whiteland and Chester County emphatically say no, and demand a safe and full cleanup of the landsite and its full return to a natural open space," said **John Preston, an impacted resident**.

"We thank Sen. Dinniman for supporting our community's grave concerns regarding the contaminated Bishop Tube site, which should have been remediated years ago. We ask the DEP to make this site its highest and most immediate priority – we've been waiting over 18 years for its clean-up, and further delay cannot be tolerated," said **Barbara D. Arnold, a concerned community member.**

"Throughout this process, it has been clear that our local politicians had been making decisions without all of the necessary information, including environmental data and input from the residents. Although we have made great strides in opening the lines of communication with our township supervisors and even our state senator, it is unfortunate that Representative Milne is continuing to make recommendations that directly affect our neighborhoods before all environmental testing is complete, and without meeting to discuss our concerns," said **Debra J. Mobile, a resident of General Warren Village**.

**Adds van Rossum**, "the Bishop Tube site is severely contaminated. We have serious, significant and growing concerns about the impacts of this site on community health and on the environment. And we have very significant concerns with how the Pennsylvania Department of Environmental Protection has been handling this site. Their failure to take fast action to remediate the site has allowed the plume of pollution to go deeper into the ground and to balloon offsite to a still unknown degree. It is wholly inappropriate to be advancing a heavy development project at this site; the community deserves it protected as natural open space once full remediation is accomplished by responsible parties."

The Bishop Tube Site is a former metals processing plant located in East Whiteland Township, PA. The site is bordered by Little Valley Creek, a tributary to the "Exceptional Value" Valley Creek. Portions of the site proposed for development are wooded. The site is listed on the Pennsylvania Priority List of Hazardous Sites for Remedial Response under the Pennsylvania Hazardous Sites Cleanup Act (HSCA). Groundwater, soil and surface water at the Site are contaminated with trichloroethylene (TCE), which is classified as a probable human carcinogen by the EPA and also as causing other significant health problems. Other contaminants of significant concern are also known to be present at the site.

#####

Delaware Riverkeeper Network (DRN) is a nonprofit membership organization working throughout the 4 states of the Delaware River Watershed including Pennsylvania, New Jersey, Delaware and New York. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, public education, and legal enforcement of environmental protection laws.

Filed and Attested by
PROTHONOTARY
27 Jun 2017 04:34 PM
L. Shea

**LAMB McERLANE PC**
By: James C. Sargent, Jr., Esquire
Guy A. Donatelli, Esquire
Attorney I.D. Nos. 28642/44205
24 East Market Street
P.O. Box 565
West Chester, PA 19380
(610) 430-8000

*Counsel for Plaintiffs*

| | | |
|---|---|---|
| J. BRIAN O'NEILL, O'NEILL PROPERTIES GROUP, L.P. AND CONSTITUTION DRIVE PARTNERS, LP | : | IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PA |
| Plaintiff, | : | CIVIL ACTION LAW |
| v. | : | |
| MAYA van ROSSUM, CARLA ZAMBELLI and DELAWARE RIVERKEEPER NETWORK and JOHN DOES 1 THROUGH 10 | : | NO. 2017-03836-MJ |
| Defendants. | : | |

**NOTICE TO DEFEND**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.**

CHESTER COUNTY BAR ASSOCIATION
Lawyer Referral Services
15 West Gay Street, 2nd Floor
P.O. Box 3191
West Chester, PA 19381-3191
(610) 429-1500

/s/ James C. Sargent, Jr.
JAMES C. SARGENT, JR

**LAMB McERLANE PC**
By: James C. Sargent, Jr., Esquire
Guy A. Donatelli, Esquire
Attorney I.D. Nos. 28642/44205
24 East Market Street
P.O. Box 565
West Chester, PA 19380
(610) 430-8000
*Counsel for Plaintiffs*

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| J. BRIAN O'NEILL, O'NEILL PROPERTIES GROUP, L.P. AND CONSTITUTION DRIVE PARTNERS, LP | : | IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PA |
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| Defendants. | : | |

## COMPLAINT

Plaintiffs, J. Brian O'Neill, O'Neill Properties Group, L.P., and Constitution Drive Partners, LP (hereinafter "O'Neill"), by and through their undersigned counsel, Lamb McErlane PC, hereby file this Complaint against Defendants, Maya van Rossum, Carla Zambelli, and the Delaware Riverkeeper Network seeking recovery for patently false and intentionally misleading information Defendants have published regarding Plaintiffs, and Plaintiffs' efforts to assist in the remediation and clean-up of a brownfield site known as the former "Bishop Tube Site." Defendants' statements and corresponding conduct has been designed to misinform, frighten and influence improperly the community surrounding the Bishop Tube Site regarding Plaintiffs' proposed 228 unit townhouse project and to cause Plaintiffs to suffer tens of millions of dollars in lost opportunity, suffer delays of the project and to cause Plaintiff repeated scheduling interruptions. In support hereof, Plaintiffs aver the following:

## **PARTIES**

1. Plaintiff, J. Brian O'Neill, is a citizen of the Commonwealth of Pennsylvania, with a business address of O'Neill Properties Group, 2701 Renaissance Blvd. - 4th Floor, King of Prussia, PA 19406.

2. Plaintiff, O'Neill Properties Group, L.P., is a limited partnership organized under the laws of the Commonwealth of Pennsylvania, with a principal place of business located at 2701 Renaissance Blvd. - 4th Floor, King of Prussia, PA 19406.

3. Plaintiff, Constitution Drive Partners, L.P. (hereinafter "CDP"), is a limited partnership organized under the laws of the Commonwealth of Pennsylvania, with a principal place of business located at 2701 Renaissance Blvd. - 4th Floor, King of Prussia, PA 19406.

4. Defendant, Maya van Rossum, is a citizen of the Commonwealth of Pennsylvania, who resides at 716 South Roberts Road Bryn Mawr, PA 19010.

5. Defendant, Carla Zambelli, is a citizen of the Commonwealth of Pennsylvania, who resides at 9 Toms Circle, Malvern, PA 19335.

6. Defendant, Delaware Riverkeeper Network, is a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania, with a principal place of business located at 925 Canal Street, Suite 3701, Bristol, Pennsylvania 19007.

7. Defendants John Does 1 through 10 are those unknown defendants who acted in concert with the other named Defendants to commit the acts set forth below. Plaintiffs reserve the right to add these specific individuals by name upon their identification.

## JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter and parties pursuant to 42 Pa.C.S. §5301 as the cause of action arose in the Commonwealth of Pennsylvania and the Defendants are citizens of and reside or do business in Pennsylvania.

9. The venue is proper pursuant to Pennsylvania Rules of Civil Procedure 1006 and 2179, as the cause of action arose in Chester County and transactions or events out of which the cause of action arose took place in Chester County.

## FACTUAL BACKGROUND

10. Plaintiff J. Brian O'Neill founded O'Neill Properties Group, L.P. in 1988; he is a limited partner of both Plaintiffs O'Neill Properties Group, L.P. and CDP.

11. Plaintiff O'Neill Properties Group, L.P. is a leading real estate development company specializing in identifying and acquiring abandoned or underutilized industrial sites, remediating and transforming them into high-quality, Class A commercial space or luxury multifamily live, work, and play communities.

12. Plaintiff CDP is an affiliate of O'Neill Properties Group, L.P. which undertakes the mission to remediate and re-develop abandoned or underutilized industrial sites.

13. Plaintiff CDP purchased a property known as the "Bishop Tube" site in 2005, which is a 13.7 acre parcel located at 1 Malin Road in East Whiteland Township, Chester County, Pennsylvania ("the Bishop Tube Site" or "Site").

14. The Bishop Tube Site is a former industrial site upon which industrial buildings and other vacant and dilapidated improvements remain standing. Stainless steel tubes were manufactured on the Bishop Tube Site from the 1950's through 1999 by a variety of owners and operators, and these industrial operations resulted in the release of significant amounts of chlorinated solvents, principally

TCE, to soil and ground water at the Site; this contamination in groundwater has migrated off-Site to the surrounding community.

15. The chlorinated solvent contamination that occurred at the Site during industrial operations from the 1950's to 1999 still remains today in Site soils and groundwater. In addition, the chlorinated solvent contamination in groundwater has migrated significant distances beyond the boundaries of the Site, generally in a Northeasterly direction.

16. Except for limited remedial activities implemented by CDP, no meaningful remediation of chlorinated solvent contamination has occurred since the identification of chlorinated solvent contamination at the Site. In addition, since the cessation of operations, the shuttered industrial buildings present at the Site have been a target for vandalism.

17. To date, the Pennsylvania Department of Environmental Protection ("PADEP"), has identified two potentially responsible parties, Johnson Matthey, Inc. and Whittaker Corporation (collectively the "PRPs"), who PADEP believes have liability to investigate and remediate the contamination identified at and beyond the Bishop Tube Site because these entities succeeded to the liabilities of former operators at the Site. Although the PRPs have conducted investigation activities at and beyond the boundaries of the Site, these PRPs have never conducted any remediation of contamination, and the PRPs have explicitly denied that they have any liability or responsibility to remediate any contamination at or beyond the boundaries of the Bishop Tube Site. In fact, to date, other than CDP's proposed plan for remediating unsaturated soils at the Site, no party has offered a plan to remediate chlorinated solvent impacts to unsaturated soils at the Site.

18. CDP acquired the Site in 2005. At the time CDP acquired the Site, CDP entered into a Consent Order and Agreement with PADEP dated March 17, 2005 pursuant to the Hazardous Sites Cleanup Act, commonly referred to as a "Prospective Purchaser Agreement" or "PPA". Pursuant to the

PPA, PADEP provided CDP with a covenant not to sue CDP in connection with the contamination at the Site, and also afforded CDP contribution protection against third party claims relating to such contamination. In exchange for these legal benefits, CDP agreed to certain commitments under the PPA, including an obligation to perform certain remedial activities of Site soils and to cooperate with PADEP. Through two amendments to the PPA, one dated January 22, 2007 and the other dated June 4, 2010, CDP was able to satisfy its remedial obligations under the PPA by installing an air sparging/soil vapor extraction ("AS/SVE") remediation system, operating the system for a period of time, and paying PADEP $10,000. PADEP confirmed by letter dated December 22, 2010 that CDP has already satisfied all of its remedial obligations under the PPA, as amended.

19. CDP has fully cooperated with PADEP since the execution of the PPA in 2005. However, by letter dated January 28, 2014, PADEP expressed its position that the covenant not to sue under the PPA was void because of damage caused by a salvage contractor to the no-longer-used AS/SVE system in 2011. CDP appealed PADEP's issuance of this letter to the Pennsylvania Environmental Hearing Board ("EHB"); the EHB ultimately dismissed CDP's appeal because the EHB determined that PADEP's letter was not a final agency action, and therefore not appealable to the EHB. It is still CDP's position that PADEP's covenant not to sue remains in full force and effect, pursuant to the PPA. In addition, the contribution protections contained pursuant to the PPA also still remain in full force and effect.

20. In 2014, the Township of East Whiteland rezoned the Bishop Tube Site from industrial use to residential use, and specifically rezoned the property to a Residential Revitalization District ("RRD").

21. The purpose of this zoning change to RRD was to promote revitalization and remediation of the Site. Prior to the zoning change, despite extensive efforts to market and redevelop

the Site for commercial purposes, CDP was unable to successfully redevelop the Site given certain non-environmental Site constraints. The Township's determination to rezone the Site to residential purposes was also based on the need for additional residential housing within the community, and the recognition that CDP would construct such housing with all safe and reasonable state of the art methods to prevent exposure to any chlorinated solvent impacts present at the Site, both during construction and after the completion of the residential townhouse community.

22. In anticipation of the remediation of the Bishop Tube site and returning it to a beneficial and much needed use, Plaintiff CDP (and a non-party to this action) sought municipal approvals from the Township of East Whiteland, through its Board of Supervisors and Township Zoning Hearing Board, to approve plans to construct a 228 residential townhome community on a portion of the Bishop Tube Site.

23. Without a rational basis or foundation, using a contrived narrative, and without proposing an alternative, better plan for remediation of the extensive soil contamination at the Site – much less funding for such a plan – Defendants have resisted Plaintiffs' proposed soil clean up, remediation and repurposing of the Bishop Tube Site, in a thinly-veiled attempt to coerce the Township and the Commonwealth to impede Plaintiff's' efforts and spend many millions of dollars of public revenue to remediate the site and create a park.

24. To accomplish this purpose, Defendants have engaged in, and have conspired to engage in a campaign of misinformation that is designed to mislead, and have misled, the residents of East Whiteland Township and other surrounding townships, the officials of East Whiteland Township, and the officials of the PADEP into believing that any improvements that are proposed by Plaintiffs will be dangerous because of the contaminants currently present at the site, and that improvement of the Bishop

Tube Site pursuant to the RRD Zoning puts the surrounding residents in a greater risk of exposure to said contaminants.

25. Defendants' statements have made assertions of fact regarding the risk of the improvements proposed by Plaintiffs that are not true. Such statements by Defendants have been made in public meetings, writings and social media.

26. Shortly before April 6, 2017, the Defendants agreed to publish and distribute, and did publish and distribute, a flier to the community that stated as fact that redevelopment of the site will "expose us to more of the toxins and put 200+ homes on the contaminated land!!!," and that "if this development happens your community could be on the receiving end of more contamination as the toxins make their way through our local waterways and water table," all of which are materially false. Through the flyer and continuing public misstatements, Defendants are attempting to mislead and frighten the residents and officials of East Whiteland Township by falsely claiming that cleanup and remediation of the site will expose the residents to more toxins, while at the same time stating that they desire the site to be "fully cleaned up." A copy of this flier is attached hereto as Exhibit "A".

27. Defendants' purpose in publishing this false and misleading information has one goal – to prevent the legitimate and lawful business interests of Plaintiff to improve the Bishop Tube Site through their clean-up efforts and the development of their 228 townhouse community.

28. Further, the abovementioned flier was intentionally misleading by representing as fact that CDP planned to use "a $1million grant from the DEP (Our tax money) to perform a **'PARTIAL' CLEAN-UP**" of the Bishop Tube site", and that the developer is refusing "to take responsibility for full removal of the toxins at the site" which by necessary implication caused the public to infer that CDP has responsibility for remediating the contaminants that are in the groundwater at the site and downstream, and that CDP is refusing to fulfill those responsibilities. In fact, CDP plans to clean up the

soils above the water table at the site to PADEP's residential statewide health standard; one of the highest cleanup standards, and the parties that caused the contamination of the groundwater continue to bear the responsibility for cleaning the contaminated groundwater under the site and downstream, not CDP.

29. Moreover, any chlorinated solvent impact that will remain in groundwater at the Site after Plaintiffs' remediation and development of the Site will be appropriately and safely shielded from the new residents of the townhouses, will not pose any new or different risk to the residents of the surrounding area, and in fact will likely pose less risk because CDP's soil remediation will also have a benefit on groundwater quality that is migrating off-site. Further, any groundwater remediation required at or beyond the Site is not, and has never been the legal responsibility of CDP, and will occur at some point in the future, as determined by PADEP pursuant to HSCA; and such determinations by PADEP are completely independent of CDP's planned redevelopment of the Site, and are not Plaintiff's legal responsibility or obligation to remediate.

30. Additionally, remediation of the surface contaminants and redevelopment of the property can occur separate and apart from remediation of the ground water at the Site and downstream. The development of the Site will not impair the later ability for the PRP's to fulfill their responsibility to clean up the contaminated ground water at a later date. If, in fact, the Defendants have a bona fide environmental concern to clean up the groundwater at and around the Site, they should be pursuing the PRP's to perform this clean up instead of wrongfully attacking the Plaintiffs, who bear no responsibility for the cleanup of the contaminated groundwater.

31. Defendant Delaware Riverkeeper Network has also published documents on its website containing deceitful information in an attempt to scare the residents and public officials of East Whiteland Township into opposing the development of the Bishop Tube Site by saying that

development of the property will increase potential pollution of the nearby streams and wetlands and that contamination would continue to affect the surrounding environment and community because of the development.

32. The statements on the Defendant Delaware Riverkeeper Network's website are false.

33. Defendant Carla Zambelli runs a website, chestercountyramblings.com, where she supports and republishes the above-referenced document and the contents of the Defendant Delaware Riverkeeper Network's website and aids in the further dissemination of false and misleading information aimed at Plaintiffs.

34. The conduct of Defendants set forth also jeopardizes grants to be used for further remediation of the soils at the site.

35. In addition to the written language above, on June 7, 2017, Defendant van Rossum declared to a room of 200 people that Brian O'Neill brushed up against her inappropriately, when no such event occurred. Defendant made this statement after Mr. O'Neill had left the building.

36. Defendant van Rossum's statement was false, slanderous and designed to impugn Mr. O'Neill's character and reputation for the sole reason of discrediting Plaintiffs' efforts to improve the Property.

**COUNT I**
**ALL PLAINTIFFS v. ALL DEFENDANTS**
**DEFAMATION/COMMERCIAL DISPARAGEMENT**

37. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth fully herein.

38. Upon information and belief, Defendants knowingly published (in social media and letters) the false statements set forth above regarding O'Neill, O'Neill Properties Group, L.P, and

CDP, intending to cause pecuniary loss, or reasonably should have recognized that such publication would cause pecuniary loss and potentially millions of dollars to CDP.

39. Upon information and belief, Defendants published false and defamatory statements about O'Neill, O'Neil Properties Group, L.P., and CDP to residents and officials of East Whiteland Township, and to officials of the PADEP, in order to cause the public to look disfavorably upon the Plaintiffs and to interfere with the Plaintiffs' legal right to full use and/or development of its property.

40. Upon information and belief, Defendants' statements left the public with a false impression of O'Neill, O'Neill Properties Group, L.P., and CDP, and Plaintiffs have suffered actual pecuniary loss as a direct result of the disparaging statements made by Defendants including, but not limited to: (a) increased development costs on the Project; (b) delays in the approval, construction, marketing and sale of the Project; (c) the loss of goodwill, particularly goodwill established by Plaintiffs based on past brownfield site cleanups; (d) loss of future business opportunities; and (e) potential failure of the Project due to unfounded negative public perception of the Plaintiffs and the Project.

41. Persons receiving these false and malicious statements made by Defendants understood them to refer to Plaintiffs.

42. At all times material hereto, Defendants' statements were false, disparaging and/or malicious and made with intentional and/or reckless disregard for the truth of the statements and without privilege of any nature.

43. Defendants' conduct was intentional, malicious, and wanton and deliberately intended to cause pecuniary harm or loss to Plaintiffs, thereby entitling Plaintiffs to an award of punitive damages.

**WHEREFORE**, Plaintiffs respectfully request preliminary and permanent injunctive relief and judgment in its favor and against Defendants in an amount in excess of $50,000.00, plus attorneys' fees, costs, punitive damages, interest and such other relief as the Court deems equitable, just and proper.

## COUNT II
## CONSTITUTION DRIVE PARTNERS, L.P. v. ALL DEFENDANTS
## TORTIOUS INTERFERENCE WITH A CONTRACTUAL OR BUSINESS RELATION

44. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if set forth fully herein.

45. At all relevant times, a contractual relationship existed between CDP and the PADEP, by virtue of the Prospective Purchaser Agreement and its various amendments.

46. Upon information and belief, Defendants have repeatedly and maliciously supplied false or misleading information to the PADEP in an attempt to entice the PADEP into taking inappropriate and unnecessary action against Plaintiffs and to delay development of the Bishop Tube Site.

47. By their acts, Defendants purposefully and tortiously interfered with the contractual and business relationship with PADEP with intent to harm the existing relationship.

48. Defendants have no reasonable basis or privilege to actively interfere with the existing contractual relationship by spreading false or misleading information about the Plaintiff and/or the existing agreement between the CDP and the PADEP.

49. Defendants have failed to correct their false or misleading statements and continue to spread lies about Plaintiff and their intentions to do so to anybody that will listen.

50. Plaintiff has suffered significant monetary harm in an amount in the tens of millions of dollars as a result of Defendants' actions.

**WHEREFORE**, Plaintiff CDP respectfully requests preliminary and permanent injunctive relief in the form of a retraction of the defamatory and false statements, and judgment in its favor and against Defendants in an amount in excess of $50,000.00 attorneys' fees, costs, punitive damages, interest and such other relief as the Court deems equitable, just and proper.

**COUNT III**
**ALL PLAINTIFFS v. ALL DEFENDANTS**
**CIVIL CONSPIRACY**

51. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if set forth fully herein.

52. Through a series of overt acts, including false and fraudulent statements, representations, and information submitted, Defendants collectively entered into an agreement and conspiracy whereby Defendants intended to knowingly publish false and defamatory statements about O'Neill, O'Neil Properties Group, L.P., and CDP to residents and officials of East Whiteland Township in order to cause the public to look disfavorably upon the Plaintiffs and to interfere with the Plaintiffs' legal right to full use and/or development of its property and to interfere with the Plaintiff's contractual relationship with PADEP.

53. The conspiracy was entered into willfully and maliciously by all Defendants.

54. The civil conspiracy has caused damage to the Plaintiffs.

55. The actions of all Defendants were so outrageous and intolerable such that Plaintiffs are entitled to punitive damages against Defendants.

**WHEREFORE**, Plaintiffs O'Neill, O'Neill Properties Group, L.P. and CDP respectfully request judgment in its favor and against Defendants in an amount in excess of $50,000.00, plus attorneys' fees, costs, punitive damages, interest and such other relief as the Court deems equitable, just and proper.

Respectfully submitted,

**LAMB McERLANE PC**

BY: /s/ James C. Sargent, Jr.
James C. Sargent, Jr.
Guy A. Donatelli

# EXHIBIT "A"

# URGENT CALL TO STOP DEVELOPMENT ON TOXIC LAND

Bishop Tube Site, South Malin Road, Frazer PA, is a **Super Fund Site** and East Whiteland Township might allow Brian O'Neill and John Benson (Constitution Drive Partners) to disturb the land, expose us to more of the **toxins** and put 200+ homes on the **contaminated land**!!!

- During its operation (1951- 1990) Bishop Tube **contaminated** the ground with TCEs and heavy metals. These **toxins** are still present on the site and continue to **poison** the ground water of Little Valley Creek; a tributary to Valley Creek, the Schuylkill and Delaware Rivers.
- If this development happens your community could be on the receiving end of more **contamination** as the toxins make their way through our local waterways and water table.
- East Whiteland Township is in the process of approving a high density residential community on this **toxic Super Fund Site.**
- The developer, Constitution Drive Partners (O'Neill and Benson), have agreed to only **PARTIAL clean-up** of the site prior to development. Constitution Drive Partners is going after a $1million grant from the DEP (Our tax money) to perform a **"PARTIAL" clean-up** of the site no doubt for their financial benefit.
- A change in leadership at the PADEP is <u>accepting the developer's refusal to take responsibility for full removal of the **toxins** at this site!</u>

**Environmental Experts highly recommend that this site be fully cleaned up and left as OPEN SPACE!**

## Urgent action is needed

## There is a Community Meeting regarding this project:

**Thursday, April 6, 2017** at **6:30pm**

The Center for Spiritual Living,

**16 Industrial Blvd, Suite 112, Paoli PA 19301**

<u>For more information:</u>

*Chestercountyramblings.com,*

*Delawareriverkeeper.org*

2017-03836-MJ

**VERIFICATION**

I, Brian O'Neill, state that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

Date: 6.27.17

J. BRIAN O'NEILL

To: PLAINTIFFS

You are hereby notified to file a written response to the enclosed PRELIMINARY OBJECTIONS within twenty (20) days from service hereof or a judgment may be entered against you.

Jordan B. Yeager

CURTIN & HEEFNER LLP
BY: Jordan B. Yeager, Esquire
Attorney I.D. 72947
Mark L. Freed, Esquire
Attorney I.D. 63860
Doylestown Commerce Center
2005 S. Easton Road, Suite 100
Doylestown, PA 18901
267-898-0570

*Counsel for Defendants, Maya van Rossum and Delaware Riverkeeper Network*

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|---|---|---|
| BRIAN O'NEILL, O'NEILL PROPERTIES AND CONSTITUTION DRIVE PARTNERS, LP, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PA |
| | : | CIVIL ACTION LAW |
| v. | : | |
| MAYA VON ROSSUM, CARLA ZAMBELLI and DELAWARE RIVERKEEPER NETWORK, Defendants. | : | No. 2017-03836-MJ |

**PRELIMINARY OBJECTIONS OF DEFENDANTS MAYA VAN ROSSUM AND DELAWARE RIVERKEEPER NETWORK TO PLAINTIFFS' COMPLAINT**

Defendants MAYA VAN ROSSUM and DELAWARE RIVERKEEPER NETWORK, by and through their undersigned counsel, hereby file the instant Preliminary Objections to Plaintiffs' Complaint, stating as follows:

**INTRODUCTION:**

By this action, Plaintiffs seek to chill the valid exercise by citizens of their constitutional rights to freedom of speech and to petition the State and local governments for the cleanup of a

13.7 acre property that is contaminated with significant amounts of chlorinated solvents that have migrated offsite to the surrounding community. Plaintiffs seek to intimidate and retaliate against the citizens for their constitutionally protected activities and thereby discourage and close down the lines of communication to government bodies clothed with the authority to correct or enforce the environmental laws and regulations. It is in the public interest for this Court to bring a swift end to Plaintiffs' retaliatory lawsuit, which seeks to undermine Defendants' participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations.

## PRELIMINARY OBJECTIONS:

1. The present matter arises from Plaintiffs' ownership and development of a 13.7 acre contaminated property located at 1 Malin Road in East Whiteland Township, Chester County ("the Bishop Tube Site" or "Site"). Complaint ¶ 13 (A true and correct copy of the Complaint is attached hereto as Exhibit "A").

2. Plaintiff Constitution Drive Partners, LP ("CDP") has owned the Site since 2005. Complaint, ¶ 13. CDP is an affiliate of Plaintiff, O'Neill Properties Group, L.P. Complaint, ¶ 12. Plaintiff J. Brian O'Neill ("O'Neill") is a limited partner of both CDP and O'Neill Properties Group, L.P. Complaint ¶ 10.

3. Defendants in this matter are Maya van Rossum, Carla Zambelli, the Delaware Riverkeeper Network and ten (10) John Does. (Defendants Maya van Rossum and the Delaware Riverkeeper Network WILL be referred to hereinafter collectively as "DRN").

4. According to the Complaint, industrial operations at the Site resulted in the release of significant amounts of chlorinated solvents, principally TCE, to soil and groundwater at the site. This contamination in groundwater has migrated significant distances offsite to the surrounding

community. Complaint ¶¶ 15, 14. The chlorinated solvent contamination also remains in Site soils and groundwater. ¶ 15.

5. CDP intends to remediate only soils above the water table at the Site, but not the groundwater that is on or migrating from the Site. Complaint ¶ 28. Plaintiffs allege that "any groundwater remediation required at or beyond the Site is not, and has never been, the legal responsibility of CDP." Complaint ¶ 29.

6. However, under the Pennsylvania Hazardous Sites Cleanup Act, 35 P.S. § 6020.101, *et seq*., ("HSCA"), any person in the chain of title is subject to liability, even in the absence of evidence that it contributed to the current environmental problem. *See* 35 P.S. § 6020.701; *Degussa Constr. Chem. Operations, Inc. v. Berwind Corp*., 280 F.Supp.2d 393, 406 (E.D. Pa. 2003).

7. As reflected in the Pennsylvania Bulletin, the site is listed on the Pennsylvania Priority List of Hazardous Sites for Remedial Response ("PAPL") under the HSCA. 40 Pa.B. 5250. Sites are placed on the list when PADEP has determined that there are releases or threatened releases of hazardous substances, or releases or substantial threatened releases of contaminants, which present a substantial threat to the public health, safety and environment. *Id.* HSCA allows the Commonwealth to participate fully in the cleanup of Pennsylvania sites under the Federal Superfund program.

8. In or around March 17, 2005, CDP and the Pennsylvania Department of Environmental Protection ("PADEP") entered into a Consent Order and Agreement under HSCA, known as a "Prospective Purchaser Agreement" or "PPA". Complaint ¶ 18. The PPA was amended in or around January 22, 2007 and June 4, 2010. Complaint ¶ 18. In the PPA, PADEP

provided CDP with a covenant not to sue. *Id.* The PPA was further amended by letter from the PADEP dated January 28, 2014. Complaint ¶ 19.

9. By its letter dated January 28, 2014, PADEP advised CDP that, because of actions taken at the Site, the covenant not to sue between PADEP and CDP contained in the PPA was void. Complaint ¶ 19.

10. Despite the fact that Plaintiffs base their claims against Defendants on the PPA, *See, e.g.*, Complaint ¶ 45 (A contractual relationship, upon which Plaintiffs' claim for tortious interference with a contractual or business relationship is based, "existed between CDP and the PADEP, but virtue of the Prospective Purchaser Agreement and its various amendments"), Plaintiffs failed to attached a copy of the PPA, its amendments, or the January 28, 2014 letter to their Complaint. *See* Pa. R.C.P. 1019(i).

11. In 2014, the Township of East Whiteland rezoned the Bishop Tube Site from industrial use to residential use. Complaint ¶ 20. Thereafter, CDP sought municipal approvals from the Township to approve plans to construct a 228 unit residential townhome community. Complaint ¶23.

12. Plaintiffs allege three counts against "All Defendants": Count I - Defamation/Commercial Disparagement; Count II – Tortious Interference with A Contractual or Business Relation; and Count III – Civil Conspiracy.

13. In support of these counts, Plaintiffs allege that the disparate group of "Defendants" have made statements regarding Plaintiffs' proposed remediation of the Site that are "[w]ithout a rational basis or foundation, using a contrived narrative" and "engaged in, and have conspired to engage in a campaign of misinformation that is designed to mislead." Complaint ¶¶ 23, 24. *See also* Complaint ¶¶ 38 – 43.

14. Primarily, Plaintiffs claim that Defendants published and distributed a flyer allegedly containing false information. Complaint ¶ 26. Among the allegedly false information is the claim that CDP plans only to "perform a '**PARTIAL CLEAN-UP**' of the Bishop Tube site", and that CDP is refusing to "take responsibility for full removal of the toxins at the site." Complaint, ¶ 28 (emphasis in original).

15. Plaintiffs have conceded in the Complaint that Defendants' alleged actions are for the purpose of petitioning their State and local governments to remediate the Site. *See* Complaint ¶¶ 23, 24, 26.

16. Plaintiffs allege that Defendants actions have interfered with their "contractual and business relationship" with PADEP resulting in harm "in the amount of tens of millions of dollars." Complaint, ¶ 50.

## I. PRELIMINARY OBJECTION IN THE FORM OF A DEMURRER AND MOTION TO STRIKE COUNTS I, II AND III OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(4) [Legal Insufficiency of Pleading – *Noerr-Pennington* Doctrine]

17. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

18. Pennsylvania Rule of Civil Procedure 1028(a)(4) provides that a party may file preliminary objections based upon the "legal insufficiency of a pleading (demurrer)." Pa. R.C.P. 1028(a)(4).

19. Under the well-established *Noerr-Pennington* Doctrine, an individual is shielded from liability for exercising his or her First Amendment right to petition the government. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961) ("Noerr"); United Mine Workers v. Pennington, 381 U.S.657 (1965) ("Pennington").* Since the doctrine is

rooted in the U.S. Constitution, it applies in Pennsylvania. *See, e.g., Penllyn Greene Associates, L.P., v. Clouser*, 890 A.2d 424, 429 n.5 (Pa. Cmwlth. 2005).

20. The protection exists "regardless of the defendants' motivations" in waging their campaigns, as it is recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." *Noerr*, 365 U.S. at 139; *Accord City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991); *Professional Real Estate Investors, Inc. v. Columbia Pictures, Industries, Inc.*, 508 U.S. 49, 58-59 (1993); *Firetree, Ltd v. Fairchild*, 920 A.2d 913, 919 (Pa. Cmwlth. 2007).

21. *Noerr-Pennington* protection "extends to persons who petition all types of government entities – legislatures, administrative agencies and courts." *Trustees of University of Pennsylvania v St. Jude Children's Research Hospital,* 940 F. Supp. 2d 233, 240-41 (E.D. Pa. 2013)*, citing California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972).

22. "[P]arties may petition the government for official action favorable to their interest without fear of suit, even if the result of the petition, if granted, might harm the interests of others." *Tarpley v. Keistler, 188 F.3d 788, 794 (7th Cir. 1999) (citations omitted).*

23. The sole exception to the *Noerr-Pennington* Doctrine is the "sham exception," under which a defendant will not be protected if he or she is simply using the petition process as a means of harassment. *Omni Outdoor Advertising*, 499 U.S. at 380 (citations omitted); *Penllyn Greene Assoc.,* 890 A.2d at 429 n.5.

24. However, under well-settled U.S. Supreme Court precedent, in order for the challenged activities to constitute a "sham", they must be *objectively baseless* in the sense that no reasonable litigant could realistically expect success on the merits. *Trustees of the University of*

*Pennsylvania, 940 F.Supp.2d at 244 (*quoting *Omni Outdoor Advertising, 499 U.S. at 381)* (emphasis added).

25. Indeed, a court cannot even consider a person's subjective motivation unless the court first determines that the activity is objectively without merit. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.,* 508 U.S. 49, 60-61 (1993)*; Firetree, Ltd. v. Fairchild,* 920 A.2d 913, 919 (Pa. Commw. Ct. 2007) (the doctrine provides "an absolute right that does not depend on whether the speaker has a proper motive or intent.").

26. The *Noerr-Pennington* Doctrine has been applied in both Pennsylvania federal and state courts, and has been relied upon by courts as a basis for dismissal of complaints. *See, e.g., VIM, Inc. v. Somerset Hotel Ass'n,* 19 F.Supp.2d 422, 426-28 (W.D. Pa. 1998) (motion to dismiss claims for civil conspiracy, tortious interference and malicious use of process granted pursuant to *Noerr-Pennington* Doctrine)*; Bethany Bldg., Inc. v. Dungan Civic Ass'n,* March Term 2001, No. 2043, 2003 WL 1847603 (Phila. C.C.P. Mar. 13, 2003) (preliminary objections sustained as to claims asserted by developers against individuals who opposed development plans, based upon *Noerr-Pennington* Doctrine).

27. Plaintiffs cannot credibly argue here that the Defendants' actions were "objectively baseless," given that Plaintiffs themselves concede that: 1) chlorinated solvent contamination remains in Site soils and groundwater contamination has migrated significant distances offsite to the surrounding community (Complaint ¶¶ 15, 14); and 2) CDP intends to conduct only a partial cleanup of the site based on its erroneous belief that "any groundwater remediation required at or beyond the Site is not, and has never been the legal responsibility of CDP." (Complaint ¶ 29).

28. It is apparent from the face of the Complaint that Plaintiffs' claims against Defendants are precluded by the *Noerr-Pennington* Doctrine, as the alleged conduct of the

Defendants constitutes protected free speech and petitioning under the First Amendment of the United States Constitution, U.S. Const. amend. I, and Article I, Section 7 of the Pennsylvania Constitution, Pa. Const. Art. I, § 7. Many of the activities and comments alleged in the complaint relate to a legislatively mandated public comment period regarding the PPA. *See*, HSCA Section 1113, 35 P.S. § 6020.1113.

29. In addition, any actions undertaken by Defendants would necessarily have been in furtherance of their constitutionally-protected interests as property owners, as parents, and as advocates for public health, safety and a clean and healthy environment. Pa. Const. art. I, §§1, 27.

30. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Counts I, II and III of the Complaint pursuant to Pa. R. Civ. P. 1028(a)(4).

## II. PRELIMINARY OBJECTION IN THE FORM OF A DEMURRER AND MOTION TO STRIKE COUNTS I, II AND III OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(4) [Legal Insufficiency of Pleading – Environmental Immunity Act]

31. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

32. Plaintiffs' claims against Defendants are barred by the Environmental Immunity Act, 27 Pa.C.S. § 8301, *et seq*.

33. The Environmental Immunity Act provides that:

> Except as provided in subsection (b), a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action.

27 Pa.C.S. § 8302(a).

34. The Environmental Immunity Act's preamble states that "[i]t is contrary to the public interest to allow lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances." *Pennsbury Village Associates, LLC v. Aaron McIntyre*, 11 A.3d 906, 912-13 (Pa. 2011) (*quoting* Preamble to the Act of December 20, 2000, P.L. 980, No. 138).

35. The preamble further provides that "[i]t is in the public interest to empower citizens to bring a swift end to retaliatory lawsuits seeking to undermine their participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations." *Id.* at 913.

36. The Act's purpose is to "protect those persons targeted by frivolous lawsuits based on their constitutionally protected government petitioning activities[,]" and "encourage and open the lines of communication to those government bodies clothed with the authority to correct or enforce our environmental laws and regulations." *Id.* (*quoting Penllyn Greene Associates, L.P. v. Clouser*, 890 A.2d 424, 433 - 34 (Pa. Cmwlth. 2005).

37. Plaintiffs' Complaint is nothing more than a SLAPP suit brought primarily to chill the valid exercise by citizens of their constitutional rights to freedom of speech and to petition the government for the redress of grievances.

38. It is in the public interest for this Court to bring a swift end to Plaintiffs' retaliatory lawsuit, which seeks to undermine Defendants' participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations.

39. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Counts I, II and III of the Complaint pursuant to Pa. R. Civ. P. 1028(a)(4).

## III. PRELIMINARY OBJECTION IN THE FORM OF A MOTION TO STRIKE COUNTS I, II AND III OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(2) [Failure of Pleading to Conform to Rule of Court – Failure to Attach Copies of Writings]

40. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

41. Pennsylvania Rule of Civil Procedure 1028(a)(2) provides that a party may file preliminary objections to a pleading that fails to "conform to a law or rules of court." Pa. R.C.P. 1028(a)(2).

42. Pennsylvania Rule of Civil Procedure 1019(i) provides that "[w]hen any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof." Pa. R.C.P. 1019(i).

43. Plaintiffs' claims against Defendants are based in large part on the PPA, as amended and the subsequent January 28, 2014 letter from PADEP. *See* Complaint ¶¶ 18, 19, 45, 47.

44. Among other claims, Plaintiffs allege its count for tortious interference with a contractual or business relationship is based upon a contractual relationship that "existed between CDP and the PADEP, by virtue of the Prospective Purchaser Agreement and its various amendments." Complaint ¶ 45.

45. Plaintiffs failed to attach to the Complaint copies of the PPA, as amended, or the subsequent January 28, 2014 letter.

46. This failure is significant as, had Plaintiffs complied with the rules and appended the PPA and the January 28, 2014 letter to the Complaint, it would have been clear from the face of the Complaint that:

a. The PADEP has in its files over thirty (30) "studies, inspection reports, sample results, and general files relating to releases or threats of releases at the Site," March 17, 2005 PPA ¶ E and A;

b. "[T]he Department has determined that [CDP] is or could become a potentially responsible person within the meaning of Section 701(a) of HSCA for the releases or threatened releases of hazardous substances or contaminants at the Site, March 17, 2005 PPA ¶ J;

c. CDP agreed to "not contribute or otherwise exacerbate . . . any Existing Contamination attributable to the Site," March 17, 2005 PPA ¶ 5;

d. A contractor for CDP destroyed a liquid boot while performing metal recovery activities at the Site which potentially exacerbated the Existing Contamination at the Site, in violation of the PPA and its amendments, January 28, 2014 PADEP Letter p. 1;

e. PADEP requested that CDP repair the liquid boot, but this was never done, in continued violation of the PPA and its Amendments, January 28, 2014 PADEP Letter p. 1;

f. At CDP's request, PADEP agreed to allow CDP to demolish buildings at the Site in lieu of repair of the liquid boot, January 28, 2014 PADEP Letter p.1;

g. During a meeting in mid-December, 2013, the PADEP Regional Director was assured by Plaintiff J. Brian O'Neill that the demolition was going forward immediately, January 28, 2014 PADEP Letter p. 2;

h. "Notwithstanding the assurance, nothing has occurred at the Bishop Tube site, and CDP continues to be in violation of the PPA and its Amendments," January 28, 2014 PADEP Letter p 2.

i. PADEP "considers the CDP's violation of the PPA to void the Covenant Not to Sue" set forth in the PPA, January 28, 2014 PADEP Letter p. 2.

47. A copy of the March 17, 2005 PPA and the January 22, 2007 and June 4, 2010 amendments thereto are attached hereto as Exhibits "A", "B" and "C", respectively. A copy of the PADEP January 28, 2014 letter is attached hereto as Exhibit "D". By failing to attach copies of the PPA, as amended, and the January 28, 2014 letter, Plaintiffs failed to conform their pleading to Rule 1019(i).

48. In addition, Plaintiffs allege that on June 7, 2017, Maya van Rossum falsely stated at a meeting that Brian O'Neill "brushed up against her inappropriately." Complaint ¶¶ 35, 36.

49. Although CDP engaged a stenographer to document statements made at the meeting, Plaintiffs failed to attach a copy of the transcript of Ms. van Rossum's statements to the Complaint. Fortunately, a video recording of the meeting was created and can be found at https://www.youtube.com/watch?v=xTtfPT6y8g8.

50. Had Plaintiffs appended a copy of the meeting transcript to their Complaint, it would have been clear that:

a. The meeting at which the statements were made was an informational meeting held by PADEP, local officials and East Whiteland Township residents to discuss the proposed Bishop Tube development plan;

b. Ms. van Rossum stated not only that Mr. O'Neill had inappropriately brushed up against her, but that he asked her "did you get my love note?" Plaintiffs suit does not challenge the veracity of Ms. van Rossum's statement regarding Mr. O'Neill's comment;

c. The "love note" was presumably the Writ of Summons in this litigation, which was filed prior to the meeting (summons was filed on May 7, 2017) and served on Ms. van Rossum on Sunday, May 14, 2017 (Mother's Day); and

d. Mr. O'Neill encouraged Ms. van Rossum to make public the statement regarding his actions at the meeting (another fact that Plaintiffs' suit does not challenge).

51. Plaintiffs' failure to append to the Complaint a document they created and that evidences material statements on which their claims are based is a violation of Rule 1019(i).

52. It is clear that the allegedly defamatory statements are not defamatory at all but rather evidence a pattern of behavior by Plaintiffs intended to intimidate and chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances.

53. Furthermore, it is clear that these statements occurred after Plaintiffs determined to, and did in fact, institute the above-captioned litigation. The allegations are nothing more than a pretext for intimidation and retaliation against Defendants for exercising their constitutionally protected rights.

54. It is in the public interest that this Court bring a swift end to the retaliatory lawsuit seeking to undermine the citizens' participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations. *Pennsbury Village Associates*, 11 A.3d at 913.

55. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Counts I, II and III of the Complaint pursuant to Pa. R. Civ. P. 1028(a)(2).

## IV. PRELIMINARY OBJECTION IN THE FORM OF A MOTION TO STRIKE COUNTS I, II and III OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(2) [Failure of Pleading to Conform to Rule of Court -- Failure to Assert Separate Counts for Separate Claims Against Separate Defendants]

56. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

57. Pennsylvania Rule of Civil Procedure 1020(a) permits a plaintiff to state more than one cause of action cognizable in a civil action against the same defendant, but requires that each cause of action and any special damage related thereto be stated in a separate count containing a demand for relief.

58. In addition, under Pennsylvania Rule of Civil Procedure 1020(a) it is mandatory that "plaintiff set forth each cause of action against each defendant in a separate count under a separate heading" and "a complaint may be stricken for failure to comply with this requirement". *See* Goodrich Amram 2d § 1020(a):5 citing *General State Authority v. Lawrie and Green*, 356 A.2d 851 (Pa. Commw. 1976).

59. In Count I of the Complaint, Plaintiffs assert claims for "Defamation/Commercial Disparagement" against Defendants.

60. Defamation and Commercial Disparagement are separate and distinct torts. Z*erpol Corp. v. DMP Corp.,* 561 F. Supp. 404, 408 (E.D. Pa. 1983) (*citing Developments in the Law—Competitive Torts,* 77 Harv.L.Rev. 888, 892–905 (1964).

61. A cause of action for Defamation arises under 42 Pa. C.S. § 8343. To establish a *prima facie* case of defamation, a plaintiff must establish the following elements:

(1) The defamatory character of the communication;

(2) Its publication by the defendant;

(3) Its application to the plaintiff;

(4) The understanding by the recipient of its defamatory meaning;

(5) The understanding by the recipient as intended to be applied to the plaintiff;

(6) Special harm resulting to the plaintiff from its publication; and

(7) Abuse of a conditionally privileged occasion.

42 Pa.C.S. § 8343(a); *Joseph v. Scranton Times L.P.*, 129 A.3d 404, 424 (Pa. 2015).

62. In addition, if the plaintiff is a public official or public figure, and the statement relates to a matter of public concern, then to satisfy First Amendment strictures, the plaintiff must establish that the defendant made a false and defamatory statement with "actual malice". *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A.2d 389, 400 (Pa. 2007).

63. A person may become a limited purpose public figure if:

> he "thrust[s] himself into the vortex of the discussion of pressing public concerns." *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). Such a person uses "purposeful activity" to thrust "his personality" into a "public controversy." *Curtis Publishing Co. v. Butts*, 388 U.S. [388 U.S. 130, 155, 87 S.Ct. 1975 (1967).] He becomes a limited purpose public figure because he invites and merits "attention and comment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 346, 94 S.Ct. 2997 (1974).] A person may

> become a limited purpose public figure if he attempts to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.

*Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63 (Pa. Super 2005).

64. Even where a plaintiff establishes these elements, the defendant may justify its actions by showing:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern.

42 Pa.C.S. § 8343(b); *Joseph*, 129 A.3d at 424-425.

65. A cause of action for Commercial Disparagement requires a plaintiff to show:

(1) That the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect;

(2) That no privilege attaches to the statement; and

(3) That the plaintiff suffered a direct pecuniary loss as the result of the disparagement.

*U.S. Healthcare v. Blue Cross of Greater Phila.*, 898 F.2d 914, 924 (3d Cir.1990); *SNA, Inc. v. Array*, 51 F.Supp.2d 554, 565 (E.D. Pa. 1999).

66. The purpose of a Commercial Disparagement action is to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability. It is not to vindicate the plaintiff's business reputation and good name. *Array*, 51 F.Supp.2d at 565 (quoting *U.S. Healthcare*, 898 F.2d at 924).

67. "Unlike a defamation action, a plaintiff claiming commercial disparagement must prove actual pecuniary loss." *Array*, 51 F.Supp.2d at 566.

68. In Count I, Plaintiffs have combined multiple causes of action into a single count, in violation of Pa. R.C.P. 1020(a).

69. In addition, in each count, Plaintiffs have set forth claims against a disparate group of "Defendants," including various unnamed "John Does," without distinguishing between the parties. *See, e.g.*, Complaint ¶¶ 24 – 26, 38, 46, 52.

70. Plaintiffs have also, under a single count, alleged various claims against various Defendants arising out of distinct alleged acts. *See, e.g.*, Complaint ¶¶ 31, 33.

71. Plaintiffs' Complaint violates Pa. R.C.P. 1020(a) by failing to separate the claims against Defendants into separate counts under separate headings.

72. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Counts I, II and III of the Complaint pursuant to Pa. R. Civ. P. Pa. R. Civ. P. 1028(a)(2).

**V. PRELIMINARY OBJECTION IN THE FORM OF A DEMURRER AND MOTION TO STRIKE COUNT I OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(2), (3) and (4) [Failure of Pleading to Conform to Rule of Court, Insufficient Specificity of Pleading and Legal Insufficiency of Pleading – Failure of Indispensable Element of Claim]**

73. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

74. Pennsylvania Rule of Civil Procedure 1019(a) mandates that the material facts on which a cause of action is based be stated in concise summary form.

75. The purpose of Rule 1019(a) is to require the pleader to sufficiently disclose material facts to enable the adverse party to prepare his case, and "Rule 1019(a) is satisfied if allegations in a pleading (1) contain averments of all facts the plaintiff will eventually have to prove in order to recover, and (2) [t]hey are sufficiently specific so as to enable the party served to prepare a defense thereto." *Landau v. Western Pennsylvania Nat'l Bank*, 282 A.2d 335, 339 (Pa.

1971); *Dep't of Transp. v. Shipley Humble Oil Co.*, 370 A.2d 438, 439-40 (Pa. Commw. 1977) (citations omitted).

76. To support a claim for defamation, the complained of statements must be of a defamatory character. 42 Pa.C.S. § 8343(a).

77. Similarly, to support a claim for Commercial Disparagement, the complained of statement must be untrue or incorrect. *U.S. Healthcare v. Blue Cross of Greater Phila.*, 898 F.2d 914, 924 (3d Cir.1990); *SNA, Inc. v. Array*, 51 F.Supp.2d 554, 565 (E.D. Pa. 1999).

78. Primarily, Plaintiffs' Complaint focuses on the April 2017 flyer, attached to the Complaint as Exhibit "A". Plaintiffs allege that the statements in the flyer are untrue. *See* Complaint ¶¶ 26-28.

79. The statements that Plaintiffs allege are untrue are:

a. The Township "might allow [Plaintiffs] to disturb the land, expose us to more of the toxins and put 200+ homes on contaminated land!!!";

b. If this development happens your community could be on the receiving end of more contamination as toxins make their way through your local waterways and water table;

c. CDP planned to use "a $1million grant from the DEP (our tax money) to perform a **'PARTIAL' CLEAN-UP"** of the Bishop Tube Site; and

d. The developer is refusing "to take responsibility for full removal of the toxins at the site".

Complaint, ¶ 26, 28 (emphasis in original).

80. Based on Plaintiffs' admissions in the Complaint, however, it is clear that the objected to statements in the flyer are true.

81. Averments in the Complaint that support and justify the statements in the flyer include:

a. Industrial operations at the Site "resulted in the release of significant amount of chlorinated solvents, principally TCE, to soil and groundwater at the Site; ***the contamination of groundwater has migrated off-Site to the surrounding community.***" Complaint ¶ 14 (emphasis added).

b. Chlorinated solvent contamination "still remains today in Site soils and groundwater. In addition, ***the chlorinated solvent contamination in groundwater has migrated significant distances beyond the boundaries of the Site*** . . . ." Complaint ¶ 15 (emphasis added).

c. Plaintiffs propose to cleanup the soils above the water table at the site ***but not the contamination of the groundwater that is on and migrated significant distances beyond the boundaries of the Site*** and into the surrounding community (i.e. a partial clean-up). Complaint ¶ 28 (emphasis added).

d. Any groundwater remediation required at or beyond the Site will not be addressed by CDP. Complaint ¶ 29.

e. In 2014, the Township of East Whiteland rezoned the Bishop Tube Site from industrial use to residential use. Complaint ¶ 20.

f. Plaintiff CDP has sought municipal approvals of plans for a 228 unit residential townhome community on a portion of the Bishop Tube Site. Complaint ¶ 22.

82. It is clear on the face of the Complaint, therefore, that the statements in the flyer are neither defamatory, untrue nor incorrect.

83. Moreover, an essential element of a claim for defamation is that a defendant published a defamatory statement. *See* 42 Pa. C.S. § 8343(a).

84. In their Complaint, Plaintiffs allege generally that "Defendants" agreed to publish and distribute and did publish and distribute an allegedly defamatory flyer to the community.

85. Primarily, Plaintiffs' Complaint focuses on the April 2017 flyer, attached to the Complaint as Exhibit "A".

86. Plaintiffs fail to allege any material facts that would support a claim that either Maya van Rossum or the Delaware Riverkeeper Network participated in publication or distribution of the flyer.

87. In addition, based on the face of the Complaint, Brian O'Neill and the other Plaintiffs are, at the very least, limited purpose public figures, that have used purposeful activity to thrust their personalities into a public controversy. By involving themselves in the development of this contaminated site which Plaintiffs concede contains chlorinated solvents in groundwater that has "migrated off-Site to the surrounding community," Complaint ¶ 14, they have invited and merit attention and comment. They realistically can be expected to have a major impact on the resolution of this specific public dispute that has foreseeable and substantial ramifications for the entire community. In addition, there can be no question that the development of the Bishop Tube site is a matter of public concern. *See American Future Systems*, 923 A.2d at 400; *Weber*, 878 A.2d 63 (Pa. Super. 2005).

88. Accordingly, Plaintiffs are required to allege "actual malice" on the part of Defendants.

89. Actual malice in a defamation action requires a showing that that the defendant knew that the statement was false or acted with reckless disregard as to whether it was false or not.

*DeMary v. Latrobe Printing and Pub. Co.*, 762 A.2d 758, 764 (Pa. Super. 2000). The defendant must have made the false publication with a high degree of awareness of probable falsity, or must have entertained serious doubts as to the truth of his publication. *Joseph*, 129 A.3d at 424 (*quoting Harte–Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S.Ct. 2678, 2686 (1989)).

90. Plaintiffs have failed to set forth any allegations that would support a finding of actual malice on the part of Defendants.

91. Finally, for both the claims of Defamation and Commercial Disparagement, a lack of privilege is required. *See* 42 Pa.C.S. § 8343(b); *U.S. Healthcare*, 898 F.2d at 924.

92. As set forth in Preliminary Objections I and II, above, the alleged statements by Defendants are subject to privilege under *Noerr-Pennington* Doctrine and Environmental Immunity Act, 27 Pa.C.S. § 8301, *et seq*.

93. Plaintiffs have failed to sufficiently and specifically allege material facts needed to support an indispensable element of their claim in Count I of the Complaint. Moreover, the facts that are alleged in the Complaint undermine Plaintiffs' claims of Defamation and Commercial Disparagement.

94. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Count I of the Complaint pursuant to Pa. R. Civ. P. 1028(a)(2), (3) and (4).

## VI. PRELIMINARY OBJECTION IN THE FORM OF A MOTION TO STRIKE COUNT I OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(3) [Insufficiency Specificity of Pleading].

95. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

96. Pennsylvania Rule of Civil Procedure 1028(a)(3) permits the filing of preliminary objections to a pleading for "insufficient specificity."

97. In reviewing the objection under Rule 1028(a)(3), the pertinent inquiry is "whether the plaintiffs Complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that [it] may know without question upon what grounds to make [its] defense." *Rambo v. Greene*, 2006 PA Super 231, 242, 906 A.2d 1232, 1236 (Pa. Super. 2006).

98. Notably, the Pennsylvania Supreme Court has ruled that a trial court "may strike any such vague language from the complaint in order to prevent a defendant from being prejudiced in preparing a defense." *Liquori v. Wind Gap Chiropractic Ctr.*, 75 Pa. D. & C.4th 106, 111-12 (Northampton Cty. 2005) (*citing Connor v. Allegheny Gen. Hosp.*, 461 A.2d 600 (Pa. 1983)).

99. In addition to the flyer, noted above, Plaintiffs allege generally that Delaware Riverkeeper Network has published unspecified false statements and documents on its website. Complaint ¶¶ 31 and 32.

100. Plaintiffs fail to allege any facts identifying the documents or the allegedly defamatory content thereof.

101. Plaintiffs' Complaint fails to inform the defendant with accuracy and completeness of the specific basis on which recovery is sought.

102. The vagueness of Plaintiffs' allegations prejudices DRN in preparing a defense to Plaintiffs' claims and should, therefore, be stricken by the Court.

103. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Count I of the Complaint pursuant to Pa. R. Civ. P. 1028(a)(3).

## VII. PRELIMINARY OBJECTION IN THE FORM OF A DEMURRER AND MOTION TO STRIKE COUNT II OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(2), (3) and (4) [Failure of Pleading to Conform to Rule of Court, Insufficient Specificity of Pleading and Legal Insufficiency of Pleading – Failure of Indispensable Element of Claim]

104. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

105. In Count II of the Complaint Plaintiffs claim that the Defendants as a collective group should be found liable for tortuously interfering with Plaintiffs' contractual or business relationship "with PADEP." Complaint ¶ 47.

106. Plaintiffs' claims for tortious interference are based solely the Consent Order known as the PPA, and its amendments. Complaint ¶ 45.

107. Under Pennsylvania law, the requisite elements of a cause of action for tortious interference with contracts are: (1) an existing or prospective contractual relationship between complainant and third party; (2) purposeful action intended to harm existing contractual relation; (3) absence of privilege or justification; and (4) actual occurrence of harm or damage. *Accumed LLC v. Advanced Surgical Servs., Inc.,* 561 F.3d 199, 212 (3d Cir. 2009) (quoting *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.,* 140 F.3d 494, 530 (3d Cir. 1998)).

108. Plaintiffs have failed to sufficiently allege a claim for tortious interference.

109. First, as a matter of law, there is no basis for finding that Plaintiffs and PADEP are engaged in a contractual or business relationship by virtue of the PPA.

110. There is no "existing contractual relationship" between the parties. Rather, the PPA is an Order of the Department authorized and issued pursuant to Section 1102 of HSCA, 35 P.S. § 6020.1102.

111. Nor is there any "business" relationship between Plaintiffs and PADEP. Rather, Plaintiffs are merely regulated entities subject to the permitting and enforcement authority of the agency.

112. Secondly, Plaintiffs fail to sufficiently aver how allegedly defamatory statements -- the only specifically identified statements being made in ***2017*** -- could have undermined the PPA, key provisions of which PADEP determined were void on or about January 28, ***2014***.

113. Third, Plaintiffs fail to sufficiently aver the absence of privilege or justification. On the contrary, as Plaintiffs concede, the claims in this matter involve Defendants activities in petitioning the government to remediate the Site. *See* Complaint ¶¶ 23, 24, 26. Many of Defendants' alleged activities and comments relate to a legislatively mandated public comment period regarding the PPA. *See*, HSCA Section 1113, 35 P.S. § 6020.1113. As set forth more fully in Preliminary Objections I and II, Defendants' alleged activities are protected under both the Federal and State Constitutions and State law.

114. Plaintiffs have failed to sufficiently allege indispensable elements for a claim for tortious interference with contractual or business relations.

115. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Counts II of the Complaint pursuant to Pa. R. Civ. P. 1028(a)(2), (3) and (4).

## VIII. PRELIMINARY OBJECTION IN THE FORM OF A DEMURRER AND MOTION TO STRIKE COUNT III OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(2), (3) and (4) [Failure of Pleading to Conform to Rule of Court, Insufficient Specificity of Pleading and Legal Insufficiency of Pleading – Failure of Indispensable Element of Claim]

116. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

117. In Count III of their Complaint, Plaintiffs allege a claim for civil conspiracy.

118. "Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." *Thompson Coal Co. v. Pike Coal Co.,* 488 Pa. 198, 412 A.2d 466, 472 (Pa. 1979).

119. The element of malice requires a showing that "the sole purpose of the conspiracy is to cause harm to the party who has been injured." *Id.*; *Becker v. Chicago Title Ins. Co.,* No. 03-2292, 2004 WL 228672 at *13 (E.D. Pa. 2004).

120. Where it is clear on the face of the Complaint that a person acted to advance his or her own interests, those interests constitute justification and negate any alleged intent to injure. *Thompson Coal Co., supra,* 412 A.2d at 472*; WM High Yield Fund v. O'Hanlon,* No. 04-3423, 2005 WL 6788446 (E.D. Pa. 2005) (granting motion to dismiss civil conspiracy claim).

121. Here, any actions allegedly undertaken by Defendants would necessarily have been undertaken in furtherance of Defendants' own constitutionally-protected interests as property owners, as parents, and as advocates for public health, safety and a clean and healthy environment. Pa. Const. art. I, §§1, 27.

122. Plaintiffs have failed to establish the requisite elements of a conspiracy -- that the Defendants acted *solely* with the intention of harming the Plaintiffs, rather than to advance Defendants' own interests.

123. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Count III of the Complaint pursuant to Pa. R. Civ. P. 1028(a)(2), (3) and (4).

## IX. PRELIMINARY OBJECTION IN THE FORM OF A DEMURRER AND MOTION TO STRIKE COUNT I, II AND III OF PLAINTIFFS' COMPLAINT AGAINST THE DEFENDANTS PURSUANT TO PA. R. CIV. P. 1028(a)(4) [Legal Insufficiency of Pleading – Punitive Damages]

124. DRN incorporates the averments contained in the above paragraphs as if fully set forth herein.

125. In the WHEREFORE clause of each of the three counts asserted by Plaintiffs, Plaintiffs seek "punitive damages" from Defendants.

126. In Pennsylvania, "'[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.'" *Hutchison v. Luddy*, 870 A.2d 766, 770 (Pa. 2005), *quoting Feld v. Merriam*, 485 A.2d 742, 747 (Pa.1984), *quoting* Restatement (Second) of Torts § 908(2) (1979). "As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct." *Hutchison*, 870 A.2d at 770. The purpose of punitive damages is twofold. *Id*. The first purpose is to punish a tortfeasor for outrageous conduct. *Id*. The second is to deter the tortfeasor or others like him or her from similar conduct in the future. *Id.*

127. Despite Plaintiffs' hyperbole to the contrary, Plaintiffs have failed to allege any outrageous conduct or conduct motived by an evil motive or reckless indifference to the rights of others.

128. On the contrary, the facts as plead merely set forth a scenario of Defendants exercising their constitutional privilege by petitioning their governments with true and accurate information as advocates on behalf of their families and communities for a safe, clean and healthy environment.

129. Accordingly, DRN respectfully requests that this Honorable Court strike and dismiss Plaintiffs' claims for punitive damages pursuant to Pa. R. Civ. P. 1028(a)(4).

WHEREFORE, Defendants Maya van Rossum and the Delaware Riverkeeper Network, respectfully request that the Court grant the instant Preliminary Objections and enter an Order dismissing the Plaintiffs' Complaint, together with such other and further relief as this Court may deem appropriate.

Respectfully submitted,

CURTIN & HEEFNER LLP

By:______________________________

Date: July 26, 2017

JORDAN B. YEAGER, ESQUIRE
Attorney I.D. 72947
MARK L. FREED, ESQUIRE
Attorney I.D. 63860
Doylestown Commerce Center
2005 S. Easton Road, Suite 100
Doylestown, Pennsylvania 18901
Tel.: 267-898-0570

# EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

| | | |
|---|---|---|
| In the Matter Of: | : | |
| | : | |
| Bishop Tube Site | : | |
| East Whiteland Township, | : | |
| Chester County, Pennsylvania | : | |
| Constitution Drive Partners, L.P. | : | Prospective Purchase Agreement |
| 700 South Henderson Road, Suite 225 | : | |
| King of Prussia, PA 19406 | : | |

## CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement ("CO&A") is entered into and effective this 17th day of March, 2005, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") or ("DEP") and Constitution Drive Partners, L.P., 700 South Henderson Road, Suite 225, King of Prussia, PA 19406 ("Developer").

## FINDINGS

The Department made and determined the following findings, which Developer agrees are true and correct:

A. The Department is the agency of the Commonwealth of Pennsylvania ("Commonwealth") vested with the duty and authority to administer and enforce the provisions of the Clean Streams Laws ("CSL") 35 P.S. § 691.1 et seq., the Solid Waste Management Act ("SWMA"), 35 P.S. §6018.101 et seq., the Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. § 6020.101 et seq., the Storage Tank and Spill Prevention Act ("STSPA"), 35 P.S. § 6021.101 et seq., the Land Recycling and Remediation Standards Act ("Act 2"), 35 P.S. § 6026.101 et seq., Section 1917-A of the Administrative Code, 71 P.S. § 510-17, and rules and regulations duly promulgated thereunder. The Department is also the agency of the Commonwealth vested with the duty and responsibility to work with the United States Environmental Protection Agency

("EPA") to implement and enforce the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq.

B. Developer is a Pennsylvania Limited Partnership with a business address of 700 South Henderson Road, Suite 225, King of Prussia, PA 19406.

C. The Bishop Tube HSCA Site ("Site") is a site within the meaning of HSCA. The Site is located approximately a quarter of a mile south of U.S. Route 30, East Whiteland Township, Chester County, Pennsylvania. The Site consists of land totaling approximately 13.7 acres in size. The Site is identified as Chester County Tax Parcel Number UPI 42-04-0321.020.

D. The Site was formerly used as a precious metals processing and stainless steel fabricating facility between the early 1950s and the late 1990s. Prior environmental investigations, conducted on behalf of Site owner Christiana Metals Corporation ("Christiana") in the 1980s and 1990s, and later on behalf of the Department, have identified environmental impacts from the prior manufacturing operations at the Site. Specifically, soils at the Site, groundwater at and potentially migrating from the Site, and surface water and sediments in Little Valley Creek, which runs through the eastern portion of the Site, have been found to be impacted primarily by chlorinated solvents, including trichloroethylene ("TCE"), as well as other hazardous substances. The results of the investigations performed for Christiana and the Department are summarized in two recent reports prepared for the Department by Baker Environmental, Inc. ("Baker"), including a "Final Supplemental Soil Characterization Report," dated June 30, 2003, and a 'Final Phase III Supplemental Groundwater Investigation Report," dated July 2, 2004.

E. In addition to the two reports referenced in Paragraph D above, the Department has in its files other studies, inspection reports, sample results, and general files relating to releases or threats of releases at the Site, including but not limited to the documents listed in Exhibit A attached hereto and incorporated herein by reference.

F. The environmental contamination identified in the reports described in Paragraph D above and in the other studies, reports, analytical data and files described in Paragraph E above shall constitute "Existing Contamination" for purposes of this CO&A. The Existing Contamination constitutes a release or threat of release of hazardous substances and/or contaminants within the meaning of HSCA.

G. Developer has represented to the Department that Developer has neither caused, contributed to, nor is otherwise responsible for any releases or threat of releases of hazardous substances or contaminants at or from the Bishop Tube HSCA Site. The Department is not aware of any information to the contrary which would indicate such responsibility.

H. As part of its responsibility under HSCA, the Department has incurred and/or will continue to incur response costs as that term is defined under HSCA, relating to the Bishop Tube HSCA Site.

I. Developer has entered into an agreement to purchase the Site, and Developer plans to develop the Site for commercial purposes.

J. Section 701(a) of HSCA provides that owners and operators of Sites during the time of release or threatened release of hazardous substances shall be liable for response costs incurred by the Department. As a result, the Department has determined that Developer is or could become a potentially responsible person within the meaning of Section 701(a) of HSCA for the releases or threatened releases of hazardous substances or contaminants at the Site.

K. In connection with its intended purchase and redevelopment of the Site, Developer desires to enter into this CO&A for the purpose of resolving any potential environmental liability to the Commonwealth associated therewith by receiving a covenant not to sue from the Commonwealth and contribution protection under HSCA relating to Existing Contamination as set forth in this Consent Order and Agreement. In exchange for this covenant from the Department, and as compensation for response costs incurred and to be incurred by the Department in connection with the Site, Developer commits to complete the necessary and appropriate investigation and/or remediation of soils at the Site in order to demonstrate attainment of a remediation standard for soils established pursuant to Act 2. For purposes of this Consent Order and Agreement, remediation of soils shall mean remediation of soils located within the unsaturated zone between the ground surface and the groundwater.

L. It is Developer's intent that Developer's performance of investigation and due diligence activities prior to acquisition of the Site and Developer's investigatory and remedial activities relating to Site soils as contemplated to be performed by Developer hereunder shall satisfy Developer's obligation to undertake all appropriate inquiry and exercise appropriate care with respect to hazardous substances at the Site as required to qualify as a "bona fide prospective purchaser" pursuant to Section 101(40) of CERCLA, 42 U.S.C § 9601(40).

M. While the Department makes no commitment to funding any remediation of the contaminated groundwater at the Site, the Department recognizes that the HSCA program may, at some point, provide a source of funds towards addressing the releases or threatened releases of hazardous substances or contaminants in groundwater at the Site.

## ORDER

After full and complete negotiation of all matters set forth in this CO&A and upon the mutual exchange of covenants contained herein, the parties intending to be legally bound, it is hereby ORDERED by the Department and AGREED to by Developer, as follows:

1. **Authority:** This CO&A is an Order of the Department authorized and issued pursuant to Section 1102 of HSCA, 35 P.S. § 6020.1102.

2. **Findings:**

(a) Developer agrees that the findings set forth in Paragraphs A through L above, which are incorporated herein by reference, are true and correct, and, in any matter or proceeding concerning the Site involving Developer and the Department, Developer shall not challenge the accuracy or validity of these findings.

(b) The parties do not authorize any other persons to use the findings in this Consent Order and Agreement in any matter or proceeding.

3. **Work To Be Performed:** In exchange for the benefits conferred by the Department to Developer under this CO&A, and as compensation for response costs incurred and to be incurred by the Department in connection with the Site, Developer hereby agrees that, by March 1, 2009, Developer shall undertake investigation and/or remediation of soils at the Site necessary to demonstrate attainment with a non-residential statewide health standard or site-specific standard under Act 2 for soils at the Site in accordance with the Remedial Action Work Plan ("Plan") attached hereto as Exhibit B and incorporated herein by reference. In this regard, Developer shall follow all required procedures and notices under Act 2 within the time frame set

forth in this paragraph.

4. **Access and Right of Entry:** Developer hereby grants to the Department, its employees, agents, contractors and subcontractors, access and right of entry to the Site for the performance of any response actions the Department may deem necessary or appropriate for the Site. The Department will use best efforts, and shall cooperate with Developer, to avoid any unreasonable interference with Developer's business activities at the Site during any access or entry by the Department or its contractors; provided however, that Developer recognizes that remediation of contaminated groundwater at the Site may involve certain technical activities which are necessarily intrusive by nature. The Department agrees to provide reasonable advance notice to Developer or its attorney prior to entry upon the Site by the Department, its employees, authorized representatives, contractors and others under the direction of the Department. Nothing in this paragraph is intended, nor shall it be construed, to limit any right of access or entry that the Department may otherwise have by operation of law.

5. **Non-Exacerbation:** Developer shall not contribute to or otherwise exacerbate, by act or failure to perform a legal duty, any Existing Contamination attributable to the Site. In the event that Developer discovers or is otherwise placed on notice that it has contributed to or otherwise exacerbated the Existing Contamination, Developer shall immediately take steps to abate any such exacerbation in a manner approved by the Department. The Parties agree that the Developer's performance of the soil remediation activities in accordance with the requirements of Paragraph 3 and Act 2 above shall not be deemed to contribute to or otherwise exacerbate Existing Contamination at the Site.

6. **Non-Interference:** Developer shall not interfere with or impair any response

actions taken by the Department, or any other person or entity under the auspices of the Department with regard to the Existing Contamination or any other contamination identified at the Site. The parties agree that the Developer's performance of the soil remediation activities in accordance with the requirements of Paragraph 3 above and Act 2 shall not be deemed to interfere with or impair any response actions taken by the Department.

