

EXHIBIT A



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

January 29, 2017

Delaware Riverkeeper Network

FEB 02 2018
RECEIVED

Ms. Maya van Rossum
Delaware Riverkeeper Network
925 Canal Street, Suite 3701
Bristol, PA 19007

Re: Response to Public Comments
Bishop Tube HSCA Site

Dear Ms. Van Rossum:

The Pennsylvania Department of Environmental Protection (PA DEP) would like to thank you for submitting comments during the public comment period concerning the Bishop Tube HSCA Site. Enclosed is a copy of the PA DEP's Response to Public Comment.

Thank you for your interest in this matter. For updates on this Site please visit our website at www.dep.pa.gov/bishoptube.

If you have any questions, please contact me at 484.250.5723 or by email at darmstrong@pa.gov.

Sincerely,

Dustin Armstrong
Environmental Protection Specialist
Environmental Cleanup and Brownfields

Enclosures

cc: Mr. Nagel - East Whiteland Twp.
East Whiteland Twp. EAC
Re 30 (cm18ecb) 025.4



HSCA Group

484.250.5960

PA DEPARTMENT OF ENVIRONMENTAL PROTECTION

SOUTHEAST REGION

HAZARDOUS SITES CLEANUP GROUP

January 26, 2018

Bishop Tube HSCA Site

Response to Significant Public Comments

**Regarding Second Amendment to Prospective Purchaser Agreement
Between the Department and Constitution Drive Partners**

The Pennsylvania Department of Environmental Protection (Department) hereby files this Response to Significant Public Comments regarding the First Amendment to the Prospective Purchaser Agreement (1st Amended PPA) and the Second Amendment to Prospective Purchaser Agreement (2nd Amended PPA) between the Department and Constitution Drive Partners pursuant to Section 1113 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.101 *et seq.*

BACKGROUND

The Bishop Tube HSCA Site ("Site") is located in East Whiteland Township, Chester County, PA. The Site consists of an abandoned tube manufacturing facility located on approximately 13.7 acres of land adjacent to a railroad line running parallel to U.S. Route 30 in east Whiteland Township, more properly identified as Chester County Tax Parcel No. UPI-42-04-0321.020 (the "Property"). The Site also consists of a large plume of contaminated groundwater that originates from the Property and extends generally in a northern and eastern direction, as well as potentially impacted portions of Little Valley Creek.

The Site was formerly used as a precious metals processing and stainless steel fabricating facility between the early 1950s and the late 1990s. At some point during ownership of the facility, hazardous substances were released into the soils and groundwater at the Property. Department investigations identified three suspected source areas in soils at the Site. On September 11, 2010, pursuant to Section 502 of HSCA, the Department placed the Site on the Pennsylvania Priority List of contaminated sites to be addressed by the Department under HSCA. Notice of Listing on the Pennsylvania Priority List of Hazardous Sites for Remedial Response was published in the PA Bulletin on September 11, 2010.

On March 17, 2005, the Department exercised its discretion to enter into a Prospective Purchaser Agreement (“PPA”) with Constitution Drive Partners, L.P. (“CDP”), for the Site. CDP planned to develop the Site for commercial purposes. In exchange for a Covenant Not to Sue and Contribution Protection from the Department, CDP agreed to undertake certain remediation of soil activities within the unsaturated zone at the Site necessary to demonstrate attainment with a non-residential statewide health standard or site-specific standard under the Land Recycling and Environmental Remediation Standards Act, 35 P.S. § 6026.101 *et seq.* (“Act 2”) in accordance with a Remedial Action Work Plan which had been approved by the Department.

On April 8, 2005, the Department published notice of the PPA pursuant to Section 1113 of HSCA and opened a 60-day period of public comment period on the PPA. The Department received no comments on the PPA during the public comment period, and the PPA became final when the Department notified CDP that no comments had been received.

The Department subsequently exercised its discretion to enter into two separate Amendments to the original PPA. In the 1st Amended PPA, dated January 22, 2007, the parties agreed to modify certain performance obligations of CDP related to investigation and remediation of soils at the Site. In accordance with the terms of the 1st Amended PPA, the modifications to the performance obligations of CDP were made part of the initial PPA, which otherwise remained in full force and effect. This amendment to the PPA also facilitated the design, installation and operation of a physical treatment technology, known as an air sparging/soil vapor extraction (AS/SVE) system.

On September 5, 2007, the Department issued a Statement of Decision (“SOD”) for a prompt interim response action at the Site. The Department provided notice of this action on December 16, 2006, commencing a 90-day public comment period, and issued a response to Significant Comments also on September 5, 2007. Through this SOD, the Department selected a system for Treatment of Groundwater Contained in Unconsolidated Material in the Plant 8 area of the Site. As set forth in the SOD, the purpose of this interim response was to remove “TCE and related contaminants to reduce dissolved contaminant levels in the shallow (overburden) zone around the treatment area.” The SOD further stated that “under this response tasks and costs would be shared between the Department and the developer’s soil vapor system to provide for compatibility and increased efficiency.” Both the SOD and the Department’s Response to Significant Public Comments make clear that this action was not intended to be a final response action for the Site and that further cleanup would be required.

In 2008, the AS/SVE System was installed and operated by CDP. The system did not meet performance standards. There were operational difficulties resulting from the shallow water table and system flooding, as a result, operation of the system was halted.

On August 18, 2008, the Department entered into a binding Consent Order and Agreement with Johnson Matthey Incorporated, a potentially responsible person (“PRP”). They agreed to complete a Remedial Investigation (“RI”) and Feasibility Study (“FS”) at the Site. That agreement was amended on August 4, 2009 to include another PRP, Whitaker Corporation. These investigations are performed using a systematic approach, typically starting at an area of concern then continuing outward to evaluate migration from the source. The Department and the PRPs have and continue to collect large amounts of data to demonstrate the migration direction and extent of the plume from the Bishop Tube property.

Throughout the RI process, the Department has provided oversight of the PRPs investigation activities by reviewing and approving work plans and other plans prior to initiation of the work. Department personnel frequently visit the Site to provide direct oversight. During some sampling events, the Department collects samples, called “split” samples, in an effort to provide quality assurance and quality control for the work they perform.

Upon completion of the RI and associated FS, a final, comprehensive site remedy will be proposed by the Department. All information that the Department utilizes in formulating the proposal will be incorporated into an Administrative Record. The public will have an opportunity to review and comment on the Department’s proposed remedial response and contents of the Administrative Record during a 90-day public comment period. During the comment period, the Department will hold at least one public hearing. Upon completion of this process, the Department will select a final remedial response for the Site that meets the substantive and procedural requirements of HSCA. In addition, the Department may implement additional interim response actions at the Site as deemed necessary or appropriate. Any remediation work by PRPs, Department contractors, or others will require careful oversight to assure that unnecessary risks to public health and the environment are avoided or minimized.

In the 2nd Amended PPA, dated June 4, 2010, the parties agreed to further modify CDP’s performance obligations and provide for a cash-out once CDP had met the modified performance obligations. As with the 1st Amended PPA, the 2nd Amended PPA provided only that the modified performance obligations were to be made part of the initial PPA, which otherwise remained in full force and effect. CDP paid a total of \$32,000 to the Department in two installments, \$10,000, on July 6, 2010 and \$22,000 (\$20,000, plus 10% delay cost) on July 13, 2011. In addition, at the time of the amendments to the PPA,

the Department's understanding of the proposed usage of the Bishop Tube property had not yet changed. East Whiteland later changed the zoning at CDP's request to residential in 2014.

On April 1, 2017, the Department published Notice of the 1st Amended PPA and the 2nd Amended PPA in the *Pennsylvania Bulletin* and further published Notice in *The Daily Local News* on March 18, April 1, April 29, and June 14, 2017. Written comments were accepted during the comment period, which extended from March 18 to June 7, 2017. At the request of East Whiteland Township, the comment period was extended to July 7, 2017.

Under the terms of both the 1st and 2nd Amended PPAs, the initial PPA remained in full force and effect, other than with regard to certain modifications that were made to the performance obligations of CDP. Consequently, the only portions of the 1st and 2nd Amended PPAs that are subject to public comment and this Department response under Section 1113 of HSCA are the modifications to the performance obligations of CDP as set forth therein. This Comment Response Document will therefore respond to all significant comments received by the Department during the public comment period identified above that address the propriety of the modifications to CDP's performance obligations under the 1st and 2nd Amended PPAs.

Some comments have noted the use of state grant funding at the Site. The Department's role in the Industrial Sites Reuse Program, administered by the PA Department of Community and Economic Development (DCED), is to advise DCED with regard to applicant eligibility pursuant to the DCED's guidelines and to review the Scope of Work provided with the grant application for compliance with Act 2. The grant project, if approved by DCED, would have constituted only one step in the overall cleanup of the Bishop Tube Site.

The Department has compiled all comments received during the comment period from the following person(s).

Person(s)

Mr. Charles Bernhardt, Resident
Frazer, PA (Comment 1)

Counselors at Law on behalf of Whittaker
Corporation and Johnson Matthey Inc.
(Comment 2)

Delaware Riverkeeper Network
Bristol PA (Comment 3)

Ms. Jill Holsclaw, Resident
Malvern, PA (Comment 7)

Ms. Debra J. Mobile, Resident
Malvern, PA (Comment 8)

Mr. John Preston, Resident
Devon, PA (Comment 9)

Forensic Environmental Services Inc.
Exton, PA (Comment 4)

Mr. Larry and Mrs. Kate Stauffer, Residents
Malvern, PA (Comment 10)

Hamburg, Rubin, Mullin, Maxwell & Lupin,
HRMM&L, PC Attorneys at Law on behalf of
East Whiteland Township (Comment 5)

Stauffer, Resident (Comment 11)
(Name is illegible, & no address was provided)

Ms. Pauline Heizenroth, Resident
Malvern, PA (Comment 6)

The following comments are attached to this document.

Attachment A	Counselors at Law on behalf of Whittaker Corporation and Johnson Matthey Inc.	original comment - received June 12, 2017 supplemental comment - received July 7, 2017
Attachment B	Delaware Riverkeeper Network Bristol PA	original comment - received June 7, 2017 supplemental comment - received July 6, 2017
Attachment C	Forensic Environmental Services Inc. Exton PA	comment - received June 13, 2017
Attachment D	Hamburg, Rubin, Mullin, Maxwell & Lupin, HRMM&L, PC Attorneys at Law on behalf of East Whiteland Township	comment - received July 7, 2017
Attachment E	Ms. Pauline Heizenroth, Resident Malvern, PA	comment - received April 17, 2017
Attachment F	Mr. John Preston, Resident Devon, PA	comment - received July 7, 2017
Attachment G	Stauffer, Resident (Name is illegible, & no address was provided)	comment - received April 12, 2017.

Each comment, the source or sources of the comment identified by number and the Department's response are listed below:

Comment 1: Comment received by from Mr. Bernhardt on June 12, 2017.

From: Charles Bernhardt [REDACTED]
Sent: Monday, June 12, 2017 1:25 PM
To: Armstrong, Dustin <darmstrong@pa.gov>
Subject: Public Comment to Bishop Tube Public Informational Meeting
Importance: High

Public Comment to Bishop Tube Public Informational Meeting
Meeting Held: June 7, 2017 @ Great Valley Middle School
PA DEP Representative: Dustin Armstrong

June 12, 2017
Comment by: Charles Bernhardt, 23 Birch Road, Malvern, PA

Dear Mr. Armstrong

Thank you for presenting the "TIMELINE OF EVENTS" related to the Bishop Tube HSCA Site in East Whiteland. However by the end of the night, I was never so saddened by the mishandling and seeming incompetence by all State and Local Government units involved and the failing to protect the health, safety and welfare of the Taxpayers over the last 18 years.

