

BEFORE THE ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER)
NETWORK,)
And MAYA VAN ROSSUM,)
THE DELAWARE RIVERKEEPER)
Appellants,)
v.) EHB Docket No. 2018-020-L
COMMONWEALTH OF)
PENNSYLVANIA DEPARTMENT)
OF ENVIRONMENTAL)
PROTECTION,)
Appellee,)
and Constitution Drive Partners, LP)

Brief of Appellants, Delaware Riverkeeper Network, and Maya van Rossum, the Delaware Riverkeeper, in Support of their Appeal that the Department of Environmental Protection’s Ratification of the 2007 and 2010 Prospective Purchaser Agreements was Improper and Unlawful

Appellants, the Delaware Riverkeeper Network, Maya van Rossum, the Delaware Riverkeeper, (referred to collectively as, “Appellants” and “DRN”) respectfully submit this Brief in support of their Appeal from the Department of Environmental Protection’s (“DEP” and “Department”) ratification of the 2007 and

2010 Prospective Purchaser Agreements (“PPAs”). Because the PPAs, when ratified in 2018, failed to comply with the Department’s duties -- the safeguards and limitations established in Sections 1113 and 706 of HSCA -- and violated the Environmental Rights Amendment¹, they do not serve the public interest and must be rejected as arbitrary and capricious.

Facts

The Bishop Tube site (“Site”) is located in East Whiteland Township, Chester County. AR#0023. The Site has been described as follows:

The Site is occupied by two large rectangular-shaped buildings that cover approximately 3.2 acres of surface area. The two buildings are connected and referred to as Building #5 and Building #8. These buildings are currently not in use and in various states of disrepair. The remainder of the site consists of paved and gravel-covered parking/storage areas, with a lesser amount of undeveloped grassy areas.

Id. The Site is bordered to the east by a residential neighborhood, the General Warren Village. See id. Little Valley Creek, a designated exceptional value creek, runs through the property. See id.

¹ 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 preserve and maintain them for the benefit of all the people. PA. CONST. art. I, §27.

The main contaminant of concern at the Site is trichloroethylene (“TCE”), but there are other chlorinated volatile organic compounds and metals at the Site in excess of regulatory levels. See AR#060, AR#0486, Remedial Investigative Report (2015) at 21.² TCE at various locations and depths on the Site is at extraordinarily high concentrations. See e.g., AR#0487-0488 (“Levels of TCE as high as 10,754,000 µg/kg were detected in the soil during investigations. TCE levels in groundwater in a nearby deep monitoring well are as high as 1,900,000 µg/L.”).³ See also AR#0321 (references groundwater samples at greater than 60,000 µg/L and soil concentrations at greater than 1,000,000 µg/L). In that regard, the Agency for Toxic Substance and Disease Registry (ATSDR) commented in 2016 to East Whiteland Township regarding the potential future redevelopment of the site for *residential* purposes as follows:

It is important to note that the responsible party, under PADEP oversight, has identified a **significant source of chlorinated solvents at the site that has not been fully remediated**. Given the presence of significant contamination at the site, other uses for the property besides residential should be considered. If the site is developed for residential uses, ATSDR recommends a number of steps to protect future residents from exposure levels of health concern. **It is important to note that even very low levels of trichloroethylene, the primary chlorinated solvent contaminant at the site, may be**

² The parties agreed to reference this report via its electronic link due to its voluminous nature. AR #0473.

³ The Maximum Contaminant Level which has been established for TCE in drinking water is 5 µg/L. AR#0488.” The Department 's Statewide Human Health Standard for TCE in soil is 500 ug/Kg for the soil to groundwater pathway.”.

harmful, and great care must be taken to not allow exposure to occur.

AR #0499 (emphasis added).

The Department has been aware of this Site and investigating it since at least 1981 and placed it on the Pennsylvania Priority List on September 11, 2010.

AR#0119, AR#0243. There are known financially solvent responsible parties who caused or contributed to the contamination at this Site, but no final remediation has yet occurred. See AR#00121, AR#00245 (identifying Johnson and Matthey as a potential responsible party), AR#0255 (identifying Whittaker Corporation as a potential responsible party). The Department entered a Consent Order and Agreement with these parties, nearly a decade ago, for characterization of the contamination, but there has still not been a final remediation plan.⁴ AR#0241, AR#0253.

In 2005, Constitution Drive Partners (hereinafter “CDP” or “Developer”) desired to buy the Site for development for commercial purposes. AR#0001-0018. CDP executed a 2005 Prospective Purchaser Agreement (“2005 PPA”) with DEP, dated March 17, 2005. AR#0001-0018. This agreement provided, *inter alia*, that

⁴ The failure of the Department to cleanup or cause cleanup of the site is a subject of an ongoing litigation in the Commonwealth Court. See Delaware Riverkeeper Network, the Delaware Riverkeeper, Maya van Rossum, and Member, Kathleen Stauffer, Petitioners v. Pennsylvania Department of Environmental Protection, 525 M.D. 2017, 2018 WL 3554639 (Pa. Cmwlth. 2018) (unpublished) (preliminary objections denied).

CDP purchased the Site and planned to develop the Site for *commercial* purposes. AR#0003. CDP agreed to investigate and remediate soils at the Site to demonstrate attainment with a *non-residential* statewide health standard or site specific standard under Act 2 by March 1, 2009. AR# 0005 (at para. 3). In accordance with this obligation, CDP filed a Notice of Intent to Remediate to *non-residential standards* in November, 2005. AR#0495-0498.⁵ CDP promised that it would not contribute or exacerbate, by action or failure to perform a legal duty, any “Existing Contamination attributable to the Site.” AR#0006 at para 5. The Developer, CDP, further promised to not interfere with or impair any response actions taken by the DEP. AR#0007 at Para 6. In exchange for CDP’s promises, the Department provided a covenant not to sue or take administrative or judicial action against the Developer for response costs, response actions, civil penalties, natural resource damages or injunctive relief relating to a release or threatened release at the Site.⁶ See id. The covenant not to sue did not cover future releases of hazardous substances at the Site. AR#0008. Of import, the 2005 PPA provided that the Department reserved the right to withdraw its consent to the PPA if during a public comment period, pursuant to Section 1113 of the Hazardous Sites Cleanup

⁵ A Notice of Intent to Remediate is required under the Land Recycling and Environmental Remedial Standards Act. See e.g., 6026.303(h)(1). The Administrative Record does not reflect a Notice of Intent to Remediate to residential standards notwithstanding rezoning of the area to accommodate the developers planned use of the site for residential purposes.