7. **Department's Covenant Not to Sue:** Subject to the Reservation of Rights provided in Paragraph 8 below, the Department covenants not to sue or take any administrative or judicial action against Developer for response costs, response actions, civil penalties, natural resource damages, or injunctive relief, including encumbering the Property (through lien or otherwise), arising from or relating to the release and/or threatened release of hazardous substances defined as Existing Contamination at the Site. These covenants extend only to Developer, except as they may be transferable as stated below and may terminate at the Department's sole discretion upon Developer's failure to meet any of the requirements of the CO&A. These covenants shall take effect upon the effective date of this CO&A.

8. **Reservation of Rights:**

(a) Notwithstanding any other provision of this CO&A, the Department reserves the right to take any action, administrative or otherwise, against Developer with regard to response costs or response actions at the Site if:

(1) The Department receives previously unknown information that indicates that Developer, prior to the execution date of this CO&A, caused, contributed to, or is otherwise liable (other than for the reasons described in Paragraph J, supra) for any releases of hazardous substances or contaminants at or from the Site; or

(2) Developer has made in any material respect a false or inaccurate representation or statement in a record, report or document relating to the release or threatened release of hazardous substances or contaminants at the Site.

For purposes of this paragraph, the information known to the Department includes the information set forth in this CO&A, contained in the Department's files at the time of execution of this CO&A, or in the documentation identified as describing Existing Contamination at the Site.

(b) The Department's Covenant Not to Sue set forth herein shall not apply to the following claims by the Department against Developer for:

(1) Failure to meet the requirements of this CO&A;

(2) Future releases of hazardous substances or contaminants outside the boundaries of the Site, except to the extent of Existing Contamination;

(3) Future releases or threatened releases of hazardous substances or contaminants at the Site, except to the extent of Existing Contamination, provided that passive migration of Existing Contamination shall not be deemed to constitute a future release or threatened release of hazardous substances or contaminants at the Site; or

(4) Past, present, or future violations of federal or state criminal law.

9. **Contribution Protection.** The Department agrees that, by entering into this CO&A, Developer is a person who has resolved any potential liability to the Commonwealth for the releases or threatened releases of hazardous substances or contaminants at the Site and therefore shall be afforded any existing legal protection provided in Section 705 of HSCA, 35 P.S. § 6020.705, or Section 113(f)(2) of CERCLA, 42, U.S.C. §9613(f)(2) against any claims for contribution that may be asserted against Developer, regarding matters addressed in this CO&A.

Developer acknowledges that the Department has no obligation to defend it in any suit, demand or claim for contribution for any matters arising from the release or threatened release of hazardous substances or contaminants at the Site, arising out of response actions at the Site, or arising out of this CO&A. The contribution protection afforded by this Paragraph shall be in addition to the exclusions from or defenses to liability that may be available to Developer, its successors and assigns, under statutory or common law.

10. **Transferability.**

(a) This Consent Order and Agreement, excluding Developer's obligations pursuant to Paragraph 3 above, shall be transferable to any lessees or subsequent purchaser of any portion of the Site provided that: (1) such lessee or subsequent purchaser did not cause or contribute to, or is otherwise not liable for, any of the Existing Contamination; (2) such lessee of subsequent purchaser agrees in writing to all terms and conditions set forth in this Consent Order and Agreement, excluding those found in Paragraph 3, with respect to its portion of the Site; and (3) the Department is notified within fourteen (14) days of execution of such lease or purchase. For purposes of condition (2) above, the lessee or subsequent purchaser may satisfy this condition by submitting to the Department a copy of this CO&A, which has been endorsed by lessee or subsequent purchaser with a statement indicating its agreement to all terms and conditions set forth herein, excluding Paragraph 3. In the event of such transfer, the lessee or subsequent purchaser shall be entitled to the full benefits of this CO&A, including but not limited to the Covenant Not to Sue set forth in Paragraph 8 above and the contribution protection provided by this CO&A and discussed in Paragraph 9 above.

(b) In the event that Developer or a subsequent transferee desires to lease or transfer all or a portion of the Site to a lessee or subsequent purchaser, and to transfer to the lessee or subsequent purchaser Developer's (or transferee's as the case may be) obligations pursuant to Paragraph 3 above with respect to the portion of the Site to be leased or transferred, then Developer may request the Department to amend this CO&A to specify that the lessee or subsequent purchaser shall be solely responsible for any remaining obligations of Paragraph 3 relating to the lessee's or subsequent purchaser's portion of the Site. The Department, in its discretion, may agree to such amendment provided that all of the following conditions have been satisfied: (a) the Department determines that the lessee or subsequent purchaser is financially capable of completing the remaining obligations of Paragraph 3 at the lessee's or subsequent purchaser's portion of the Site; (b) the lessee or subsequent purchaser did not cause or contribute to any contamination at the Site; and (c) the lessee or subsequent purchaser agrees that, with respect to its portion of the Site, it shall be solely responsible for such remaining obligations of Paragraph 3, shall comply with all other terms and conditions set forth in this CO&A and shall agree to become a signatory to this CO&A under these conditions. In the event of such transfer, the lessee or subsequent purchaser shall be entitled to the full benefits of this CO&A, including but not limited to the Covenant Not to Sue set forth in Paragraph 8 above and the contribution protection described in Paragraph 9 above.

(c) Notwithstanding anything to the contrary, any transfer by Developer or a subsequent transferee pursuant to this paragraph 10 shall not terminate the full benefits of the CO&A with respect to said Developer or subsequent transferee.

11. **Correspondence with the Department.** All correspondence with the Department concerning this CO&A shall be addressed to:

Mr. Stephan Sinding
Environmental Cleanup Program Manager
Pennsylvania Department of Environmental Protection
Southeast Regional Office
2 East Main Street
Norristown, PA 19401

12. **Correspondence with Developer.** All correspondence with Developer concerning this CO&A shall be addressed to:

Constitution Drive Partners, L.P.
700 South Henderson Road, Suite 225
King of Prussia, PA 19406
Attn: Kevin Silverang, President, Constitution Drive Acquisition Corporation, General Partner of Constitution Drive Partners, L.P.

With a copy to:

Attorney for Developer:

Jonathan H. Spergel, Esquire
Manko, Gold, Katcher & Fox, LLP
401 City Avenue - Suite 500
Bala Cynwyd, PA 19004

13. **Severability:** The paragraphs of this CO&A shall be severable and should any part hereof be declared invalid or unenforceable, the remainder shall continue in full force and effect between the Parties.

14. **Entire Agreement:** This CO&A shall constitute the entire integrated agreement of the Parties. No prior or contemporaneous communications or prior drafts shall be relevant or admissible for purposes of determining the meaning or extent of any provisions herein in any litigation or any other proceeding.

15. **Attorney's Fees:** The Parties shall bear their respective attorney's fees, expenses, and other costs in prosecution or defense of this matter, or any related matters, arising

prior to the execution of this CO&A.

16. **Modifications:** No changes, additions, modifications or amendments to this CO&A shall be effective unless they are set forth in writing and designed by the Parties hereto.

17. **Titles:** A title used at the beginning of any paragraph of this CO&A may be used to aid in the construction of that paragraph but shall not be treated as controlling.

18. **Existing Obligations Unaffected.** Except as provided above, and subject to the terms and conditions contained herein, nothing in this CO&A is intended, nor shall it be construed, to relieve or limit any obligation on the part of Developer to comply with any applicable existing or subsequent statute, regulation, permit or order of the Department. In addition, nothing in this CO&A is intended, nor shall it be construed, to authorize any violation of any statute, regulation, order or permit issued by the Department.

19. **Relation to Other Parties:** Except as specifically provided herein, nothing in this CO&A is intended, nor shall it be construed, to diminish or modify in any way the obligations of any other person or entity with respect to the Site.

20. **Responsibility of Developer:** Developer shall be liable for any violations of this CO&A by Developer, including those violations caused by, contributed to, or allowed by its agents, servant or privies, to the extent that they are acting as such, and any persons, contractors and consultants acting for or under Developer.

21. **Remedies for Breach:** Developer's substantial failure to comply with any material provision of this CO&A shall be deemed a breach, and in the event of such breach, the Department may, in addition to the remedies prescribed herein, institute any equitable,

administrative, civil or criminal action, including an action to enforce this CO&A, against Developer. These remedies are cumulative, and the exercise of one shall not preclude the exercise of another. The determination by the Department not to pursue a remedy shall not be construed as waiver of that remedy.

22. **Service of Process:** Service of any notice for any purpose under this Consent Order and Agreement shall be made by mailing a copy of the notice by U. S. Mail First Class, registered mail, certified mail, or a nationally recognized overnight delivery service to the addresses set forth in Paragraphs 11 and 12.

23. **Decisions Under Consent Order:** Any decision that the Department makes under the provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board or to any Court until such time as the Department enforces this CO&A or pursues equitable, administrative, civil or criminal action based on the belief that Developer has failed to comply with any material provision of this CO&A. At no time, however, may the parties challenge the content or validity of this CO&A or challenge the Findings agreed to in this CO&A.

24. **Publication and Comment:**

(a) Notice of this CO&A shall be published in the Pennsylvania Bulletin and in a newspaper of general circulation in the area of the Site pursuant to Section 1113 of HSCA, 35 P.S. §6020.1113, and the Department shall receive and consider comments relating to his CO&A for a period of sixty (60) days from the date of publication. The Department reserves the right to withdraw its consent to this CO&A if, during the public comment period, the comments disclose facts or considerations previously unknown to the Department which indicate to the Department, in its reasonable discretion, that this CO&A is inappropriate, improper, or not in the public interest. Said publication and public comment period shall not affect the effective date of this CO&A.

(b) This CO&A shall be final upon the date that the Department files a response to any significant comments received during the public comment period, if described in Paragraph 23(a) above or notifies Developer that no comments were received. If the Department notifies Developer that it is withdrawing its consent to this CO&A in response to public comment received pursuant to Paragraph 24(a) above, the terms of this CO&A shall be void and of no effect and shall not be used as evidence in any litigation or other proceeding.

25. **Effective Date:** This Consent Order and Agreement shall become effective upon the date first entered above, provided that Developer takes title to the Site within forty five (45) days of the effective date.

26. **Counterparts:** This Consent Order and Agreement may be executed in counterparts, each of which counterparts shall constitute an original, but which counterparts together shall constitute the same Consent Order and Agreement. The delivery by any party hereto of a telecopy or facsimile signature shall have the same legally binding effect as the delivery of an original signature.

IN WITNESS HEREOF, the Parties have caused this Consent Order and Agreement to be executed by their duly authorized representatives. The undersigned representations of Developer certify, under penalty of law, as provided in 18 Pa. C.S.A. § 4904, that they are authorized to execute this Consent Order and Agreement on behalf of Developer, that Developer consents to the entry of this Consent Order and Agreement as a final ORDER of the Department, and that Developer hereby knowingly waives their right to appeal this Consent Order and Agreement and to challenge its contents or validity, which rights may be available under Section 4 of the Environmental Hearing Board At, 35 P.S. § 7514, the Administrative Agency Law, 2 Pa C.S. § 103(a) and Chapters 5A and 7A, or any other provision of law. Signature by Developer's attorney certifies only that the agreement has been signed after consulting with counsel.

FOR CONSTITUTION DRIVE PARTNERS, L.P.:

Date: 3/17/05

Kevin Silverang, VICE President
Constitution Drive Acquisition Corporation, its General Partner

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION:

Date: KENNEDY SIGNED

Stephan Sinding
Environmental Program Manager,
Environmental Cleanup Program

Date: 3/17/05

Anderson Lee Hartzell,
Regional Supervising Counsel

## EXHIBIT A

## INDEX OF ENVIRONMENTAL DOCUMENTS IN PADEP FILES

"Bishop Tube Company, Closure Plan for Change of Status from Storage Facility to Generator," Bishop Tube Co., July 1, 1986.

"Ground Water Quality Investigation Report for Bishop Tube Co., Frazer, Pennsylvania," BCM, May 1988.

"Results of the Soil Vapor Survey, Bishop Tube Corporation, Frazer, Pennsylvania," BCM Engineers, May 15, 1989.

"Groundwater Remediation Work Plan for Christiana Metals Corporation, Frazer, Pennsylvania," BCM Engineers, June 1989.

"Results of Implementation of Groundwater Remediation Work Plan, Phase I," BCM Engineers, January 1990.

"Fourth Quarter 1989 NPDES Groundwater Monitoring Results," BCM Engineers, April 4, 1990.

"First Quarter 1990 NPDES Groundwater Monitoring Results," BCM Engineers, April 27, 1990.

"Registration of Storage Tanks Form," Alloy Steel Corp./Bishop Tube Facility, June 11, 1990.

"Results of Well Search for Christiana Metals Corporation, Bishop Tube Facility, Fraser, Pennsylvania," BCM Engineers, August 1990.

"Results of Soil Vapor Survey in the Degreaser Area at the Bishop Tube Facility, Frazer, Pennsylvania," BCM Engineers, August 1990.

"Scope of Work For Ground Water Investigation and Remediation for Christiana Metals Corporation, Frazer, Pennsylvania," BCM Engineers, November 1990.

"Summary of Quarterly Groundwater Monitoring Results for Christiana Metals Corporation, Bishop Tube Facility, Frazer, Pennsylvania," BCM Engineers, December 1991.

"Underground Storage Tank Closure Report," Brandywine Environmental Compliance, Inc., May 1993.

Correspondence from PADEP to Christiana Metals Corp, No Further Action for Removal of Two 5,000-Gallon Fuel Oil USTs, September 8, 1993.

"Preparedness, Prevention, and Contingency Plan for Damascus-Bishop Tube Company, Inc., Frazer, Pennsylvania," BCM Engineers, June 1994.

"Site Characterization and Interim Remedial Action Plan," O'Brien and Gere, September 1998.

"Ground Water Interim Remedial Action Work Plan," O'Brien and Gere, May 1999.

"HSCA Response Justification Document - Bishop Tube Site," PADEP, March 13, 2000.

"Analytical Sampling Results from Bishop Tube Project, June through August 2001," PADEP, September 25, 2001.

"Bishop Tube Site - 2001 Soil Vapor Survey," PADEP, December 14, 2001.

"Bishop Tube Site - Discreet Interval Sampling MW-5, MW-17 and MW-19," PADEP, December 18, 2001.

"Phase I - Site Characterization Report, Soils, Sediment, Surface Water, and Shallow Groundwater, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania," Baker Environmental, Inc., January 11, 2002.

"Phase II - Ground Water Investigation Report, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania," Baker Environmental, Inc., June 2002.

"Phase III Supplemental Soil Characterization Report," Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania", Baker Environmental, Inc., June 30, 2003.

"Bishop Tube Site, Little Valley Creek Surface Water and Spring Monitoring, Sampling Event Report," PADEP, August 2003.

Correspondence from PADEP to Mr. Robert Gerlach, Sampling Results 30 Conestoga Road, September 2, 2003.

"Phase III Supplemental Groundwater Characterization Report", Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania," Baker Environmental, Inc., July 2, 2004.

"Soil Gas and Shallow Groundwater Sampling Report, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania," Baker Environmental, Inc., August 27, 2004.

Correspondence from PADEP regarding Indoor Air Sampling Results, January 28, 2005.

# EXHIBIT B

## PRELIMINARY REMEDIAL ACTION WORK PLAN

# EXHIBIT B

Pennsylvania Department of Environmental Protection

**2 East Main Street**
**Norristown, PA 19401**

**January 22, 2007**

Southeast Regional Counsel

Telephone: (484) 250 - 5871
Facsimile: (484) 250 - 5931

Jonathan Spergel, Esquire
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 500
Bala Cynwyd, PA 19004

**RE: Bishop Tube HSCA Site**
**First Amendment to Consent Order and Agreement**

Dear Jonathan:

Enclosed please find one (1) fully executed original of the First Amendment to Consent Order and Agreement for the Bishop Tube HSCA Site. Thank you for all your time and effort in resolving this matter. Please contact me if you have any additional questions or concerns.

Sincerely,

Lauren G. Rosen
Assistant Counsel

Enclosure

Cc: D. Armstrong, ECP w/out enclosure
A. Hartzell, OCC w/out enclosure

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

| | | |
|---|---|---|
| Bishop Tube Site | : | Amendment to |
| East Whiteland Township | : | Prospective Purchase Agreement |
| Chester County, Pennsylvania | : | |
| Constitution Drive Partners, L.P. | : | |
| 2701 Renaissance Boulevard, 4th Floor | | |
| King of Prussia, PA 19406 | | : |

**FIRST AMENDMENT TO**
**CONSENT ORDER AND AGREEMENT**

This First Amendment to Consent Order and Agreement ("Amendment") is entered into this 22nd day of January, 2007, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), and Constitution Drive Partners, L.P. ("Developer," and Developer and the Department shall collectively be referred to herein as the "Parties").

WHEREAS, Developer and the Department entered into a Consent Order and Agreement dated March 17, 2005 (the "CO&A") relating to the former Bishop Tube HSCA site located approximately a quarter of a mile south of U.S. Route 30, East Whiteland Township, Chester County, Pennsylvania, and consisting of land approximately 13.7 acres in size, and identified as Chester County Tax Parcel Number UPI 42-04-0321.020 (the "Site");

WHEREAS, under the CO&A, in exchange for, inter alia, Developer's commitment to remediate unsaturated soils at the Site in order to demonstrate attainment with one or a combination of remediation standards for soils under the Pennsylvania Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 to 6026.908 ("Act 2"), the Department has provided Developer with a covenant not to sue pursuant to Section 7 of the CO&A, and contribution protection pursuant to Section 9 of the CO&A;

WHEREAS, the Department desires to address the releases or threatened releases of hazardous substances or contaminants in groundwater at the Site;

WHEREAS, Developer and the Department have been engaged in discussions pursuant to which the Developer would satisfy all of its remedial obligations under the CO&A by (1) purchasing and installing certain portions of a soil vapor extraction/air sparging remedial system (the "AS/SVE System") as further described in the Remediation Design Report prepared by Brownfields Associates, Inc. dated November 20, 2006 (the "Remediation Design Report") and attached hereto as Attachment A, and (2) operating the AS/SVE System until it is deemed "Operational" by the Parties;

WHEREAS, Developer and the Department believe that the installation, implementation and operation of the AS/SVE System will assist in the remediation of hazardous substances in soil and groundwater at the Site;

WHEREAS, Developer and the Department desire to amend the CO&A to, inter alia, modify the Developer's remedial obligations thereunder;

WHEREAS, the Parties hereto believe that by entering into this First Amendment, hazardous substances present in soil and groundwater at the Site will be remediated in a more expeditious fashion, to the benefit of the Commonwealth of Pennsylvania;

NOW, THEREFORE, upon the mutual exchange of the covenants contained herein, the Parties intending to be legally bound, it is hereby ORDERED by the Department and AGREED TO by Developer as follows:

1. Paragraph 3 of the CO&A shall be amended and restated as follows:

   "**WORK TO BE PERFORMED:** In exchange for the mutual benefits conferred by the Parties under this CO&A, and as compensation for response costs incurred and to be incurred by the Parties in connection with the Site, the Parties hereby agree to the following:

(a) System Installation.

(1) Developer agrees to perform the tasks identified as the responsibility of Developer on the Task Allocation Memo attached hereto as Attachment B and incorporated herein by reference, in accordance with the deadlines contained therein, at no cost, expense, or liability to the Department.

(2) The Department agrees to perform the tasks identified as the responsibility of the Department on the Task Allocation Memo attached hereto as Attachment B, in accordance with the deadlines contained therein, at no cost, expense, or liability to Developer.

(3) During performance of any tasks by either Party pursuant to the Task Allocation Memo, an agent or representative of the non-performing Party shall be present as an "Oversight Party" to observe the performance of work relating to the task, and upon completion of such task, the agent or representative of the Oversight Party shall: (i) when the Oversight Party is Developer, provide a Professional Engineer's Certification in writing that the task was performed correctly and as specified in the Developer's Remediation Design Report; and (ii) when the Oversight Party is the Department, provide written certification that the task was performed correctly, and as specified in the Developer's Remediation Design Report.

(b) System Startup. After completion by the Parties of the tasks identified on the Task Allocation Memo, Developer shall commence, and be solely responsible for the start up of, the AS/SVE System, which start up period shall last for thirty (30) days ("System Start Up"). Developer shall perform System Start

Up at no cost, expense, or liability to the Department, although the Department may have an agent or representative present to monitor System Start Up, with the cost of such monitoring to be the sole liability and responsibility of the Department.

(c) System Operation/Performance Standards.

(1) After completion of the System Start Up, Developer shall operate the AS/SVE System for a period of sixty (60) days (the "First Operation Period") and provide training to Department-specified operators, with each Party bearing their respective costs and expenses. The AS/SVE System shall be deemed "Operational" if (a) the AS/SVE System meets the specifications for system design flow rate, vacuum, and pressure, as identified in the Remedial System Performance Criteria , attached hereto as Attachment C, which are incorporated herein by reference, on at least fifty-four (54) days of the First Operation Period and (b) the AS/ SVE System removes, on average during the First Operation Period, ten (10) pounds of volatile organic compounds ("VOCs") per day; provided that, if a Force Majeure event occurs during the First Operation Period that directly prevents the AS/SVE System from meeting the system design flow rate, vacuum, and pressure specifications on one or more days, the First Operation Period shall be extended by the same number of days as the Force Majeure event. In the event the AS/SVE System is not deemed Operational after the First Operation Period, Developer and the Department shall operate the AS/SVE System for an additional

sixty (60) days (the "Second Operation Period), after which the AS/SVE System would be deemed Operational if (a) the AS/SVE System meets the specifications for system design flow rate, vacuum, and pressure, as identified in the Remedial System Performance Criteria on at least fifty-four (54) days of the Second Operation Period and (b) the AS/ SVE System removes, on average during the Second Operation Period, ten (10) pounds of volatile organic compounds ("VOCs") per day; provided that, if a Force Majeure event occurs during the Second Operation Period that directly prevents the AS/SVE System from meeting the system design flow rate, vacuum, and pressure specifications on one or more days, the Second Operation Period shall be extended by the same number of days as the Force Majeure event. In the event the AS/SVE System is not deemed Operational at the end of the Second Operation Period, the Parties agree to meet to discuss identifying alternative AS/SVE System performance standards, with the objective of identifying a strategy for concluding that the AS/SVE System is Operational.

(2) Completion of Developer's Remedial Obligations. Upon a determination that the AS/SVE System is Operational in accordance with Paragraph 3(c) above, except as otherwise specified herein, Developer shall have no further remedial obligations to the Department relating to the Site pursuant to the CO&A, and the Department shall be solely responsible, with no cost or liability to Developer, to operate the

AS/SVE System at the Site, with the objective of demonstrating attainment with one or a combination of remediation standards pursuant to Act 2 for unsaturated soils at the Site.

(3) AS System Credit. If the air sparging system portion of the AS/SVE System to be located in the Building 8 Vapor Degreaser area of concern (the "AS System") is determined to be "Inoperable," as defined below, notwithstanding the Task Allocation Memo, Developer agrees to pay for the six (6) months of utility bills associated with the AS/SVE System immediately following the Inoperable determination. The AS System will be deemed Inoperable if, during the First Operation Period, or if necessary, the Second Operation Period, the AS System does not: (a) meet the specifications for system design flow rate, vacuum, and pressure, as identified in the Remedial System Performance Criteria on at least fifty-four (54) of sixty (60) days; and (b)recover, on average, ten (10) pounds of volatile organic compounds ("VOCs") per day.

(4) Future Remedial Activities. The Department agrees to operate the AS/SVE System at the Site, and to expeditiously perform (or require responsible parties other than Developer to perform) other necessary remedial actions at the Site in order to demonstrate attainment with one or a combination of remediation standards under Act 2 for soils and groundwater at the Site that are consistent with Developer's intended redevelopment activities. If, upon completion of

AS/SVE system operation, the Department deems it necessary to implement engineering and/or institutional controls in the vicinity of the Drum Storage Area, as identified on Attachment D, to meet an Act 2 standard, Developer will be responsible for implementation of such controls; provided that, Developer shall only be financially responsible for implementing engineering controls in the Drum Storage Area, consisting of Site capping through a combination of asphalt paving, building foundations, and/or landscaped areas; provided further that, such engineering and institutional controls shall not unreasonably interfere with Developer's intended future redevelopment or reuse of the Site. Notwithstanding anything to the contrary contained herein, Developer and subsequent Site owners shall be solely responsible for evaluating, and implementing any necessary engineering and institutional controls, to ensure that vapor intrusion into Site buildings will not pose an unacceptable level of risk to current or future Site occupants.

2. The Developer's address under Paragraph 12 of the CO&A shall be amended and restated as follows:

> "Constitution Drive Partners, L.P.
> 2701 Renaissance Boulevard, 4th Floor
> King of Prussia, PA 19406
> Attention: Kevin Silverang, President, Constitution Drive Acquisition Corporation, General Partner of Constitution Drive Partners, L.P."

3. A new Paragraph 27 of the CO&A shall be added as follows:

"27. **Force Majeure.**

a. In the event that Developer is prevented from complying in a timely manner with any time limit imposed in this CO&A solely because of a strike, fire, flood, act of God, or other circumstances beyond Developer's control and which Developer, by exercise of all reasonable diligence, is unable to prevent, then Developer may petition the Department for an extension of time. An increase in the cost of performing the obligations set forth in this Agreement shall not constitute circumstances beyond Developer's control. Developer's economic inability to comply with any of the obligations of this Agreement shall not be grounds for any extension of time.

b. Developer shall only be entitled to the benefits of this paragraph if it notifies the Department within five (5) working days by telephone and within ten (10) working days in writing of the date Developer becomes aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation, as well as a notarized affidavit from an authorized individual specifying the reasons for the delay, the expected duration of the delay, and the efforts which have been made and are being made by Developer to mitigate the effects of the event and to minimize the length of the delay. The initial written submission may be supplemented within 10 working days of its submission. Developer's failure to comply with the requirements of this paragraph specifically and in a timely fashion may render this paragraph null and of no effect as to the particular incident involved, as determined in the Department's sole discretion.

c. The Department will decide whether to grant all or part of the extension requested on the basis of all documentation submitted by Developer and other information available to the Department. In any subsequent litigation, Developer shall have the burden of proving that the Department's refusal to grant the requested extension was an abuse of discretion based upon the information then available to it.

4. This Amendment shall modify and is made a part of the CO&A. Otherwise, except as amended hereby, the CO&A shall remain unmodified and in full force and effect.

5. This Amendment may be executed in counterparts, each of which counterparts shall constitute an original, but which counterparts together shall constitute the same Amendment. The delivery by any Party hereto of a telecopy or facsimile signature shall have the same legally binding effect as the delivery of an original signature.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their duly authorized representatives. The undersigned representative of the Buyer certifies under penalty of law, as provided by 18 Pa. C.S. Section 4904, that he is authorized to execute this Amendment on behalf of the Developer; that the Developer consents to the entry of this Amendment as a final Order of the Department; and that the Developer hereby knowingly waives any rights to appeal this Amendment and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 1988-94, 35 P.S. Sect. 7514; the Administrative Agency Law, 2 Pa. C.S. Sect. 103(a) and Chapters 5A and 7A thereof; or any other provision of law. (Signature by attorney for Buyer certifies only that the agreement has been signed after consulting with counsel.)

FOR THE BUYER:

CONSTITUTION DRIVE PARTNERS, L.P.
By its General Partner
CONSTITUTION DRIVE
ACQUISITION CORPORATION

Richard Heany

Name: Richard Heany
Title: President

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

Name: Stephan Sinding
Title: Environmental Program Manager
Environmental Cleanup Program

for

Name: Anderson L. Hartzell
Title: Assistant Regional Counsel

JURAT Page

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF (COUNTY) :

On this 22nd day of January, 2007, before me, a Notary Public, the undersigned officer personally appeared, Stephan Sinding, who acknowledged himself to be the Environmental Cleanup Program Manager for the Southeast Regional Office of the Pennsylvania Department of Environmental Protection, and that he as such Manager, being authorized to do so, executed the Consent Order and Agreement for the purpose therein contained by signing his name as Cleanup Program Manager.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Vanetta Bouknight, Notary Public
Norristown Boro, Montgomery County
My Commission Expires Dec. 1, 2009
Member, Pennsylvania Association of Notaries

# EXHIBIT C

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SOUTHEAST REGIONAL COUNSEL

June 7, 2010

Jonathan H. Spergel, Esquire
Manko, Gold, Katcher & Fox LLP
401 City Avenue
Suite 500
Bala-Cynwyd, PA 19004

Re: Bishop Tube Second Amendment

Dear Jonathan,

Enclosed please find a fully executed Second Amendment to Consent Order and Agreement for the Bishop Tube matter. Please note that this was signed on June 4, 2010 for purposes of the various deadlines.

Thank you for your attention to this matter.

Very truly yours,

Anderson Lee Hartzell
Regional Supervising Counsel

cc: Steve Sinding
Ragesh Patel
Dustin Armstrong

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

| | | |
|---|---|---|
| Bishop Tube Site | : | Second Amendment to |
| East Whiteland Township | : | Prospective Purchase Agreement |
| Chester County, Pennsylvania | : | |
| Constitution Drive Partners, L.P. | : | |
| 2701 Renaissance Boulevard, 4th Floor | | |
| King of Prussia, PA 19406 | : | |

**SECOND AMENDMENT TO**
**CONSENT ORDER AND AGREEMENT**

This Second Amendment to Consent Order and Agreement ("Second Amendment") is entered into this 4th day of June 2010, 2010, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), and Constitution Drive Partners, L.P. ("Developer," and Developer and the Department shall collectively be referred to herein as the "Parties").

WHEREAS, Developer and the Department entered into a Consent Order and Agreement dated March 17, 2005, (the "CO&A") relating to the former Bishop Tube HSCA site located approximately a quarter of a mile south of U.S. Route 30, East Whiteland Township, Chester County, Pennsylvania, and consisting of land approximately 13.7 acres in size, and identified as Chester County Tax Parcel Number UPI 42-04-0321.020 (the "Site");

WHEREAS, Developer and the Department entered into a First Amendment to Consent Order and Agreement dated January 22, 2007, (the "First Amendment") amending the CO&A;

WHEREAS, under the CO&A and First Amendment, in exchange for, inter alia, the Developer's covenants and commitment to remediate unsaturated soils at the Site in order to demonstrate attainment with one or a combination of remediation standards for soils under the Pennsylvania Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 to 6026.908 ("Act 2"), the Department provided Developer with a covenant not to sue pursuant to Section 7 of the CO&A, and contribution protection pursuant to Section 9 of the CO&A;

WHEREAS, Developer and the Department agreed pursuant to the First Amendment that the Developer would satisfy all of its remaining remedial obligations under the CO&A by: (1) purchasing and installing certain portions of a soil vapor extraction/air sparging remedial system (the "AS/SVE System"); and, (2) operating the AS/SVE System until certain criteria were met;

WHEREAS, Developer has installed and commenced operation of the AS/SVE System and has made significant progress towards meeting the system operational criteria established in the First Amendment, and Developer and the Department believe that future operation of the AS/SVE System will assist in the remediation of hazardous substances in soil and groundwater at the Site;

WHEREAS, Developer and the Department desire to further amend the CO&A to allow the Department to assume operational control of the AS/SVE System;

NOW, THEREFORE, upon the mutual exchange of the covenants contained herein, the Parties intending to be legally bound, it is hereby ORDERED by the Department pursuant to Section 1102 of HSCA and AGREED TO by Developer as follows:

1. Paragraph 3 of the CO&A shall be amended and restated as follows:

"(a) **WORK TO BE PERFORMED/MONETARY COMPENSATION:** In exchange for the benefits conferred by the Department to Developer under this CO&A, and as compensation for response costs incurred and to be incurred by the Department in connection with the Site, Developer shall undertake the following:

(1) <u>AS/SVE System Repair</u>. Developer shall make any necessary repairs, including but not limited to the repair or replacement of any manifold equipment that is broken, damaged or otherwise not functioning, to the AS/SVE System such that the AS/SVE System is fully operational for a seventy-two (72) hour period (the "AS/SVE System Repairs"). Developer shall complete the AS/SVE System Repairs within sixty (60) days of execution of this Second Amendment..

(2) <u>AS/SVE System Startup</u>. After completion by the Developer of the AS/SVE System Repairs, Developer shall commence, and be solely responsible for the start up of, the AS/SVE System, which start up period shall be satisfied once Developer has demonstrated to the reasonable satisfaction of the Department that the AS/SVE

System has operated continuously without incident for a seventy-two (72) hour period ("AS/SVE System Startup").

(3) AS/SVE System Manuals and Drawings. Within thirty (30) days of execution of this Second Amendment, Developer shall provide the Department with a copy of all operational manuals and as-built drawings, stamped by a Licensed Professional Engineer, for the AS/SVE System in the possession of Developer or its consultants.

(4) Monetary Compensation. Developer shall make the following monetary payments to the Department: (a) Developer shall pay the Department $10,000 within thirty (30) days of execution of this Second Amendment; and (b) Developer shall pay the Department an additional $20,000 within one (1) year of the date of execution of this Second Amendment. Both payments shall be made payable to the Hazardous Sites Cleanup Fund , and mailed to Mr. Ragesh Patel, HSCA Manager, PA Department of Environmental Protection, 2 East Main Street, Norristown, PA 19401

(5) Road Repair. Within 60 days of the date of execution of this Second Amendment, Developer shall repair the road along the north side of the main building

(the "Building") at the Site, as depicted on Exhibit B attached hereto, and incorporated herein by reference, so that it is passable for standard passenger vehicles and so that stormwater discharged from roof drains to the road as depicted on Exhibit B are directed away from the AS/SVE System.

(6) Security. Developer shall, within sixty (60) days of the date of this Second Amendment, install fencing with a minimum height of seven (7) feet, around all manifold enclosures. The fencing shall include an enclosure over the manifold, in addition to the vertical fencing.

(b) Upon satisfaction of Developer's obligations pursuant to Paragraph 3(a) above, the Department shall provide Developer with a letter within fourteen (14) days of satisfaction of Developer's obligations confirming that Developer has satisfied its obligations pursuant to Paragraph 3(a), and Developer shall have no further remedial obligations at all to the Department relating to the Site pursuant to the CO&A and First Amendment (including, but not limited to any obligation to remediate soil, groundwater, or surface water at or beyond the Site, or for the operation and maintenance of the AS/SVE System at the Site).

(c) If the Department deems it necessary to implement Engineering or Institutional Controls as part of Remedial Action for the Site, Developer shall only be financially responsible for implementing the following Engineering Controls: (1) Site capping in the Drum Storage Area through a combination of asphalt paving, building foundations and/or landscaping; and/or (2) other Engineering Controls determined to be necessary to address vapor intrusion risks for on-site structures.

2. The Developer's address under Paragraph 12 of the CO&A shall be amended and restated as follows:

> "Constitution Drive Partners, L.P.
> 2701 Renaissance Boulevard, 4th Floor
> King of Prussia, PA 19406
> Attention: Richard Heany, President, Constitution Drive Acquisition Corporation, General Partner of Constitution Drive Partners, L.P."

3. This Second Amendment shall modify and is made a part of the CO&A. Otherwise, except as amended hereby, the CO&A shall remain unmodified and in full force and effect.

4. This Second Amendment may be executed in counterparts, each of which

counterparts shall constitute an original, but which counterparts together shall constitute the same Second Amendment. The delivery by any Party hereto of a telecopy or facsimile signature shall have the same legally binding effect as the delivery of an original signature.

IN WITNESS WHEREOF, the parties hereto have caused this Second Amendment to be executed by their duly authorized representatives. The undersigned representative of the Developer certifies under penalty of law, as provided by 18 Pa. C.S. Section 4904, that he is authorized to execute this Second Amendment on behalf of the Developer; that the Developer consents to the entry of this Second Amendment as a final Order of the Department; and that the Developer hereby knowingly waives any rights to appeal this Amendment and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 1988-94, 35 P.S. Sect. 7514; the Administrative Agency Law, 2 Pa. C.S. Sect. 103(a) and Chapters 5A and 7A thereof; or any other provision of law.

FOR THE DEVELOPER:

CONSTITUTION DRIVE PARTNERS, L.P.
By its General Partner
CONSTITUTION DRIVE ACQUISITION CORPORATION

Richard Heany
Name: RICHARD HEANEY
Title: PRESIDENT

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

Name: Stephan Sinding
Title: Environmental Program Manager
Environmental Cleanup Program

Name: Anderson L. Hartzell
Title: Assistant Regional Counsel

JURAT Page

COMMONWEALTH OF PENNSYLVANIA :
:
: SS.
COUNTY OF (COUNTY) ::

On this 7th day of June, 2010, before me, a Notary Public, the undersigned officer personally appeared, Stephan Sinding, who acknowledged himself to be the Environmental Cleanup Program Manager for the Southeast Regional Office of the Pennsylvania Department of Environmental Protection, and that he as such Manager, being authorized to do so, executed the Consent Order and Agreement for the purpose therein contained by signing his name as Cleanup Program Manager.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Vanetta Bouknight Ross
Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Vanetta Bouknight Ross, Notary Public
Norristown Boro, Montgomery County
My Commission Expires Dec. 1, 2013
Member, Pennsylvania Association of Notaries

JURAT Page

COMMONWEALTH OF PENNSYLVANIA :
:
: SS.
COUNTY OF (COUNTY) ::

On this 4th day of June, 2010, before me, a Notary Public, the undersigned officer personally appeared, Richard Heany, who acknowledged himself to be the President (Title) of Constitution Drive Acquisition Corporation, a Pennsylvania corporation and General Partner of Constitution Drive Partners, L.P., and that (s)he as such (Title), being authorized to do so, executed the Consent Order and Agreement for the purpose therein contained by signing the name of the corporation by (him)(her)self as (Title).

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
HARRY A. REICHNER, Notary Public
Whitpain Twp., Montgomery County
My Commission Expires November 13, 2010

Notary Public



709487

# EXHIBIT D

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SOUTHEAST REGIONAL OFFICE

January 28, 2014

Mr. Brian M. Kroker
Vice President, Asset Management & Operations
O'Neill Properties Group
OPG Property Management Corporation
2701 Renaissance Boulevard, 4th Floor
King of Prussia, PA 19406

Dear Mr. Kroker:

As you know, the Department of Environmental Protection (DEP) has been working with Roux Associates, as contractor to Johnson Matthey and Whitaker Corporation, under a federal Consent Decree, to address the release or threatened release of hazardous substances associated with the former Bishop Tube facility now owned by Constitution Drive Partners, LLC (CDP). This work has entailed both remedial investigatory work and implementation of in situ interim response actions within the building areas. As you also know, DEP formally authorized Roux Associates to implement a field study last winter for an anaerobic remediation process within Building 8 in the location of the Soil Vapor Extraction/Air Sparging (SVE/AS) system that was previously installed at the site and capped with a liquid boot. The SVE/AS system was installed in the context of an original Prospective Purchaser Agreement (PPA) with CDP and two Amendments thereto. The last Amendment to the PPA allowed CDP to cash-out of its potential liability to DEP for releases associated with Bishop Tube under certain conditions. One of those conditions, applicable to both the original PPA and the subsequent Amendments, states that CDP "shall not contribute to or otherwise exacerbate . . . any Existing Contamination attributable to the Site". Another condition states that CDP "shall not interfere with or impair any response actions taken by the Department or any other person or entity under the auspices of the Department."

In the early summer of 2011, a contractor for CDP destroyed the liquid boot while performing metals recovery activities within Building 8. Needless to say, this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the PPA and its two Amendments. DEP requested that CDP repair the liquid boot to allow for the continued operation of the SVE/AS system. This was never done, in continued violation of the PPA and its two Amendments. Last spring, in the context of other discussions relating to potential redevelopment of the site, CDP informed DEP that it was looking into demolishing the buildings on the site in order to enhance the potential for redevelopment. Because demolition of the buildings would simplify implementation of Roux Associates' proposed field study, DEP indicated its support for demolition of the buildings in lieu of repair to the liquid boot, even so far as sending a letter to East Whiteland Township in support of CDP's application for a demolition permit.

DEP also met with representatives of VIST Bank back in September in order to encourage them to concur with CDP's demolition of the buildings, something that later became moot once a new investor was secured by CDP. Lastly, during a meeting in mid-December, Regional Director Cosmo Servidio was assured by Mr. O'Neill that the demolition was going forward immediately. Notwithstanding that assurance, nothing has occurred at the Bishop Tube site, and CDP continues to be in violation of the PPA and its Amendments.

This is to advise you that DEP now considers the CDP's violation of the PPA to void the Covenant Not To Sue set forth in Paragraph 7, which states: "These covenants . . . may terminate at the sole discretion of the Department upon [CDP's] failure to meet any of the requirements of the CO&A." Please be advised that this determination is not intended as an appealable action, and DEP will consider whether to exercise its enforcement options related to this determination as matters progress at the site. Immediate demolition of the buildings as CDP has repeatedly proffered will directly impact DEP's consideration of such enforcement options. In this regard, please be advised that DEP has instructed Roux Associates to schedule drilling activities in Building 8 for implementation of the field study identified above by the fourth week in February.

Please notify us by February 7, 2014, of your intention and schedule for the demolition of the building. Depending on your response, we may schedule a meeting to coordinate the remedial activities at the site.

If you have any questions, please feel free to contact Mr. Dustin Armstrong at 484.250.5723.

Sincerely,

Stephan Sinding
Regional Manager
Environmental Cleanup and Brownfields

cc: Mr. Servidio
Andy Hartzell, Esq.
Mr. R. Patel
Mr. Armstrong
Re 30 (eh14ecb)023-5

CURTIN & HEEFNER LLP
BY: Jordan B. Yeager, Esquire
Attorney I.D. 72947
Mark L. Freed, Esquire
Attorney I.D. 63860
Doylestown Commerce Center
2005 S. Easton Road, Suite 100
Doylestown, PA 18901
267-898-0570

*Counsel for Defendants, Maya van Rossum and Delaware Riverkeeper Network*

| | | |
|---|---|---|
| BRIAN O'NEILL, O'NEILL PROPERTIES AND CONSTITUTION DRIVE PARTNERS, LP, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PA |
| | : | CIVIL ACTION LAW |
| v. | : | |
| MAYA VON ROSSUM, CARLA ZAMBELLI and DELAWARE RIVERKEEPER NETWORK, Defendants. | : | No. 2017-03836-MJ |

**ORDER**

AND NOW, this this ______ day of _______________, 2017, upon Defendants Maya van Rossum and the Delaware Riverkeeper Network's Preliminary Objections, and any responses thereto, it is hereby ORDERED and DECREED that said Preliminary Objections are SUSTAINED, and the Complaint in the captioned action is DISMISSED with prejudice.

It is so ordered.

BY THE COURT:

____________________________, J.

CURTIN & HEEFNER LLP
BY: Jordan B. Yeager, Esquire
Attorney I.D. 72947
Mark L. Freed, Esquire
Attorney I.D. 63860
Doylestown Commerce Center
2005 S. Easton Road, Suite 100
Doylestown, PA 18901
267-898-0570

*Counsel for Defendants, Maya von Rossum and Delaware Riverkeeper Network*

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|---|---|---|
| BRIAN O'NEILL, O'NEILL PROPERTIES AND CONSTITUTION DRIVE PARTNERS, LP, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PA |
| | : | CIVIL ACTION LAW |
| v. | : | |
| MAYA VON ROSSUM, CARLA ZAMBELLI and DELAWARE RIVERKEEPER NETWORK, Defendants. | : | No. 2017-03836-MJ |

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that true and correct copies of forgoing documents were served on this date via the Court's Electronic Filing System on the following:

James C. Sargent, Jr., Esquire
Lamb McErlane PC
T. Maxwell O'Keefe, Esquire
24 E. Market Street, P.O. Box 565
West Chester, PA 19381-0565

Samuel C. Stretton, Esquire
301 South High Street
PO Box 3231
West Chester, PA 1938

CURTIN & HEEFNER LLP

Date: July 26, 2017

By:____________________________
JORDAN B. YEAGER, ESQUIRE
Attorney I.D. 72947
Doylestown Commerce Center

1843925.1/51932

2005 S. Easton Road, Suite 100
Doylestown, Pennsylvania 18901
Tel.: 267-898-0570
*Counsel for Defendants, Maya von Rossum and Delaware Riverkeeper Network*

# ATTACHMENT 9

Filed and Attested by
PROTHONOTARY
22 Aug 2017 03:30 PM
J. Miller

| | | |
|---|---|---|
| BRIAN O'NEILL, O'NEILL PROPERTIES and CONSTITUTION DRIVE PARTNERS, LP<br>Plaintiffs | : | IN THE COURT OF C[illegible] CHESTER COUNTY, |
| VS. | : | NO. 2017-03836-MJ |
| MAYA VON ROSSUM, CARLA ZAMBELLI and DELAWARE RIVERKEEPER NETWORK<br>Defendants | : | CIVIL ACTION - LAW |

James C. Sargent, Esquire, Attorney for Plaintiffs
Jordan B. Yeager, Esquire and Mark L. Freed, Esquire, Attorneys for Defendants

**ORDER OF COURT**

AND NOW, this 22 day of August, 2017, upon review and consideration of the Preliminary Objections of Defendants Maya Van Rossum and Delaware Riverkeeper Network to the Complaint, and any response thereto, it is hereby ORDERED said Preliminary Objections are **SUSTAINED**.[1]

Plaintiff's Complaint is hereby DISMISSED with prejudice.

BY THE COURT:

Jeffrey R. Sommer

Jeffrey R. Sommer J.

[1] Defendants Maya Van Rossum and Delaware Riverkeeper Network (hereinafter, "DRN") have asserted a total of nine (9) Preliminary Objections to the Complaint. Plaintiff filed Preliminary Objections to the Preliminary Objections on the basis that DRN's objections have alleged facts outside of the Complaint. In the interest of expediency, we overrule the Preliminary Objections of Plaintiff and address DRN's Preliminary Objections under the well-established standard requiring us to accept

Plaintiff's well-pleaded allegations as true. Plaintiff asserts three causes of action against the Defendants: (1) Defamation/Commercial Disparagement; (2) Tortious Interference with Contractual or Business Relations; and (3) Civil Conspiracy.

DRN's first objection is a demurrer to all counts of the Complaint on the basis that the claims are barred by the *Noerr-Pennington* Doctrine. Pursuant to the *Noerr-Pennington* Doctrine, an individual is immune from liability for exercising his First Amendment right to petition the government. Our Commonwealth Court laid out the history of the *Noerr-Pennington* Doctrine in *Penllyn Greene Assocs., L.P. v. Clouser*, as follows:

> The *Noerr-Pennington* Doctrine originated with the United States Supreme Court's decisions in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In recognition that the "right of petition is one of the freedoms protected by the Bill of Rights," the U.S. Supreme Court held that individuals and organizations are immune from liability under antitrust laws for actions constituting petitions to the government. *Noerr*, 365 U.S. at 138, 81 S.Ct. 523. Over the years, courts have extended this immunity doctrine, referred to as the *Noerr-Pennington* Doctrine, to protect political activity against tort claims. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (First Amendment protected against a civil conspiracy claim by white merchants whose businesses were being boycotted); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir.1988) (defendants were immune from conspiracy liability for damages resulting from inducing official action to decertify a nursing home).
>
> The sole exception to the *Noerr-Pennington* Doctrine is the "sham exception" under which a defendant will not be protected if he is simply using the petition process as a means of harassment. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344, 113 L.Ed.2d 382, (1991). "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.* Therefore, under the "sham" exception, an individual will be liable if he

> "use[s] the governmental process-as opposed to the outcome of that process-as [a] ... weapon." *Id.* See e.g. *Wawa, Inc. v. Litwornia, et al.*, 817 A.2d 543 (Pa. Super. 2003). (dissemination of false information aimed at interfering directly with the business relationships of a competitor triggered "sham" exception to the *Noerr-Pennington* Doctrine).

890 A.2d 424, 430 (Pa. Commw. Ct. 2005). The *Noerr* Court held such immunity existed "regardless of the defendants' motivations" in waging their campaigns, as it recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." *Noerr*, 365 U.S. at 139. Thus, "parties may petition the government for official action favorable to their interest without fear of suit, even if the result of the petition, if granted, might harm the interests of others." *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir.1999).

Based upon the allegations of the Complaint, we find that the *Noerr-Pennington* Doctrine applies here to bar Plaintiff's claims. The Complaint basis its claims on DRN's efforts in resisting Plaintiff's proposed soil clean up, remediation, and repurposing of the Bishop Tube site, a former industrial site which has been rezoned "residential" and which Plaintiff intends to develop additional residential housing within the East Whiteland community. See, *Complaint at ¶23-24*. The Complaint described DRN's activities as a conspiracy "to engage in a campaign of misinformation that is designed to mislead, and have misled, the residents of East Whiteland Township and other surrounding townships, the officials of East Whiteland Township, and the officials of the PADEP ("Pennsylvania Department of Environmental Protection") into believing that any improvements that are proposed by Plaintiffs will be dangerous because of the contaminants currently present at the site...." *Id. at ¶24*. Despite the descriptive language attached to the allegations of DRN's conduct, what is clear based upon the Complaint is that DRN is engaged in the petitioning of the government in opposition of Plaintiff's development efforts. DRN has the right to petition its local and state governments as advocates for environmental safety and public health. This is true even if it means that DRN's efforts are adverse to Plaintiff. This is what we call constitutionally protected free speech under the First Amendment of the United States Constitution and the Pennsylvania Constitution. See, U.S. Const. Amend. I, and Article I, Section 7 of the Pennsylvania Constitution, Pa.Const. Art. I, §7.

Because the Complaint makes evident that DRN petitioned the local government in order to influence policy and obtain favorable government action, the sham exception does not apply. See, *Chantilly Farms Inc. v. West Pileland Twp.*, 2001 W.L. 290645 (E.D. Pa. 2001). Moreover, even if we were to consider whether the alleged conduct constituted a "sham", the challenged activities must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Trustees of the University of Pennsylvania v. St. Jude*

*Children's Research Hospital*, 940 F. Supp.2d 233, 240-41 (E.D. Pa. 2013), quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991). From the allegations in the Complaint, we conclude that DRN's concern for the proposed remediation plan and soil clean up is not an objectively baseless concern. Plaintiff has conceded that "chlorinated solvent contamination…remains today in Site soils and groundwater" and that "contamination in groundwater has migrated significant distances beyond the boundaries of the Site" to the surrounding community. See, *Complaint at ¶14-15*. Moreover, Plaintiff has made clear it does not intend to conduct a full clean up of the site, but only a partial one, based upon its belief that it has no legal obligation to do more. See, *Id. at ¶29*. Although Plaintiff avers that it plans to clean up the soils above the water table at the site in accordance with PADEP's standards, it notes that the party who caused the groundwater contamination that bears the responsibility for cleaning it up – and that entity is not Plaintiff. See, *Id. at ¶28*. Given that there is no dispute regarding the fact that groundwater contamination on the site exists and that it has spread beyond the site, DRN's concern cannot be objectively baseless. The dispute remains over who is responsible for cleaning it up and to what degree. That question is not before this Court at this juncture.

In light of the above discussion, we have, therefore, determined that the conduct described in the Complaint is protected by the *Noerr-Pennington* Doctrine and DRN is immune from Plaintiff's tort claims. We need not address the remaining eight preliminary objections as they have been rendered moot by the dismissal of Plaintiff's Complaint against DRN.

# ATTACHMENT 10

| | | |
|---|---|---|
| J. BRIAN O'NEILL, O'NEILL PROPERTIES GROUP, L.P. and CONSTITUTION DRIVE PARTNERS, LP | : | IN THE COURT OF COMM[ON PLEAS] CHESTER COUNTY, PEN[NSYLVANIA] |
| VS. | : | |
| MAYA van ROSSUM, CARLA ZAMBELLI, DELAWARE RIVERKEEPER NETWORK and JOHN DOES 1 THROUGH 10 | : | NO. 2017-03836-MJ |
| | : | CIVIL ACTION |

James C. Sargent, Jr., Esquire, Attorney for Plaintiffs
Jordan B. Yeager, Esquire and Mark L. Freed, Esquire, Attorneys for Defendants Maya van Rossum and Delaware Riverkeeper Network
Samuel C. Stretton, Esquire, Attorney for Defendant Carla Zambelli

## OPINION PURSUANT TO Pa.R.A.P. 1925

BY: SOMMER, J. October 23rd, 2017

I. **Procedural Setting**:

This matter comes before this Court as the result of an appeal filed by J. Brian O'Neill, O'Neill Properties Group, L.P. and Constitution Drive Partners, LP (hereinafter "Appellants") from this Court's Order of August 22, 2017, sustaining the preliminary objections of Appellees Maya van Rossum and Delaware Riverkeeper Network (hereinafter "DRN") and dismissing the Complaint. Appellants filed a timely Notice of Appeal on September 21, 2017. I issued an Order for a Concise Statement of Errors Complained Of on Appeal the same day. Appellants' Concise Statement was received in chambers on October 11, 2017. The matter is now ripe for determination.

II. **Facts**:

The underlying facts, as alleged in the Complaint, are set forth as follows. Appellants purchased a property known as the "Bishop Tube" site in 2005. *Complaint at ¶12.* The Bishop Tube site is a former industrial site upon which industrial buildings and other vacant improvements remain standing. *Id. at ¶14*. The site was formerly a large industrial operation which manufactured stainless steel tubes from the 1950s through 1999. *Id.* The manufacturing process involved the release of significant amounts of chlorinated solvents into the soil and groundwater at the site. *Id.* This contamination remains today in the site's soil and groundwater and has migrated significant distances beyond the boundaries of the site into the surrounding community. *Id. at ¶¶14-15.*

Upon purchasing the Bishop Tube site in 2005, Appellant Constitution Drive Partners, LP ("CDP") entered into an agreement with the Pennsylvania Department of Environmental Protection ("PADEP") pursuant to the Hazardous Sites Cleanup Act whereby CDP agreed to several commitments, including the performance of certain remedial activities. *Id. at ¶18*. Under the agreement, PADEP provided CDP with a covenant not to sue CDP in connection with the contamination at the site and also afforded CDP contribution protection against third party claims relating to same. *Id. at ¶18.* Thus, while Appellants are not responsible for the contamination, they agreed to partially remediate the site, proposing a plan for remediating unsaturated soils. *Id. at ¶17*. In 2010, CDP allegedly satisfied its remedial obligations by installing an air sparging/soil vapor extraction ("AS/SVE") remediation system and operating the system for an unspecified period of time. *Id. at ¶18.*

In 2014, PADEP advised CDP by letter that the covenant not to sue was void as a result of certain damage caused by a salvage contractor to the AS-SVE system, which was no longer in use. *Id. at ¶19.* CDP disputes PADEP's position, but was unsuccessful in its appeal of PADEP's issuance of the letter. *Id.*

Also in 2014, East Whiteland Township rezoned the Bishop Tube site from industrial use to residential use and specifically rezoned the property to a Residential Revitalization District ("RRD"). Prior to the zoning change, CDP had made extensive efforts to market and redevelop the site for commercial purposes, but was unable to do so. *Complaint at ¶21.* As a result, CDP sought municipal approvals from the Township for plans to construct a 228 residential townhome community on a portion of the site. *Id. at ¶22.* Appellees van Rossum and the Delaware Riverkeeper Network have opposed Appellees' proposed soil clean-up plan as well as remediation and repurposing of the Bishop Tube site by Appellants. *Id. at ¶23.* Rather than a new townhome development, Appellees have advocated for the Township and Commonwealth spend public funds to remediate the site and create a park. *Id.*

Appellants allege that Appellees have engaged in a "campaign of misinformation that is designed to mislead, and ha[s] misled, the residents of East Whiteland Township and other surrounding townships, the officials of East Whiteland Township, and the officials of the PADEP into believing any improvements that are proposed by [Appellants] will be dangerous because of the contaminants currently present at the site and that improvement of the Bishop Tube site pursuant to the RDD Zoning puts the surrounding residents in a greater risk of exposure to said contaminants." *Id. at ¶24.* Appellants also allege that Appellees have made untrue assertions of fact regarding the risk of the improvements proposed by [Appellants] at public meetings, writings and social media. *Id. at ¶25.*

Specifically, Appellees published and distributed a flier to the community which stated as fact that the redevelopment of the site will "expose us to more of the toxins and put 200+ homes on the contaminated land."[1] *Id. at* ¶26. The flier also stated "if this development happens your community could be on the receiving end of more contamination as the toxins make their way through our local waterways and water table."[2] *Id.* Appellants allege these statements are false. According to Appellants, Appellees desire that the site be fully remediated. *Id. at* ¶26. Appellants also contend that Appellees' single goal is to "prevent the legitimate and lawful business interests of [Appellants] to improve the Bishop Tube site through their clean-up efforts and the development of their 228 townhouse community."[3] *Id. at* ¶27.

Appellants allege that the abovementioned flier also stated that CDP planned to use a "$1 million grant from the DEP (our tax money) to perform a 'PARTIAL CLEAN-UP" of the Bishop Tube site" and that the developer is refusing "to take responsibility

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[1] While Appellants describe this statement as false, it is apparent from the face of the Complaint that it is not. Appellants alleged that the groundwater contamination has migrated significantly offsite, which means that more of the community has been exposed to the contaminants. *Complaint at* ¶¶*14-15*. Appellants further alleged that they proposed a plan to construct 228 new townhomes on a portion of the site. *Id. at* ¶22. The effect of migrating contamination and additional homes being constructed on an already contaminated site is that more of the community will be exposed to such contamination. Therefore, based upon Appellants' own allegations, it appears that the statement of Appellees is actually true.

[2] Appellants have admitted to the fact that groundwater and soil on the site is contaminated. *Complaint at* ¶¶*14-15*. The groundwater contamination has spread significantly offsite as it makes its way through the water table into the nearby creek. *Id.* It is clear, therefore, that nearby communities *could* be on the receiving end of more contamination. Despite Appellants' characterization of the statement as false (which may be ignored for purposes of considering preliminary objections), this statement is not untrue.

[3] Appellants characterize this as Appellees' singular goal; however, throughout the Complaint, Appellants note that Appellees desire the full remediation of the site for purposes of constructing a public park on the land. *Complaint at* ¶¶*23, 26*. Thus, the Complaint contains conflicting allegations.

for full removal of the toxins at the site."[4] *Id. at ¶28.* Appellants allege that the public may infer that CDP is obligated to accept such responsibility but is refusing to do so. *Id. at ¶28.* However, the Complaint alleges again that Appellants are not responsible for remediation of any contaminated groundwater under the site or downstream from the site and that such responsibility lies with the PRPs identified by the PADEP. *Id. at ¶¶17, 28.* Appellants additionally claim that DRN has published false statements on its website saying "that development of the property will increase potential pollution of nearby streams and wetlands and that contamination would continue to affect the surrounding environment and community because of the development." *Id. at ¶¶31-32.*[5]

Based upon these statements, Appellants assert three counts against Appellees van Rossum and DRN consisting of (1) Defamation/Commercial Disparagement; (2) Tortious Interference with Contractual or Business Relations; and (3) Civil Conspiracy. Appellees filed Preliminary Objections to the Complaint made up of nine objections ranging from demurrers to challenging the factual insufficiency of the allegations. Rather than respond to the merits of the Preliminary Objections,

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[4] Again, these statements are not false. Appellants allege that they agreed to perform a partial remediation of the site. *Id. at ¶¶17-18.* Appellants also pleaded that they have not been deemed a "potentially responsible party" ("PRP") and, therefore, have no liability or responsibility to remediate any contamination at the site. *Id. at ¶17.*

[5] As above, these statements are simply not false. Appellants admit that the groundwater has been contaminated and spread significantly offsite. *Id. at ¶¶14-15.* The reasonable inference is that contaminated groundwater travels through the water table to nearby waterways, including streams and wetlands, which increases <u>*potential*</u> pollution of those areas. Anything less than full remediation of the site may potentially increase contamination of surrounding areas. This is especially true where construction of townhomes will result in disturbance of the soil through digging and excavating, which will in turn release more toxins present in the soil and groundwater into the surrounding environment.

Appellants filed Preliminary Objections to the Preliminary Objections as they are entitled to do under Pa.R.C.P. 1017 and 1028.

By Order of August 22, 2017, after careful consideration, I overruled Appellants' Preliminary Objections to the Preliminary Objections. At the same time but by separate Order, I ruled on Appellees' Preliminary Objections. I did so after reviewing the extensive argument of Appellees in their Preliminary Objections (filed on July 26, 2017), the Memorandum of Law in support thereof (filed on August 15, 2017), and the Complaint. In so reviewing and after considerable research, I concluded that the *Noerr-Pennington* Doctrine applied to preclude Appellants' claims. See, Order dated August 22, 2017, which is attached hereto and incorporated by reference.

Appellants present sixteen (16) matters complained of on appeal[6] for the appellate court's consideration. The trial court is directed by the Supreme Court of Pennsylvania to address, on the merits, all issues raised in good faith, despite the verboseness of such complaints. *Eiser v. Brown & Williamson Tobacco Corp.*, 595 Pa. 366, 372, 938 A.2d 417, 420 (2007). While we question the "good faith" of Appellants in bringing the instant lawsuit and subsequent appeal, we will address the complaints,

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[6] In considering the burden such an appeal places upon the limited resources of the judicial system, I recall the words of the Honorable Ruggero J. Aldisert, then of the United States Court of Appeals for the Third Circuit.

> When I read an appellant's brief that contains 10 or 12 points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebutable presumption, but is a presumption that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness.

*United States v. Hart*, 693 F.2d 286, 287 n.1 (3d Cir. 1982) (citations omitted). As stated below, although Appellants set forth sixteen alleged errors by the court, we conclude that Appellants essentially state two errors which are summarized and addressed herein.

which are set forth as follows:

1. Appellants were deprived of their right to due process when the trial court disregarded the requirements of the Rules of Civil Procedure and the Chester County Local Rules of Civil Procedure by granting the Preliminary Objections filed by Appellees, without properly considering Appellants' Preliminary Objections to the Preliminary Objections, and without providing an opportunity for, or considering, Appellants' arguments on the merits in opposition to Appellees' Preliminary Objections.

2. Appellants' Complaint set forth a cause of action for defamation. Appellees filed Preliminary Objections to the Complaint, asserting a number of facts outside the Complaint in order to support a claim that Defendants were exercising their First Amendment right to free speech when they defamed Appellants.

3. Appellees' Preliminary Objections were in the nature of a speaking demurrer because they alleged a number of facts outside of the Complaint.

4. Appellants filed timely Preliminary Objections objecting to Appellees' Preliminary Objections on the basis that Appellees' Preliminary Objections were in the form of a speaking demurrer and because Appellees' Preliminary Objections asserted new facts and attached new exhibits that were not part of the record established by and limited to the Complaint, hence were not part of the case.

5. While Appellees have a First Amendment right to voice opposition to a proposed land development project, Appellees have no First Amendment right to defame Appellants, and Appellants would have made this important distinction had the trial court followed correct procedures.

6. The trial court deprived Appellants of the opportunity to vindicate their right to be free from defamation by failing to following Pennsylvania and local procedural rules, and ruling on Appellees' Preliminary Objections prematurely.

7. Appellees did not file a memorandum of law in support of their Preliminary Objections and did not file a praecipe for determination, and accordingly, Appellees' Preliminary Objections were not, and never have been, ripe for determination.

8. Appellants' own Memorandum of Law in support of their Preliminary Objections to Appellees' Preliminary Objections was not due until after the trial court prematurely ruled on Appellees' Preliminary Objections.

9. Appellants were entitled to an opportunity to be heard. Appellants' due process rights encompass the right to notice and the opportunity to be heard on their Preliminary Objections to Appellees' Preliminary Objections, and on the merits of the alleged First Amendment rights and right to be free from Defamation. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

10. At the very least, the trial court should have treated Appellees' Preliminary Objections as a petition, and ordered the parties to take depositions, to either request a hearing or submit memoranda of law, and it should have scheduled argument.

11. Under both the Pennsylvania Rules of Civil Procedure and the Chester County Local Rules of Civil Procedure Appellants were entitled to:

a. Submit a memorandum of law in support of their own arguments on Appellants' Preliminary Objections to Appellees' Preliminary Objections;

b. Evaluate whatever law and arguments were made by Appellees in their Preliminary Objections, and respond to Appellees' not yet filed Memorandum of Law in support of those Preliminary Objections;

c. File Appellants' own Memorandum of Law opposing Appellees' arguments in support of Appellees' Preliminary Objections and, as appropriate, arguing the merits of the First Amendment versus defamation theories;

d. Request oral argument on, and argue, the issues raised by both sets of Preliminary Objections and responses thereto (C.C.R.C.P. 206.5, 206.6, 208.3(b), C.C.R.C.P. 211.1).

12. Appellants were not provided the opportunity to exercise their Due Process rights by addressing the issues raised by the two sets of Preliminary Objections.

13. Rather, on August 22, 2017, the trial court, without notice and in disregard of the Pennsylvania Rules of Civil Procedure and Chester County Local Rules, granted Appellees' Preliminary Objections and struck Appellants' Complaint without properly considering Appellants' responsive Preliminary Objections, and disregarded and precluded Appellants' argument that Appellees' speaking demurrer was improper.

14. In fact, contrary to Pennsylvania's standards for review of Preliminary Objections, rather than taking all of the allegations in Appellants' Complaint as true, and affording those allegations all reasonable inferences, the trial court took the

factual allegations in Appellees' Preliminary Objections as true, and ignored the allegations of the Complaint.

15. The trial court's deprivation of a property right (to be free from defamation) by adjudication must be preceded by notice and an opportunity to be heard. Otherwise it is a deprivation of property without due process of law. Notice and an opportunity to be heard are indispensable to due process. The procedures (or absence of procedures) that occurred in the trial court deprived Appellants of their right to due process.

16. The trial court did not even afford Appellants the opportunity to file an amended Complaint.

Upon review of Appellants' allegations of error, we find them to be cumulative and repetitive. For purposes of this opinion and ease of discussion, the basic complaints are summarized as (1) the trial court violated Appellants' due process rights by denying them an opportunity to be heard in opposition to Appellees' Preliminary Objections and (2) the trial court improperly considered Appellees' speaking demurrer and, in doing so, did not adhere to the applicable standard of review in deciding the merits of the Preliminary Objections. The first is largely a procedural issue while the second attacks the substance of this court's ruling.

## III. <u>**Issues**</u>:

A. Whether this court violated Appellants' due process rights by denying them an opportunity to be heard in opposition to Appellees' Preliminary Objections?

B. Whether this court erred as a matter of law in dismissing Appellants' Complaint for failure to state a cognizable claim against Appellees?

## IV. <u>**Holdings**</u>:

A. No, this Court did not violate Appellants' due process rights or deny them an opportunity to be heard in opposition to Appellees' Preliminary Objections.

B. No, this court did not err as a matter of law in dismissing Appellants' Complaint for failure to state a cognizable claim against Appellees.

**V. <u>Rationale</u>:**

A. Standard and Scope of Review

The question presented in a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. If doubt exists concerning whether the demurrer should be sustained, then this doubt should be resolved in favor of overruling it. However, any argumentative allegations or expressions of opinion are not accepted as true. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). The Court is similarly not obliged to accept the legal conclusions or theories underlying the claims. The Superior Court's standard of review of a lower court's decision granting a demurrer is *de novo*. *Bruno v. Erie Ins. Co.*, 630 Pa. 79, 106 A.3d 48 (2014) (internal citations and quotations omitted).

B. Discussion

1. *The Court did not Violate Appellants' Due Process Rights*

Appellants contend that this court violated their due process rights by depriving them of notice and an opportunity to be heard prior to the dismissal of their Complaint. According to Appellants, this overarching abuse contains several subparts. Specifically, Appellants argue that the court ignored the procedural requirements of the Rules of Civil Procedure and local rules by (1) ruling on Appellees' Preliminary Objections before a praecipe for determination was filed, thereby violating C.C.R.C.P. 206.6; (2) by ruling on Appellees' Preliminary Objections prior to Appellees filing a memorandum of law in support thereof in violation of C.C.R.C.P. 1028(c); (3) by not scheduling oral argument in violation of C.C.R.C.P. 211.1; (4) by not treating Appellees' Preliminary Objections as a petition and ordering the parties to engage in discovery; (5) by failing to allow Appellants the opportunity to file a response to Appellees' Preliminary Objections and brief in support thereof in accordance with C.C.R.C.P. 1028(c); and (6) by failing to provide Appellants the opportunity to file an amended complaint. As a result of the court denying Appellants an opportunity to respond to the merits of Appellees' Preliminary Objections, Appellants allege their due process rights have been violated because they have been deprived of a property right (to be free from defamation). We will address each of these complaints in seriatim.

Appellants contend that Appellees' Preliminary Objections were never ripe for adjudication because Appellees did not file a praecipe for determination or memorandum of law in support thereof. Appellees are mistaken. Both a praecipe for determination and Memorandum of Law were filed by Appellees on August 15, 2017. Thus, the matter was ripe for determination. Appellants also claim that I should have ordered oral argument on the Preliminary Objections and failing to do so was a violation of C.C.R.C.P. 211.1. Again, Appellants are mistaken. To my knowledge, no request for oral argument was made by either party on either set of preliminary objections nor does the docket reflect any such request. Even so, it is within the court's discretion whether to host oral argument. Appellants further argue that I should have treated Appellees' Preliminary Objections as a petition and directed discovery. However, what was before the court was objections to the Complaint based upon the legal and factual sufficiency of the pleadings. No discovery is necessary to resolve these issues. These complaints lack merit.

Next we turn to the overarching complaint which is that Appellants were not provided with the opportunity to respond to Appellees' Preliminary Objections, which Appellants contend, amount to a due process violation. We recognize that Appellees' Preliminary Objections contained a notice to plead pursuant to Pa.R.C.P. 1026(a). However, because we reviewed the legal and factual sufficiency of the Complaint and any applicable law, we determined that no response from Appellants was necessary nor would it aid the Court in its determination. While this may amount to a liberal interpretation of the local and Commonwealth's procedural rules governing the disposition of the preliminary objections, it does not amount to a violation of due process.