In summary, the ONLY information that I saw as reasonable and objective was the recommendation by ATSDR's Robert Helverson as to leave the property as fallow until greater testing and remediation can be completed. At this time, I fully support the position of the ATSDR recommendation.

In my thirty years of professional experience and participating in presentations, before your "Informational Presentation", I had NEVER seen a meeting where the general public and those in the audience appeared far more informed than those giving the meeting. This was a sad day for the PA DEP and the Supervisors of East Whiteland Township!

While I realize that giving the Public a detailed and straightforward response to even the most remedial question, I have the following questions that I wish to make public and obtain public response:

Since the Polluters, Corporate Entities and their Stockholders all appear to be known, why in the last 18 years has the Commonwealth of PA or Environmental Protection Agency not taken the appropriate legal action to get those Parties to undertake sufficient testing or clean-up the entire environmental disaster?

1. If any scientific conclusion requires objective, verifiable, timely and sufficient sampling data, then:
 - Why has PA DEP Allowed almost all of sampling data came from those with an economic agenda to mitigate the degree of the problem (i.e., Polluters and Land Developers) and constantly been concluded to be insufficient to draw a conclusion over 18 years?
 - Why has PA DEP not just fined or required payment by the Polluters to underwrite a scientifically accepted and economically objective organization to undertake all the testing needed to determine proper clean-up of this site prior to any consideration of development?
 - Since it was presented at the Information meeting that Polluted material was purposely shipped throughout East Whiteland Township by the property owners and your current testing has geographic limitations with no indication that the true extent of the pollution is known, why are you not expanding the sample size of testing on all identified pollution storage sites from Bishop Tube as well as in the all directions from the site to provide assurance as to the extent of the pollution and better determine the extent of the clean-up required?
2. Why has the PA DEP not spent more time, effort and resources investigating the claims of former workers of Bishop Tube and long-term residence as additional sites that Bishop Tube had polluted on and off the current Bishop Tube site? Is the PA DEP intentionally attempting to remain ignorant on the true extent of the pollution at this site?
3. Since the PA DEP and the Polluters have spent the last 18 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 solution is complete?

Please let me know if you have any questions regarding my inquire.

Sincerely,

Charles T. Bernhardt
[REDACTED], Frazer, PA 19355
Email: [REDACTED]

Comment 1 Response: The Department appreciates the comment. As discussed above, this comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 2: Comment from Blank Rome Counselors at Law on behalf of Whittaker Corporation and Johnson Matthey Inc. received June 12, 2017. Supplemental comment was received July 10, 2017.

The original comment and the supplemental comment are both included in Attachment A.

Comment 2 Response: As discussed above, this comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. Among other things, the comment notes that, in 2014, the Site was re-zoned from industrial use to residential use and further submits that, because of the re-zoning of the Site, the Department's decisions to enter into the 1st and 2nd Amended PPAs were inappropriate. The Department disagrees with this comment. As stated above, the Department will proceed with selecting a remedy for the Site which follows both the substantive and procedural provisions of HSCA, including all cleanup standards provisions. Nothing about the modification to CDP's obligations under the 1st and 2nd Amended PPAs or the Department's exercise of its discretion to enter into the 1st and 2nd Amended PPAs is relevant to those determinations. Moreover, zoning and land use decisions are outside of the Department's purview but are the responsibilities of local municipalities. In addition, the Department has limited control over the timeline associated with land use and development so long as the development activities don't interfere with investigation and remediation activities.

The comment also raises the issue of CDP's potential non-compliance with the terms and conditions of the agreements and the Department's January 28, 2014 letter to CDP. That letter was appealed to the Pennsylvania Environmental

Hearing Board, which ultimately determined that the letter was not an appealable action. With regard to CDP's damage to the Air Sparge/Soil Vapor Extraction System, the Department is not aware of information indicating that damage has led to exposure to area residents. At this time, the Department has 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 or with regard to other potentially responsible persons at the Site.

The comment also makes several legal arguments related to the potential non-validity of CDP's Covenant Not to Sue and Contribution Protection under the 1st and 2nd Amended PPAs or CDP's exposure to potential enforcement action by the USEPA based upon the re-zoning of the Site. Those arguments may ultimately be litigated in a court of law, but they do not persuade the Department that its entries into the 1st and 2nd Amended PPAs are inappropriate or should be rescinded.

However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 3: Comment from Delaware Riverkeeper Network received June 7, 2017. Supplemental comment received July 6, 2017.

The original comment and the supplemental comment are both included in Attachment B.

Comment 3 Response: As with other comments submitted to the Department, the original comment, as a general matter, does not address the modifications to CDP's performance obligations as set forth in the 2nd Amended PPA. However, in order to provide additional clarification, the Department offers the following responses to individual numerated items in the original comment letter:

Comment 3(I) Response: As discussed above, the Department provided proper notice and an opportunity for public comment on the initial PPA and received no comments. Consequently, the initial PPA became final. The purposes of the 1st and 2nd PPA were to modify CDP's performance obligations, and the Department has now provided proper notice and opportunity for public comment on the 1st and 2nd Amended PPAs as required by Section 1113 of HSCA. The comment does not address these modifications in any detail other than to state that they "are not minor, they are significant and substantive" With regard to the Covenant Not to Sue, please see Response to Comment No. 2 above.

Comment 3(II) Response: This comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs other than to state that the Department's interim response will not protect the public health and the environment from the short and long-term effects of the release of hazardous substances at the Site. As provided in the SOD and associated Response to Significant Comments dated September 5, 2007, the Department was implementing interim response actions at the Site for the purpose of removing a sufficient mass of TCE and related contaminants to reduce dissolved contaminant levels in the shallow overburden zone around the treatment area. These responses were never intended to be a final response action for the Site, and the Department has always indicated its view that further investigation and cleanup would be required. The investigation is underway, which will lead to a final response action.

The remainder of the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 3(III) Response: This comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. Moreover, it is pure speculation as to whether the Department would have acted differently in 2010 had the Site been zoned residential. Nevertheless, the comment does not persuade the Department that its entries into the 1st and 2nd Amended PPAs are inappropriate or should be rescinded.

Comment 3(IV) Response: This comment addresses potential future use at the Site and is not relevant to the 1st and 2nd Amendments to the PPA.

Comment 3(V) Response: The comment addresses the Department's ultimate determinations regarding remedy selection at the Site and is therefore not relevant to the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the Department recommends that the commenter continue with active interest in this matter.

Comment 3(VI) Response: The comment addresses the Department's ultimate determinations regarding remedy selection at the Site and is therefore not relevant to the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. Moreover, the comment addresses

potential plans for the current redevelopment of the Site which are also not relevant to the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the Department recommends that the commenter continue with active interest in this matter.

Comment 3(VII) Response: See Response to Comment No. 3(VI) above.

Comment 3(VIII) Response: See Response to Comment No. 3(VI) above.

Comment 3(IX) Response: Please see response to Comment No. 2 above. In addition, the Department disagrees that it has not appropriately communicated with the public and East Whiteland Township. As noted above, the Department complied with all legal notice and public comment requirements for its Statement of Decision and received several comments during that process. Moreover, the Department has fully complied with all legal notice and public comment requirements relating to the initial PPA, although no comments were received. In addition, the Department has informed East Whiteland Township regularly of its activities since initiating its HSCA investigation at the Site, primarily through East Whiteland's Environmental Advisory Council (EAC). The Department has attended several EAC meetings, which are open to the public, and EAC members have routinely contacted the Department for updates prior to each of their meetings. Additionally, the Township is copied on all monthly progress reports submitted to the Department provided under the Consent Order and Agreement identified above. Finally, East Whiteland Township has the opportunity to seek a Technical Evaluation Grant to pay for its own evaluation of the proposed response action, and the Department has been coordinating with the Township on that effort.

Comment 3(X) Response: See Response to Comment 3(VI) above.

Supplemental Comment 3 Response: The supplemental comment also, as a general matter, does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, in order to provide additional clarification, the Department offers the following responses to individual numerated items in the supplemental comment letter:

Comment 3(1) Response: As discussed above, the Department provided proper notice and an opportunity for public comment on the initial PPA and received no comments. Consequently, the initial PPA became final. The purposes of the 1st and 2nd Amended PPAs were to modify CDP's

performance obligations, and the Department has now provided proper notice and opportunity for public comment on the 1st and 2nd Amended PPAs as required by Section 1113 of HSCA. The comment does not address these modifications in any detail. With regard to the Covenant Not to Sue, please see Response to Comment No. 2 above.

Comment 3(2) Response: Please see Response to Comment No. 2 above.

Comment 3(3) Response: Please see Response to Comment No. 3(II) above. In addition, however, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 3(4) Response: The comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 3(5) Response: The Department has addressed this comment in its other responses throughout this document.

Comment 4: Comment from Forensic Environmental Services Inc. received June 13, 2017.

The comment is included in Attachment C.

Comment 4 Response: As with other comments submitted to the Department, the original comment, as a general matter, does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs.

Comment 5: Comment from Hamburg, Rubin, Mullin, Maxwell & Lupin, HRMM&L, PC Attorneys at Law on behalf of East Whiteland Township received July 7, 2017.

The comment is included in Attachment D.

Comment 5 Response: As with other comments submitted to the Department, this comment, as a general matter, does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, in order to provide additional clarification, the Department offers the following responses to individual numerated items in the comment letter:

Comment 5(1) Response: As discussed above, the Department will, upon completion of the RI and associated FS, select a final, comprehensive site remedy through an Administrative Record process that includes public involvement. At this time, the Department has not ruled out any particular remediation technology towards that end. In addition, the Department may implement additional interim response actions at the Site as deemed necessary or appropriate.

Comment 5(2) Response: Please see Response to Comment 2 above.

Comment 5(3) Response: Please see Response to Comment 2 above.

Comment 5(4) Response: The comment addresses the Department's investigations of hazardous substances at the Site and is therefore not relevant to the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the Department's website for this site contains various communications related to the ongoing scope of those investigations.

Comment 5(5) Response: The comment addresses the Department's ultimate determinations regarding remedy selection at the Site and is therefore not relevant to the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the Department recommends that the commenter continue with active interest in this matter.

Comment 5(6) Response: Please see Response to Comment No. 5(4) above.

Comment 5(7) Response: The comment addresses the Department's ultimate determinations regarding remedy selection at the Site and is therefore not relevant to the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the Department recommends that the commenter continue with active interest in this matter.

Comment 5(8) Response: The Department anticipates that it will select a final remedial action for the Site in 2018.

Comment 5(9) Response: The comment addresses the Department's investigations of hazardous substances at the Site and is therefore not relevant to the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs.

Comment 5(10) Response: The Department has had intermittent contact with ATSDR through the investigatory process at the Site. However, there was no particular coordination with ATSDR at the time the Department exercised its discretion to enter into the 1st and 2nd Amended PPAs.

Comment 5(11) Response: Please see Response to Comment No. 2 above.

Comment 6: Comment from Ms. Heizenroth received April 17, 2017.