⁶ The Department also granted CDP contribution protection. See AR#0008.

Act, the comments disclosed facts or considerations that the PPA was “inappropriate, improper or not in the public interest.” AR#0013-0014 (paragraph 24).⁷

The Developer’s consultant recommended the use of soil vapor extraction (“SVE”) technology to “aggressively remove chlorinated solvents from unsaturated soils within three primary soil areas of concern.” AR#0021. The Remedial Action Work Plan, referenced in the 2005 PPA, provided that the Developer would not be addressing groundwater impacts and that DEP would assume sole responsibility for groundwater cleanup at the Site. AR#0022. See also AR#0005 (at para 3). The Remedial Action Work Plan demonstrated that all parties knew that previous site investigations had shown that elevated concentrations of chlorinated solvents in soil “may pose a potential vapor intrusion concern for any occupied building at the Site.” See id at AR#0025. It was known by all Parties that there was the potential for adverse impacts to natural resources, since ground water aquifers beneath the Site “appear to be a source of baseflow to Little Valley Creek.” See id. The March 2005 PPA was properly noticed and published. AR#0033.

⁷ The PPA improperly did not mention the Board’s statutory authority to find the Department’s response to comments arbitrary and capricious and to overturn the settlement agreement. 35 P.S. §6020.1113.

In 2007, the Department determined that there was a reasonable need for a prompt interim action. AR#0485-492. The original Statement of Decision that selected the interim remedy of the AS/SVE system was clear that a “no action” alternative was not protective of public health and the environment and is contrary to applicable, relevant and appropriate remediation requirements. AR#0489-0490.

Rather than remediating the soils by March 1, 2009, CDP and the Department negotiated another agreement which is referenced to as the 1st Amended Prospect Purchaser Agreement. See AR#0120. This Prospective Purchaser Agreement was executed on January 22, 2007 (“2007 PPA”). AR# 0035-0047. Exhibits to the 2007 PPA indicate that because the groundwater beneath the Site was highly contaminated “standard SVE” construction was not going to be sufficient. See AR#0054. The Department wanted to use air sparging (AS) technology to address ground-water remediation and to include a vapor barrier. Id. As explained in the final remediation design report:

Ultimately, CDP environmental consultants determined that an isolation vapor barrier (in the form of Liquid Boot®)⁸ was needed to control vertical migration of air through the building 8 subgrade to prevent “short circuiting” of soils vapors during SVE operations and **the possible intrusion of residual chemical vapors in soil**

⁸ The final remediation design report explains that the liquid boot “is a spray applied membrane that ultimately provides a vapor barrier for Sites seeking to eliminate potential vapor intrusion pathways.” AR#0067. This definition is mentioned and important given the subsequent events in which the liquid boot barrier is destroyed.

and groundwater into indoor air space over the long term.

AR#0054.

In the 2007 PPA, the Developer promised to engage in various tasks identified in a task allocation memo wherein the Developer would fund at 80% the cost of the design of the air sparging soil vapor extraction system and be responsible for the start-up period for the system. See AR#0037; See also AR#0089-93. The Department was also to bear certain design costs and operation costs. AR#0235-0240 (task allocation memo). The 2007 PPA further provided for some performance criteria for the system's operation. See AR#0040.⁹ The Department was to operate the system or require responsible parties to operate the system in order to attain the standards for soils and groundwater that are "consistent with Developer's intended redevelopment activities." AR#0041. (There was no mention in 2007 of the Developer's intention to change the purpose of the development away from a commercial purpose.) Ultimately, "the system did not meet the performance standards." See AR#0121.

Unlike the prior 2005 PPA, the 2007 PPA was not noticed to the public or published at the time it was proposed, executed, or performance was attempted. As the Department admitted in its "Response to Significant Public Comments," it

⁹ The SVE/AS system was to remove on average ten (10) pounds of volatile organic compounds ("VOCs") per day. AR#0040.

was not until April 1, 2017 that the Department published notice of the 2007 PPA. AR #0122.

When CDP did not meet the performance standards of the 2007 PPA, the Department agreed to yet another Prospective Purchaser Agreement, altering CDP's obligations once again. AR#0097-0106. This subsequent agreement, dated June 4, 2010, was referred to by the parties as the 2nd Amended Prospective Purchaser Agreement ("2010 PPA"). AR#0121. In the 2010 PPA, the Department agreed to assume operation and control of the system and cleanup of the ground water with monetary compensation of \$30,000. AR#0101 at para. 4. The 2010 PPA indicated that after completing various tasks including tendering the repaired AS/SVE system and demonstrating that it was operable for 72 hours, the Developer had no further remedial obligations to the Department relating to the Site. See AR#0100-0103. The 2010 PPA, like the prior 2007 PPA, was not published when it was proposed, or executed or at the time of performance, including when the Department provided a letter to the Developer on December 22, 2010 accepting its performance. AR#0115 (72 hour systems operation letter). As the Department admitted in its "Response to Significant Public Comments," it was not until April 1, 2017, that the Department published notice of the 2010 PPA. AR #0122.

Subsequent to the 2010 PPA, on July 26, 2011, the Department wrote to CDP to document that it had discovered damage to portions of the air sparge/soil vapor extraction system (AS/SVE), which compromised the Liquid Boot vapor barrier and damaged piping. AR#0263-265 The Department indicated that investigation revealed that the damage was caused by the operation of heavy equipment operated by a CDP contractor performing demolition and recovery of recyclable metal from the building.Id. In 2014, when repair had still not occurred nor other desired actions (demolition of buildings on the site) undertaken, the Department sent CDP a follow-up letter regarding its conduct, which stated as follows:

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 continued operation of the SVE/AS system. This was never done in continued violation of the PPA and its two Amendments.

AR#00267 (emphasis added).

The January 28, 2014 letter concluded that the Department “now considered the CDP’s violation of the PPA to void the covenant not to sue set forth in Paragraph 7.” AR#0268. CDP disputed that it had interfered with response actions at the property and indicated (among other things) that the Department had never

operated the System after the December 2010 system acceptance and was not planning on operating the system. AR#0270, AR#0272.

