DELAWARE RIVERKEEPER NETWORK

July 6, 2017

(via Email and Hand Delivery)
Dustin Armstrong
PADEP
2 East Main Street
Norristown, PA 19401

Dear Mr. Armstrong:

This supplemental comment follows the Delaware Riverkeeper Network's participation in the well-attended public meeting held on June 7, 2017 in East Whiteland Township to discuss the Bishop Tube site and the status of the PPA documents. The purpose of this comment is to:

- ⇒ further address the issue of proper notice of the 2010 PPA amendment,
- ⇒ reiterate our firm position that the 2010 PPA amendment should be revoked in its entirety, or, at a minimum, that the Covenant Not to Sue provision should be stricken from the document as it has been previously (and on multiple accounts) determined by DEP to be "void",
- ⇒ express our tremendous concern with PADEP's failure to notify the community in 2014, 2015 or at the 2017 meeting of the DEP's decisions to void the Covenant Not to Sue,
- ⇒ discuss other issues relevant to the residential development of the site which is being facilitated by DEP through the 2010 PPA amendment, and
- ⇒ discuss DEP's long failure to deliver a comprehensive and appropriate final remediation to the site.

**1. Deficient Notice of the 2010 Amendment to the PPA provides DEP the opportunity to withdraw from this imprudent agreement**

As a matter of law the prospective purchaser agreement (PPA) and amendments must be noticed to the public. It is required by both the HSCA statute and the requirements of due

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process of law, because members of the public live in the neighborhood and have property rights impacted by the 2010 PPA and predecessor agreements See gen. *Augustin v. City of Philadelphia*, 171 F. Supp. 3d 404, 408 (E.D. Pa. 2016), certificate of appealability denied, No. 14-CV-4238, 2016 WL 7042215 (E.D. Pa. Apr. 8, 2016) citing *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)) ( "**notice** and an opportunity to be **heard** must be provided at a meaningful **time** and in a meaningful manner.") The procedures outlined in Section 1113 of HSCA are the legally proper way for citizens to exercise their due process right to challenge a PPA or amended PPA.35 Pa. C.S.A. §6020.1113.[1]

Because the DEP did not follow that procedure within a reasonable time period and because following such procedures would have made a substantial difference in the outcome (for example, public community comment would have alerted DEP to the community's dissatisfaction with the agreement, public comment would have allowed for demonstration to DEP that the agreement did not comport with the requirement that it be in the public interest, See 35 P.S. §6020.706, and following proper procedure would have provided the opportunity for legal challenge if DEP continued to advance and commit to the proposal), the entirety of the 2010 amendment of the PPA is unenforceable and DEP's action to enter into, execute and implement said agreement was and is arbitrary and capricious. See 35 P.S. §6020.1113; 35 P.S. §6020.508(d). Moreover, even the present notice of the 2010 PPA amendment was insufficient since it did not (1) notify the public of the broad language concerning relief given to CDP from liability for both on-site and off-site contamination, (2) indicate the presence of the "Covenant Not to Sue" provision (3) document or indicate in any way the fact that subsequent significant actions had occurred that voided the Covenant Not to Sue, a significant element of the PPA, (4) discuss or demonstrate how the changed proposed use of the site from commercial to residential affected the terms, goals or outcomes of the agreement, (5) express or explain the status of additional data collection that had been undertaken, additional data collection that was anticipated, and how that information could impact the PPA agreement, (6) express or explain the status of the proposed remediation scope of work in discussion between CDP and the DEP and how that could/would/should/did affect the PPA amendment proposal, (7) discuss any concerns the DEP had regarding compliance with other provisions in the PPA documents including regarding the SVE/AS system, potentially exacerbating existing contamination at the site, and/or granting site access for purposes of advancing testing or remediation of the site (see infra).See gen. 35 P.S. §6020.506(a)(2)(contents of administrative record for response

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[1] "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.



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action/interim response action). Accordingly, the Department has both the right and the responsibility to withdraw its consent to the entirety of the 2010 "draft" PPA amended agreement, based upon, among other things, the significant procedural defects of late and incomplete notice to the public.