The comment is included in Attachment E.

Comment 6 Response: As discussed above, this comment does not specifically address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the Department offers the following responses to individual comments set forth in the comment letter:

Comment 6a: *"The site was acquired by the Central and Western Chester County Industrial Authority and sold to Constitution Drive Partners...." "how long ago did this happen" "*

Comment 6 Response: Central and Western Chester County Industrial Development Authority (CWCCIDA) had a lien on the Property dating back to the 70's and acquired the property upon abandonment by Christiana Metals, the former site owner. In 2005, CWCCIDA sold the property to CDP.

Comment 6b: *"Was the full area of assessed already? If so when?" "What were the results of the assessment?" "Did it only find contamination in the three spots noted by CDP on their map and proposed development plan?" "*

Comment 6b Response: The results of the investigations performed prior to the 2005 PPA are summarized in two reports a *Final Supplemental Soil Characterization Report* dated June 30, 2003 and a *Final Phase III Supplemental Groundwater Investigation Report* dated 2004 prepared by a Department contractor, Baker Environmental Inc. These reports are available for review on the Department's website. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 6c: *“Why does it “one of the standards”? Are there different types of remediation in Standards Act 2? What type of remediation is needed to fully restore this property to a non-contaminated area? What type of remediation is CDP planning to do? From what I recallCDP said they plan to remediate the Site to residential standards. What specifically does that mean?”*

Comment 6c Response: As discussed above, this comment does not address the modifications to CDP’s performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department’s selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

There is information related to the Land Recycling and Standards Act (“Act 2”) on our website. At the home page, <http://www.dep.pa.gov>, search for “Land Recycling.”

Comment 6d: *Does this “Covenant not to sue” protect CDP from being sued by anyone in regard to its Bishop Tube development??? What is meant by “contribution protection” from PADEP”*

Comment 6d Response: The comment refers to legal ramifications of the Covenant Not to Sue and Contribution Protection provisions that were agreed to by the Department and CDP in the initial 2005 PPA. The Covenant Not to Sue and Contribution Protection provisions were not altered during the entries into the 1st and 2nd Amended PPAs. Those issues may ultimately be litigated in a court of law, but they do not persuade the Department that its entries into the 1st and 2nd Amended PPAs is inappropriate or should be rescinded.

Comment 6e: *Regarding the soil vapor extraction and air sparging remedial system, “Was this done? If so, when? Was it successful?...What happened during the 72 hours? Did the system work? Did it remediate the site? Is PADEP still running this system?”*

Comment 6e Response: In 2008, the AS/SVE System was installed and operated. In two months, the system removed approximately 680 pounds of volatile organic compounds. Due to operational difficulties resulting from the shallow water table and system flooding, operation of the system was halted.

Comment 6f: *“....it says the public may comment on the amendments.....Were they amended on those dates or are they still up for debate?”*

Comment 6f Response: Yes. As set forth in the discussion above, the Department provided for a public comment period on the 1st and 2nd Amended PPAs. This Response to Significant Comments is intended to provide the Department's response thereto.

Comment 7: Comment from Ms. Holsclaw received July 6, 2017.

-----Original Message-----

From: Jill Holsclaw [mailto: [REDACTED]]

Sent: Thursday, July 06, 2017 5:35 PM

To: Armstrong, Dustin <darmstrong@pa.gov>

Cc: [REDACTED]

Subject: Clean up Bishop Tube

Mr. Armstrong,

Now is the time to clean up Bishop Tube. We don't want our future impacted by neglect from the past.

Read the article from the Philadelphia Inquirer from a few weeks ago. The city, developers and state agencies didn't do their job. Their children are now getting poisoned. "It's everyone's problem yet it is no one's problem."

<https://na01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fdigital.olivesoftware.com%2Folive%2FODN%2FPhiladelphiaInquirer%2Fshared%2FShowArticle.aspx%3Fdoc%3DPHQ%252F2017%252F06%252F18%26entity%3DAR00103%26sk%3D5EC6BB3E%26mode%3Dtext&data=02%7C01%7Cdarmstrong%40pa.gov%7C4d44dd0bd98242642dcc08d4c4b6e528%7C418e284101284dd59b6c47fc5a9a1bde%7C1%7C0%7C636349737203184879&sdata=iHSXixluHv8ohoyl9kE3rXvImw9DCwRk1ycyc8lkBcU%3D&reserved=0>

Respectfully,

Jill Holsclaw

[REDACTED]

Malvern

Comment 7 Response: The Department appreciates the comment. As discussed above, this comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 8: Comment from Ms. Mobile received June 27, 2017.

From: [REDACTED]
Sent: Tuesday, June 27, 2017 4:53 PM
To: Armstrong, Dustin <darmstrong@pa.gov>; Maya K. van Rossum, Delaware Riverkeeper <keepermaya@delawareriverkeeper.org>
Subject: Bishop Tube

Dustin Armstrong
PA Department of Environmental Protection

Mr. Armstrong,

I am a retired public school teacher living at [REDACTED] in East Whiteland Township. I am a life-long resident of Chester County, Pennsylvania and have been living in the small neighborhood known as "The Village" for over 35 years.

I have strong concerns about the current handling and proposed development of the Bishop Tube site on South Malin Rd in Frazer, PA. I am writing with concerns in response to the informational meeting held on June 7 for concerned residents.

- The fact the DEP has been involved in the situation at Bishop Tube for over 17 years, and has yet to find a resolution or develop a cleanup plan is unacceptable.
- I realize that you are not involved in local zoning issues but your failure to notify the township when the current owners broke the SVE/AS system and voided their "Covenant Not to Sue," indicates that you are somewhat culpable in the poor decisions that have been made.
- That fact that neither you nor the current owners notified the surrounding community/residents that their actions "exacerbated the contamination" therefore exposed all of us to additional toxins is inexcusable.
- I am still at a loss to see how our government agencies can make decisions including zoning, awarding grants, and approving cleanup plans without all of the testing data. To make recommendations and plans without all of the information is irresponsible.

The PA Department of Environmental Protection is charged with the protection of environment and the citizens of Pennsylvania. I am not a scientist and certainly do not claim to be an expert in these matters. However, as a resident this is what I want:

- Reports from an objective, independent, outside source must be conducted before any cleanup decisions are made. This would include testing to find out just how far the plume goes, and notifying the residents in those additional areas.
- Any cleanup plan must take into consideration the health and safety of nearby residents. The General Warren Village is within the wind pattern from Bishop Tube. How can toxins be safely removed without making it worse and poisoning (by wind) the residents who live nearby? Already the current owners have added pollutants to the environment (see above) and failed to notify us.

At the meeting you indicated, some of the toxins, which have contaminated this site, would never be totally removed. Furthermore through abstention, you indicated that you would not live on the property. How can the DEP support any plan for residential development? I would think protecting future residents would be within your area of concern as well.

As a taxpayer I am opposed to giving any monies to a corporation that stands to make millions of dollars for a partial cleanup of the property. The current owners have allowed the pollution to continue for at least 12 years and shown us that the health and safety of residents and the environment are not their priorities.

Mr. Armstrong, I am asking you to withhold your support for this project. The DEP needs to take a stand for a clean, safe environment and the health and welfare of its citizens.

Sincerely,

Debra J Mobile

[REDACTED]

Malvern, PA 19355

[REDACTED]

cc: Delaware Riverkeeper Network

Comment 8 Response: The Department appreciates the comment. As discussed above, this comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 9: Comment from Mr. John Preston received July 7, 2017.

The comment is included in Attachment F.

Comment 9 Response: The Department appreciates the comment. As discussed above, this comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. In addition, the comment raises the issue of CDP's potential non-compliance with the terms and conditions of the 1st and 2nd Amended PPAs and the Department's January 28, 2014 letter to CDP. That letter was appealed to the Pennsylvania Environmental Hearing Board, which ultimately determined that the letter was not an appealable action. At this time, the Department has 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 or with regard to other potentially responsible persons at the Site.

Comment 10: Comment from Kate and Larry Stauffer received July 6, 2017.

From: kathleen stauffer [mailto:klstau@comcast.net]
Sent: Thursday, July 06, 2017 12:01 PM
To: Armstrong, Dustin <darmstrong@pa.gov>
Subject: Bishop Tube Site

Dear Dustin,

We urge you to support us in upholding Article 1 Section 27:

§ 27. Natural resources and the public estate.

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.
(May 18, 1971, P.L.769, J.R.3)

We urge you to do what is best, to be sure that the toxins at the Bishop Tube site cause no further damage! (so no other parent has to be faced with their child having a life threatening illness!)

We urge you to hold past and present property owners responsible for total clean-up of the toxins.

We urge you to investigate thoroughly the nature of the toxins (especially TCE's), be honestly direct in articulating the nature of these toxins and be forthright and honest about the reality of clean-up without exacerbation.

Sincerely,
Kate and Larry Stauffer
Fahnestock Road
Malvern, PA 19355

Comment 10 Response: The Department appreciates the comment. As discussed above, this comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

Comment 11: Comment received April 12, 2017. Department personnel could not read the name of the individual who submitted the comment.

The comment is included in Attachment G.

Comment 11 Response: The Department appreciates the comment. As discussed above, this comment does not address the modifications to CDP's performance obligations as set forth in the 1st and 2nd Amended PPAs. However, the comment is relevant to the ongoing investigatory actions at the Site and may be germane to the Department's selection of a final remedy for the Site. Consequently, the Department recommends that the commenter continue with active interest in this matter.

RESPONSE TO COMMENTS**Bishop Tube HSCA Site**

January 26, 2018

ATTACHMENTS

Attachment A	Counselors at Law on behalf of Whittaker Corporation and Johnson Matthey Inc.	original comment - received June 12, 2017 supplemental comment - received July 7, 2017 (Comment 2)
Attachment B	Delaware Riverkeeper Network Bristol PA	original comment - received June 7, 2017 supplemental comment - received July 6, 2017 (Comment 3)
Attachment C	Forensic Environmental Services Inc. Exton, PA	comment - received June 13, 2017. (Comment 4)
Attachment D	Hamburg, Rubin, Mullin, Maxwell & Lupin, HRMM&L, PC Attorneys at Law on behalf of East Whiteland Township	comment - received July 7, 2017 (Comment 5)
Attachment E	Ms. Pauline Heizenroth, Resident Malvern, PA	comment - received April 17, 2017 (Comment 6)
Attachment F	Mr. John Preston, Resident Devon, PA	comment - received July 7, 2017 (Comment 9)
Attachment G	Stauffer, Resident (Name is illegible, & no address was provided)	comment - received April 12, 2017 (Comment 11)

ATTACHMENT A

Counselors at Law on behalf of Whittaker Corporation and Johnson Matthey Inc.
(Comment 2)

original comment - received June 12, 2017

supplemental comment - received July 7, 2017

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COUNSELORS AT LAW

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Phone: (215) 569-5689
Fax: (215) 832-5689
Email: Stonelake@BlankRome.com

June 7, 2017

Via Email and Certified Mail; Return Receipt Requested

Mr. Dustin Armstrong
Project Officer, Environmental Cleanup Program
Pennsylvania Department of Environmental Protection
2 East Main Street,
Norristown, PA 19401

Re: Comments on Amended Prospective Purchaser Agreement Between the Pennsylvania Department of Environmental Protection and Constitution Drive Partners, L.P. Regarding the Bishop Tube Site

Dear Mr. Armstrong:

We write on the joint behalf of Whittaker Corporation (“Whittaker”) and Johnson Matthey Inc. (“JMI”) concerning the June 4, 2010 Amended Prospective Purchaser Agreement (the “2010 APPA”) between Constitution Drive Partners, L.P. (“CDP”) and the Pennsylvania Department of Environmental Protection (the “Department”).