The fact that the interim response, the AS/SVE system, was not used likely results in additional impact to Little Valley Creek. In a letter dated May 25, 2011-- a few months prior to the destruction of the AS/SVE system -- wherein DEP was trying to get others to assume responsibility for running the system -- DEP noted the following with regard to the importance of operation of the system:

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.... **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.**

AR#0478.

In 2015, despite the fact that CDP requested that the Department reconsider its rescission of the covenant not to sue, the Department refused, indicating that "DEP is not aware of any changes at the site that support granting of your request." AR#0353. No information regarding the voiding of the covenant not to sue nor the destruction of the AS/SVE system was included in the April 1, 2017 Notice regarding the 2007 and 2010 PPA. See AR#0117.

Years after the prospective purchaser agreement was signed and the notice of intention to remediate to non-residential standards was filed, in 2014, CDP petitioned and persuaded East Whiteland Township to rezone the Bishop Tube site from industrial use to residential use, to facilitate the Developer's construction of a townhouse community. See AR#0144, AR#0361. Neither the 2007 nor 2010 PPA addressed a remediation standard different from the non-residential standard contained within the "Findings" and "Work to be Performed" set forth in the 2005 PPA. AR#0003, AR#0005.

In April 2017, the Department noticed and published the 2007 and 2010 agreements. Numerous comments were filed. See AR#0123-0235. Concerned residents wrote comments. See e.g., Comment of Charles Bernhardt, AR#0124-0125 ("Since the PA DEP and the Polluters have spent the last eighteen years at Bishop tube accomplishing little more than taking insufficient tests and spending inadequate resources to address a problem that attacks the health, safety, and economic welfare of a large portion of East Whiteland Township, why is there a rush to develop this property until the problem is fully known and the solution is complete"). East Whiteland Township wrote a comment. AR#0217-220 (The township asked 11 questions including: "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?”).AR#0218. Some potentially responsible parties wrote a comment urging the Department to postpone the finalization of any type of settlement until after the Department determined whether additional remediation is necessary given the 2014 rezoning of the Site and alleging, *inter alia*, that the objectives of Act 2 would be frustrated unless the PPAs were amended to reflect residential use and the involved standards. AR#0141-0151. One concerned resident wrote a comment that went so far as calling the Site the Chernobyl of Chester County reflecting the strong feelings experienced by the public, whose voices and concerns were not being heard. AR#0229.

Petitioners submitted two comments. AR#0157-0210. The comments stressed that the public had not been appropriately notified of the PPAs nor protected by them. See *id.* The comment further stated, *inter alia*, that: the PPAs undermined the goals of HSCA and the Land Recycling and Environmental Remediation Standards Act because contamination was not being addressed with the AS/SVE system; the PPAs did not account for the Developer’s change in development plans from commercial to residential; the PPAs were not in the public

interest; and the PPAs were contrary to DEP's constitutional obligations and its duty under Section 301(16) of HSCA. See *id.* DRN's comment also attached an expert report of Dr. Tom Myers which indicated that the residential development planned by the Developer (and facilitated by the PPA) leaves egregious levels of toxic contamination on the site, which would continue for an undetermined future time and may make remediation of the groundwater more difficult. AR#0165, AR#0361-0369

On January 26, 2018, the Department responded to comments and thereby attempted to ratify the 2007 and 2010 PPAs. See AR#0119-0137. The Department responded to most of the comments by asserting that they did not address the "modifications to CDP's performance obligation," and/or did not "persuade the Department that its entries into the 1st and 2nd Amended PPAs are inappropriate or should be rescinded." See e.g., AR#0125-126. With specific respect to CDP's violations of its obligations that triggered the aforesaid January 28, 2014, letter indicating that the covenant not to sue was void, the Department commented that it had not made "any decision as to how it will exercise its enforcement discretion with regard to the potential violation of the terms and conditions of the PPA." AR#0126.

Petitioners timely filed a Notice of Appeal on February 21, 2018.

Legal Argument

Introduction

A new purchaser of a contaminated HSCA Site is classified as “owner” of the Site and, therefore a legally responsible party.¹⁰ 35 P.S. §6020.701. HSCA contains broad liability and a current owner can be liable for releases of hazardous substances that occur at the time of his ownership as well as for releases that occurred prior to his ownership. See Pennsylvania Department of Environmental Protection v. Trainer Custom Chemical, LLC, 2018 WL 4844077, --- F.3d ---- (3rd Cir. 2018)(current owner who caused a release during his ownership of HSCA site can be liable for response costs during and before his Site acquisition). To respond to a potential purchaser’s liability concern in the development of a HSCA site, the Department has the authority to enter into a prospective purchaser agreement if it will serve to promote the goals of HSCA for cleanup and economic development of the Commonwealth. See Chirico v. Commonwealth of Pennsylvania, 2002 WL 2300676, 2002 EHB 25 (2002). The Department’s authority and interest in entering such agreements, which grants liability protection, must be in harmony with other HSCA policy objectives including protecting the public health, safety and welfare and the natural resources of this Commonwealth from the short-term

¹⁰ This statement is assuming that the purchaser is aware of the contaminated condition and has purchased the property with full knowledge of the risks. CDP did purchase the property with awareness of the Site’s contaminated conditions. AR#0004.

and long-term effects of the release of hazardous substances and contaminants into the environment. 35 P.S. §6020.102(12)(vi). Moreover, the Department has numerous mandatory HSCA duties, which are implicated in entering a prospective purchaser agreement; they include the following:

- 1) The duty to develop, administer and enforce an independent state response program for the investigation, assessment and cleanup of hazardous sites and replacement of water supplies and the protection of the citizens and natural resources of this Commonwealth from the dangers of hazardous substances and contaminants that have been released or are threatened to be released into the environment. 35 P.S. §6020.301(3).
- 2) The duty to administer and expend funds appropriated to the department or granted to the Commonwealth under the Federal Superfund Act or other authority for the protection of the public and the natural resources of this Commonwealth from releases of hazardous substances or contaminants. 35 P.S. §6020.301(6).
- 3) The duty to Act as trustee of this Commonwealth's natural resources. 35 P.S. §6020.301(14).
- 4) The duty to implement section 27 of Article I of the Constitution of Pennsylvania. 35 P.S. §6020.301 (16).
- 5) The duty to develop a program for public participation in the assessment of sites and selection of appropriate remediation 35 P.S.35 P.S. §6020.301(8).