The Delaware Riverkeeper Network would like to anticipate and dispel any potential argument that DEP's withdraw from the PPA could result in hardship to CDP. The actions taken by CDP that resulted in voiding and/or undermining critical and substantive elements of the 2005, 2007 and 2010 PPA documents were, by all appearances, knowing and/or intentional. The lapse of 12 years since the first 2005 PPA document, failure to meet the original 2009 deadline, significantly altering the intended use of the site from commercial to heavy residential, and taking the actions that violated the terms of the PPA agreements were all actions that were within the power of CDP to implement or avoid. In addition, CDP was a joint party to this agreement that was governed by HSCA requirements and therefore could and should have pushed for immediate publication, and delayed performance until the settlement notice and comment period had expired and the Department made the 2010 PPA amendment final. CDP was represented by knowledgeable and capable legal counsel and therefore should have well-known that, without proper publication and finalization, the 2010 PPA amendment was only a draft and could not be relied upon. See 35 P.A. C.S.A. §6020.1113. Investments undertaken by CDP, and/or promises made to investors or others, were taken with knowledge of the draft status of the agreement and process both in 2010 and after January 28, 2014 when CDP was fully aware that the Covenant Not to Sue Provision had been declared void by the DEP. Further, the DEP at the public hearing on June 7, 2017 admitted and agreed that the "covenant not to sue" is still deemed void by the DEP. The video recorded testimony from the public hearing contained the following important colloquy:

> woman: I have a question for the fellow from DEP: apparently right now the covenant not to sue is void, correct?
> DEP: technically yes though we have not taken any action to determine if there was any contamination, we have not enforced the consent order agreement in the document we have just stated that we that we
> woman: that the covenant not to sue is void?
> DEP: Yes

Source: July 7, 2017 public meeting,
https://www.facebook.com/Delaware.Riverkeeper.Network/videos/1534007249983677/

The ongoing determination that the "Covenant Not to Sue" is void is consistent with the DEP's letter to CDP, dated January 2014, in which it stated inter alia as follows:

> In 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 has 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 the continued operation of the SVE/AS system. This was never done, in continued violation of the PPA and its two 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"…

DEP Letter Dated January 28, 2014 (attached to our prior Comment as Exhibit "H"). There does not appear to be any action taken by CDP that would remedy the situation so as to justify a change in position by DEP.

A "Covenant Not to Sue" is something that is governed by statute and should be entered into only when it is in the public interest. The PPA and amendments at issue here are (individually and collectively) demonstrably ***not*** in the public interest for all the reasons stated in our previous comment, including but not limited to the fact that there are known responsible parties who could fully remediate the site without the need for grant monies at public expense. See 35. P.S. §6020.706. DRN believes that, had DEP known the truth in 2005 that CDP intended a residential development for this seriously contaminated site after only partial remediation, undertaken with public dollars, it would not have agreed to the PPA or any protection from liability. Regardless, the 2005 PPA referenced the non-residential Statewide Health remedial standards applicable to a commercial development. The current residential use proposal significantly alters the applicable remediation standard. Pursuant to Act 2, the remediation must match the future uses of the property. The significant change of use anticipated and proposed for the site constitutes a "reopener" that justifies additional remediation. Further, where a potentially responsible party (which is the status of the owner of the site) causes a new release – even after conducting its remedial obligations -- they enjoy no liability protection. See 35 P.S. §6020.706(f); See also 2005 PPA at Section 8 (Reservation of Rights).