By notice dated April 1, 2017, the Department requested public comments regarding the 2010 APPA, which is to be entered into pursuant to the Hazardous Sites Cleanup Act (“HSCA”), 35 P.S. §§ 6020.101 *et seq.*, the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, and the Land Recycling and Environmental Remediation Standards Act (“Act 2”), 35 P.S. § 6026.101 *et seq.* Together, the 2010 APPA, the January 22, 2007 Amended Prospective Purchaser Agreement (the “2007 APPA”), and the original March 17, 2005 Prospective Purchaser Agreement (the “Original PPA”) (collectively, the “PPAs”) purport to resolve the liability of CDP for “Existing Contamination” at the Bishop Tube site (the “Site”). This included a grant by the Department of a covenant not to sue CDP and contribution protection from claims for contribution that may be asserted against CDP regarding matters addressed in the PPAs.

In short, as detailed below, the 2010 APPA is deficient in multiple respects in its current form. Whittaker and JMI request that the Department postpone the finalization of any type of

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Mr. Dustin Armstrong
June 7, 2017
Page 2

settlement with CDP under CERCLA, HSCA, and/or Act 2 with respect to the Site until after the Department is able to determine whether additional remediation is necessary given the 2014 rezoning of the Site from industrial to residential use. As the Department is well aware, the PPAs were executed in contemplation that the Site would be developed for non-residential use. This premise is no longer valid, rendering the liability protections set forth in the PPAs legally untenable. The Department will be in no position to determine what additional remedial measures—if any—are necessary to permit future residential development at the Site until the Department develops all necessary and appropriate remedial action objectives (RAOs) for the Site, evaluates remedial alternatives, proposes one or more remedial actions to be implemented at the Site, provides an opportunity for public review and comment of those remedies and selects one or more remedial actions that will be protective of human health and the environment, including potential future inhabitants of CDP's proposed residential development. Under these circumstances, the 2010 APPA should not be finalized at this time, and may need to be further amended once the above steps have been taken.

I. BRIEF SUMMARY OF SITE BACKGROUND.

The Bishop Tube Site is a 13.7-acre property located at 1 South Malin Road, Malvern, East Whiteland Township, Pennsylvania 19355. From the 1950s until the late 1990s, the Site was used as a steel tube manufacturing facility. JMI's predecessors operated at the Site from the 1950s to March 1969, and Whittaker operated there from April 1969 to early January 1974, when the business at the Site was sold to Christiana Metals. The Central and Western Chester County Industrial Development Authority provided financing to Christiana Metals and held legal title to the Site until 2005, when it sold the Site to CDP. JMI and Whittaker contend that the environmental contamination now present on the Site occurred during the 25-year period from early January 1974 to 1999 when a series of other entities owned and operated the Bishop Tube Site.

In anticipation of purchasing the Site, on March 17, 2005, CDP entered into the Original PPA with the Department. From the outset, CDP asserted that it intended "to develop the Site for commercial purposes." CDP agreed to undertake an investigation and remediation of soils at the Site necessary to demonstrate attainment with a non-residential statewide health standard or site-specific standard under Act 2. In exchange, the Department agreed to grant CDP a covenant not to sue and contribution protection for claims arising from matters addressed in the Original PPA. Shortly after CDP and the Department executed the Original PPA, CDP purchased the Site.

Mr. Dustin Armstrong
June 7, 2017
Page 3

CDP directed its consultant, Environmental Standards Inc., to conduct pilot-scale tests at the Site. Based on these tests, CDP proposed to remediate unsaturated soils in two areas of the Site, the Drum Storage Area and Building 5 Vapor Degreaser Area, using soil vapor extraction. It was concluded that a third area, known as the former Plant #8 Vapor Degreaser Area ("Plant #8 Area"), had a significant amount of trichloroethylene contamination in the saturated zone above the bedrock. Because of the amount of contamination under the Plant #8 Area, it was determined that the soil and groundwater in that Area would be treated using a combined air sparging/soil vapor extraction system (the "AS/SVE System").

On January 22, 2007, CDP and the Department entered into the 2007 APPA. In exchange for liability protection, CDP agreed to perform tasks identified in a "Task Allocation Memo," which included the startup of the AS/SVE System, the startup period of which would last for 30 days, and the operation of the AS/SVE System for a period of 60 days during which CDP would train Department-specified operators on how to use the AS/SVE System. Nowhere in the 2007 APPA did the parties address whether these remediation measures were appropriate for property that would later be rezoned for residential use.

Meanwhile, on August 18, 2008, JMI entered into a Consent Order and Agreement with the Department to perform investigation work at the Site. On December 29, 2008, the Department filed a complaint against Whittaker in the U.S. District Court for the Eastern District of Pennsylvania, asserting claims under CERCLA and HSCA (the Department filed an amended complaint adding JMI as a defendant on May 12, 2010). On March 18, 2009, the court issued an order placing the matter in civil suspense. On August 4, 2009, Whittaker and JM entered into an Amended Consent Order and Agreement with the Department to perform a Remedial Investigation ("RI") and Feasibility Study ("FS") (collectively, the "RI/FS") in contemplation of the Bishop Tube site being developed for industrial use. This RI/FS work is anticipated to be completed by the end of November 2017, and it is our understanding that the Department will select a remedy based on the RI/FS findings near year-end 2017.

On June 4, 2010, CDP and the Department entered into the 2010 APPA. In exchange for liability protection, CDP agreed, *inter alia*, to 1) repair and temporarily operate the AS/SVE System; 2) pay the Department \$30,000 over the course of a year from the execution of the 2010 APPA; 3) repair a road along the north side of the main building on the Bishop Tube Site; and 4) install fencing around all manifold enclosures. Like the Original PPA and the 2007 APPA, the 2010 APPA made no mention of what remediation measures would be needed in the event that the Site was rezoned from non-residential to residential use.

Mr. Dustin Armstrong
June 7, 2017
Page 4

On July 26, 2011, the Department sent a letter to Richard Heany, the President of CDP, informing him that the AS/SVE System was damaged by heavy equipment that “was reportedly operated by a contractor retained by CDP to perform demolition and recovery of recyclable metals from [a] building” on the Site. In a follow-up letter dated January 28, 2014, the Department notified CDP that it “now considers the CDP’s violation of the PPA to void the Covenant Not To Sue . . . and [the Department] will consider whether to exercise its enforcement options related to this determination as matters progress at the site.” The Department identified two reasons for its decision to void the Covenant Not To Sue: 1) CDP failed to repair the AS/SVE System that CDP damaged in 2011; and 2) the Department and CDP agreed that CDP could demolish the Site’s Building 8 in lieu of making the Department’s requested repairs, yet CDP had failed to demolish Building 8.

CDP responded by letter on February 7, 2014 disputing the factual premises of the Department’s decision to void the Covenant, and requesting that the “Department rescind the Department Letter in writing, and confirm that the Department does not believe that CDP is in violation of its obligation under the PPA and that the covenant not to sue remains in effect.” To the best of JM and Whittaker’s knowledge, the Department never rescinded its letter and the Covenant is still void.

Several years after the 2010 APPA was executed, in 2014, CDP petitioned for and successfully persuaded East Whiteland Township to rezone the Bishop Tube Site from industrial use to residential use. Since the Original PPA was signed, the Department and CDP have not attempted to evaluate whether the Site conditions are acceptable for residential development. Nevertheless, approximately seven years after the Department and CDP executed the 2010 APPA, the Department submitted a Notice of Settlement Under CERCLA and HSCA.

II. DEFICIENCIES OF SETTLEMENT UNDER ACT 2

Act 2 was passed by the General Assembly with the objective of promoting the remediation and re-development of contaminated properties. *See* 35 P.S. § 6026.102. This objective of Act 2 would be frustrated by the rezoning—which was done at CDP’s urging—of the Bishop Tube Site for residential use unless the PPAs are amended to specifically require that: (1) the Site must be fully remediated to meet residential standards under Act 2; and (2) CDP establishes a fully funded Post Remediation Care Plan that provides for regular inspections and maintenance of any and all remedial actions that are necessary to satisfy the requirements of Act 2 and CERCLA to protect the health of future residents and the environment in perpetuity.

Mr. Dustin Armstrong

June 7, 2017

Page 5

Under Chapter 3 of Act 2, “[a]ny person who proposes . . . to respond to the release of a regulated substance at a site and who wants to be eligible for the cleanup liability protection under Chapter 5 “must meet one or more of the following standards: 1) background standards; 2) statewide health standard that was adopted by the Environmental Quality Board; and/or 3) a site-specific standard, which “achieves remediation level based on a site-specific risk assessment so that any substantial present or probable future risk to human health and the environment is eliminated or reduced to protective levels.” § 6026.301(a).

If the standards outlined in Chapter 3 are met, then pursuant to Chapter 5, the remediating party is relieved from further liability for any contamination identified in reports submitted to and approved by the Department, thereby protecting the remediating party from 1) citizen suits; 2) contribution actions brought by responsible persons; and, in some instances, 3) other actions brought by the Department with respect to the property. § 6026.501-502. Despite these protections, Act 2’s Reopener provision provides that a person who completes remediation in compliance with Act 2 may still be required to undertake additional remediation if the Department demonstrates, *inter alia*, the following:

[T]he level of risk is increased beyond the acceptable risk range at a site due to substantial changes in exposure conditions, such as in a change in land use from nonresidential to a residential use, or new information is obtained about a regulated substance associated with the site which revises exposure assumptions beyond the acceptable range. Any person who changes the use of the property causing the level of risk to increase beyond the acceptable risk range shall be required by the department to undertake additional remediation measures under the provisions of this act.

§ 6026.505 (emphasis added).

Here, it is unclear whether CDP is still eligible for liability protection under Act 2 and the PPAs. The Department’s January 28, 2014 letter explicitly voided the Covenant Not To Sue, and there is no indication that the Department’s letter was ever rescinded as requested by CDP. Therefore, even if the 2010 APPA is finalized in its current form, the underlying liability protections provided to CDP would appear to remain void.

Further, without an investigation into the health and safety risks of developing the Bishop Tube Site for residential use, the Reopener provision would be triggered the moment the 2010

Mr. Dustin Armstrong
June 7, 2017
Page 6

APPA is finalized. The Original PPA provided that CDP “shall undertake investigation and/or remediation of soils at the [Bishop Tube] Site necessary to demonstrate attainment with a non-residential statewide health standard or site specific standard.” The 2007 and 2010 APPAs provide that CDP must conduct limited AS/SVE System operations in exchange for liability protection under Act 2. The PPAs were undoubtedly executed in contemplation of a non-residential use. This expectation is confirmed by the fact that, on November 18, 2005, CDP’s consultant submitted a Notice of Intent to remediate the Site to meet Statewide Health Standards or Site Specific Standards under Act 2 for non-residential use. However, the current provisions of the PPA do not address this “substantial change in exposure conditions.”