35 P.S. §6020.301.

In addition to the policy of HSCA, and the concomitant duties upon the Department, the ability of the Department to agree to a prospective purchaser agreement is specifically limited by two statutory sections within HSCA: Section

1113 and Section 706. Section 1113 deals with substantive and procedural aspect of public participation in settlement agreements, and 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 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.

Pursuant to Section 1113, a party adversely affected by a settlement agreement, has the right to Appeal to the Environmental Hearing Board. 35 P.S. §6020.1113.¹¹

Section 706 requires that settlement agreements that contain a covenant not to sue must be in the public's best interest and expedite cleanup and provides in part as follows:

(a) General rule--To encourage the voluntary and timely cooperation of responsible parties in the cleanup of certain hazardous waste sites, the department may provide a responsible person with a

¹¹ The 2010 PPA was merely a draft proposed agreement prior to the Department's ratification on January 26, 2018, and prior to this Board's future determination of this Appeal. See 35 P.S. §6020.1113. That the parties elected to perform those agreements -- without the certainty and benefit of finalization of the contract via the procedures outlined in Section 1113 -- was a risk that they elected to take. Id.

covenant not to sue concerning liability to the Commonwealth under this act, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action where:

- (1) The covenant not to sue is in the public interest.
- (2) The covenant not to sue would expedite response action....

35 P.S. §6020.706(a).

The Department's actions are also limited by the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution. The 2007¹² and 2010 PPAs, when ratified in 2018, failed to comply with the Department's duties-- the safeguards and limitations established in Sections 1113 and 706 of HSCA-- and violated the Environmental Rights Amendment.¹³ As discussed in more detail below: a) DEP failed to fulfill the mandatory legal obligation to timely publish notice of the PPAs; b) DEP's 2018 ratification of the 2007 and 2010 PPAs was arbitrary and capricious; c) DEP's ratification of the 2007 and 2010 PPAs 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; and d) the

¹² To the degree that the 2007 PPA is less at issue because the AS/SVE system did not meet the specified performance standards (AR#0121), Appellants will simplify their discussion by focusing on the 2010 PPA. The arguments regarding the procedural and substantive defects are equally applicable to the 2007 PPA.

¹³ 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 preserve and maintain them for the benefit of all the people. PA. CONST. art. I, §27.

remedy Appellants seek is fair and reasonable and advances the Department's HSCA obligations. As such the PPAs must be rejected.

A. DEP Failed to Fulfill the Mandatory Legal Obligation to Publish Notice of the 2010 PPA *At the Time of Proposal.*

Prospective purchaser agreements are governed by section 1113 of HSCA which 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 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 (emphasis added); See also 24 Summ. Pa. Jur. 2d

Environmental Law § 6:85 (2d ed.).

The statute is interpreted according to its plain meaning. Eagle Environmental, L.P. v. Dept. of Environmental Protection, 833 A.2d 805, 808 (Pa. Cmwlth. 2003), citing 1 Pa. C.S. § 1921(b); Highway News, Inc. v. Dep't of Transp., 789 A.2d 802 (Pa. Cmwlth. 2002) ("Where the words of regulation are clear and free from ambiguity, the letter of the regulation is not to be disregarded

under the pretext of pursuing its spirit), citing 1 Pa.C.S. §1921(b); Highway News, Inc. v. Dep't of Transp., 789 A.2d 802 (Pa. Cmwlth. 2002).

The legislature was clear that settlement agreements need to be published so that the public has an opportunity to comment and that the time for this publication is not infinite. Notice of the Agreement must be published *at the time that settlement is proposed*. See 35 P.S. §6020.1113.¹⁴ The Department failed to satisfy this mandatory duty. The Department proposed the 2010 PPA long before it published notice in April of 2017. Despite the clear statutory mandate, the Department denied the public their right to comment at the time the agreement “is proposed.” The Department’s claim of “administrative oversight” does not excuse or mitigate the egregious failure to properly notice the settlement at a time that the public could meaningfully comment, participate and potentially affect the outcome of the agreement.

The General Assembly specifically intended HSCA to include public participation. See 35 P.S. §6020.301(8). While the HSCA could have been enacted without public participation, the public was specifically made an important part of the Act’s function. For example, a citizen is given the ability to bring enforcement

¹⁴ This obligation is also consistent with due process of law since cleanup of a hazardous substance or a lack thereof implicates the most important of personal rights to be free from bodily injury, to protect property from hazardous substances and the right to a clean environment for this and future generations. Pa. Const. Article 1, Section 1; Pa. Const. Article 1, Section 27.

actions where the Department is not diligently prosecuting. 35 P.S. §6020.1115. The public is provided with the opportunity to comment on a proposed remedial response under HSCA. 35. P.S. §6020.506(c). Likewise, when the Department settles a HSCA liability, the Act specifically requires citizen notification and input. 35 P.S. §6020.1113. This is meant to be a true opportunity to review a settlement agreement and to alert the Department if the Agreement is not deemed protective of the public or the environment. Seeking public comment, egregiously late, when the AS/SVE system was no longer functional, due to its destruction, and critical elements of the involved agreements had already been declared void due to a failure to perform and then validating the now outdated and ineffective agreement was an empty process. DEP's ratification in this matter was nothing more than an impermissible rubber-stamp.

The Department, pursuant to Section I, Article 27, is a fiduciary to its public beneficiary and failed to perform its sacred obligation to act as a trustee to protect the natural resources of the Commonwealth and to act with prudence, loyalty, and impartiality. See Robinson Township, Delaware Riverkeeper Network et al. v. Commonwealth, 83 A.3d 901, 957 (Pa. 2013). The Department's objectivity and impartiality was impaired, because the review of the 2010 PPA came so late in the process. The Department had already "accepted" performance of the 2010

Agreement, prior to its ratification, and without the requisite public participation and meaningful input.¹⁵

The failure to follow the Section 1113 timelines for public review of the proposed agreement resulted in the Department's unthinking ratification of a lopsided 2010 agreement that offered no benefit to the public and substantial detriment. See infra. Failure to publish the proposed settlement at the time it was proposed was itself a serious breach, particularly when there has been egregious delay and significant change of facts in the interim which renders the agreement without tangible benefit.¹⁶ See infra.