Finally, Appellants argue it was an abuse of discretion to deny the opportunity to file an amended pleading following dismissal of the complaint. An amendment is properly refused where it appears amendment is futile. *Lutz v. Springettsbury Twp.*, 667 A.2d 251 (Pa. Cmwlth.1995). Because the speech about which Appellants complained was protected free speech, I concluded that any amendment to the Complaint would have been futile. No amount of pleading would change the fact that Appellees exercised their right of free speech under the First Amendment of the United States Constitution to petition their government, e.g. East Whiteland Township and PADEP, against Appellants' proposed development. I cannot conceive in what respects the present complaint may be amended to make it sufficient in law without alleging facts inconsistent with those contained in the present Complaint. In denying Appellants the opportunity to replead, I denied them the ability to further prolong this abusive action against Appellees. Based upon the foregoing, I respectfully request that the Order of August 22, 2017 be affirmed.

### 2. *The Complaint Failed to State a Cognizable Claim*

Now we turn to the substantive complaints on appeal. Appellants essentially argue that their Complaint stated a cognizable claim for defamation. Although this Court's Order of August 22, 2017 dismissed all three (3) counts of defamation/commercial disparagement, tortious interference with contractual or business relations, and civil conspiracy, Appellants' Concise Statement only raises issues related to the dismissal of the defamation claim, thereby conceding that the claims for tortious interference and civil conspiracy were properly dismissed. We therefore address the application of the *Noerr-Pennington* Doctrine and the Participation in Environmental Law or Regulation Act, otherwise known as the "Environmental Immunity Act", 27 Pa.C.S. § 8301, et seq. (hereinafter "Act").

#### a. *Noerr-Pennington* Doctrine

Appellants argue that Appellees' Preliminary Objections set forth facts outside of the Complaint in order to demonstrate to the Court that Appellees were exercising their First Amendment right to free speech, i.e. a speaking demurrer. Thus, it appears that Appellants contend only that dismissal of the claim was premature at the preliminary objection stage based upon facts *de hors* the record, not that the claim ultimately would have been meritorious. This lends to the idea that Appellants commenced this action as a means of intimidation and harassment, not because Appellants believe in the success of their claims.

Pursuant to the *Noerr-Pennington* Doctrine, an individual is immune from liability for exercising his First Amendment right to petition the government. As set forth in great length, the *Noerr-Pennington* Doctrine applies here to bar Appellants' claim for defamation. I will not restate the history and applicability of the *Noerr-Pennington*

Doctrine here, but refer the appellate court to my Order of August 22, 2017. Instead, I will focus on the allegations of the Complaint which led to the conclusion that the Appellees were engaged in exercising their First Amendment rights in petitioning their government.

Specifically, Appellants alleged that "[Appellees] have resisted [Appellants'] proposed soil clean up, remediation and repurposing of the Bishop Tube Site, in a thinly-veiled attempt to coerce the Township and the Commonwealth to impede [Appellants'] efforts and spend many millions of dollars of public revenue to remediate the site and create a park." *Complaint at ¶23*. In evaluating a demurrer, the trial court need only accept as true the well-pleaded allegations of fact, but may disregard conclusions of law, argumentative allegations or expressions of opinion. *Firing*, supra, 466 Pa. 560. Thus, it was within my discretion to discard Appellants' blustery and derogatory characterization of Appellees' conduct and look at the facts as alleged – Appellees were advocating to the Township and PADEP their position that a full remediation of the site and the development of a public park, with public funds, was a better use of the property than the proposed 228 townhome development. These facts were not taken outside the record as Appellants allege; rather, they come straight from paragraph 23 of Appellants' Complaint.

While Appellants clearly disagreed with the position of Appellees, and the opposition of Appellees has allegedly caused delays in Appellants' ability to proceed with its proposed plans, the conduct is not actionable. Appellees petitioned the local and state governments in order to oppose actions which they believe are harmful to the environment and the public. Doing so is an exercise of their First Amendment rights.

As set forth in the Order of August 22, 2017, the sole exception to the *Noerr-Pennington* Doctrine is the "sham exception" under which a defendant will not be protected if he is simply using the petition process as a means of harassment. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L.Ed.2d 382, (1991). "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.*

Appellants contend that Appellees' single goal is to "prevent the legitimate and lawful business interests of [Appellants] to improve the Bishop Tube site through their clean-up efforts and the development of their 228 townhouse community." *Id. at* ¶*27.* This allegation might seem to remove Appellees' conduct from immunity under the *Noerr-Pennington* Doctrine; however, when viewing the Complaint as a whole which I am obligated to do, it becomes apparent that this allegation is contradicted by the remaining averments. Throughout the Complaint, Appellants note that Appellees desire the full remediation of the site for purposes of constructing a public park on the land. *Complaint at* ¶¶*23, 26.* Moreover, it is clear from the pleadings that Appellees are concerned about the spreading of contaminated soil and groundwater throughout the community. Thus, Appellants' allegations are undermined by its own admission that Appellees are attempting to procure favorable government action due to genuine concerns. The mere fact that Appellants' business ventures are frustrated by Appellees' opposition does not remove such conduct from the protections of the First Amendment and *Noerr-Pennington* Doctrine.

*b. Environmental Immunity Act*

Although not discussed in the Order of August 22, 2017, I determined that the Environmental Immunity Act, 27 Pa.C.S. § 8301, et seq., also applies to bar Appellants' claim for defamation. The Environmental Immunity Act provides that,

> a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action. 27 Pa.C.S.A. §8302(a).

The purpose of this Act is to protect those who espouse legitimate environment concerns. It also provides a means to bring a "swift end to retaliatory lawsuits seeking to undermine participation in the establishment of state and local environment policy." *Pennsybury Village Associates, LLC v. Aaron McIntyre*, 11 A.3d 906, 912-13 (Pa.2011)(quoting Preamble to the Act of December 20, 2000, P.L. 980, No. 138). The Act covers both communications to the government and communications to third parties. *Penllyn Greene Assocs., L.P. v. Clouser*, 890 A.2d 424, 433 (Pa. Cmwlth. 2005). Immunity is triggered if, and only if, the communication is aimed at procuring favorable government action, regardless of whether the communication is made directly to the government or to third parties. *Id.* However, a person shall not be immune if the communication is "knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity." 27 Pa.C.S.A. §8302(b)(1).

Here, as discussed above, it is apparent from the Complaint that Appellees petitioned the local and state governments, and third party residents of East Whiteland Township, against the townhome development and in favor of full remediation of the site and creation of a public park. *Complaint at ¶¶23-24*. In doing so, Appellees created certain fliers that they distributed to Township officials, residents and the PADEP as well as posting certain documents and information on the DRN website. *Id. at ¶¶24-26, ¶28, and 31*. Appellants contend that the information contained in the fliers and on the website were false. *Id.* However, the characterization of the statements as false is belied by the other allegations of Appellants' Complaint.

First, one flier stated that the redevelopment of the site will "expose us to more of the toxins and put 200+ homes on the contaminated land." *Id. at ¶26.* However, in this same Complaint, Appellants admit that the groundwater contamination has migrated significantly offsite. *Complaint at ¶¶14-15*. The reasonable inference is that, as a result of the migration of groundwater contamination, more of the community has been exposed to the contaminants. Additionally, Appellants acknowledge that they intend to build 228 new townhomes on the site. When you build homes, you intend for people to live in them. By creating more housing for people on a site that is indisputably contaminated, it means that more of the community will be exposed to such contamination. Therefore, these statements are not false.

Next, the flier also stated "if this development happens your community *could be* on the receiving end of more contamination as the toxins make their way through our local waterways and water table." *Id.* (emphasis added). Again, Appellants have admitted to the fact that groundwater and soil on the site is contaminated. *Complaint at ¶¶14-15*. The groundwater contamination has spread significantly offsite as it makes its way through the water table into the nearby creek. *Id.* This court reasonably deduced that nearby communities *could*, in fact, be on the receiving end of more contamination were this development to proceed. As a result, this statement is not untrue.

The flier also stated that CDP planned to use a "$1 million grant from the DEP (our tax money) to perform a 'PARTIAL CLEAN-UP" of the Bishop Tube site" and that the developer is refusing "to take responsibility for full removal of the toxins at the site." *Id. at ¶28.* In the Complaint, Appellants allege that they agreed to perform a partial remediation of the site. *Id. at ¶¶17-18.* Appellants also pleaded that they have not been deemed a "potentially responsible party" ("PRP") and, therefore, have no liability or responsibility to remediate any contamination at the site. *Id. at ¶17.* Thus, the statements simply are not false.

Finally, according to the Complaint, DRN has published statements on its website saying "that development of the property will increase potential pollution of nearby streams and wetlands and that contamination would continue to affect the surrounding environment and community because of the development." *Id. at ¶¶31-32.* Yet Appellants have pleaded that the groundwater is contaminated and has spread significantly offsite. *Id. at ¶¶14-15.* The reasonable inference is that contaminated groundwater travels through the water table to nearby waterways, including streams and wetlands, which increases *potential* pollution of those areas.

In ruling on a demurrer, I am mindful that I must accept all well-pleaded allegations as true. This is not so, however, where the pleadings contain statements that are in conflict with one another. One cannot simply call a statement false in one paragraph and in another admit to its veracity. By definition, such allegations are not well-pleaded. However, this is not merely inartful pleading. It is the result of Appellants straining to state a claim that is categorically lacking in merit. Requiring the court to disregard such inconsistencies in favor of a plaintiff who, by all accounts, is simply using this lawsuit to chill free speech and harass those who oppose his potentially lucrative development project would be an injustice.

It is clear from the Complaint that Appellees opposed the development of the Bishop Tube Site due to genuine environment concerns – they desired to fully remediate the site, eliminating the risk of the spread of groundwater and soil contamination, for purposes of creating a public park. *Complaint at ¶23.* Because Appellees' actions were aimed at procuring favorable government action, the Act's immunity provision is triggered and Appellees are immune to Appellants' defamation claim under the Environmental Immunity Act.

Based upon the foregoing, I respectfully request that my Order of August 22, 2017 be affirmed.

All of which is respectfully submitted.

BY THE COURT:

Jeffrey R. Sommer

Jeffrey R. Sommer J.

BRIAN O'NEILL, O'NEILL PROPERTIES and CONSTITUTION DRIVE PARTNERS, LP
Plaintiffs

VS.

MAYA VON ROSSUM, CARLA ZAMBELLI and DELAWARE RIVERKEEPER NETWORK
Defendants

IN THE COURT OF C[illegible] CHESTER COUNTY,

Filed and Attested by PROTHONOTARY 22 Aug 2017 01:30 PM J. Miller

NO. 2017-03836-MJ

CIVIL ACTION - LAW

James C. Sargent, Esquire, Attorney for Plaintiffs
Jordan B. Yeager, Esquire and Mark L. Freed, Esquire, Attorneys for Defendants

## ORDER OF COURT

AND NOW, this 22 day of August, 2017, upon review and consideration of the Preliminary Objections of Defendants Maya Van Rossum and Delaware Riverkeeper Network to the Complaint, and any response thereto, it is hereby ORDERED said Preliminary Objections are **SUSTAINED**.[1]

Plaintiff's Complaint is hereby DISMISSED with prejudice.

BY THE COURT:

Jeffrey R. Sommer

Jeffrey R. Sommer J.

[1] Defendants Maya Van Rossum and Delaware Riverkeeper Network (hereinafter, "DRN") have asserted a total of nine (9) Preliminary Objections to the Complaint. Plaintiff filed Preliminary Objections to the Preliminary Objections on the basis that DRN's objections have alleged facts outside of the Complaint. In the interest of expediency, we overrule the Preliminary Objections of Plaintiff and address DRN's Preliminary Objections under the well-established standard requiring us to accept


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Plaintiff's well-pleaded allegations as true. Plaintiff asserts three causes of action against the Defendants: (1) Defamation/Commercial Disparagement; (2) Tortious Interference with Contractual or Business Relations; and (3) Civil Conspiracy.

DRN's first objection is a demurrer to all counts of the Complaint on the basis that the claims are barred by the *Noerr-Pennington* Doctrine. Pursuant to the *Noerr-Pennington* Doctrine, an individual is immune from liability for exercising his First Amendment right to petition the government. Our Commonwealth Court laid out the history of the *Noerr-Pennington* Doctrine in *Penllyn Greene Assocs., L.P. v. Clouser*, as follows:

> The *Noerr-Pennington* Doctrine originated with the United States Supreme Court's decisions in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In recognition that the "right of petition is one of the freedoms protected by the Bill of Rights," the U.S. Supreme Court held that individuals and organizations are immune from liability under antitrust laws for actions constituting petitions to the government. *Noerr*, 365 U.S. at 138, 81 S.Ct. 523. Over the years, courts have extended this immunity doctrine, referred to as the *Noerr-Pennington* Doctrine, to protect political activity against tort claims. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (First Amendment protected against a civil conspiracy claim by white merchants whose businesses were being boycotted); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir.1988) (defendants were immune from conspiracy liability for damages resulting from inducing official action to decertify a nursing home).
>
> The sole exception to the *Noerr-Pennington* Doctrine is the "sham exception" under which a defendant will not be protected if he is simply using the petition process as a means of harassment. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344, 113 L.Ed.2d 382, (1991). "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.* Therefore, under the "sham" exception, an individual will be liable if he



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> "use[s] the governmental process-as opposed to the outcome of that process-as [a] ... weapon." *Id.* See e.g. *Wawa, Inc. v. Litwornia, et al.*, 817 A.2d 543 (Pa. Super. 2003). (dissemination of false information aimed at interfering directly with the business relationships of a competitor triggered "sham" exception to the *Noerr-Pennington* Doctrine).

890 A.2d 424, 430 (Pa. Commw. Ct. 2005). The *Noerr* Court held such immunity existed "regardless of the defendants' motivations" in waging their campaigns, as it recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." *Noerr*, 365 U.S. at 139. Thus, "parties may petition the government for official action favorable to their interest without fear of suit, even if the result of the petition, if granted, might harm the interests of others." *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir.1999).

Based upon the allegations of the Complaint, we find that the *Noerr-Pennington* Doctrine applies here to bar Plaintiff's claims. The Complaint basis its claims on DRN's efforts in resisting Plaintiff's proposed soil clean up, remediation, and repurposing of the Bishop Tube site, a former industrial site which has been rezoned "residential" and which Plaintiff intends to develop additional residential housing within the East Whiteland community. See, *Complaint at ¶23-24*. The Complaint described DRN's activities as a conspiracy "to engage in a campaign of misinformation that is designed to mislead, and have misled, the residents of East Whiteland Township and other surrounding townships, the officials of East Whiteland Township, and the officials of the PADEP ("Pennsylvania Department of Environmental Protection") into believing that any improvements that are proposed by Plaintiffs will be dangerous because of the contaminants currently present at the site...." *Id. at ¶24*. Despite the descriptive language attached to the allegations of DRN's conduct, what is clear based upon the Complaint is that DRN is engaged in the petitioning of the government in opposition of Plaintiff's development efforts. DRN has the right to petition its local and state governments as advocates for environmental safety and public health. This is true even if it means that DRN's efforts are adverse to Plaintiff. This is what we call constitutionally protected free speech under the First Amendment of the United States Constitution and the Pennsylvania Constitution. See, U.S. Const. Amend. I, and Article I, Section 7 of the Pennsylvania Constitution, Pa.Const. Art. I, §7.

Because the Complaint makes evident that DRN petitioned the local government in order to influence policy and obtain favorable government action, the sham exception does not apply. See, *Chantilly Farms Inc. v. West Pileland Twp.*, 2001 W.L. 290645 (E.D. Pa. 2001). Moreover, even if we were to consider whether the alleged conduct constituted a "sham", the challenged activities must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Trustees of the University of Pennsylvania v. St. Jude*





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*Children's Research Hospital*, 940 F. Supp.2d 233, 240-41 (E.D. Pa. 2013), quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991). From the allegations in the Complaint, we conclude that DRN's concern for the proposed remediation plan and soil clean up is not an objectively baseless concern. Plaintiff has conceded that "chlorinated solvent contamination…remains today in Site soils and groundwater" and that "contamination in groundwater has migrated significant distances beyond the boundaries of the Site" to the surrounding community. See, *Complaint at ¶14-15*. Moreover, Plaintiff has made clear it does not intend to conduct a full clean up of the site, but only a partial one, based upon its belief that it has no legal obligation to do more. See, *Id. at ¶29*. Although Plaintiff avers that it plans to clean up the soils above the water table at the site in accordance with PADEP's standards, it notes that the party who caused the groundwater contamination that bears the responsibility for cleaning it up – and that entity is not Plaintiff. See, *Id. at ¶28*. Given that there is no dispute regarding the fact that groundwater contamination on the site exists and that it has spread beyond the site, DRN's concern cannot be objectively baseless. The dispute remains over who is responsible for cleaning it up and to what degree. That question is not before this Court at this juncture.

In light of the above discussion, we have, therefore, determined that the conduct described in the Complaint is protected by the *Noerr-Pennington* Doctrine and DRN is immune from Plaintiff's tort claims. We need not address the remaining eight preliminary objections as they have been rendered moot by the dismissal of Plaintiff's Complaint against DRN.



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# ATTACHMENT 11

**For Immediate Release:**
September 7, 2018

**Contacts:**
Maya van Rossum, The Delaware Riverkeeper, Delaware Riverkeeper Network, 215-801-3043 (cell)

# SLAPP Suit Filed By Developer Against Environmental & Community Opposition Struck Down by PA Superior Court

***Chester County, PA:*** The Pennsylvania Superior Court dismissed the continued attempt by Developer Brian O'Neill, along with his corporate counter parts O'Neill Developers and Constitution Drive Partners, to silence the Delaware Riverkeeper Network and members of a Chester County community silencing his proposed development project on a highly toxic brownfields site. The September 6, 2018 dismissal was rendered by Judge Bender and Judge Lazarus of the PA Superior Court.

"The lawsuit filed by Brian O'Neill and his counterparts were a clear effort to silence, through intimidation, myself, my organization and the residents opposed to his proposed partial clean up and associated development plan; this is what is known as a SLAPP suit, a strategic lawsuit against public participation," explained **Maya van Rossum, the Delaware Riverkeeper**. "It is wrong for anyone, particularly a well funded team of lawyers, corporations and individuals to misuse our legal system to scare a community into silence. While we were confident that the judges would once again see through Mr. O'Neill's false claims, bluster and fear tactics, it's always nice when the decision finally comes down. If Mr. O'Neill appeals yet again, we will know that this is a clear and obvious strategy to try to drain the financial resources of a concerned nonprofit and private individuals."

The Delaware Riverkeeper Network organization, led by Maya van Rossum the Delaware Riverkeeper who was also a named defendant in the suit, have been actively challenging a proposal by O'Neill, O'Neill Developers and Constitution Drive Partners to advance only a partial clean up of a highly contaminated site known as Bishop Tube located in East Whiteland Township in order to accommodate construction of a more than 200 unit housing development. The original SLAPP action was filed by O'Neill and his counterparts on June 27, 2017 in the Court of Common Pleas in Chester County and claimed the advocacy activities of van Rossum and the Delaware Riverkeeper Network resulted in defamation/commercial disparagement, interference with contractual or business relations and amounted to a civil conspiracy. O'Neill sought a judgement that would both silence the organization and mandate they pay over $50,000 in damages. The suit also threatened to target up to ten additional residents, naming them as defendants to the suit, in addition to the resident already included as a named defendant.

Judge J. Sommers presiding over the case at the Court of Common Pleas dismissed the suit on August 22, 2017, determining that van Rossum and the Delaware Riverkeeper Network were engaged in "***constitutionally protected free speech under the First Amendment of the United States Constitution and the Pennsylvania Constitution" and that the defendants are "immune from Plaintiff's tort claims."*** O'Neill and his counterparts immediately appealed the decision. Judge Sommers issued a follow-up opinion in which the judge stated that the complaints filed against DRN "lack merit." The court also questioned the complaint itself, saying "**While we question the "good faith" of Appellants in bringing the instant lawsuit and subsequent appeal**, we will address the complaints,..." The opinion also stated that Mr. O'Neill et al had "**commenced this action as a means of intimidation and harassment**, not because Appellants believe in the success of their claims."

In its decision issued September 6, 2018 dismissing the O'Neill appeal, the Pennsylvania Superior Court did not agree with O'Neill et al that there were any procedural problems with the lower court ruling that would require its decision be overturned. Substantively the Superior Court judges also found no grounds to overturn the Court of Common Pleas decision and in fact stated:

- ✓ "However, the trial court observed that Appellants' 'characterization of the statements as false is belied by the other allegations of Appellants' [c]omplaint[,]' and we agree."
- ✓ "Accordingly, Appellants admit that they plan to conduct only a partial cleanup of the site — namely to the soils above the water table — and, thus, the groundwater at the site, where the townhouses are planned to be built, would remain contaminated. As a result, **we do not consider [DRN's] statements** that Appellants intended to conduct only a partial cleanup, and planned to build over 200 homes on contaminated land, **to be false**. Similarly, because the contaminated groundwater could continue to pollute surrounding areas, **it is not false that the community could be exposed to more toxins**."

- ✓ "As the trial court aptly discerned, '[t]hroughout the [c]omplaint, Appellants note that [DRN] desire[s] the full remediation of the site for purposes of constructing a public park on the land. **Moreover, it is clear from the pleadings that [DRN is] concerned about the spreading of contaminated soil and groundwater throughout the community**.' TCO at 16 (citation omitted). We agree, and do not view [DRN's] conduct as a sham given the allegations in the complaint detailing the environmental issues at play. As such, **we conclude that [DRN] has immunity** …."
- ✓ "…the trial court did not err in dismissing Appellants' complaint."

Said **Maya van Rossum, the Delaware Riverkeeper and leader of the Delaware Riverkeeper Network**, both targeted by the lawsuit: "Mr. O'Neill should be ashamed of himself for misusing the law to threaten people into silence and seeking a judgment that would strip them of their First Amendment rights to free speech and to petition their government for appropriate action. The Delaware Riverkeeper Network and the residents we are working with in East Whiteland, PA are standing up for protection of our environment, our families and our communities. Nobody's rights to make a profit should reign supreme, regardless of the harm it inflicts on the environment, on peoples' health, on public safety, peoples' property rights and the First Amendment right to free speech. I am gratified that the court so quickly recognized the abuse of law that was being perpetrated by Mr. O'Neill and that it sought to render a strong decision quickly in order to assuage the fears of residents being so directly threatened by the developer and his multiple corporate entities."

Ms. van Rossum and the Delaware Riverkeeper Network were represented by attorneys **Mark L. Freed** and **Jordan B. Yeager** of **Curtin & Heefner LLP**. "We're pleased that the Court has vindicated the constitutional rights of residents to speak up and advocate for a healthy environment without fear of retribution," **said Freed**.

**<u>Background: Bishop Tube site</u>**

Adds van Rossum, "The Bishop Tube site is severely contaminated. We have serious, significant and growing concerns about the impacts of this site on community health and on the environment. And we have very significant concerns with how the Pennsylvania Department of Environmental Protection has been handling this site. Their failure to take fast action to remediate the site has allowed the plume of pollution to go deeper into the ground and to balloon offsite to a still unknown degree. It is wholly inappropriate to be advancing a heavy development project at this site; the community deserves it protected as natural open space once full remediation is accomplished by responsible parties. That is why on August 7, 2017 we filed a notice of intent to sue with the DEP, because we are concerned that they are evading their obligations under the law."

The Bishop Tube Site is a former metals processing plant located in East Whiteland Township, PA. The site is bordered by Little Valley Creek, a tributary to the "Exceptional Value" Valley Creek. Portions of the site proposed for development are wooded. The site is listed on the Pennsylvania Priority List of Hazardous Sites for Remedial Response under the Pennsylvania Hazardous Sites Cleanup Act (HSCA). Groundwater, soil and surface water at the Site are contaminated with trichloroethylene (TCE), which is classified as a probable human carcinogen by the EPA and also as causing other significant health problems. Other contaminants of significant concern are also known to be present at the site.

A copy of the Superior Court's decision can be found at:
http://cqrcengage.com/delawareriverkeeper/file/wrT6mNqV0oP/memorandum%20%20affirmed%20%20103689558416329
02.pdf

A copy of the court of Common Pleas confirming decision on 10.23.2017 can be found at:
http://www.delawareriverkeeper.org/sites/default/files/Chester%20County%20Judge%20Issues%20Opinion%20on%20SLAPP%20Suit%20Dismissal%20%282017-10-24%29.pdf#page=3

A copy of the court of Common Pleas original decision can be found at: http://bit.ly/DRN-SLAPPSuitCourtDecision8-22-17

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Delaware Riverkeeper Network (DRN) is a nonprofit membership organization working throughout the 4 states of the Delaware River Watershed including Pennsylvania, New Jersey, Delaware and New York. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, public education, and legal enforcement of environmental protection laws.

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

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|---|---|
| J. BRIAN O'NEILL, O'NEILL PROPERTIES GROUP, L.P. AND CONSTITUTION DRIVE PARTNERS, LP<br><br>Appellants<br><br>v.<br><br>MAYA VAN ROSSUM, CARLA ZAMBELLI AND DELAWARE RIVERKEEPER NETWORK AND JOHN DOES 1 THROUGH 10<br><br>Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 3066 EDA 2017 |

Appeal from the Order Entered August 22, 2017
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2017-03836-MJ

BEFORE: BENDER, P.J.E., LAZARUS, J., and FORD ELLIOTT, P.J.E.

MEMORANDUM BY BENDER, P.J.E.: FILED SEPTEMBER 06, 2018

Appellants, J. Brian O'Neill, O'Neill Properties Group, L.P. ("OPG"), and Constitution Drive Partners, LP ("CDP"), appeal from the trial court's order sustaining Appellees', Maya van Rossum and Delaware Riverkeeper Network (collectively referred to herein as "DRN"), preliminary objections and dismissing Appellants' complaint.[1] We affirm.

We briefly summarize the factual allegations set forth in Appellants' complaint. Appellants represent that OPG is a leading real estate development company, and CDP — an affiliate of OPG — remediates and redevelops

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[1] According to Appellants, they have discontinued their action against Carla Zambelli. *See* Appellants' Brief at 5 n.1.

abandoned or underutilized industrial sites. Complaint, 6/27/2017, at ¶¶ 11, 12. In 2005, CDP purchased a property in East Whiteland Township known as the Bishop Tube site, a former industrial site upon which industrial buildings and other vacant, dilapidated improvements remain standing. *Id.* at ¶¶ 13, 14. From the 1950s through 1999, a variety of owners and operators manufactured stainless steel tubes on the Bishop Tube site, which resulted in the release of significant amounts of chlorinated solvents into the soil and groundwater at the site, and such contamination remains there today. *Id.* at ¶¶ 14, 15. Further, the contamination in the groundwater has migrated off the Bishop Tube site to the surrounding community. *Id.*

To date, the Pennsylvania Department of Environmental Protection ("PADEP") has identified two potentially responsible parties — namely, Johnson Matthey, Inc. and Whittaker Corporation (collectively referred to herein as "PRPs") — that it believes have liability to investigate and remediate the contamination at and beyond the Bishop Tube site. *Id.* at ¶ 17. Although the PRPs have conducted investigations at and beyond the Bishop Tube site, they have never remediated any of the contamination, and deny that they have any responsibility to do so. *Id.* When CDP acquired the site in 2005, it entered into a Prospective Purchaser Agreement ("PPA") with the PADEP, in which the PADEP provided CDP with a covenant not to sue it in connection with the contamination, as well as with contribution protection against third party claims regarding the contamination. *Id.* at ¶ 18. In exchange, CDP committed to performing certain remedial activities to Bishop Tube's soils and agreed to cooperate with the PADEP. *Id.* CDP subsequently satisfied its obligations under the PPA by installing an air sparging/soil vapor extraction ("AS/SVE") remediation system, operating it for a period of time, and paying $10,000 to the PADEP. *Id.* In December of 2010, the PADEP confirmed by letter that CDP satisfied all of its remedial obligations under the PPA. *Id.* In January of 2014, however, the PADEP notified CDP by letter that the covenant not to sue under the PPA was void due to damage caused by a salvage contractor to the no-longer-used AS/SVE system in 2011. *Id.* at ¶ 19. CDP disputes the PADEP's position, believing that the covenant not to sue remains in full force and effect, but the PADEP's issuance of the letter was not appealable. *See id.*

In 2014, East Whiteland Township changed the zoning of the Bishop Tube site from industrial to residential use, and specifically rezoned the property as a Residential Revitalization District ("RRD"). *Id.* at ¶ 20. Before this rezoning, CDP tried to market and redevelop the Bishop Tube site for commercial purposes, but that attempt proved unsuccessful due to non-environmental constraints. *Id.* at ¶ 21. In making this zoning decision, East Whiteland Township also considered the need for additional residential housing within the community, and recognized that CDP would construct such housing with all safe and reasonable methods to prevent exposure to contamination at the site. *Id.* As a result, CDP sought municipal approval to construct a 228-residence townhome community on a portion of the Bishop Tube site. *Id.* at ¶ 22.

Appellants further claim in their complaint that DRN has resisted Appellants' proposed soil clean up, remediation, and repurposing of the Bishop Tube site, purportedly in an attempt to coerce East Whiteland Township and the Commonwealth to impede Appellants' efforts and spend millions of dollars in public revenue to remediate the site and create a park. *Id.* at ¶ 23.[2] To accomplish this goal, DRN has allegedly engaged in a campaign of misinformation, misleading residents and government officials to believe that any improvements proposed by Appellants are dangerous due to the contamination, and that improvements at the site pursuant to the RRD zoning puts surrounding residents at a greater risk for exposure. *Id.* at ¶ 24. Specifically, DRN published and distributed a flier to the community that stated that redevelopment of the site will "expose us to more of the toxins and put 200+ homes on the contaminated land!!!," and "if this development happens your community could be on the receiving end of more contamination as the toxins make their way through our local waterways and water table." *Id.* at ¶ 26. In addition, the flier represented that CDP planned to use "a $1 million grant from the [PA]DEP ([o]ur tax money) to perform a **'PARTIAL** CLEAN-**UP'** of the Bishop Tube site," and that the developer is refusing "to take responsibility for full removal of the toxins at the site[.]" *Id.* at ¶ 28 (emphasis in original; some internal quotation marks omitted). DRN

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[2] According to the complaint, Delaware Riverkeeper Network is a non-profit corporation, and Ms. van Rossum is a citizen of Pennsylvania. Complaint at ¶¶ 4, 6. Based on our review of the record, we are not sure of the nature of their relationship to one another.

ostensibly published this false and misleading information to impede Appellants' business interests of improving the Bishop Tube site through their clean-up efforts and the development of the townhouse community. *Id.* at ¶ 27. Furthermore, Appellants allege Ms. van Rossum declared to a room of 200 people that Mr. O'Neill brushed up against her inappropriately, when no such event occurred, in order to discredit Appellants' efforts to improve the property. *Id.* at ¶¶ 35, 36.

On June 27, 2017, Appellants filed their complaint, raising claims against DRN for defamation/commercial disparagement, tortious interference with a contractual or business relation, and civil conspiracy. On July 26, 2017, DRN filed preliminary objections to the complaint, advancing a variety of arguments. Thereafter, on August 14, 2017, Appellants filed preliminary objections to DRN's preliminary objections, wherein they claimed that DRN improperly averred facts and attached documents not contained in the complaint or record to their preliminary objections. *See* Appellants' Preliminary Objections to DRN's Preliminary Objections, 8/14/2017, at 1-2. On August 15, 2017, DRN filed a memorandum of law and a praecipe for determination relating to its preliminary objections.

On August 22, 2017, the trial court entered an order overruling Appellants' preliminary objections to DRN's preliminary objections. On that same day, it entered a separate order sustaining DRN's preliminary objections, and dismissing Appellants' complaint. In doing so, it explained that the conduct by DNR described in Appellants' complaint is protected by the *Noerr-*

*Pennington* doctrine and that DRN is immune from Appellants' tort claims. *See* Trial Court Order Sustaining DRN's Preliminary Objections, 8/22/2017, at 1 n.1.[3] On September 13, 2017, Appellants filed a motion to vacate and reconsider these orders, which the trial court denied on September 21, 2017.

On September 21, 2017, Appellants filed a timely notice of appeal. That same day, the trial court ordered Appellants to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and they timely complied. The trial court subsequently issued a Rule 1925(a) opinion, in which it determined that — in addition to immunity pursuant to the *Noerr-Pennington* doctrine — DRN also has immunity from Appellants' defamation claim under the Environmental Immunity Act, 27 Pa.C.S. §§ 8301-8305. *See* Trial Court Opinion ("TCO"), 10/23/2017, at 17.

Presently, Appellants raise the following issues for our review:

> 1. Did the trial court err by failing to follow the proper procedure for ruling on preliminary objections when it: (a) failed to permit briefing and argument on Appellants' [p]reliminary [o]bjections and to allow Appellants to make a substantive response to [DRN's] improper [p]reliminary [o]bjections; (b) accepted as true all of [DRN's] allegations in their improper "speaking demurrer" and failed to construe the [c]omplaint in the light most favorable to Appellants; and (c) accepted as dispositive the affirmative defenses raised by [DRN's p]reliminary [o]bjections?
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> 2. Where [DRN's p]reliminary [o]bjections improperly injected a First Amendment defense based on the *Noerr-*

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[3] As discussed further *infra*, the *Noerr-Pennington* doctrine provides that "an individual is immune from liability for exercising his First Amendment right to petition the government." *Wawa, Inc. v. Alexander J. Litwornia & Associates*, 817 A.2d 543, 546 (Pa. Super. 2003) (citations omitted).

> *Pennington* [d]octrine, which had nothing to do with Appellants' defamation claim, was it error for the trial court to overrule Appellants' [p]reliminary [o]bjections to [DRN's p]reliminary [o]bjections?
>
> 3. Where Appellants' [c]omplaint properly pleaded a claim for common law defamation based on public statements by [DRN], was it error for the trial court to dismiss the [c]omplaint at the preliminary objection stage?

Appellants' Brief at 4.

At the outset, we acknowledge our standard of review:

> [O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
>
> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

*Greenberg v. McGraw*, 161 A.3d 976, 980 (Pa. Super. 2017) (citation omitted; brackets in original).

In their first issue, Appellants claim the trial court failed to follow proper procedure in ruling on the parties' preliminary objections. To begin, they argue that the trial court overruled their preliminary objections without giving them an opportunity to brief or argue those objections. *See* Appellants' Brief at 16. Moreover, they insist that the trial court erred by then immediately sustaining DRN's preliminary objections, without permitting Appellants to respond substantively to them. *Id.* They also contend that DRN filed an improper "speaking demurrer" by inappropriately including many "new factual allegations" in support of its preliminary objections, which the trial court then considered. *Id.* at 20.[4] Finally, they assert that the trial court disregarded the procedural requirement that affirmative defenses — such as immunity from suit — must be raised in new matter to an answer, and not as preliminary objections. *Id.* at 21-22.

Appellants have not convinced us that such procedural deviations require us to reverse the trial court's decision and remand for further proceedings. Initially, Appellants complain that they did not have an opportunity to brief or argue their preliminary objections, nor plead over to DRN's preliminary objections once their own objections were overruled.[5] *See id.* at 17-18. We view any such errors as harmless. The trial court dismissed

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[4] Citing *Black's Law Dictionary*, Appellants explain a "speaking demurrer" is a "demurrer that cannot be sustained because it introduces new facts not contained in the complaint." Appellants' Brief at 20 n.4 (quoting *Black's Law Dictionary* (10th ed. 2014)).

[5] "A party has a right to file a preliminary objection raising any appropriate defenses or objections which that party might have to an adverse party's preliminary objection." *Ambrose v. Cross Creek Condominiums*, 602 A.2d 864, 866 (Pa. Super. 1992) (citations omitted); *see also Chester Upland School Dist. V. Yesavage*, 653 A.2d 1319, 1324 n.8 (Pa. Cmwlth. 1994) ("The proper method for challenging the propriety of a preliminary objection is by a preliminary objection to a preliminary objection.") (citation omitted). Further, "[i]f the preliminary objections are overruled, the objecting party shall have the right to plead over within twenty days after notice of the order or within such other time as the court shall fix." Pa.R.C.P. 1028(d).

Appellants' complaint based on its determination that "the conduct described *in the [c]omplaint* is protected by the *Noerr-Pennington* [d]octrine and [DRN is] immune from [Appellants'] tort claims." Trial Court Order, 8/22/2017, at 1 n.1 (emphasis added); *see also id.* ("*Based upon the allegations of the [c]omplaint*, … the *Noerr-Pennington* [d]octrine applies here to bar [Appellants'] claims.") (emphasis added); TCO at 17-20 (determining that the Environmental Immunity Act applied based on the allegations in Appellants' complaint). Thus, Appellants' preliminary objections — in which they moved to strike improperly averred facts and extraneous documents included in DRN's preliminary objections, and objected to Appellees' preliminary objections for DRN's failure to sign and attach a verification in conformance with Pennsylvania Rule of Civil Procedure 1024[6] — were not relevant to the trial court's decision. Relatedly, Appellants' claim that they were not permitted to plead over to DRN's preliminary objections is also inconsequential as the trial court decided that the *Noerr-Pennington* doctrine and Environmental Immunity Act applied based on the allegations made by Appellants in their complaint.[7] Thus, Appellants' response to any

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[6] Rule 1024 states, *inter alia*, that "[e]very pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified." Pa.R.C.P. 1024(a).

[7] We also note that DRN's preliminary objections based on the *Noerr-Pennington* doctrine and Environmental Immunity Act were based on the

facts not of record averred in DRN's preliminary objections would have had no effect on the trial court's disposition, as the trial court did not even consider such facts in its analysis.[8]

Nevertheless, Appellants next claim that the trial court improperly relied on factual averments made in DRN's "speaking demurrer." Appellants' Brief at 19. Despite Appellants' contentions, we do not discern that the trial court relied on any of the "new facts" asserted by DRN to dispose of DRN's preliminary objections. While Appellants point to "new facts" introduced by DRN in its preliminary objections, *see id.* at 20-21, they do not cite to where the trial court actually relied on these factual allegations in ruling on DRN's preliminary objections, *id.*

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legal insufficiency of Appellants' pleading. *See* DRN's Preliminary Objections, 7/26/2017, at 5-10.

[8] Appellants also argue that "the trial court's actions in eliminating the opportunity for Appellants to respond in a meaningful manner to the *merits* of [DRN's p]reliminary [o]bjection[s] was clearly a violation of Appellants' [d]ue [p]rocess rights under the United States and Pennsylvania Constitutions." Appellants' Brief at 19 (emphasis in original). However, even if the trial court erred by not permitting Appellants to file a response, we see little value in remanding this matter for them to do so now. The trial court has already denied Appellants' motion to vacate and reconsider, in which they argued in their brief in support thereof that the trial court misapplied the *Noerr-Pennington* doctrine. *See* Appellants' Brief in Support of Motion to Vacate and Reconsider, 9/15/2017, at 4-6. Further, we apply the same standard of review as the trial court in reviewing preliminary objections in the nature of a demurrer, and Appellants have had an opportunity to brief the relevant issues before us. *See Pittsburgh Nat. Bank v. Perr*, 637 A.2d 334, 336 (Pa. Super. 1994) ("Our standard of review in an appeal from an order sustaining preliminary objections in the nature of a demurrer is the same as that which the trial court employs…."). Accordingly, we believe remanding this matter on this basis would be futile and a waste of judicial resources.

Last, Appellants maintain that the trial court improperly ruled on the merits of affirmative defenses raised in DRN's preliminary objections. *Id.* at 21. They insist that "the trial court ignored the procedural requirement that affirmative defenses are to be raised in new matter to an answer, and *not* as preliminary objections." *Id.* (emphasis in original). They say the sole exception to that rule is where an affirmative defense is clear on the face of the pleadings and, here, the immunity defense was not obvious on the face of the complaint as the alleged defamatory communications occurred only outside of any bona fide governmental proceedings. *Id.*

We disagree. This Court has regularly allowed litigants to raise immunity defenses in preliminary objections where the opposing party lodged no objections to such procedure. "Immunity from suit is an affirmative defense which must be pleaded in [n]ew [m]atter, not in preliminary objections. However, where the defense is raised by preliminary objections and this procedure is not objected to, the question of immunity from suit may be decided." *Bloom v. Dubois Regional Medical Center*, 597 A.2d 671, 675 n.4 (Pa. Super. 1991) (citations omitted).[9] Our review of the record indicates that Appellants did not object to DRN's raising immunity defenses in its preliminary objections, nor do they suggest that they did. Thus, we reject

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[9] *Accord Pollina v. Dishong*, 98 A.3d 613, 617 n.3 (Pa. Super. 2014); *Richmond v. McHale*, 35 A.3d 779, 782 (Pa. Super. 2012); *Soto v. Nabisco, Inc.*, 32 A.3d 787, 788 n.2 (Pa. Super. 2011); *Heinrich v. Conemaugh Valley Memorial Hosp.*, 648 A.2d 53, 57 (Pa. Super. 1994); *Mosley v. Observer Pub. Co.*, 619 A.2d 343, 344 n.1 (Pa. Super. 1993); *Preiser v. Rosenzweig*, 614 A.2d 303, 305 (Pa. Super. 1992).

this contention, and conclude that none of Appellants' procedural arguments warrant reversal.

In their second issue, Appellants claim that "[t]he *Noerr-Pennington* doctrine and the Environmental Immunity Act are inapposite based on the facts of this case." Appellants' Brief at 23 (unnecessary capitalization and emphasis omitted).[10] We begin by considering whether the *Noerr-Pennington* doctrine applies.[11]

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[10] We observe that Appellants' argument section for their second issue does not neatly align with the second issue set forth in their statement of the questions involved. In their statement of the questions involved, Appellants ask: "Where [DRN's p]reliminary [o]bjections improperly injected a First Amendment defense based on the *Noerr-Pennington* [d]octrine, which had nothing to do with Appellants' defamation claim, *was it error for the trial* ***court to overrule Appellants' [p]reliminary [o]bjections to [DRN's*** *p]****reliminary [o]bjections?"*** Appellants' Brief at 4 (emphasis added). However, in the argument section for their second issue, Appellants claim that "the *Noerr-Pennington* immunity doctrine and Environmental Immunity Act are inapposite based on the facts of this case," and that "the trial court erred by sustaining [DRN's p]reliminary objections based on immunity defenses, where no such immunity was appropriate." *Id.* at 23, 25 (unnecessary emphasis and capitalization omitted). We see these as different, albeit somewhat interrelated, issues. For the reasons discussed already, the trial court's overruling Appellants' preliminary objections did not affect its determination that the *Noerr-Pennington* doctrine applied, as it found such immunity was warranted based on the face of the complaint, not on new factual allegations made by DRN in its preliminary objections. Thus, in our opinion, whether the *Noerr-Pennington* doctrine applies based on the allegations in the complaint is a separate issue from the overruling of Appellants' preliminary objections.

[11] Appellants' Rule 1925(b) statement is rambling and confusing. *Accord* TCO at 6, 6 n.6, 10 (noting that Appellants' concise statement is "cumulative and repetitive" and acknowledging that Appellants raised 16 alleged errors therein). While we could arguably determine that Appellants have failed to

This Court has previously described the *Noerr-Pennington* doctrine as follows:

> [T]he *Noerr–Pennington* doctrine, which originated with the United States Supreme Court's holding in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)("*Noerr*"), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)("*Pennington*"), that an individual is immune from liability for exercising his First Amendment right to petition the government. Further, the Court held that there was immunity regardless of the defendants' motivation in waging their campaigns, as it recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." *Noerr*, 365 U.S. at 139, 81 S.Ct. 523. The Court made these rulings in an antitrust context.
>
> The principles of the *Noerr–Pennington* doctrine have been extended to provide defendants immunity from liability for civil conspiracy pursuant to the First Amendment. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (First Amendment protected against a civil conspiracy claim by white merchants whose businesses were being boycotted); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir. 1988) (defendants were immune from conspiracy liability for damages resulting from inducing official action to decertify a nursing home).
>
> One caveat to the *Noerr–Pennington* doctrine is the "sham" exception, which "emphasized that such immunity did not extend to 'illegal and reprehensible practice[s] which may corrupt the ... [administrative and] judicial proces[s],' [*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508,] 513, 92 S.Ct. 609, 30 L.Ed.2d 642 [(1972)], hearkening back to an earlier statement that antitrust immunity would not extend in lobbying

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preserve this issue by not raising it clearly and concisely in their Rule 1925(b) statement, we decline to do so. *See* Pa.R.A.P. 1925(b)(4) (requiring, *inter alia*, that the concise statement "set forth only those rulings or errors that the appellant intends to challenge[;]" "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge[;]" and "should not be redundant or provide lengthy explanations as to any error").

> 'ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.' *Noerr*, *supra*, at 144, 81 S.Ct. 523. This line of cases thus establishes that while genuine petitioning is immune from antitrust liability, sham petitioning is not." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 122 S.Ct. 2390, 2396, 153 L.Ed.2d 499 (2002).
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> In *Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151 (3d Cir. 2001), which reversed a district court's denial of attorney's fees to defendants who were sued under 42 U.S.C. § 1985(3) for conspiring (on racial discrimination grounds) to deprive the Barnes Foundation (by means of zoning restrictions) equal protection of the law, the Third Circuit Court of Appeals wrote:
>
> > Before we close our discussion of the *Noerr–Pennington* doctrine we hasten to add that persons contemplating bringing suits to stifle First Amendment activity should draw no comfort from this opinion because the uncertainty of the availability of a First Amendment defense when a plaintiff brings a civil rights case now has been dispelled. *This point is of particular importance in land-use cases in which a developer seeks to eliminate community opposition to its plans as this opinion should make it clear that it will do so at its own peril.*
>
> 242 F.3d at 162 (emphasis added); *see also Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-[]15 (8th Cir. 1980) (holding private citizen immune from section 1983 liability in zoning dispute).

*Wawa*, 817 A.2d at 546-47.

Appellants appear to argue that the *Noerr-Pennington* doctrine does not apply in the case *sub judice* for two main reasons. First, they maintain that the immunity does not apply because their complaint "did not cite a *petition* submitted by [DRN] to governmental bodies, nor did the [c]omplaint take issue with any comments made in meetings with any governmental bodies." Appellants' Brief at 23-24 (emphasis in original; footnote omitted).

Rather, they say that their complaint "cited a [flier] distributed house-to-house in a local residential community, and public statements in press conferences and social media, that were alleged to have defamed Appellants." *Id.* at 24. In other words, they assert that DRN made the at-issue statements outside of governmental proceedings and not to a governmental entity. *Id.* at 10. Second, Appellants insist that DRN distributed false and misleading information. More precisely, they contend that DRN "did not simply advocate a different use for Bishop Tube. Instead, [it] *blamed* Appellants for polluting Bishop Tube — which is totally false; for attempting to avoid a legal duty to remediate the pollution — also false; and [it] stated that Appellants' development of the site would expose local residents to additional pollution — which is similarly a falsehood." *Id.*at 24. (emphasis in original; footnote omitted).

The only case Appellants discuss on appeal to support their position that the *Noerr-Pennington* doctrine does not apply is *Wawa*. *See* Appellants' Reply Brief at 9-10. In *Wawa*, the convenience store filed a complaint against the appellees, raising claims of commercial disparagement, intentional interference with actual and prospective contractual relationships, and civil conspiracy. *Wawa*, 817 A.2d at 545. Wawa claimed that the appellees had "engaged in a consolidated effort to disparage it in three locations targeted for new convenience food markets dispensing gasoline in the Lehigh Valley area — these were in proximity to [the appellees' convenience] stores." *Id.* Specifically, Wawa "contended [the a]ppellees contacted at least one of the landowners to dissuade her from selling [land to Wawa] and disseminated a videotape to local officials containing erroneous data that an excessive amount of traffic would be generated by [Wawa's] proposed convenience stores." *Id.* The appellees subsequently filed preliminary objections, arguing that their alleged conduct was protected by, *inter alia*, the First Amendment. *Id.* The trial court agreed and dismissed Wawa's complaint. *Id.* On appeal, we reversed and remanded the case for further proceedings, determining that the appellees purportedly "proliferated false information aimed at interfering directly with the business relationships of a competitor. This type of conduct translates into a 'sham' of inaccurate information communicated to incite the public." *Id.* at 548 (citations omitted). Thus, this Court concluded that the *Noerr-Pennington* doctrine did not protect the appellees given the allegations in the complaint. *Id.* (noting that such conduct "triggers the 'sham' exception to the *Noerr-Pennington* doctrine").

Appellants interpret *Wawa* as holding that "the *Noerr-Pennington* doctrine does not apply to false *public* statements made outside of governmental proceedings as part of a challenge to an application to a local governmental agency." Appellants' Reply Brief at 9 (emphasis in original). Thus, they claim that "[b]ecause the facts at issue here closely resemble those presented in *Wawa* — alleged 'protected' activities petitioning government, with collateral 'sham' activities disseminating false information publicly — this Court must reverse the trial court's dismissal of [Appellants'] complaint and remand this case for further proceedings." *Id.* at 10. We disagree.

Initially, we do not read *Wawa* as holding that the *Noerr-Pennington* doctrine does not apply to false public statements made outside of governmental proceedings. Instead, as discussed above, the *Wawa* Court ascertained that the *Noerr-Pennington* doctrine did not provide immunity as Wawa's "pleadings paint [the a]ppellees as *effectuating governmental action directed at impeding the business affairs of a competitor*. Such conduct ... triggers the 'sham' exception to the *Noerr–Pennington* doctrine." *Wawa*, 817 A.2d at 548 (emphasis added). The *Wawa* Court's decision did not center on the fact that the appellees made some of the at-issue statements outside of governmental proceedings, specifically to a local landowner and community groups. Rather, we emphasized in reversing the trial court's decision that "we cannot say with certainty that no recovery is possible under the law with the admission as true of the content of the complaint regarding the dissemination of false information geared toward derailing [the a]ppellees' competitor." *Id.* Thus, Appellants' reliance on *Wawa* does not convince us that the *Noerr-Pennington* doctrine would not protect DNR's statements to community members for the mere reason that the statements were made outside of formal government proceedings.[12, 13]

Appellants also claim that the *Noerr-Pennington* doctrine does not apply here because Appellants alleged that DNR's statements were false and meant to interfere with Appellants' business interests, like in *Wawa*. *See*

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[12] We emphasize, again, that Appellants cite to only *Wawa* to support their position that the *Noerr-Pennington* doctrine does not protect statements made to the general public outside of any governmental proceedings. They proffer no other authority, either binding or persuasive, to back this argument.

[13] Further, the complaint in the case at bar indicates that DNR was concurrently petitioning and attempting to influence the government while making these statements to the community. In their complaint, Appellants alleged that DNR has "resisted [Appellants'] proposed soil clean up, remediation[,] and repurposing of the Bishop Tube [s]ite, in a thinly-veiled attempt *to coerce the [t]ownship and the Commonwealth* to impede [Appellants'] efforts and spend many millions of dollars of public revenue to remediate the site and create a park." Complaint at ¶ 23 (emphasis added); *see also id.* at ¶ 24 (averring that DNR has "engaged in, and ha[s] conspired to engage in[,] a campaign of misinformation that is designed to mislead, and ha[s] misled, the residents of East Whiteland Township and other surrounding townships, *the officials of East Whiteland Township, and the officials of the PADEP* into believing that any improvements that are proposed by [Appellants] will be dangerous because of the contaminants currently present at the site") (emphasis added); *id.* at ¶ 31 ("Delaware Riverkeeper Network has also published documents on its website containing deceitful information in an attempt to scare the residents *and public officials of East Whiteland Township* into opposing the development of the Bishop Tube [s]ite....") (emphasis added). The allegedly defamatory flier — attached to Appellants' complaint — also called for "urgent action[,]" and asked recipients to attend a community meeting regarding the project. *See id.* at Exhibit A.

Additionally, DNR astutely points out that "communicating with and mobilizing the public is a key element of petitioning the government. … To hold a person is precluded from seeking the support of his or her neighbors when petitioning the government would … create an exception to the protections of the *Noerr-Pennington* [d]octrine that would swallow the rule." DNR's Brief at 22.

Appellants' Brief at 24; Appellants' Reply Brief at 10. However, the trial court observed that Appellants' "characterization of the statements as false is belied by the other allegations of Appellants' [c]omplaint[,]" and we agree. TCO at 18. For instance, although Appellants alleged that DNR's purpose in publishing false and misleading information was to impede the business interests of Appellants, *see* Complaint at ¶ 27, they simultaneously conceded that DNR seeks to "spend many millions of dollars of public revenue to remediate the site and create a park." *Id.* at ¶ 23; *see also id.* at Exhibit A ("Environmental [e]xperts highly recommend that this site be fully cleaned up and left as OPEN SPACE!"). In addition, Appellants recognized in their complaint that "industrial operations resulted in the release of significant amounts of chlorinated solvents … to soil and groundwater at the [s]ite[,]" and that "the chlorinated solvent contamination in groundwater has migrated significant distances beyond the boundaries of the [s]ite, generally in a [n]ortheasterly direction." *Id.* at ¶¶ 14, 15. They acknowledged that "CDP plans to clean up the soils above the water table at the site[,]" but that "any groundwater remediation required at or beyond the [s]ite is not, and has never been[,] the legal responsibility of CDP…." *Id.* at ¶¶ 28, 29; *see also id.* at ¶ 28 ("[T]he parties that caused the contamination of the groundwater continue to bear the responsibility for cleaning the contaminated groundwater under the site and downstream….").

Accordingly, Appellants admit that they plan to conduct only a partial cleanup of the site — namely to the soils above the water table — and, thus, the groundwater at the site, where the townhouses are planned to be built, would remain contaminated. As a result, we do not consider DNR's statements that Appellants intended to conduct only a partial cleanup, and planned to build over 200 homes on contaminated land, to be false. Similarly, because the contaminated groundwater could continue to pollute surrounding areas, it is not false that the community could be exposed to more toxins. *Accord* TCO at 5 n.5 ("Anything less than full remediation of the site may potentially increase contamination of the surrounding areas.").

We therefore do not view the allegations in the complaint as establishing that DNR was sham petitioning and "proliferat[ing] false information aimed at interfering directly with the business relationships of a competitor." *Wawa*, 817 A.2d at 548. As the trial court aptly discerned, "[t]hroughout the [c]omplaint, Appellants note that [DNR] desire[s] the full remediation of the site for purposes of constructing a public park on the land. Moreover, it is clear from the pleadings that [DNR is] concerned about the spreading of contaminated soil and groundwater throughout the community." TCO at 16 (citation omitted). We agree, and do not view DNR's conduct as a sham given the allegations in the complaint detailing the environmental issues at play. As such, we conclude that DNR has immunity pursuant to the *Noerr-*

*Pennington* doctrine, and that the trial court did not err in dismissing Appellants' complaint.[14]

Order affirmed.

President Judge Emeritus Ford Elliott did not participate in the consideration or decision of this case.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/6/18

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[14] Given our disposition, we need not address the application of the Environmental Immunity Act, nor Appellants' third issue as to whether their complaint made out a claim for common law defamation. We also need not address Appellants' allegation that Ms. van Rossum falsely stated that Mr. O'Neill inappropriately brushed up against her, as Appellants develop no argument with respect to this claim. *See Commonwealth v. Thoeun Tha*, 64 A.3d 704, 713 (Pa. Super. 2013) ("Failure to present or develop an argument in support of a claim causes it to be waived.") (citation omitted).

# ATTACHMENT 12

Filed 11/02/2018

**IN THE SUPERIOR COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

| | | |
|---|---|---|
| J. BRIAN O'NEILL, O'NEILL PROPERTIES GROUP, L.P. AND CONSTITUTION DRIVE PARTNERS, LP | : | No. 3066 EDA 2017 |
| Appellants | : | |
| v. | : | |
| MAYA VAN ROSSUM, CARLA ZAMBELLI AND DELAWARE RIVERKEEPER NETWORK AND JOHN DOES 1 THROUGH 10 | : | |

**ORDER**

IT IS HEREBY ORDERED:

THAT the application filed September 20, 2018, requesting reargument of the decision dated September 6, 2018, is DENIED.

PER CURIAM

# ATTACHMENT 13

| | | |
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| **CONSTITUTION DRIVE PARTNERS, L.P.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2014-019-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: July 17, 2014** |

**OPINION AND ORDER ON**
**DEPARTMENT'S MOTION TO DISMISS**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board finds that a Department letter informing the appellant that the Department is terminating a covenant not to sue and considering whether to subsequently take enforcement action is not an appealable action under the terms of the Consent Order and Agreement entered into by the parties.

## OPINION

In 2005, appellant Constitution Drive Partners, L.P. (CDP) purchased property known as the Bishop Tube HSCA[1] site in East Whiteland Township, Chester County, which had at one time been operated as a precious metals processing and stainless steel fabricating facility. The former operations on the site resulted in soil contamination and groundwater contamination that has migrated offsite. On March 17, 2005, CDP entered into a Prospective Purchaser Consent

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[1] Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. § 6020.101 et seq.

Order and Agreement (the COA)[2] with the Department of Environmental Protection (Department) in which CDP agreed to undertake certain performance measures at the site in exchange for protection from liability. The COA consists of the original agreement and two amendments.

Of particular note are paragraphs 6, 7 and 23 of the COA. Paragraph 6 sets forth CDP's duty of non-interference:

> **6. Non-Interference:** Developer shall not interfere with or impair any response actions taken by the Department, or any other person or entity under the auspices of the Department with regard to the Existing Contamination or any other contamination identified at the Site….

(Exhibit B to Department's Motion)

Paragraph 7 sets forth the Department's covenant not to sue:

> **7. Department's Covenant Not to Sue:** Subject to the Reservation of Rights provided in Paragraph 8 below, the Department covenants not to sue or take any administrative or judicial action against Developer for response costs, response actions, civil penalties, natural resource damages, or injunctive relief, including encumbering the Property (through lien or otherwise), arising from or relating to the release and/or threatened release of hazardous substances defined as Existing Contamination at the Site. These covenants extend only to Developer, except as they may be transferable as stated below and may terminate at the Department's sole discretion upon Developer's failure to meet any of the requirements of the CO&A. These covenants shall take effect upon the effective date of this CO&A.

(*Id.*)

Finally, Paragraph 23 sets forth the parties' agreement as to when a decision under the COA becomes appealable:

> **23. Decisions Under Consent Order:** Any decision that the Department makes under the provisions of this CO&A shall not be

[2] The COA is also sometimes referred to in the parties' filings as "CO&A" or as the Prospective Purchaser Agreement or PPA.

> deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board or to any Court until such time as the Department enforces this CO&A or pursues equitable, administrative, civil or criminal action based on the belief that Developer has failed to comply with any material provision of this CO&A. At no time, however, may the parties challenge the content or validity of this CO&A or challenge the Findings agreed to in this CO&A.

(*Id.*)

In 2011, an independent contractor retained by CDP damaged piping and protective covering on a soil vapor extraction and air sparging system (the SVE/AS system) while conducting salvage operations at the site. According to CDP, the Department agreed that repairs to the system could be delayed until such time as the Department intended to operate the system or CDP intended to commence site redevelopment activities. (CDP Response to Motion, page 3)

On January 28, 2014, the Department issued the letter that is the subject of this appeal (the January 28, 2014 letter). The letter references the damage that occurred in 2011 and states that "this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the [COA] and its two Amendments." (Exhibit 1 to Department's Motion) The letter states that CDP's failure to repair the protective covering of the SVE/AS system constitutes a violation of the COA and its amendments. The letter also contains the following paragraph:

> This is to advise you that DEP now considers the CDP's violation of the PPA [COA] to void the Covenant Not To Sue set forth in Paragraph 7, which states: "These covenants . . . may terminate at the sole discretion of the Department upon [CDP's] failure to meet any of the requirements of the CO&A." Please be advised that this determination is not intended as an appealable action, and DEP will consider whether to exercise its enforcement options related to this determination as matters progress at the site. Immediate demolition of the buildings as CDP has repeatedly proffered will directly impact DEP's consideration of such enforcement options…

(*Id.*)

CDP appealed the letter to the Environmental Hearing Board (Board) on February 27, 2014. The Department has moved to dismiss the appeal on the grounds that the letter is not an appealable action. CDP filed a response to the motion on June 6, 2014, and the Department filed a reply on June 23, 2014.

We evaluate a motion to dismiss in the light most favorable to the non-moving party. *Harvilchuck* v. DEP, EHB Docket No. 2013-202-M (Opinion and Order issued April 1, 2014), *slip op*. at 7; *Teska v. DEP*, 2012 EHB 447, 452. A motion to dismiss may be granted where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. *Id.*

**<u>Discussion</u>**

The Department contends that the January 28, 2014 letter is not appealable under the terms of Paragraph 23 which states that any decision made under the COA is not final or appealable until such time as the COA is enforced or the Department pursues action against CDP. The January 28, 2014 letter specifically states that the Department "will consider whether to exercise its enforcement options. . .as matters progress at the site." The Department argues that the purpose and intent of the letter was simply to notify CDP of the Department's determinations relating to Paragraph 6 of the COA (impairment of response actions) and Paragraph 7 (covenant not to sue) and not to initiate any enforcement action..

In support of its argument, the Department directs the Board to our decision in *Chesapeake Appalachia, LLC v. DEP*, which was recently affirmed by the Commonwealth Court. See, *Chesapeake Appalachia, LLC v. DEP,* 2013 EHB 447, *aff'd,* No. 1570 C.D. 2013 (Pa. Cmwlth. April 3, 2014). Like the present case, the appellant in *Chesapeake* had entered into a COA that contained language similar to that of Paragraph 23:

> **Decisions Under Consent Order and Agreement.** Except for Paragraph 16.c., above [relating to transfers of interest in gas wells], any decision which the Department makes under the provision of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa.C.S. § 101. Any objection which Chesapeake may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

2013 EHB at 455 (quoting Paragraph 24 of the Consent Order and Agreement). The Department letter at issue in that case involved an evaluation of a corrective action plan submitted by the appellant in connection with the remediation of gas wells and directed the appellant to begin work on certain gas wells and to assess others. The Board found that the letter was not an appealable action because it did not create any new rights or obligations beyond those set forth under the COA. Additionally, the Board pointed to the language of the COA that preserved any appeals until such time as the Department enforced the COA:

> If we were to hold that the Department's letter is appealable, we would have effectively rendered Paragraph 24 meaningless. The letter undeniably expresses a "decision under the COA." By consent, such decisions were not supposed to be appealed. If this letter can be appealed, we are effectively nullifying the agreement. . . . A holding that the letter is appealable by Chesapeake is the same as a holding that the Board will not recognize the terms of a COA even though that COA, by definition, was not appealed and cannot now be appealed. We will have disregarded the parties' bargain, which normally would not be done even in an enforcement or contract action absent fraud, accident, or mistake.

*Id.* at 465-66 (*citing Com. v. U.S. Steel,* 325 A.2d 324, 328 (Pa. Cmwlth. 1974); *Global Eco-Logical Services v. DEP*, 2001 EHB 99, 102).

CDP argues that the Department's reliance on *Chesapeake* is misplaced because *Chesapeake* involved a letter requiring corrective action, and not the termination of a covenant not to sue. Similarly in *Consol Pennsylvania Coal Co. v. DEP and Citizens Coal Council*, 2013

EHB 683, *appeal docketed*, No. 2257 CD 2013 (Pa. Cmwlth. Jan. 27, 2014), which relied heavily on the *Chesapeake* decision, the Board found that two letters requiring corrective action under a COA were not appealable actions under the terms of the COA. In the present case, CDP argues that, whereas the letter in *Chesapeake* was nothing more than a request with which the appellant could choose to comply or ignore, the voiding of a covenant not to sue carries significant consequences, including interfering with CDP's ability to attract investors or to secure financing or local land approvals for the redevelopment project. In CDP's opinion, the voiding of the covenant is itself the penalty, and forestalling the right to challenge it until some unspecified time in the future violates CDP's right to due process. The question before us then is whether the Department's letter which announced the termination of the covenant not to sue is an appealable action under the terms of the COA.

In determining whether a letter or other communication by the Department is an appealable action, the Board looks at whether the communication affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." *Chesapeake, supra* at 461; *Felix Dam Pres. Ass'n. v. DEP*, 2000 EHB 409, 421-22 (citing 25 Pa. Code § 1021.2). Department "decisions" are appealable when they are "determination[s] which can be classified as quasi-judicial in nature and which affect rights or duties." *Sayreville Seaport Assocs. Acquisition Co., LLC v. DEP*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012) (citing *DER v. New Enterprise Stone and Lime Co., Inc.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976)).

CDP argues that it is adversely affected by the January 28, 2014 letter because the Department's letter voiding the covenant not to sue may have significant, far reaching circumstances, such as exposing CDP to claims by third parties and affecting its ability to attract investors or obtain land use approvals. However, these concerns are purely speculative, and the

Department's letter places no new obligations, duties or liabilities on CDP. Moreover, one can make an argument that *any* decision by the Department under the COA can have a significant or far reaching effect. That is the reason that parties enter into an agreement of this type, in order to avoid piecemeal litigation each and every time the Department makes a decision or issues a letter related to the project in question.

We see no material difference between the January 28, 2014 letter and a notice of violation, which is generally not appealable. *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 375 ("We have consistently held that an NOV containing a listing of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action."), citing, *inter alia*, *Beaver v. DEP*, 2002 EHB 666, 674; *Lower Providence Twp. Mun. Auth. v. DEP*, 1996 EHB 1139, 1140-41; *The Oxford Corp. v. DER*, 1993 EHB 332, 333-34. A notice of violation merely serves to notify the recipient that the Department considers it to be in violation of some statutory provision or regulation, sets forth actions that the recipient must take in order to come into compliance, and may mention the possibility of future enforcement action. Similarly, the January 28, 2014 letter does not require anything of CDP. It simply notifies CDP that the Department considers it to be in violation of Paragraph 6 of the COA and states that the Department will *consider* future enforcement action.

In addition, Paragraph 7 contains the covenant not to sue in which the Department agrees, subject to the Reservation of Rights in Paragraph 8, "not to sue or take any administrative or judicial action against Developer …" The provision further provides that the "covenant . . . may terminate at the Department's sole discretion upon Developer's failure to meet the requirements of the CO&A." The termination is contingent upon the Developer's violation of the COA and it is subject to the sole discretion of the Department according to the COA that CDP executed with the Department. At this point, the Department has announced in a letter that it has terminated the covenant not to sue as a result of an alleged violation of the COA and that it now believes it is entitled to sue CDP in the future, although no action to sue has begun. The Department's announcement of the termination of the covenant not to sue is therefore quite similar to the Department's announcement of violations in a notice of violations. The termination of the covenant not to sue alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations of the COA. CDP can challenge the termination and the underlying violations in the future when the Department decides to sue CDP.

Even if we accept CDP's argument that the Department's termination of the covenant not to sue has adversely affected its rights, privileges, immunities, duties, liabilities or obligations, Paragraph 23 of the COA, which CDP negotiated with the Department, deprives CDP of the opportunity to appeal it now. Paragraph 23 clearly states that *any* decision the Department makes under the COA shall not be treated as a final action of the Department and shall not be appealable to the Board until the COA is enforced. If the parties had wished to treat the voiding of the covenant not to sue differently than other decisions made under the COA, they very easily could have excluded it from the coverage of Paragraph 23. For example, in *Chesapeake,* the parties included an exception in the COA that would have allowed the appellant to appeal certain types of decisions. The language stated, "*Except for Paragraph 16.c., above [relating to transfers of interests in gas wells]*, any decision which the Department makes under the provisions of the Consent Order and Agreement . . . is intended to be neither a final action . . . nor an adjudication . . ." (emphasis added). In the present case, the parties could just have easily included similar language in Paragraph 23.[3] They did not do so, and the Board is loath to read

[3] For example, the language of Paragraph 23 could have been drafted as follows: "*Except for Paragraph 7 [relating to the Department's Covenant Not to Sue]*, any decision that the Department makes under the

language into the COA that the parties did not include. As we held in *Chesapeake*, the parties "should honor their agreement, and so should we." 2013 EHB at 464.

CDP argues that the Department should not have sole discretion to terminate the covenant not to sue without some meaningful opportunity for challenge or review of that decision. But isn't that precisely what CDP has agreed to? Paragraph 7 gives the Department the right to unilaterally void the covenant not to sue, and Paragraph 23 prohibits CDP from challenging this decision until such time as the COA is enforced. CDP argues that if the Department is allowed to terminate a covenant not to sue without any opportunity for the other party to challenge the decision, it will significantly undermine the Department's credibility in negotiating with redevelopers in the future. CDP may be correct; the Department's actions in this case may very well have a negative effect on its negotiations with future redevelopers wishing to avoid a similar fate as CDP. However, the Department assumes that risk, and it is not up to the Board to protect the Department, in any future negotiations with other parties, from any potential consequences of its actions in this matter involving CDP.

Finally, CDP disputes the Department's finding that it has exacerbated the existing contamination on the property and has interfered with the Department's response actions at the site. CDP asserts that the Department knew of its plans and appeared to be in agreement with them. While this may be a legitimate argument if and when the Department enforces the COA, it is premature at this stage of the proceeding.

Because we conclude that the Department's January 28, 2014 letter is not appealable, we will enter an order granting the Department's motion to dismiss.

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provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board . . ."

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CONSTITUTION DRIVE PARTNERS, L.P.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2014-019-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : : : | |

**O R D E R**

AND NOW, this 17th day of July, 2014, it is hereby **ORDERED** that the Department of Environmental Protection's Motion to Dismiss is **granted** and this appeal is marked closed and discontinued.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: July 17 , 2014**

**c:** **DEP, General Law Division:**
Attention: April Hain
9th Floor, RCSOB

**For the Commonwealth of PA, DEP:**
Anderson Lee Hartzell, Esquire
Office of Chief Counsel – Southeast Region

**For Appellant:**
Jonathan H. Spergel, Esquire
Lynn R. Rauch, Esquire
MANKO GOLD KATCHER & FOX, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CONSTITUTION DRIVE PARTNERS, L.P.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2014-019-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**DISSENTING OPINION OF**
**JUDGE BECKMAN**

**By Steven C. Beckman, Judge**

The posture of this case is a pending motion to dismiss by the Department. The Majority identifies the standard for evaluating a motion to dismiss; that is, the Board evaluates the motion in the light most favorable to the non-moving party and will grant the motion only where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. *See* Majority Op. at 4. An important corollary of that standard is that *all reasonable inferences must be drawn in favor of the nonmoving party*. *See Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. When reasonable inferences favorable to Constitution Drive Partners, L.P. ("CDP") are properly drawn in this case, the inevitable conclusion is that the Department's motion must be denied at this stage of the litigation.