While investigation work at the Bishop Tube Site to date has been conducted based on the premise that the Site would be used for non-residential purposes, the information generated from these investigations suggest that additional remediation might be required if Bishop Tube is developed for residential purposes.¹ For example, one report prepared for the Department and referenced in the Original PPA—the Phase I Site Characterization Report Soil, Sediment, Surface Water and Shallow Groundwater (January 11, 2002, Baker Environmental, Inc., “2002 Baker Report”)—indicates that there are substances present in the soil at concentrations that are less than the Act 2 non-residential Medium Specific Concentrations (“MSCs”). In this regard, the 2002 Baker Report details that:

- A soil sample was collected on June 20, 2001 at a depth of 3-4 feet. PCB Aroclor 1260 was reported at 18 mg/kg. That is twice the Act 2 residential MSC (9 mg/kg for soil at 0 to 15 feet), but less than the non-residential MSCs (46 mg/kg at 0-2 feet, and 190,000 mg/kg at 2-15 feet).
- A soil sample was collected on June 19, 2001 at a depth of 2-3 feet. Benzo(a)Pyrene was reported at 1.3 mg/kg. That exceeds the Act 2 residential MSC (0.58 mg/kg for soil at 0-15 feet), but is less than the non-residential MSCs (12 mg/kg at 0-2 feet, and 190,000 mg/kg at 2-15 feet).
- A soil sample was collected on June 19, 2001 at a depth of 7-8 feet. Arsenic was reported at 15 mg/kg. That exceeds the Act 2 residential MSC (12 mg/kg for soil at 0-15 feet), but is less than the non-residential MSCs (61 mg/kg at 0-2 feet, and 190,000 mg/kg

¹ Importantly, JMI and Whittaker are not taking the position that additional remediation is required for the Site to be developed for residential use. That determination cannot be made at this time. JMI and Whittaker simply submit that, based on the data available to date, additional remediation might be necessary.

Mr. Dustin Armstrong
June 7, 2017
Page 7

at 2-15 feet).

See Baker Environmental, Inc. Report of 2002.

Further, the 2002 Baker Report specifically evaluated soil investigation results relative to non-residential Site uses. Indeed, the Report states the following in Section 4.4: “For comparison purposes, the measured concentrations of organic and inorganic compounds detected in the soil samples collected during the investigation were evaluated based upon either the Non-Residential Direct Contact or Non-Residential Soil to Groundwater Pathway Standards.” *Id.* (emphasis added). There is no indication that CDP or the Department has ever evaluated the existing data to determine its impact on proposed residential use of the Site.

Even putting these data aside, JMI’s and Whittaker’s RI/FS work is still underway, and the Department is not likely to select a remedy for at least another six months. Until the RI/FS process is finished, it is not possible to determine—nor reasonable to assume—that any proposed remediation measures are sufficient to protect the health of those who use the Site for non-residential purposes, let alone for any future residents who might inhabit the Site.

In short, the rezoning of the Bishop Tube Site for residential use at CDP’s urging represents a “substantial change in exposure conditions,” and the Department and CDP must now evaluate whether the previous RI work scope was sufficient to characterize the Site conditions for residential use—and whether additional RI work needs to be performed—and then conduct its own FS to determine what remedial measures—if any—are appropriate in light of the rezoning. See § 6026.505. Until such a process has been completed, it cannot be determined whether the decision to rezone the Bishop Tube Site increased the level of risk “beyond the acceptable risk range.” *See id.*

III. DEFICIENCIES OF SETTLEMENT UNDER MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT AND REGION 3 OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.

While the PPAs purport to grant CDP CERCLA-contribution protection, the Department might not possess the authority to grant this protection given its decision to finalize the 2010 APPA without investigating the impacts and risks of developing the Bishop Tube Site for residential use. Consequently, CDP could find itself in a situation where it is required to contribute to the possible future remediation of the Bishop Tube Site, notwithstanding any of the provisions in the PPAs that purport to protect CDP from having to do so.

Mr. Dustin Armstrong
June 7, 2017
Page 8

CERCLA is a federal statute that is administered by the U.S. Environmental Protection Agency (“EPA”). *See* 42 U.S.C. § 9601 et seq. Without the consent of the EPA, the Department cannot absolve a party of liability under CERCLA. *See* § 9628. The EPA provides such consent through a Memorandum of Agreement (“MOA”), which specifies the circumstances under which the Department can exempt a party from CERCLA liability. *Id.* Here, the Department entered into a MOA with Region 3 of the EPA on April 21, 2004. Pursuant to § V(A) of the MOA, the Department “agree[d] to ensure that voluntary response activities conducted under the VCP [Voluntary Cleanup Program] protect human health and the environment and that the VCP remediator complies with all applicable Federal law.”

As explained above, the PPAs were executed by CDP and the Department in contemplation of the Bishop Tube Site being remediated for non-residential use. In the original 2005 PPA, CDP agreed “to complete the necessary and appropriate investigation and/or remediation of the soils at the Site in order to demonstrate attainment of a remediation standard for soils established pursuant to Act 2.” However, it does not appear that CDP or the Department are following the Act 2 process currently. The Notice of Intent to Remediate (“NIR”) that was submitted by Environmental Standards on November 18, 2005 identified the use of the property as non-residential. At this point, the Department will not be in a position to determine whether the remediation measures currently contemplated by CDP are sufficient until:

- 1) An RI that includes a Human Health Risk Assessment that considers future residential uses and a complementary FS are completed;
- 2) The Department proposes a remedy that is protective for residential users, or CDP submits a Cleanup Plan pursuant to Act 2 that is protective of residential users. The Cleanup Plan would clearly articulate the remedial actions that will be completed for the entire Site for all substances and media that exceed residential criteria, describe any institutional and engineering controls that are required for the remedy to be protective, and provide details on the Post Remediation Care Plan (“PRCP”) that will be necessary to ensure that the remedy remains protective. The funding mechanism for any PRCP should also be specified.
- 3) The public has an opportunity to review and provide comments concerning the proposed remedy or Cleanup Plan; and
- 4) The final remedy has been selected and a Final Report is issued pursuant to Act 2.

Mr. Dustin Armstrong
June 7, 2017
Page 9

The information currently available to the Department is not sufficient to make a determination as to whether further remediation is necessary to “protect human health.” We are aware that CDP has submitted a revised Remediation Scope of Work (“SOW”) dated April 25, 2017. More detailed comments on this SOW are attached to this letter. However, this SOW is not a Cleanup Plan prepared pursuant to Act 2 and does not address all of the substances detected in soil that are present at a concentration greater than a residential MSC. Until the Department can reasonably determine that developing the Bishop Tube Site for residential use does not require additional remediation, beyond what is described in the SOW, the Department will be in breach of the MOA, freeing EPA or any third party to bring enforcement actions, and likely vitiating the PPAs’ contribution protections. To eliminate this uncertainty, CDP and/or the Department must determine what, if any, additional remediation measures should be taken in light of the rezoning of the Site for residential use.

IV. DEFICIENCIES OF SETTLEMENT UNDER § 128 OF CERCLA

Even if the Department is in compliance with the MOA, § 128(b)(1)(B) of CERCLA essentially negates the CERCLA liability protections that the Department has purported to grant CDP in the PPAs. In particular, § 128(b) of CERCLA prohibits the federal government from taking administrative or judicial enforcement actions only where:

- (i) there is a release or threatened release of a hazardous substance, pollutant, or contaminant; and
- (ii) a person is conducting or has completed a response action regarding the specific release that is addressed by the response action that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment.

§ 9628(b)(1)(A)(i)-(ii). This grant of liability protection is not unlimited, and CDP likely does not qualify for protection under the current version of the 2010 APPA.

First, it appears that CDP’s remediation obligations under the PPAs do not meet the elements of § 128(b). Section 128(b)(1)(A)(ii) requires that CDP’s response action be in compliance with “the State program that specifically governs response actions for the protection of public health and the environment.” Yet, CDP is currently not in compliance with Act 2, i.e., the “State Program.” As described above, the Department terminated CDP’s liability protections

Mr. Dustin Armstrong
June 7, 2017
Page 10

under the PPAs after CDP's contractors damaged the AS/SVE System. The Department is permitted under the PPAs to terminate the Covenant Not To Sue "upon [CDP's] failure to meet any of the requirements of the" PPAs. Accordingly, the Department's decision to terminate the Covenant is an explicit acknowledgement that CDP is not in compliance with the "State Program" and is thus still subject to CERCLA liability. Further, none of the work is being done pursuant to a NIR prepared for Residential use or an approved Cleanup Plan that was submitted for public comment.

Similarly, CDP is not in compliance with Act 2 because of the rezoning of the Site for residential use as requested by CDP. That rezoning decision triggered Act 2's Reopener provision, under which CDP "shall be required by the department to undertake additional remediation measures under the provisions of this act." 35 P.S. § 6026.505. CDP has not conducted a RI or FS at the Site for residential use, let alone conducted any "additional remediation measures." Thus, it appears that under the 2010 APPA, CDP is not in compliance with Act 2, and therefore not eligible for the protections under § 128 of CERCLA.

Finally, CDP's proposed redevelopment of the Bishop Tube Site without following the National Contingency Plan's process for evaluating and selecting remedies that would be protective of future residents likely triggers at least one of the exceptions to the liability protections of CERCLA § 128. Specifically, the EPA is permitted to bring an administrative or judicial enforcement action, despite the existence of and compliance with a state cleanup program, when the EPA determines the following:

- (I) a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment; and
- (II) additional response actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release.

42 U.S.C. § 9628(b)(1)(B)(iii)(I)-(II).

If CDP and the Department proceed to finalize the PPAs before a RI and/or FS for residential use of the Bishop Tube Site are conducted, CDP might find itself exposed to CERCLA liability based on the foregoing exception. Until additional information is collected and a remedy for residential use is identified, there is no way to determine whether CDP's

Mr. Dustin Armstrong
June 7, 2017
Page 11

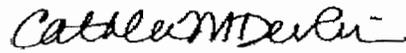
contemplated remediation measures adequately protect future residents, such that CDP could remain exposed to substantial liability.

V. CONCLUSION

To summarize, because the PPAs executed by and between CDP and the Department were not prepared in contemplation of the subsequent rezoning of the Bishop Tube Site from industrial to residential use, the need for further remediation to address residential use remains an open question. So long as this is the case, any liability protections afforded to CDP in the PPAs would be in jeopardy if challenged in court. *See Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014) (“But where a state, as opposed to the federal government, is a party to a proposed CERCLA consent decree, we do not defer to the state to the same degree as we would the federal government.”). If CDP wishes to enjoy the benefit of environmental liability protections in connection with its proposed residential development of the Bishop Tube Site, CDP would need to conduct its own Remedial Investigation that includes a Human Health Risk Assessment and considers future residential uses, and must also implement a remedy that satisfies the requirements of Act 2 and CERCLA to be protective of public health and the environment, including the health of future residents of its proposed development.

Very truly yours,


Benjamin G. Stonelake, Jr., Esquire
Francis X. Crowley, Esquire
Michael J. Montalbano, Esquire
Counsel for Whittaker Corporation


Cathleen M. Devlin, Esquire,
Elizabeth U. Witmer, Esquire
Amy Donohue-Babiak, Esquire
Counsel for Johnson Matthey Inc.