B. DEP's 2018 Ratification of the 2010 PPA was Arbitrary and Capricious.

As this Board determined, the appropriateness of the Department's authority to bind the Commonwealth to the settlement agreement must be judged at the time of the 2018 Response to Comments. DRN v. Department of Environmental Protection, 2018 EHB 020 (July 2, 2018) ("We will determine whether the

¹⁵ By way of simple analogy, if an attorney, a fiduciary, fails to consult his client about settlement agreements he has committed malpractice. See Rizzo v. Haines, 520 Pa. 484 (1989) (attorney commits malpractice by failing to communicate all settlement offers to his client).

¹⁶ It is also problematic that the Department failed to notify the public about key issues impacting the settlement agreement terms. The failure of the Department to mention, in the public notice, that the AS/SVE system was destroyed, that the covenant not to sue provision had been voided, and that there had been a change in intended use of the Site from commercial to residential that was not reflected in the 2010 PPA, undermined the ability of the public to offer an informed and reasonable comment.

settlements are arbitrary and capricious when they became final, namely, January 26, 2018, when the Department issued its response document in compliance with Section 1113”).

At the time of the Department’s Response Document,

- (1) The AS/SVE system, which was the impetus for the involved PPAs, was not operable and had not been operated by the Department.
- (2) The “Covenant Not to Sue” was either void or would be deemed void at the Department’s sole discretion based on CDP’s *prior* actions and inactions at the site.
- (3) The development plans for the site had changed from non-residential to residential, without any modification of the cleanup standard in the prospective purchaser agreements.
- (4) No other interim or final remediation for the site has been published, so the site remained severely contaminated, and the 2007 and 2010 PPAs were not beneficial to the public in advancing cleanup.

The aforesaid changed circumstances between the time of the proposal of the 2010 PPA and finalization of the agreement in 2018 results in an agreement that is improper and not in the public’s interest.

The only case which discusses application of Section 1113 of HSCA is John Chirico v. Commonwealth of Pennsylvania, 2002 EHB 25 (2002). While the facts of Chirico are distinguishable from those here¹⁷ the Board in Chirico discussed the

¹⁷ In Chirico, the Department followed the mandatory statutory procedure and provided the public notice and the opportunity to comment as well as an opportunity for an EPA hearing. Id.

standards for determining whether “the PPA serves the public interest in an efficient and effective manner.” Id. at 42. To determine if the Agreement in Chirico was arbitrary and capricious, the Board considered the following factors:

- 1) Whether the Agreement will cost the Department significant public monies? Id. at 38.
- 2) Whether the grant of a covenant not to sue was in the public interest; this, with specific reference to Section 706 of HSCA? Id. at 39.
- 3) Whether approval before the full remediation presents a health threat from hazardous chemicals at the Site, including whether the Agreement will result in an exacerbation of contamination? Id. at 40-42.

Review of each of these factors, considering the factual circumstances of this case, and through the clear lens of all that is known at the time of the 2018 Response Document, results in the inescapable conclusion that the Department acted arbitrarily and capriciously in ratifying the PPAs. As discussed further below: 1) The PPAs cost significant public monies and offer no benefit; 2) The 2010 PPA was not in the Public Interest and 3) Approval of the PPAs before final remediation presents an undue health threat as nothing is being done in the face of significant contamination.

1. The PPAs cost significant public monies and offer no benefit.

Such is not this case here. Being given notice of the fully performed agreements, seven and ten years late respectively, does not follow the requirements of Section 1113 and led to the wrongful ratification of a defective agreement.

The government, while having the flexibility to encourage economic development, should not be put in the position of being overly involved in the funding of that which is truly a for-profit private project. In Chirico, the Developer paid \$2000 toward the Department's response costs and \$225,000 to EPA for its costs. Id. at 30, 38. The Department represented in Chirico that it did not anticipate spending significant public monies. Id. at 33 and 38. Accordingly, the Board in Chirico did not find the agreement to be arbitrary and capricious. Id. at 38.

In contrast, in this matter, in the 2007 and 2010 PPAs the Department has already expended substantial public monies to obtain a remediation system that was known in 2007 to potentially fail and in fact did fail. AR#0235 (DEP paid \$377,000 toward the AS shallow groundwater operations); AR#0491 (“the shallow depth of groundwater table poses some issues with respect to implementability of air sparging coupled with soil vapor extraction, since the water table could potentially interfere with vapor collection”). While in some cases it may not be known if the government's investment in funds will be sufficient to resolve the contamination at the site, we unequivocally know that future substantial expenses will be required for this Site. At the time of the 2018 Response Document, the

AS/SVE system, which was the impetus for the involved PPAs, was not operable¹⁸ and had not been operated by the DEP. AR#0121, AR#0263-268, AR#0270, AR#0272. In the language of contract law, the benefit of the bargain did not exist.

In the 2007 Statement of Decision, the Department wrote, “Generally, removal and/or destruction of contaminants in the source area, where they are most concentrated, have the potential to reduce the overall project life span and cost.” AR# 0492. It is beyond argument, as Dr. Myers, pointed out in his report, “TCE sources will remain until removed or leached out.” AR#0364. Accordingly, the failure of the AS/SVE remedy caused delay, increased remediation costs and allowed the continued migration of the TCE into groundwater and surface water.

The Department’s effort to ratify the financially expensive, outdated and ineffective 2010 PPA, after the agreement failed to provide tangible public benefit, is a serious deficiency in the Department’s analysis. Unlike Chirico, the Department cannot claim that it will not be obligated to spend substantial future money toward cleaning up of the groundwater at the Site. By ratification of the PPAs, the Department agreed to allow the Developer -- who stands to profit

¹⁸ It was not operable due to the fact that CDP’s contractor destroyed the system. AR#0263-265. See also AR#0012(“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.”)

financially from his development – to foist groundwater cleanup onto others, including potentially the Department and thereby the public.¹⁹

Further, the cost of cleanup is invariably linked to the current and future use of the Site. Significantly, the original 2005 PPA reflected that the developer intended to meet a **non-residential** Act 2 standard. AR#0005. This standard was set because the Developer indicated that it was remediating for commercial purposes. AR#0003, AR#0005. There was no express modification of the remedial goal in the 2010 PPA to reflect the Developer’s intent to change the intended use of the Site to residential.