A "Covenant Not to Sue" is also interpreted according to normal rules of contract law. See Global Ecological Services v. Commonwealth, 789 A.2d 789 (Pa. 2001)(provisions in consent agreement to automatically revoke permit was enforceable as a contractual settlement between the parties). The 2005 PPA specifically required that there be no exacerbation of contamination. See Paragraph 5. Moreover, the entire purpose of the 2010 PPA amendment was that the AS/SVE system should be operable to remove ground water contamination. By destroying or allowing a contractor to destroy the AS/SVE system and potentially causing a release via destruction of the liquid boot and piping, CDP has breached its contractual obligations. DEP is entirely within its rights to void the "Covenant Not to Sue," and that decision, reiterated approximately one year later by PADEP and reiterated again at the July 7, 2017 public meeting, should be deemed a final determination by DEP that the public and land use authorities can rely upon. See Id. Accordingly, for all the foregoing reasons, DRN requests the withdrawal of DEP from this imprudent and draft agreement. At a minimum, DEP should re-



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open the agreement in its entirety, remove the Covenant Not To Sue, adjust remediation obligations so as to be in keeping with the proposed residential use, and should subject the entire modified agreement to full and fair public review and comment to determine if the agreement is in the public interest and to fully comply with the public notice and comment mandates of the law.

2. **Information is missing and required regarding the destruction of the AS/SVE system and CDP's subsequent actions are a reopener to any remediation liability protection**

In this matter, DRN has filed requests for information which fully cover the 2011 AS/SVE incident in which the liquid boot of the system and piping was destroyed by a CDP contractor. While we have obtained some documents, we still seek information regarding the precise location where the liquid boot was destroyed, the approximate date and time when any release occurred until stopped, and the area and volumes involved.[2] Such a new release could reasonably create a separate area of concern (AOC) with a separate batch of sampling of possibly multiple media (soil vapor, soils at varying depths, groundwater). We continue to seek any testing performed by DEP and/or the PRP group in the area of the liquid boot's destruction and any other impacted areas. To the degree that DEP, itself, was deemed the operator of the AS/SVE at the site during the relevant time period, it may also bear liability for allowing metals reclamation work done on the site, which caused a further release. As such, there is a serious potential issue of spoliation of evidence that arises from the failure to have tested in the involved area of concern. If indeed the release was caused by the actions of CDP and it was CDP's obligation to supervise its contractors on the site, DEP had every reason to take enforcement action against CDP.[3] It is anomalous that DEP has not taken any action to fine and/or fully require CDP to clean up any released TCE or breakdown products, or other contaminants of concern. In stark contrast, DEP did properly require CDP to engage in cleanup of a PCB release which was the result of vandalism. Thus, DRN questions why DEP is not enforcing and fining CDP in connection with the potential exacerbation that caused it to declare the "Covenant Not to Sue" void.

In addition, DRN continues to seek, including through a legal challenge to a denial of one of our Right to Know requests, additional documentation pertaining to CDPs failure to comply with all other terms of the 2005, 2007 and/or 2010 PPA documents. This matter remains in litigation. Absent full data and information regarding the 2011 AS/SVE incident with the liquid boot and all information regarding the PPA documents, DRN is unable to fully comment on all

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[2] One would have thought that DEP should have had a formal incident report in its file as well as an initial notification of the incident from CDP. We have not seen evidence of these documents.

[3] It is worth noting that the AS/SVE system may itself be a "point source" for pollution when the system was caused to malfunction. See Tri-Realty Company v. Ursinus College, 124 F.supp.3d 418 (2015)(nonpoint source pollution can become point source pollution as required for Clean Water Act liability once pollutants are collected and channeled by man)

aspects of the PPA agreement and CDPs compliance therewith. Further, on June 26, 2017, DRN learned that DEP on June 20, 2017 notified CDP of liquid dripping from a rusted pipe that crosses Little Valley Creek, sampled the discharge and upstream and downstream impacts and required CDP to mitigate that discharge. The sampling revealed elevated levels of Total Chromium, Total Nickel and Total Aluminum. DEP has mandated that CDP undertake responsive action. Full information regarding the source and response for this discharge is also necessary in order to ensure a full and fair opportunity to comment.