BGS:

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COUNSELORS AT LAW
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Phone: (215) 569-5689
Fax: (215) 832-5689
Email: Stonelake@BlankRome.com

July 7, 2017

Via Email and Certified Mail; Return Receipt Requested

Mr. Dustin Armstrong
Project Officer, Environmental Cleanup Program
Pennsylvania Department of Environmental Protection
2 East Main Street,
Norristown, PA 19401

Re: Supplemental Comment Regarding Prospective Purchaser Agreement and Its Amendments Between the Pennsylvania Department of Environmental Protection and Constitution Drive Partners, L.P. Concerning the Bishop Tube Site

Dear Mr. Armstrong:

We write on the joint behalf of Whittaker Corporation ("Whittaker") and Johnson Matthey Inc. ("JMI") to supplement the June 7, 2017 Comment submitted on behalf of Whittaker and JMI concerning the June 4, 2010 Amended Prospective Purchaser Agreement between Constitution Drive Partners, L.P. ("CDP") and the Pennsylvania Department of Environmental Protection (the "Department").

On April 1, 2017, the Department issued a Request for Comment in the Pennsylvania Bulletin (*available at* <http://www.pabulletin.com/secure/data/vol47/47-13/535b.html>). The Department's Request referenced the Original Prospective Purchaser Agreement between CDP and the Department, the January 22, 2007 Amended Prospective Purchaser Agreement, and the June 4, 2010 Amended Prospective Purchaser Agreement. The Request further stated that "Interested persons may submit written comments regarding this PPA and its amendments by submitting them to Dustin Armstrong at the Department's address as listed above."

JMI and Whittaker hereby supplement their June 7, 2017 Comment to clarify that their Comment applies to the Original Prospective Purchaser Agreement between CDP and the Department, as well as to its January 22, 2007 and June 4, 2010 amendments, in conformity with the Department's invitation that "[i]nterested persons . . . submit written comments *regarding th[e] PPA and its amendments.*"

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Mr. Dustin Armstrong
July 7, 2017
Page 2

As always, please do not hesitate to contact us if you would like to discuss this matter in further detail or have any questions in this regard.

Very truly yours,

Benjamin G. Stonelake, Jr.
Benjamin G. Stonelake, Jr., Esquire
Francis X. Crowley, Esquire
Michael J. Montalbano, Esquire
Counsel for Whittaker Corporation

Cathleen M. Devlin

Cathleen M. Devlin, Esquire,
Elizabeth U. Witmer, Esquire
Amy Donohue-Babiak, Esquire
Counsel for Johnson Matthey Inc.

BGS:

Mcclennen, Bonnie

From: Armstrong, Dustin
Sent: Friday, July 07, 2017 3:23 PM
To: Montalbano, Michael
Subject: RE: Joint Comments By JMI and Whittaker On PPA Between DEP and CDP and its Amendments

Michael,

This is to confirm that I received your email and attached comments sent on behalf of JMI/Whittaker.

Have a nice weekend -- DA

Dustin A. Armstrong | Environmental Protection Specialist
Department of Environmental Protection | Southeast Regional Office
2 East Main Street | Norristown, PA 19401
Phone: 484.250.5723 | Fax: 484.250.5961
www.dep.pa.gov

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From: Montalbano, Michael [mailto:MMontalbano@BlankRome.com]
Sent: Friday, July 07, 2017 2:42 PM
To: Armstrong, Dustin <darmstrong@pa.gov>
Cc: Thomas Maguire <forensic@chesco.com>; Paul Miller <pmiller@envalliance.com>; Amy Donohue-Babiak <Amy.Donohue-Babiak@jmus.com>; Greg Martin <gmartin@rouxinc.com>; Devlin, Cathleen M. <CDevlin@saul.com>; Stonelake, Benjamin Jr. <Stonelake@BlankRome.com>; Barbara A. Curtis <Barbara.Curtis@jmus.com>; Sara Redding <redding@rouxinc.com>; Witmer, Elizabeth U. <EWitmer@saul.com>; Justin Kowalkoski <jkowalkoski@rouxinc.com>; Chris Thoeny <cchoeny@envalliance.com>; Crowley, Francis X. <Crowley@BlankRome.com>; JSpergel@mankogold.com; bholmes@eastwhiteland.org; sdrummond@eastwhiteland.org; jnagel@eastwhiteland.org; Patterson, Patrick <patpatters@pa.gov>; Hartzell, Anderson <ahartzell@pa.gov>; Schena, Robert <roschena@pa.gov>
Subject: Joint Comments By JMI and Whittaker On PPA Between DEP and CDP and its Amendments

Mr. Armstrong,

Please find attached to this email a supplemental comment concerning the Prospective Purchaser Agreement between the Pennsylvania Department of Environmental Protection and Constitution Drive Partners L.P., and its January 22, 2007 and June 4, 2010 Amendments. The supplemental comment is being filed jointly by Johnson Matthey Inc. and Whittaker Corporation. A hardcopy will be mailed to your office today.

Kindly confirm that you have received this email and the attached supplemental comment. Thank you for your consideration, and please let me know if you have any questions.

Best,

Michael

Michael Montalbano | Blank Rome LLP

One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998

Phone: 215.569.5618 | Fax: 215.832.5618 | Email: MMontalbano@BlankRome.com

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ATTACHMENT B

Delaware Riverkeeper Network
Bristol PA
(Comment 3)

original comment - received June 7, 2017

supplemental comment - received July 6, 2017



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June 7, 2017

(VIA EMAIL AND HAND DELIVERY)

Dustin Armstrong
PADEP
2 East Main Street
Norristown, PA 19401

Dear Mr. Armstrong:

We submit these comments regarding the 2010 amendment to a Prospective Purchaser Agreement (collectively, "PPA") for the Bishop Tube site in East Whiteland Township (hereinafter the "site").¹

At the outset we note that this public comment period provided by the Pennsylvania Department of Environmental Protection (DEP or Department) comes a full seven years after the document was finalized and signed by the state. We note also, that from what we can see, there was no public comment period associated with the January 22, 2007 PPA Amendment prior to, or subsequent to, its signing by state officials.

We also note that the public notices for the PPA documents, both the notice in the newspaper and in the PA Bulletin, fail to notify the public of crucial information, particularly:

- ⇒ That on January 28, 2014, DEP determined that CDP had engaged in action that "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" and as a result,

¹ For the sake of providing the history of our communications with the DEP regarding the PPA and the residential development project, we include the following attachments which documents our efforts and concerns regarding this site:

Letter to Anderson Hartzell, dated March 20, 2017 (Exhibit "A")
Letter to Anderson Hartzell, dated March 27, 2017 (Exhibit "B")
Letter to Anderson Hartzell, dated March 28, 2017 (Exhibit "C")
Letter to Anderson Hartzell, dated April 5, 2017 (Exhibit "D")
Letter to Anderson Hartzell, dated April 6, 2017 (Exhibit "E")
Letter to Anderson Hartzell, dated April 19, 2017 (Exhibit "F")
Letter to Anderson Hartzell, dated May 16, 2017 (Exhibit "G")

DELAWARE RIVERKEEPER NETWORK
925 Canal Street, Suite 3701
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"DEP now considers the CDP's violation of the PPA to void the Covenant Not to Sue set forth in Paragraph 7..."

(See Exhibit "H", letter of January 28, 2014, Stephan Sinding to Brian Kroker)

⇒ That on December 1, 2015, in response to a request made by Manko, Gold & Katcher lawfirm on behalf of CDP that DEP reconsider its rescission of the Covenant Not To Sue, DEP explicitly refused to do so.

(See Exhibit "I", letter of December 1, 2015, Stephan Sinding to Jonathan Spergel, Esq.)

Based on our review of the facts, the law and the PPA documents, the Delaware Riverkeeper Network believes that the terms of the PPA are unacceptable and should not be agreed to by the PADEP on behalf of our communities. The project proposed by Constitution Drive Partners (CDP) and O'Neill Development for the Site fails to ensure protection of the public health, safety or welfare; and/or the health, safety and welfare of the environment in violation of the Hazardous Sites Clean Up Act and the Land Recycling and Environmental Remediation Standards Act.

Procedurally, the actions described within the PPA are considered by the Department to be an interim response action. Importantly, the "interim response" has materially changed in the twelve years since the first PPA document was finalized and signed. Material changes include:

- who will be doing the remediation (DEP is, per the 2010 amendment, now proposing to conduct the interim remediation itself as opposed to the developer),
- what the cleanup goal for the remediation is both independently and in the context of the new intended use for the site (the 2005 PPA has the developer proposing to use the property for commercial purposes, the current intent is to develop the property for significant residential use, over 200 units),
- how the Air Sparging/Soil Vacuum Extraction ("AS/SVE") remediation has failed due to ground water flooding issues, poor oversight, and unrepaired damage to the system,
- how the developer's new plans -- not mentioned in the agreement or amended agreement -- will impact the future interim and comprehensive remediation plans for the site,
- how the past failure of the developer to fulfill its legal obligation to provide full access to the site for purposes of advancing full remediation of the site is to be addressed and prevented,
- what is the full extent of the remediation to be implemented and what are the elements of that remediation for purposes of expert review and public comment.

We are further deeply concerned that there has not been a final comprehensive remedial work plan for this site in the almost two decades since the Department has identified this as a HSCA site. In this intervening time period, the site's neighbors have been unnecessarily exposed to dangerous contamination from the site and any associated environmental and health impacts. Additionally, natural resources and the environment have also been continually exposed and impacted. Further, it seems clear that the Department has prioritized securing a deal acceptable to the site's proposed developer, including helping secure a \$1 million dollar grant for the developer's benefit, over securing full remediation of the site at the expense of responsible parties. The Department's actions at this site have been highly problematic and in derogation of DEP's powers and duties pursuant to 35 P.S. § 6020.301, and as set forth by Article 1, Section 27 of the Pennsylvania Constitution, and the Pennsylvania Supreme Court in *Robinson Twp. Delaware Riverkeeper Network, et. al. v Commonwealth of PA*. While it is our understanding that the EPA has offered to oversee and assist in remediation of the site, DEP has largely refused such help, despite its obligation to cooperate with the Federal Government to protect the public and the natural resources.

Significantly, although Little Valley Creek, an exceptional value stream, has been and continues to be impacted by the released contamination, it has not been identified for cleanup even though it borders, and is impacted by, this HSCA site.

Accordingly, this letter in its entirety and all attached exhibits are deemed to be our comment to the PPA and we highlight the following specific points for which we seek the Department's specific response as is required under 35. P.S. § 6020.1113.

I. DEP has failed to fulfill its legal obligations to properly notice the PPA documents.

As such, it is entirely clear, that the Department has completely failed to properly notice any new interim response actions and to compile and publish an administrative record in accordance with its obligation under 25 Pa. Code 3.22. The Department has belatedly solicited comment to the 2010 amendment to the Prospective Purchaser Agreement in violation of its obligations pursuant to Section 1113 of HSCA and also failed (we believe) to appropriately solicit comment on the interim 2007 amendment. We note that the modifications made by way of the 2007 and 2010 PPA documents to the deal struck with CDP are not minor, they are significant and substantive and the failure to subject them to notice and comment is a serious breach by the Department.

Accordingly, while the Delaware Riverkeeper Network is providing our comments to the PPA as amended in 2010 as requested in the Notice dated April 1, 2017, we are not waiving our right to object to the Department's failure and refusal to properly and timely notice any new interim response plan, or adhere to requisite applicable procedures.² The current

² It is our position that the failure to follow the requisite procedure in a timely manner does create a significant difference in how the remediation should have progressed had the public been properly notified and given the opportunity to comment.

notice and comments are no substitute for the aforementioned requirements if there is to be a new interim response.