In Act 2, the General Assembly declared:

Cleanup plans should be based on the actual risk that contamination on the site may pose to public health and the environment, taking into account its current and future use and the degree to which contamination can spread offsite and expose the public or the environment to risk, not on cleanup policies requiring every site in this Commonwealth to be returned to a pristine condition.

35 P.S. § 6026.102(6) (emphasis added)

While the Department may not control land use decisions, they are obligated to assure that appropriate remedial goals in accordance with intended use be achieved

¹⁹ While there are some known potentially responsible parties, they are contesting their liability for response costs. In the past decade, the Department has not ordered them to engage in any Site remediation, outside of the investigative work. See AR#0121. The Administrative Record does not demonstrate that there are potentially responsible parties willing to voluntarily remediate, at this time. For example, the Department could not get any potentially responsible party to operate the AS/SVE system. AR#0478.

and are achievable. See 35 P.S. §6020.504. When the Department ratified the 2010 PPA at issue, it was well aware of the land use change and of its failure to bargain for a cleanup standard commensurate with that changed use and for the likely increased costs created by such changed use. See AR#0142, AR#0144, AR#0158, AR#0161, AR#0162 (public comments referencing the residential land use change). See gen. Land Recycling Program Technical Guidance Manual (2002) at 1-2 (“A property used for industrial development need not be as clean as a playground or residential site”). The other potentially responsible parties doing investigation work at the Bishop Tube Site have raised concerns that they proceeded in an extensive investigation of the Site under the premise that the Site would be used for non-residential purposes, and that additional study and remediation might be required if Bishop Tube is to be developed for residential purposes. AR#0146. This creates an increased burden on the Department and other potentially responsible parties to the benefit of the Developer. See AR#0162 (DRN Comment).

At a minimum, the administrative record does not support that CDP’s contribution to the Department’s costs is fair and reasonable under the changed circumstances, the rezoning and new intended use of the Site. The Administrative Record does not reflect the future costs to the Department from the change in intended use of the Site and from the failure of the AS/SVE system to operate.

As a result of the 2010 PPA, the Department in 2018 has received the minimal amount of \$32,000 along with an inoperable remedial system (only partially funded by CDP).²⁰ The Department has already expended substantial resources and has promised to remediate the ground water to support “remediation standards under Act 2 for soils and groundwater at the Site that are consistent with Developer's intended redevelopment activities” AR#0041. The material change in the planned use of the Site should have triggered a modification in CDP’s funding so that it would be commensurate with the likelihood of increased cleanup required to bring the Site to safe conditions for residential usage.

The Department’s response to comments on these points that “zoning and land use decisions are outside of the Department's purview but are the responsibilities of local municipalities” gravely missed the key point that it has ratified an agreement about what cleanup obligations the Developer will have for the Site and what cleanup obligations the Department will shoulder at the public’s expense. See AR#0125 (Response to Comments).

2. The 2010 PPA was not in the Public’s Interest.

In Chirico, the Board indicated that the Department may provide a covenant not to sue within the limits of Section 706 of HSCA. 2002 EHB 25, 35 P.S. §6020.706. The Board, in Chirico, concluded that it did not find anything in the administrative

²⁰ CDP also promised to repair a road and install a fence in the 2010 PPA. AR#0101-0102.

record to indicate that the grant was not in the public interest or that the agreement would not have a tendency to expedite necessary response actions. *Id.* at 39. There is no basis for such a conclusion in this matter.

The General Assembly provided that the Department has a mandatory duty under Section 706 not to enter a “covenant not to sue” with a “responsible party” without giving due consideration to the public interest and to whether it would expedite a response action. 35 P.S. §6020.706(a). The Department is also required to consider the following “public interest” statutory factors when considering a covenant not to sue:

(1) the effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the site concerned; (2) the nature of the risks remaining at the site; (3) the extent to which performance standards are included in the order or decree; (4) the extent to which the technology used in the response action is demonstrated to be effective; (5) whether the fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the site; and (6) whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

See 35 P.S. §6020.706(d)(1)-(6).

A review of the statutory factors, in light of the facts known at the time of the Department’s 2018 ratification of the 2010 PPA, demonstrates that the Department improperly entered into the covenant not to sue. For example, the key performance provided in the 2010 PPA-- acquisition of the AS/SVE system -- is not an effective remedy, because the AS/SVE system is inoperable and was not

operated by the Department. AR#0270, AR#0272. See also AR#0473, Remedial Investigation Report at 21 (“Although there may have been some brief testing periods of the AS/SVE system, the system is not believed to have operated since 2007).²¹ See also Section 1. Further, to the extent that there has not been a successful interim remediation via the AS/SVE system -- when there was a known need for interim response -- means that significant contamination remains, with risks to on-site and to off-site areas. See AR#0364. Dr. Tom Myers has cogently explained the hazards from the unremediated Site as follows:

Chlorinated solvents contaminating soils and groundwater beneath the Bishop Tube Superfund Site have been a risk to human health and ecosystems in the Valley Creek watershed since at least the 1980s. Large quantities have bound to unsaturated soils at the site and have leached into groundwater. TCE is found more than 300 feet bgs in bedrock fractures because of its high density. Characteristics of TCE and related products cause it to remain at the site and slowly dissolve into groundwater. Because the contaminants are toxic at extremely low concentrations, the unremediated site will continue to be a hazard for the foreseeable future. Contaminants can pass downstream through surface waters from LVC to Valley Creek and the Schuylkill River or through groundwater by transporting with groundwater flow through bedrock fractures to points of discharge, including springs or streams. It is likely that not all discharge points to surface waters have been identified. Contaminants also can pass offsite as dust.

AR#0368.

²¹ While the DEP claimed that the AS/SVE system removed 680 pounds of volatile organic compounds in the short two months that it operated, this was a tiny fraction of the amount that required removal. See AR#0132.

Moreover, the Department had to expend public money on a remedial system that we know with certainty was not beneficial for the Site. AR#0235. See also Section 1. In selecting the AS/SVE system as a remedial response, the Department reviewed a “no action” alternative and concluded that such a response would be costly. The Statement of the Decision provided as follows:

Implementation of the No Action Alternative for this source area could increase the overall cost and time frame of a final remedial response to address groundwater contamination at the site by allowing groundwater to be impacted and migrate from a continuing source of contamination where significant mass of contamination is present

AR#0490.