In my opinion, the issue presented by the Motion to Dismiss raises two questions. The first is whether the Department's January 28, 2014 letter ("Letter") constitutes an appealable action. The second question is, if the Letter is appealable, what is the impact of Paragraph 23 of the Prospective Purchaser Consent Order and Agreement ("COA")?

In the Letter, the Department noted its finding that a contractor for CDP destroyed a liquid boot that capped the Soil Vapor Extraction/Air Sparging ("SVE/AS") system and stated that "[n]eedless to say, this action interfered with or impaired the SVE/AS system that DEP had implemented and potentially exacerbated the Existing Contamination at the site, in violation of the PPA." The Department requested that CDP repair the damaged boot but that effort was apparently delayed while CDP considered demolishing buildings at the site. The Department concludes this section of the Letter by stating that "nothing has occurred at the Bishop Tube site, and CDP continues to be in violation of the PPA and its Amendments." Had the letter stopped there, I would agree with the Majority that there was "no material difference between the January 28, 2014 letter and a notice of violation, which is generally not appealable." Majority Op. at 7. The Letter, however, goes further. In the next paragraph, it advises CDP that, as a result of the alleged violations, the Department has determined that the Covenant Not to Sue ("Covenant") found in Paragraph 7 of the COA is void. It is this determination memorialized in the Letter that is the main subject of CDP's appeal.

As the Majority states in its opinion, in evaluating whether a letter from the Department is an appealable action, the Board looks at whether the action outlined in the communication affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." Majority Op. at 6 (citing *Chesapeake Appalachia v. DEP*, 2013 EHB 447, 461). In applying this standard, the Majority dismisses CDP's concerns about the impact of the voiding of the Covenant as "purely speculative" and finds that the Letter places no new obligation, duties or liabilities on CDP. They assert that the Letter is akin to a notice of violation in that it simply notifies CDP of the alleged violations and that the Department will consider future enforcement. Specifically addressing the termination of the Covenant, the Majority states that "the termination of the covenant not to sue alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations of the CO&A." Majority Op. at 8.

Dismissing CDP's concerns as speculative and treating the Department's decision to void the Covenant as a simple notification ignores the reality of the agreement between the parties set forth in the COA and the real impact of that decision. At the time the COA was executed, CDP represented that it had not caused or contributed to, and was not responsible for any of the identified contamination on the site and the Department agreed that it was not aware of any information contrary to CDP's representation. Despite having no legal responsibility for the contamination issues at the site, CDP agreed, pursuant to the COA, to be legally bound to conduct certain work to address the contamination at the site. In return for its willingness to take on this work, CDP received the Covenant along with the contribution protection found in Paragraph 9 of the COA.

The Covenant (along with the contribution protection) was the major benefit of the bargain for CDP in entering the COA in the first place. Even the Majority recognizes this fact when it states that CDP entered into a COA with the Department "in which CDP agreed to undertake certain performance measures at the site *in exchange for protection from liability*" Majority Op. at 2 (emphasis added). This protection from liability is the key to allowing development of these types of brownfield sites and plays a significant role in the ability of developers like CDP to obtain the financing necessary to bring these sites back in to productive use. The Department's decision to void the Covenant directly eliminates the central benefit that it provided to CDP under the COA. The Board must draw inferences in favor of CDP, and in doing so, it cannot so readily dismiss CDP's alleged injuries as speculative, or find that this action by the Department was analogous to a mere notification of violation. In my opinion, the Department's decision set forth in the Letter to void the Covenant clearly *enforces* the terms of the COA, and affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations" of CDP. As such, under our prior rulings, the Letter is a final action of the Department that is subject to appeal to the Board.

The conclusion that the voiding of the Covenant is a final action subject to Board jurisdiction is supported by a review of another provision of the COA. The Majority states that the Department's action simply "alerts CDP that the Department now believes that it is able to sue CDP in the future for alleged violations," but fails to note that the Department did *not* need to void the Covenant in order to put CDP on notice of the alleged violations and allow for future enforcement. Under the terms of the COA, the Department already has the authority to bring a future enforcement action for any alleged violations. Under the Reservation of Rights found at paragraph 8 of the COA, CDP and the Department agreed that the Covenant Not to Sue "*shall not apply* to the following claims by the Department against Developer for: (1) Failure to meet the requirements of this CO&A" (emphasis added). In light of that reservation, the decision to void the Covenant is clearly more than a notification of alleged violations of the COA and the potential for future enforcement related to those violations. If it is only intended as a notice of violation, why void the Covenant in the first place and not just rely on the reservation of rights provided in Paragraph 8?

It certainly would have been less problematic to have relied on the clear authority under the reservation of rights. It is not difficult to surmise, particularly when viewing the matter in the light most favorable to CDP—as we are required to do—that the Department knew the value of the Covenant to CDP and that voiding it would have a significant impact on CDP even without any further enforcement. It is reasonable to further draw the inference that the Department chose this course of action; that is, *enforcing* a distinct provision of the COA, to pressure CDP to complete the work requested by the Department. Under the terms of the COA, the Department had a clear right to unilaterally terminate the Covenant upon its determination that CDP failed to meet certain requirements of the COA as a result of the alleged violations. I am not questioning the Department's strategic decision to void the Covenant; however, the decision to do so should not be shielded from Board review simply by a claim that the Department's action was only advisory.

Because I find that the voiding of the Covenant as set forth in the Department's Letter is an appealable action, it is necessary to consider the second question posed by the issue in this case, that is, what is the impact of Paragraph 23 of the COA on CDP's current appeal? The relevant part of Paragraph 23 provides that "[A]ny decision that the Department makes under the provisions of this CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the Environmental Hearing Board or to any Court until such time as the Department *enforces this CO&A or pursues equitable, administrative, civil, or criminal action* . . . ." (emphasis added). The Department's voiding of the Covenant is clearly a decision of the Department within the meaning of this paragraph and none of the parties appear to seriously dispute that fact. Further, I agree with the Majority that the parties could have drafted the language of this provision to specifically exclude the decision to terminate the Covenant, but the fact that they did not do so here is not determinative in my opinion.

The issue, as I see it, is whether any of the triggering actions by the Department that would lift the prohibition on an appeal have taken place. In other words, has the Department enforced the COA or otherwise pursued equitable, administrative, civil or criminal action? Given that the Majority finds the Letter to be analogous to a notice of violation, the inference they draw is that no enforcement action has taken place. This view is consistent with a narrow interpretation of what constitutes enforcement under Paragraph 23. The Majority apparently reads "enforcement" in that paragraph to simply mean the type of enforcement typical of the Department, that is, pursuing administrative or civil action against a party.

While I do not disagree that that reading is plausible, it essentially discards one clause from the Paragraph and ignores the use of the conjunction "or" in the key phrase. From the actual wording of the clause agreed to by the parties, it is just as plausible to draw the inference that the parties intended to distinguish between "enforc[ing] this CO&A" and "pursu(ing) equitable, administrative, civil or criminal action." Under this reading, enforcing the COA would not involve the Department's typical enforcement action as the Majority finds, but rather incorporates the Department's exercise of its contractual right to void the Covenant. Given that the Board must evaluate this Motion in the light most favorable to CDP, this approach to the meaning of Paragraph 23 should be taken where there is nothing in the record to indicate that another interpretation was intended by the parties. In the end, both questions raised by the issue in this Motion to Dismiss are close calls. Our standard of review, however, should lead the Board to resolve close questions in favor of the non-moving party where reasonable inferences support that result. Therefore, because I conclude that doing so in this case requires that the Motion be denied, I dissent from the Majority's decision to grant the Department's Motion.

**ENVIRONMENTAL HEARING BOARD**

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**STEVEN C. BECKMAN**
**Judge**

**DATED: July 17, 2014**

# ATTACHMENT 14

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER** | : | |
| **v.** | : | **EHB Docket No. 2018-020-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSTITUTION DRIVE PARTNERS, LP, Permittee** | : | **Issued: April 26, 2019** |

# A D J U D I C A T I O N

**By the Environmental Hearing Board**

**Synopsis**

The Board finds that the 2007 Amendment and the 2010 Amendment (collectively the "Amendments") to a prospective purchaser agreement entered into between the Department and a developer for the remediation and redevelopment of the Bishop Tube HSCA Site are arbitrary and capricious. The Amendments are considered settlements under Section 1113 of the Hazardous Sites Cleanup Act. Under Section 1113, the Department shall provide notice of any settlements when they are proposed, and the settlements are not final until the Department has provided public notice of the settlements and responded to any public comments. Although the Amendments were executed in 2007 and 2010, the Department did not publish notice as required by Section 1113 until 2017, and it did not issue its comment response finalizing the Amendments as settlements until 2018. Conditions at the Bishop Tube HSCA Site evolved during the intervening years and the Department's actions with regards to the Amendments failed to meet the requirements of Section 1113 and failed to identify and account for the changed circumstances and conditions at the Site.

## FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth of Pennsylvania vested with the duty and authority to administer and enforce the provisions of the Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. §§ 6020.101 – 6020.1305, the Land Recycling and Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908, Section 1917-A of the Administrative Code, 71 P.S. § 510-17, and the rules and regulations duly promulgated thereunder. (Administrative Record Page No. ("AR") 0001.)

2. The site at issue in this appeal is known as the Bishop Tube HSCA Site ("Site"), which is located on Malin Road, south of U.S. Route 30, in Frazier, East Whiteland Township, Chester County. (AR 0002, 0117, 0119, 0485.)

3. The 13.7-acre Site is currently owned by Constitution Drive Partners L.P. ("Constitution Drive"), which purchased it from the Central and Western Chester County Industrial Development Authority in 2005 in order to redevelop the property. (AR 0002, 0117, 0485.)

4. Constitution Drive is a Pennsylvania Limited Partnership with a business address of 700 South Henderson Road, Suite 225, King of Prussia, Pennsylvania 19406. (AR 0002.)

5. The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, the appellants in this appeal (hereinafter collectively "the Riverkeeper"), make up an organization based in Bristol, Pennsylvania that has actively participated in the Department's oversight of the Bishop Tube Site. (AR 0157-0210.)

6. Beginning in the 1950s, the J. Bishop Company used the Site for manufacturing steel tubes. (AR 0486.)

7. The manufacturing and processing of metal alloy tubes and associated equipment continued at the Site until 1999 under the ownership of several companies, including successors to the J. Bishop Company. (AR 0486.)

8. A 2005 remedial action work plan developed for the Site and approved by the Department noted that manufacturing operations at the Bishop Tube facility included the cleaning, shaping, welding, degreasing, annealing, straightening, sandblasting, polishing, and painting of stainless steel and specialty metals into tubes and pipes and other various metal products. (AR 0024, 0120.)

9. The work plan found that the facility utilized a variety of raw materials and chemicals in the manufacturing process, including nitric acid, hydrofluoric acid, caustic materials, motor and gear oils, specialty drawing lubricants, degreasing solvents (primarily trichloroethene (TCE)), anhydrous ammonia, coolants, polishing compounds, and paints. (AR 0024.)

10. The Department has found that hazardous substances were employed in the manufacturing processes throughout the history of manufacturing at the Site, particularly TCE, which it says was utilized in two vapor degreasers, processed in onsite distillation units, and stored in an above-ground tank at the Site. (AR 0486.)

11. The Department has evidence that TCE was released into soil and groundwater as early as the mid-1960s. (AR 0487.)

12. In addition to TCE, monitoring wells at the Site have detected fluoride, chromium, and nickel in exceedance of Pennsylvania's residential medium specific concentrations. (AR 0487.)

13. Soil samples have also detected tetrachloroethene, 1,2-dichloroethene, and 1,1,1-trichloroethane. (AR 0488.)

14. The Department has described the Site as having "extremely high levels of contamination in the subsurface…." (AR 0478.)

15. The Department has determined that a large plume of contaminated groundwater now exists at the Site that originates from the property and extends off-site in a northern and eastern direction, as well as toward portions of Little Valley Creek, a designated exceptional value (EV) stream. (AR 0002, 0023, 0119.)

16. Constitution Drive did not cause the historic releases of hazardous substances or contaminants at the Site. (AR 0003.)

17. On March 17, 2005, the Department entered into a prospective purchaser agreement (the "2005 PPA") with Constitution Drive in the form of a consent order and agreement pursuant to various statutory authorities, including HSCA and Act 2, in connection with Constitution Drive's proposed acquisition and planned redevelopment of the Site. (AR 0120.)

18. The 2005 PPA contained the following provision at Paragraph 3 regarding the work to be performed by Constitution Drive:

> **Work To Be Performed:** In exchange for the benefits conferred by the Department to Developer [Constitution Drive] under this CO&A, and as compensation for response costs incurred and to be incurred by the Department in connection with the Site, Developer hereby agrees that, by March l, 2009, Developer shall undertake investigation and/or remediation of soils at the Site necessary to demonstrate attainment with a non-residential statewide health

> standard or site-specific standard under Act 2 for soils at the Site in accordance with the Remedial Action Work Plan ("Plan"") attached hereto as Exhibit B and incorporated herein by reference. In this regard, Developer shall follow all required procedures and notices under Act 2 within the time frame set forth in this paragraph.

(AR 0005-0006.)

19. Subject to a list of exceptions, the Department in the 2005 PPA covenanted not to sue Constitution Drive for any claims relating to the historic contamination at the Site. (AR 0007-0008.)

20. The Department provided in the agreement that Constitution Drive was entitled to contribution protection pursuant to Section 705 of HSCA, 35 P.S. § 6020.705, and Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613 (f)(2), relating to hazardous substances previously released at the Site. (AR 0008-0009.)

21. Constitution Drive agreed to complete this work by March 1, 2009. (AR 0005.)

22. On April 9, 2005, pursuant to Section 1113 of HSCA, 35 P.S. § 6020.1113, the Department published notice of the 2005 PPA in the *Pennsylvania Bulletin*, 35 Pa.B. 2166, and opened a 60-day public comment period. (AR 0033-0034, 0120.)

23. No person commented on the 2005 PPA during the public comment period, and the 2005 PPA became final under Section 1113 of HSCA when the Department notified Constitution Drive that no comments had been received. (AR 0014, 0120.)

24. The Department and Constitution Drive subsequently sought to amend the 2005 PPA on two separate occasions. (AR 0120.)

25. In the first amendment, dated January 22, 2007, the parties agreed to modify certain performance obligations of Constitution Drive related to the investigation and remediation of unsaturated soils at the Site (the "2007 Amendment"). (AR 0035-0095, 0120.)

26. The 2007 Amendment "amended and restated" Paragraph 3 of the 2005 PPA in several key respects. (AR 0037-0042.)

27. Apart from modifying Constitution Drive's performance obligations, the 2007 Amendment generally left the 2005 PPA unmodified and in full force and effect. (AR 0044, 0122.)

28. The 2007 Amendment provided that Constitution Drive would partner with the Department to design, install, and operate a physical treatment technology, known as an air sparging/soil vapor extraction system (the "AS/SVE system") at the Site and provided a timeline for the specific tasks necessary to complete the work on the AS/SVE system. (AR 0037-0042, 0092-0093, 0120, 0478.)

29. The AS/SVE system was intended to reduce contamination present in soils and groundwater. (AR 0065-0066.)

30. Among other things, Constitution Drive was required to operate the AS/SVE system for a 30-day start up period, and then operate the system for 60 days in accordance with certain specifications, while removing an average of ten pounds of volatile organic compounds (VOCs) per day. (AR 0039-0040.)

31. The 2007 Amendment at Paragraph 1(c)(2) provided in part that, once it was determined that the AS/SVE system was operational in accordance with the performance standards, Constitution Drive "shall have no further remedial obligations to the Department relating to the Site pursuant to the CO&A [the 2005 PPA], and the Department shall be solely responsible, with no cost or liability to Developer, to operate the AS/SVE System at the Site, with the objective of demonstrating attainment with one or a combination of remediation standards pursuant to Act 2 for unsaturated soils at the Site." (AR 0040-0041.)

32. In 2008, the AS/SVE system was installed and operated by Constitution Drive. (AR 0121.)

33. The AS/SVE system ultimately did not meet the performance standards. There were operational difficulties resulting from the shallow water table and system flooding. As a result, operation of the system was halted. (AR 0121.)

34. On June 4, 2010, the Department and Constitution Drive entered into a second amendment to the 2005 PPA (the "2010 Amendment") that further modified Constitution Drive's work obligations that were established in the 2005 PPA and amended by the 2007 Amendment. (AR 0100-0103, 0121.)

35. The 2010 Amendment contained the following WHEREAS clauses:

> WHEREAS, Developer has installed and commenced operation of the AS/SVE System and has made significant progress towards meeting the system operational criteria established in the First Amendment, and Developer and the Department believe that future operation of the AS/SVE System will assist in the remediation of hazardous substances in soil and groundwater at the Site;
>
> WHEREAS, Developer and the Department desire to further amend the CO&A to allow the Department to assume operational control of the AS/SVE System ….

(AR 0099.)

36. The 2010 Amendment "amended and restated" Paragraph 3 of the 2005 PPA in several key respects. (AR 0100-0103.)

37. The 2010 Amendment required Constitution Drive to: (1) make repairs to the air sparging system as necessary for the system to be fully operational for a 72-hour startup period; (2) be solely responsible for the system during the startup period and demonstrate that it operated continuously without incident for 72 hours; (3) provide the Department with operational manuals and as-built drawings for the system; (4) pay the Department $30,000; (5) repair a road along the

north side of the main building at the Site in accordance with certain specifications; and (6) install 7-foot fencing around certain areas of the Site. (AR 0100-0102.)

38. In exchange for completing this work, the 2010 Amendment included the following provision:

> Upon satisfaction of Developer's obligations pursuant to Paragraph 3(a) above, the Department shall provide Developer with a letter within fourteen (14) days of satisfaction of Developer's obligations confirming that Developer has satisfied its obligations pursuant to Paragraph 3(a), and Developer shall have no further remedial obligations at all to the Department relating to the Site pursuant to the CO&A and First Amendment (including, but not limited to any obligation to remediate soil, groundwater, or surface water at or beyond the Site, or for the operation and maintenance of the AS/SVE System at the Site).

(AR 0102-0103.)

39. As with the 2007 Amendment, the 2010 Amendment provided that it was to be made a part of the original 2005 PPA, which otherwise would remain unmodified and in full force and effect. (AR 0103.)

40. During the 72-hour startup period, the AS/SVE system is estimated to have removed 23.75 pounds of contaminant mass. (AR 0108-0112.)

41. In total, the system is estimated to have removed approximately 680 pounds of VOCs during a two-month period that it operated. (AR 0132.)

42. On September 11, 2010, the Department placed the Site on the Pennsylvania Priority List of contaminated sites to be addressed by the Department under HSCA. (AR 0119.)

43. In a letter dated December 22, 2010, the Department determined that Constitution Drive had satisfied its obligations under the 2010 Amendment to the 2005 PPA. (AR 0115.)

44. However, during visits to the site in June 2011, the Department discovered that a consultant hired by Constitution Drive damaged the AS/SVE system through the use of heavy equipment on the Site. (AR 0263-65.)

45. In a letter dated July 26, 2011, the Department requested that Constitution Drive repair the AS/SVE system. (AR 0263-0265.)

46. As of January 2014, the AS/SVE system had not been repaired. (AR 0267.)

47. On January 28, 2014, the Department sent Constitution Drive a letter which advised it that, because of the damage to the AS/SVE system caused by Constitution Drive's contractor and it potentially exacerbating the existing contamination at the Site, the Department viewed Constitution Drive as having violated the 2005 PPA and its Amendments, and the Department considered these violations to have voided the covenant not to sue established in the 2005 PPA. (AR 0267-0268.)

48. Constitution Drive disputed the Department's factual findings and asked that the Department rescind its January 28, 2014 letter. (AR 0269-0274.) Constitution Drive appealed the Department's letter to the Board but that appeal was dismissed because the Board determined that the letter was not an appealable action. *Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465. (AR 0275-0309.)

49. Constitution Drive has been unsuccessful in redeveloping the Bishop Tube Site for commercial purposes. (AR 0269-0273.)

50. Constitution Drive engaged in discussions with East Whiteland Township about the potential rezoning of the Site to allow for residential redevelopment. In 2014, East Whiteland Township approved Constitution Drive's request to adopt a zoning amendment that changed the zoning of the Site from industrial to residential. (AR 0121-0122, 0125, 0144.)

51. In 2016, Constitution Drive submitted a Remediation Scope of Work to the Department that proposed targeted soil removal activities to reduce or eliminate the risk of future Site occupants. (AR 0333-0352, 0447-0451, 0481.)

52. In January 2017 and April 2017, Constitution Drive submitted a first and second revised Remediation Scope of Work for Targeted Soil Excavation in response to comments from the Department on the Remediation Scope of Work. (AR. 0333-0352, 0371-0375, 0445-0451.)

53. As part of the Remediation Scope of Work, a consultant for Constitution Drive stated that Constitution Drive planned to develop the Site for townhouses and apartments. (AR. 0337.)

54. Under HSCA, the Department is required to publish notice of proposed prospective purchaser agreements and any amendments thereto in the *Pennsylvania Bulletin* and a newspaper of general circulation in the area of the Site and provide a 60-day public comment period. 35 P.S. § 6020.1113.

55. Public notice for the 2007 Amendment and the 2010 Amendment was not published at the time Constitution Drive and the Department drafted the respective Amendments. (AR 0122.)

56. There is no support in the administrative record for the Department's assertion that the failure to publish timely notice was an "inadvertent administrative oversight." (See, e.g., DEP Brief at 2, 10, 10 n.8.)

57. On April 1, 2017, the Department for the first-time published notice in the *Pennsylvania Bulletin* of the Amendments. 47 Pa.B. 1902. The notice provided as follows:

> The Department of Environmental Protection (Department), under the authority of the Hazardous Sites Cleanup Act (HSCA), 35 P.S. §§ 6020.101—6020.1305, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9601—9675, has entered into an amended Prospective Purchaser Agreement (PPA) with Constitution Drive Partners, L.P. (CDP) regarding the Bishop Tube HSCA Site (Site).
>
> The Site is located approximately .25 mile south of US Route 30 in East Whiteland Township, Chester County. The Site consists of land totaling approximately 13.7 acres and was formerly used as a precious metals and

> stainless steel manufacturing facility. The Department has determined that there is significant soil and groundwater contamination at the Site.
>
> The Site was acquired by the Central and Western Chester County Industrial Development Authority for potential redevelopment and was subsequently sold to CDP for purposes of redevelopment. Under the terms of the Agreement with the Department, which was executed immediately prior to CDP's acquisition of the Site, CDP agreed to (1) assess and clean up soil contamination at the Site to one of the standards set forth in the Land Recycling and Environmental Remediation Standards Act (Act 2), 35 P.S. §§ 6026.101—6026.908; (2) not to exacerbate any existing contamination at the Site; and (3) to provide access and right of entry to the Department for potential future remediation of groundwater contamination in exchange for a covenant not to sue and contribution protection from the Department. The Department and CDP subsequently amended the PPA on two occasions. On January 22, 2007, the Department and CDP agreed that, in order to satisfy its remediation obligations under the PPA, CDP would design, provide mechanical equipment and demonstrate performance of a soil vapor extraction and air sparging remedial system (AS/SVE System), which the Department would install and take over upon performance demonstration. On June 4, 2010, the Department and CDP amended the PPA for a second time and agreed that, to satisfy its remediation obligations, CDP would repair and run the AS/SVE system for a seventy-two (72) hour period, after which it would relinquish control to the Department and pay the Department an amount of $30,000.
>
> This notice is provided under section 1113 of HSCA, 35 P.S. § 6020.1113. The agreements may be examined at the Department's offices at 2 East Main Street, Norristown, PA 19401 by contacting Dustin Armstrong at 484.250.5723 or Robert Schena at 484.250.5865. The Department will accept public comments for a period of 60 days from the date of publication of this notice. Interested persons may submit written comments regarding this PPA and its amendments by submitting them to Dustin Armstrong at the Department's address as listed above.

(AR 0117.)

58. The Department also published notice in *The Daily Local News* on March 18, April 1, April 29 and June 14, 2017. (AR 0122.)

59. The public comment period initially ran from March 18 through June 7, 2017, but the Department agreed to extend the public comment period to July 7, 2017 at the request of East Whiteland Township. (AR 0122.)

60. The only mention in the public notice of the failure of the AS/SVE system is in noting that Constitution Drive was required to repair the system as part of the 2010 Amendment.

There is no mention of the subsequent damage to the system and it being rendered inoperable. (AR 0117.)

61. The public notice does not mention Constitution Drive's plan to now redevelop the Site for residential use or the 2014 change in zoning at the Site. (AR 0117.)

62. The public notice does not mention the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation submitted by Constitution Drive and reviewed by the Department. (AR 0117.)

63. The Riverkeeper, among several others, submitted written comments to the Department on the Amendments. (AR 0157-0210.)

64. East Whiteland Township submitted comments regarding the 2010 Amendment in a letter dated July 7, 2017. (AR 0217-0220.)

65. Among other things, the Township provided the following comments:

> 2. The 2005 PPA and its amendments are predicated on a non-residential remediation of the Site. As DEP is aware, the proposed use of the Site is now residential. How will DEP address this change of use at the Site within the context of the existing PPA, which was based upon a non-residential use of the Site? Will DEP require another amendment to the PPA or other agreement to address residential-related issues, specifically the more stringent remediation standards required for residential use purposes?
>
> 3. Although the PPA was entered into under HSCA, does DEP have any plans to now require attainment with Act 2 and its remediation standards, given the proposed residential use of the Site? Does DEP have any plans to negotiate additional amendments to the PPA to include, among other things, the more stringent statewide health standards for soil under Act 2?
>
> ….
>
> 11. The 2005 PPA provides CDP with both a Covenant Not To Sue and Contribution Protection under HSCA for any "Existing Contamination" determined to be present at the Site. In 2014, DEP advised CDP that the Covenant Not To Sue provision is void. Please confirm that DEP's present position is that the Covenant Not To Sue provision is indeed void. If DEP does not consider the Covenant Not To Sue provision to be void, then please explain any change in position since DEP's 2014 determination. Furthermore, do the Contribution Protection provisions in the PPA still apply to CDP? (PPA, Paragraph K).

(AR 0218-0219.)

66. Whittaker Corporation and Johnson Matthey, Inc., potentially responsible parties (PRPs) at the Site, submitted lengthy comments to the Department on June 7, 2017, supplemented on July 7, 2017. (AR 0141-0153.)

67. Among other things, they commented that the Amendments do not properly account for the changed proposed use of the Site from nonresidential to residential purposes. They commented that the 2005 PPA and its Amendments inaccurately provide that Constitution Drive is entitled to contribution protection. They point out that the Department rescinded its covenant not to sue, yet the Amendments were proposed for finalization. (AR 0141-0151.)

68. On January 26, 2018, the Department issued its comment response document titled "Response to Significant Public Comments Regarding Second Amendment to Prospective Purchaser Agreement Between the Department and Constitution Drive Partners," in which the Department determined that entry and finalization of the Amendments complied with the requirements of HSCA. (AR 0119-0137.)

69. Pursuant to Section 1113 of HSCA, the Amendments became final on the date the Department issued the comment response document. 35 P.S. § 6020.1113.

70. In response to comments regarding the delay in public notice of the Amendments, the Department only stated that "the Department provided proper notice and an opportunity for public comment on the initial PPA and received no comments. Consequently, the initial PPA became final. The purposes of the 1st and 2nd PPA were to modify CDP's performance obligations, and the Department has now provided proper notice and opportunity for public comment on the 1st and 2nd Amended PPAs as required by Section 1113 of HSCA." (AR 0126.)

71. In response to comments regarding the change in development to a residential use and the change in zoning at the Site, the Department stated that "zoning and land use decisions are outside of the Department's purview but are the responsibilities of local municipalities. In addition, the Department has limited control over the timeline associated with land use and development so long as the development activities don't interfere with investigation and remediation activities." The Department further stated that "it is pure speculation as to whether the Department would have acted differently in 2010 had the Site been zoned residential. Nevertheless, the comment does not persuade the Department that its entries into the 1st and 2nd Amended PPAs are inappropriate or should be rescinded." (AR 0125, 0127.)

72. In response to comments regarding the covenant not to sue and contribution protection, the Department said that "[t]hose arguments may ultimately be litigated in a court of law, but they do not persuade the Department that its entries into the 1st and 2nd Amended PPAs are inappropriate or should be rescinded." (AR 0126.)

73. The Department did not address the substance of many of the comments because the Department viewed them as irrelevant to the Amendments. Instead, the Department invited commenters to "continue with active interest in this matter" as their comments "may be germane to the Department's selection of a final remedy for the Site." (AR 0125, 0126, 0127, 0129-0133, 0135, 0136, 0137.)

74. While the Department was working with Constitution Drive, in 2008 and 2009 the Department entered into a consent order and agreement with Johnson Matthey Inc. and Whittaker Corporation, two PRPs at the Site. (AR 0121, 0241-0262.)

75. Pursuant to this consent order and agreement, Johnson Matthey and Whittaker agreed to complete a Remedial Investigation and Feasibility Study for the Site. (AR 0121, 0241-0262.)

76. According to the Department, upon completion of the Remedial Investigation and Feasibility Study, a final comprehensive Site remedy will be proposed by the Department, and the Department says the public will have an opportunity to review and comment on the proposed remedial response. (AR 0121.)

77. Once this process is complete, the Department says it will select a final remedial response for the Site that meets the substantive and procedural requirements of HSCA. (AR 0121.)

78. As of January 2018, the Remedial Investigation and Feasibility Study agreed to in 2008 and 2009 has not been completed. (AR 0121.)

## DISCUSSION

The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (hereinafter collectively "the Riverkeeper"), have appealed the Amendments to the 2005 PPA entered into by the Department of Environmental Protection (the "Department") and Constitution Drive Partners, L.P. ("Constitution Drive"). The 2005 PPA was executed on March 17, 2005, in the form of a consent order and agreement and addressed an abandoned steel tube manufacturing facility located in East Whiteland Township, Chester County, known as the Bishop Tube HSCA Site ("Site"). The Site has a history of contamination with hazardous waste, primarily trichloroethene ("TCE"). Constitution Drive bought the contaminated property originally with the intent of redeveloping it for commercial purposes. Pursuant to the 2005 PPA, Constitution

Drive agreed by March 1, 2009, to undertake an investigation and/or remediation of soils at the Site necessary to demonstrate attainment with a nonresidential statewide health standard or site-specific standard under Act 2 in accordance with a remedial action work plan that was attached and incorporated into the PPA. In exchange for Constitution Drive's work relating to the existing contamination at the site, the Department entered into a covenant not to sue Constitution Drive and agreed that Constitution Drive was afforded contribution protection pursuant to HSCA and CERCLA.

The 2005 PPA was amended twice, the first time on January 22, 2007, and the second time on June 4, 2010. The 2007 Amendment "amended and restated" Constitution Drive's remedial obligations established under the 2005 PPA. The 2007 Amendment mostly concerned the installation of an air sparging/soil vapor extraction system ("AS/SVE system"), which was intended to expedite the remediation of soils and groundwater at the Site. (AR 0036.) Among other things, Constitution Drive was required to operate the system for 60 days under certain specifications while removing an average of ten pounds of volatile organic compounds (VOCs) per day in order to complete its remedial obligations. (AR 0039-0041.) After Constitution Drive had fulfilled these obligations, it would be released of its remedial obligations at the Site and the Department would then assume operation of the AS/SVE system. (AR 0040-0041.) Unfortunately, the AS/SVE system never worked as planned and Constitution Drive could not get it to meet the agreed-upon performance standards.

The Department and Constitution Drive then entered into a second amendment to the 2005 PPA in June 2010 that again "amended and restated" Constitution Drive's remedial obligations. Under the 2010 Amendment, Constitution Drive was to repair the AS/SVE system and get it to operate continuously without incident for 72 hours (a significantly shorter time than the 30-day startup period and 60-day operational period called for under the 2007 Amendment). Constitution Drive was also required to pay the Department $30,000, repair a road, and install some security fencing.[1] Constitution Drive completed its remedial obligations under the 2010 Amendment, and in December 2010, the Department released Constitution Drive from all further remedial obligations established in the 2005 PPA and the Amendments.[2]

A number of additional events involving Constitution Drive have taken place at the Site after the remedial tasks were completed and the Department's release letter was issued in December 2010. In June 2011, the Department discovered that a contractor for Constitution Drive had damaged the AS/SVE system and rendered it inoperable. (AR 0115, 0263-0267.) In July 2011, the Department requested that Constitution Drive repair the AS/SVE system. Constitution Drive and the Department appear to have conducted discussions regarding the continuing necessity and viability of the AS/SVE system but, as of January 2014, the AS/SVE system had not been repaired. In a January 2014 letter, the Department declared the covenant not to sue to be void because of Constitution Drive's failure to repair the AS/SVE system. The covenant not to sue was important to Constitution Drive and its efforts to redevelop the Site and formed part of the consideration for the 2005 PPA and the Amendments. (AR 0007-0008, 0269-0273.) Constitution Drive appealed the January 2014 letter to the Board, but the Board ruled that the letter was not an appealable action by the Department. (*Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465, Judge Beckman dissenting.) Also, in 2014, East Whiteland Township changed the zoning at the Site from industrial to residential at the request of Constitution Drive, which decided to pursue a residential development at the Site after being unsuccessful in

[1] Constitution Drive paid the Department $32,000 over two installments in 2010 and 2011, which included a $2,000 delay penalty. (AR 0121.)

[2] The 2010 Amendment did provide that Constitution Drive would be financially responsible for certain additional Engineering Controls if the Department deemed them necessary as part of Remedial Action for the Site. (AR 0103.)

redeveloping it for commercial purposes. (AR 0121-0122, 0125, 0144, 0337.) Finally, in 2016/2017, the Department reviewed and commented on a new remediation workplan for the Site proposed by Constitution Drive that provided for targeted soil excavation that Constitution Drive claimed would reduce or eliminate the risk of exposure to the compounds of concern for the future occupants. In addition to these post-2010 actions involving Constitution Drive, there also were other remediation activities and Department actions at the Site that did not directly involve Constitution Drive based on documents included in the administrative record.

There is no disagreement among the parties that the Amendments to the 2005 PPA constitute orders issued pursuant to Section 1102 of the Hazardous Sites Cleanup Act (HSCA), 35 P.S. § 6020.1102. There is also no disagreement that the Amendments to the 2005 PPA are settlement agreements within the purview of Section 1113, 35 P.S. § 6020.1113. *See also Chirico v. DEP*, 2002 EHB 25, 34. Section 1113 of HSCA states certain procedures for noticing settlement agreements and it defines how the Board must review these agreements if there is an appeal:

> When a settlement is proposed in any proceeding brought under this act, notice of the proposed settlement shall be sent to all known responsible persons and published in the Pennsylvania Bulletin and in a newspaper of general circulation in the area of the release. The notice shall include the terms of the settlement and the manner of submitting written comments during a 60-day public comment period. The settlement shall become final upon the filing of the department's response to the significant written comments. The notice, the written comments and the department's response shall constitute the written record upon which the settlement will be reviewed. A person adversely affected by the settlement may file an appeal to the board. The settlement shall be upheld unless it is found to be arbitrary and capricious on the basis of the administrative record.

35 P.S. § 6020.1113.

Notably, under Section 1113, settlements do not become final until notice is provided, and the Department responds to any comments. This is where we find an odd wrinkle in this case. Although the Amendments were drafted and signed in 2007 and 2010, due to what the Department without any record support terms an "inadvertent administrative oversight," the notice required under Section 1113 was not published for either the 2007 Amendment or the 2010 Amendment until 2017, seven and ten years after the fact. A notice for both of the Amendments was published in the *Pennsylvania Bulletin* on April 1, 2017, and notice was published in *The Daily Local News* on March 18, April 1, April 29, and June 14, 2017. In response to the Department's notice, extensive comments were submitted, including by the Riverkeeper, East Whiteland Township, local residents, and potentially responsible parties (PRPs). The Department issued its response to those comments on January 26, 2018. Accordingly, even though Constitution Drive and the Department undertook performance pursuant to the 2007 and 2010 Amendments, the Amendments did not legally become final until the Department issued its comment response document in January 2018.

The Riverkeeper filed this appeal of both of the Amendments on February 21, 2018. Under Section 1113, any appeal of a HSCA settlement is to be decided on the basis of an administrative record, as opposed to the *de novo* review afforded by the typical Board appeal, *see United Ref. Co. v. Dep't of Envtl. Prot.*, 163 A.3d 1125, 1135-36 (Pa. Cmwlth. 2017). The administrative record for purposes of Section 1113 is limited to the notice of the settlements, written comments to the settlements, and the Department's responses to the comments. Under the language of Section 1113, the Riverkeeper has the burden of showing that the Amendments are arbitrary and capricious on the basis of the administrative record that has been filed with the Board.[3] The Department, in its Brief, states the "standard for the Board's review in this appeal is

[3] The Department tells us in its brief that there are a number of other actions pertaining to the Bishop Tube site in other courts. Despite acknowledging at the outset of its brief that the Board's review is "based exclusively" on the administrative record filed with the Board, the Department invites us to take "judicial notice" of the other court actions and pleadings filed in them. The Department even goes so far

limited solely to whether the Department acted arbitrarily or capriciously in finalizing the Amendments through the DEP Response." (DEP's Response Brief, at 6.)

On June 21, we issued an Order staying all proceedings and scheduling an in-person case management conference with the parties on June 26. At the conference, we discussed with the parties how this matter should move forward in terms of compiling the administrative record and submitting briefs. We thereafter issued an Opinion and Order on Case Management wherein we outlined procedures for the appeal going forward, including when the Department would provide the other parties with a proposed administrative record, when the Department would file the administrative record with the Board and in what form, and when the other parties could move the Board to include additional documents or exclude certain documents from the administrative record. 2018 EHB 666. We also issued an Opinion and Order on the Department's motion to quash the Riverkeeper's discovery requests, wherein we determined that discovery was generally inconsistent with the administrative record review envisioned by Section 1113 of HSCA. 2018 EHB 672. The parties were subsequently able to agree upon the contents of the administrative record and filed the administrative record on our docket. We accepted that record as the basis for our review.

Before delving into the merits of this appeal, it is important to keep in mind the underlying goals and policies of HSCA and Act 2 in terms of advancing the cleanup of contaminated sites. "HSCA's Declaration of Policy expressly declares that the cleanup of

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as to attach to its brief a petition for review filed by the Riverkeeper in a matter before the Commonwealth Court. Relying on case law to make legal arguments is one thing; relying on pleadings in actions before other tribunals and courts in an administrative record review proceeding is quite another. We think this attempt to essentially supplement the administrative record is inappropriate and it is contrary to Section 1113, what the parties agreed upon during our in-person case management conference, and what we laid out in our Opinion and Order on Case Management, 2018 EHB 666. We decline the Department's invitation to dig into the pleadings in those matters for purposes of evaluating the propriety of the PPA amendments.

properties contaminated with hazardous materials is vital to the economic development of the Commonwealth and that the Department should be provided with flexible and effective means to enter into various settlement agreements with responsible parties at contaminated sites." *Chirico v. DEP*, 2002 EHB 25, 32 (citing 35 P.S. §§ 6020.102(3), 6020.102(12)(vii) and (ix)). *See also Guerin v. DEP*, 2014 EHB 18, 24-25 (HSCA provides the Department broad authority to effectuate its provisions and further its goals). Along the same lines, the Pennsylvania Legislature has created programs to incentivize the cleanup of contaminated sites, *see, e.g.*, 35 P.S. § 6026.102 (Act 2 declaration of policy), while the Department pursues responsible persons to recover costs, *see, e.g.*, 35 P.S. § 6020.507 (recovery of response costs under HSCA). Cognizant of these policies, we must not lose sight of the fact that Constitution Drive did not cause the historic contamination at the Site. Rather, at the time of the 2005 PPA, it was an innocent purchaser seeking to redevelop a brownfield property for a new use, a property that might otherwise remain abandoned and contaminated. We do not wish to erect unnecessary barriers to cleaning up a site or discourage innocent purchasers from contributing to cleaning up and redeveloping contaminated property.

The crux of the Riverkeeper's primary argument in this appeal is that the Department's ratification of the Amendments was arbitrary and capricious due to the passage of time, the inadequacy of the 2017 public notice and the changed circumstances between when the Amendments were signed by the Department and Constitution Drive in 2007 and 2010, and when they became final in January 2018. The Riverkeeper contends that, by January 2018, (1) the AS/SVE system was not operable because it had been damaged by one of Constitution Drive's contractors, (2) the Department indicated that the covenant not to sue established in the 2005 PPA was either void or would be deemed void at some point in the future, (3) the redevelopment plans for the site changed from commercial to residential without appropriate changes in the Amendments, and (4) the Bishop Tube site has remained severely contaminated and the Amendments did not materially advance any cleanup. The Riverkeeper also argues that, in finalizing the Amendments, the Department has failed to uphold its duties as a trustee of the Commonwealth's natural resources under Article I, Section 27 of the Pennsylvania Constitution.[4]

Initially, the Riverkeeper focuses on the Department's public notice of the Amendments and argues that the notice was defective because it was so late. The Riverkeeper cites the language in Section 1113 providing that notice shall be published "[w]hen a settlement is proposed," and says that this means notice must be published at the time a settlement is entered into, not years later. In addition to the arguments that the statutorily required notice took place several years too late, the Riverkeeper also challenges the wording of the notice and argues that it did not contain any meaningful information on what had changed in the intervening years. It says the late and inadequate notice published by the Department denied the public its right to comment on the agreements when they were proposed, which could have affected the public's ability to meaningfully comment and potentially influence the final agreements.

The Department repeatedly asserts that the failure to publish timely notice was an "inadvertent administrative oversight," but it fails to point to anything in the administrative record substantiating that claim.[5] The Department merely states that no one in this appeal has questioned that the failure to publish notice was an administrative oversight. There is nothing in the administrative record that explains or justifies the belated notice. In response to the Riverkeeper's comments directed at the untimely notice and its inadequate wording, the

[4] Because we find the 2007 and 2010 Amendments arbitrary and capricious for other reasons, we do not reach, and there is no need to decide the Riverkeeper's Article 1, Section 27 argument.
[5] We note that the procedures for publishing notice and receiving comments, and an explanation of the effect of the Department responding to comments, are detailed in the 2005 PPA. (AR 0013-0014.)

Department, in the January 2018 comment response document, unhelpfully states that it "has now provided proper notice and opportunity for public comment on the 1st and 2nd Amended PPAs as required by Section 1113 of HSCA." (AR 0126.) Constitution Drive for its part asserts that the Department's failure to timely publish public notice of the 2007 Amendment and the 2010 Amendment was cured with the 2017 publication. It also contends that the delay allowed the public to comment on a more informed and developed record for the site, and that the public had a more meaningful opportunity to review and comment on the Amendments because of the delay. Constitution Drive points to nothing in the administrative record to support these assertions.

The Board has not previously addressed the issue presented in this case by the Riverkeeper's claim of untimely and inadequate notice of a HSCA settlement agreement. The Department identified *Chirico v. DEP*, 2002 EHB 25, as the only prior case in which the Board has considered a challenge to a similar agreement and states that the outcome of this case is controlled by the Board's decision in *Chirico* upholding the Department's entry into the prospective purchase agreement in that case. We disagree with the Department's conclusion that *Chirico* controls this case. The facts in *Chirico* regarding the Department's actions in finalizing the agreement under Section 1113 of HSCA are completely different. In *Chirico*, the agreement was entered into on May 24, 2000 and notice of the agreement was published in the *Pennsylvania Bulletin* a month later on June 24, 2000. *Chirico*, 2002 EHB at 26-27. There is nothing in the Board's opinion in *Chirico* to suggest that the challengers raised inadequate wording in the public notice as an issue in the case. Further, there is no indication that any significant changes took place at the site in *Chirico* in the one month of time that elapsed between the execution of the agreement and the publication of the required notice in the *Pennsylvania Bulletin*.

In other cases, unlike *Chirico*, the Board has been required to evaluate public notice issues, and we have been hesitant to overturn Department actions in these cases. These cases have involved challenges to permitting actions by the Department and have raised both untimely notice and inadequate notice issues. *See Groce v. DEP*, 2006 EHB 856; *Hopewell Township v. DEP*, 1996 EHB 956, *Fontaine v. DEP*, 1996 EHB 1333; *Anjar Trust v. DEP*, 2001 EHB 927, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002); *Kleissler v. DEP*, 2002 EHB 737. We are not convinced that these permitting cases are a good analog for our current case because of their different and distinct notice requirements when compared to those in Section 1113. The overall principal we derive from these cases is that issues with public notice should be viewed from the perspective of the Department action and what impact the public notice shortcomings had on the public's ability to meaningfully comment on the Department's actions. For various reasons, including the role of public comments in permitting decisions, in most cases, it seems likely that the party challenging the action will have an uphill climb to convince the Board that public notice issues rise to a level where the party has been denied an opportunity for meaningful comment and, as consequence, the Board should undo the Department's action.

Despite our concerns expressed above, we find that the Riverkeeper's notice arguments have merit under the relevant HSCA statute and the unique facts present in this case. The notice and public comment process play a key role in HSCA settlements under the terms of Section 1113 of HSCA. The legislature expressly provided that a settlement agreement is not final until certain enumerated steps are completed including: (1) notice is sent to all responsible parties and published in the *Pennsylvania Bulletin* and a local newspaper; (2) a 60-day window for public comment is completed; and (3) the Department responds to the significant written comments. Consistent with the central role that the notice and comment procedures created by the legislature play in HSCA settlements, we conclude that the Department is required to provide a timely and meaningful notice and comment process in order to finalize HSCA settlements under Section 1113. The steps taken by the Department in this case were woefully inadequate in satisfying this requirement. Therefore, in the language of the standard of review set forth by the Department in its Response Brief, we hold that "the Department acted arbitrarily or capriciously in finalizing the Amendments through the DEP Response." (DEP's Response Brief, at 6.)

We agree with the Riverkeeper that the Department's egregiously late public notice is a clear violation of the requirement that notice of a HSCA settlement be published when it is proposed. There is no reasonable reading of the Section 1113 language that allows for publication seven and ten years later and the Department's excuse—that there was an "inadvertent administrative oversight"—finds no support in the administrative record and in any event is hardly a legitimate excuse. This is not a case where the required notice was a few weeks or even a few months late, a circumstance where any impact from the late notice might be negligible and/or readily mitigated by subsequent publication. The Department's action initially placed the public, and now places the Board, in a bizarre situation of evaluating the propriety of the Department finalizing the Amendments to the 2005 PPA years removed from the execution of those Amendments with Constitution Drive. The lapse in time presents obvious challenges for the public's ability to provide timely and meaningful comment on the Amendments.

The problems created by the unacceptably late publication of the notice are compounded, in our opinion, by the shortcomings in the content of the notice and how it fails to address the changed circumstances at the Site between 2010 and 2017. The notice is not at all forthcoming on revealing how dramatically late it is or what has changed in the intervening years since the Amendments were entered into. For instance, the AS/SVE system had not worked for several years before the Department sought comment on whether it would be a good idea to install an AS/SVE system. The only allusion in the public notice to any issues with the AS/SVE system occurs in the description of the 2010 Amendment wherein it states that Constitution Drive agreed to "repair" the AS/SVE system. (AR 0117.) The notice does not reveal that a contractor for Constitution Drive subsequently damaged the AS/SVE system and it has not been operated ever since. The Riverkeeper also notes that the notice does not mention the Department's rescission of the covenant not to sue that followed the contractor's damaging of the AS/SVE system. Nor does the notice mention that the zoning of the site changed from industrial to residential in 2014. Further, the notice makes no mention of the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation submitted by Constitution Drive and under review by the Department. Although most of the commenters appear for the most part to be aware of the ongoing issues with the remediation of the site, the notice is wholly unhelpful to anyone who was not paying close attention to the developments over the course of the last decade.

The Department's response to comments is at times equally frustrating. For example, the Department asserts that the Riverkeeper's comments do not address the Amendments, but this is just not true. The Riverkeeper's comment says that the AS/SVE system "will not protect the public health, safety and welfare and the natural resources of this Commonwealth from the short-term and-long-term effects of the release of hazardous substances and contaminants into the environment from the Bishop Tube site." (AR 0161.) The AS/SVE system, of course, was not part of the 2005 PPA and only became part of the remediation during the 2007 Amendment. The Department deals with this comment in its response by saying the actions taken pursuant to the

2005 PPA and the Amendments are just an interim response and a final response action is forthcoming. (AR 0127.) Indeed, the Department repeatedly tries to minimize the importance of the Amendments by assuring the commenters that further investigation and cleanup is needed and a final response action will come someday. However, this is a bit of a dodge that is not particularly helpful in evaluating whether the Amendments should have been finalized by the Department. The AS/SVE system was almost a complete failure and appears to have not materially advanced the cleanup of the site, yet the Department seems unwilling to acknowledge this reality in its response to comments. The Amendments are premised on basic assumptions that have not existed for years.

This is somewhat emblematic of the Department's entire comment response document. The Department says that the majority of comments it received were not related to the Amendments themselves and the modifications of Constitution Drive's performance obligations. Perhaps some of that that can be forgiven since the commenters were asked to comment on two agreements that the passage of time had rendered nearly superfluous. Further, the notice of public comments says that "[i]nterested persons may submit written comments **regarding this PPA and its amendments**…." (AR 0117 (emphasis added).) Yet in its response the Department repeatedly criticizes the commenters for offering comments on the 2005 PPA. The Department says in its brief that the Amendments may not have been fully understood by the public without reference to the original PPA, so the notice offered the public the opportunity to comment solely on the Amendments but viewed in the context of their relation to the 2005 PPA. Although we are in no way saying that the language in the notice opens up the 2005 PPA to challenge, it is illustrative of the Department's less than careful approach to seeking public input on the Amendments. The Department defends its response and construes its effort in responding to comments as "painstaking," but it instead reads like a series of pro forma statements meant to belatedly satisfy its obligations under Section 1113 but go no further. The Department goes through the motions but does not earnestly address some of the comments, and its response almost treats it as a foregone conclusion that the Amendments would be finalized, without modification or further consideration.

The Department's response to extensive comments about the change in zoning of the Bishop Tube site from industrial to residential is similarly unsatisfying. The zoning change was made by East Whiteland Township in 2014 at the request of Constitution Drive. The 2005 PPA provided that Constitution Drive "plans to develop the site for commercial purposes." (AR 0003.) It also provides that Constitution Drive would remediate the soils at the site to a level "necessary to demonstrate the attainment of a non-residential statewide health standard or site-specific standard…." (AR 0005.) The 2007 Amendment to the PPA altered that obligation. In exchange for Constitution Drive getting the AS/SVE system up and running for 60 days, the 2007 Amendment provided that the Department would assume the responsibility of demonstrating attainment with an unspecified remediation standard:

> [t]he Department agrees…to expeditiously perform (or require responsible parties other than Developer [Constitution Drive] to perform) other necessary remedial actions at the Site in order to **demonstrate attainment with one or a combination of remediation standards under Act 2 for soils and groundwater at the Site that are consistent with Developer's intended redevelopment activities**.

(AR 0041 (emphasis added).) It is unclear whether the 2010 Amendment further modifies that obligation or not. The 2010 Amendment again provided a mechanism to relieve Constitution Drive of any further remediation obligations at the Bishop Tube site under the PPA in exchange for running to AS/SVE system for 72 hours:

> Upon satisfaction of Developer's obligations pursuant to Paragraph 3(a) above, the Department shall provide Developer with a letter within fourteen (14) days of satisfaction of Developer's obligations confirming that Developer has satisfied its obligations pursuant to Paragraph 3(a), and Developer shall have no further remedial obligations at all to the Department relating to the Site pursuant to the CO&A and First Amendment (including, but not limited to any obligation to remediate soil, groundwater, or surface water at or beyond the Site, or for the operation and maintenance of the AS/SVE System at the Site).

(AR 0102-0103.)

There is very little support in the administrative record to show that the Department gave serious consideration to the change in zoning from industrial to residential. One commenter noted that "[n]owhere in the 2007 [Amendment] did the parties address whether these remediation measures were appropriate for property that would later be rezoned for residential use." (AR 0143.) But the Department widely panned such comments on the change in zoning, saying "zoning and land use decisions are outside of the Department's purview but are the responsibilities of local municipalities." (AR 0125.) Nor did the Department make any mention in the comment response document of the ongoing discussions between itself and Constitution Drive regarding the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation that appears related to the zoning change and revised development plans. While zoning decisions themselves are largely outside of the Department's authority, that is not to say that zoning decisions do not influence the cleanup for the site. The 2007 Amendment makes clear that remediation must be consistent with the Site's intended use after redevelopment. Nowhere in the comment response document does the Department explain why the AS/SVE system will further the cleanup of the Site for its use for residential purposes

Instead, the Department simultaneously attempts to use the passage of time as a sword and a shield by saying things like it is "pure speculation" whether the Department would have acted differently in 2010 if the property had been zoned residential. (AR 0127.) This completely ignores the fact that the 2010 Amendment was not final until the Department issued its response to the public comments. We do not have to speculate what the Department would have done in 2010 because the 2010 Amendment is being finalized in 2018, and the Department does not at any point explain what it will do now on the basis of the zoning change. The Department also says that "at the time of the amendments to the PPA, the Department's understanding of the proposed usage of the Bishop Tube property had not yet changed. East Whiteland later changed the zoning at [Constitution Drive's] request to residential in 2014." (AR 0121-0122.) But that again misses the point. The Amendments were not final and were still subject to change. The Department could have changed the Amendments in light of its understanding of the proposed use of the property in 2018. The Department never explains why, based on its understanding of the zoning now, and the apparent ongoing efforts surrounding the 2016/2017 Remediation Scope of Work, these Amendments are still appropriate to finalize. The Department cannot cure its initial failure to comply with the notice and comment requirements in Section 1113 by the significantly late publication of an inadequate notice compounded with responding to the public comments it did receive as though nothing had changed at the Site or relative to the provisions of the Amendments since 2010.

The Department's action to finalize the Amendments in the face of the unique circumstances in this case is arbitrary and capricious in the opinion of this Board. We therefore sustain the appeal of the Riverkeeper and find that the 2007 Amendment and the 2010 Amendment are void because they were never properly finalized under Section 1113 and, at this point, we see no pathway for properly finalizing them in their current form.[6]

[6] We take no position on the continuing viability of the 2005 PPA. The Riverkeeper's appeal did not challenge that HSCA settlement document. Constitution Drive, in its Brief in Response, asserts that among the Riverkeeper's proposed relief is a request that the 2005 PPA be declared null and void. (Constitution Drive's Brief in Response, at 22.) In its Reply Brief, the Riverkeeper states that "DRN did

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514; 35 P.S. § 6020.1113.

2. The Board's review of a settlement under HSCA is limited to determining whether the settlement is arbitrary or capricious on the basis of an administrative record. 35 P.S. § 6020.1113.

3. A prospective purchaser agreement in the form of a consent order and agreement, and any amendments thereto, are settlements of a proceeding under Section 1113 of HSCA. *Chirico v. DEP*, 2002 EHB 25, 24.

4. A person appealing a settlement under Section 1113 of HSCA bears the burden of proving that the settlement is arbitrary and capricious on the basis of the administrative record. 35 P.S. § 6020.1113.

5. The Department's actions addressing the 2007 Amendment and the 2010 Amendment under Section 1113 of HSCA were arbitrary and capricious and render those two settlements themselves arbitrary and capricious.

6. The Amendments were never properly noticed and made final in accordance with Section 1113 of HSCA and are, therefore, void because the Department's attempt to notice and finalize the Amendments in 2018 was inadequate, untimely and failed to identify and account for the changed circumstances and conditions at the Site

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not request that the Board do anything about that 2005 PPA" while restating its belief that the 2005 PPA is void because it was unperformed by the March 1, 2009 deadline. (Riverkeeper's Reply Brief, at 15.)

E-FILED
04/26/2019
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER** | : | |
| **v.** | : | **EHB Docket No. 2018-020-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSTITUTION DRIVE PARTNERS, LP, Permittee** | : | |

**O R D E R**

AND NOW, this 26th day of April 2019, it is hereby ordered that this appeal is **sustained**. The 2007 Amendment and the 2010 Amendment are declared void.

**ENVIRONMENTAL HEARING BOARD**

s/ Thomas W. Renwand
**THOMAS W. RENWAND**
**Chief Judge and Chairman**

s/ Michelle A. Coleman
**MICHELLE A. COLEMAN**
**Judge**

s/ Bernard A. Labuskes, Jr.
**BERNARD A. LABUSKES, JR.**
**Judge**

s/ Richard P. Mather, Sr.
**RICHARD P. MATHER, SR.**
**Judge**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: April 26, 2019**

**c:** **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

**For the Commonwealth of PA, DEP:**
Anderson Lee Hartzell, Esquire
(*via electronic filing system*)

**For Appellants:**
Deanna Kaplan Tanner, Esquire
(*via electronic filing system*)

**For Permittee:**
Jonathan Spergel, Esquire
Nicole R. Moshang, Esquire
James McClammer, Esquire
(*via electronic filing system*)

# ATTACHMENT 15

DELAWARE RIVERKEEPER NETWORK

**January 14th, 2022**

**VIA EMAIL**
Dustin A. Armstrong
Environmental Protection Specialist
Pennsylvania Department of Environmental Protection
2 East Main Street
Norristown, PA 19401

RA-EP-SEROECB@pa.gov

**Subject:** Bishop Tube Public Comment

The Pennsylvania Department of Environmental Protection (PADEP) has failed to fulfill its regulatory, statutory, and constitutional obligations with its remedial action proposal for the Bishop Tube Site.

PADEP released this remediation proposal prematurely, seemingly in response to the fact that PADEP is the subject of a legal challenge, rather than having a fully composed and understood remediation plan that complies with the law and is appropriate for public review and comment.

Contamination concentrations in the surface and groundwater at and near the site represent a threat to human health and the environment. The proposed Analysis of Alternatives and Remedial Response (AOA) fails to address known contamination at, and leaving, the site; the AOA is fraught with misinformation that prevents formation of an informed plan that will effectively and completely address contamination at the site and ensure compliance with the law and protection of human health and the environment.

**The AOA Fails to Fulfill Requirements of Law.**

Pursuant to Article 1, § 27 of the Pennsylvania Constitution:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pursuant to Hazardous Sites Cleanup Act (HSCA):

DELAWARE RIVERKEEPER NETWORK
925 Canal Street, Suite 3701
Bristol, PA 19007
Office: (215) 369-1188
fax: (215)369-1181
drn@delawareriverkeeper.org
www.delawareriverkeeper.org

> Where there is a release or substantial threat of release of a contaminant which presents a substantial danger to the public health or safety or the environment or where there is a release or threat of a release of a hazardous substance, the department shall investigate and, if further response action is deemed appropriate, the department shall notify the owner, operator or any other responsible person of such release or threat of a release if such persons are known and may allow such person or persons to investigate and undertake an appropriate response, or may undertake any further investigation, interim response or remedial response relating to the contaminant or hazardous substance which the department deems necessary or appropriate to protect the public health, safety or welfare or the environment.

35 P.S. § 6020.501(a).

> The department *shall* undertake or cause to be undertaken by the owner, operator or any other responsible person as permitted under subsection (a), investigations, monitoring, surveys, testing and other similar activities necessary or appropriate to identify the existence and extent of the release or threat of release, the source and nature of the hazardous substances or contaminants and the extent of danger to the public health or welfare or the environment.

35 P.S. § 6020.501(d) (emphasis added).

> Final remedial responses under this act *shall* meet all standards, requirements, criteria or limitations which are legally applicable or relevant and appropriate under the circumstances presented by the release or threatened release of the hazardous substance or contaminant and shall be cost effective.

35 P.S. § 6020.504(a) (emphasis added).

PADEP must base its response action on an administrative record. 35 P.S. § 6020.505(a). In preparing the administrative record, PADEP is required to have a public comment period and hold a public hearing. 35 P.S. § 6020.506(c), (d).

> At the close of the public comment period, the department shall file a statement of the basis and purpose for its decision. The statement shall include findings of fact, an analysis of the alternatives considered and the reasons for selecting the proposed response action. It shall include an explanation of any major changes in the response action from that described in the notice. The department shall also file a response to each of the significant comments, criticisms and new data submitted in oral or written presentations during the public comment period.

35 P.S. § 6020.506(e).

The Department issued an Analysis of Alternatives and Remedial Response report on or about August 17, 2021. The AOA divides the site into three operable units ("OU").

- OU1 - soil contamination at the site
- OU2 groundwater at the site
- OU3 - drinking water impacts

The AOA identifies the following five (5) alternatives for OU1 (soil):

- Alternative 1 - No Action
- Alternative 2 - Engineering Controls, Coupled with ICs
- Alternative 3 - Excavation with Offsite Treatment and/or Disposal
- Alternative 4 - Excavation with Onsite Treatment
- Alternative 5 - In Situ Chemical Oxidation/In Situ Chemical Reduction ("ISCO/ISCR"), Coupled with Soil Mixing

The AOA identifies the following five (5) alternatives for OU2 (groundwater):

- Alternative 1 – No Action
- Alternative 2 – Monitored Natural Attenuation (MNA)
- Alternative 3 – In Situ Injection (ISCO/ISCR/Bioremediation)
- Alternative 4 – In Situ Thermal Treatment ("ISTT")
- Alternative 5 – Hydraulic Control ("HC")

The AOA proposes Alternative 5 for OU1 (Soil), and Alternative 3 for OU2 (Groundwater).

The AOA is based largely on the Remedial Investigation Report (RIR) and Feasibility Study (FS) conducted by Roux Associates, Inc. on behalf of former site operators. Initially, the FS considered seven (7) groundwater remediation alternatives:

1. No action
2. Monitored natural attenuation
3. In situ chemical reduction that includes involving the injection of chemical amendments to treat organic contaminants
4. In situ chemical oxidation that includes involving the injection of chemical amendments to treat organic contaminants
5. Enhanced reductive chlorination that includes involving the injection of chemical amendments to treat organic contaminants
6. Two-part in-situ chemical oxidation that includes involving the injection of chemical amendments to treat organic contaminants
7. Hydraulic control

An eighth alternative was considered in an addendum document that combined soil and in situ chemical reduction but reduced the number of areas to be treated. The options for OU1 and OU2 proposed by PADEP in the AOA are largely the same as FS Alternative 8.

PADEP's chosen options would leave substantial TCE in place by failing to treat a number of known areas of contamination and by failing to fully treat/remove TCE in the locations that are treated. Leaving TCE on site ensures that there will continue to be ongoing contamination, and fails to provide the remediation or protection required by law or needed by the community and our environment. In addition, this proposal includes the injection of as-of-yet unknown chemicals that could themselves become problematic or react with contamination on site that will result in additional releases of contamination.

Removal of contaminated soil from the site for treatment is an essential component of an effective solution, but was rejected by PADEP at the behest of the responsible parties rather than because it wasn't the right proposal for human health and the environment.

**The Remediation Plan Fails to Meet Anti-Degradation Protections Required for Little Valley Creek and Associated Wetlands.**

The Little Valley Creek is classified as an exceptional value stream. *See* 25 Pa. Code § 93.9f. Pursuant to regulation, its associated wetlands are also given this same exceptional value designation and associated protections. 25 Pa. Code § 105.17(1)(iii). As a result of this special protection waters designation, the Little Valley Creek and Associated wetlands are the subject of heightened antidegradation protections and standards.

In Pennsylvania, "[t]he water quality of Exceptional Value Waters shall be maintained and protected." 25 Pa. Code § 93.4a(d). Any:

> person proposing a new, additional or increased discharge to . . . Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective . . .. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.

25 Pa. Code § 93.4c(b)(1)(i)(A). Further, PADEP is prohibited from issuing a general NPDES permit for any point source that discharges to a surface water classified as an Exceptional Value Water under Chapter 93. 25 Pa. Code § 92a.54(8).

Rather than consider these antidegradation protections as mandatory ARARs, PADEP treated these standards and this EV protection as something simply "To Be Considered." As a result, PADEP neither mandated nor recommended a plan that will achieve the appropriate exceptional value regulatory standards applicable to Little Valley Creek and its wetlands. *See* 35 P.S. § 6020.504(a); Applicable or Relevant and Appropriate Requirements (ARARs) for Cleanup Response and Remedial Actions in Pennsylvania, 262-4500-606, 13-14 (2013).

**The Remediation Proposal Fails to Protect for Residential Development of the Site.**

The site has been rezoned to accommodate a residential use, a residential development of approximately 90 homes is proposed for this site, and a residential site preliminary plan has been approved by the Township. It is clear that the proposed future use of this site, against the wishes of the community, is a residential development. Therefore, remediation of the site must meet the highest standards available for residential use.

The RIR and FS on which the AOA is based, however, expressly states that the analysis is based on the assumption that present and future use of the Site will be non-residential only. Feasibility Study Report - Former Bishop Tube Property, at 2 (Jan. 13, 2021) ("As agreed with [PA]DEP, both this FS Report and the 2021 RIR assume that present and future use of the Property will be non-residential only."). The failure by PADEP to address a residential end use of the site while investigating the feasibility of various remedial alternatives is a fundamental failing. This is especially true where, as here, Statewide Health Standards are being utilized as part of the cleanup standards for the remediation. Statewide Health Standards vary based on whether the end use is residential or nonresidential. Thus, a cleanup plan selected based on its ability to achieve Statewide Health Standards for a nonresidential end use will not meet the standards required for a residential end use.

While the community is 100% opposed to any development of this site and is demanding that all government officials work to ensure its protection as natural open space, in perpetuity, for the benefit of the community, currently the proposed-approved-use is residential. Therefore, the evaluation process must be initiated with an understanding that the end goal of the remediation plan is a residential use. Instead, however, PADEP based its AOA on multiple reports that assumed the site as a non-residential development.

**The Proposed Remedial Response is Undermined by Misinformation, Missing Information, Misrepresentations, and Misinterpretations.**

To highlight a few of the ways (but by no means a comprehensive or complete list) in which the Remedial Response is factually deficient:

- While the plan assumes a clear boundary for the pollution plume, there is a lack of monitoring wells to support this assertion/assumption.
- Mapping fails to clearly articulate the differences in the pollution plume between the overburden soils and the bedrock aquifers.
- The site is a likely source of PFOS/PFAS contamination. The failure to test for, and address, this contamination is a constitutional, legal, and moral failing of PADEP's proposal.
- The reports relied upon to create the plan use a modeling approach that is not adequate to evaluate the movement of TCE and therefore cannot be used to inform or support the plan put forth by PADEP for consideration.

As a result of the proposed plan and supporting analyses being fraught with many areas of misinformation, data gaps, misrepresentations or misinterpretations of science, data, modeling, and/or facts, the proposed remedial action plan is not final and cannot be said to fulfill the requirements of law.

The AOA itself recognizes the fundamental failings in terms of the inaccuracy of its information. The AOA repeatedly calls for additional data and study in order to determine the extent of the contamination and steps that need to be taken. *See, e.g.*, AOA at p.12 fn. 3, p. 14, p. 15, p. 16, p. 22. As a result of the misinformation and missing information, it cannot be determined nor demonstrated that the Remedial Response could or would address the site contamination to the degree required by law. In addition, absent this information, this is not a proposal that experts or community members can fully understand and comment upon. This proposal more closely resembles a draft interim set of ideas than a remedial action plan intended to comply with the requirements of the law.

Underlying modeling, amongst other things, fails to account for variation in quantities and timings of TCE releases and thereby invalidates the methodology used for estimating TCE decay half-lives. It also assumes no continuing source of TCE present at the site, despite acknowledging the presence of DNAPL in deep bedrock, thereby invalidating the effects of the predicted future plume behavior so that the modeling applied is inaccurate. The model itself is contradicted by the earlier, more complex model used at the site.

In evaluating the growing and future pollution plume, PADEP conveniently fails to evaluate VOCs other than TCE, even though they are present and have different subsurface transport behaviors. Amongst our many concerns in this regard, is the failure to consider vinyl chloride, a confirmed, and potent, cause of cancer in humans and other animals that may be carried by groundwater four times faster than TCE.

An option for OU2 proposed by PADEP involves the injection of chemicals, yet it is not clear what chemicals would be used, nor was there the needed consideration of the discharge of new/additional contaminants that could result from this approach, and how the chemicals break down and/or react with other contaminants. AOA at p. 31. The environmental ramifications of this have not been assessed as part of the proposed remedial action plan. In addition, the additives that will be used to treat saturated and unsaturated soils are as-of-yet unknown, so it is impossible for PADEP, let alone the public, to comment or assess the ramifications of this proposed remediation.

The AOA reports limited human health risk assessments involving vapor inhalation and exposure to surface water, but fails to evaluate the potential effects of future modeled concentrations throughout the whole plume. Because the AOA, and the documents on which it is based (i.e., the Roux RIR and FS) fail to model future concentrations of all contaminants, or any contaminants at all in the Little Valley Creek, the AOA could not undertake this necessary evaluation. Also missing are assessments of risk from other potential offsite uses of groundwater, such as irrigation, or commercial and industrial uses. There are downstream business operations such as Uhler seed, for whom this evaluation is important.

It is notable that concentrations of hexavalent chromium in Little Valley Creek were found to have exceeded the PADEP Fish and Aquatic Life criteria in 2018 when it was measured under low flow conditions, yet the Ecological Risk Assessment fails to consider hexavalent chromium. Additional data should have been collected and ecological risk assessment evaluations undertaken. The failure to pursue this threat based on a lack of existing data cannot be legally justified.

**The Reports Relied Upon by PADEP for its Proposed Remediation Plan are Fundamentally Flawed.**

There are numerous bodies of misinformation, incorrect assumptions, and misrepresentations of fact and science that prevent PADEP from putting forth an analysis or remediation proposal that fulfills its legal and constitutional obligations.

The reports relied upon: are based on the assumption that soil on the site will be removed when that is not in fact being proposed; fail to consider other potentially hazardous VOCs that are known to be present in the pollution plume and of environmental and human health concern, and; the assumption that present and future use of the site will be non-residential only.

The RIR and FS assume that contaminated unsaturated soils above the water table will be removed, thereby removing one of the contaminant sources that will leach into the groundwater long term. This assumption, which directly impacts the entire analysis and remediation proposal, is fundamentally incorrect because the proposal for soils remediation would leave substantial COCs in the soil. Additionally, there are significant sources of TCE in the bedrock on the site which dissolve and desorb from fractures into the groundwater that will not be addressed by the proposal.