We note that the broad Covenant Not to Sue the developer (including for impacts to ground and surface water beyond the site) in this instance is not in the public interest, see 35 P.S. § 6020.706(d), and is in further derogation of the Department's duties and mandates under the law. 35 P.S. §6020.301. That being said, we also believe the Department has improperly noticed the 2010 PPA. Given that DEP has determined that the Covenant Not to Sue within the document is void this provision should not have been included as being among the terms of the 2010 PPA subject to public comment. The Covenant Not To Sue is no longer a part of the PPA documents and therefore should not be represented as being still applicable or viable.

II. The Goals and Purposes of Applicable Laws are Not Supported by the Proposed PPA and Anticipated Development

Among the goals of the Hazardous Sites Cleanup Act ("HSCA") are:

- (1) *The citizens of this Commonwealth have a right to clean water and a healthy environment, and the General Assembly has a responsibility to ensure the protection of that right.*
- (2) *Hazardous substances which have been released into the environment through improper disposal or other means pose a real and substantial threat to the public health and welfare of the residents of this Commonwealth and to the natural resources upon which they rely.*
- (3) *The cleanup of sites that are releasing or threatening the release of hazardous substances into the environment and the replacement of contaminated water supplies protects the public health, preserves and restores natural resources and is vital to the economic development of this Commonwealth.*
- (12)(vi) *Protect the public health, safety and welfare and the natural resources of this Commonwealth from the short-term and long-term effects of the release of hazardous substances and contaminants into the environment.*

35 P.S. § 6020.102 (emphasis added)

Among the goals/policies of the Land Recycling and Environmental Remediation Standards Act are:

- (1) *The elimination of public health and environmental hazards on existing commercial and industrial land across this Commonwealth is vital to their use and reuse as sources of employment, housing, recreation and open-space areas. The reuse of industrial land is an important component of a sound land-use policy that will help prevent the needless development of prime*

farmland, *open-space areas and natural areas* and reduce public costs for installing new water, sewer and highway infrastructure.

- (2) Incentives should be put in place to encourage responsible persons to voluntarily develop and implement cleanup plans *without the use of taxpayer funds...*
- (6) *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.*
- (7) *Cleanup plans should have as a goal remedies which treat, destroy or remove regulated substances whenever technically and economically feasible as determined under the provisions of this act.*

35 P.S. § 6026.102 (emphasis added).

The Hazardous Sites Cleanup Act (35 P.S. § 6020.101 et seq.) and the Land Recycling Act (35 P.S. § 6026.101 et seq.) were passed to protect public health, safety and welfare, and for the protection and restoration of the environment in order to advance the many benefits a healthy environment provides. These goals are not only not advanced by the proposed 2010 PPA that is the subject of this comment; but these goals will be specifically undermined by the 2010 PPA.

The proposed interim remediation of the site set forth in the PPA – AS/SVE technology – will not protect the public health, safety and welfare and the natural resources of this Commonwealth from the short-term and long-term effects of the release of hazardous substances and contaminants into the environment from the Bishop Tube site. Under the PPA, contamination at the site will continue for an undetermined period of time and result in an undetermined level of clean up, and as a result will result in ongoing public health and environmental harms, both on the site and beyond the site boundaries, as contamination continues to be released into the environment, including through contaminated groundwater and other pathways for release of contaminants.

The Land Recycling and Environmental Remediation Standards Act urges DEP to consider the future use of a site when evaluating remediation plans. 35 P.S. § 6026.102(6). In this case, the near-term use is to build 228 homes, and after securing only partial clean up. While it is not stated in the four corners of the document, it is known to the DEP and evident in the public record that Constitution Drive Partners intends to develop the site for a high density residential use. This sets up a dangerous precedent of bringing families, including children and other vulnerable people such as pregnant women and elderly individuals, to a site where ongoing contamination will persist and continue to be released. The releases will include discharges to Little Valley Creek, a place where people are known

to enjoy and play – it is foreseeable that the children who will eventually occupy homes in the new development will come into direct contact with the Creek. The developer's planned use will place new residents at risk of exposure, and in any event has expended, and will continue to expend, significant public resources towards negotiating and supporting a partial clean up proposal, diverting resources needed to advance full clean up. While the 2005 PPA specifically mentions the then anticipated commercial use, the 2010 PPA fails to identify the current intended residential use.

The proposed residential development will exacerbate the preexisting contamination by creating new sources and pathways for pollution and environmental degradation from the site. Given that the Little Valley Creek, associated wetlands and other associated natural resources are already compromised due to the serious contamination at the site, imposing additional nonpoint source pollution from the development, an increased volume of runoff, and the drastic reduction of a naturally-vegetated buffer will inflict a magnified level of harm to the natural resources, further compromising their condition and impacting the plants and other living organisms that they support.

The Land Recycling and Environmental Remediation Standards Act further urges DEP to encourage cleanup projects that do not burden taxpayers. 35 P.S. § 6026.102(2). Constitution Drive Partners and Brian O'Neill have made clear that they plan to pursue, and may even require, a state grant on the order of \$1 million to support their clean up if it is to proceed. The grant being sought is through Industrial Site Reuse Program. The developers have also made clear that despite the significant level of profit they are poised to receive from the massive development and partial cleanup plan, they are apparently limiting their investment to this effort to a maximum \$500,000. It seems clear that taxpayers are in fact expected to be burdened with significant costs of this proposal, despite there being known responsible parties who have the financial wherewithal to fund the remediation effort in full.³

³ See June 24, 2016 email from Jonathan Spergel to PADEP (emphasis added)

"1. ISR Grant, Scope of Work Discussion.

a. Scope: Hot Spot soil removal and off-site disposal or ex-situ treatment and reuse (after remediated to residential standards); excavation includes saturated soils.

b. **\$1 Million grant, plus up to \$500,000 private match from Constitution Drive Partners (CDP).**

c. ***If little to no soil needs to be managed as hazardous waste (which will be known before 7/7 meeting), all three hot spot areas can be remediated with \$1.5 Million or less; if a significant portion of soils are characterized hazardous, not all 3 areas will be able to be remediated, and other funding source will be required: PRPs?***

d. Department approval of scope of work needed for ISR grant application to move forward.

2. Redevelopment Concerns

a. ***In order for CDP to be able to contribute up to \$500,000 of private matching funds for the grant, the brownfield redevelopment project must work economically. Without permitting relief as described below, the required level of density to justify the redevelopment cannot be achieved, the hot spot removal remediation will not take place, and a dilapidated and unredeveloped eyesore will remain in the community.***

The Land Recycling and Environmental Remediation Standards Act stresses environmental protection goals including implementing the program as a way to avoid needless development of open space and natural areas. 35 P.S. § 6026.102. While this policy encourages redevelopment of contaminated sites, it does so for the purposes of greater environmental protection, including open space preservation. The best way to advance this public policy at this site is to clean up the contaminated areas, not to develop the site, but to advance its preservation as natural open space for the benefit of the public. A significant portion of the site is wooded and there are significant areas of exceptional value wetlands. As stated above, Little Valley Creek, which borders the site, is part of the exceptional value Valley Creek stream system. In short, the site is, in large part, the kind of natural, open space (minus the toxic contamination) the law is designed to protect for its community and ecological benefits. The natural portions of the site are appreciated by the community in their current undeveloped state. Despite the contamination, the natural portions of the site provide ecological, quality of life and property value benefits to the community, as well as providing habitat, water cleansing and other ecological benefits. The community appreciates having the trees, wetlands and stream to view from their homes, and as they walk the community. They enjoy hearing the birds and being able to view them from their neighborhoods. They enjoy the ecological sounds and values of having this natural green space nearby. They are benefitted by the pollution prevention, stormwater management, ecological habitat, property value enhancement, erosion protection, and noise and light buffering the trees and wetlands at the site provide.

Preserving the site as a natural open space also furthers the goals of HSCA to protect "the public health and welfare of the residents of this Commonwealth and ... the natural resources upon which they rely." 35 P.S. § 6020.102(2). The community and environment will be adversely impacted if the trees are cut, the stream and wetlands encroached upon, the natural habitats lost, and all of it replaced by roads, retaining walls, houses, driveways, and stormwater systems that discharge increasing and contaminated stormwater runoff (including being contaminated by nonpoint source pollution resulting from development of the site) into the creek and wetlands that are already impacted by contamination from the site. Loss of the woodlands and adverse impacts to the wetlands would have a profound negative impact on the community and the environment - an impact they are not willing or wanting to bear, nor should they be required to bear.

This community has suffered enough as a result of the significant contamination of the Bishop Tube site. The community is entitled to full clean-up of the site and its protection as natural open space.

III. The amended PPA does not account for the developer's changed plan for the site, and DEP has failed to consider the material nature of the change

While the original PPA signed in 2005 was entered into for purposes of accommodating commercial development, the developer is now proposing construction of 228 residential homes (primarily townhomes). This dramatic change in use is not considered in the PPA, neither for compliance with the goals and standards of applicable laws, nor for its impacts

on the existing neighboring community or residents who would live in the newly constructed homes onsite. Had the 2007 and 2010 versions of the PPA included an accurate description of the residential development, it is likely the DEP would have approached the matter differently. Had the 2007 and 2010 PPA documents included the residential development goal and been released for public review and comment, it is certain the community, including the Delaware Riverkeeper Network, would have provided significant comments. Given the lack of an appropriate endpoint (i.e. commercial vs. 228 residential units), coupled with a failing to secure public comment, the PPA cannot properly and responsibly be permitted to stand.

IV. The PPA is Not in the Public Interest; Full Remediation and Preservation of the Site as Natural Open Space Best Serves the Community.

The DEP is required to consider the public interest when entering into a "Covenant Not to Sue". Rather than serve the public good, the PPA, along with its expansive liability protection, is clearly designed to facilitate the Developer's residential development plan for the site. This is not in the public's interest and is contrary to the duties and responsibilities of the department.

Full remediation and preservation of the site as open space provides the greatest level of community and ecological benefit and protection. In addition, this open space use would also help meet identified goals for increasing open space in the East Whiteland Comprehensive Plan Update, 2016.⁴ Converting the site to open space would be beneficial to the community for recreational purposes, as well as providing habitat for wildlife and plants. Protection as natural open space will also be beneficial for water quality, flood damage reduction, erosion protection, for the benefit of aquatic habitat, for protection of air quality, and for the aesthetics of the community.

Conservation of woodlands on and near residential sites enhances property values as well as the marketability of nearby homes. People are willing to pay a premium to live near protected open space areas. The radius of economic benefits covers at least a mile.⁵ For example, Pennypack Park has been credited for increasing the market value of nearby homes by as much as 38%. In addition to the property value increases there are complimentary property tax benefits as well.⁶ Full remediation of the Bishop Tube site and protection as natural open space also contributes to enhanced quality of life, stress reduction and increased public safety.