For these additional reasons, DEP should withdraw its agreement to the 2010 amendment to the PPA since subsequent CDP actions are a reopener to any remediation protection. (See 2005 PPA at paragraph 8 (reservation of rights)). Even assuming arguendo that DEP does not withdraw from the 2010 PPA amendment in its entirety, the DEP should make clear that it has made a final decision that the conduct of CDP at the site has caused the "Covenant Not to Sue" to become void such that CDP will have no liability protection for its past and/or future action and activities at the site. DEP should notify all state, county and local officials with any involvement in the Bishop Tube site accordingly.

We have fully addressed in our previous comment that the highest and best land use for the site which is truly in the public's best interest is full remediation followed by site protection as natural, public open space.

3. **Diminution of Property caused by any deed notice on surrounding property is undesirable and against public interest**.

If a remediation is to leave contamination in, on and/or under the surrounding properties, (including in Little Valley Creek as it flows through a property) deed notice may be required and will impair the value and perhaps even the sale or rental of neighboring properties. 35 P.S. §6020.512. Hence, a PPA amendment requiring only an interim remediation prior to residential development which leaves such significant, and not fully known, levels of contamination (and which may even make full remediation more difficult) is clearly not in the public interest and thus, a covenant not to sue is inappropriate. See 35 P.S.§6020.706. It appears that remediation using the designated AS/SVE system is not possible since it has been destroyed and/or is otherwise no longer deemed by DEP to be worthy of pursuing. And regardless, does not provide the level of remediation appropriate for accommodating heavy residential development of the site.

4. **Present Site conditions continue to demonstrate a substantial endangerment to the surrounding community and a potential State-Created Danger in Violation of the 14th Amendment.**

The goal of any interim remedial action is to protect public health, safety and welfare or the environment. According to the 2005 Notice regarding the interim response action, this was the stated goal of the operation of the AS/SVE system. Yet shockingly, the system has not been

run in years, and there is no evidence that any other successful interim remediation has been substituted.[4] Moreover, documents reflect that access on the site to advance further remediation and testing may have been impeded at times and as such could have hindered remediation progress. At this time, documents and data demonstrate that contamination remains on the site and is migrating off the site.

On June 7, 2017, DRN staff visited the cul de sac, at the bottom of the site. The site remains physically open and without clear notice of the hazardous conditions of the surface waters and soils. Children and teens live in this neighborhood and can easily wander into the site area. In fact, the PCB spill and response documented a child in contact with the impacted stream, Little Valley Creek, clearly putting CDP and the DEP on notice that contact with the creek was a reality and not mere speculation. Moreover, failure to test the AOC where the liquid boot barrier was destroyed is a failure of DEP's duty to the community and potentially exposes the surrounding community to harms from an unknown amount of further release; this while the Site was under its control and while it was supposedly operating the AS/SVE system.

Every effort should be made to timely and appropriately remediate the site. Publication of old, outdated, ineffective, ill-conceived "draft" remediation proposals (PPA amendments) are not of assistance. The DEP must fulfill its mandatory duties under the Hazardous Sites Cleanup Act, including sections 35 P.S. §6020.301 and 35 P.S.§6020.501. Further, the DEP must not be involved in a violation of the Due Process Clause by a "state created danger" whereby its actions and corresponding inactions subject neighboring residents (our members) to involuntary exposure to TCE and other toxins and increasing danger, and present or future health harms.[5]

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[4] In a letter dated May 25, 2011 to the PRP Group, Anderson Hartzell noted:

The Department's technical staff continue to believe that operation of the AS/SVE system, whether that be at design parameters or through operational adjustments will continue to remove contaminant mass from the underlying subsurface in both the vadose and unconsolidated sub-vadose zones and thereby meet the overall objectives of the interim response action. Removal of significant mass quantities of contaminants through this system will not only respond directly to the on-site threats associated with such high levels of contamination but will also have the effect of greatly reducing the potential for migration of these pollutants into the groundwater hydrology and consequential re-contamination of the aquifer. Given that contamination of this aquifer from the Bishop Tube site is already likely impacting the Exceptional Valley Little Valley Creek, the Department considers this interim response action to be essential towards addressing the long term impacts to the stream.
DEP Letter dated May 25, 2011 to Benjamin Stonelake and Joel Burcat.