Because the AS/SVE system was not operable, the Site has effectively remained with a “No Action Alternative.” In 2018, the Department ratified an agreement that increased the overall cost and time frame of a final remedial response. Id. According to the HSCA Section 706(d) factors, the DEP should not have ratified the 2010 PPA to provide for a covenant not to sue. While it substantially benefits the Developer to have liability protection, the agreement is not in the public’s interest, because no response is being expedited.

The Department in 2014 found that the Developer’s inactions (failure to demolish buildings) and actions (contractor’s destruction of the AS/SVE system) interfered with response actions and potentially exacerbated contamination on the

Bishop Tube Site.²² See AR#0267-0268. The Department has taken the position that the covenant not to sue is void but has not decided whether or when to take enforcement action against CDP for its violations. Id. See also AR#0126. While the Department may not have made any decision regarding enforcement against CDP for the past violations, it is arbitrary and capricious to ratify a contract where the covenant not to sue has been declared void due to the Developer's prior actions. See AR#0126.

In sum, the 2010 PPA does not provide a remedy or interim remedy for the Site that will expedite cleanup, and the Developer's action and inactions have already caused the Department to void the covenant not to sue. Thus, the Department is expending great effort to ratify an outdated and ineffective agreement that cannot in the least be said to be in the public's best interest within the meaning of Section 706. 35 P.S. §6020.706.

3. The Approval of the PPAs before final remediation presents an undue health threat as nothing is being done in the face of significant contamination.

In Chirico, supra, the Board recognized that, where there is a prospective purchaser agreement for a highly-contaminated property that presents a health risk to nearby residents, the EHB could overrule the settlement as arbitrary and

²² This letter was appealed to the Board which determined that it was not a final action. AR #0301.

capricious. Id. at 40-41. In this case, as fully explained, the AS/SVE system, and whatever promise it may have held was never actualized due to its failure to effectively perform and due to its destruction by a CDP contractor.²³ There been no notice of any other successful interim response. This leaves the property with significant contamination. Dr. Myers specifically opined, “The vast amounts of TCE and contaminants remaining stored in the soils at the site create a health risk due to the potential direct contact to the soil, airborne TCE in neighboring residences, and contact with surface water.” AR#0364. The preliminary Remedial Work Plan by CDP’s consultant recognized the presence of contaminants that exceeded regulatory levels. See AR#0058. They also recognized the health risk caused by leaving the contaminants in place. The preliminary Remedial Work Plan provided: “the primary goal would be to mitigate the risk to human health of vapor intrusion from the impacted soil into on-Site (and off-Site) buildings, as this exposure pathway is considered to represent the greatest potential risk to human health directly related to impacted soils at the Site, and by direct contact with the impacted soils.” AR#0021. The remedial goal was not met by the original PPA or the 2007 and 2010 PPAs.

²³ In Chirico, the EPA promised to oversee the Site and to assure that “the developers do not dig through any contaminated areas which may pose a risk for the community.” In stark contrast to the promises of the EPA, the DEP has done nothing to assure the public that it will sufficiently supervise the developer. When DEP was allegedly in charge of operating the AS/SVE system on the Site, CDP’s contractor destroyed the AS/SVE system which may have exacerbated contamination. AR#0267- AR#0268.

Given the failure of the AS/SVE system to meet the performance criteria set in the 2007 PPA, a period beyond an initial 72 hour start-up was necessary to assure that the system was fully functional in 2010.²⁴ Because the Department did not operate the system prior to its destruction, it appears that it was not fully functional. See AR#0121. Moreover, numerous years have passed since the destruction of the AS/SVE system, without repair.

There is simply no basis for the Department's effort in ratification of the 2010 PPA which time has clearly shown did not decrease the health threats from the TCE in the soils, surface or groundwater. The public health and the environment are not served by the ratification of the PPAs. A comprehensive final remediation is desperately needed. At the very least it was arbitrary and against the public interest to approve PPAs that did not include any meaningful interim measures that would work toward that emergent cleanup. The 2010 PPA is known to be without any benefit in advancing the cleanup and protecting the public health and natural resources from the significant contamination that remains on the Site and is migrating significant distances to offsite locations. See AR#0364, AR#0368, See also AR #0499, AR#0487-0488, AR#0321.

²⁴ The PPA also should have specified which party would carry insurance on the expensive system.

The Department's response to comments that the interim remedy was not meant as a final remedy is insufficient. It neglects the point that the 2010 PPA offers no material advancement of the cleanup. See e.g., AR #0125, AR #0404. It also disregards the fact that the Developer's track record at managing this Site has been questionable in failing to prevent acts of vandalism from releasing contamination, and failing to stop teens and young children from gaining access to the Site or interacting with the creek known to be contaminated by pollutants from the Site, and failing to assure that its own contractors don't potentially exacerbate contamination. See AR#0205, See also AR#0473, Remedial Investigation Report at 21.

At this time, it has unfortunately been confirmed that the 2010 PPAs (and prior agreements) did not advance proper and prudent cleanup at the Site and leaves the Site in a condition that presents an undue risk to the community.²⁵ It is arbitrary and capricious to have ratified the 2010 PPA and its predecessor (2007 PPA). Ratification was not in the public interest, has been and will be costly to the Department (and taxpayers) and has not expedited a remedial response such that undue risk from the Site remains.

²⁵ In addition to a human health risk, there is an ecologic health risk and degradation to an exceptional value stream. Ar#0388, AR#0408, AR#0401-402.

C. DEP’s Ratification of the 2007 and 210 PPA’s 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.

The agreements are arbitrary and capricious because they fail to comply with the Pennsylvania Constitution. PA Constitution, Article I, Section 27, 35 P.S. 6020.301(16). Pursuant to Article I, Section 27 of the Pennsylvania Constitution, the Department has constitutional obligations as an agency of the Commonwealth. See Pennsylvania Env’tl. Def. Found. v. Com., 161 A.3d 911 (Pa. 2017). (“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) (emphasis added). See also 35 P.S. §6020.301(16) (HSCA provision indicating that DEP shall have the power and duty to implement Section 27). The Board has extensively explained the Department’s constitutional obligations as follows:

The Supreme Court in *PEDF* ...finds that the Commonwealth has two basic duties as trustee: 1) prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties and 2) act affirmatively via legislative action to protect the environment....