Much of the site will have trenches excavated to install utilities. Some of this excavation will be 20 feet deep and more in proximity to known contamination. If the remediation is not adequate, this material will be excavated and there is no requirement or guidance on the approved land development plans of how to protect workers and the public, or keep potentially contaminated materials contained on site.

**The AOA Fails to Address a Significant Proportion of the Contamination and, as a Result, Leaves in Place an Ongoing Source of Contamination to Groundwater, Little Valley Creek, and the Community.**

The TCE plume exceeds 3,000 feet in length and has been found to be greater than 400 feet deep into the earth, including in bedrock. Yet, the remediation plan focuses only on shallow groundwater contamination, less than 120 feet deep. In fact, most of the source contamination is in the bedrock and deeper soils. That means there will continue to be TCE source material that will feed into the environment, completely undermining any proposed remediation. The failure to address the full breadth of the contamination is legally, constitutionally, and morally unacceptable.

The failure of PADEP to consider a combination of alternatives is an obvious failing of the analysis and proposal. For example,

- for groundwater cleanup and protection there should be consideration of the environmental benefits of combining AOA Alternatives 3 and 5, with an emphasis on Alternative 3. By themselves, neither of these approaches is sufficient to address contamination. Alternative 3 is the only alternative that could, if properly implemented, affect deep bedrock and the DNAPL that is present. Complimenting this approach with hydraulic control in the overburden and shallow bedrock aquifer to prevent constituents from reaching Little Valley Creek would be beneficial.
- for the soils, PADEP should have considered combining Alternative 5, a rapid development of a vegetation cover to limit infiltration, and doing it while hydraulic control in the groundwater on the property (not mentioned in any of the proposed alternatives) is working to capture any released constituent or treatment chemicals before they reach Little Valley Creek.

There is not enough monitoring in the area northeast of the site in the bedrock. While PADEP acknowledges a substantial amount of TCE in the overburden and shallow bedrock groundwater, it has relatively few wells in the intermediate and deep bedrock. MW-44C has quite high concentrations of TCE in deep bedrock. As a result, TCE in bedrock is not adequately characterized. If there is a substantial amount of TCE there, additional groundwater alternatives could be necessary. At present PADEP plans to use MNA in that area regardless of the choice for clean-up at the site. Doing nothing but monitoring is not an acceptable solution given the high degree of contamination, impact, and the years communities and the natural environment have been harmed by site contamination. Active treatment is essential to address all contamination at, and emanating from, this site.

**PADEP Failed to Provide a Public Process that Adequately Allowed Community Members to Meaningfully Engage with the Dense Technical Materials Involved.**

While PADEP relented to public pressure and extended the opportunity for written comment until the end of January, as opposed to the original date just after the year-end holidays; it continued to advance a hearing process that failed to provide a meaningful opportunity to comment. The November date was too early after release of the extensive and highly technical materials to provide the public the opportunity to fully digest and assess the proposal in order to provide meaningful comment. Further, PADEP's use of a Zoom platform where disembodied voices got to speak to a faceless set of agency representatives was not conducive nor supportive to hearing the concerns, input, and questions of a community that has been deeply and profoundly impacted by the Bishop Tube contamination for decades.

Additional comments from Delaware Riverkeeper Network consultants on the AOA, and the RIR and FS on which it is based, are attached hereto and incorporated herein by reference. In addition, we incorporate by reference comments submitted by Caroline Armstrong, Sarah Caspar, Kathleen and Larry Stauffer, Deb Mobile, Bill Coneghan, Trout Unlimited, and other impacted neighboring and downstream residents and businesses.

Based on the foregoing, it is clear that the AOA, including the Remedial Response, is completely inadequate and PADEP has failed to meet its statutory and Constitutional obligations. It has failed to undertake or cause to be undertaken investigations, monitoring, surveys, testing and other activities necessary or appropriate to identify the existence and extent of the release or threat of release, the source and nature of the hazardous substances or contaminants and the extent of danger to the public health or welfare or the environment, as required by 35 P.S. § 6020.501(d). It has failed to propose remedial responses that meet all standards, requirements, criteria or limitations which are legally applicable or relevant and appropriate under the circumstances presented by the release of the hazardous substances or contaminants. 35 P.S. § 6020.504(a). And, it has failed in its duty as a trustee of the Commonwealth's public natural resources, to conserve and maintain them for the benefit of all the people.

Respectfully submitted,

Maya K. van Rossum

Maya K. van Rossum
the Delaware Riverkeeper

Enclosures

Cc:
East Whiteland Board of Supervisors
East Whiteland Environmental Advisory Council
Regional Administrator Adam Ortiz, EPA Region 3
Senator Carolyn T. Comitta
Representative Kristine Howard
Regional Director Patrick Patterson, PADEP Southeast Region
Chester County Commissioners
Chester County Planning Commission

**Comments on the Bishop Tube Site 8/17/2021**
**Analysis of Alternatives and Proposed Response**
Edmund A.C. Crouch, Ph.D.
January 13, 2022

The following are comments on the 8/17/2021 *Analysis of Alternatives and Proposed Response* (the "AOA") for the Bishop Tube Property, East Whiteland Township, Chester County (the "Site"[1]) from the Hazardous Sites Cleanup Program of the Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department").

*Per* the Department, its AOA "presents the decision-making process and description of the proposed response for the Bishop Tube Site." The Department further explains that it:

> … proposes to address contaminant source areas within unsaturated and saturated soils through addition of treatment reagents, coupled with in situ mixing; groundwater and surface water through in situ injection of reagent designed to chemically or biologically treat Site-related COCs, coupled with monitored natural attenuation, engineering controls, and institutional controls ("ICs"); and an impacted residential water supply through the connection to the existing public water supply waterline, combined with restrictions on the use of groundwater. This action is taken to protect human health, safety, and the environment.

Unfortunately, the AOA for this Site is deficient. Accordingly, the proposed response is not likely to adequately protect human health or the environment. The deficiencies include at least the following.

**1. In its AOA, the Department relies on prior reports that are substantially flawed**.
The AOA relies primarily on a series of reports by Roux Associates, Inc. ("Roux") and Groundwater & Environmental Services, Inc. ("GES"). However, these reports are inadequate to evaluate the effects of contaminants from the Site, since, fundamentally, they:

i. are based on an incorrect assumption that the soil on the site will be removed,
ii. use a modeling approach that is not adequate to evaluate the movement of the potentially hazardous chemical, trichloroethylene (TCE), and
iii. do not evaluate the movement of other, potentially hazardous, volatile organic compounds (VOCs) known, or reasonably expected, to be present in the plume.

[1] "Site" refers herein to the Bishop Tube property combined with the area of off-property contamination emanating from the property.



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For additional detail, please refer to my comments (in the memorandum attached herewith) on the June 2019 version of Roux's Remedial Investigation Report (RIR) and Feasibility Study (FS), which comments apply to the subsequently slightly modified January 2021 RIR and FS cited in the Administrative Record.

**2. The anti-degradation requirement is an ARAR, and not just a TBC (To Be Considered).**
The AOA mentions (on page 17) that:

> As noted, above, LVC is classified as an Exceptional Value stream by DEP. This designation subjects LVC to special protections, including anti-degradation requirements discussed in Section V, below.

However, there is no discussion of anti-degradation requirements in Section V, and no special protections are mentioned there or elsewhere in the AOA. Indeed, "anti-degradation" occurs twice (page 17, as noted above, and page 30, where it is referred to as an ARAR), while "antidegradation" occurs 8 times at pages 22, 23, 28, 32, 33, 35 in Section VI, and twice in Appendix B; none of these locations provides any discussion of the requirements. In the discussions of Section VI, where alternatives are rejected the antidegradation requirements are cited as though they are ARARs, whereas for acceptable alternatives it is always wording such as "progress toward achieving antidegradation requirements" that apparently makes the alternative acceptable, rather than the compliance *demanded* of other ARARs.

Moreover, the sole reference given in Appendix B as an "authority" for listing anti-degradation requirements as TBC (To Be Considered) status is a *Water Quality Antidegradation Implementation Guidance*, November 29, 2003. This despite references to "antidegradation *requirements* of Chapter 93" (or equivalent wording) throughout the AOC (pages 22, 23, 28). Indeed, 25 Pa. code 93.4a(d) states "*Protection for Exceptional Value Waters*—The water quality of Exceptional Value Waters shall be maintained and protected."

The AOA appears to be compounding the error in the (2021) FS on pp63-64, in which preliminary remediation goals are discussed by comparison with human health, fish and aquatic life criteria, and by a Human Health Risk Assessment and Ecological Risk Assessment. Those are irrelevant in view of the requirement to *maintain* and *protect* the water quality of Exceptional Value Waters – there is no exception that holds that water quality may be degraded to match any of the criteria or approaches discussed in the FS.

**3. On-site soil (OU1)**

**a. Alternatives 1 (No Action) and 2 (Engineering and Institutional Controls).**
As discussed in the AOA, these alternatives are inadequate and unacceptable through failure to meet ARARs, including anti-degradation requirements for LVC, and would also fail to meld with any of the proposed groundwater alternatives because the soil may act as a continuing source to groundwater.


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**b. The Department's proposed Alternative 5 (ISCO/ISCR, with soil mixing).**

The AOA claims that "some varieties of ISCR amendments …" and "[i]n some circumstances …" this alternative might provide desirable results. However, no actual evidence is provided that that with any "variety" of amendment, or in the particular "circumstances" of the Site, these desirable results could in fact be achieved. It is all left to "pre-design investigation to maximize effectiveness and minimize negative effects such as impacts to LVC." Thus the outcome is uncertain even as to effectiveness of this proposed alternative. And there is no guarantee of meeting ARARs, or of meeting the anti-degradation requirements for LVC, indeed the AOA only mentions the possibility to "maximize effectiveness" and "minimize negative effects" on LVC, with no certainty of being able to do both simultaneously.

Even if the "pre-design investigation" is successful, application of this alternative will still be incomplete — there will be contaminated sub-surface locations that are missed, even with soil mixing (e.g. due to the unevenness of bedrock preventing mixing all the way to bedrock everywhere; locations between the proposed mixing "cells" due to the geometry of the cells and the shape of the mixers; misalignment of the mixers with the hypothetical "cells").

Also not mentioned is the time required for initial soil testing, for effectiveness testing (with the also unmentioned but necessary aging tests that should be required for the inorganic COCs[2] hopefully stabilized by the treatment but not actually removed or reduced in concentration), and for the post-treatment testing to ensure the treatment behaves in the field as in the effectiveness testing. Nor is there any mention of the interaction of this alternative with the current, already approved, plans to develop the site.

Complete implementation would require more complete soil testing – for example soil testing on a grid across the site – to ensure location of all contaminated areas, since current soil testing has been limited primarily to previously suspect areas, without consideration that there may be unsuspected contaminated areas.

Finally, the injection of soil amendments might *exacerbate* the contamination of LVC by liberating or adding contamination to the LVC. A pre-requisite for any evaluation of effects on the LVC and planning protection efforts is an adequate 3-D groundwater model for surface soils and upper bedrock on the property and to the east under LVC.

The *effectiveness* of the proposed alternative is currently uncertain and would depend on the outcome of future unspecified testing; the protectiveness of future health would rely on future testing and the application of an institutional control; and the protectiveness of LVC from degradation is entirely uncertain without modification of the alternative to incorporate protections.

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[2] Such aging tests might be accelerated by adjustment of physical parameters (e.g. temperature); but they would also have to account for potential biological effects such as microbial action, which are less susceptible to such accelerations.



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c. **Alternative 3 (Excavation with offsite treatment/disposal)**

This alternative is the only one evaluated that could, if implemented properly, achieve compliance with ARARs, could be implemented rapidly, and would not require any post-compliance institutional controls connected with soil. Adequate implementation requires more detailed soil testing to ensure finding all elevated soil concentrations that need to be addressed. Excavation and removal or treatment of the soil would ensure eventual compliance with the anti-degradation requirement for LVC, from on-property soil sources, and in particular for the metals/fluoride contamination. Choice of replacement soil, and adequate attention to methods of emplacement need to be determined for DEP to evaluate this plan.

To be effective, treatment and disposal of extracted water would be required for treatment of soil below groundwater. What is not mentioned in the AOA is that further on-site controls (beyond stormwater and fugitive emissions management) would likely be necessary to ensure compliance with anti-degradation requirements for LVC. Extracting groundwater might compromise groundwater flow to LVC, and some method of mitigation might be required (e.g. upgradient clean groundwater extraction with re-injection along and adjacent to LVC, possibly reversing flow of contaminated water back towards the excavation while maintaining groundwater levels near LVC). Planning of such mitigation would require adequate 3-D modeling of groundwater flow in the surface soil and upper bedrock on the property and to the east under LVC.

d. **Alternative 4 (Excavation with onsite treatment)**

Alternative 4 is similar to Alternative 3, except that soil treatment and disposal would be on site (with "disposal" back into excavated areas). In this Alternative, the treatment for non-volatile COCs would have to be evaluated using aging tests to ensure continued compliance with ARARS and the anti-degradation requirements. And institutional controls on soil would be required similar to those for Alternative 5.

**4. Groundwater (OU2)**

a. **Alternatives 1 and 2 (no action, and monitored natural attenuation)**

The AOA correctly dismisses these alternatives as failing to meet ARARs, including anti-degradation requirements. There is no difference in what happens to the contamination under these two Alternatives.

b. **The Department's proposed Alternative 3 (In Situ Injection — ISCO/ISC/Bioremediation)**

Alternative 3 would be unlikely to have any effect on any deep bedrock sources of the off-property plume, and any effect on the plume or on off-property discharges to LVC would be slow (if there is any effect at all). Attempts to evaluate any effect or timing of differing options in application of this Alternative on the plume or discharge to LVC would require an adequate 3-D groundwater model on- and off-property, both currently lacking (as described above); without such a model, any such attempt would provide meaningless results, so option selection



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would be arbitrary. Indeed, any estimates of timing in the AOA are pure speculation at this point, insofar as they are based on the "degradation rate" claimed in the RI, since that was estimated by a procedure that cannot be accurate (as shown in the accompanying memorandum). The 30-year lifespan mentioned in the AOA for active period plus post-remedial care can thus be regarded as completely speculative — for example, Figure 10 of the accompanying memorandum shows that 50 years after a complete cleanup of the source (which cannot be achieved), the concentration at 3000 feet and further from the property could be practically unaffected.

The AOA mentions that "[i]n situ injection may not be viable for hot spot areas (i.e., acid rinse spill area) in close proximity to LVC because of potential negative impacts to surface water." What it fails to mention is that any type of use of the proposed methods in Alternative 3 could impact LVC, and that evaluation of such potential impacts cannot be attempted without a suitable 3-D groundwater model for the groundwater on the property in soils and shallow bedrock. Without such a modeling effort, application of these methods will be blind, and effects on LVC will only be determined in retrospect and only if they are actively sought. The idealized approach "anticipated" in the AOA that is a "closely monitored, phased implementation to maximize effectiveness and avoid negatives outcomes, such as negative impacts to LVC or to the ongoing natural attenuation processes" is reactive only — by the time the "close monitoring" detects any effect, it may well be too late to do anything about it (and it cannot be determined ahead of time whether it is too late, nor even to determine how to "closely monitor" without such a model).

**c. Alternative 4 (In Situ Thermal Treatment — ISTT)**

This alternative has all the disadvantages of Alternative 3 and more. It could not affect deep bedrock sources. Any effect on the off-property plume is even less likely since treatment would extend only to 80 ft depth rather than 120 ft (or more if the treating chemicals were to sink deeper).

**d. Alternative 5 (Hydraulic control)**

Alternative 5 is considered in the AOA as a stand-alone system, but as described there it would actually be designed to affect off-property migration to downgradient areas and to the LVC, not to clean up contamination on the property, except indirectly through capture as those contaminants migrate off-site. It is the only Alternative considered that would plausibly have a noticeable effect on the off-property plume, with an effect that propagates from the property into the plume over time. Mention is made in the AOA of the requirement for hydraulic modeling in the "[p]re-design investigations", but what is needed for complete design and evaluation of the effectiveness of this Alternative is an accurate 3-D groundwater model. Such a model also would allow determination of the rate of propagation into the plume of the effect of implementation. As mentioned above, and demonstrated in the accompanying memorandum, the effect will be negligible beyond the propagation front, and the front could easily move as slowly as 60 ft/yr (3000 ft in 50 yrs).



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**5. The Department's lack of consideration of combinations of alternatives**

The AOA treats the Alternatives individually, and inexplicably fails to consider the possibility of using two (or more) together, or elements of one with elements of another. In particular, Groundwater Alternative 5 is the only Alternative examined with any plausible effect on the off-site plume, while Soil Alternatives 3 or 4 may be the most effective for on-site remediation. And Soil Alternatives 3 or 4 (or other) may be improved by using a version of hydraulic control to ensure no further degradation of LVC and possibly to start to clean up LVC to its natural state (and hence maintain and protect its Exceptional Quality).

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Please see the attached memorandum for additional details.



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**ATTACHMENT**



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Green Toxicology LLC www.GreenToxicology.com Crouch@GreenToxicology.com

**Memorandum**

*To:* *Delaware Riverkeeper Network*

Edmund Crouch

*From:* *Edmund A.C. Crouch, Ph.D.*
*Date:* *January 26, 2020*
*Subject:* *Comments on the Bishop Tube 2019 Remedial Investigation Report and Feasibility Study Report*

**Introduction and Summary**

I write to provide comments on the *Remedial Investigation Report* (RIR) and *Feasibility Study Report* (FSR) regarding the Former Bishop Tube Property, East Whiteland Township, Chester County, Pennsylvania, authored by Roux Associates, Inc. (2019a and 2019b). As you will read, I find that the analyses presented in the RIR are deficient in several respects; and I offer suggestions for improving upon these analyses. Because the FSR is based on the RIR, it too is unreliable.

The technical issues detailed below, are:

- The history of the site provided in the RIR omits salient facts that would assist evaluation of the current and future site conditions; in particular, there are no estimates of the quantities and timings of releases of trichloroethylene (TCE) (and other volatile organic compounds, VOCs) that might (i) bound the quantities currently present in the plume and/or in dense non-aqueous phase liquid (DNAPL; that is, undissolved TCE) in the deep bedrock, and (ii) assist the evaluation of decay half-lives of contaminants. The RIR fails to present any estimates of these quantities, ignoring an earlier report (Baker, 2003) that had indicated a total of 3.7 tons down to 10 to 20 ft depth in the hot spots on site; moreover the RIR plume delineation in Figure 45 implies a plausible range of from 6.5 to 56 tons (omitting any DNAPL), although both these estimates use implausible assumptions such as assigning the maximum measured concentration in any well or boring throughout the entire depth range considered.
- The methodology used in the RIR to evaluate the half-life of decay of TCE in groundwater is deficient in many ways, and cannot provide a reliable estimate of that half-life on this site. It is (i) theoretically incorrect, (ii) biased to low values, (iii) not consistently applied, and (iv) omits multiple measurements meeting its own inclusion criteria. The methodology also

assumes the same value everywhere in the plume, an assumption which is provably incorrect.

- At least some of the contaminant measurements in groundwater made at the site have been omitted from the summary tables.
- The RIR modeling takes no account of potential variations in the quantities and timings of TCE releases, and assumes that there is no continuing source of TCE present, despite acknowledging, correctly but inconsistently, the presence of DNAPL in deep bedrock. The first (failing to account for variation in quantities and timings of TCE releases) affects the interpretation of time-series of concentrations in wells, and entirely invalidates the methodology used for estimating TCE decay half-lives. The second (assuming no continued source) affects the predicted future plume behavior, so that the modeling applied is inaccurate.
- The modeling performed by the RIR fails to build on previous extensive and more comprehensive modeling of contaminant behavior in groundwater at this site (Baker, 2004). The model used is needlessly simplistic, and results in unjustified conclusions.
- Indeed, a straightforward calculation of the flow velocity of TCE according to the parameters used in the model used in the RIR shows that it could not possibly account for the extent of the current plume. The earliest that TCE could have been used at the site is the early 1950s, approximately 70 years ago. With the RIR modeling, TCE could only have travelled about 1,100 feet in that time, compared with a plume that actually extends some 3,500 feet (and the additional distance to the plume front due to dispersivity cannot account for the difference). The RIR authors should have made, but apparently did not make, this simple check on their work.
- The RIR modeling also includes unrealistic assumptions about the boundary of the plume, both currently and in the future. Previous (more comprehensive) modeling showed that the plume potentially could, at some depth, (i) extend beneath Little Valley Creek to the north, in areas where the RIR model deliberately prevents that possibility; and (ii) extend into the Northwest corner of General Warren Village, another possibility that the modeling apparently deliberately omits.
- While the modeling implies contaminated discharges to Little Valley Creek, there is no attempt to evaluate the resulting contaminant concentrations in Little Valley Creek by evaluating the flow of groundwater and its entrained contaminants into the Creek.
- There is no evaluation of VOCs other than TCE in the future plume, although they have different subsurface transport behavior — in particular vinyl chloride (which is most worrisome, being a confirmed, and potent, cause of cancer in humans and other animals), which may be carried by groundwater about four times faster than TCE.
- While some limited assessments of risks to public health and the environment are performed for the current situation, there is no attempt to evaluate risks from future plume configurations, neither in the RIR nor the FSR. The FSR requires such evaluations to adequately compare the potential health and environmental effects of various clean-up schemes.

- The FSR is inadequate in that it relies on incomplete and incorrect evaluations in the RIR. In particular, the evaluation of monitored natural attenuation is incorrect, in that it is based on the incorrect evaluation of future plume behavior in the RIR.

The RIR clearly requires amendment to adequately evaluate future plume behavior, in particular delineation of the extent of, and concentrations in, the future plume, not only for TCE but also for other contaminants. The FSR subsequently must be modified to account for such corrections.

**1. Timing and mass of trichloroethylene (TCE) released to groundwater**

The RIR provides a summary history of the site that, unfortunately, omits salient facts that might assist in bounding the mass of TCE that was released to groundwater, and the timing of such release, which information is necessary (or must be inferred) in modeling of plume extent and persistence. For example, Section 5.1 of the RIR mentions only that "During certain periods of time, chlorinated solvents were used for degreasing at the Property." Evaluation, even if only approximate, of total receipts (and specification as to identity of each such solvent, if more than just TCE had been used), for example, would serve to place an upper bound on the quantity of these solvents. The total potential time frame runs from approximately 1951 (when the building was built; RIR Section 5.1) through approximately 1991. TCE was stored for some of this time in a 4,000 gallon aboveground storage tank (which, when full, would contain approx. 24 tons of the solvent), installed in 1975 (RIR Section 5.2), that was removed in 1992 (Armstrong, 2018, Exhibit 43). All releases should have ceased prior to 1991 (Marcegagalia USA, Inc letter, DEP 000055090–55091, and RIR Section 5.1), although earlier documentation assumed TCE release to have ceased by 1983, based solely on assumed implementation/enforcement of federal RCRA regulations (Baker, 2004, pp84–85).

The combined mass of TCE present in (i) the shallow soil down to approximately 10.7 ft depth below the vapor degreaser area in building 8, (ii) 8 ft depth below the vapor degreaser area in building 5, and (iii) 20.7 ft depth below the former drum storage area was estimated by Baker (2003, Tables 8.1–8.3 and Appendix D) as approximately 3.7 tons. This is likely an overestimate, in that maximum concentrations in each borehole evaluated were assumed to apply through the entire soil column. The estimated plume provided as Figure 45 of the RIR corresponds to approximately 56 tons of TCE in the groundwater and adsorbed to soil (omitting any non-aqueous phase TCE), assuming an average groundwater thickness of 440 ft, porosity of 0.05, retardation coefficient of 9 (all from RI, Appendix S). Approximately half of that mass is within the 100,000 μg/L contour. This probably represents an upper bound on the mass of TCE; a lower bound (for the groundwater as modeled in the RIR) can be obtained by assuming no adsorption to soil (e.g. no organic carbon in the soil[3]), which gives approximately 6.5 tons dissolved in groundwater in the plume. Both of these estimates are likely overestimates, since

[3] There appear to have been no measurements of soil organic carbon over the entire history of the site, though some should have been made.



781-316-1685
Green Toxicology LLC www.GreenToxicology.com Crouch@GreenToxicology.com

the assumption is made in the RIR that the maximum concentration measured at any depth in a well applies throughout that entire groundwater thickness.

**2. Methodology for estimating the half-life of TCE in groundwater**

The methodology used in the RIR (Roux, 2019a, Appendix S) for estimating the half-life of TCE in groundwater is incorrect, undefined, and/or inconsistently followed.

First, and most important, the methodology is theoretically incorrect, and cannot under any circumstances (except by chance) give an accurate estimate of half-life. For the methodology to be accurate, the groundwater concentration of TCE at every point evaluated would have to be decreasing at the same first-order rate, implying that the spatial variation (factoring out this exponential term) was constant. That is, the TCE plume would have to have exactly the same shape and location throughout time, and simply be everywhere (or at least at all measured points) decreasing at the same rate. This conclusion is model independent, but can also be inferred from the solute transport model used in the RIR. Moreover, such a plume would be physically impossible in advecting groundwater — in order to maintain the same plume shape and location, concentrations would have to rise sufficiently in downgradient directions so that dispersion could cancel the effect of advection (which moves the location of the plume). The appendix to this report demonstrates this physical impossibility analytically for a 1-dimensional simplification of the model used in the RIR. The actual rate of change of concentration at any point in a plume depends on the time, advection velocity, and the time course of the source term of the plume, as illustrated below by simplified examples in this case.

Second, the methodology was specified as, "Monitoring wells considered for this calculation required: 1) at least 4 data points over an extended period of time (i.e., at least 4 years); and 2) evidence of attenuating TCE concentrations (i.e., declining concentrations with time)." This approach is problematic for several reasons, including:

a. The second specification arbitrarily omits any wells without such a declining concentration, so will necessarily bias any estimate of "decay rate."[4]
b. The second specification is also undefined; no operational definition of "declining concentrations with time" is provided. The natural interpretation would be that the value of $\lambda$, the "decay rate" defined on page 11 of Appendix S of the RIR, is positive. However, examination of the data in Appendix B-1 shows that this cannot have been the operational definition, since multiple wells meeting the first specification (4 or more data points over 4 or more years) and with positive $\lambda$ are in fact not included in Table 2 of Appendix S (e.g. MW-06, MW-14, MW-19, MW-20). Indeed, there are

[4] Since the methodology cannot evaluate the degradation half-life of TCE in the plume, the only quantities estimated are time-variations in particular wells over particular time periods; I distinguish these quantities from the decay rate and half-life associated with TCE degradation by quoting the terms "decay rate" and "half-life."


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51 monitoring wells (MW-XX) listed in Table B-1 of the RIR that meet the first criterion, 44 of which have a positive $\lambda$, but only 30 are included in Table 2 of Appendix S. No explanation for omission of data from these wells is offered.

c. It is difficult to conceive of any consistent specification that would include MW-23 but exclude MW-06, as is done in the RIR (see Figure 1).
d. The methodology adopted in the RIR was to average the "half-lives" calculated by linear regression over all available measurements in Table B-1 for the wells in Table 2 of Appendix S. This methodology is incorrect, however, for at least two reasons. First, if such averaging over wells were appropriate, then the correct methodology requires averaging over all "decay rates" (both positive and negative), not averaging over "half-lives" (essentially the inverse of "decay rates"). Second, performing such averaging assumes that the average has some physical meaning — that the "decay rate" measurements in individual wells are all (imperfect) measures of the same quantity applicable to the whole site — but in this case, examination of the distribution of "decay rates" shows that the measurements are in fact not of the same quantity. Figure 2 shows a normal probability plot of the "decay rate" ($\lambda$) for all 51 monitoring wells satisfying the first criterion ($\geq$ 4 points, $\geq$ 4 years). This distribution is indistinguishable from normal,[5] and clearly the measurements are not all consistent with a single mean value. A formal likelihood ratio test confirms this — maximum likelihood estimates of mean and standard deviation of a normal distribution are 0.00029 per day and 0.00024 per day respectively, taking account of all the individual uncertainties, and the standard deviation estimate is non-zero ($p$ = 1e–97).

The implication of the non-zero standard deviation is that the "half-life" varies in different places on the site. This variation (if the methodology used to derive the value had any meaning; but see above and below) would need to be taken into account in any modeling. Indeed, approximately one third or more of the "half-life" measurements are consistent *with no "decay" at all* that those locations (see Figure 2). This conclusion is not surprising, given the results shown below, since the concentration at any particular well can be increasing, decreasing, or constant, dependent on multiple factors of which TCE degradation is only one. And in view of the microcosm tests (Baker, 2009, Appendix A; Roux, 2015a, Appendix B), such a finding for actual TCE degradation rates would also not be surprising; and such degradation rates remain to be measured, particularly any variation of half-life with depth and/or location.

[5] There are no standard tests that can incorporate the uncertainties in individual measurements, but application of the Shapiro-Wilk test to the point estimates, omitting the most negative which clearly is so uncertain as to provide only negligible information on the distribution shape, shows a p-value of 0.67, indicating the distribution is indistinguishable from normal.

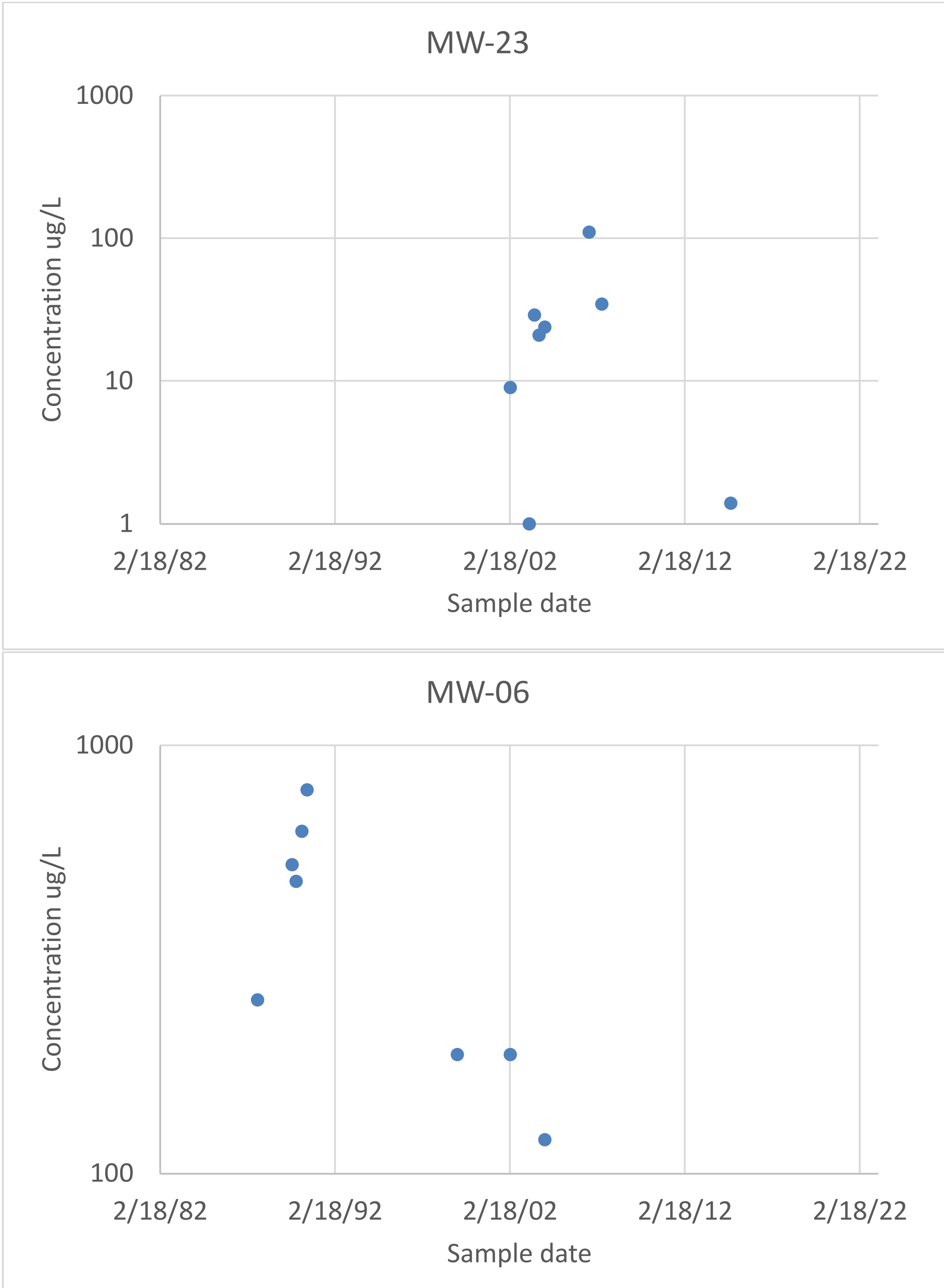


Figure 1 Comparison of sampling in MW-23 and MW-06


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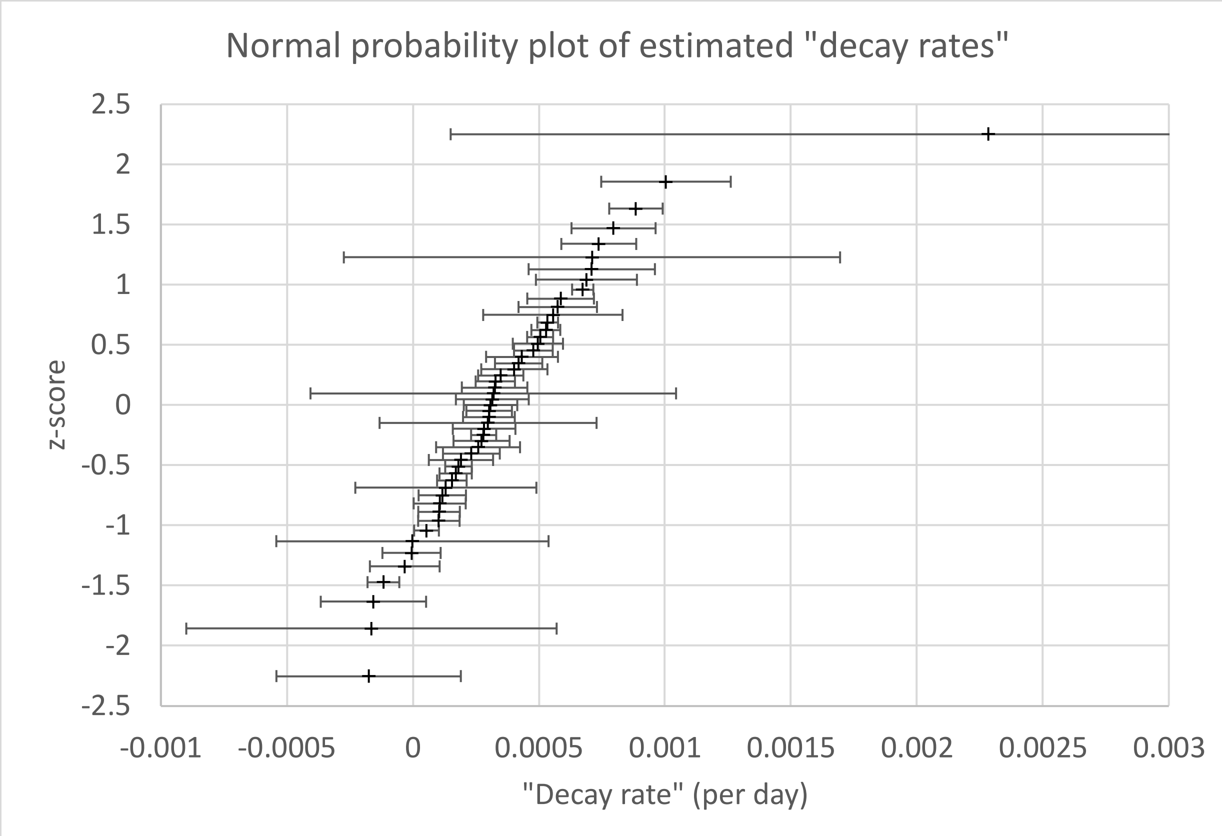


Figure 2 Normal probability plot of "decay rates" in the 51 monitoring wells, with standard errors

**3. Missing data from time series**

Some of the groundwater measurements have been excluded from the RIR. Specifically, the measurements documented in the microcosm study of Appendix B of the 2015 Treatability Study (Roux, 2015a) in MW-08, MW-25C, MW-26A, VDA8-1, VDA8-3, and VDA8-4 (from 10/10/11) and MW-25C (from 10/11/11) are not included in the summary data in Appendix B of the RIR; although apparently the sample (possibly a split sample) taken in 8/23/06 from MW-02 and used in the earlier microcosm study (Baker, 2009, Appendix A) is included.

**4. Failure to account for source variation**

The RIR makes the factually incorrect assumption that there is no continuing source present — only the TCE present in groundwater and adsorbed to soil/rock (with no non-aqueous phase TCE). It also implicitly assumes the lack of any source prior to the start of the modeling timeframe, through the methodology used to evaluate "half-life" of TCE in the various wells. Suppose instead that there was a source at some time in the past (which is obviously true), and this source varied in strength with time. Then variations in concentration can be expected to occur at the source location; and these variations in concentration would propagate into the plume, so that variations in concentration at each well will occur due to such variations in


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source strength.  Moreover, the variations in concentrations in wells will represent variations in source strength at earlier times.  Thus any analysis of concentrations in wells that attempts to estimate true decay (degradation) rates must account for variations in source strength at those earlier times, and must untangle such variations from any decay that is occurring.  No such attempt was made in the RIR.

There are some wells in which variations in source strength are much more likely than decay to account for a major part of some concentration variations.  Several wells have a very substantial decrease in concentration between measurements made prior to the mid 1990s and those made subsequent to that time. Particular examples in which decay as the only determinant of substantial reductions occurring between the 1980 to early 1990s and early 2000s seems unlikely are MW-15 (Figure 3) and MW-03 (Figure 4), with less obvious examples being MW-02 (Figure 5), MW-06 (Figure 6), and MW-08 (Figure 7), although such an effect cannot be ruled out in *any* well without adequate analysis that takes account of the propagation time and dispersion occurring between source and well. The example wells mentioned here are close to the putative source(s) of the TCE, so would reflect changes in source terms relatively soon after such source changes, and the changes would not be substantially extended in time by dispersion.  The effect of source changes in wells further downgradient would occur later and be slower.  Since the source term probably ceased sometime in the 1980s or as late as 1991, abrupt changes in nearby wells between the 1980s and late 1990s may quite plausibly be due to source changes.

Figure 3 (MW-15) also illustrates the disconnect between measured concentrations and the RIR modeling, for this well at least.  The initial peak in the modeling is due to a higher concentration part of the plume passing by MW-15, and the faster drop-off in concentration at large times (compared with the decay rate, illustrated by the dashed black line) is due to the reducing concentration behind that higher concentration part of the plume (MW-15 is situated so that, in the modeling, a kink in the assumed 10,000 μg/L contour will sweep across it as the whole plume migrates down-gradient; see Figure 46 of the RIR).

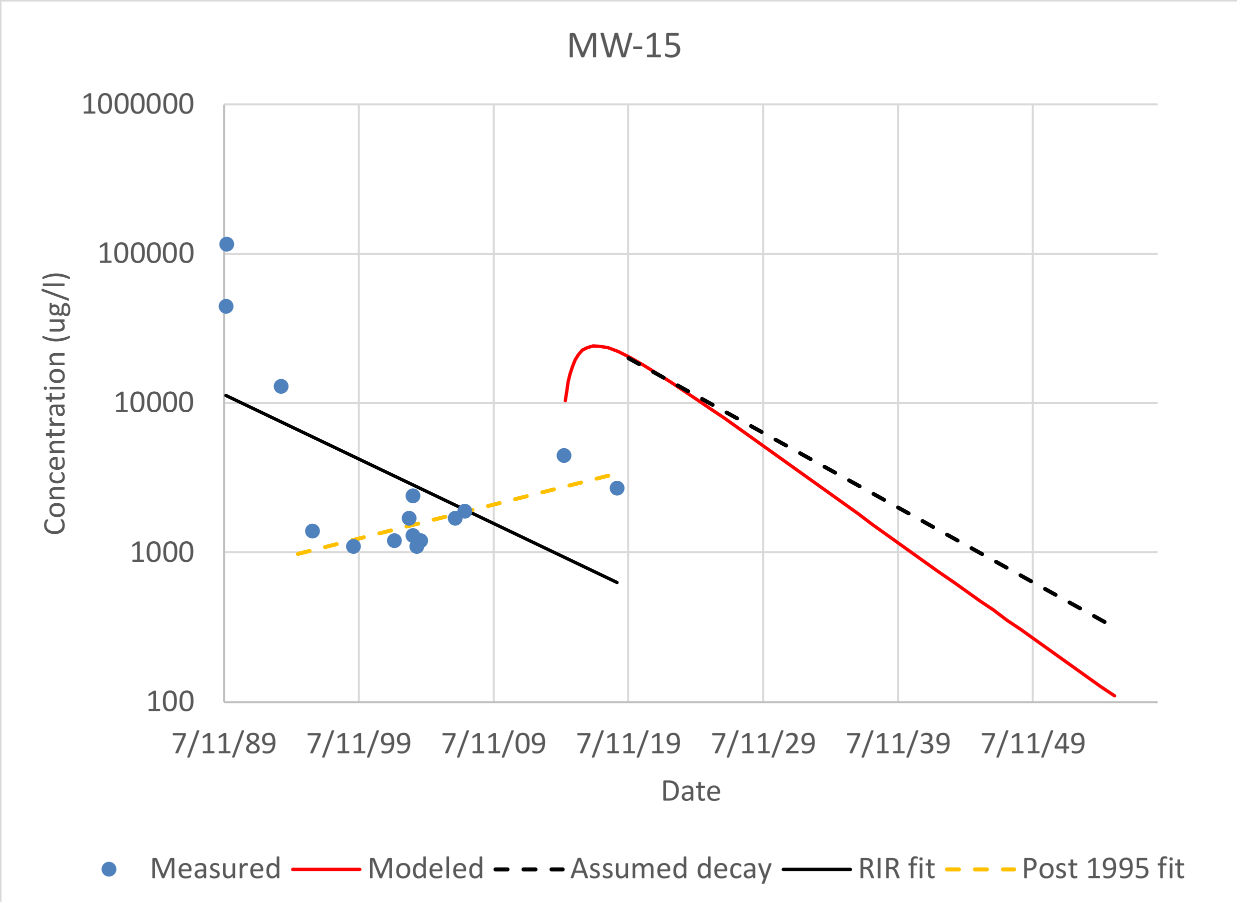


Figure 3 Measured concentrations, the RIR "fit" to those concentrations, and a fit to those after 1995, and the modeled concentration in MW-15, with a line showing the assumed decay rate.


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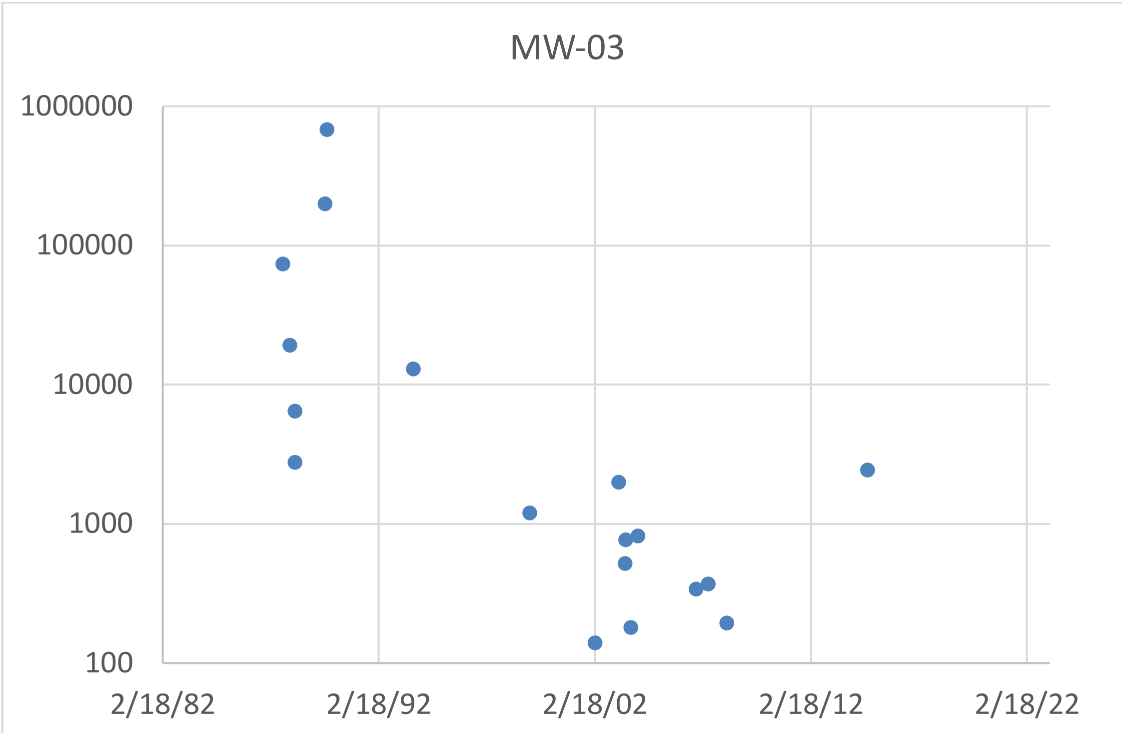


Figure 4 Concentrations measured in MW-03, showing a substantial drop in the mid 1990s

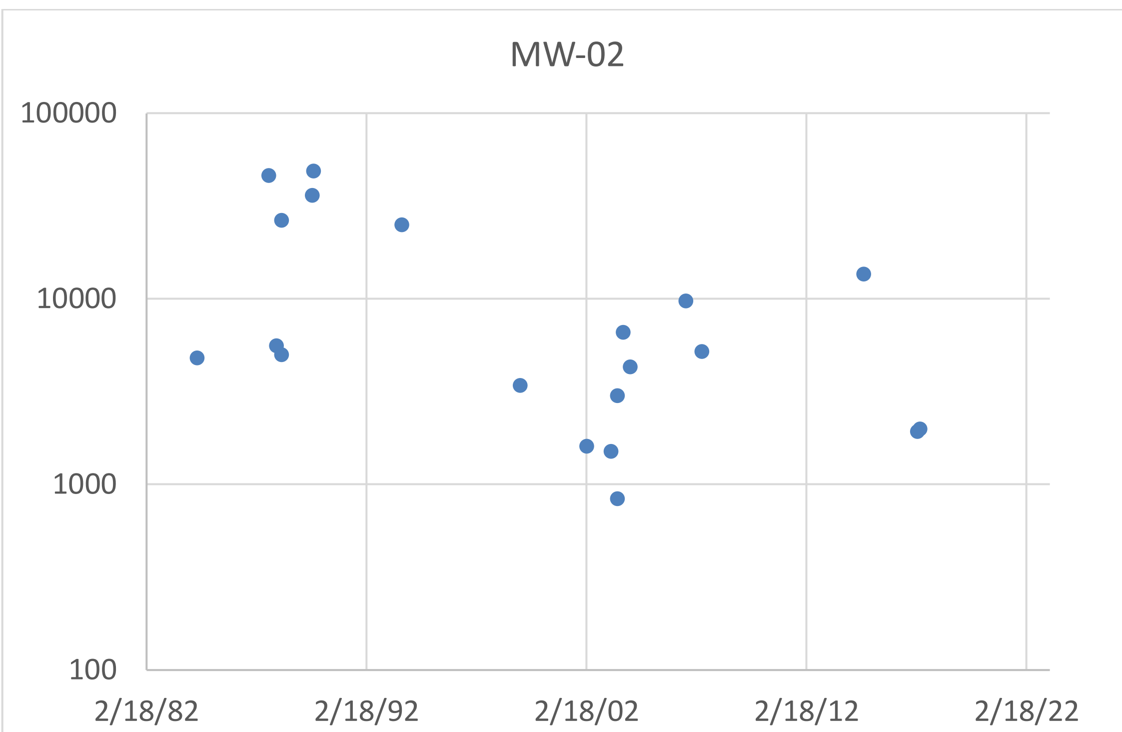


Figure 5 Concentrations measured in MW-02

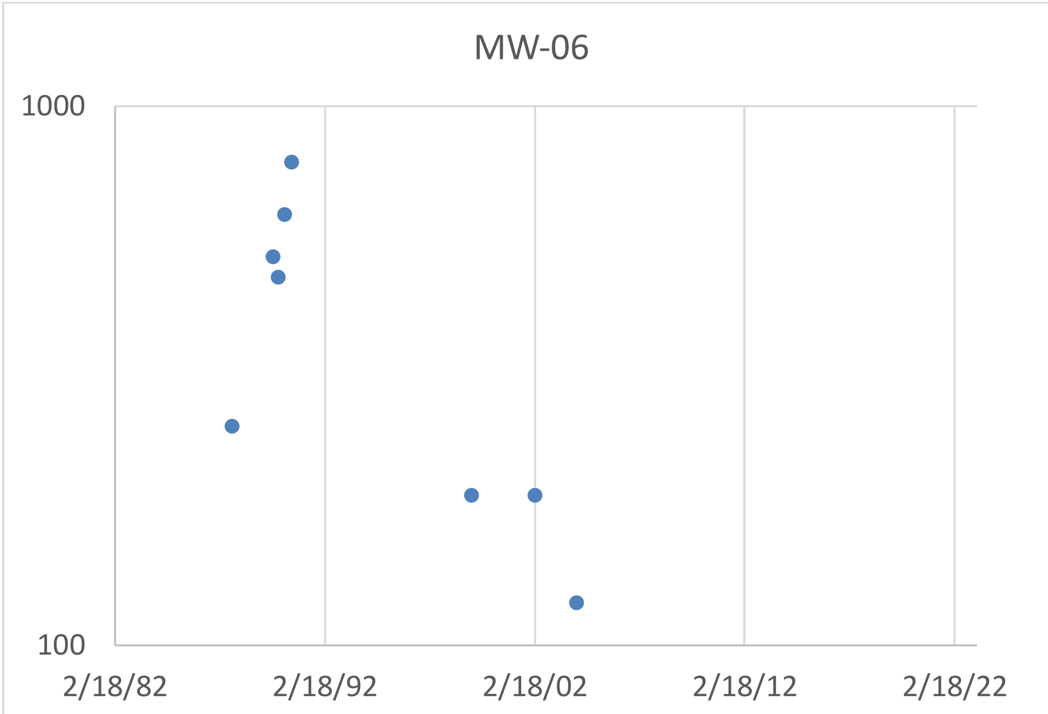

Figure 6 Concentrations measured in MW-06

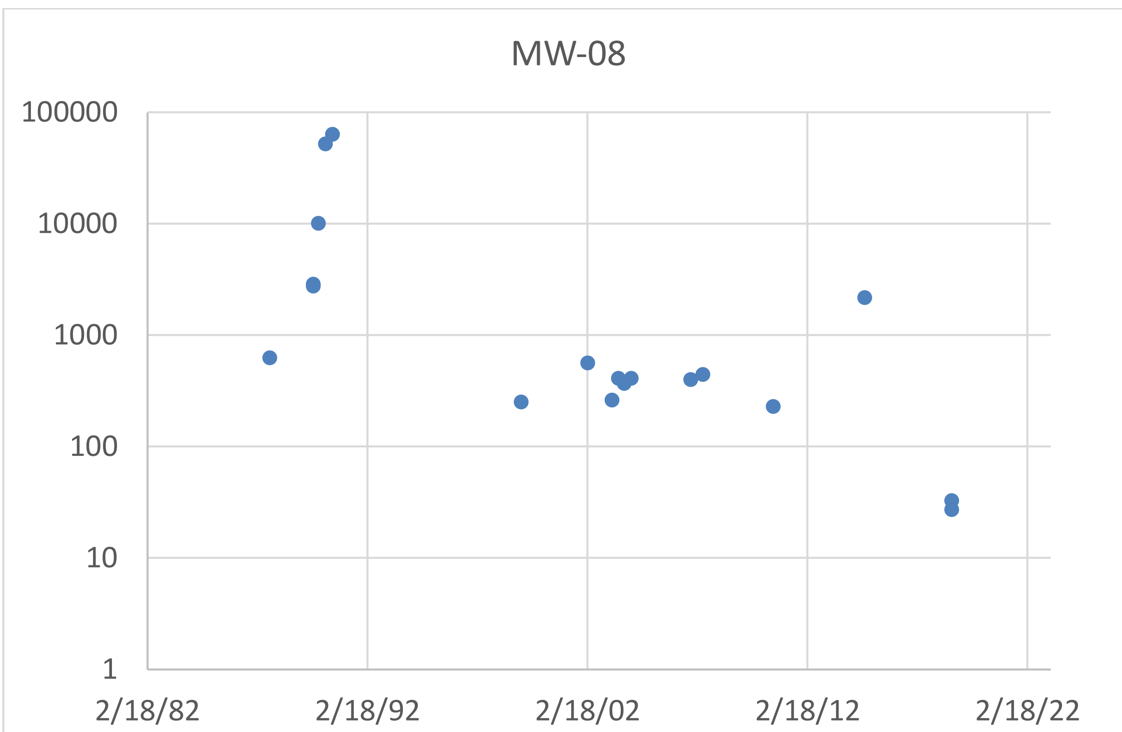

Figure 7 Concentrations measured in MW-08



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**5. Failure to cite, evaluate, and build on previous analyses**

While a previous extensive groundwater characterization report (Baker, 2004) is mentioned, none of its findings or analyses are cited within the RIR, and the model used in the RIR takes nothing from that previous modeling. As explained below, this failure to build upon prior work is inappropriate, and should be remedied.

Baker (2004) presented a groundwater model that better characterized the site than the model adopted by the RIR, by (i) using the MODFLOW/MODPATH/RT3D model system, (ii) using four depth layers, and (iii) accounting for the different hydrogeologic units in the modeling domain (Baker, 2004, Tables 29 and 30), building on the previous hydraulic modeling by Sloto (1990). This approach allowed taking account of the variation of hydraulic conductivity with depth (acknowledged in the RIR, p121) and hydrogeologic unit, which variation is not included in the RIR model. Critically, many of the formations and depth ranges have hydraulic conductivity substantially higher than the 1.1 ft/day assumed to apply uniformly by the RIR (Appendix S).

The substantial improvement (a reduction in residual statistics by a factor of about 2) of the Baker (2004) model over the model adopted in the RIR can be inferred from the fit to measured hydraulic heads over a near-site hydraulic head range of 90–100 feet (Table 1).

| Residual statistic | 2019 RIR | Baker (2004) | Unit |
|---|---|---|---|
| Mean | 0.899 | -0.091 | feet |
| Mean absolute value | 6.883 | 3.793 | feet |
| Root mean square | 9.004 | 4.789 | feet |
| Number of wells | 14 | ~33 | (count) |

Table 1 Statistics of residuals of modeled versus observed hydraulic heads near the site (RIR: Attachment B to Appendix S, table and figure; Baker, 2004, Figure 28)

**6. Impossibility of the RIR modeling to account for TCE plume extension**

The essential need to account for variation in hydraulic conductivity in modeling the plume behavior, and in particular for including paths with higher hydraulic conductivity, may be illuminated by some simple calculations. The RIR modeling assumed a constant hydraulic gradient of 0.019, a constant hydraulic conductivity of 1.1 ft/day, a constant porosity of 0.05 (RIR, Appendix S, Table 1), and a retardation coefficient of 9 for TCE. These assumptions imply a linear velocity for a TCE plume (ignoring longitudinal dispersion), or approximately of the center of a plume front (including longitudinal dispersion) of $(1.1\times 0.019/(0.05 \times 9) = 0.0464$ ft/day. After a modeling time of 41 years (2014 to 2055; RIR, Appendix S, Attachment C, Table C1) the distance traveled by a plume front would be approximately 700 feet, which is only about 1/5 the length of the current plume. The model is thus *incapable* of explaining the current plume, which extends at least 3,500 feet after at most 69 years (1951 to 2020),



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corresponding to 1171 feet using the RIR model parameters, so cannot be expected to evaluate the extension of the plume, which was, of course, the claimed purpose of this modeling.

In contrast to the RIR modeling, Baker (2004, Table 30) estimates the hydraulic conductivity in the top 100 feet of the Ordovician Conestoga Formation (in which most of the RIR modeling grid presumably[6] lies) at 10.4 ft/day, decreasing to 1.2 ft/day only in the 300–400 foot depth range.

In the modeling sensitivity analysis, the RIR notes that increasing the hydraulic conductivity by a factor of just 5 would result in the plume extending beyond the modeling domain, but claims that, "The value chosen in the calibrated model is based on Site-specific data (slug tests) for the shallow bedrock zone and represents the highest Site-specific K value of all bedrock aquifer zones at the Site." The slug tests (Roux, 2015b, Table 43) however, show that hydraulic conductivity decreases with depth; and for the first 100 ft depth (center of screen; including both overburden and bedrock), the average value[7] measured in the slug tests is 2.6 ft/day (and the screen-length-weighted average is 2.84 ft/day), with individual values up to 22 ft/day (in a bedrock measurement with screen 46–63 feet, MW-22). Thus, a calibrated model value as high as 10.4 ft/day is quite plausible, and a value at higher than the RIR value of 1.1 ft/day is necessary to explain the current plume size (see below).

An alternative possibility not considered in the RIR is that most groundwater flow is through fractures, with little involvement of the bulk of the soil or rock. Flow through fractures only requires equilibrium with the surfaces of those fractures, not the surrounding rock/soil, so that adsorption to rock and soil would be negligible compared with an assumption of equilibrium with the entire rock/soil mass.[8] In such circumstances, the retardation factor for VOCs could be substantially lower than estimated; and ultimately a retardation factor close to unity is likely. The sensitivity analysis performed for the modeling fails to account for this quite likely scenario.

To further explore the adequacy of the RIR modeling even for evaluation of plume extension, I examined a one-dimensional simplification (see appendix) to overestimate the center-line concentration of the plume. This simplification provides an overestimate because it omits

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[6] The RIR does not provide a diagram of the location of the modeling grid, nor its dimensions, and does not provide any other method of identifying its exact location except by obtaining the model input file and a copy of the model.

[7] For flow through multiple layers driven by the same hydraulic gradient, the total flow per unit width is the sum over layers of the product of layer hydraulic conductivity and layer thickness, so that the average hydraulic conductivity is the layer-thickness-weighted average of layer hydraulic conductivities; in the absence of information on layer thicknesses (and not too extreme differences) the best estimate is the straight arithmetic average.

[8] Diffusion into the rock surrounding fractures would occur, but the time-scale for such diffusion is likely to be long enough to result in negligible effect. A fracture-transport model would take such effects into account.



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dispersion to the sides; however, I expect that the results provided could be reproduced in the two-dimensional case with slight adjustment to the parameters. The simplest possible example, and an absolute worst case, assumes that the source has been maintained at a concentration equal to the solubility limit of TCE, approximately 1,100,000 μg/L (e.g. Baker, 2004, Tables 1–18) from the initial possible time of 1951 through 2013, the mid-point of the times used in the RIR to construct the contours shown in Figure 46 of the RIR, and continues forever. Figure 8 shows the result, which demonstrates that even in this worst-case scenario, the model adopted by the RIR (with the parameter values in the RIR, Appendix S, Table 1) cannot account for the distance to the 10 μg/L plume contour (nor the predicted 5 μg/L contour).

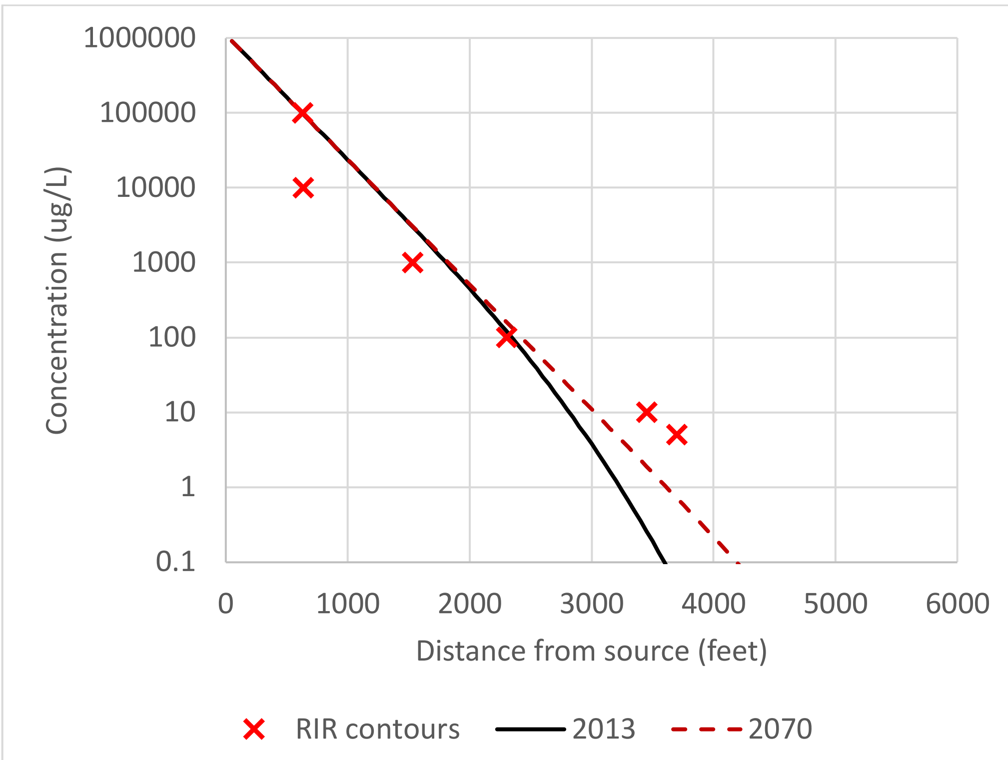


Figure 8 The absolute worst-case estimate of plume centerline concentration using the RIR model.

Clearly, with the parameter values used in the RIR, this worst-case plume would be in steady state out to 2,000 feet in 2013, and out to beyond 4,000 ft by 2070, and the 5 μg/L contour would never extend beyond about 3,200 feet.

It is, however, not difficult to find parameter estimates within the range discussed in the RIR or in previous modeling (Baker, 2004), that allow matching the plume estimates of RIR Figure 46, at least beyond the 100,000 μg/L contour. I consider that contour to simply reflect the anisotropy of the subsurface, with insufficient distance from the source(s) for the averaging effect of dispersion to have had sufficient effect for any smooth model to match it. For


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example, simply increasing the estimated hydraulic conductivity to 2.129 ft/day and reducing the assumed (constant forever after 1951) source term gives Figure 9, which shows a plume in practical equilibrium to about 2,500 ft by 2013, and beyond 5,000 feet in 2070.

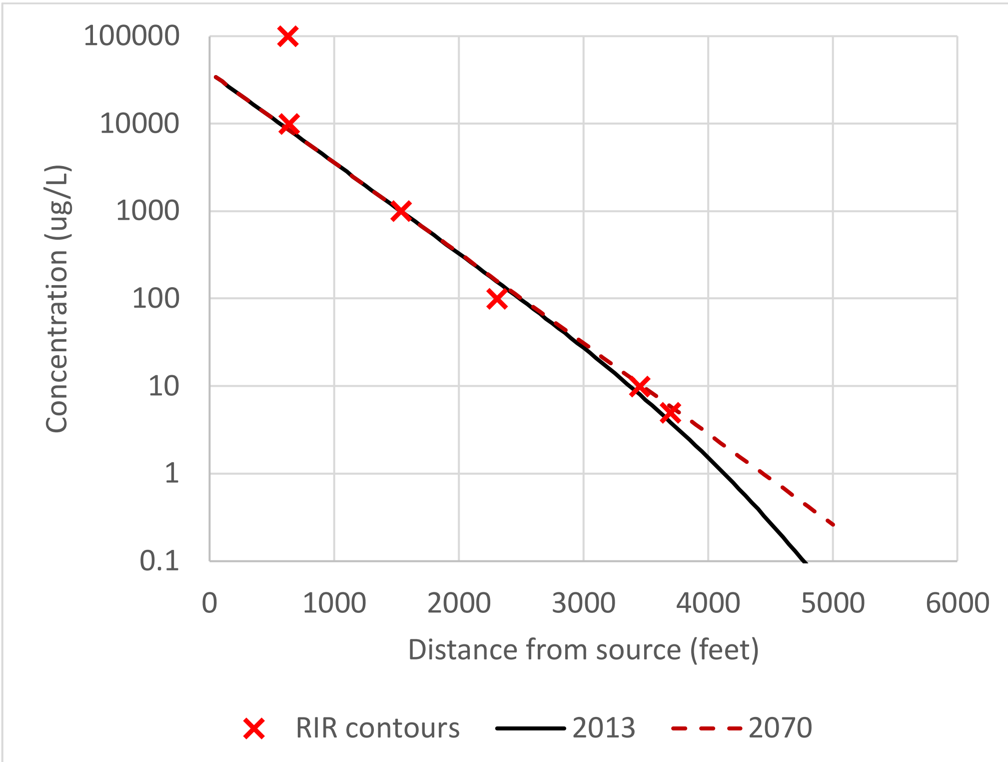


Figure 9 Showing that a constant source can match the RIR results with just a change in hydraulic conductivity.

However, while it is possible to find combinations of parameters agreeing with the RIR conclusions, it is also possible to find combinations that disagree substantially. Thus Figure 10 shows an example with variable source term that matches the RIR estimated plume in 2013, but demonstrates that the plume might extend considerably further by 2070 (indeed, in this case, the 5 μg/L contour would extend to approximately 4,500 ft by about 2100). This particular solution corresponds to a hydraulic conductivity of 1.776 ft/day and a degradation half-life of 3,506 days,[9] which are fully as plausible as the values used in the RIR and are "calibrated" to the observed plume in 2013.[10]

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[9] Combined with a source term that varies from 1,100,000 μg/L starting in 1954, dropping to 3,000 μg/L in 1954.25, increasing to 103,907 μg/L in 1988, then decreasing to 31,172 μg/L in 1991.

[10] The source term dates were chosen (not quite arbitrarily) and then the other parameters obtained by a constrained optimization. The fit to the 2013 RIR plume contours (omitting 100,000 μg/L or higher) is well within any uncertainties in the contour locations.

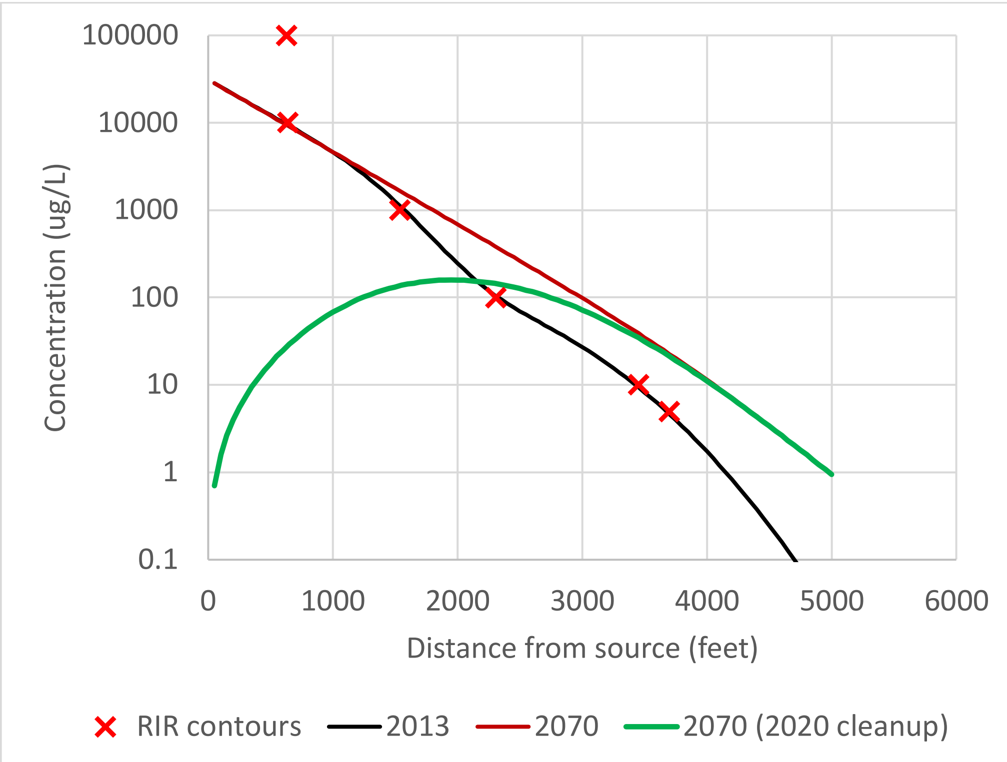


Figure 10  An example showing that the RIR might have substantially underestimated potential plume extent; and the effect of an immediate source term cleanup.

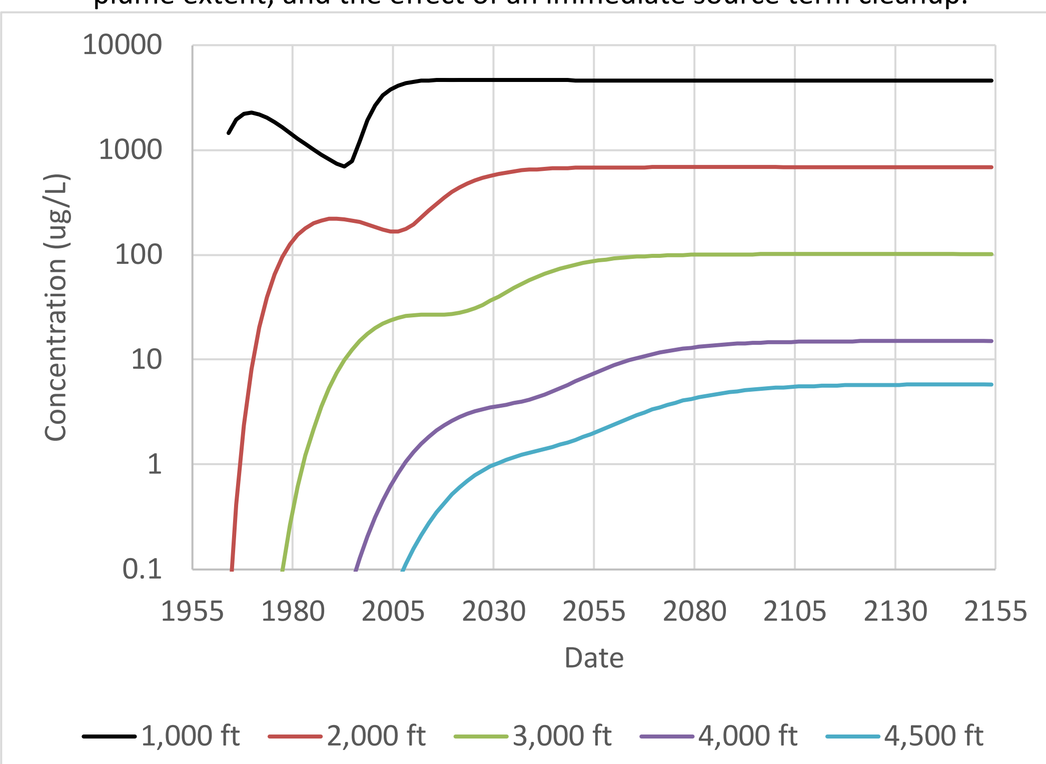


Figure 11  Concentration versus time at various distances for the example in Figure 10



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Concentration versus date curves at various down-gradient distances for the example shown in Figure 10 are shown in Figure 11. Noteworthy features include:

- Periods of decreasing concentration have nothing to do with TCE degradation. They are controlled by variations in source terms.
- The "decay rates" estimated from such periods would certainly vary by location, and probably by time frame.
- Ultimately, all concentrations tend to a constant value (this occurs because of the assumption of a continuing source).
- The time to reach the ultimate value can extend well beyond the modeling time-frame of the RIR (which was limited to 2055).