[5]"The **Due Process** Clause of the Fourteenth Amendment provides that "[n]o State ... shall deprive any person of life, liberty, or property, without **due process** of law." U.S. Const. amend. XIV § 1. Generally, the **Due Process** Clause is not violated where the state fails to protect its citizens from harm. *DeShaney v. Winnebago Cnty. Dep't of Social Servs.,* 489 U.S. 189, 195, 202, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (recognizing that the **DueProcess** Clause "forbids the State itself [from] depriv[ing] individuals of life, liberty or property without '**due process** of laws' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means"). However, under the state-created danger theory, the state may be subject to liability when it " 'acts in a way that makes a person substantially more vulnerable to injury from another source than he or she would have been in the

5. **Present site conditions continue to demonstrate that the DEP has failed to meet its duties as a trustee of the Commonwealth's natural resources and to abide by its Constitutional duties pursuant to Article I Section 27.**

As we stated in our previous comment, DEP must refrain from infringing on peoples' rights to "***clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.***" In addition, PADEP is failing to recognize that "***Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.***" And that DEP, as a trustee of these resources, is obligated to "***conserve and maintain them for the benefit of all the people.***"

Under Article I, Section 27 of the Pennsylvania Constitution, the Department has particular constitutional obligations as an agency of the Commonwealth. *See Pennsylvania Envtl. Def. Found. v. Com.,* ---Pa--, (June 20, 2017) n. 23. ("PEDF"). Section 27 places an affirmative duty on the Commonwealth to "prevent and remedy the degradation, diminution, or depletion of our public natural resources" *PEDF* at 32, *quoting Robinson Township and Delaware Riverkeeper Network et al. v. Com.,* 83 A.3d 901 (Pa. 2013) (plurality).Our Pennsylvania Supreme Court also found in *PEDF* that a trustee of the Commonwealth's natural resources has the fiduciary duty to act toward the "corpus[6]" with prudence, loyalty, and impartiality. *See Pennsylvania Envtl. Def. Found. v. Com.,* ---Pa--, (June 20, 2017)

Rather than recognizing that time is of the essence in securing full remediation of this site for the protection of the health, safety and welfare of people and the environment, it is apparent to the Delaware Riverkeeper Network that the DEP continues to prioritize finalizing what we believe to be an improper "sweetheart deal" with CDP in order to advance its goal of a heavy residential development project. Ratification of the draft 2010 PPA violates its duty as a trustee to the natural resources of the environment. It is a tragedy that the source contamination has remained for so long that it has and continues to contaminate on and off-site properties and natural resources. The 2010 PPA, as time has unfortunately shown, does not advance proper and prudent cleanup of the Site. It should not be ratified by the DEP and to the extent that it was prematurely ratified, it should be revoked as it was legally not final or binding until the DEP had the benefit of its citizen's input and comments.35 P.S. §6020.1113. DRN and its members strongly oppose this PPA amendment as improper and one that does not advance the goal of a true comprehensive cleanup of the site that remains seriously contaminated and becomes worse with the passage of time. Rather than putting forward an improper "sweetheart deal," the DEP must protect the peoples' rights to pure water, clean air and a healthy environment. It must

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absence of state intervention."

*Wright v. City of Philadelphia*, 2015 WL 894237, at *8 (E.D. Pa. Mar. 2, 2015)(city potentially liable for exposing PHA residents to asbestos)

[6] The State's natural resources.



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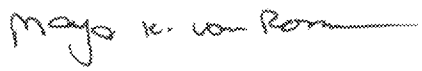
protect the trust "corpus" for which it is the fiduciary, and it must protect the health and safety of the people as is its paramount obligations.

Finally and significantly, the Pennsylvania Hazardous Sites Cleanup Act strongly requires public comment and participation in cleanup plans.35 P.S. §6020.506. This is reasonable given that cleanup of a Site impacts the neighboring community. DEP's failure to timely publish the PPA amendments and provide the relevant information to the public on the cleanup plans violates its HSCA and fiduciary obligations.

Respectfully,



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