We held in *CCJ* that the proper approach in evaluating the Department's decision under the first part of Article I, Section 27 is, first, for the Board to ensure that the Department considered the environmental effects of its actions. **The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or**

will be. *Id.* Cf. *Blue Mtn. Preservation Ass'n. v. DEP*, 2006 EHB 589 (failure to conduct proper analysis alone justifies a remand); *Hudson v. DEP*, 2015 EHB 719 (same). We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable. *CCJ*, slip op. at 60-61.

Friends of Lackawanna v. Commonwealth of Pennsylvania Department of Environmental Protection and Keystone Sanitary Landfill, Inc., 2017 EHB 1123, 1159-1161, 2017 WL 5558489, at *20–21.

The Department has breached its mandatory constitutional obligation by ratifying agreements that did not serve to protect the natural resources of the Commonwealth, and by not informing itself as to the consequences of the destruction of the AS/SVE system. *See id.* The Department’s entire approach, as reflected in its Response Document, is the antithesis of compliance with its obligations. With respect to whether the destruction of the AS/SVE vapor barrier and piping led to the release of hazardous contamination, all the Department can say is, “the Department is not aware of information indicating that damage has led to exposure to area residents.” DRN in its comments directly challenged the Department’s failure to perform testing and failure to require CDP to clean up any released TCE or breakdown products. AR#0203. In discussing the hazards during the installation of the AS/SVE system, the Statement of Decision provides as follows:

the Installation of the remedy (piping, vapor barrier and subsurface equipment) may present a temporary risk to workers from volatile organic emissions during well drilling and system installation. Emissions from these activities may be monitored and controlled, if necessary, using protective health and safety equipment such as respirators, foam covers, or other fugitive emission control measures.

AR#0491.

Yet, the administrative record does not reflect that the Department did any testing in the area of the piping and liquid boot's destruction and any other impacted areas. See AR#0203. The Department cannot act like an ostrich and put its head down and simply claim that it is "not aware of information" (AR #0126), and at the same time assert its ability to void the covenant not to sue because the destruction "potentially exacerbated the Existing Contamination at the site, in violation of the PPA and its two Amendments." (AR#0267). See also 35 P.S. §6020.501 (Department has a mandatory duty under HSCA to investigate whenever there is a release). Further, it is completely at odds with the Department's trustee duties to spend scarce resources on an AS/SVE system as an interim response action, accept delivery of the purportedly operating system and then not even operate the system; this, before any claim of destruction.²⁶ AR#0272.

²⁶ Even assuming arguendo the Department is to claim that it moved on to another remedial approach, it is still problematic that they did not use this system that they have paid and bargained with the developer to obtain.

The Department has ratified the 2010 PPA despite clear evidence that there is not environmental benefit. To the contrary, there is deterioration from volatile organic compounds continuing to contaminate and migrate to cause additional environmental impacts. The Department's ability to enter prospective purchaser agreements is specifically limited by its Constitutional obligation to prevent degradation of natural resources and the environment. Further, the Department's trust obligation brings a duty for informed decision-making. The failure to investigate the exacerbation of contamination from the AS/SVE destruction, and to seek and consider public comments, including factual and technical comments on the PPAs, are a failure of the Department to fulfill its constitutional trust obligations. As a result of the foregoing deficiencies, the Department has acted arbitrarily and capriciously by ratifying the 2010 PPA that does not advance any cleanup of the Site.

D. The Remedy Appellants Seek Is Fair and Reasonable and Advances Respect for the Department's HSCA Obligations.

It is axiomatic that a Commonwealth agency can bind the Commonwealth only upon contracts authorized by law. Accordingly, if the Board determines that the PPAs, ratified in January 2018, are arbitrary and capricious, such that the Department cannot enter into those agreements, then they are retroactively void as

illegal. DRN v. Department of Environmental Protection, 2018 EHB 020 (July 2, 2018) (“If this Board determines that the settlements are arbitrary and capricious, they will not be upheld”) See also Milestone Materials, Inc. v. Department of Conservation and Natural Resource, 730 A.2d 1034 (Pa. Cmwlth. 1999)(Where DCNR entered into a contract or lease to mine minerals from State Forest land and did not require bidding, the Department entered into an illegal contract that must be rescinded).

Appellants seek a declaration that the 2007 and 2010 PPAs were arbitrary, capricious and improper. As a result of this holding, the 2007 and 2010 PPAs would be null and void due to illegality. The 2005 PPA, is now also void, because the Developer did not meet the performance required in it; it was not performed by the March 1, 2009 deadline. AR#0005.

Any dispute that the Developer may have with the Department over its failure to publish the agreement at an earlier date is between the Developer and the Department. The public’s right and the Department’s constitutional and legal obligations cannot be set aside in an effort to benefit a third party Developer that was well-represented throughout the process by legal counsel, who is very familiar with the obligations of law, and had every opportunity to seek, secure and work with the Department to legally advance a fair and equitable PPA that included appropriate compliance with the law and protection of the public’s interests.

While it is not something that Appellants can request as relief, it would seem to be in all parties' interests for the Department and CDP to negotiate and create a new settlement agreement that would provide appropriate remediation to the Site in keeping with the new intended use. It is understood that the Developer has work to do on the Site if it intends to use it for any purpose, and, therefore, it becomes a matter of the parties determining a remedial plan for the Site as an interim remediation or part of the final remediation, and ensuring appropriate public input and benefit. Unlike the debacle that the 2007 and 2010 PPAs became, such a new agreement could be timely published and offer environmental and public benefit and thus be in the public's best interest. But whatever the chosen next steps of the Department and the Developer, the public has been disenfranchised and deeply harmed by the failure of the Department to comply with its legal and/or constitutional obligations. A Prospective Purchaser Agreement is a potent tool that the Department can use to expedite cleanup and encourage responsible development. Such an Agreement, however, must be consistent with the goals and limitations set forth in HSCA and with the Department's obligations under the Pennsylvania Constitution. The 2007 and 2010 PPAs here failed to meet those standards.

Conclusion

For all of the foregoing reasons, it is respectfully requested that the Department's ratification of the 2007 and 2010 PPAs be deemed arbitrary and capricious and these Settlement Agreements deemed void as illegal.

Respectfully submitted,
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