This example is probably not entirely compatible with all the measurements in individual wells at the site, although short term fluctuations in source term (not included here) could provide better correlations with such measurements while retaining the overall average effect. It is included to illustrate the potential effect of variations in source term. An adequate RIR would investigate the inverse problem of estimating the source terms from the well measurements, and obtain a consistent solution that would allow accurate estimates of the future plume.

Also shown on Figure 10 is the effect of stopping the entire source completely in 2020, to illustrate the importance of immediate action. The hypothetical source term was selected so that, in 1991, 70% of the source at that time was removed in an effort to illustrate the potential effect of stopping TCE releases at the site at that time. Any DNAPL TCE in the bedrock at that time would sink to deeper levels, with some presumably remaining trapped in blind pockets throughout the rock column. Gradual dissolution of both sources would probably provide a substantially reduced source strength compared with DNAPL TCE still flowing through the rock column. However, TCE present as DNAPL in or adsorbed to soil above the rock column would not be so affected by such a change — that would still be available for leaching into groundwater. Unfortunately, the RIR makes no attempt to evaluate the relative sizes of these sources, but merely assumes that both vanish entirely — the TCE in the rock column by implicit omission, and the TCE in the soil by simply assuming it away. Figure 10 arbitrarily assumes that the rock column is a negligible source after 1991, and that leaching from the soil could amount to 30% of the total at that time (and could continue forever). Removing the soil in 2020 would then correspond to the green curve, showing a substantial reduction in concentrations over the first 3,000 ft of plume by 2070.[11]

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[11] Nothing done at the site can have any effect beyond about 3,000 ft (for the combination of hydraulic conductivity and half-life simulated) by 2070, since there is insufficient time for any effect to propagate that far in that time



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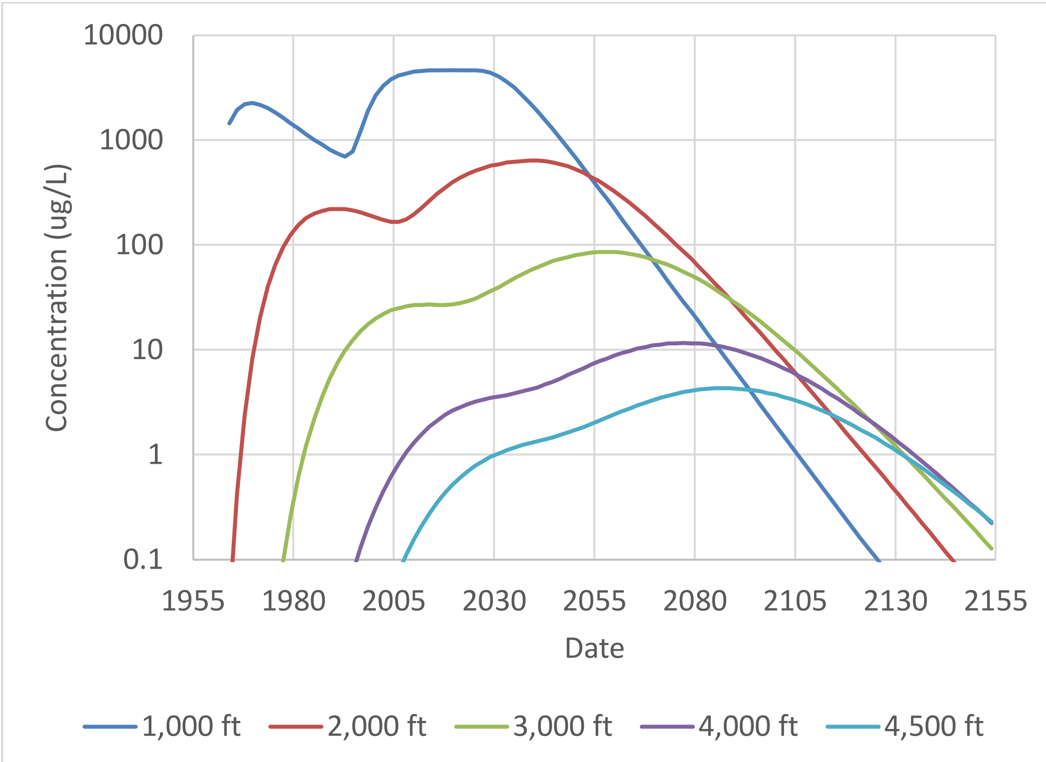

Figure 12 Concentration versus date curves at various distances for the clean-up scenario in Figure 10

The concentration versus date curves corresponding to the cleanup scenario of Figure 10 are shown in Figure 12. Further noteworthy (and generic) features (compared with Figure 11) are:

- After a time delay corresponding to the propagation time from the source, the concentrations start to decline almost exponentially with time.
- Despite the appearance on Figure 12 that the declining curves could be parallel and straight, the exponential declines are different at different times and distances, and none of them correspond to the TCE degradation half-life (they are more rapid).

**7. Inadequate boundary conditions on the modeling**

The RIR model imposes a line sink boundary condition at the Little Valley Creek (LVC) in the part of the modeling domain where the LVC was measured as gaining. This condition, however, is artificial, since it implies (in the model) that no TCE can be advected under the location of the LVC. However, the more complex and realistic MODFLOW/MODPATH/RT3D modeling by Baker (2004) demonstrated such flow beneath the LVC (Figures 41–44). Examination of a cross-section of the valley (Baker, 2004, Figure 15) illustrates why the LVC would not be expected to act as a groundwater boundary, except in shallow groundwater, with the continued decrease in surface elevation down to Valley Creek.

The initial contour shape in the vicinity of the Northwestern corner of General Warren Village appears unlikely, and there are no wells in that corner of the Village to confirm or deny the prior modeling (Baker, 2004, Figures 41–52) that projected contamination beneath that corner. The RIR also lacks any figures showing future modeled contours, except for the interpretation of the plume extent, so prevents evaluation of the modeling in that area.

**8. Undetermined effect on the Little Valley Creek (LVC)**
The LVC, treated as a line sink, was specified as gaining 75 gallons per minute along a 2,500 foot length (RIR, Appendix S, p7), despite the substantially higher measurements. These inflows along the northern boundary of the site imply influxes of TCE carried by those inflows. However, there is no accounting for the effect on concentrations in the LVC from those flows, so the RIR has failed to document the potential degradation of this stream, which is classified as being of exceptional value.

**9. Undetermined evaluation of other volatile organic compound (VOC) contaminants**
The RIR documents measurements of multiple volatile organic compounds (VOCs), but then models only the TCE plume. Other VOCs may have different plume characteristics because of their different transport and decay characteristics, and in any event should be explicitly evaluated. Of particular concern is the potent, established, human carcinogen, vinyl chloride (VC), which has a soil-water partition coefficient approximately 1/9 that of TCE, hence a retardation factor of about 2, so would move through the subsurface approximately 4 times faster than TCE. Actual concentrations would also depend on decay rates that differ for different VOCs. And since VC is a microbial degradation product of TCE, evaluation of plume characteristics requires a model such as the reactive multi-species transport in 3-dimensional groundwater systems model (RT3D) designed to account for degradation of contaminants.

**10. Incomplete assessments of impacts to public health and the environment**
The RIR performs limited human health risk assessments involving vapor inhalation and exposure to surface water based on recently measured concentrations at individual wells and in individual buildings (and implicitly for groundwater ingestion), but fails to evaluate the potential effects of future modeled concentrations throughout the whole plume. Indeed, it could not do so, in that it failed to model future concentrations of all contaminants, or any contaminants at all in the LVC. There are also no assessments of risk from other potential uses of groundwater, such as irrigation, or commercial and industrial uses.

Potential ecological effects were claimed to be evaluated in the tributary of the LVC near the Bishop Tube site, but the effect on the LVC of future potential concentrations was not evaluated (and, again, could not be evaluated through lack of evaluation of such concentrations). It is notable that the concentrations of hexavalent chromium in the tributary exceeded the PADEP Fish and Aquatic Life criteria (RIR Table 20) on the single occasion (in 2018) on which it was measured under low flow conditions; yet the Ecological Risk Assessment (RIR, Appendix R) passes over hexavalent chromium because "hexavalent chromium, thallium and vanadium did not have TRVs that could be located in the published literature commonly used to conduct ecological risk assessments, therefore the potential for ecological risk to benthic invertebrates ***cannot be estimated***" (emphasis added). Clearly, however, what can be "estimated" is that the current conditions exceed PADEP criteria. Moreover, it appears that hexavalent chromium has never been measured any further downstream than SW-5, despite the exceedance of criteria at SW-5. Clearly again, therefore "the potential for ecological risk to benthic invertebrates cannot be estimated" any further downstream into the LVC.

**11. Inadequacy of the Feasibility Study Report (FSR)**

The Feasibility Study Report necessarily relies upon the RIR for site evaluation, and in particular must account for the future condition of the site under various alternative scenarios. As documented above, however, the RIR fails to adequately evaluate future site conditions in the plume. The Feasibility Study Report is thus necessarily inadequate, since evaluation of future changes due to potential remedial technologies necessarily require an accurate baseline. This is particularly true for "Monitored Natural Attenuation" (MNA), since the only clean-up mechanisms in such circumstances are decay, dilution, and containment (if the latter two can be considered "clean-up"). The RIR, however, provides an inaccurate estimate of decay rate and dilution for TCE only, since it uses a methodology that fails to account for multiple effects. Production, decay, and dilution of the other VOCs is, inappropriately, ignored entirely.

In addition, the FSR considers that the DNAPL phase of TCE in deep bedrock is "a) below the water table, b) contained in rock, and c) at depth," so that "there is no direct exposure pathway from DNAPL in bedrock" (FSR, p6). However, this is an argument made without any apparent analysis whatsoever. The RIR assumes the absence of DNAPL and fails to evaluate multiple depth ranges separately, so cannot examine whether there is a "direct exposure pathway." Such a pathway is certainly plausible, since the deep DNAPL will certainly act as a source to groundwater, and that groundwater may be directly tapped, or may flow into surface water. The current RIR does not (and could not) evaluate either possibility; clearly, it should.

**Concluding remarks**

Overall, then, the analyses presented in the 2019 Remedial Investigation Report and Feasibility Study Report for this site are inadequate, particularly with respect to evaluation of the future plume conditions and associated risks: these reports could and should be improved. Such improvements should include full acknowledgement and use of previous analyses. The substantial quantities of TCE, other volatile organic compounds, and inorganic contaminants apparently remaining in soils at the site create a potentially significant risk to public health and the environment, due to exposures via soil, ambient air, surface water, and groundwater. It appears that prevention of continuing contamination of the LVC tributary, if not the LVC itself, above PADEP criteria requires removal (or other mitigation) of the site soil sources. And further downgradient contamination with TCE and other VOCs would also likely be substantially ameliorated by removal (or other mitigation) of site soil sources; and given the likely higher cost and requirement for off-site action to achieve the same amelioration later, the sooner the better.



Green Toxicology LLC www.GreenToxicology.com 781-316-1685 Crouch@GreenToxicology.com

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**References**

Armstrong, 2018. Deposition Vol. 3 of Dustin Armstrong, Dec 7, 2018, in Civil Action No. 08-6010, US District Court for the Eastern District of Pennsylvania, Comm. PA DEP v Whittaker Corp., Johnson Matthew Inc., & Christiana Metals Corp; and Whittaker Corp & Johnson Matthey, Inc. v Constitution Drive Partners.

Baker, 2003. Final Supplemental Soil Characterization Report, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania. PADEP Contract No. ME359184, Work Requisition No. 31-116. June 30, 2003.

Baker, 2004. Final Supplemental Groundwater Characterization Letter Report, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania. PADEP Contract No. ME359184, Work Requisition No. 31-116. July 2, 2004.

Baker, 2009. Final Shallow Groundwater Feasibility Study Report. Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania. PADEP Contract No. SAP4000006380, Work Requisition No. 4-1-154. Prepared for PADEP by Michael Baker Jr., Inc. December 3, 2009.

Roux, 2015a. Treatability Study Completion Report/ Former Bishop Tube Property, 1 South Malin Road, East Whiteland Township, Chester County, Pennsylvania. Prepared for: The Bishop Tube Project Team. Prepared by: Roux Associates, Inc., 402 Heron Drive, Logan Township, New Jersey 08085. October 9, 2015.

Roux, 2015b. Remedial Investigation Report: Former Bishop Tube Property, 1 South Malin Road, East Whiteland Township, Chester County, Pennsylvania. Prepared for: The Bishop Tube Project Team. Prepared by: Roux Associates, Inc., 402 Heron Drive, Logan Township, New Jersey 08085. August 31, 2015.

Roux, 2019a. Remedial Investigation Report (2 volumes): Former Bishop Tube Property, 1 South Malin Road, East Whiteland Township, Chester County, Pennsylvania. Prepared for: The Bishop Tube Project Team. Prepared by: Roux Associates, Inc., 402 Heron Drive, Logan Township, New Jersey 08085. June 10, 2019.

Roux, 2019b. Feasibility Study Report: Former Bishop Tube Property, 1 South Malin Road, East Whiteland Township, Chester County, Pennsylvania. Prepared for: The Bishop Tube Project Team. Prepared by: Roux Associates, Inc., 402 Heron Drive, Logan Township, New Jersey 08085. June 17, 2019.

Sloto RA, 1990. Geohydrology and simulation of ground-water flow in the carbonate rocks of the Valley Creek basin, Eastern Chester County, Pennsylvania. U.S. Geological Survey Water Resources Investigations Report 89-4169.

## Appendix: The one-dimensional advection-dispersion groundwater solute transport model

### 1. **Analytic solution for specific boundary conditions**

The one-dimensional version of the advection-dispersion groundwater solute transport model of the Aquifer$^{Win32}$ model (ESI 2011) as used in the RIR is a solution of the differential equation:

$$D\frac{\partial^2 C}{\partial x^2} - V\frac{\partial C}{\partial x} = \varphi R\frac{\partial C}{\partial t} + \lambda\varphi RC$$

where the terms are:

| | |
|---|---|
| $C = C(x,t)$ | the solute concentration at distance $x$, time $t$, |
| $V = -iK$ | the Darcy velocity of the groundwater, the product of hydraulic gradient $i$ and hydraulic conductivity $K$, |
| $D = \alpha V$ | the dispersion coefficient, the product of the dispersivity $\alpha$ and the Darcy velocity $V$ (ignoring molecular diffusivity, which is small enough to ignore in this context), |
| $\varphi$ | the porosity of the soil or rock, |
| $R$ | the retardation coefficient of the solute, and |
| $\lambda$ | the first-order decay coefficient of the solute. |

This formulation assumes that all the terms except $C$ are constant in time and space (as assumed in the RIR), and for this analysis the required solution has boundary conditions of a zero concentration everywhere prior to $t = 0$, with a constant concentration $C_0$ for all $t > 0$ at $x = 0$ (maintained, for example, by dissolving DNAPL), and with $C(x,t) \to 0$ as $x \to \infty$ for all $t$.

The unique analytical solution satisfying the differential equation with these boundary conditions is:

$$C(x,t) = \frac{C_0}{2}\exp(-\lambda t - [X - B]^2)\{\mathrm{M}(X+\gamma) + \mathrm{M}(X-\gamma)\}$$

where:

$$a = {}^{D}\!/_{\varphi R};\ \ b = {}^{V}\!/_{\varphi R};\ \ d = 2\sqrt{at};\ \ X = {}^{x}\!/_{d};\ \ B = {}^{bt}\!/_{d};\ \ \gamma = \sqrt{\lambda t + B^2};\text{ and}$$
$$\mathrm{M}(z) = \exp(z^2)\mathrm{erfc}(z)\text{ for arbitrary } z \text{ is a modified Mills ratio}$$

This solution was used in the text to produce the curves shown. The linearity in concentration of the differential equation shows that the effect of multiple sources can be obtained independently and added to obtain the effect of all sources combined; and negative sources at later times can be used to obtain the effect of arbitrary step function sources.

### 2. Unique unphysical solution for similar exponential decay at all locations and times.

If it is assumed, as in the RIR, that the concentration at all locations falls exponentially with the same decay rate $\lambda$ at all times, then the right hand side of the defining equation above



Green Toxicology LLC www.GreenToxicology.com 781-316-1685 Crouch@GreenToxicology.com

vanishes, and the solution factorizes into a product of a term exp($-\lambda t$) and an $x$-dependent term $H(x)$, which is the solution of the equation

$$D\frac{d^2H}{dx^2} - V\frac{dH}{dx} = 0$$

which has the general solution

$$H = K_1 + K_2\exp\left({}^{Vx}/_{D}\right)$$

where $K_1$, $K_2$ are constants, corresponding to a concentration everywhere constant or exponentially increasing with $x$ everywhere, which is physically impossible.

**Appendix Reference**

ESI, 2011. Guide to Using Aquifer$^{Win32}$ Version 4. Environmental Simulations, Inc., 300 Mountain top Rd., Reinholds, PA 17569. [Note: the RIR used Aquifer$^{Win32}$ Version 5, but correspondence with ESI shows the Version 4 manual applies to Version 5]



781-316-1685
Green Toxicology LLC www.GreenToxicology.com Crouch@GreenToxicology.com

Tom Myers, Ph.D.
Hydrologic Consultant
P.O. Box 177
Laporte, PA 18626
775-530-1483
tommyers1872@gmail.com

**Technical Memorandum**

**January 13, 2022**

**Subject: Bishop Tube 2021 Remedial Investigation Report, Feasibility Study, and Selection of Alternative**

**Prepared for: Delaware Riverkeeper Network**

**Summary**

Roux Associates (Roux) completed a Remedial Investigation Report (RIR) and Feasibility Study (FS) for the Bishop Tube (BT) site in 2021[1], which were updates to 2019 versions. The FS identifies potential remedial activities, as identified by Roux. A FS Addendum supplemented the FS report. In August 2021, the Pennsylvania Department of Environmental Protection (DEP) issued its Analysis of Alternatives and Proposed Response (AOA) in which it chooses its remediation plans for the BT site. The memorandum reviews that choice and DEP's reasoning.

DEP chose an alternative that mixes soil recovery (OU1), groundwater remediation (OU2) and drinking water (OU3) into one decision in the AOA.

For soils, DEP chose to use an in-situ injection alternative which could inject either reductive or oxidizing compounds into a mixed surface soil. The soil in the targeted areas would be mixed down to the saturated zone. DEP's choice for soils is not acceptable because it will leave TCE in place at areas that will not be treated and will not treat all the TCE at the treated locations. For groundwater, DEP combined all FS injection alternatives into a simple in-situ injection alternative combined with the soil injection choice. It only directly treats two areas, the building vapor degreaser and the drum storage area with chemical amendments that still have to be chosen. By not choosing which chemical addendums to use, DEP essentially admits it does not understand enough about the groundwater chemistry of the site. Treating just two areas would leave substantial TCE mass in place in the bedrock and groundwater. By not treating offsite areas, the plume would be allowed to naturally attenuate, a process DEP rejected as an

[1] Roux Associates, Inc., Remedial Investigation Report (Volume 1 of 2), Former Bishop Tube Property, January 13, 2021. Roux Associates, Inc., Remedial Investigation Report (Volume 2 of 2), Former Bishop Tube Property, January 13, 2021. (hereinafter RIR). Roux Associates, Inc., Feasibility Study Report, Former Bishop Tube Property, January 13, 2021. (hereinafter FS). Roux Associates, Inc. Former Bishop Tube Site Feasibility Study Addendum, Remedial Alternative #8 – Basis of Design Memorandum, December 20, 2020 (hereinafter FS Addendum).

alternative because it would take decades, during which time it will continue to impact on-site and off-site areas.

In choosing its remediation plan, DEP relied heavily on Roux RIR and FS reports. Roux assumed the property would be developed for nonresidential uses but, the property has since been rezoned for residential use. The RIR assumes that the soils, meaning unsaturated materials above the water table in the overburden, will be removed, so that analysis assumes there is no contaminant source leaching into the groundwater long term. These assumptions bias all analyses of groundwater quality and remediation strategies presented in the FS, making the strategies seem to remediate the area faster than they otherwise would if the surface soils are not removed or otherwise adequately treated.

There are at least three identifiable aquifers on the site. On the surface, there is overburden, which is saturated soil on top of the bedrock. Second is shallow bedrock which is substantially fractured bedrock with relatively high conductivity. Deep bedrock where fractures become smaller and denser is a third aquifer. Roux treats overburden and shallow bedrock as one aquifer, but this is inappropriate because the bedrock has a northeasterly fracture trace so that groundwater tends to flow in that direction, but the overburden does not. Deep bedrock also trends northeast.

Trichloroethene (TCE) concentrations vary substantially with both location around the area and with time at all levels. A plume map shows the site has affected groundwater north of Lancaster Ave to at least Conestoga Blvd. The TCE contour map as presented in the RIR has errors and uncertainties as represented by the rapid fluctuation of TCE concentrations in various wells and the lack of a single consistent date for sampling events. A steep gradient in the concentration contours on the east side is not supported by the data due to a lack of monitor wells in the General Warren Village east of Bishop Tube.

TCE concentration varies with depth and between the overburden and bedrock such that a single map does not adequately represent the plume. Showing TCE contours for the entire site is a gross simplification and does not demonstrate the actual conditions at the site.

TCE concentration at some wells varies substantially, probably due to recharge events. There are very high concentrations in the overburden very near several sources on the BT site. The two areas with highest known concentrations are the Building 8 vapor degreaser site and the drum storage area east of Building 5. There are also very high TCE concentrations in the deep bedrock under the site. Northeast of the site between Lancaster Ave and Conestoga Blvd, the highest known concentrations are in the shallow bedrock, not the overburden. There are also very high TCE concentrations in the shallow bedrock just northeast of the site which may be a fracture flow zone to the northeast.

Groundwater at the Bishop Tube site eventually discharges to surface water, specifically the Little Valley Creek (LVC) tributary just east and north of the site. Surface water quality data shows the TCE concentrations increase along the stream reach from nondetect upstream of BT to levels that substantially exceed standards at the northeast corner of the site. TCE is detectable surface water as far as a site beyond Conestoga Ave. By considering just concentration instead of load, the RIR does not provide a good description of TCE interaction between the groundwater and surface water. TCE concentrations have decreased since 2003, but the data is not controlled for flow which could cause the concentrations to fluctuate due to the amount of dilution.

TCE and other contaminant concentrations in surface and groundwater at and near the site continue to represent a threat to human health and the environment. The FS provides seven alternatives for remediation, including no action (1), monitored natural attenuation (MNA, 2), in-situ chemical reduction (ICR, 3), in-situ chemical oxidation (4), enhanced reductive chlorination (5), two-part in-situ chemical oxidation (6), and hydraulic control (HC, 7). MNA is basically just monitoring the on-going natural attenuation and would require decades or longer for the site to be remediated. Alternatives 3 through 6 all involve injection of chemical amendments that would treat the organic contaminants. The FS does not identify the amendments which would be determined once the strategy is selected. Because it does not specify the amendments, the FS is incomplete and cannot be considered a decision document; a reviewer does not have a full picture of what is being proposed. The FS Addendum added an eighth alternative which combined soil and alternative 3 ICR treatment but reduced the number of areas to be treated. It would leave much more TCE in the groundwater as compared to alternatives 3 through 6, assuming an appropriate amendment was chosen.

Alternative 7, HC, involves creating a line of low water level or potentiometric surface levels which would create a capture zone for groundwater flowing from the site. It would likely be effective only in alluvium because pumping from fractured rock would remove water mostly from the larger fractures. TCE would remain in the smaller fractures and adsorbed to the aquifer media. HC could deplete stream flow or dry groundwater dependent wetlands which would be an unacceptable effect.

The FS did not consider an alternative that mixes injection with HC. A line of wells downgradient of the injection sites could intercept any contaminants created by injection, including toxic breakdown products, the targeted contaminants that had been adsorbed to the soils, or the chemical amendments.

As noted above, DEP chose a slimmed-down alternative that mixes soil recovery, groundwater remediation and drinking water into one decision. It would leave contaminants in the soils and fail to treat major groundwater contaminationareas. Contaminants would continue to leach into Little Valley Creek.

Throughout the FS, revised FS and DEP's decision document, there is a failure to consider the actions that have worked at similar sites. Roux and DEP failed to complete a detailed literature review of the remediation of other TCE sites or compare them to Bishop Tube. DEP is making decisions for Bishop Tube without learning from similar sites. The memorandum below details many issues regarding trend in contaminants at the site including temporal and spatial trends. There is detailed discussion of the fate and transport model developed in the RIR and relied on for developing the FS and AOA.

**Introduction**

The Pennsylvania Department of Environmental Protection (DEP) issued its Analysis of Alternatives and Proposed Response (AOA) in August 2021 in which it chooses its remediation plans for the Bishop Tube (BT) site. The memorandum reviews that choice and DEP's reasoning. In preparation for the AOA, Roux Associates (Roux) completed a Remedial Investigation Report (RIR) and Feasibility Study (FS) for the BT site in 2021, which were updates to 2019 versions. The RIR supplemented earlier reports completed in 2015 and 2010 (RIR, p 1). RIR Appendix A presents raw soil contaminant concentrations and Appendix B presents a time series of groundwater concentrations for all monitoring wells. RIR Appendix S partially documents a groundwater fate and transport model used to develop the plume map. The FS identifies potential remedial activities, as identified by Roux. This memorandum reviews aspects of the RIR and FS, concentrating on the 2021 versions that provide the basis for DEP's choice in the AOA.

**Analysis of Site Hydrogeologic Conditions**

There are at least three identifiable aquifers on the site. On the surface, there is overburden, which is saturated soil on top of the bedrock. Second is shallow bedrock which is substantially fractured bedrock with relatively high conductivity. Deep bedrock where fractures become smaller and denser is a third aquifer. Roux treats overburden and shallow bedrock as one aquifer, but this is inappropriate because the bedrock has a northeasterly fracture trace so that groundwater tends to flow in that direction, but the overburden does not. Deep bedrock also trends northeast.

The RIR does not quantitatively describe the hydrogeologic properties of the site, which should be the first step to developing a site conceptual model. The 2015 RIR provided a cursory description of slug-test results but left out significant important information. The RIR essentially sets conductivity equal to 1.1 ft/d for the entire aquifer consisting of both overburden and fractured bedrock, the geometric mean of a few slug tests discussed in the 2015 RIR (conductivity is specified only in RIR Appendix S). A mid-range estimate such as the mean ignores the high and low values which control most flow. Reported values (in the 2015 RIR) are as much as an order of magnitude higher than the geometric mean which would indicate there are preferential flow zones at the site. Flow and contaminant transport through such a zone occur much faster than expected from the (unweighted geometric) average values. Contaminants could flow much faster and have a higher load than expected using averages.

The geometric mean conductivity also provides no information regarding anisotropy, the tendency for conductivity to be greater in one direction over another so that more flow occurs in that direction. As will be discussed, flow at this site is at an angle to the primary gradient, south to north, which means there are preferential flow zones in the bedrock that controls the flow direction.

Contaminants in groundwater at the site (chlorinated volatile organic compounds (CVOCs)) discharge to local tributaries of Little Valley Creek (LVC). Stream trichloroethene (TCE) concentrations have decreased for six consecutive sampling events, but those events may not be comparable, because they were collected during differing wet or dry periods, when flow rates were not similar. Surface runoff dilutes the stream concentrations because the contaminants are not lying on the ground surface where they can be washed into runoff. Roux's analysis of trend mixes observations from different flow regimes and therefore is not evidence of a decreasing TCE load in the stream.

There has been no data collected or tests performed to obtain evidence describing groundwater flow, dissolved contaminant transport, dense non-aqueous phase liquids (DNAPL, undissolved TCE and other COCs,) or flow among aquifer levels, although it clearly occurs. This would be important to understand how fast contaminants settle into the aquifer and from how deep they could discharge to LVC. Without this information, it is not possible to estimate how the various remediation scenarios in the FS would respond.

**Soil Concentrations**

RIR Appendix A compiles soil contaminant masses from 1988 through 2018, but Roux does not analyze soils contaminant concentrations or consider them as a source. It presents figures of concentration in soils of TCE and other contaminants including heavy metals; the figures color code wells by contamination categories. Soil samples have identified CVOCs including TCE, 1,1,1-trichloroethane (TCA), cis-1,2-dichloroethene (cDCE), and tetrachloroethene (PCE) (Id.). An earlier figure presented by Baker includes contours of TCE (Figure 1). Contaminants occur in at least three hot spots, but there is no evidence of how they vary with time. Neither the RIR figures nor Appendix A present data that can be analyzed for trend because samples are spot measures, not monitoring points, meaning they extract soil at distinct locations rather than measure concentrations in place.

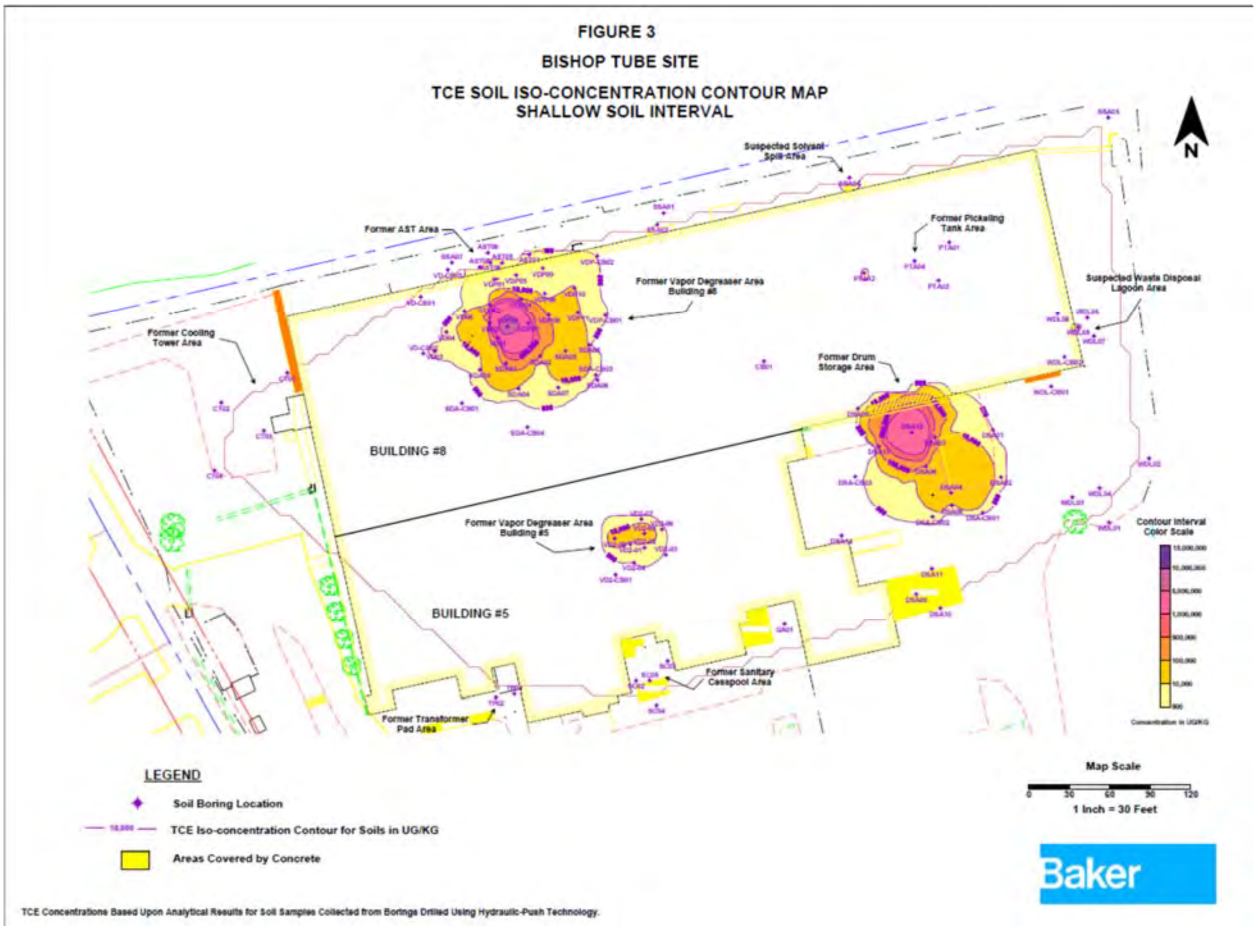


*Figure 1: Concentration map for TCE prepared by Baker 2003).*

Roux collected additional data from known hotspots and PADEP investigated reports of other potential hot spots, with Roux analyzing split samples, but did not find any. There does not appear to have been a systematic sampling of soil beneath the site. Without sampling on a grid, it is impossible to rule out the existence of other soil surface hot spots.

Without time series plots of the mass of contaminants including TCE and the various breakdown products, it is not possible to assess whether the mass in soils is decreasing, as might be expected as precipitation leaches mass from the original sources.

The groundwater analysis erroneously assumes that the soils, meaning unsaturated materials above the water table in the overburden, will be removed. This means the analysis assumes there is no contaminant source in the unsaturated zone leaching into the groundwater long term. Assuming total removal of the source renders predictions of the evolution of the plume inaccurate if removal does not actually occur and renders the use of the model, discussed below, to assess remediation useless.

**Groundwater TCE Concentrations by Well**

RIR Figure 30A and B shows most recent TCE concentrations for monitoring wells in the overburden, shallow, intermediate, and deep bedrock groundwater, respectively. Because the observation dates vary from 2014 to 2018, with a few being even earlier, the maps are not a snapshot in time. However, discussions throughout the RIR alleging concentrations are steady state or falling imply these figures are somehow a maximum observation.

The TCE concentrations by depth in RIR Figure 30 tell a story of the TCE sources and migration. In the overburden, the highest concentrations occur under one portion of Building 8; the remaining overburden wells throughout the area of the building show detectable but lower concentrations. Northeast of the source in Building 8, concentrations are higher in shallow bedrock than in the overburden. This is at an angle to the flow path expected based on groundwater gradient which suggests regional flow and contaminant advection should be due north. However, Figure 30 shows that in the overburden (MW-49A and MW-60) and the shallow bedrock (MW-7, MW-14D, MW-49B and MW-50A, B), little TCE moves in that direction and TCE is almost nondetect north of Lancaster Blvd.

Overburden wells north of Lancaster Ave and east of LVC, northeast of the site, have relatively higher TCE concentrations than found in the overburden on the northeast portion of the property away from the sources. Shallow bedrock wells there have higher TCE than occurs in the overburden. TCE at depth north of Lancaster could be from vertical movement because of limited horizontal conductivity and even connectivity in the fractures at depth. Transport to those wells appears to be through shallow bedrock and a preferential pathway in deeper bedrock. MW-51 (all levels) and MW-79A show very high TCE concentrations in an area offsite near Lancaster Ave between the site and the area north of Lancaster Ave. Well MW-26B shows high concentrations in the northeast of the site. The high TCE concentrations at these wells could reflect transport and measurements along a specific fracture that is not monitored either further up- or down-gradient. This pathway should be better delineated to identify targets for treatment.

TCE concentrations on the site around Building 8 are higher at depth than in the overburden or shallow bedrock due to the tendency for TCE to disperse vertically downward because it is denser than water. Only at the source is the concentration at Building 8 high in shallow aquifers. MW-78 demonstrates the short-term variability of TCE concentrations in shallow bedrock and that the AOC continues to be a source that leaches during recharge events. This well is located near the center of the AOC in NW Building 8 and has screens in bedrock from 85 to 110 (A), 262 to 287 (B) and 340 to 400 (C) ft below ground surface (bgs), respectively. In just two years, the shallow well decreased from 10,000 ug/l to non-detect and then increased back to 15,600 ug/l; this demonstrates a slug of TCE transported through the aquifer layers, likely with a significant downward gradient. MW-78B fluctuated between 21,500 and 93,600 ug/l and MW-78C between 147,000 and 233,000 ug/l. The proportional fluctuations at depth are likely less than higher up because the K at depth is lower so groundwater and TCE moves slower and thereby accumulates. Recharge events cause this temporal variability, but the RIR does a poor job in considering these variable sources. Unless treatment removes these sources, high TCE concentrations at depth will continue for a very long time.

DNAPL is likely the source of very high TCE in wells under the northwest and northeastern portions of Building 8 (RIR Figure 30B). It is likely bound in the bedrock and slowly dissolving into the groundwater. The slow movement of groundwater at depth allows the concentration to become very high. There is insufficient well density, however, to know whether preferential flow causes some TCE to move far from the source, however it could be part of the fracture trace discussed above. For example, MW-44C had TCE equal to 694 and 646 ug/ in 2017, but it appears to be downgradient of MW-43C which had TCE equal to 27 ug/l; this suggests there could be very narrow pathways for TCE to move from DNAPL sources downgradient. The paucity of sampling also allows many areas that could be substantial sources to have been missed or remain unknown for these studies. Remediation plans will miss the DNAPL sites due to poor sampling.

DNAPL resident in bedrock will be a long-term source of TCE to bedrock groundwater at the site if it is not properly remediated. For this reason, an accurate map of wells that potentially have DNAPL is necessary. RIR Figure 47 is grossly insufficient because it is not a systematic assessment of DNAPL. There has not been a systematic drilling program to various depths to identify DNAPL. Areas on the map without wells with potential DNAPL will be inappropriately assumed to be free of DNAPL and not receive the remediation treatment they require.

In summary, TCE concentration maps show two trends for TCE emanating from the source in Building 8. After dissolving into overburden and shallow groundwater, it flows northeast to the area north of Lancaster Ave likely through a preferential flow zone. This should be identified and be a target for treatment. Some TCE disperses to deeper bedrock. At the site, DNAPL has settled into deep bedrock which causes very high TCE concentrations at depth. These areas must be treated or they will be a long-term source of TCE to the groundwater that will spread downgradient.

**Groundwater TCE Concentration Contour Mapping and Errors**

The RIR presents TCE concentration contours in two figures, Figures 45 and 46, developed in the groundwater model discussion presented in RIR Appendix S (the model is reviewed below). Roux hand-contoured contours from 10 to 100,000 ug/l (logarithmic spacing) based on 2012 to 2014 groundwater quality data for both figures. The figures claim they used the maximum concentration from that period (which means the concentrations used for the mapping differ from those presented in Figure 30 and discussed in the previous section), therefore the figures do not represent a point in time. The description of the contours indicates the contouring was for just shallow bedrock (RIR, App S, p 11), although the figures show both overburden and bedrock wells. For nested bedrock wells, Roux used the highest concentration regardless of depth, so the plume map cannot be said to represent a given level in the bedrock. Some wells have higher TCE at depth, so the map would be representing deep bedrock at those wells. The 5 ug/l contour, developed in part using the groundwater model, is the only difference between Figure 46 and Figure 45.

Concentrations in overburden wells SMP-2 through SMP-5, adjacent to the LVC tributary east of the site, far exceed the mapped contours. For example, TCE concentrations at SMP-2 is 245 ug/l although it is outside of the 5 ug/l contour[2]. The concentration at SMP-1 on the same date is 802 ug/l although it is between the 5 and 10 ug/l contour. The SMP wells are shallow, with screens from 5 to 10 or 6 to 11 ft bgs. These observations show the TCE has certainly expanded further east toward General Warren Village in the overburden than Roux estimates in the bedrock, although the basis for the 5 ug/l contour is unclear since Roux does not present any contoured model outputs, and these results contradict earlier multi-level modeling (Baker, 2004). There are insufficient wells east of LVC in the General Warren Village to accurately identify the extent that TCE has reached within the subdivision.

TCE concentrations vary substantially with both location around the area and with time at all levels. Therefore, the TCE contour maps as presented in the RIR has errors and uncertainties as

[2] Table B-1 presents a time series of concentrations for all wells

represented by the rapid fluctuation of TCE concentrations in various wells and the lack of a single consistent date for a sampling event. Continuing recharge of TCE is one cause of short-term variability.

TCE extends far from the original site, as demonstrated by the plume shown in the RIR and by the changes in the mapping suggested here and represents a potential threat to human health and the environment.

**Groundwater TCE Trends and Roux's Half-Life Analysis**

The trend of TCE is quite variable as described above due to the sources being intermittent and controlled by recharge events. Recharge and rising/falling water tables also affect the rate of flow through the aquifers. The RIR indicates there is a general decreasing trend in TCE and other VOC concentrations at the site and it near offsite wells, but time series graphs in Appendix B show the trend is not consistent across the site. The RIR concluded that the general decrease in TCE at the site can be described as having a half life of 2200 days (6 years). This implies the average TCE concentration decreases by half every six years. So many gross assumptions go into this estimate that it is useless.

Half-lives as calculated by Roux display a significant bias. First, the half-life estimate is an average of half-life estimates at approximately 30 wells on the site that have at least 4 data points over at least 4 years with evidence of attenuating TCE concentrations (RIR p 70). Roux only considered wells that show TCE concentrations are decreasing. This biased the analysis by not considering wells with steady or not decreasing concentrations. Other biases come from mixing wells that may have little in common, as the following paragraphs describe.

Wells from different levels or aquifers have different TCE sources. Shallow groundwater TCE is likely sourced from TCE deposits in the unsaturated zone or deep groundwater TCE from DNAPL deposits in the bedrock. Differing transport and dissolution rates in the different media would cause different rates of change. Additionally, the distance from the source affects the concentration trends. Even if the source were decreasing, concentrations at a distance could be increasing while those near the source are decreasing.

Simple averaging of the values determined from such variable monitoring well is improper. In statistical terms, the data has been drawn from wells that are not part of the same data set. Some are bedrock, some are overburden. Some are increasing or decreasing due to distance from the source. They should not be treated as representative of one source.

In summary, the soil source continues to leach sufficient TCE to keep TCE concentrations in wells under the site high. There are insufficient monitoring wells to fully identify the plume or its trend with time along the preferential pathway. Many factors affect the concentration and its changes with time. At depth, DNAPL bound in bedrock continues to dissolve causing very high TCE concentrations at the site that are a continuing source for transport downgradient. It is not possible to define a decay rate for TCE that applies across the site.

**Surface Water Trends**

Groundwater at the Bishop Tube site eventually discharges to surface water. Shallow groundwater discharges to and supports the LVC tributary just east of the site and to a ditch that bounds the north side of the site and flows east. RIR Figure 40 shows 2014 TCE concentrations in the stream and springs. The highest surface water TCE concentrations are near the BT site, specifically at the northeast corner of the site, but are detectable as far as a site beyond Conestoga Ave (SW-11). The decrease in concentrations going downstream is not evidence that TCE does not discharge into the stream beyond Conestoga Ave. The RIR claims incorrectly that "absence of a marked increase in CVOC concentrations in this stream segment supports the conclusion that CVOC contributions from groundwater … are largely limited to … the northeast corner of the Property" (RIR, p 139). Stream concentrations would decrease due to a groundwater inflow with concentrations lower than that in the stream even if the additional load is substantial. The TCE mass could have increased if there are TCE discharges into the stream below the site. The RIR analysis is not evidence that TCE does not enter the stream downstream of the northeast corner of the property.

In the data relied on by Roux, concentrations at SW-4 and SW-5 have decreased between 2003 and 2018. However, the data is not controlled for flow which could cause the concentrations to fluctuate due to the amount of dilution.  The most recent dry season value, September 2018, is the lowest compared to previous samples (the November 2018 value is a wet period and therefore more diluted). Separating the data into wet/dry conditions based on precipitation in the previous couple days is not sufficient because groundwater discharge varies based on groundwater levels which depend on a much longer period of antecedent moisture conditions. Any analysis of trend is in error because it does not consider load.

Tables showing average statistics for groundwater or surface water concentration are useless. This is because the inherent assumption is the data is stationary. Statistics of data that could be trending and which differs depending on antecedent conditions is meaningless.

**REMEDIATION**

The FS considers various remediation strategies which form the basis for the choice made by DEP. Many sections repeat information provided in the RIR and are not further reviewed here. This section considers aspects of the FS that are new and necessary for understanding and selecting a remediation scheme.

**Functional Areas**

The FS distinguishes functional areas (FA) for groundwater, surface water and DNAPL. Soil is not considered because the FS does not consider soil remediation. The FS designates DNAPL as technologically infeasible to remediate, so the area is not considered here. Figure 2 shows the functional areas.


*Figure 2: Snapshot of part of FS Figure 17 showing functional areas as identified for remediation of organic contaminants. There are three onsite areas, GW-1a, b, and c, and two offsite areas, GW-2a and b, and LVC and tributary east of the site. The purple areas are DNAPL FAs. Each groundwater FA has a shallow (overburden and shallow bedrock) and deep (intermediate and deep bedrock) layer. GW-1d is an area of inorganic contaminants that includes most of the three onsite areas (not shown).*

The surface water FA is the LVC reach with average TCE greater than 2.5 µg/l. The three onsite groundwater areas link to the three main TCE source areas and include shallow and deep divisions; the shallow groundwater is overburden and shallow bedrock and deep groundwater is intermediate and deep bedrock (shallow, intermediate and deep correspond to various maps of TCE concentrations in the RIR). There is also a groundwater FA for inorganics (not shown on Figure 2) that covers most of the three areas set aside for organics.

The offsite areas include too little area. The GW-2a area is area between the northern property boundary and the south side of Lancaster Ave. There is no hydrogeologic or TCE concentration evidence that supports Lancaster Ave as a boundary. There are numerous wells with substantial TCE concentrations extending northeast from the site under Lancaster Ave that should be included for remediation with higher concentrations south of Lancaster Blvd. The northern boundary of GW-2b area is LVC. This implies that the stream is a sink boundary into which groundwater flows rather than extending north. There is no evidence supporting this, even if the stream is gaining. There are no monitoring wells at any level near but north of LVC (RIR Figure 30), therefore there is no evidence that groundwater does not flow to the north beneath LVC.

The calculation of volume of media requires the determination of thickness of layer. FS Table 2 shows the bottom of bedrock is 420 and 240 feet for areas GW-1a-D and GW-2a-D, respectively. The FS fails to explain the choice of depth. The choice appears to coincide with the depth of wells, but it is not reasonable to assume there is no TCE below these depths; this is especially true considering the DNAPL is heavier than water and has settled to a depth that has not been identified.

Because the site is abandoned and not being used, the analysis identifies "no current unacceptable human health or ecological risk" (FS p 5). The FS then implies that remedial actions could make the site worse (Id.) which allows Roux to imply current conditions are better than conditions that could occur due to remedial actions. There are numerous actions and mitigations that would prevent these problems if implemented. The FS highlighting of the problem without considering a solution instills a bias in the reader or decision maker.

DNAPL has been designated as technically impractical to remove due to its depth in fractured bedrock (FS p 6). Specifically, its high specific gravity (it is heavier than water, so it sinks), the reduction in fracture frequency and connectivity, decreasing fracture transmissivity, and matrix diffusion limits the vertical movement of DNAPL (Id.). The DNAPL has entered the pore spaces of the rock including the bulk media, from which it could diffuse into groundwater for as long as it remains. Because it is below the water table, in rock and at depth, the analysis assumes there is no direct exposure pathway for DNAPL from bedrock. There has been no risk analysis performed regarding the risks of leaving it in place. For example, all groundwater eventually discharges to surface water, but Roux does not consider the ultimate destination for TCE-laden groundwater in deep bedrock.

Roux assumes the property would be developed for nonresidential uses only (RIR p 3, FS p 2), even though it has been rezoned for residential use and current development plans are for residential development (FS p 10). The analysis uses the nonresidential use assumption to claim that “current exposure pathways” (FS p 4) do not cause a risk to “any existing receptors or the LVC tributary” (Id.). The no residential use standard therefore allows the analysis to consider less remediation. The RIR therefore fails to describe the extent of the needed remediation and the FS fails to identify strategies based on the actual site requirements.

The only pathway discussed for future residential development is vapor intrusion, for which there is an assumption that “pathway elimination measures” will protect the residents (FS 39); there is no analysis of these practices, and no analysis of the proposed residential plans to determine whether they incorporate any such measures.

**Remediation Alternatives**

The FS considers seven alternatives for remediation, including no action (1), monitored natural attenuation (MNA, 2), in-situ chemical reduction (ICR, 3), in-situ chemical oxidation (4), enhanced reductive chlorination (5), two-part in-situ chemical oxidation (6), and hydraulic control (HC, 7). Except for HC, the five action alternatives result in the use of natural or enhanced breakdown of PCE and TCE. PCE breaks down to TCE. Breakdown products of TCE include 1,1-DCA, 1,1-DCE, cDCE, and VC (RIR, p 69). Vinyl chloride (VC) is potentially more toxic than TCE and its presence as part of remediation is important.

MNA is basically just monitoring the on-going natural attenuation. It assumes there will be a continuing decrease of TCE concentrations. It also relies on the source decreasing or being eliminated. Roux predicts it would require more than 30 years, although the FS does not provide details used for the prediction. DEP estimates it could take decades even if the soil source is removed. The time for natural attenuation clearly depends on what happens to the sources in the soils and the location of DNAPL which is dissolving into the groundwater. The FS fails to consider this and therefore does not provide a reasonable assessment of the period required for MNA to occur. The FS also fails to consider the breakdown product and the period over which they will remain in the groundwater or whether they may be more damaging. As noted, VC is potentially more toxic than TCE.Alternatives 3 through 6 involve injection of various chemicals to cause the TCE and other contaminants to degrade or decay more than they would if natural attenuation is the only strategy used. These include:

- Alt 3: in-situ chemical reduction (ISCR) using zero-valent iron (ZVI) components to reduce the organics and the metals in GW-1D
- Alt 4: in-situ chemical oxidation (ISCO) using alkaline activated sodium persulfate for organics and the ISCR agent to reduce the metals in GW-1D
- Alt 5: enhanced reductive dichlorination using molasses and biological amendments for the organics and the ISCR agent to reduce the metals in GW-1D
- Alt 6: a two-part ISCO method with sodium permangate followed by liquified activated carbon and the ISCR agent to reduce the metals in GW-1D

Figures 3 and 4 show the locations proposed in the FS.

The FS relies on yet-to-be-done studies to identify which chemical additives would be most effective. As noted for MNA, the fate and type of breakdown products resulting from the enhanced reactivity, the concentrations of which could increase more quickly due to injection, have not been considered. Part of the needed study is a determination of the relative toxicity of the breakdown products and their transport properties. If a breakdown product moves more quickly through the groundwater, it could create a plume that covers a larger area if it moves faster than TCE and/or does not further degrade. These studies should provide parameters that would allow the calculation of the required for complete remediation. The FS fails as a decision document because there are no estimates of the effectiveness of various chemicals or the time for them to work.

None of the injection points would be in deep bedrock. The FS claims highly fractured bedrock as found in the deeper layers is too difficult to target with injection. Because the groundwater flow is so slow, the TCE and other contaminants will mostly remain in the deep groundwater onsite until they naturally attenuate (use of MNA for deep bedrock since monitoring will continue). Because DNAPL occurs at depth, as determined in the RIR, deep bedrock groundwater onsite will likely remain contaminated for a very long period and eventually contaminate downgradient unidentified surface water. Institutional controls (ICs), primarily a prohibition on developing onsite groundwater, are not a substitute for treatment.

The location of injection sites is the same for the four injection alternatives. Both onsite and offsite, the injection locations include the DNAPL locations and groundwater directly beneath the surface sources. DNAPL locations are areas where TCE concentrations exceed 1% of its solubility (about 14,720 µg/l) or where there were signs of DNAPL in the wells or observed during well construction.

The injected chemicals are more viscous than water. Therefore, they will remain close to the injection point rather than moving quickly with groundwater flow. Especially in the shallow bedrock, the injection solutions would flow through the more pervious fractures. Because the solutions would probably be heavier than water, they would sink deeper into the fractures rather than move as part of the groundwater flow. There would be a chance for the amendments to flow into lower permeability fractures, through diffusion and dispersion, just as groundwater otherwise moves into those fractures. Because of the high viscosity and being heavier than water, the treatments would be effective only near the point of injection. The FS does not analyze the radius over which it could be effective as it must do before DEP can select a density of injection locations. The FS also does not consider injecting chemicals directly into deep bedrock, even into obvious hot spots under or just northeast of the site. This is a failure that would allow a substantial amount of TCE go untreated and remain as a source in deep bedrock.

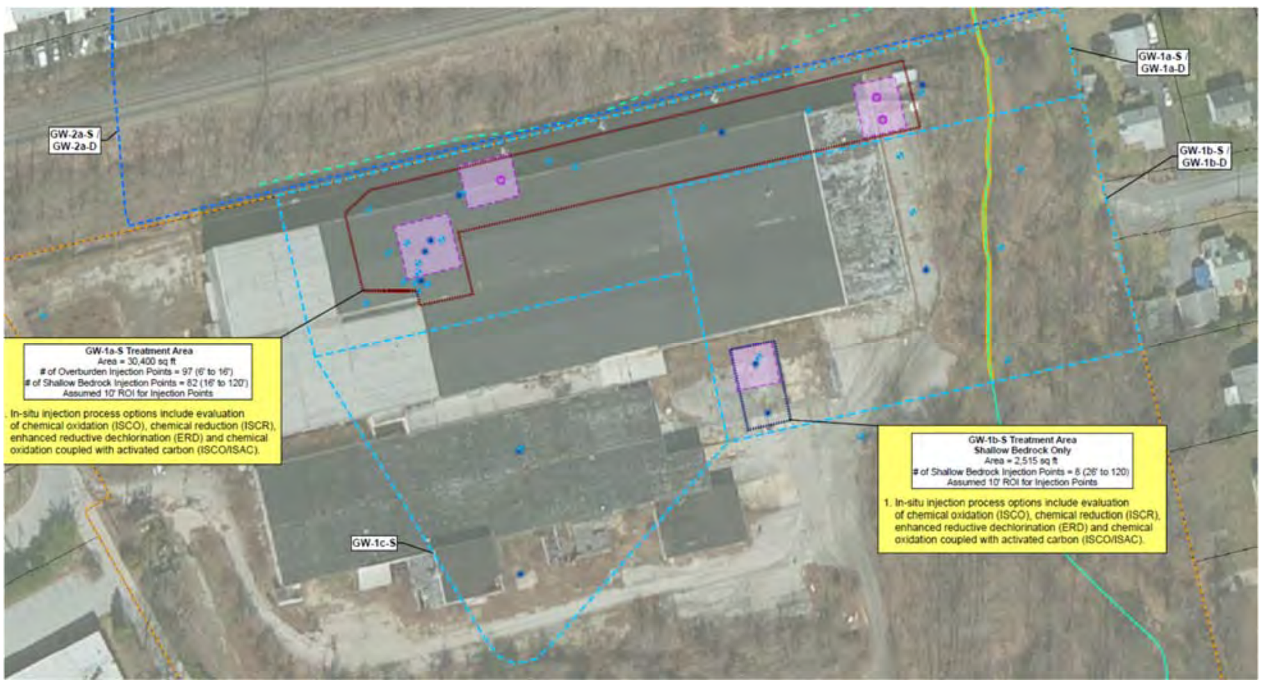


*Figure 3: Snapshot of FS Figure 19b showing the onsite areas for injection in alternatives 3 through 6 in FS GW-1a-S and GW-1b-S. The outlined injection sites would include points located based on 10 ft radii of influence with wells in both the overburden and shallow bedrock layers. There would be no injection into GW-1c or into deep bedrock.*


*Figure 4: Snapshot of FS Figure 20b showing the areas for offsite injection in alternatives 3 through 6 in FS GW-2a-S. The outlined injection sites would include injection points located on 10 ft radii of influence in the overburden and shallow bedrock layers.*

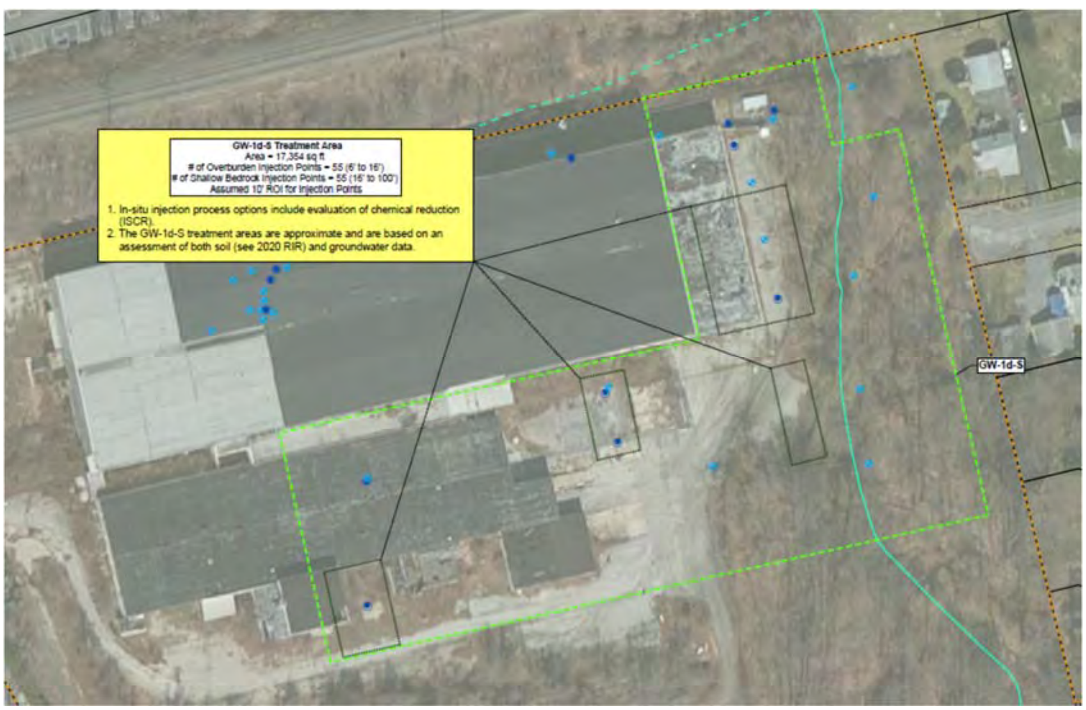


*Figure 5: Snapshot of FS Figure 21b showing the areas for injection in alternatives 3 through 6 to treat metals in FS G-1d-S. The outlined injection sites would include injection points located on 10 ft radii of influence with wells in the overburden and shallow bedrock layers.*

The FS raises the same implementability issues for all injection alternatives. The RIR repeats the following section in several footnotes to describe issues with these alternatives. These concerns are also raised individually for each alternative:

> Potential deleterious effects exist for this in-situ injection RA. Injecting in-situ amendments in fractured bedrock is complex and injecting large quantities of amendments in immediate proximity to the LVC tributary also poses significant implementability concerns (e.g., human health and/or ecological risks that do not currently exist). Implementation concerns include a) dissolution of adsorbed-phase COCs and a consequent increase in the rate of discharge or migration of these COCs, b) discharge of the amendments themselves into the adjacent stream, c) injection measures could modify the groundwater flow and COC transport conditions which could cause undesirable conditions such as creation of VI exposure routes that do not currently exist, d) injection measures/amendments could be incompatible with observed natural attenuation mechanisms active at the Site, e) injection measures could cause COCs or the amendments themselves to discharge at land surface (i.e., "day-lighting") and potentially produce adverse effects on human health and the environment, f) ineffective delivery of the amendment to the desired treatment intervals, g) loss of amendment to less-impacted but more transmissive bedrock fractures (i.e., not the desired fracture network where high CVOCs are located), h) loss of amendment to subsurface infrastructure (e.g., the abandoned AS/SVE piping network), i) rebound effects after treatment including anticipated matrix back diffusion, and j) amendments to treat inorganic COCs in groundwater will not treat fluoride. (FS, p 100, footnote 106)

These implementability issues are theoretically legitimate from a hydrogeologic perspective but were poorly considered in the FS and are relatively easy to counter in practice. Tests could show if the amendments would dissolve adsorbed COCs but leaving them in place simply allows them to remain a source until they naturally desorb and move. The concern that the amendments, desorbed COCs or breakdown products could reach LVC is also legitimate, but mitigation could include changing the point or rate of injection, the use of cutoff barriers or hydraulic control to prevent them reaching LVC or otherwise daylighting onto the ground surface. (See the discussion below on combining injection with HC.) The FS does not present an analysis, theoretical or experimental, of interactions between chemicals and natural attenuation. The concern with creating VI exposure routes is fallacious since the studies have minimized the idea such routes existing near the site and future development would be required to prevent such routes. Concerns about ineffective delivery or loss of amendment to transmissive fractures can be overcome with proper design, including close spacing of injection sites, and with adaptive management; monitoring so that adjustments in product placement could be made are necessary. As for rebound effects, if the treatment shows significant decreases for each application, it is simply a matter of continuing the treatment until rebound effects cease.

Alternative 7, hydraulic control (HC), differs from the other alternatives by pumping and treating contaminated water. Contrary to the in-situ injection methods, it treats the water above ground and reinjects it to the groundwater. Figure 6 shows that a zone of pumping wells would line zone GW-1a on the east and northeast, the direction of likely flow through shallow groundwater to the northeast.

HC does not target onsite sources, so it does not quickly remove large amount of contaminant mass. This alternative would require substantial time to remove substantial mass of TCE or other contaminants. A huge problem with HC is that HC would pull water through the fractures more rapidly than groundwater flows naturally. There would be a significant tendency for the majority to pass through the larger fractures. As the gradient increases, the amount of flow from the larger fractures would increase more rapidly than from the small fractures. Much contaminated groundwater would be missed. Additionally, drawing overburden water could intercept groundwater flowing to LVC thereby decreasing stream baseflow and potentially drying groundwater dependent wetlands. Pumping at lower rates would decrease the effects on the LVC but would also make the alternative less effective.

Offsite HC would focus on pumping near the DNAPL source areas (Figure 7). The northeastern most extraction area is near the very high TCE MW-79 and MW-51. The westerly extraction site is at the high concentration site MW-28. However, extraction would be from shallow bedrock and the high TCE concentrations are in the deep bedrock. The alternative would not pump from near the source but would simply remove mostly clean water above the source. The FS does not consider the value of capturing groundwater near the source in deep bedrock.


*Figure 6: Snapshot from FS Figure 19a showing location of extraction and reinjection zones for alternative 7.*

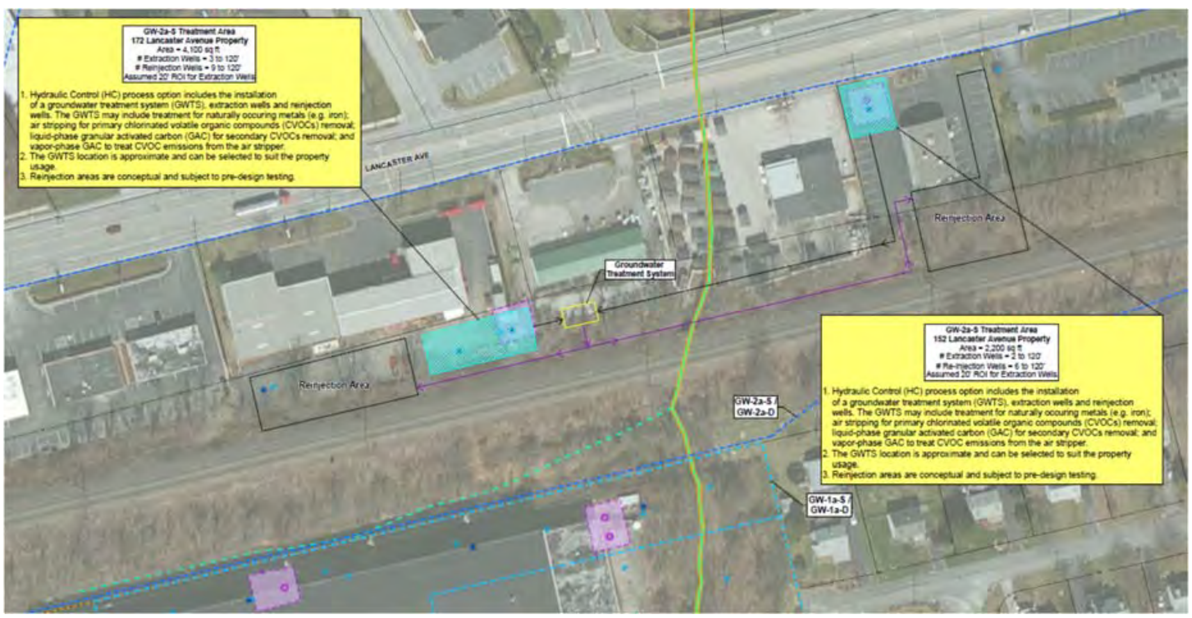


*Figure 7: Snapshot from FS Figure 20a showing location of extraction and reinjection zones for offsite areas for alternative 7*

The FS did not consider an additional alternative that would combine an injection alternative with an HC alternative to overcome some of the implementability issues with the injection alternative A line of collection wells downgradient and between the injection wells and LVC could prevent the unwanted products of injection from reaching the streams or daylighting into wetlands if properly designed. HC would only be necessary if monitoring detected transport of COCs to the creek. The FS failed therefore to analyze what could be the most promising alternative.

**Best Management Practices**

Alternatives 2 through 7 use BMPs to address effects of the alternatives on surface water, specifically LVC (FS, p 98).

Proposed BMPs include methods designed to prevent contaminated surface water from reaching LVC and to intercept contaminated groundwater before it discharges to LVC. Roux claims the primary BMP for LVC is MNA (FS Appendix D, p 1). However, Roux does not estimate the time required for the stream to naturally recover to occur. Because LVC receives groundwater discharge from the entire site, recovery of the entire site would be necessary for the ongoing degradation of LVC to cease. Natural recovery would depend on the portion of the site that takes the longest, meaning that MNA alone would take as long as the longest natural attenuation period on the site – an unacceptable fate for LVC.

The first BMP proposed is that the six primary source regions, three for CVOCs and three for metals (Figure 8), be capped with an impervious layer. There is no consideration of how this would work with future development of the site. There is no consideration of the need for an impervious cap if the source within the soil is completely removed. There is also no consideration of a water balance barrier which would use most of the infiltration for plant growth and limit infiltration of CVOCs substantially.

Stormwater runoff will reach the LVC tributary if the site is developed. FS Appendix D suggests the use of bioretention areas adjacent to the west side of the LVC tributary to cause runoff to infiltrate. Bioretention areas would be a mixture of sand, soil and organic matter into which runoff would percolate. The runoff would then percolate into groundwater before reaching LVC. However, the bioretention area would only remove sediment, not dissolved CVOCs that could reach the creek. The RIR does not provide any samples of surface runoff, so there is no evidence regarding the quality of storm runoff from the current site.

The FS does not provide calculations as to the size of the bioretention area, but merely states it would need 4200 square feet (FS Appendix D, p 2). The FS failed to consider the volume of runoff that would have to be captured (dependent on the return interval of storm from which sheet flow runoff would be infiltrated) and calculate the needed site of bioretention area. The

FS failed to consider the infiltration rate, the rate of seepage into surrounding groundwater, and the water volume that could be held.

The third BMP is the use of rows of poplar trees as a “phyto technology” area to intercept groundwater flowing to LVC. Supposedly, each tree would take up and transpire 10 to 25 gallons of groundwater per day thereby sequestering contaminants dissolved in the water (FS Appendix D, p 2). This would decrease groundwater inflow to the creek. There is no evidence presented that a plan such as this could work or references to sites where this as worked. The plan also fails to consider the period during which the trees are becoming established. It also does not consider the effect on baseflow in the stream.

The FS failed to consider the use a line of shallow wells between LVC and the site as a BMP. The wells could be pumped whenever monitoring indicates that COCs are moving toward the creek. The water could be treated either on or offsite and reinjected at optimally located points so that the pumping does not affect the flow in LVC.

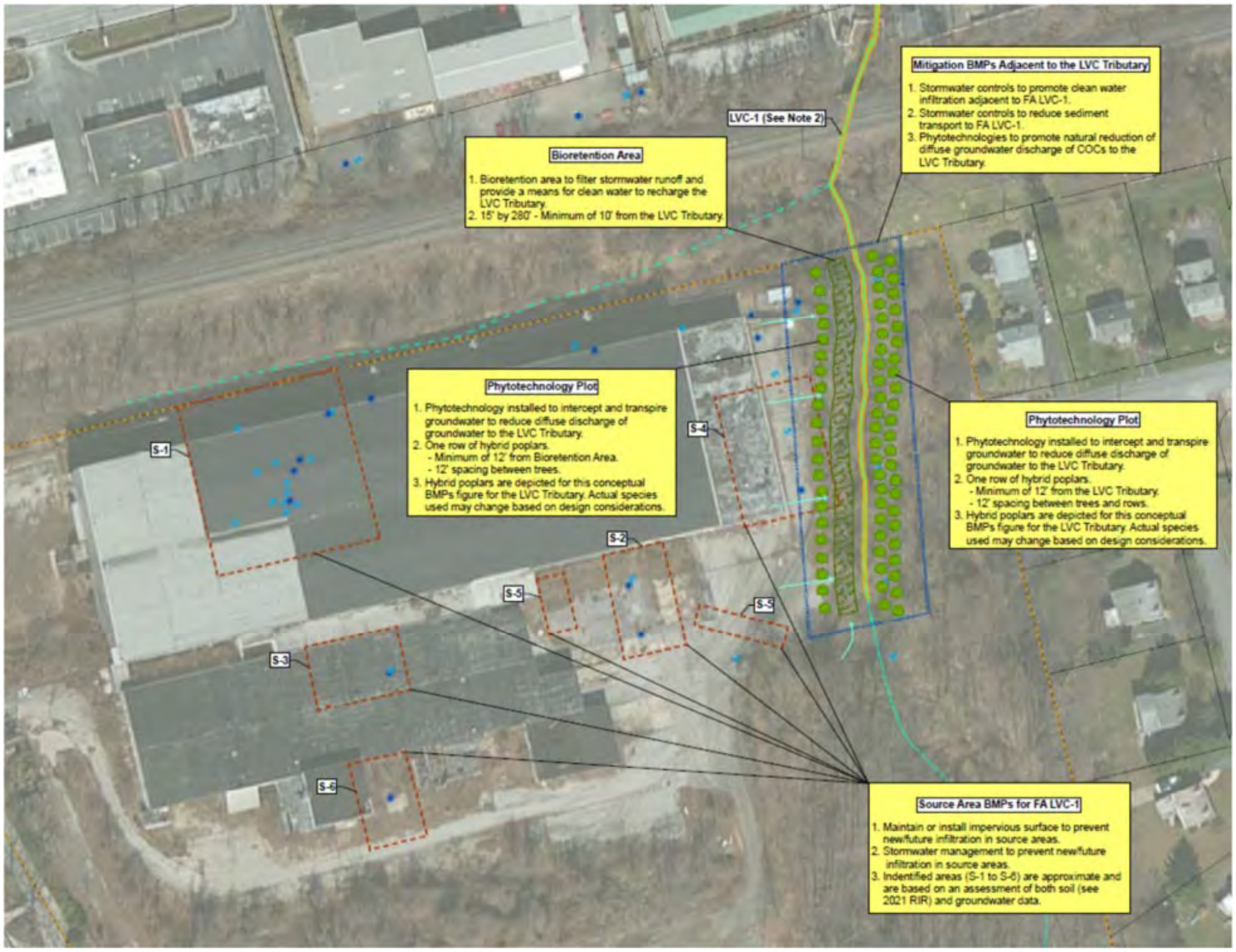


*Figure 8: Snapshot of FS Figure 22 showing the conceptual design of best management practices to protect LVC.*

**FS Addendum**

Roux prepared an addendum to the FS report after DEP reviewed the seven alternatives reviewed above. The FS Addendum identified an eighth alternative, which is essentially a combination of alternative 2, MNA, part of alternative 3, ISCR, and a soils remediation alternative.

The soils remediation would involve using ISCR to treat in place the unsaturated soil at two locations (Figure 9), AOC 1 (Building 8 vapor degreaser area) and AOC 9 (Drum storage area near Building 5). The soil would also be mixed in place to enhance the placement of the ISCR amendments. Groundwater alternative 3 would be reduced to utilize ISCR at just two much smaller onsite locations (Figure 9) rather than the areas shown in Figures 3, 4 and 5. There would be no treatment of offsite areas north of the site.

This new alternative 8 leaves substantial TCE in the groundwater and is even less effective than other FS injection alternatives. This alternative leaves many areas, especially the high TCE concentration in the preferential flow zone offsite north of the northeast corner of the site.


*Figure 9: Snapshot from FS Addendum Figure 1 showing the location of the two areas to receive active soils and groundwater treatment.*

**Choice of PA DEP**

DEP chose an alternative that mixes soil recovery (OU1), groundwater remediation (OU2) and drinking water (OU3) into one decision in the AOA.

For soils, DEP chose to use an in-situ injection alternative which could use either reductive or oxidizing compounds into a mixed surface soil. The soil in the targeted areas would be mixed down to the saturated zone. The targeted areas would be as shown in Figure 9.

DEP's choice for soils is not acceptable because it will leave TCE in place at areas that will not be treated and will not treat all the TCE at the treated locations. Excavation can be much more effective. If sampling is performed to identify the highest mass loading of TCE, the excavation can be very focused. Dewatering the saturated soil would not be as significant a problem as DEP claims. If the excavations are limited as could happen with detailed sampling on a grid, the volume of groundwater removed near the excavations, lowering the water table at most a few feet for a short period should be manageable. The water could be trucked from the site for treatment and discharge elsewhere or reinjected into groundwater far upgradient from the LVC.

For groundwater, DEP combined FS alternatives 3, 4, 5, and 6 into a simple in-situ injection alternative but combines with the soil injection choice and only directly treats the two areas identified in the FS Addendum, the Building vapor degreaser and the drum storage area. It differs from the FS Addendum alternative 8 by allowing a full complement of injection amendments, leaving the final decision to future study. By not choosing which chemical addendums to use, DEP essentially admits it does not understand enough about the groundwater chemistry of the site. As noted above in the discussion of FS Addendum, treating just two areas would leave substantial TCE mass in place in the groundwater at the sites it does not treat. By not treating the offsite area GW-2a-S, the extent of the plume would not be contained nearly as fast as it could have been.

Throughout the FS, revised FS and DEP's decision document, there is a failure to consider the actions that have worked at similar sites. Roux or DEP failed to complete a detailed literature review of the remediation of other TCE sites or compare them to Bishop Tube. Decisions are being made at Bishop Tube without learning from similar sites.

## FATE AND TRANSPORT MODEL

Roux describes Fate and Transport in Chapter 10 of the RIR. There are various conceptual problems with this analysis, most importantly the reliance on a two-dimensional approach to flow and transport simulation for what is inherently a three-dimensional problem. The modeling is not even close to accurate enough to use for predictions of the fate of plume as various remediation scenarios are applied to it. The following section comments in detail on the modeling mostly described in the RIR Chapter 11 and Appendix S.

### Groundwater Fate and Transport Model

Roux completed a simple, two-dimensional groundwater flow and transport model to generally fill in the 5 ug/l contour in the plume mapping; the discussion is included in RIR Appendix S. The description is incomplete, and assumptions are necessary to understand how the modeling was completed. The page references in this section are to the model report in Appendix S unless otherwise stated.

Roux used the WinFlow/WinTran code to simulate a two-dimensional model of the shallow groundwater. The flow model WinFlow is analytic which means it relies on solutions of the differential equations so can accommodate only very simplified representations of the domain. WinFlow describes a flow field based on a grid over the domain. The model outputs water level and flow rates for any chosen point in the flow field.

The flow field is steady state which means that seasonal changes in the water level due to recharge events cannot be considered. Wet and dry season discharges to the streams cannot be considered.

The transport model uses a finite element solution based on the steady state flow solution on the grid. The transport model is transient for contaminant but cannot consider temporal changes in recharge rates. Roux's modeling only considers the movement of a plume described with initial conditions through the domain. No sources can be incorporated.

Roux calibrated the model to the 2014 observed TCE concentrations and simulated four years to 2018 for verification. Roux claims the verification shows that simulated concentrations match observed concentrations, but there is little evidence of this in the report. The concentration contour mapping is the exact same for initial and calibrated simulations.

Roux hypothesized a model thickness to be 500 feet (p 6) but the actual simulated thickness is less than that (and very poorly described). The model top and bottom were set equal to 500 and -100 feet (Table 1), but the constant head boundary at the upgradient end was set equal to 390 feet (p 8). At this boundary, the thickness would be 490 feet. Water level at the downgradient end is not specified, but the report sets a gradient equal to 0.019 ft/ft (p 8m Table 1), so with an aquifer length of 6000 feet, the groundwater level would be 276 feet, so the thickness reduces to 376 feet, assuming the aquifer bottom elevations are constant throughout the domain. The reducing thickness means the transmissivity decreases with length along the flow paths, but the flow velocity may not change because groundwater would discharge to the line sink boundary on the north of the domain.

The model assumes the aquifer is homogeneous, so the same parameters describe its entire thickness, which is as much as 390 feet. Roux provides substantial evidence that this is poor conceptual modeling but does it regardless. Specifically, the pores and permeability decrease with depth in bedrock, so conductivity also decreases with depth as noted (p 3). The parameters were based on shallow bedrock, so at depth the parameters describe media that is more permeable than reality which causes the model to simulate too much flow at depth. Second, Roux correctly notes that high TCE concentrations at depth do not represent a flow path because the fractures are discontinuous and do not represent a long-range flow path (p 3). There is "no expectation that the deep bedrock interval will produce higher groundwater velocities or a longer CVOC plume when compared with the shallow interval" (p 3, 4).

Roux claims it is conservative to treat the entire aquifer thickness with the parameters as described for shallow bedrock:

> Therefore, the fate and transport analysis focuses (sic) on the shallow bedrock conditions, thereby presenting a conservative/protective evaluation for all depth intervals. The entire vertical thickness of the affected bedrock aquifer was assigned the characteristics of the shallow bedrock interval as a conservative measure regarding TCE fate and transport analysis. (p 4)

This is not conservative and is indeed quite wrong, because, being 2-d, the model assumes that concentration is the same throughout the layer thickness. As contaminants enter a section of the domain, the model assumes that the concentration is spread evenly through the layer. TCE load that would otherwise be near the surface would be simulated at depth. The monitoring wells with multiple sampling portals show substantial variation with depth. In some areas, TCE is higher in the overburden and other areas the higher concentrations occur at depth, so the model is an oversimplification. Roux's explanation, as follows is meaningless:

> This conceptual modeling approach is validated through the existing groundwater quality data, whereby slight exceedances of groundwater MSCs are confirmed only in the two most downgradient shallow bedrock wells MW-81 and MW-82A (screened at depths extending to 26 feet and 85 feet below ground surface ["bgs"], respectively)7. Therefore, considering the above-stated modeling objectives, the shallow interval of the bedrock hydrostratigraphic unit represents the only zone for which calculation of a simulated downgradient plume boundary is necessary and is the pathway where the longest potential plume dimension is anticipated. (FS Appendix D, p 4)

That TCE has low concentrations in the two most downgradient shallow bedrock wells has little to do with modeling a thick aquifer, regardless of the objectives. Rather it justifies modeling just the upper 120 feet and somehow accounting for the TCE that settles into deeper bedrock. In fact, simulating the aquifer as thick as it proposes would cause more transport at depth. TCE is high onsite and without effectively isolating it, the model would simulate flow from deep below the site downgradient; higher flow velocities modeled at depth would allow the model to move contaminant load away from the project domain faster than occurs in reality. Predictions would be for faster attenuation as a result.

Roux cites the Sloto (1990) analysis as justification for a 2-d analysis. There are two problems with this. First, Sloto's analysis occurred in 1990 when the ability for models to simulate two or more layers was much less than it is currently because of the lesser computer power. Second, and more important, Sloto described a regional model where the details of local flow were less important. Sloto's model was for flow only and the effect of vertical gradients on transport was unimportant. Furthermore, there was already available a model for the site using multiple layers (Baker, 2004) that Roux could readily have adapted.

Vertical gradients are ignored in a one-layer model. Roux dismisses this by stating that vertical gradients are local (p 3), but this is exactly the point. The model cannot simulate the variable vertical flow which would affect the distribution of contaminants.  This assumption is most problematic near the stream where there is evidence for upward gradients and flow into the stream.  This could cause the model to underestimate discharge of contaminants into the stream. Only a three-dimensional flow/transport model could accommodate the issues regarding homogeneity and the lack of vertical flow. Many of the wells have multiple ports that could be used to calibrate a 3-d model.

The model ignores recharge that occurs across the site by assuming all flow enters at the constant head boundary (p 7). The model does not consider that recharge equaling about 15 in/y enters the top of the domain and therefore ignores a source of dilution. Rather than making the model conservative, the failure to consider recharge causes the calibration to adjust other parameters to match the observed conditions. Without considering recharge, the model cannot consider changes in transport due to changing loads and due to BMPs affecting recharge.

Boundaries provide flow sources and sinks to the model and partially control the groundwater level, but Roux describes them poorly. At the upgradient end, the boundary is a constant head set at 390 feet. Roux states the 390 feet is at a point, but a CH boundary is along the edge of the model domain so it is actually a line source.

The other described boundary is a line sink for LVC and its tributaries, which Roux describes as representing "a portion of LVC and its tributaries that has gaining conditions between Conestoga Road and Morehall Road" (p 7). This indicates that the model does not simulate discharge to the LVC tributary on the east side of the site or the gaining reaches upstream of Conestoga Road.  It fails to simulate the concentrating effect of having TCE-laden groundwater converge on the creek.

A line-sink boundary simply accepts groundwater discharge from the domain. The boundary would have an elevation which would control the downgradient elevation and hence the gradient through the model. Roux claims that LVC and tributaries are simulated with line-sink boundaries and Figure S-1 shows the stream and tributaries which could receive groundwater discharge, the description appears to allow only discharge downgradient of Conestoga Road (p 7). With the constant head boundary at the upgradient end, the boundaries impose a simplistic control on the flow through the aquifer, preventing flow from converging to the streams within the domain, such as the tributary just east of the site.  This may prevent the stream from simulating hot spots of TCE concentration.

LVC has reaches from which water discharges into the groundwater, so a boundary that can act only as a sink is not appropriate. The proper boundary for this simulation would be one that both receives and provides groundwater and contaminants to the aquifer.

Also, Roux considers it “conservative” to simulate the line-sink as receiving “discharge from shallow bedrock to LVC and its tributaries of approximately 75 gallons per minute over a length of approximately 2,500 feet” as compared to measured 237 and 171 gpm during previous surveys (p 7). Since this is the only outflow from the model domain, it causes flow and advection to occur slower, but it also allows more TCE to decay before it reaches downgradient portions of the domain. It would cause the model to simulate less TCE transmission off the site and constrain simulated future TCE contours.

Transmissivity changes through the model domain as the saturated thickness decreases. Because the line sink boundary borders the northern portion of the domain, the decreasing transmissivity would direct groundwater toward the boundary. However, decreasing the transmissivity must also increase the gradient to allow groundwater to flow through the domain cross-section. This means the Darcy flow velocity (flow rate over the entire cross-sectional area) must increase. This would increase the rate that contaminants transport by advection through the domain and from the model.

The model simulates flow that cuts across the regional potentiometric surface contours, which run generally east-west and show a north-south gradient of 0.05 to 0.04 ft/ft. Roux shifted the grid 32 degrees north of east to align with the flow/transport axis surmised from the TCE contour maps, and create a gradient of about 0.023 ft/ft, later calibrated to 0.019 ft/ft based on matching groundwater levels at various wells. That groundwater flow does not follow the steeper regional gradient demonstrates the control exhibited by fractured rock. The horizontal conductivity is highly anisotropic, which means the conductivity along the flow path (at a 0.019 ft/ft gradient) is much higher than the conductivity in another direction. This is a major reason that the simplifying assumptions used in this model are inappropriate.

Many of the simplifications critiqued above led to a poor calibration for the model. Roux used just 14 monitoring wells for calibration (p 9) and the statistics show the fit is very poor. The standard deviations and sum of squares are very high for a domain with such a small elevation range. The maximum absolute residual is about 28% of the total potentiometric head difference, a very high number (p 10). Although there is no “standard” for an acceptable model, 10% is often considered a decent fit. Roux dismisses concern with the high maximum absolute residual by noting the mean error is close to zero. Mean error being zero effectively means the residuals are scattered around zero and provides no information about the magnitude of those residuals. The high scatter of residuals is due to the model effectively trying to fit a flat surface (a plane based on one parameter set) through a curvilinear surface (the reality of a nonhomogeneous aquifer).

The model simulates concentration in three ways. It starts with an initial concentration, which is the observed concentrations from the 2012-14 contour mapping. Contaminants flow with the steady state groundwater flow and undergo dispersion, degradation, and retardation.

The model does not simulate TCE sources to the model domain. The mass initially present (as initial concentrations) is the only mass simulated as flowing through the system. It is effectively a slug of contaminant present throughout the aquifer at a given initial time. The model then advects and disperses contaminants through the aquifer and removes contaminants either by degradation processes or by discharging them into a boundary sink. For any future predictions, the model assumption is that sources in the unsaturated soils have been removed, and no leaching occurs from TCE adsorbed to soil or from non-aqueous phase TCE. The simulated graphs of monitoring well concentration show the movement of a slug of TCE passing through the system rather than a source providing TCE to the system.

TCE mass is removed from the domain in two ways. One is discharge into the line sinks that simulate LVC and its tributaries. Roux should report the amount that leaves the domain through the boundaries so it can be compared to measured values for calibration. Most of the TCE likely does not discharge in this way and therefore remains within the domain after adsorbing or disappears after decaying, the second way TCE is removed from the domain.

A half-life controls the rate that TCE decays within the domain. This means that half of the mass disappears in that period (the model does not consider its fate, so “disappears” is the proper descriptor). Even without advective transport removing mass from the domain, the simulated concentrations would decrease by half over that period. Roux used a decay half-life of 2200 days based on decay rate constants of 30 site monitoring wells. As described above, this decay value is meaningless.

Retardation is the process that the contaminant moves much slower than it would if controlled simply by advection, or transport with the flow of groundwater. Dispersion through pore spaces and adsorption to aquifer particles contributes to retardation (Fetter 1999). Retardation varies with depth at Bishop Tube because in fractured rock retardation increases in areas with lower fracture density (p 14). Adsorption and the process of a contaminant being bound in fractures would also contribute to estimated decay. Roux calibrated the model by adjusting the retardation coefficient and comparing the evolution of concentration with time. Degradation affects the observed concentrations, so calibration also causes the model to double count retardation. Roux's model double counts the effects of retardation; it withdraws mass from the plume inappropriately fast.

Roux calibrates the transport parameters by adjusting parameters so that simulated concentrations approximate the observed concentrations yields parameters based on there being no source of TCE to the groundwater, which is simply incorrect. Observed TCE concentration graphs show temporally variable values that reflect recharge events contributing TCE to the groundwater. Simulated concentrations often rise and fall in a steady pattern, but observed concentrations appear mostly random in comparison. The sources continue to leach TCE which affects the observed TCE concentrations; observed TCE increases rapidly in response to TCE recharge events. Without simulating the sources leaching contaminant into the groundwater, the calibrated parameters are meaningless.

The graphs of simulated concentration at various monitoring wells and hypothetical monitoring points demonstrate that the model simply advects TCE from the domain into the boundaries. For example, TCE at MW-51, which lies about 500 feet northeast of Building 8, starts at near 100,000 ug/l, which is about 70% of the actual observed value, decreases rapidly to about 12,000 ug/l by 2025 and approaches zero by 2035. Considering that this monitoring well has had high values for a couple decades, Figure S-3 demonstrates what would occur only if the sources are removed. A similar trend occurs for MW-15, which lies about 150 feet north of Building 8; a difference is that TCE increases in the simulation for the first few years from its initial (currently observed) values. Advection of the higher concentrations under the building causes the initial increase; after the mass passes, TCE concentration decreases rapidly because there is no source adding TCE to the system. Inadvertently, the model demonstrates the value in removing all TCE sources to the groundwater.

In conclusion, the groundwater flow and transport model is insufficient for predicting future conditions due to any remediation strategy proposed at Bishop Tube. The preceding the paragraphs outline the primary problems, but they include (1) treating the aquifer as two-dimensional flow, (2) not considering heterogeneity in the aquifer properties, (3) ignoring the change in properties with depth, (4) ignoring preferential flow, (5) not considering natural recharge, (6) not simulating contaminant sources (assuming all sources in the soils are removed), (7) improper boundary conditions, (8) reliance on a faulty half life analysis, (9) poor calibration, and (10) not consideration of transient loading.

## References


Baker (2004) Final Supplemental Groundwater Characterization Report, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania.

Baker (2003) Phase III Supplemental Soil Characterization Report, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania. Prepared of the HSCA Program, Pennsylvania Dept of Environmental Protection

Fetter CW (1999) Contaminant Hydrogeology, Second Edition. Prentice-Hall.

Roux Associates (2015) Remedial Investigations Report, Former Bishop Tube Property, Chester County Pennsylvania. Prepared for the Bishop Tube Project Team. August 31, 2015, Logan Township, NY

Sloto RA (1990) Geohydrology and simulation of ground-water flow in the carbonate rocks of the Valley Creek Basin, Eastern Chester County, Pennsylvania, US Geological Survey Water Resources Investigations Report 89-4169.

MALIN ROAD
ROAD 'A'
ROAD 'B'
ROAD 'C'
RAIN GARDEN #1
PARCEL #42-4-320
N/F
FRIENDS FIDUCIARY CORP.
PARCEL #42-4-295
N/F
BUCKEYE TERMINALS, LLC.
PARCEL #42-4-321.1
N/F
10 MALIN ROAD ASSOCIATES
N/F
SYLVANIA LINES, LLC
- 0.2'
- 2.1'
- 5.1'
- 7.3'
- 6.4'
- 2.0'
- 4.0'
- 8.7'
- 9.9'
- 9.0'
- 5.9'
- 3.0'
- 8.7'
- 2.3'
- 2.6'
- 8.1'
- 5.5'
- 8.2'
+ 3.8'
- 3.7'
- 3.4'
- 9.0'
- 4.7'
- 8.1'
- 8.6'
- 4.0'
- 0.8'
0.0'
- 5.5'
- 6.3'
+ 2.6'
- 2.3'
- 2.9'
- 0.3'
- 6.6'
- 1.9'
+ 11.1'
+ 4.4'
- 4.2'
+ 13.2'
+ 7.63'
- 0.8'
- 5.8'
- 10.0'
+4.0'
- 7.0'
- 7.7'
+ 4.1'
- 13.2'
- 6.5'
- 14.0'
- 13.2'
- 1.5'
- 11.0'
- 1.7'
- 13.4'
- 1.7'
- 3.5'
LEGEND
EXISTING
PROPOSED
MANHOLE
INLET
CONCRETE HEADWALL
FLARED END SECTION
UTILITY POLE
FIRE HYDRANT
SIGN
EDGE OF WOODS
SANITARY SEWER
STORM DRAIN
WATER MAIN
SANITARY LATERAL
ROOF DRAIN
WATER SERVICE
TELEPHONE LINE
ELECTRIC LINE
GAS LINE
GATE VALVE
TEE
PLUG(CAP)
CONTOUR LINE
GRADE
MEET EXISTING GRADE
TOP OF CURB ELEVATION
GUTTER ELEVATION
HANDICAP RAMP
CONCRETE CURB
EDGE OF PAVEMENT
CONCRETE
POROUS PAVERS
GRAPHIC SCALE
PREPARED BY:
meliora
Civil, Water Resources, and Structural Engineering
FOR THE DELAWARE
RIVERKEEPER NETWORK
12/07/2021
LEGEND
CONTAMINATED SOIL, TO BE REMEDIATED
PROPOSED DEP SOIL SAMPLING AREAS
TEMPORARY SOIL STOCKPILE AREA
EXISTING BUILDING, TO BE DEMOLISHED
PROPOSED STORM SEWER
PROPOSED SANITARY LINE
PROPOSED WATER LINE
+/- 0.0'
PROPOSED EXCAVATION DEPTH BELOW
EXISTING GROUND SURFACE

# ATTACHMENT 16

**Valley Creek Trustee Council**
**1400 North Outer Line Drive**
**King of Prussia, PA 19406-10009**

RE: Comments on the PA DEP Analysis of Alternatives and Proposed Response for the Bishop Tube Site – a.k.a. Remedial Response Action

The Valley Creek Trustee Council (VCTC) is composed of representatives of the United States Department of Interior and the Commonwealth of Pennsylvania. The Department of Interior is represented by Valley Forge National Historical Park (Valley Forge) and the Commonwealth is represented by the Pennsylvania Fish and Boat Commission (PFBC). The VCTC was established in accordance with the federal Comprehensive Environmental Response, Compensation, and Liability Act – otherwise known as CERCLA or "Superfund" Law – when the Valley Creek watershed was contaminated in the mid-1980's by polychlorinated biphenyls (PCB's), which ultimately led to a significant loss of angler use as well as direct damages to natural resources. Monies to compensate for natural resource damages and lost angler use were received through legal settlements with the responsible parties and placed into a restoration fund administered by the VCTC. The VCTC has the responsibility to use its restoration fund to restore the natural resources of the Valley Creek watershed by improving the aquatic habitat for trout and by increasing public access to Valley Creek by anglers. The VCTC is currently evaluating a grant application to fund the proposed acquisition of the Bishop Tube property for the purposes of open space. Prior to providing funding for the acquisition, the property must be remediated and not represent a continued threat to the exceptional value of the Valley Creek watershed.

After careful consideration of the available material, the VCTC has concerns about the PA Department of Environmental Protection's (PA DEP) proposed Remedial Response Action. These concerns include comments that refute the adequacy of the Remedial Investigation Report (RIR) and Ecological Risk Assessment (ERA) Report completed by Roux, which are foundational to the Remedial Response Action (RRA), and we have identified the following deficiencies.

1. During the metals manufacturing process hydrofluoric acid was used and fluoride was stored on site. Concentrations of fluoride in site groundwater (Figure 36 of the Roux Remedial Investigation, Table R-4) and surface water (Table R-3) warrant a determination of the source. Fluoride in groundwater is indicative of per- and polyfluoroalkyl substances (PFAS) degradation. Chromium was also used during manufacturing and it and hexavalent chromium remain on site as constituents of concern and continue to leave the site via groundwater and surface flows. PFAS are known to be associated with chromium processes.

   Publicly available information from the U. S. Geological Survey and PA DEP indicates that water samples collected in 2019 from DEP's water quality network (WQN) station 154 in Valley Creek at Wilson Road had a relatively high concentration of total PFAS at

103.3 ng/L. The total number of PFAS chemicals detected out of the 33 tested in the discrete sample was 10. Station 154 is 1.2 miles downstream of the confluence of Little Valley Creek with Valley Creek.

No sampling for PFAS has been done on the site or proximally off site. Based on these factors, we request that sampling for PFAS be conducted to determine if it is present on site or leaving the site, the specific chemical constituents and their concentrations, and locations of any hot spot elevated concentrations. Detectable concentrations of PFAS in groundwater, surface water and sediment should be screened against both human health and ecological benchmarks for risk assessment.

2. The Ecological Risk Assessment is inadequate for multiple reasons including the omission of assessments of the site-specific standards and the remedial alternatives. According to Title 25 Pa Code Chapter 250 regulations, a *risk assessment* is defined as "*a process to quantify the risk posed by exposure of a human or ecological receptor to regulated substances. The term includes base-line risk assessment, development of site-specific standards and risk assessment of the remedial alternatives."*

3. As DEP is aware, the VCTC is interested in protecting Little Valley Creek's aquatic resources and potential future recreational use by anglers. The Human Health Risk Assessment (HHRA) model needs to be run for potential future recreational users including anglers. While the HHRA correctly states that the PFBC currently regulates (Little Valley Creek) LVC as catch-and release fishing, this restriction could be changed in the future. Recreational fishermen could be exposed to chlorinated volatile organic compounds ("CVOCs"), other volatile organic compounds ("VOCs"), and toxic metals through direct contact with the surface water in LVC. Through ingestion of fish, they could also be directly exposed to these contaminants. The omission of recreational use of LVC by recreational anglers under the existing Human Health Risk Assessment Report needs to be corrected by assessing such contaminant exposure risks.

4. There is a need to evaluate the human health and ecological risk associated with secondary by-products and/or metabolites of the proposed in situ treatment chemicals and the targeted contaminants in both soil and groundwater. Reductive de-chlorination of certain chlorinated volatile organic compounds could produce daughter metabolites of greater concern than the parent compounds being treated. No such risk assessment has been done. The formation of chloroethane or vinyl chloride by-products of treatment may warrant the use of an aerobic bioremediation step. Bench scale and/or pilot testing, as well as strict quality control for injected materials needs to be required.

5. The area identified for study in the ERA at Figures R-2 and R-3 does not include an assessment of the risks to the biota of LVC a sufficient distance downstream of the site. The study area was limited in size and thereby did not adequately assess the potential area of ecological concern. The reach of the LVC tributary being assessed in the ERA extended from near the Amtrak railroad bridge south of the property to an area just north of the Conrail

railroad bridge located to the north of the property. The reach of the LVC that was assessed for potential ecological concern is approximately 600 feet in length. Use of such a limited area for study excludes assessment of the off-site risks to the biota of LVC – especially wild trout and aquatic macroinvertebrates. LVC is a stream that gains flow from diffuse discharge of groundwater for a distance of approximately 1.0 mile downstream of the Bishop Tube property, and the stream channel corresponds to the direction of migration for the groundwater contaminant plume (see RIR, volume 2, Figures 4 and 40). Discharge of groundwater chlorinated volatile organic compounds (CVOC) to LVC is evident in samples collected at locations within approximately 1.0 mile downstream of the Bishop Tube property (see RIR, Volume 2, Figure 40 – Surface Water CVOC Sampling Results, June 2014). We want to obtain water sampling test results for the metals contaminant concentrations in this section of LVC, and then have the ERA determined for specific fish and aquatic macroinvertebrate species (i.e., wild Brown Trout and Eastern Crayfish).

6. There is a need to perform specific conductivity and temperature monitoring in LVC to locate higher volumes of diffuse groundwater discharge in order to identify sites for additional sampling that will primarily target inorganic contaminants (i.e., metals such as chromium, hexavalent chromium, fluoride, aluminum, manganese, and nickel). Metals contaminants were not adequately tested in the surface water samples collected from LVC downstream of the Bishop Tube source property. The additional water sampling in LVC is recommended for a section of stream extending approximately 0.9 mile downstream of the source property to the confluence with the Morehall Tributary (a.k.a., Warren Run) on the west side of Morehall Road (S.R. 29).

7. Unless the contaminated surface soil (0-2') is being removed, ecological risk analysis is needed for site soil. The ERA does not include soil screening and ecological benchmarks are not included in Tables 1 and 2 of the RIR. We have a particular concern about elevated metals concentrations in the soil, because soil invertebrates and birds are sensitive to some metals. Soil invertebrates and an avian vermivore (e.g., American robin) should be evaluated for direct exposure and food chain risks, respectively. Preference should be given to EPA Region 3 screening values and EPA Ecological Soil Screening Levels (Eco-SSLs).

8. Within the ERA, the Marsh Wren should be replaced with Carolina Wren as it is a year-round resident in SE PA and thus, has higher exposure potential. The Seasonal Use Factor in Table C-1 should be 100% and Table C-5 should be deleted. Belted Kingfisher is irrelevant as the site is too small to support this species.

9. The ERA needs to evaluate direct contact of contaminants from soil (stream substrate sediment) and surface water with <u>specific</u> macroinvertebrate, amphibian, and fish species. The ERA is deficient because it does not address all ecological receptors as described further in our comments below. The surface water direct contact pathway for fish and amphibians must be evaluated. Multiple contaminants of concern (COCs) were identified in surface water, including TCE concentrations as high as 7.3 g/L and hexavalent chromium of 22 ug/L. And yet none of the chosen remedies adequately address the current contamination in the

surface water. Direct contact toxicity reference values (TRVs) for fish and amphibians compiled by Environment Canada and EPA Ecotox are available for many of the contaminants present at the site. Preference should be given to TRVs for the most sensitive life stages - eggs and/or larvae.

As benthic invertebrates are in direct contact with sediment porewater in the small study reach of LVC, surface water direct contact should be evaluated using the groundwater concentrations for COCs (Table R-4) from the site overburden wells in close proximity to the creek. Alternatively, piezometer or passive sampling can be used to determine actual porewater concentrations at the sediment locations adjacent to and immediately downstream of the former facility. This evaluation is necessary to ensure that the selected groundwater remedy will address COCs for aquatic biota as well as human health.

The habitat assessment portion of the ERA was conducted in December 2018. No terrestrial or aquatic species were observed, but this is not surprising given the time of year that the survey was performed.

Wild Brown Trout *(Salmo trutta)* are an inhabitant of LVC and need to be included as an ecological receptor species. Since trout would have direct contact with the contaminants in the surface water and through ingestion of food (both piscivorous and insectivorous ingestion), this omission needs to be corrected.

The existing methodology does not satisfactorily evaluate bioaccumulation of contaminants within the tissue of these receptor species. We disagree with some of the content of Figure R-4 “Ecological Conceptual Site Model” (RIR, Volume 1, page 4090). Specifically, we request that a predatory fish and its common prey fish be included such that the pathway for “uptake by biota” accurately reflects a significant exposure through ingestion. Accordingly, we request that Brown Trout (*Salmo trutta*), which is both piscivorous and insectivorous, and a benthic macroinvertebrate such as Eastern Crayfish (*Cambarus bartonii;* a.k.a. Appalachian Brook Crayfish), which is primarily insectivorous, be used, because these species are known to inhabit LVC. Crayfish are part of the trout diet. Improved representation by crayfish will change the direct contact with sediment to significant because crayfish have such substrate contact from egg, juvenile, to adult life stages.

There is a need to do fish tissue sampling to detect the concentrations of hexavalent chromium in both Brown Trout and Eastern Crayfish collected within LVC at locations within 1.0 mile downstream of the site. If sampling for PFAS, as requested in comment 1 above results in surface water concentrations within LVC, laboratory analysis of fish tissue samples for this contaminant may also be appropriate. Such investigation is needed to determine whether a Fish Consumption Human Health Advisory needs to be considered. Currently, there is no such fish consumption advisory in place to recommend restrictions on the amount or frequency of ingestion of fish from these waters in the human diet. As a follow-up investigation, histopathology of gills from Brown Trout collected within the aforementioned sampling area may be warranted.

For amphibian species, we request that contaminant risks be assessed for the Northern Red Salamander (*Pseudotriton ruber ruber*) and the American Bullfrog (*Lithobates catesbeianus*) as representative biota of LVC, the drainage swale at the north side of the site, and all wetlands. This was not done in the ERA.

10. The ERA needs to include an evaluation of the contaminant risks to the Exceptional Value (EV) Wetlands adjacent to LVC. The "Ecological Receptor Map" of Figure R-3 (RIR Volume 1, page 4089) depicts four riparian wetland areas (i.e., A, B, B1, & C) along LVC. Although these riparian wetlands were identified by Roux Associates, they were not characterized as EV. LVC is an EV stream; therefore, the riparian wetlands are also designated as EV. The 25 Pa Code Chapter 105.17 and Chapter 250.311 require that EV Wetlands be evaluated in the Ecological Risk Assessment. This was not done by Roux Associates. The ERA omits mention of the presence of EV wetlands and excludes them as indicated on page 7 at Section 3.0 describing the elements that describe the scope of the "Ecological Screening Process." The DEP RRA recognizes that the riparian wetlands adjacent to LVC are EV. However, the Roux "Ecological Risk Assessment" makes no mention of the existence of EV wetlands on the Bishop Tube site, and therefore does not include them as receptors that were assessed. A risk assessment for these ecological receptors needs to be completed.

11. Although the aforementioned "Ecological Receptor Map" depicts the drainage swale conveying surface water flow to LVC at the north end of the property as a receptor, it is not identified as a wetland and is omitted as a receptor habitat for risk assessment. There is a need to evaluate contaminant concentrations in soil, groundwater, and surface water within this drainage swale at the north end of the property. This drainage swale also needs to be evaluated for the presence of wetlands and as habitat for amphibian species that should be assessed as receptors for contaminant ecological risk. Because this drainage swale is hydrologically connected to LVC and likely contains wetland habitat, it needs to be assessed for contaminant ecological risks. A risk assessment for the associated amphibian receptor species also needs to be completed.

12. The ERA has at Figure R-4 an "Ecological Conceptual Site Model" (RIR, Volume 1, page 4090) that does not address several of the previously identified receptors that need to be evaluated. This site model was used to develop the Roux ERA, so the omission of specific fish and amphibian species and EV wetlands as receptors was continued within the risk assessment narrative. As a result, the "Assessment and Measurement Endpoints" described in Section 5.3 need to be expanded to include these additional receptors. This section also contains the statement: "in this ERA the results of the benthic invertebrate risk characterization are employed as a surrogate for an assessment of fish communities." We disagree with this approach and request that fishes be evaluated for contaminant risk. Some of the constituents of potential ecological concern (COPECs), such as hexavalent chromium and aluminum, that fish are particularly sensitive to due to potentially lethal gill damage at low concentrations are not adequately assessed for risks to fish using macroinvertebrates as representative surrogates.

13. The PA Natural Diversity Inventory (PNDI) review result included in the ERA at Appendix B (and described on page 9) indicates that the person at Roux who submitted the request did not identify that wetlands of any type, including EV, are located within the project search area. This PNDI review result is identified as a "DRAFT NOT FOR ACTUAL USE" and is dated 2/20/2019. It further states that "it has not been submitted to jurisdictional agencies for review." It is now outdated, unreliable, and invalid because the presence of wetlands was omitted from the initial submittal and it was not submitted to jurisdictional agencies for review. The PNDI search needs to be resubmitted for review and must specify that EV wetlands are present in the project search area. There needs to be a legible signature on the PNDI search document indicating the name of the person who submitted the search request. In addition, the PNDI search indicated a potential impact risk to the Bog Turtle *(Glyptemys muhlenbergii)* and required submittal of additional information and further consultation with the U. S. Fish and Wildlife Service (USFWS). There is no documentation from the USFWS included to confirm that the potential impact to the Bog Turtle was satisfactorily resolved based on a Phase I survey to characterize the suitability of the habitat for this species that is federally listed as threatened and Pennsylvania listed as endangered. The only habitat assessment for any wildlife species that is documented in the ERA was conducted in December 2018, and this time frame is inappropriate for completion of a Phase I survey for the Bog Turtle, and there is no indication that any such survey was performed at an appropriate time.

14. With regard to the hazard quotients (HQ) discussed in the Roux ERA, there is a statement that HQ values between 1 and 10 are considered to be indicative of "acceptable risk." However, contaminant toxicity curves are not linear, but are likely exponential. To rely on an HQ, one would need to develop a dose response curve for each constituent of potential ecological concern (COPEC) and each receptor species. Otherwise, there is no way to know what level of mortality is likely from an HQ for a specific species. Without such additional study, an HQ cannot be used to claim that the ecological risk is acceptable. The HQ values >1.0 require further evaluation. The existing claim that there is no unacceptable ecological risk is not warranted.

15. In ERA Table C-3 Sediment-Invertebrate Direct Contact Exposure Estimate, under the Hazard Quotient columns, there are "No Direct Contacts TRV" for boron, hexavalent chromium, thallium, and vanadium. In the ERA at "Section 5.5.1 Evaluation of Potential Ecological Risk to Benthic Invertebrate Communities" is the following statement: "Boron, hexavalent chromium, thallium and vanadium did not have toxicity reference values (TRVs) that could be located in the published literature commonly used to conduct ecological risk assessments, therefore the potential for ecological risk to benthic invertebrates cannot be estimated" [for these Constituents of Potential Ecological Concern (COPECs)]. The following statement appears a few sentences later: "Based on the above information, it is concluded that the COPECs present in surface water and sediment for the assessed area of the LVC tributary do not pose an ecological risk to benthic invertebrates at the Site." Note the disconnect between the two statements and the fact that the conclusion that there is no

risk to the aquatic benthic invertebrates is not based on evidence, because the risk cannot be estimated.

The VCTC has additional comments on the PA DEP's proposed Remedial Response Action (RRA) and the associated documents in the Administrative Record.

16. The proposed selected alternatives for both Operational Unit 1 (Soils) and 2 (Groundwater) indicate that in situ treatment will occur through injection of oxidant or reductant chemicals yet to be determined. For Operational Unit 2, injection amendments may also include bacteria or nutrients yet to be determined. The amendments to be used will be determined following additional laboratory and field studies. There is no indication what specific remediation chemicals will be used, nor is there an assessment of the human or ecological risks associated with these chemicals. The chemicals and other amendments that will be used to treat the contaminants needs to be specified and evaluated for human health and ecological risks. DEP needs to develop a summary list of all the pre-remedial design investigations that it is requiring for completion prior to the implementation of site cleanup. Such a summary should include a time schedule for completion of each investigation.

17. The proposed use of chemical oxidation deals with volatile organics which will deal with the primary human health issue - TCE. However, if metals exceed ecological benchmarks in soil or groundwater near LVC, then additional amendments will need to be added to bind metals. The VCTC requests information demonstrating that the in situ treatments for both soil and groundwater will address any metals that pose ecological risk.

18. In the description of the Operational Unit 2 preferred alternative 3 for in situ injection (ISCO/ISCR/Bioremediation) to remediate contaminated groundwater there is the following statement: "In situ injection may not be viable for hot spot areas (i.e., acid rinse spill area) in close proximity to LVC because of potential negative impacts to surface water." We agree; however, there is no indication of how the determination on what distance is too close will be made. This injection proximity caution also needs to be applied to the drainage swale that drains to LVC at the north end of the property, because there are contaminant hot spots in relatively close proximity to this water feature that is an ecological receptor. The methodology for determining the locations where injection will be avoided needs to be explained. How will LVC be protected?

19. Injection of treatment amendments for both Operational Unit 1 (Soils) and 2 (Groundwater) may result in downward and/or lateral movement of the existing contaminants which could contribute to further spread of the contamination from soil to groundwater and/or from diffuse groundwater discharge to LVC. In the event contaminants and/or treatment amendments migrate via groundwater plume or discharge to LVC, there is no indication in the remediation plan of implementing prevention measures or developing a contingency plan to deal with such an adverse outcome. Although the proposed remediation includes performance monitoring, the frequency for such monitoring is not indicated. The VCTC requests that the closest groundwater wells and the surface water of LVC be sampled on a

daily basis during the in situ treatment of both soils and groundwater, and thereafter on at least a monthly frequency to detect contaminant concentrations and the extent of their migration. A contingency plan needs to state that in situ injection treatment will cease immediately upon detection of increased concentrations of contaminant metals or VOCs in monitoring wells and LVC until such time that means can be designed and implemented to prevent such an occurrence.

20. If the proposed in situ treatment of soil and/or groundwater results in undesirable migration of contaminants to LVC or groundwater, it could take months before such an adverse outcome is detected and a means of prevention is designed and implemented to effectively stop the unwanted migration and treat the areas of increased contamination. Rather than rely on performance monitoring or a contingency plan, it would be more advantageous to implement prevention measures prior to initiating the in situ treatment. A permeable reactive barrier (PRB) could be installed between LVC and the proposed areas for soil and groundwater treatment prior to any injection of treatment amendments. Following laboratory and field trials to determine the most effective treatment amendment to use for the reactive barrier, it could be installed parallel to LVC prior to the injections described for soil and groundwater treatment. Use of zero valent iron mixed with sand (to improve permeability) and bentonite (to improve removal of metals) is one potential material for installation in the PRB that could provide meaningful reduction in the metals entering LVC via groundwater.

21. For both Operational Unit 1 and 2, the engineering and institutional controls (ECs and ICs) that will or may be used are not specified. Again, such details are currently unknown and will be determined in the future. The variety of engineering and institutional controls that are likely to be used need to be specified in the Remedial Response Action. The need for ECs and ICs indicates that contamination will remain in place after the remedial action. In our experience, most of these controls break human exposure pathways and not exposure pathways to ecological receptors. Any proposed controls need to break the contaminant exposure pathways to ecological receptors.

22. Treatment chemicals injected as fluids into the ground for in situ treatment of contaminated soils and groundwater may displace (or “push”) contaminated pore water ahead of the injection front, leading to short-lived but dramatic changes in the distribution of groundwater contamination. So, concentrations of the contaminants may increase in some areas and the contaminant plume may spread. Explain the monitoring strategy that will be implemented to detect a spread of the groundwater contaminant plume and increases in the concentration of contaminants in groundwater and to LVC as a result of the in situ injection of treatment chemicals.

23. The Remedial Response Action should include a plan for future sampling to detect contaminant migration and increased concentrations, as well as planned contingency activities if contaminant concentrations leaving the site increase. Such a plan needs to specifically identify the groundwater well and surface water measurement locations which

will be tested in the future to verify the expectation that groundwater contamination will not be migrating horizontally or vertically beyond the area of groundwater contamination existing prior to in situ treatment.

24. There are two approaches commonly used to perform hydraulic containment: the use of pumping wells to change the hydraulic gradient and the excavation of trenches or installation of drains to intercept the contaminant plume. This technology requires a simple operation system. Targeted contaminants could include non-aqueous phase liquid (NAPL) and a wide range of dissolved contaminants. Several applications of hydraulic containment need to be further considered for treatment of the CVOC's and inorganic contaminants degrading LVC through diffuse discharge of contaminated groundwater.

    a. **Pumping Wells:** When using pumping wells, the goal is to modify the groundwater gradient to slow down or stop the migration of the contaminated plume. The pumped groundwater is either treated or disposed of in an appropriate manner. A row of pumping wells could be installed parallel to LVC to intercept, remove, and treat contaminated groundwater moving toward this stream prior to discharging to it. Treatment of the pumped groundwater could be done onsite with potential use of the cleaned water for injection with other treatment chemicals used for in situ remediation of contaminated groundwater at other locations on the site. Alternatively, the treated groundwater could be evaluated for reinjection on the site in areas upgradient from the locations of known contamination.

    b. **Trenches and Drains:** Trenches and drains could be used to intercept shallow contaminated groundwater that is migrating towards LVC. Trenches and drains could be installed upgradient of the contamination to prevent the non-contaminated groundwater from entering a contaminated plume, or downgradient of the contamination to prevent the contaminated water from migrating to LVC and its associated exceptional value wetlands. The contaminated water that is intercepted could be pumped from trenches or drainage systems, and then directed into an on-site treatment system or sent off-site to an authorized disposal facility. Alternatively, a Permeable Reactive Barrier (PRB) could be installed downgradient of the metals and VOC contaminated groundwater in a trench parallel to the LVC. The PRB could be constructed with Zero Valent Iron (potentially mixed with clean sand to improve permeability and bentonite to improve removal of metals) to treat both metals and TCE prior to the groundwater flow reaching LVC. The use of a PRB is not proposed as a replacement to in situ treatment of soils and groundwater, but as a supplemental treatment method.

25. There is no indication that the remediation plan will maintain and preserve the existing riparian buffer of trees and shrubs along LVC. The "Feasibility Study" includes a site map depicting the application of phytoremediation through the proposed plantings of poplar trees and the installation of a trench filled with wood mulch parallel to the stream channel. The proposed treatment approaches would adversely impact the EV Wetlands adjacent to

LVC. The plan to use phytoremediation by planting poplars in the LVC riparian corridor will be more harmful than helpful because there are existing mature trees performing a shallow groundwater uptake function that would likely be removed. The existing mature trees and shrubs are already providing phytoremediation and need to be retained. As illustrated in the Roux Feasibility Study at Figure 22 - Conceptual BMPs for LVC Tributary, it appears that the existing mature trees and shrubs would need to be removed for the placement of new trees and the installation of a mulch trench. Native species of poplars (such as Quaking Aspen and Big-tooth Aspen) could be planted within the riparian corridor to supplement the remediation provided by the existing trees. Removal of existing mature trees and shrubs in the riparian corridor is not recommended. However, the installation of a Permeable Reactive Barrier (PRB) within a trench paralleling LVC could be installed at a location set-back further from the forested riparian corridor along LVC, so that removal of existing trees is unnecessary. The use of a PRB is not proposed as a replacement to in situ treatment of soils and groundwater, but as a supplemental treatment method.

26. Although not proposed in the Bishop Tube site remediation plan, hydraulic containment is often used to control the migration of dissolved contaminants. PA DEP should consider the use of hydraulic control by pump dewatering of drilled wells upgradient of the contaminant hot spots in the groundwater to keep clean water clean. Such pump dewatering could slow the spread of clean groundwater down gradient into the areas of existing soil and groundwater contamination. The water pumped from the upgradient wells could then be used in the injection of treatment amendments for the in situ remediation of contaminants in both soil and groundwater.

27. Who will be performing site inspections and construction oversight during the implementation phase of the remediation plan? Will this task be done by PA DEP staff, Township staff, other agencies, or third-party consultants hired by DEP or the responsible parties? If a third-party consultant is the inspector, will the results of all site inspections be promptly reported to PA DEP and the Township? Who will determine, if implementation of the remediation plan needs to be revised based on the performance monitoring results or site inspections – PA DEP, the contracted remediators, or the responsible parties of the contamination?

28. Who will the implementers of the remediation plan be directed and supervised by – the responsible parties for the contamination, the technical consultants for the responsible parties, consultants for the PA DEP, or DEP staff?

29. There needs to be a discussion in the DEP RRA about the specific requirements for various permits, EV wetland protection, and stormwater management that will need to be met prior to the implementation of any contaminant remediation measures.

30. What role, if any, does the U. S. Environmental Protection Agency (EPA) have for cleanup of the hazardous contaminants at the Bishop Tube site? The EPA Region 3 has assigned this site the identification number PAD081868309. Do they perform a review of the DEP RRA

and provide technical assistance to PA DEP? Do they assist DEP with the public participation process? Do they provide any funding for contaminant cleanup or post remediation monitoring of the site if the responsible parties are unwilling or unable to pay the entire cost? The One Cleanup Program Memorandum of Agreement signed by PA DEP and EPA Region 3 on April 21, 2004 appears to provide opportunities for collaboration between the two agencies that has not been evidently exercised for the Bishop Tube site remediation.

31. Has a written public involvement plan been developed for this site? If not, I recommend that DEP prepare such a plan. PA DEP did not meet with the public to answer questions about the RRA. One public hearing with a summary presentation describing the RRA was insufficient to prepare the public for commenting. The technical complexity and volume of documents associated with the RRA warranted opportunities for the public to obtain further explanation and interpretation from DEP. Yet, DEP requested public comment on this proposal from an audience that it inadequately prepared to accomplish that task. More interaction with the public could have promoted trust of the agency and better understanding of the remediation planning and implementation process and the associated technical methods used for contaminant cleanup and the various cleanup standards. DEP has substantially deferred to East Whiteland Township for providing opportunities for public participation. This lack of state agency engagement with the public is not only disappointing, but it is also deficient relative to the public participation provisions of PA Act 2 – the Land Recycling and Environmental Remediation Standards Act – and the public participation provisions described in PA Title 25, Chapter 250, 25 PA Code Section 250.6. Public Participation. In order to accomplish a Bishop Tube site remediation outcome that will be satisfactory to the public, we recommend that PA DEP provide opportunities for increased public participation in the future and assign a member of staff to serve as the coordinator for public participation to actively solicit input and to respond to questions from the stakeholder community. Active outreach by DEP to encourage public participation needs to be implemented before, during, and after the site remediation.

32. In both the Roux Associates Remedial Investigation Report (RIR) and the Feasibility Study (FS) there is a foundational premise agreed to between PA DEP and Roux that the Bishop Tube site will not be used for residential purposes. Within the Remedial Investigation Report (Volume 1, pages 3-4, under 2.0 Scope of Remedial Investigation) there is discussion about this land use premise that includes the following statement: “as agreed with DEP, both the RIR and the FS assume that present and future use of the Site will be non-residential only.” Similar language appears within the FS on page 2, Section 1.2 Clarification of FS Scope. Both documents include footnotes referencing Roux’s letter dated December 16, 2016 and DEP’s response dated January 11, 2017 that further clarify this premise for mutual agreement. However, neither of these two letters is included within the PA DEP Administrative Record Docket. Both letters need to be added to the Administrative Record. Despite this premise, there appears to be some uncertainty about the potential use of the property for residential purposes based on the omission within the Remedial Response Action of any such discussion limiting future land use. The use of the site for only

non-residential purposes needs to be definitively stated by DEP within the Remedial Response Action.

33. The VCTC requests that the PA DEP provide it all future documentation and data re: any and all additional site investigation, treatability studies, selected remediation techniques and treatment amendments, ecological risk assessments, and pre-treatment sampling as well as monitoring results during and following implementation of the selected remediation methods.

Valley Creek is designated by DEP as an EV water and is also designated by the PFBC as a Class A wild trout stream. EV designation is a special protection water meeting certain criteria which afford it the highest protection against degradation, and Class A wild trout streams comprise less than 3% of the flowing water resources in Pennsylvania. Class A wild trout streams support robust populations of naturally reproducing wild trout due to a significant biological, ecological, or environmental condition within the watershed. DEP is mandated to properly protect the exceptional values of the Valley Creek watershed and we hope the comments provided by the VCTC will help DEP to meet its obligation.

Rosalyn Fennell
Superintendent
Valley Forge National Historical Park

Heather Smiles

Heather Smiles, Chief
Division of Environmental Services
PA Fish and Boat Commission

# ATTACHMENT 17

EAST WHITELAND TOWNSHIP
THE HEART OF GREAT VALLEY

209 Conestoga Road
Frazer, Pennsylvania 19355-1699
Telephone: 610-648-0600
www.eastwhiteland.org

**Board of Supervisors:** Scott Lambert - Chair • Richard Orlow - Vice • Peter Fixler - Member
**Township Manager:** John Nagel

January 31, 2022

Mr. Dustin A. Armstrong
Environmental Protection Specialist
Pennsylvania Department of Environmental Protection
2 East Main Street, Norristown, PA 19401
Via email: RA-EP-SEROECB@pa.gov

Re: Comments to the Pennsylvania Department of Environmental Protection (PADEP) Regarding Former Bishop Tube Site, East Whiteland Township

Dear Mr. Armstrong:

East Whiteland Township (the Township) has conducted a review of the Pennsylvania Department of Environmental Protection (PADEP's; or Department) August 17, 2021, *Analysis of Alternatives and Proposed Response* and the *Administrative Record*, which opened for public comment on September 25, 2021 for the former Bishop Tube Site (the Site or site). In addition, the Township has solicited input from the public regarding the remediation of the Site at a series of public meetings, most notably on November 5, 2021, and January 20, 2022. These comments have been prepared and submitted in order to meet the January 31, 2022 deadline for public comments to the PADEP related to the *Administrative Record*. Included in these comments are a brief synopsis of facts pertaining to the Site which are broken into six broad categories and forty-four (44) questions (provided in italics) addressed to the PADEP. The PADEP's answers to the questions will allow the Township and the public to better understand the PADEP's proposed course of remediation and how the public and environment will be protected during this process.

Comments provided by the Township are based on the understanding that all environmental matters relevant to the Site, including the management of all environmental risk, are the responsibility and within the jurisdiction of the PADEP. The Township has been concerned by the pace of investigation and remediation activities at the Site to date and believes that its residents deserve a more rapid resolution of these conditions. Consequently, the Township expects that the PADEP will utilize its full legal authority and every available resource to ensure remediation of the Site is conducted in a timely fashion and is fully protective of human health and the environment. Please accept the following comments and questions regarding the Site and the *Analysis of Alternatives and Proposed Response* on behalf of the Township.

## I - REVIEW OF ADMINISTRATIVE RECORD

Manufacturing operations began at the Site in 1951 and environmental investigations began in the early 1970s. Chlorinated solvent impacts were identified in the early 1980s. Investigations at the Site have continued through to the present. The primary contaminant of concern (COC) identified by the PADEP is trichloroethylene (TCE), however, a number of other volatile and semi-volatile organic compounds, as well as metals and polychlorinated biphenyls are also present at the Site above regulatory levels. For the purpose of remediation, the PADEP has divided the Site into three operable units consisting of soil (OU1), groundwater (OU2), and drinking water (OU3). Chlorinated solvent impacts in soils have been generally delineated, the exact extent of other COCs in soils has not been fully defined. The groundwater plume extent has been largely confirmed by groundwater monitoring wells, but the leading edge of the groundwater plume has been estimated by computer modeling. The vertical extent of the groundwater plume within bedrock has been predicted by the 2021 *Remedial Investigation Report* (RIR) to be limited by reduced fracture frequency and permeability with depth. The RIR asserts that there are no unacceptable human health risks under present site conditions; however, potential future human health risks exist related to consumption of groundwater and vapor intrusion from Site groundwater. The risk assessment prepared as part of the 2021 RIR also did not consider risks associated with residential use of the Site.

Remedial action objectives (RAOs), or the broad goals to be achieved by remediation, were defined by the PADEP for OU1 and OU2 as follows:

OU1 – Soils:" ...1) assuring that exposure pathways are eliminated or remain closed in accordance with an Act 2 Standard; 2) reducing contaminant transfer and migration from the soil into groundwater; and 3) preventing movement of contaminated soils by water or wind."

OU2 – Groundwater: "...1) assuring that potential future exposure pathways resulting from groundwater contamination remain closed in accordance with Act 2; 2) reducing contaminant migration across the Source Property Boundary; 3) reducing COC discharge to Little Valley Creek (LVC); and 4) hastening retraction of the groundwater contaminant plume."

No RAOs were explicitly defined for OU3. Irrespective of PADEP's approach all properties within the plume of contamination that are presently utilizing wells for their water supply should be placed on public water.

The PADEP's *Analysis of Alternatives and Proposed Response* evaluated five potential remedies for soil and five potential remedies for groundwater. The PADEP selected in-situ treatment as the proposed remedial approach for both soil and groundwater. Three remedies for OU3 were considered; connection of the single impacted home to public water was selected. The estimated cost of the selected soil remedy is $2.8 million but, for comparison the most expensive remedy considered, excavation and off-site disposal, is estimated at $7.2 million. The estimated cost of the groundwater remedy is $5.2 million with the most expensive remedy considered, hydraulic control, estimated at $38.4 million. Somewhat more laterally extensive in-situ remedies for groundwater, excluding deep bedrock, as described in the 2021 *Feasibility Study* prepared by Roux are estimated to cost between $16 and $20.3 million but are not included in the remedial options evaluated. Cost for connection to public water to address OU3 is estimated at $24,000.

The *Analysis of Alternatives and Proposed Response* identified a number of areas where additional site characterization of soil and groundwater were required as part of the remedial design process. Most notably, this included additional characterization of inorganic constituents in soil and groundwater, additional studies to determine if remediation of deep bedrock TCE is practical, determination of appropriate chemical treatments for each area, and what measures or limitations will be required to protect the LVC during remediation. In part due to these data needs, a number of key aspects of the remedial plan are defined only by a broad remedial approach and not by specific detail.

1) *Is the PADEP aware of any documents within its files, or in the possession of others, which are not included in the Administrative Record?*

## II – REMEDIATION OF THE SITE MUST BE COORDINATED WITH A RESIDENTIAL USE OF THE SITE

As noted in the *Analysis of Alternatives and Proposed Response*, the former Bishop Tube property is currently zoned for residential use. In addition, a preliminary land development plan for residential use of the property was approved by the Township in February 2021. An appeal of the Township's action was taken and the Township's approval has recently been affirmed by the Chester County Court of Common Pleas. Further, conditions of that land development plan approval require achievement of residential standards under Act 2 in general and remediation of soils to Residential Statewide Health Standards in three specific areas impacted by trichloroethylene (TCE). However, all **documents prepared by the "Bishop Tube Project Team" address only non-residential property use**. As set forth by the 2021 RIR, ". . . both the RIR and the FS assume that present and future use of the Site will be non-residential only", which is directly contrary to approved zoning and approved use of the Site. Standards to be achieved are not specified in the *Analysis of Alternatives and Proposed Response.*

Regardless of who is responsible for remediation of the Site, the PADEP is responsible for ensuring the remediation as a whole is protective of human health and the environment. The **PADEP must consider the approved residential end use of the property throughout the remedial process.** Achievement of residential standards under Act 2 must be the PADEP's ultimate goal for remedial action, and Residential Statewide Health Standards must be the goal for remediation of Site-related contaminants in soils. Consequently, the most stringent residential standards must be applied when designing, monitoring, and evaluating remedial actions.

2) *Given that the Township's preliminary land development approval contained conditions for residential site use, which conditions were accepted by the developer, why has the PADEP not required the planning of remediation to achieve residential standards?*

3) *How does the PADEP intend to ensure the safe residential use of the property if remediation is not conducted to achieve compliance with residential standards?*

4) *How does the PADEP intend to resolve the disconnect in assumed site use, applicable standards, and exposure pathways between the scope of work which the PADEP has required of the Bishop Tube Working Group and that which the Township has required as part of future development?*

## III - THE PADEP MUST PROVIDE ADDITIONAL CLARITY REGARDING THE PRE-REMEDIAL DESIGN INVESTIGATIONS REQUIRED AT THE SITE

The *Analysis of Alternatives and Proposed Response* identifies a range of topics where additional evaluation is required prior to developing a final remedial design. Some of these topics will have a significant bearing on remedial design or remedial outcomes but little information was provided by the PADEP on how these topics will be addressed. The Township believes that additional information is required before the public can provide meaningful comments on remedial plans. Therefore, the PADEP **must** ensure that adequate opportunity is provided for additional and continuing public input into remedial decisions as this information becomes available. The Township requests no less often than quarterly update meetings with any additional information being distributed on an interim basis when completed. The format of public input must allow for meaningful dialogue including formal comments and the opportunity for asking questions and receiving answers from the PADEP within a reasonable time frame, preferably at a PADEP public meeting.

5) *How does the PADEP intend to solicit additional public comment once pre-design investigations have been completed and a detailed remedial design is developed? Will the format of public input allow for asking questions and receiving answers within a reasonable time frame?*

The Township highlights the following topics where significant data gaps exist and additional information on the PADEP's and the Bishop Tube Team's plans for investigation are warranted:

- **Evaluation of emerging contaminants:** 1,4-Dioxane was not historically well characterized at the Site; however, data collected in 2021 confirms it is a contaminant of concern (COC) exceeding Medium Specific Concentrations (MSCs) in the primary source area. Techniques for remediation of 1,4-dioxane differ from those for the remediation of TCE. Other emerging contaminants also warrant evaluation at the Site, specifically per-and polyfluorinated alkyl substances (PFAS), which have not been evaluated at the Site despite being the subject of increased attention and regulation by the PADEP under the Act 2 Land Recycling Program. Recent actions by the PADEP include the development of Medium Specific Concentrations (MSCs) for select PFAS compounds in soil and groundwater. Evaluation of the range of commonly quantifiable PFAS compounds is warranted to determine if operations at the Site released these compounds into the environment and to evaluate if regulated or unregulated PFAS compounds at the Site present a potential risk to human health and/or the environment.

6) *Will additional evaluation of 1,4-Dioxane be conducted at the Site? How will the presence of 1,4-Dioxane affect remedial design?*

7) *What, if any, evaluation has the PADEP performed to evaluate the risk of PFAS contamination at the Site? Has sampling for PFAS compounds been performed at the site or requested by the PADEP? If not, why has no sampling for PFAS compounds been required?*

- **Delineation of soil impacts:** Full horizontal and vertical delineation of soil impacts has not been achieved. Full delineation/characterization is necessary to develop accurate remedial plans and monitor remedial effectiveness. The execution of the remedial investigation assumes future non-residential site use, and may result in data gaps associated with delineation of COCs in soil with respect to residential MSCs. This is notably the case for hexavalent chromium (Cr VI), polychlorinated biphenyls (PCBs), and benzo[a]pyrene (B(a)P), which are not delineated to residential MSCs. In addition, recent sampling has evaluated Cr VI presence in only some of the proposed treatment areas (only where total chromium exceeded the residential used aquifer soil to groundwater MSC, excluding where it exceeded the lower residential direct contact MSC). Pre-remedial design sampling **must** include delineation of all Site-associated COCs to the most restrictive MSCs and evaluate all areas of concern.

8) *Will the PADEP require delineation of all soil contamination, excluding only adequately demonstrated and documented natural background conditions, to the most restrictive residential MSCs, across the entire site?*

9) *Who will be responsible for completing soil delineation, on what timeline, and how will this information be incorporated into the remedial design?*

- **Horizontal and vertical delineation of groundwater:** Vertical delineation of groundwater impacts and, by inference, the vertical delineation of residual dense nonaqueous phase liquid (DNAPL) source material has not been performed. Some of the highest TCE concentrations are observed in the deepest (i.e., 400 ft) monitoring wells. While the 2021 RIR asserts qualitatively that deep bedrock impacts are less mobile, no quantitative assessment of fate and transport, COC mass distribution, or flux are presented to support this assertion. To the contrary, previous quantitative assessment of fate and transport at the Site (Baker, 2004 *Phase III Supplemental Groundwater Investigation Report*) suggests that the deep bedrock plume has the potential to expand over time. The 2021 RIR states that deep bedrock impacts are largely irrelevant to risk, as risk is driven by shallow groundwater which may impact surface water or result in vapor intrusion. However, prior fate and transport assessment by Baker (2004) suggests that the deep bedrock plume may eventually discharge down gradient of the Site. In addition, a persistent deep bedrock source is incompatible with the PADEP's stated remedial action objective of reducing COC mass flux across the property line and retraction of the overall groundwater plume. As a result, additional vertical delineation and quantitative evaluation of mass flux with depth is warranted as part of the pre-remedial design investigation. Remediation of deep bedrock may be necessary to achieve RAOs.

*10) When will the PADEP require additional delineation of deep bedrock impacts?*

*11) Will quantitative evaluation of the deep bedrock source strength and plume mobility be required as part of pre-remedial design activities?*

- **Evaluation of potential impacts to Little Valley Creek from remediation:** The *Analysis of Alternatives and Proposed Response* indicates that risk of discharge to LVC during remediation may limit the ability to implement the soil remedy in some areas. The PADEP has also recognized a need to identify measures to ensure protection of LVC from possible collateral damage due to remediation. Shallow groundwater discharge at the Site is a significant component of flow within the LVC. The *Feasibility Study* identifies a number of potential negative effects of remediation which might impact LVC, including desorption of some contaminants and discharge of chemicals used in remediation into the LVC. Changes in groundwater chemistry (e.g., reducing conditions including high dissolved iron) could also have a negative impact on water quality in the LVC.

*12) What potential impacts to LVC will be evaluated, what will be the nature of the evaluation, and how will the PADEP determine if risks to LVC require mitigation?*

*13) If mitigation of impacts to the LVC is required, what types of mitigation may be implemented within or outside of the scope of the proposed remedy?*

*14) Could and under what conditions, would the PADEP determine that risks to the LVC outweigh the benefits of remediation in one or more treatment area? How would such a determination be documented by the PADEP?*

## IV - ADDITIONAL COMMUNICATION FROM THE PADEP IS REQUIRED TO INFORM THE COMMUNITY HOW CHALLENGES TO SUCCESSFUL REMEDIATION WILL BE MET

It is the Township's understanding that prior remedial efforts for soil, undertaken by the property owner were unsuccessful, and field scale feasibility testing of reductive dechlorination in soil in 2015 was generally ineffective. This history highlights management and technical challenges for remediation of the Site. A number of aspects of the conceptual site model (CSM), notably the large vertical and horizontal extent of groundwater impacts, the extensive impacts in fractured bedrock, and low regulatory limits for many of the COCs result in complex and challenging conditions for remediation. Project management by both the PADEP and the Bishop Tube Project Team must address these challenges for remediation to be successful. Adaptive site management is a flexible approach to evaluating and adjusting remediation in an iterative fashion. This can include ongoing performance assessment and rapid modification to remedial strategies. Such an approach may assist in addressing the challenges present at the Site (e.g., Interstate Technology Regulatory Council [ITRC] guidance on Remediation Management of Complex Sites).

*15) How will the PADEP implement adaptive management techniques, such as rapid adjustments in remedial methods, including the designation of sufficient staff and resources to such management?*

Additional clarification must be provided for technical and management strategies in order to address the following:

- **Technical approaches to remedy implementation**: The remedial approach presented in the *Analysis of Alternatives and Proposed Response* is only a conceptual outline. The failure of feasibility studies using reductive dechlorination processes must be addressed in implementing groundwater remediation. Feasibility testing illustrated challenges including the transient effect of reductants, complex flow in soil and fractured rock, and the potential for production of toxic daughter products (e.g., vinyl chloride). The 2021 *Feasibility Study* identified a number of implementation concerns, notably changes in fate and transport which may induce additional vapor intrusion concerns, surface releases of chemicals used in remediation, failure to deliver chemicals to the appropriate zone within the aquifer and rebound of contamination. In particular, single injection groundwater remedies as proposed by the Bishop Tube Project Team may be short lived or result in incomplete mineralization of contaminants. Additional consideration of groundwater flow rates, DNAPL mass, and DNAPL to groundwater mass flux may be required to design and effectively integrate the soil and groundwater remedies.

16) *What approaches will the PADEP require in order to overcome challenges such as effective distribution of chemicals used for remediation, generation of toxic daughter products, and potential for rapid rebound in groundwater concentrations?*

17) *What specific assessments will be required to identify the chemistry or chemistries to be used for in-situ remedies for soil and groundwater?*

18) *Should remedial injections fail to achieve the levels consistent with demonstration of residential standards and or other RAOs, will additional rounds of injections, not included in the proposed remedy or cost estimates, be required by the PADEP?*

- **Impact of bedrock DNAPL on remedy selection and design:** The Bishop Tube Project Team has proposed that remediation of deep bedrock is technically impracticable (TI). However, as noted above, a persistent TCE source within deep bedrock is incompatible with some of the RAOs proposed by the PADEP. The mass and vertical extent of residual DNAPL within deep bedrock has not been quantified. This mass will provide an ongoing TCE source, which may call into question the long-term performance of groundwater remediation. The PADEP must provide the public additional information on how it intends to evaluate and address this important concern.

19) *Why does the proposed remedy not include remediation of deep bedrock?*

20) *Does the absence of remedial measures for deep bedrock indicate that the PADEP is in concurrence with the Bishop Tube Project Team's assertion that remediation of deep bedrock is technically impracticable?*

21) *In what manner, and by what metrics, will the PADEP evaluate the impracticability of deep bedrock remediation? How will impracticability be distinguished from remedial measures which are practicable but costly?*

- **Financing of remediation:** While the *Analysis of Alternatives and Proposed Response* provides approximate costs for the described remedial approach, is the Bishop Tube Project Team prepared to finance the selected remedial action? Costs associated with the proposed groundwater remedy are significantly less than those of more extensive in-situ groundwater remediation described within the 2021 *Feasibility Study* and correspond to those in the FS addendum describing an integrated soil and groundwater remedy prepared specifically at the PADEP's request. However, were the PADEP to require remediation of deep bedrock, remediation, costs would increase substantially.

22) *Why was Remedial Alternative #8 selected for evaluation within the Analysis of Alternatives and Proposed Response rather than more extensive remedial activities utilizing broadly similar technology as described in Remedial Alternatives #3 and #5?*

23) *Will cost limit the scope of remedial activities, or will the PADEP commit to the most effective remedial approaches for the community and environment regardless of the cost?*

24) *Is it expected that the integrated remediation of soil and groundwater, as described in the Analysis of Alternatives and Proposed Response, will be undertaken by the responsible parties?*

25) *Are the responsible parties capable of funding the remediation within the time frame outlined; and if not, is the PADEP willing to move forward with the remedial action regardless of responsible party involvement in funding the remediation?*

26) *Given the technical challenges presented by the Site, and the possibility of deep bedrock remediation, which might equal or exceed the cost of the currently proposed remedy, how will the PADEP manage the potential for increased remedial cost during implementation, both with respect to the responsible parties and internally within the PADEP?*

A successful remediation requires that the PADEP communicate regularly and effectively with the public and other stakeholders. These additional challenges, implementation concerns, and questions point to the importance of clear, ongoing, and timely communications with the public.

27) *Who will be the public point of contact at the PADEP for matters pertaining to remediation at the Site? How will this point of contact be empowered to respond to public comments and concerns throughout the pre-remedial investigation and design process and during remediation?*

## V - THE PADEP MUST MAKE PROACTIVE EFFORTS TO ENSURE THE SAFETY OF THE PUBLIC AND CLEARLY COMMUNICATE HOW THESE EFFORTS WILL BE DEVELOPED AND EXECUTED

Nearby residents have expressed significant concern regarding potential exposure to contaminants associated with the Site during the past, at present, and during future remediation. To appropriately address community concerns, the PADEP must provide close oversight and ensure adequate communication and full transparency with the public early in the remedial process. Specifically, the following topics warrant additional attention from the PADEP and the Bishop Tube Project Team:

- **Off-site vapor intrusion**: Sampling conducted through the most recent remedial investigations demonstrates that conditions at the Site have resulted in levels of TCE and other volatile chlorinated compounds in indoor air within residential and commercial off-site structures at concentrations that exceed default screening levels associated with a site-specific standard. Ongoing monitoring of indoor air quality and of other site conditions will be required to ensure that level of exposure remains acceptable regardless of remedial activities, new construction, or other changes in property use.

28) *For which properties, and at what frequency, will the PADEP require ongoing monitoring of indoor air quality and inspection for changes pertaining to vapor intrusion? If this has not yet been determined, when will the community be informed of the PADEP's decision regarding this matter?*

- **Risk assessment:** Due to the nature of the scope of work required of the Bishop Tube Project Team by the PADEP, risk assessments presented in the RIR were limited to pathways associated with groundwater and only under present site conditions. This evaluation was limited to evaluation of risk associated with vapor intrusion and exposure to surface water. The risk associated with other potential future exposure pathways associated with groundwater, such as volatilization into trenches during construction, has not been quantified. A full risk assessment for the approved residential Site use has not yet been conducted, making it impossible to evaluate remedial requirements for safe use of the property. While responsibility for remediation of the various media at the Site may or may not fall to different parties, the PADEP is responsible for oversight of remedial activities as a whole and must ensure that post-remedial conditions are fully evaluated for all media and potential exposure pathways.

29) *At what point in the remedial process will risk associated with residential use of the property be assessed and by whom?*

30) *Should redevelopment of the Site not occur, or be significantly delayed, who will undertake assessment of the exposure pathways excluded from the scope of work required by the potentially responsible parties?*

- **Safety during remediation**: The *Analysis of Alternatives and Proposed Response* provides little information regarding how the PADEP and the Bishop Tube Project Team intend to ensure the safety of residents and local businesses during remedial activities. Residents have expressed concern regarding the potential for exposure during construction of remedial measures and the PADEP must be proactive in communicating how oversight of measures to control exposure will be provided. As part of the development plan approval process, the Township has required that any development comply with all recommendations provided in the Agency for Toxic Substances and Disease Registry (ATSDR) memorandum, dated April 6, 2016, suggesting measures to mitigate environmental exposures associated with the Site. Among other things, these recommendations included controlling vapors, dust, and runoff during remediation. While detailed plans for monitoring and mitigation may not be developed until later in the remedial process, the

PADEP must outline controls (e.g., dust control and monitoring, vapor suppression, vapor capture, enhanced erosion and sediment controls, or other fence line monitoring during remediation) expected during remediation as well as the process by which necessary steps will be determined. The public must have an opportunity for input into these important decisions regarding remedial implementation.

31) *What environmental monitoring measures will be required during remedial construction to protect workers and the public? If not known at this time, how will these measures be determined?*

32) *What measures for protection of human health and the environment will be required during the active portion of remedial action? If not known at this time, how will these measures be determined?*

33) *When and how will PADEP provide the public, who may be affected by remedial activities, an opportunity to provide input on monitoring and mitigation required during remediation?*

34) *How will the PADEP provide oversight of measures to control exposure during remediation, and how will PADEP proactively communicate these oversight measures to the public?*

- **Institutional and engineering controls:** As acknowledged within the *Analysis of Alternatives and Proposed Response,* institutional and engineering controls will be required as part of site remediation. Further information must be provided on how these controls will be developed and implemented, particularly given the expectation that responsibility for remediation of various media at the Site may be divided between various parties.

35) *Given the uncertain and extended time frame of remediation, at what point in the remedial process will the nature of required institutional and engineering controls be determined?*

36) *How will responsibility for development and implementation of these controls be divided among the various parties involved (e.g., responsible parties vs a future developer)?*

## VI - THERE IS A NEED FOR TIMELY AND RIGOROUS OVERSIGHT BY THE PADEP AND THE TOWNSHIP SHOULD NOT HAVE ANY ROLE IN MANAGING ENVIRONMENTAL RISK

Based on the past history of the Site, the PADEP must facilitate a timely and complete remediation through active management and oversight. The pace of investigation and remedial activities to date have not been adequate to address the level of public concern, and potential risk associated with the Site. The Township believes that remedial action should be taken as soon as possible. It should be possible and would be beneficial to fast-track initial aspects of the remediation, such as designing and implementing the in-situ soil mixing, while design work is ongoing for the groundwater remediation.

37) *When are remediation activities at the Site expected to commence?*

38) *How will the PADEP ensure that remedial action progresses as rapidly as possible and in accordance with the time frame outlined in the Analysis of Alternatives and Proposed Response?*

39) *The PADEP should provide a timeline of specific tasks, projected start dates, completion dates, and responsible parties for pre-remedial design investigations and remedial activities to assist the Township and public in understanding the remedial process. The PADEP should update this timeline with an increasing level of detail as work proceeds. When can the PADEP provide an initial timeline?*

As a result of the slow pace of remediation to date, the Township has been proactive in attempting to manage potential environmental risk(s) at the Site through the conditions of land development approval. This role is more appropriately filled by the PADEP. The Township cannot take on the PADEP's role. The Township requests clarification on how the PADEP intends to address the following:

- The Township normally has responsibility for stormwater management activities, and these requirements are part of land development planning and construction. However at the Site, stormwater best management practices will be a part of remedial activities and evaluation may require additional effort or expertise for inspections or maintenance.

40) *Who will be responsible for final design, construction, and long-term operation and maintenance of best management practices incorporated into the remediation?*

41) *How will the Township and public be kept informed by the PADEP of what the PADEP perceives to be the Township's role in future remediation, including any maintenance and inspections?*

- In addition, and due to the absence of proactive management by the PADEP, the Township has mandated, as part of its preliminary land development approval, a number of requirements related to vapor intrusion mitigation. Despite these efforts, which would normally be undertaken by the PADEP, the Township should not be responsible for ensuring effectiveness of vapor intrusion mitigation measures nor should a homeowner's association be responsible for ensuring maintenance and operation of such environmental safety measures which will be located within the footprint of residential units. Regardless of the parties implementing these aspects of remediation, the PADEP must take on the role of ensuring public safety and proactively communicate how these issues will be addressed.

42) *How does PADEP intend to provide oversight of vapor intrusion mitigation systems associated with future development? Will these activities be managed as part of the present remediation or through a separate remediation?*

43) *What party will retain financial responsibility for operations and maintenance of vapor intrusion mitigation systems?*

- Although the Township is involved in various aspects of land development, it should not be responsible for enforcing or ensuring the protectiveness of other potential institutional and engineering controls. This includes environmental considerations associated with changes in property use, construction or renovation, soil management plans, prevention of exposure to workers and residents during remediation/construction, maintenance of soil caps or control of groundwater use. While the Township is willing to work cooperatively with all parties to ensure the safety of residents and the environment, ultimate responsibility for all these issues rests with the PADEP, and the PADEP must be proactive in its communication with all parties including the public to make this clear.

44) *Considering the extended timeline of remediation and Site redevelopment, as well as the division of remedial responsibilities and exposure pathways between multiple parties, how will the PADEP ensure that all potential exposure pathways associated with the Site are adequately controlled now and in the future?*

In conclusion, the Township expects that the PADEP will ensure a timely and complete remediation of the Site which is fully protective of human health and the environment, and will not place cost above that goal. The PADEP must explicitly address the fact that future residential use of the former Bishop Tube property has been approved consistent with the property's zoning. Significant data gaps exist that must be addressed, including the evaluation of emerging COCs. The Site has, and continues, to present technical and management challenges that must be addressed. In particular, a persistent TCE source within deep bedrock is incompatible with certain RAOs. The PADEP must accept and execute its responsibility for ensuring public safety and not place that burden on the Township or other parties. Finally, as additional studies are made, data gaps are closed, and remedial actions take place, the PADEP must ensure adequate and timely communications with the Township, with the public, and facilitate meaningful dialogue between all parties.

Sincerely,

Scott Lambert

Scott Lambert

East Whiteland Township Board of Supervisors Chairman

Cc:

Richard Orlow, East Whiteland Township Board of Supervisors

Peter Fixler, East Whiteland Township Board of Supervisors

Steve Brown, East Whiteland Township Assistant Township Manager

Steve Hann Esq., Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C

Brownfield Science & Technology Inc. (BSTI)

Pat Patterson, PADEP Southeast Regional Director (patpatters@pa.gov)

Sachin Shankar, PADEP Southeast Assistant Regional Director (sshankar@pa.gov)

Rob Fogel, PADEP Southeast Region Local Government Liaison (rofogel@pa.gov)

Virginia Cain, PADEP Community Relations Coordinator (vicain@pa.gov)

Ragesh Patel, PADEP Southeast Regional Program Manager Environmental Cleanup and Brownfields (rapatel@pa.gov)

Bonnie McClennen, PADEP Southeast Regional Hazardous Site Cleanup Section Environmental Group Manager (bmcclennen@pa.gov)

# ATTACHMENT 18

**March 27, 2026**

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
**501 North 3rd Street**
**508 Main Capitol Building**
**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**

**From: We The People**

**Re: Bishop Tube Consent Decree Public Comment**

Since 1985, the Pennsylvania Department of Environmental Protection (PADEP) has known that the Bishop Tube Site located in East Whiteland Township, Chester County, PA was dangerously contaminated. Over the decades, the seriousness of the contamination and its dangers for the community and environment has been increasingly revealed as data has been collected and workers at the site have shared the horrifying disregard of site owners for the environment. Rather than take swift action to enforce existing laws and secure full cleanup of the site, the State allowed the site to languish in its toxic condition.

All the while, children played in the creek taking in the site's toxic contribution; neighbors naively enjoyed life unaware of the dangers located just next door; downstream communities fished and played in the flowing waters of Little Valley Creek, Valley Creek, and the Schuylkill River; and the people of Chester County and Pennsylvania naively believed their state environmental agency was looking out for the best interests of the people and environment of Pennsylvania, rather than the interests, profits, and goals of industry and developers.

Our eyes were opened in 2017 when we learned of an illegal sweetheart deal the state entered into with a developer seeking to construct more than 200 homes, bringing over 200 families, including children, to this toxic site while it remained in its toxic condition with no plan for its remediation. Worse yet, the deal was cut with a developer who, documents revealed, had itself contributed to the site's ongoing toxic condition by damaging infrastructure that had been installed in an attempt to clean up at least some of the toxins there.***[1]

Thanks to the vigilance and curiosity of Larry Stauffer, the first member of the General Warren Village community to notice activity at the site and start to question what was happening, and with the help of the Delaware Riverkeeper Network and Green Amendments For The Generations, the community exposed, challenged, and ultimately defeated the sweetheart deal with Constitution Drive Partners. Notably, Delaware Riverkeeper Maya van Rossum, the Delaware Riverkeeper Network, and 13 to-be-named neighbors were the target of a SLAPP suit by the developer, seeking to silence our opposition. In the end, justice prevailed and both the sweetheart deal and the SLAPP suits failed.

Imagine our surprise and disgust when, 8 years later, the community and environment were once again, the last to know and the ones sacrificed as PADEP sought to strike another sweetheart deal benefiting the corporations and developer responsible for the contamination at the Bishop Tube site.

With this foundation, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed, and Pennsylvania – write to urge, implore, plead and demand that PADEP – on its own or directed by Governor Shapiro who says he puts "People before Power" – give a more rational, realistic, and meaningful time for public comment** on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

The comment period should 1) last at least a full 6 months for written comment, and 2) include at least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and 3) hold 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

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[1] *** This developer hired a contractor who, in the words of DEP, "destroyed the liquid boot while performing metals recovery activities within Building 8. Needless to say, **this action interfered with or impaired the SVE/AS system** that DEP had implemented **and potentially exacerbated the Existing Contamination at the site** in violation of the PPA and its two Amendments. DEP requested that CDP repair the liquid boot to allow for the continued operation of the SVE/AS system. This was never done, in continued violation of the PPA and its two Amendments."

The Bishop Tube toxic contamination has been under study for decades. And for at least the past decade and largely driven by community demand, the PADEP has been researching, considering, and developing approaches and plans for remediation of the site's toxic contamination.

Because of advocacy and legal action led by impacted community members, including the family of Larry and Kate Stauffer, the Delaware Riverkeeper Network, and Delaware Riverkeeper M. van Rossum, a remediation plan is finally being put forth.

However, at a glance, we find this plan severely and sorely lacking:

- It fails to ensure full remediation of the site that is driven by science, environmental protection, and the near term and long term safety of our community - instead it is a plan that is driven by dollars, political, and business objectives;
- It fails to fulfill the legal obligations of state law and the Pennsylvania Green Amendment, Article 1 Section 27, that protects our RIGHT to pure water, clean air, a quality environment and natural resources for present and future generations;
- It prioritizes persons and businesses with a vested interest in securing a quick outcome, rather than a full and protective clean up.

While PADEP, the responsible corporations, and the developer have had years to discuss, assess, debate, and negotiate the current remediation plan, *We The People* are being given a mere 60 days to review all the data and plans, and put forth meaningful and informed comments on an outcome that will impact the rest of our lives.

The toxic contamination at the Bishop Tube site has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families is heart wrenching.

Just on its face – without the time or opportunity to secure the expert and legal reviews essential for full, fair, and responsible review of a remediation and development proposal (and yes, this is very definitely a proposal for development, not just clean up) – the proposed consent decree puts the fox in charge of the henhouse, providing tremendous economic benefit and legal protection to the perpetrators of the harm and those who have economically benefitted from it at our expense. Providing for those who have every reason to shortcut the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

And so, **We The People of General Warren Village, East Whiteland Township, Chester County, the Schuylkill River Watershed and Pennsylvania who will bear the**

**environmental, health and economic burdens of a failed remediation and development plan at the Bishop Tube site demand:**

- 6 months - not just 60 days – to secure expert review and analysis, and provide full and informed comment on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site; and
- We should be provided with at least 2 public meetings where PADEP presents to us what is being proposed; and
- 2 public hearings where concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing.

Respectfully the undersigned individuals and organizations,

*Senator Katie Muth, Representing District 44 in Pennsylvania*
*Kate & Larry Stauffer*
*Elizabeth Stauffer (Brain Tumor Survivor)*
*Nicholas Stauffer*
*Cayley Dittmer*
*Michael, Jessica and Holly (their 1 year old daughter) Stauffer*
*Maureen Connolly*
*Eileen Ryan Romano*
*Joseph Romano*
*Barbara D. Arnold*
*Carol Rapp*
*Maya K. van Rossum, the Delaware Riverkeeper & Green Amendments Founder*
*Delaware Riverkeeper Network*
*Green Amendments For The Generations*
*Debra & Nick Mobile*
*Peggy & Ron Miros*
*Rhonda Funk*
*Deanna Fedor*
*Baily Funk*
*Pete & Judy Goodman*
*Sharon Connor*
*Carol L. Armstrong*

**March 27, 2026**

**To: Governor Josh Shapiro**
**Elected to Serve The People of Pennsylvania**
**501 North 3rd Street**
**508 Main Capitol Building**
**Harrisburg, PA 17120**

**Dustin A. Armstrong**
**Environmental Protection Specialist**
**Pennsylvania Department of Environmental Protection**
**2 East Main Street**
**Norristown, PA 19401**

**From: We The People**

**Re: Bishop Tube Consent Decree Public Comment**

***The below 191 signatures were collected by the Delaware Riverkeeper Network and Green Amendments For The Generations***

We, the undersigned, write to demand an extended, more equitable, and more accessible public review and comment process regarding the proposed Bishop Tube Consent Decree for toxic site remediation. We demand that, rather than 60 days with no communication between the community and the PADEP, we be given the following:

- At least a full 6 months for written comment,
- At least 2 public meetings within the first 60 days of the comment period at which PADEP will present the proposed plan directly to the community; and
- 2 public hearings at which concerned residents of the Commonwealth can speak directly via verbal testimony to PADEP, with a full transcript captured by a professional court reporter accompanied by a video recording of the hearings to be made public live during and after the hearing

The toxic contamination at the Bishop Tube site is pervasive, saturating the soil and groundwater, and contaminating an Exceptional Value stream that receives surface and groundwater flows from the site. PADEP and the business interests responsible for its presence and clean up have known about this toxic contamination for decades. Community members have only been made more recently aware thanks to the vigilance and curiosity of Larry Stauffer, the first member of our community to notice activity at the site and start to question what was happening, and to the efforts of the Delaware Riverkeeper Network and Green Amendments For The Generations, which helped uncover the extent of this situation, and provided essential scientific and legal understanding.

The Bishop Tube site's toxic contamination has had irreversible impacts on our environment and devastating consequences for real people. The stories of health impacts coming from former Bishop Tube workers and neighboring families are heart wrenching, and the contamination has expanded beyond the site footprint which is inflicting daily environmental impacts past its boundaries.

On its face, the proposed consent decree provides tremendous legal protection and economic benefit to:

- The perpetrators of the harm,
- Those who have economically benefited from the site's contamination and the slow-moving process to secure its cleanup at the lowest price tag possible,
- Those who have been legally responsible for its cleanup for many years but failed to act, and
- Those who have every reason to circumvent the toxic cleanup process and expedite site development regardless of the ramifications for real people, real children, and our cherished environment.

**But what about the community and the impacted environment?**

We are clearly an afterthought.

While PADEP, the responsible corporations, and the developer **have had years** to discuss, assess, debate, and negotiate the current remediation plan and consent decree, *We The People* are being given **a mere 60 days** to review all the data, complex plans, associated science, and applicable law, in order to attempt to put forth meaningful and informed comment on a matter that will directly impact our everyday lives and even those who are yet to come to our community.

This timeline for public review and comment is unacceptable. It denies *We The People* the opportunity to secure needed scientific and legal analysis, as well as denying us a fair amount of time to absorb the proposals, the volumes of associated data, and the complex combination of

strategies being proposed. The proposed timeline robs us of the opportunity to not only understand the information, but provide meaningful and informed comment to the PADEP.

And so, We the Undersigned:

- Residents of General Warren Village,
- Residents of East Whiteland Township,
- Residents of Chester County,
- Residents of the Schuylkill River Watershed
- Residents of the Commonwealth of Pennsylvania
- Organizations representing impacted ecosystems and community members;
- Real people who have borne the burdens of the existing toxic contamination at the site and who will bear the environmental, health, and economic burdens of a failed remediation and development plan at the Bishop Tube site moving forward;
- Real people standing up for the future generations this consequential decision will impact,

**demand the 6 months, 2 public meetings, and 2 public hearings as described above** in order to provide a more fair and accessible opportunity for the People of Pennsylvania to submit full and informed comments on the proposed consent decree with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.

Respectfully,

| First Name | Last Name | City | State |
|---|---|---|---|
| Adrienne | Rayna | New Ringgold | PA |
| Alex | Jackson | Blakeslee | PA |
| Allyson | Duncan | Malvern | PA |
| Alyssa | Mazzenga | Frazer | PA |
| Amanda | Cohen | Easton | PA |
| Amanda | Nickel | Paoli | PA |
| Amy | Brown | Malvern | PA |
| Andrea | Schran | Malvern | PA |
| Andrew | Kelly | Malvern | PA |
| Angel | Flores Jr | Villanova | PA |
| Angela | Clayton | Phoenixville | PA |
| Angela | Raftery | Malvern | PA |
| Angie | Bohn | Frazer | PA |
| Angie | Smith | Malvern | PA |

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|---|---|---|---|
| Annabelle | Stedman | Berwyn | PA |
| Anne | McCrory | Malvern | PA |
| Anne-Marie | Gincley | Philadelphia | PA |
| Annette | Bonner | West Chester | PA |
| Annsofie | Bjork | Glen Mills | PA |
| Arthur | Anderson | Philadelphia | PA |
| Barbara | Arnold | Malvern | PA |
| Barbara | Sonies | Narberth | PA |
| Barbara | Williams | Malvern | PA |
| Bea | Quaintance | Malvern | PA |
| Bernadette | Corsaro | Malvern | PA |
| Bernard | Greenberg | West Chester | PA |
| Blair | Blake | Upper Darby | PA |
| Boris | Dirnbach | Bryn Mawr | PA |
| Brett | Shallcross | Malvern | PA |
| Brian | Grant | Malvern | PA |
| Brian & Susan | Meehan | Malvern | PA |
| Bridget | S | Malvern | PA |
| Carla | Zambelli Mudry | Malvern | PA |
| Carol | Radich | Malvern | PA |
| Carol | Rapp | Malvern | PA |
| Carole | Buettner | Malvern | PA |
| Carolyn | Matthews | Malvern | PA |
| Cayley | Dittmer | Thornton | PA |
| Celeste | Dannunzio | Malvern | PA |
| Cheryl | Hendershott | Philadelphia | PA |
| Chris | King | Montoursville | PA |
| Christa | Melo | Malvern | PA |
| Christy | Norris | Malvern | PA |
| Ciaran | Rhodes | Philadelphia | PA |
| Cindy | Pinto | West Chester | PA |
| Connie | Black | Malvern | PA |
| Curt | Quaintance | Malvern | PA |
| Cynthia | Shallcross | Malvern | PA |
| Daniela | Ordonez | Bristol | PA |
| David | Fiedler | Bensalem | PA |
| Deborah | Gibase | Eddystone | PA |
| Dillan | Buettner | Malvern | PA |
| Donna | Morged | Malvern | PA |
| Donna | Saul | Malvern | PA |
| Doris | Adebanjo | Chester Springs | PA |
| Dorothy | Bedford | Phoenixville | PA |
| Douglas | Mason | Port Matilda | PA |
| Dustin | Frable | Palmerton | PA |
| Dylan | Matthews | Malvern | PA |

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|---|---|---|---|
| Edith | Janik | Paoli | PA |
| Edward | Vandame | Malvern | PA |
| Eileen | Ryan | Allentown | PA |
| Elaine | Croft | Malvern | PA |
| Eliana | Sekkidou | Easton | PA |
| Elizabeth | Kadjeski | Malvern | PA |
| Elizabeth | Stauffer | Malvern | PA |
| Ema | Torres | Bryn Mawr | PA |
| Emily | Bachman | Nazareth | PA |
| Emily | Matthews | Malvern | PA |
| Emma | Derobertis | Malvern | PA |
| Eric | D'Armiento | Malvern | PA |
| Eric | Koper | Malvern | PA |
| Eric | Pavlak | Gaks | PA |
| Erica | Maar | Malvern | PA |
| Erica | Ryan | Malvern | PA |
| Erika | Hanks | Conshohocken | PA |
| Erin | Johnson, Mph, Msn, Rn | Rutledge | PA |
| Eunice | Alexander | West Chester | PA |
| Forrest | Gauker | Easton | PA |
| Frances | Conwell | Devon | PA |
| Ginny | Marcille-Kerslake | Exton | PA |
| Grace | Beal | Malvern | PA |
| Heather | Nelson | Douglassville | PA |
| Isaiah | Guenther | Philadelphia | PA |
| Jack | Binstead | Narberth | PA |
| Jacob | Thornburg | Norristown | PA |
| Jacqueline | Pickering | Jenkintown | PA |
| James | Steiner | Malvern | PA |
| Jason | Basore Sr | Malvern | PA |
| Jeanette | Hooven | Malvern | PA |
| Jen | Stewart | Wayne | PA |
| Jennifer | Glinski | Malvern | PA |
| Jennifer | Scheuer | West Chester | PA |
| Jennifer | Tabas | Malvern | PA |
| Jennifer | Tobin | Philadelphia | PA |
| Jill | Holsclaw | Malvern | PA |
| Joanne | Connolly | Avondale | PA |
| John | Bradlee | Malvern | PA |
| John | Hegarty | Malvern | PA |
| John | Kramer | Langhorne | PA |
| John | Rossi | Glen Mills | PA |
| Joseph | Wolfgang | Bally | PA |
| Judy | Fong | Malvern | PA |
| Julia | Schulz | Mechanicsburg | PA |

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|---|---|---|---|
| K | Bailey | Langhorne | PA |
| Karen | Bedics | Coopersburg | PA |
| Karin | Goldman | Media | PA |
| Katelin | Dao | Bryn Mawr | PA |
| Kathleen | Stauffer | Malvern | PA |
| Kathy | Bosch | Malvern | PA |
| Kathy | Vannozzi | Pipersville | PA |
| Kathy | Wagner | Malvern | PA |
| Kirstin | Simmons | Malvern | PA |
| Kristen | Babcock | West Chester | PA |
| Kristen | Cosgrove | Malvern | PA |
| Laura | Fake | Womelsdorf | PA |
| Laura | Taddei | Malvern | PA |
| Lauri | Moon | Williamsport | PA |
| Lea | McCrone | Malvern | PA |
| Lela | Stanley | Philadelphia | PA |
| Leslie | Celia | West Chester | PA |
| Lily | Herron | Bristol | PA |
| Linda | Beavers | West Chester | PA |
| Lisa | Tull | Phoenixville | PA |
| Lois | Drumheller | Monroeville | PA |
| Lora | Snyder | Glen Mills | PA |
| Lucy | Lehman | Philadelphia | PA |
| Lynda | Holl | Malvern | PA |
| Lynnette | Granto | Malvern | PA |
| Lynnette | Saunders | Huntingdon Valley | PA |
| Mallory | Macaleer | Malvern | PA |
| Marina | Karulina | Malvern | PA |
| Mary | Black | Philadelphia | PA |
| Mary | Diguiseppe | Phoenixville | PA |
| Mary | More | Flourtown | PA |
| Mary | Tiebout | Pipersville | PA |
| Maryanne Rapp | Atterton | West Chester | PA |
| Melanie | Meade | Clairton | PA |
| Melissa | Macaleer | Malvern | PA |
| Melissa | Shelby | Malvern | PA |
| Meredith | Birtel | Malvern | PA |
| Meredith | Mueller | West Chester | PA |
| Michael | Moss | Philadelphia | PA |
| Michael | Rayer | Bryn Mawr | PA |
| Michael | Roberts | Whitehall | PA |
| Michael | Stauffer | Malvern | PA |
| Michelle | Mctague | Malvern | PA |
| Mike | Romanoff | Malvern | PA |
| Mikhail | Zapata-Rotz | Annville | PA |

| | | | |
|---|---|---|---|
| Nathaniel | Cain | Downingtown | PA |
| Nicholas | Stauffer | Malvern | PA |
| Nicole | Kellett | Phoenixville | PA |
| Noel | Petrie | Philadelphia | PA |
| Norman | Starr | Beach Lake | PA |
| Paige | Carlton | Malvern | PA |
| Patti | Smith | Conshohocken | PA |
| Paul | Stanley | West Chester | PA |
| Pauline | Toomey | Malvern | PA |
| Peggy | Miros | Malvern | PA |
| Peter | Hughes | Chester Springs | PA |
| Philip | Schwartz | Elverson | PA |
| Phillip | Potter | Philadelphia | PA |
| Ramya | Shetty | Malvern | PA |
| Raymond | Clarke | Malvern | PA |
| Regina | King | Malvern | PA |
| Rhonda | Anderson | Kennett Square | PA |
| Ricky | Ciccone | Malvern | PA |
| Robert | Adams | Effort | PA |
| Ryan | Dodson | Lancaster | PA |
| Sabriana | Pimentel | Catasauqua | PA |
| Sally | Doyle | Phoenixville | PA |
| Sarah | Caspar | Malvern | PA |
| Sarah | Gaffney | Easton | PA |
| Sarah | Loomis | Downingtown | PA |
| Sharon | Connor | Malvern | PA |
| Stephanie | Barbera-Waldeier | Malvern | PA |
| Stephanie | Mcnichol | Malvern | PA |
| Suzanne | Cutshall | Wayne | PA |
| Tara | Stoppa | Malvern | PA |
| Tara | Yerger | Pottstown | PA |
| Taylor | Magee | Norristown | PA |
| Thomas | Latzgo | Fogelsville | PA |
| Thomas | Rafetto | Malvern | PA |
| Tiana | Schade | Lehighton | PA |
| Tim | Caban | Malvern | PA |
| Tim | Matthews | Malvern | PA |
| Trayce | Carr | Malvern | PA |
| Vijaya | Vissapragada | Malvern | PA |
| Vincent | Prudente | Philadelphia | PA |
| Wim | Van Rossum | Bath | PA |
| Zy | Brandt | Norristown | PA |

*CC: East Whiteland Board of Supervisors*

*East Whiteland Planning Commission*

*Chester County Commissioners*

# ATTACHMENT 19

**RESOLUTION 20-2021**
**EAST WHITELAND TOWNSHIP**
**CHESTER COUNTY, PENNSYLVANIA**

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**A RESOLUTION FOR PRELIMINARY LAND DEVELOPMENT PLAN APPROVAL FOR CONSTITUTION DRIVE PARTNERS, L.P. FOR THE MALIN ROAD DEVELOPMENT**

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**WHEREAS,** Constitution Drive Partners, L.P. (the "Applicant") is the legal, titled owner of a 13.6 +/- acre site located at 1 South Malin Road in East Whiteland Township, Chester County, Pennsylvania, in the RRD – Residential Revitalization District, more specifically identified as Chester County UPI No. **42-4-321.2** (the "Property");

**WHEREAS**, the Applicant proposes to construct eighty-six (86) townhomes, internal roadways, landscaping, sidewalks, parking areas, lighting, grading, utilities, erosion and sedimentation control, and stormwater management facilities (the "Project"); and

**WHEREAS,** Applicant has requested review and approval of a Preliminary Land Development Plan entitled "Malin Road Development – 1 Malin Road" prepared by Taylor, Wiseman & Taylor, dated September 22, 2018, last revised October 18, 2020, and consisting of twenty-six (26) sheets.

**NOW, THEREFORE, BE IT RESOLVED**, by the East Whiteland Township Board of Supervisors, Chester County, this TENTH day of FEBRUARY, 2021, that said application for the Preliminary Land Development Plan is ***APPROVED WITH CONDITIONS***:

**1.** **Preliminary Land Development Plan**: The Preliminary Land Development Plan prepared by Taylor, Wiseman & Taylor, dated September 22, 2018, last revised October 18, 2020, and consisting of twenty-six (26) sheets (the "Preliminary Plan").

**2.** **Conditions of Preliminary Plan Approval**: The Preliminary Plan as referenced in Paragraph 1 of this Resolution is hereby approved subject to the following conditions:

**a.** In the Final Plan for the Project, the Applicant must address to the satisfaction of the Township the comments contained in the following letters:

1) ARRO Review Letter (Dated November 3, 2020)
2) McMahon Associates, Inc. Review Letter (Dated November 12, 2020)
3) LandConcepts Review Letter (Dated October 29, 2020)
4) Code & Life Safety Review Letter (Dated August 28, 2020)

**b.** The Applicant shall satisfy all outstanding review comments in the East Whiteland Township Department of Codes & Life Safety review letter dated August 28, 2020 prior to approval of the Final Plan.

**c.** If, upon submission of the existing fire flow documentation, an additional fire hydrant (or hydrants) is deemed necessary by the Township's Fire Code Official or Fire Marshal, the Applicant shall revise the plans to account for the design and installation of an additional fire hydrant(s). The location of the fire hydrant(s) shall be reviewed and approved by the Fire Code Official or Fire Marshal. The corresponding master pit(s) shall also be reviewed by the Fire Code Official or Fire Marshal as part of any review and approval by Aqua.

**d.** The Applicant shall maintain unobstructed access to the Property and the surrounding properties via Malin Road at all times – including during remediation, site work, construction, and roadway improvements. At no time shall the road access be impeded such that emergency personnel are unable to safely access the Property and/or the surrounding properties. This includes any limitation to the existing vertical clearance through the railroad underpass and/or narrowing of the horizontal clearance which would preclude vehicles from travelling safely through the underpass.

**e.** As outlined in the McMahon Associates review letter dated November 12, 2020, the Applicant shall perform traffic signal improvements at the intersection of Lancaster Avenue and Malin Road, including side street split signal phasing on Malin Road, as well as traffic signal equipment upgrades to accommodate the Township's planned adaptive traffic signal system along Lancaster Avenue and to comply with the Township's current traffic signal specifications. The Applicant shall submit a signal permit plan and construction plan for review as part of Final Plan submission. The Township acknowledges that these improvements are ultimately subject to review and approval by the Pennsylvania Department of Transportation.

**f.** The proposed emergency access road connecting Road A to Village Way shall be restricted to use by emergency vehicles only. The access road shall not be used for primary access or general circulation by the residents of the proposed development.

**g.** Prior to recording of the Final Plan, the Applicant shall pay a fee in lieu of dedicating land for Park, Open Space and Recreations (POR) in accordance with Section 175-40.B of the Township's Subdivision and Land Development Ordinance. The fee is presently calculated to by **$129,000** based on the established fee at the time of the original submission in 2015 ($1,500 / dwelling unit).

**h.** As discussed with the Historic Commission at its meeting on November 18, 2020, the Applicant shall assist the Commission with the design and pay for the fabrication and installation of an interpretive panel or commemorative plaque describing the historic cemetery on Malin Road. The design, placement, and all relevant aspects of the sign shall be determined prior to approval of the Final Plan.

**i.** The Applicant shall grant unrestricted access to the Township for observation and inspection throughout the course of the building, demolition, site development, and construction process. Specifically, the Applicant shall permit a Township-assigned environmental consultant to observe the demolition of the existing structures and the corresponding site work.

**j.** The Applicant requested zoning relief from the East Whiteland Township Zoning Hearing Board regarding (i) wall height and (ii) development activities within areas of steep slopes and very steep slopes. On April 25, 2017, the East Whiteland Township Zoning Hearing Board issued an Opinion and Order ("ZHB Opinion") which provided that the Applicant must comply with all of the conditions of approval in the ZHB Opinion. All such conditions of approval are incorporated herein by reference. The Applicant shall comply with all of the Conditions of Approval in the ZHB Opinion, specifically, but not limited to:

(1) The Applicant deposited Twenty Thousand Dollars ($20,000.00) in an escrow account established by the Township, the purpose of which is to fund the Township's retention of an environmental professional, the selection of whom shall continue to be at the Township's sole discretion, to provide the Township with guidance on the environmental issues applicable to the Property, including remediation of the Property and the redevelopment of the Property. If the escrow account should fall below Five Thousand Dollars ($5,000.00) at any time, the Applicant shall replenish such fund to Ten Thousand Dollars ($10,000.00) upon such occurrence or occurrences.

(2) At the time of creation of the homeowners association (the "HOA"), the Applicant shall make a one-time, nonrefundable deposit of Twenty Thousand Dollars ($20,000.00) into an escrow account to be solely controlled by the HOA, which funds may be used only by the HOA to inspect and/or repair any vapor mitigation systems required to be installed and operated in residential units at the Property.

(3) The Applicant shall implement the remedial scope of work developed by Environmental Standards (as may be amended) and approved by the Pennsylvania Department of Environmental Protection (the "DEP"), including remediating all unsaturated soils with any concentrations of TCE above Act 2 residential standards in the three (3) identified soil "hot spot" areas of concern, and securing approval from DEP for the unsaturated soils in these three (3) "hot spot" areas of concern to the satisfaction of DEP in addition to meeting all requirements of the Applicant set forth in the March 17, 2005 Consent Order and Agreement, as amended or may be amended, between DEP and Applicant, and in any Remediation Scope of Work developed by or on behalf of the Applicant for the Property and approved by DEP.

(4) No earth disturbance, construction or redevelopment activities (other than building or demolition activities) shall occur at the three (3) soil "hot spot" areas of concern until the completion of all necessary soil excavation required at the three (3) soil "hot spot" areas in accordance with DEP approved Remediation Scope of Work, as may be amended.

(5) In addition to securing DEP's approval for the unsaturated soils in the three (3) soil "hot spot" areas of concern, the Applicant shall obtain written confirmation from DEP that soil hot spot remediation was completed in accordance with DEP approved Remediation Scope of Work, as may be amended.

(6) The installation of vapor mitigation systems on any residential structures (i) located within 100 feet of groundwater with volatile organic containment (VOC) concentrations in excess of Act 2 residential statewide health standards, or (ii) that may be required pursuant to DEP's new vapor guidance. Vapor mitigation systems shall be designed and certified by the Applicant's professional engineer, and shall be reviewed and approved by the Township's special environmental engineer, with the review costs paid for by the Applicant. The Applicant's professional engineer shall also certify that the vapor mitigation systems were installed properly.

(7) The Applicant shall obtain a stormwater construction NPDES permit from DEP/Chester County Conservation District.

(8) There shall be reasonable future access granted to DEP and the PRPs to monitor groundwater wells, and to implement any future groundwater remedy that may be selected by DEP.

(9) Utilities at the site shall be designed and installed by the Applicant to prevent the potential for vapor migration into residential structures, as well as the migration of contaminated groundwater into the utilities.

(10) There shall be a recordation of an environmental covenant pursuant to the Uniform Environmental Covenants Act (the "UECA"), requiring residents to operate and maintain their vapor mitigation systems in perpetuity. The requirement to operate and maintain the systems will also be contained within the HOA documents. The recorded UECA covenant shall also require that no subsurface disturbance (other than building construction and utility installation and maintenance activities) will take place within the portion of the site where vapor mitigation systems would be required on residential structures.

(11) The Applicant shall comply with all of the provisions of the East Whiteland Township Zoning Code, specifically Section 200-25.1, entitled RRD Residential Revitalization District, unless relief is granted by the Zoning Hearing Board.

(12) The Applicant must remediate the soils in the three (3) soil hot spot areas identified by DEP. The remediation must be to the residential statewide health standard for soil and address the related vapor mitigation issue through pathway elimination. The Applicant shall submit a Report for DEP approval demonstrating remediation of the unsaturated soils in these three (3) soil hot spot areas of concern as set forth herein. The said report shall conform to the requirements of 25 Pa.Code 250.411 (Final Report) to the satisfaction of DEP.

(13) Until the remediation of the three (3) soil hot spot areas is fully completed, which shall include post-excavation samples and approval of the remediation by DEP, the Applicant shall not start the construction of any residential units or appurtenances thereto on the Property. The only permitted activity during this time shall be the installation of temporary roads to support the remediation process.

(14) The Applicant shall submit a demolition plan to the Township and DEP prior to the demolition of any structures on the Property.

**k.** To the extent that the Applicant has not yet complied with the conditions of approval in the ZHB Opinion, it must do so in addition to complying with the following conditions, with the understanding that certain of the conditions of approval in the ZHB Opinion may be satisfied by complying with the following conditions of approval:

(1) Prior to any construction occurring at the Property, the Property must be remediated by Applicant, or by any other party, which remediation shall be approved by the Pennsylvania Department of Environmental Protection ("DEP") consistent with the laws and regulations of the Commonwealth of Pennsylvania including, but not limited to, the Hazardous Sites Control Act and the Land Recycling Act (also known as Act 2) and the regulations adopted thereunder. All remediation performed or undertaken at the Property shall meet any and all requirements for residential development under the aforementioned laws and regulations, which shall include any and all applicable covenants, including, but not limited to, those covenants which may be required under the Uniform Environmental Covenants Act (UECA).

(2) Consistent with DEP's August, 2020 Final Remedial Alternatives Analysis Report, any remediation at the Property shall address any and all risks associated with vapor intrusion, unsaturated and saturated soil, surface water, dense non-aqueous phase liquid (DNAPL), and groundwater, to the extent applicable, for residential development. The identification of such risks and applicable remediation must be submitted to and approved by DEP.

(3) Any excavation at the Property for the installation or placement of utilities, or for any other purpose, shall not occur until the Property has been fully remediated in accordance with subparagraph k(1) and k(2) above.

(4) In conjunction with any remediation or construction at the Property, the applicant must demonstrate that it fully complied with all recommendations provided for in the attached April 6, 2016 letter from the Agency for Toxic Substances and Disease Registry ("ATSDR"), which letter is attached hereto at Exhibit "A," which is hereby incorporated herein by reference and made a part hereof. This includes, but is not limited to, implementing appropriate best management practices to control dust and vapor emissions during remediation and construction. Air monitoring shall be performed, in accordance with applicable guidance, to ensure that remediation and construction activities do not result in off-site migration of harmful environmental impacts.

(5) To the extent not addressed elsewhere, the following exposure pathways associated with both unsaturated and saturated surface and subsurface soils, as well as groundwater, at the Property must be evaluated to the satisfaction of DEP:

- Inhalation of vapors volatilized from surface and subsurface soils and, to the extent applicable, groundwater, to the ambient air and any residential indoor air;
- Leaching of constituents from surface and subsurface soil to groundwater;
- Dermal contact, direct ingestion, and inhalation of particulates from contaminated soil;
- Contact with surface water contaminated by runoff from contaminated surface soil;
- Inhalation of vapors volatilized from surface and subsurface soil into an enclosed space;
- Incidental soil ingestion, dermal contact with soil and/or groundwater, and inhalation of particulates and volatiles from soil and/or groundwater for a construction/trench worker; and
- Incidental soil ingestion, dermal contact with soil and/or groundwater, and inhalation of particulates and volatiles from soil and/or groundwater for a trespasser/recreational user.

**l.** The HOA documents shall prohibit the HOA from expending any of the funds escrowed in accordance with Paragraph 2.j(2) hereinabove prior to the Declarant named therein relinquishing control of the HOA to the unit owners.

**m.** The Applicant must obtain any necessary planning modules, permits, approvals, waivers, and/or reviews from all outside agencies, including, but not limited to, the Chester County Conservation District; Chester County Department of Health; DEP; Pennsylvania Department of Transportation; and U.S. Army Corps of Engineers.

**n.** Any outstanding Township fees related to the Project, including but not limited to, all outstanding Township Engineers and Solicitor invoices, and Township administrative costs associated with the Project, shall be paid in full prior to the Township's execution of any Final Plan for the Project.

**o.** The Applicant must complete and execute all covenants, easements, dedication agreements, maintenance agreements, and sewer agreements associated with the Project, and provide all applicable necessary legal descriptions, in forms satisfactory to the Township Solicitor, prior to or contemporaneously with the recording of any Final Plan for the Project. Such agreements include, but are not limited to, a Stormwater BMP and Conveyances Operation and Maintenance Agreement.

**p.** Prior to recording the Final Plan, the Applicant shall execute an Improvements Agreement and a Financial Security Agreement to guarantee the installation of all public Improvements on a form drafted by the

Township Solicitor. If Applicant elects to utilize a bond for the required financial security for this Project, then the Township Solicitor shall have the unconditional right to review the bond and must approve the conditions and language of the bond. At a minimum, the bond shall be issued by an "A++" rated surety, or an equivalency, qualified to do business in Pennsylvania. Further, the bond shall contain language stating that the bond is to be payable upon demand, absolutely, and unconditionally, and in the event that payment is not made, that the bonding company shall be responsible for all attorneys' fees and costs that are incurred to collect on the bond, plus interest at the annual rate of twelve percent (12%), for so long as the bond remains unpaid. Additionally, the bond is required to automatically renew annually until the improvements detailed on the Final Plan are completed to the satisfaction of the Township Engineer and the final release is issued by the Township, subject to partial releases being permitted in accordance with §509(j) of the MPC, and shall include a 90-day Evergreen Clause that substantively provides:

> "It is a condition of this Bond that it will be extended automatically, without amendment, for additional periods of one (1) year from the present of each future expiration date, unless at least ninety (90) days prior to the then current expiration date, East Whiteland Township is notified in writing by overnight courier, at the Township municipal address of 209 Conestoga Road, Frazer, PA 19355, that there is an election not to renew this Bond for said additional period."

**q.** If a condominium or homeowner's association ("Association") is formed, the Applicant shall submit the Association declaration and any associated maintenance agreements or covenants to the Township Solicitor for review and approval prior to recording the Plans.

**r.** As outlined in General Note 5 on the Plans, the Applicant acknowledges that the Township is not obligated to accept any offers of dedication related to the Plan or the Project.

**3.** **<u>Waivers</u>**: The Applicant has requested the following waivers from the East Whiteland Township Subdivision and Land Development Ordinance for the Preliminary Plan:

**a.** The request for a waiver from **§175-38.C,** which requires that all lots shall have direct access to a public street, is hereby:

Granted ___X___ Denied ______

Comments on the Waiver: As stewards of the Township's finances, the Board of Supervisors does not want the Township to become liable for any costs related to the environmental remediation of the Property. In the opinion of the Board, such costs will be significant. For these reasons, the Board of Supervisors will not accept any offer of dedication of the roadways within this development. The roadways will remain private, and the lots within the development will, therefore, not take direct access to a public street. The hardship occasioned by the Township's not accepting dedication of the roadways necessitates the grant of this waiver.

**b.** The request for a waiver from **§175-38.C,** which requires that all lots have at least fifty feet (50') of frontage on public street, is hereby:

Granted ___X___ Denied ______

Comments on the Waiver: As stated above, the Board of Supervisors does not want the Township to become liable for any costs related to the environmental remediation of the Property. In the opinion of the Board, such costs will be significant. For these reasons, the Board of Supervisors will not accept any offer of dedication of the roadways within this development. The roadways will remain private, and the lots within the development will, therefore, not have any frontage on a public street. The hardship occasioned by the Township's not accepting dedication of the roadways necessitates the grant of this waiver.

**In the event that the Resolution is not delivered to the Township within ten days from receipt, it shall be deemed that the Applicant does not accept these conditions, and approvals conditioned upon this acceptance are revoked, and the application shall be considered to be denied for the reasons set forth in the review letters listed in paragraph two (2).**

**RESOLVED AND APPROVED** this 10th day of February, 2021.

**EAST WHITELAND TOWNSHIP**
**BOARD OF SUPERVISORS**

Attest:

John Nagel

John B. Nagel
Township Manager

By: Scott Lambert

Scott Lambert
Chairperson

## ACCEPTANCE OF CONDITIONS

I, Jerry O'Connor, being an authorized signatory for the **Applicant**, do hereby acknowledge and accept, on behalf of the Applicant, approval for the Preliminary Plan issued by the East Whiteland Township Board of Supervisors and accept the conditions contained therein, as recited above.

**APPLICANT:**

Attest:

CONSTITUTION DRIVE PARTNERS, L.P.
By: Constitution Drive Partners Acquisition Corporation, its General Partner

Donna Wikert

By: Jerry O'Connor

2/17/2021

Date

# EXHIBIT "A"

## APRIL 6, 2016 LETTER FROM AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY ("ATSDR")

# APPENDIX H

EAST WHITELAND TOWNSHIP
THE HEART OF GREAT VALLEY

209 Conestoga Road
Frazer, Pennsylvania 19355-1699
Telephone: 610-648-0600
www.eastwhiteland.org

**Board of Supervisors**: Scott Lambert - Chair • Peter Fixler - Vice Chair • Clinton Smith - Member
**Township Manager**: Steve Brown

May 14, 2026

Dustin A. Armstrong
Environmental Protection Specialist
Pennsylvania Department of Environmental Protection
2 East Main Street
Norristown, PA 19401

**Re: East Whiteland Township comments on proposed consent decree and a proposed Qualified Settlement Fund Agreement with Whittaker Corporation (Whittaker), Johnson Matthey Inc. (JMI), Marcegaglia USA, Inc. (Marcegaglia), and Constitution Drive Partners, L.P. (CDP) to fund remediation efforts of the Site.**

Dear Mr. Armstrong:

The Township appreciates the opportunity for us and our residents to comment on the proposed Consent Decree referenced above. The comments of the Township are based on consideration of the matter at the May 13, 2026, Board of Supervisors meeting, where the Supervisors heard comments and questions raised by both Township residents, interested parties, and the Township consultant, Integral Consulting, Inc.

Comments:

1. The Consent Decree allows certain development activity following approval of the OU1 soils remedy and prior to completion of groundwater remediation, subject to specified conditions. In contrast, East Whiteland Township's Preliminary Land Development Plan Approval Resolution for the Bishop Tube site (Resolution No. 20-2021) was premised on a more conservative sequencing approach, emphasizing completion and DEP approval of key remedial actions prior to residential construction and occupancy. That Resolution reflects the Township's longstanding concern with ensuring that redevelopment proceeds in a manner that is fully protective of future residents and does not shift environmental or public-health risk to the municipality.

   Please confirm that nothing in the Consent Decree is intended to supersede or limit East Whiteland Township's land development approval, zoning authority, building permitting, or occupancy determinations under local ordinances, including conditions imposed through the Township's Preliminary and Final Land Development Plan approvals. Further, please clarify how DEP anticipates coordinating with the Township where redevelopment sequencing under the Consent Decree may differ from, or evolve beyond, the sequencing assumptions reflected in prior Township approvals.

2. The Township requests that DEP holds CDP financially accountable and that it will be responsible to complete the required remedial actions in a measurable, effective manner and not shift that burden to the taxpayers of Pennsylvania. Furthermore, the funds held in trust should be used for direct remedial actions and not for ancillary actions or measures, e.g. demolition of buildings.

3. A strong public comment component should be required and built into the process at key decision points, e.g. approval of work plans, designs, costs, and schedules. Also, while monthly progress reports are required, certain events are more significant than routine updates. DEP should provide direct notice to the Township in the event of, including but not limited to, a declaration of default, a determination that trust funds may be insufficient, and a proposed modification to the Statement of Decision.

4. Protective measures should be required for nearby properties, especially for the General Warren Village neighborhood. Specifically, the Township requests that both air and water quality monitoring be required during all remedial work and post remedial work for a period of time and the results posted to a public-facing website for viewing and consideration.

5. There should be clear monitoring requirements of post-remedial actions to determine the effectiveness of those measures. The Consent Decree provides for a Post Remedial Care Plan, but at a high level. From the Township's perspective, questions remain regarding long-term oversight once active remediation ends, particularly for residential use. The Township requests that long-term groundwater and vapor intrusion monitoring results be communicated to the Township after DEP issues a certification of completion. The Township also requests routine post-remedial monitoring summaries continue to be provided to us.

6. PFAS has been identified, but Settlor financial liability is capped following the Data Gap Pre-Design Investigation. If PFAS or other contaminants of concern are identified later and outside the scope or timeframe of the Data Gap Pre-Design Investigation, DEP should identify how it anticipates addressing long-term response obligations and consult with the Township.

7. Groundwater contamination has historically migrated off site. DEP should continue to evaluate and disclose any off-site groundwater impacts identified during OU2 activities,

including potential implications for nearby private wells or surface waters, to the public and East Whiteland Township. The DEP should clarify what liability protection, if any, does the consent decree provide to the settling parties for off-site damages or future discovery of contamination that could affect future claims by private parties or the Township.

8. Reports are submitted electronically, but ease of public access is critically important and helps to support transparency and community trust. The Township requests that DEP continue maintaining an easily accessible public repository for key reports and approvals related to the Bishop Tube site, similar to the existing Administrative Record.

The Township respectively submits the above and the included (or attached) documents received from Township residents as our public comment regarding the proposed consent decree.

Thank you.

Sincerely,

Steven C. Brown
Township Manager

Debra J Mobile
[redacted]
Malvern, PA, 19355

Concerning the : Bishop Tube HSCA Site
Consent Decree Key Provisions
March 6, 2026

1. We have concerns about the determination of the monetary amounts.

- The state agreed to settle amounts at the same time that they began drilling for testing. How can they determine the amount needed for clean-up when they don't know the extent of the damage?
- Only $8,985,000 has been set aside for clean-up. This figure was the same in proposed documents which are over 5 years old. Was there no concern for the cost of inflation?
- Even with the $2,500,000 slush fund this amount seems inadequate. This is a property with extensive damage and pollutants. You can't do much of anything for $11 millions dollars these days.
- Later in the provisions it states that if CDP runs out of money they should notify the state they couldn't complete the task. Then what? Do we stop clean up efforts? Does the state take control? Are we the tax payers now responsible?
- Additionally the state has already spent at least $4.2 million (as of 2022) of the tax payers money. Will the tax payers be reimbursed before The CDP begins to spend the rest.
- The document also allows for CDP to use these monies for demolition and site preparation. Are these not normal expenses in construction projects? Why are these expenses being paid for out of the limited clean-up fund.?
- Furthermore the agreement allows CDP to use clean-up monies for legal fees. This does not make sense. Why do clean-up monies need to pay for CDP's lawyers.?

2. This is an arbitrary agreement. It refers to clean-up efforts when there is not approved clean up plan in place or included within the document.

- How can you comment on an agreement that references a plan that does not exist? If there is a plan where is it?

- There is no provision to seek public input concerning clean up steps which will be determined as additional testing becomes available.
- There are no apparent safeguards for the local community in place.
- The state has asked for weekly reports, but there is no mention of monitoring for the health and safety of the residents of General Warren Village. The agreement does not identify who is responsible to determine if residents are at risks.
- Furthermore the DEP is ignoring the citizens legal right to "clean air and water," as defined by the PA Constitution.

3. The state has failed to meet with the residences to fully explain what is going on.

- Most of the residents of EW Township are not environmental engineers or lawyers and may have difficultly fully understanding the documents and reports.
- When asked for meeting the state said they could not until this settlement was reached. Now they just so "no" to requests for meetings.
- The consent decree has an overwhelming number of acronyms and initials. It is extremely difficult to understand without a reference key.
- How can we as residents make intelligent comments about a settlement we may not fully understand?

4. This agreement can be described as capricious. The language used within the document is vague and ill defined.

- The document uses phrases and conditions such as "best efforts," and "reasonable" or "not feasible" when referencing potential actions taken by CDP. The document does not define level of efficacy needed for CDP to achieve these levels.
- This document is so vague the DEP will have little recourse to challenge CDP if the need for court action should arise. This document is not enforceable.
- Under this agreement CDP can spend the monies with no enforceable boundaries or expectations.

4. By entering into this agreement the DEP is ignoring the legal rights of the citizens of East Whiteland Township.

- This agreement does not meet the conditions which CDP agreed to with the township in their Land Development Application.
- Agreements were made to insure the land was fully cleaned before any construct would begin. It now seems that they will leave contaminate on the site and use a method contrary to the one they agreed to with the township.
- Assurance that the site would be fully cleaned before any construction begins seems to be contrary to this agreement.
- In the past the DEP indicated that approvals for construction are the purview of the Township and zoning. Now DEP is entering in an agreement which overrides local authority.

5. I have strong concerns about CDP being left in charge of the clean-up effort.
   - CDP has already violated convents with the state. Furthermore they tried to procure additional convents in a way that was later thrown out by the courts.
   - CDP has already shown an animosity towards the resident of General Warren Village. They have issued slap suits to prevent residents from speaking at township meetings.
   - CDP is a major stack-holder in this clean-up project. Their objective is to get the work done cheaply so they can make money on the site. They are about business first, not people.
   - Under this agreement CDP could easily spend the clean-up monies as quickly as possible and then go to the state and day we have done the "best we can." CDP can spend clean-up money on a wide variety of construction related costs. CDP can blatantly be released of all responsibility relating to the actual clean-up. And the state will have no recourse.
   - **Why would you put the fox in charge of the hen house?**

Debra J and Nick J Mobile
[redacted]
Malvern, PA. 19355

May 13, 2026

## Steven Brown

**From:** WILLIAM ARNOLD <[redacted]>
**Sent:** Thursday, April 30, 2026 9:55 AM
**To:** Brittany Carosello
**Subject:** Bishop Tube Consent Decree Public Comment

**Follow Up Flag:** Flag for follow up
**Flag Status:** Flagged

Dear Ms. Carosello:

Thank you for soliciting comments concerning the Bishop Tube Consent Decree on behalf of the Supervisors. I assume you are aware the DEP denied the request to extend the public comment period from 2 months to 6 months so the deadline is still May 14. The Delaware Riverkeeper Network is still analyzing the Decree so there may be more points to address that I won't be able to do before your deadline tomorrow. Would it be permissible to share any further thoughts with you before the DEP's May 14 deadline that you can pass along to the Supervisors?

Below are the comments I plan on sending to the DEP. However, I have additional questions for the Supervisors:

1. The Consent Decree says Constitution Drive Partners (CDP) will share monthly Progress Reports with East Whiteland Township. Will the Township share those reports with the community? (see page 31 of the Decree)
2. Will the requirements set forth by the Township to be met by CD prior to developing the site be addressed or met by the Consent Decree?
3. The Consent Decree timeline is roughly 7 months for various actions, reports and reviews to be conducted and completed. Will the Board of Supervisors monitor CDP's requested deadline extensions in relation to the timeline?

Also, I want to share a short list of Key Provisions of the Consent Decree created by the DEP: https://files.dep.state.pa.us/RegionalResources/SERO/SEROPortalFiles/Community%20Info/Bishop%20Tube/Consent%20Decree/202603%20Bishop%20Tube%20Consent%20Decree%20Key%20Provisions.pdf , also available on DEP's website (if the link doesn't work, please see the March 13 email from DEP). This document contains the salient points of the Decree in brief. Would you please share this with the Supervisors so they have a shortened version of the Decree to review?

My comments to the DEP:

Thank you for the opportunity to comment on the Bishop Tube Consent Decree. I am disappointed that the request to extend the public comment period from 2 months to 6 months was denied, because the document is so lengthy and more time to review it could only help. In addition, the data currently being gathered at the site won't be analyzed and available to the public before the comment period is over. This makes it difficult to accurately comment on some of the technical aspects of the Decree.

**From:** kathleen stauffer [redacted]
**Sent:** Wednesday, May 13, 2026 8:53 PM
**To:** Donna Wikert <dwikert@eastwhiteland.org>; Scott Lambert <slambert@eastwhiteland.org>; Peter Fixler <pfixler@eastwhiteland.org>; Clinton Smith <csmith@eastwhiteland.org>
**Subject:** Bishop Tube Consent Decree Public Comment

Thank you all for your service!
Below is my letter I sent to Dustin tonight.
- Kate Stauffer

Dear Dustin Armstrong,

My beautiful, cozy home is in the General Warren Village adjacent to and up wind of the Bishop Tube site. We did not know when we moved into this house that there was a factory spewing toxins into our air and water. We did not know, when our children did their "stream study" in middle school that Little Valley Creek carried these toxins. We did not know that, because of what went on at Bishop Tube, our neighborhood is known as "cancer ally."

I'm a mother of a Brain Cancer Survivor. My daughter, Elizabeth who was born in 1990 has had 3 consecutive tumors as a teen and young adult. I watched some of my neighbors struggle with Parkinson's, lung cancer and other cancers known to be caused by the kinds of toxins emanating from the Bishop Tube site - and believed to be caused by the Bishop Tube contamination.

My family, neighbors and I have been advocating for a Clean and and Green Bishop Tube site ever since my husband Larry, in 2017, saw the Zoning sign stating the CDP and Brian O'Neill wanted to build houses on 13+ acres of toxic land.

Approval of this Consent Degree does not serve nor protect me and my community. It is arbitrary and capricious and does not uphold our Constitutional Right to clean air, pure water and a healthy environment (Article 1, Section 27 of the PA Constitution.)

I am extremely concerned by what this Consent Decree does not provide! It does not spell out Remedial Action! It gives no details; the whens the wheres, what equipment, what chemicals, and so much more? Without the substance, without the details of what the remediation plan actually is and the details of how it will be carried out, how are we, the citizens and the court, to make a meaningful and informed comment or grant approval?

My other big concern is the limited monies in the Trust Fund. The Decree states that CDP and Brian O'Neill will determine how to spend the limited money. Will he use that money, which is meant for clean-up, for demolition and site work - the Consent Decree says he can? That the Consent Decree says PADEP will have some level of review and oversight over expenditures gives me NO comfort. For over 40 years they have ignored the toxic contamination at this site, and for 20 of those years they have been trying to help CDP and Brian O'Neill develop this site without a remediation plan in place, underway and completed. Quite simply, the PADEP has no credibility because they have sought to help the developer not protect our community or our

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*They have been following our advocacy for Bishop Tube clean-up since 2017:*

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Anthony and Elizabeth Connolly Falciano, East Atlantic Beach, NY
Joanne Connolly, Avondale, PA
Peter and Robbin Adams, Campton, NH
Lois Hillman, Blufton SC
Elizabeth Stauffer, Phoenixville, PA
Michael Stauffer, Malvern, PA
Jess Stauffer, Malvern, PA
Nick Stauffer, Malvern, PA
Brigid Maelia, Long Beach, NY
Ben Giese, Long Beach, NY
Kate Ryan, Stockbridge, MA
Barb and Brad Olsen, Tuckahoe, NJ

**Steven Brown**

| | |
|---|---|
| **From:** | WILLIAM ARNOLD <wcamalvern@msn.com> |
| **Sent:** | Thursday, April 30, 2026 9:55 AM |
| **To:** | Brittany Carosello |
| **Subject:** | Bishop Tube Consent Decree Public Comment |
| **Follow Up Flag:** | Flag for follow up |
| **Flag Status:** | Flagged |

Dear Ms. Carosello:

Thank you for soliciting comments concerning the Bishop Tube Consent Decree on behalf of the Supervisors. I assume you are aware the DEP denied the request to extend the public comment period from 2 months to 6 months so the deadline is still May 14. The Delaware Riverkeeper Network is still analyzing the Decree so there may be more points to address that I won't be able to do before your deadline tomorrow. Would it be permissible to share any further thoughts with you before the DEP's May 14 deadline that you can pass along to the Supervisors?

Below are the comments I plan on sending to the DEP. However, I have additional questions for the Supervisors:

1. The Consent Decree says Constitution Drive Partners (CDP) will share monthly Progress Reports with East Whiteland Township. Will the Township share those reports with the community? (see page 31 of the Decree)
2. Will the requirements set forth by the Township to be met by CD prior to developing the site be addressed or met by the Consent Decree?
3. The Consent Decree timeline is roughly 7 months for various actions, reports and reviews to be conducted and completed. Will the Board of Supervisors monitor CDP's requested deadline extensions in relation to the timeline?

Also, I want to share a short list of Key Provisions of the Consent Decree created by the DEP: https://files.dep.state.pa.us/RegionalResources/SERO/SEROPortalFiles/Community%20Info/Bishop%20Tube/Consent%20Decree/202603%20Bishop%20Tube%20Consent%20Decree%20Key%20Provisions.pdf , also available on DEP's website (if the link doesn't work, please see the March 13 email from DEP). This document contains the salient points of the Decree in brief. Would you please share this with the Supervisors so they have a shortened version of the Decree to review?

My comments to the DEP:

Thank you for the opportunity to comment on the Bishop Tube Consent Decree. I am disappointed that the request to extend the public comment period from 2 months to 6 months was denied, because the document is so lengthy and more time to review it could only help. In addition, the data currently being gathered at the site won't be analyzed and available to the public before the comment period is over. This makes it difficult to accurately comment on some of the technical aspects of the Decree.

The "Sequencing of Remedial Action" section, which lists how long Constitution Drive Partners (CDP) has to conduct testing and submit reports for addressing numerous specific types of contamination, is very dense. Is a person or department assigned to ensure CDP meets each deadline? Will failure to meet the deadlines result in the DEP undertaking this work?

The Settlors, and specifically the Settlor Work Party (CDP), have a vested interest in expediting the clean-up of the site, possibly to the detriment of the public. Putting the party with the most to benefit in charge of the remedial site activities seems suspect to me. CDP has not been transparent or truthful in the past so I have doubts they will be honest and forthcoming in the clean-up process. Who will follow up to ensure CDP is being held accountable to the standards of the Consent Decree?

I'm concerned about the DEP's agreement not to sue the Settlors for costs and damages related to the site (subject to certain conditions), as well as the Consent Decree resolving CDP of further liability or obligations under the 2005 Consent Order and Agreement. What happens if damages occur? Will the DEP shoulder the responsibility to resolve such problems?

The settlement trust fund and the financial assurance reserve total just over $11 million. That seems low for a full remediation of this very toxic site. Does the DEP feel assured this won't leave them holding the bag financially to perform the remaining remedial response actions? How much is the DEP willing to spend to ensure full remediation of the site?

For me, the bottom line is achieving a safe, complete remediation of the site followed by leaving it as open space for the community. Even after the clean-up is completed, it may still be too dangerous for people to live on. My fear is that innocent people will be endangered if development goes forward.

Sincerely,
Barbara D. Arnold
31 Fahnestock Road, Malvern PA
wcamalvern@msn.com

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**From:** Brittany Carosello <bcarosello@eastwhiteland.org>
**Sent:** Friday, April 3, 2026 3:39 PM
**To:** wcamalvern@msn.com <wcamalvern@msn.com>; Debra Mobile <mobiledebra@verizon.net>; Carol Rapp <cfrails@aol.com>; Kevin Comber <klc375@drexel.edu>; Kathleen Stauffer <klstau@comcast.net>; katestauffer888@gmail.com <katestauffer888@gmail.com>; tina mcqueen <lobsterbird1@gmail.com>; wor320@aol.com <wor320@aol.com>; prestoj78@gmail.com <prestoj78@gmail.com>; clayangel3@gmail.com <clayangel3@gmail.com>; Andrea Schran <Schran@rcn.com>; Pete Goodman <peteg5020@gmail.com>; Peg Miros <mmiros2015@hotmail.com>; mnem.np@gmail.com <mnem.np@gmail.com>; scaspar@comcast.net <scaspar@comcast.net>; Alex Djordjevic <alexdjordjevicphotos@gmail.com>; jay.hooven@verizon.net <jay.hooven@verizon.net>; Joan Smallwood <joan.m.smallwood@gmail.com>; Kevin Comber <klc375@drexel.edu>; Maya van Rossum <Keepermaya@delawareriverkeeper.org>; Pete Goodman <peteg5020@gmail.com>; jhgrty@comcast.net <jhgrty@comcast.net>; bshallcross <bshallcross@verizon.net>; bridget@delawareriverkeeper.org <bridget@delawareriverkeeper.org>; Daryl Grable <Daryl@delawareriverkeeper.org>; Anneke@delawareriverkeeper.org <Anneke@delawareriverkeeper.org>
**Cc:** Steven Brown <sbrown@eastwhiteland.org>; Donna Wikert <dwikert@eastwhiteland.org>; Catherine

## Steven Brown

**From:** Brittany Carosello
**Sent:** Thursday, May 14, 2026 1:09 PM
**To:** Steven Brown
**Subject:** Fw: Bishop Tube Consent Decree Public Comment

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**From:** Donna Wikert <dwikert@eastwhiteland.org>
**Sent:** Thursday, May 14, 2026 6:33 AM
**To:** Tony Finding (tfinding@bstiweb.com) <tfinding@bstiweb.com>
**Cc:** Brittany Carosello <bcarosello@eastwhiteland.org>
**Subject:** FW: Bishop Tube Consent Decree Public Comment

**From:** kathleen stauffer <katestauffer@me.com>
**Sent:** Wednesday, May 13, 2026 8:53 PM
**To:** Donna Wikert <dwikert@eastwhiteland.org>; Scott Lambert <slambert@eastwhiteland.org>; Peter Fixler <pfixler@eastwhiteland.org>; Clinton Smith <csmith@eastwhiteland.org>
**Subject:** Bishop Tube Consent Decree Public Comment

Thank you all for your service!
Below is my letter I sent to Dustin tonight.
- Kate Stauffer

Dear Dustin Armstrong,

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When the Trust money runs out will me, my community, PADEP and Pennsylvania taxpayers be left to foot the bill? We, the taxpayers and PADEP have already spent $4,233,483 on this site - how will this money be paid back by those responsible for the site's toxic condition? It won't! How is that in the public interest?

The Decree also states that CDP will be overseeing and evaluating the cleanup. The Decree, at present, states that CDP can unilaterally make substantial modifications to the implementation of the remedial action without prior approval by the PADEP if the prior approval is "not feasible." In other words CDP can do whatever they want and has no one to answer to -- after the fact reaction from PADEP for something that is already done is of zero help when the wrong decision has already been made and implemented.

I do not trust that the proverbial fox won't eat the hens. There have already been incidents that show me that CDP and Brian O'Neil are an irresponsible choice for oversite of cleanup; the liquid boot damage, bad acts so severe that even the PADEP sought to remove the covenant not to sue, the SLAPP suits threatening me and my neighbors trying to scare us into keeping quiet.

In addition, I am confused and troubled by the fact that this Consent Decree puts in place a 4 to 5 year time frame for the implementation of this whole plan. The fact is, the last time PADEP held a meeting with the public over this site - just one of 2 public meetings and both of which the public had to fight to secure -- we were talking about implementation taking over 20 years. If nothing about that plan was changed by the PADEP, which is what they said when the rejected our request for an extension of the comment period, then how is it possible that only 4 to 5 years are now needed to fully implement it? It looks like PADEP has sold out our community -- yet again -- in order to give CDP a good deal at the expense of the public.

My deepest desire is that my beautiful neighborhood, the people today, and future generations, be safe from the toxins that saturate the Bishop Tube site. This Consent Decree does not assure us that safe future -- what it does do is assure the developer that the PADEP will continue to use their authority to support his development no matter how dangerous and unwise, and it assures CDP, Johnson Matthey, Whittaker Corporation who are very very very wealthy, that they are are going to be let off the hook for a pittance and without providing my community and our environment any assurance of protection.

Your honor, please do not approve this Consent Decree. To do so would not serve our public interest, and from what I can see would be arbitrary, capricious and simply wrong and unfair. Hasn't my community suffered enough? Aren't we owed assurances that we will be protected?

Thank you for your time,
- Kate
Kathleen Stauffer, M.Ed.

267-496-8759
katestauffer@me.com

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*They have been following our advocacy for Bishop Tube clean-up since 2017:*

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