Allowing for redevelopment of the site in a way that destroys the majority of the natural ecology of the site in order to secure some near term, partial remediation is not appropriate. The public and environment are better served by a plan that pursues full

⁴ <http://www.eastwhiteland.org/DocumentCenter/View/132>

⁵ See, e.g., [http://www.delawareriverkeeper.org/sites/default/files/River Values Report 0.0.pdf](http://www.delawareriverkeeper.org/sites/default/files/River%20Values%20Report%200.0.pdf); <http://www.dvrpc.org/Reports/11033A.pdf>

⁶ See, e.g., [http://www.delawareriverkeeper.org/sites/default/files/River Values Report 0.0.pdf](http://www.delawareriverkeeper.org/sites/default/files/River%20Values%20Report%200.0.pdf); <http://www.dvrpc.org/Reports/11033A.pdf>

remediation at a cost to be borne by the responsible parties, and protects the environmental resources found on the site. The public and environment are better served by including environmental restoration and preservation of the site. Given the health, safety, and economic burdens otherwise placed on the community, the preservation, restoration and open space goal is appropriate, deserved, and in fact morally owed to this community. The DEP should not enact a PPA contrary to these more appropriate uses and goals.

V. Toxic Contamination Continues

The PPA amendment sets forth only a partial emergent cleanup of the site which we now know failed and was abandoned. Subsequently, Constitution Drive Partners and O'Neill Development made plans to undertake a massive residential development project on the site and has engaged in development of an additional partial remediation plan in order to accommodate said development. But as documented by Dr. Tom Myers (see Exhibit "B"), the remaining remediation planned by the Developer and facilitated by the PPA, intentionally leaves egregious levels of toxic contamination on the site that will continue for an undetermined period of time. Contamination at the site, which will be left in place post the proposed development, leaves the site via a number of pathways, including through the discharge of groundwater.

According to Dr. Tom Myers, contaminants in the groundwater will remain after proposed excavation and site development. The developer has no plans for remediating groundwater at the site, and expert Hydrologic Consultant Tom Myers has described the potential for contaminated groundwater migrating to Little Valley Creek as, "the most important offsite risk to the environment". Little Valley Creek is part of the Valley Creek Basin designated as Exceptional Value by the State.

Dr. Myers further identified ways the proposed remediation and development plan could exacerbate contamination coming from the site. For example, excavation could "add contaminants to the groundwater and downstream waters" through "mud sticking to trucks" and dust being kicked up by equipment. Issues such as these are not addressed by the PPA or even considered.

DEP appears to continue to engage with responsible parties about site contamination, but there is no confirmed plan that identifies, when, in what way, and to what degree additional contamination at the site will be addressed.

Former Bishop Tube employees witnessed improper dumping of waste during its operations and identified additional areas to investigate for contamination which are not included in any known remedial plan or PPA. Their concerns, and the potential for additional pollution, should be taken seriously. Given the failure to publicly notice either the 2007 or the 2010 PPA for public comment, there was no official opportunity for the public to provide this kind of input. Efforts to voluntarily submit such information does not appear to have had any impact on Agency decisionmaking regarding the site.

According to Dr. Myers, a March 2017 letter from PADEP to the developer "essentially accepts the new [remediation] scope [of work] with little substantive comment, including failing to ensure that all previous PADEP questions, concerns and recommendations have been appropriately addressed." See Myers Report at Exhibit "B." It is concerning that the DEP has modified its recommendations for remediation in a way that makes them less protective and is contrary to its HSCA duty to act as a trustee for the environment and to implement Article 1 Section 27 of the State Constitution.

In addition to the ongoing environmental concerns, it is a concern that new residents will be invited to buy and reside in homes at a location still underlain by dangerous contamination that continues to enter our surface environment.

VI. Degradation of Little Valley Creek, an Exceptional Value Stream, and EV Wetlands Will Continue and Increase

Under the PPA, the site will continue to be a source of contamination to groundwater and nearby surface water. Additionally, uncertainties regarding the extent of contamination at the site continue with additional assessments ongoing. It is a dereliction of duty for DEP to be advancing deals regarding development and uses of the site without knowing the full extent of the contamination to be addressed.

As documented by Dr. Myers, ongoing contamination from toxins at the site will continue past the proposed PPA remediation effort and development:

The remediation plan implemented as part of developing this site would not protect downgradient or downstream resources from TCE contamination because it leaves too much TCE in place. Also, it would expose the existing contamination to wind and rain which would cause it to erode and pass downstream or downwind where it would contaminate additional areas. Also, much of the contamination would remain in place, especially in groundwater and soils outside of the targeted excavation zone. Other than the additional contamination caused by water and wind erosion, this residential development and remediation will expose substantial amounts of contamination that would be left in place to increased erosion. The development would not contribute substantially to the necessary remediation of downstream and downgradient resources.

See Myers Report at Exhibit "B"

To reiterate, according to Dr. Myers, contaminants in the groundwater will remain after proposed excavation and site development, and the potential for contaminated groundwater migrating to Little Valley Creek is "the most important offsite risk to the environment" and that "PADEP's former comments had urged substantial improvement to the remediation plan, but their most recent comments simply accept the developer's plans and refusals regarding the full removal of TCE from the site." See Myers Report at Exhibit "B"

In addition to the ongoing toxic contamination, there will be increased impacts to the stream caused by the development itself.

Removal of trees at the Bishop Tube site will increase stormwater runoff and increase nonpoint source pollution which will adversely impact stream baseflow and surface water quality to the creek and the surrounding wetlands. Using a detention based approach to stormwater management, which from the record it appears is intended, will exacerbate these conditions, increasing stormwater volume in the stream channel along with nonpoint source pollution.

The replacement of the natural soils, trees and vegetation on the Bishop Tube site with hardened roads, drives, rooftops and compacted soils (including from lawns) will increase the volume of stormwater runoff, the level of pollution and heat that is gathered in stormwater systems and discharged to the creek. The increased volume of runoff discharged to the creek, directly as well as through overland flow, will cause non-natural, human induced erosion, and could result in human induced flooding problems downstream.

Reducing the level of vegetated buffer protecting Little Valley Creek adjacent to the Bishop Tube site will further harm the creek and could impact downstream communities in the form of increased stormwater runoff, pollution inputs, decreased habitat health and erosion. Streamside buffers and upland woodlands consisting of trees, shrubs and grasses have been scientifically proven to provide public safety and health benefits to communities while protecting the environment. Specifically, they protect and improve water quality of streams, including in Exceptional Value and High Quality streams; they provide flood reduction and prevention benefits; they help to address stormwater and erosion issues; and they provide economic and quality of life benefits to communities in the form of increased home values, recreation, aesthetics and quality of life.

The developer has already asked for relief from stream buffer requirements and indicated to the community an intent to use stormwater practices that will result in direct discharge to the creek. In addition to public comments made, in a June 2016 email from Jonathan

Spergel of Manko Gold & Katcher law firm to PADEP employee Sachin Shankar and former employee Cosmo Servidio, Bishop Tube has sought advance agreement from DEP for "relief" from:

- (i) Managing volume for 2-year 24-hour storm on-site;
 - (1) Need relief from infiltration on at least the bottom 2/3ds of site;
 - (2) such relief cannot come at the expense of requiring utilization of slow-release BMPs that would reduce townhome units.

- (ii) Riparian buffers – CDP can remain outside of the 100-foot buffer, but CDP simply cannot secure the required amount of density without disturbing 100' to 150'. Further, it is impossible for CDP to satisfy the current Department equivalency demonstration worksheets for disturbance between 100' and 150'. These worksheets are not regulation, and the Department should allow CDP to make an alternative, more qualitative equivalency demonstration. **Anti-degradation requirements would still be satisfied.**

(Emphasis added).

In addition to relief from stormwater and buffer mandates, the developer is proposing to cut into steep slopes, and engage in significant tree removal and land manipulation in order to maximize the development potential of the site.

Little Valley Creek is valued as habitat for trout. Development at the Bishop tube site will likely have adverse impacts for that habitat. In addition to the adverse impacts from ongoing TCE contamination of the stream, and the addition of nonpoint source pollution that will result from development of the site, the reduction in buffer protection may cause temperature increases and habitat degradation harmful to the trout. Buffers enhance habitat quality and regulate water temperatures.⁷ Compared to open channels, the canopy of a forested stream reduces solar radiation and regulates stream temperatures.⁸ Water

⁷ Sweeney, B. W., & Newbold, J. D. (2014). Streamside Forest Buffer Width Needed to Protect Stream Water Quality, Habitat, and Organisms: A Literature Review. *JAWRA Journal of the American Water Resources Association*, 50(3), 560-584.; Richardson, J. S., Taylor, E., Schluter, D., Pearson, M., & Hatfield, T. (2010). Do riparian zones qualify as critical habitat for endangered freshwater fishes?. *Canadian journal of fisheries and aquatic sciences*, 67(7), 1197-1204.; Sweeney, B. W., & Blaine, J. G. (2007). Resurrecting the In-Stream Side of Riparian Forests. *Journal of Contemporary Water Research & Education*, 136(1), 17-27.; Sweeney, B. W., Bott, T. L., Jackson, J. K., Kaplan, L. A., Newbold, J. D., Standley, L. J., ... & Horwitz, R. J. (2004). Riparian deforestation, stream narrowing, and loss of stream ecosystem services. *Proceedings of the National Academy of Sciences of the United States of America*, 101(39), 14132-14137.

⁸ Moore, R., Spittlehouse, D. L., & Story, A. (2005). RIPARIAN MICROCLIMATE AND STREAM TEMPERATURE RESPONSE TO FOREST HARVESTING: A REVIEW¹.; Pusey, B. J., & Arthington, A. H. (2003). Importance of the

temperatures directly affect the metabolic rates, growth, and even survival of aquatic organisms. For example, an increase in stream temperatures from 2.9°F to 4.2°F resulted in an 81-88% reduction in young trout populations.⁹ Food availability, habitat quality, and temperature are all important factors regulating aquatic life that can uptake and convert water pollutants that enter the channel.

As part of the Exceptional Value Valley Creek watershed, Little Valley Creek is entitled to a heightened level of protection. It is clear these issues were not considered or addressed in the PPA. The PPA and the associated development project it is intended to support and advance fail to fulfill this legal obligation.

The foregoing makes clear that the approval of the PPA, which facilitates the developer's careless plans, is inconsistent with the mandates of HSCA to "protect the public health, safety and welfare and the natural resources of this Commonwealth from the short-term and long-term effects of the release of hazardous substances and contaminants into the environment." 35 P.S. § 6020.102(12)(vi). Approval would also put the public at financial risk, because "the replacement of [contaminated] water supplies is frequently beyond the resources of the people affected" and clean natural resources are "vital to the economic development of this Commonwealth." 35 P.S. § 6020.102(3), (4). Because this is a development project involving a brownfields site, greater attention is needed for protection of the exceptional value stream resources that will be impacted. The history of contamination at the site means these EV water resources have already been compromised. As such, they need a heightened level of protection in order to help overcome the damage that is such a glaring part of the stream's past, present and foreseeable future. There is no need to provide exceptions to regulatory requirements, like the EV buffer mandate, other than that the developer wants it so he can make more profits at the expense of the environment and the community. Any sort of relief from buffer, stormwater or other requirements is totally unjustified. And yet none of these issues are given even passing consideration in the proposed PPA.

VII. Removing the trees in order to accommodate this massive development project will inflict further environmental and community harm.

In addition to helping to provide habitat, reduce stormwater runoff and otherwise benefitting Little Valley Creek, the woodlands existing on the site also provide a vegetated buffer for the neighboring residential communities. The high level of development and associated tree cutting proposed for the site means neighbors who once had an attractive view of nature will now be subjected to a view of townhouses, walls, roads, driveways and street lights. In addition to seeing the development, neighbors will hear it, including associated traffic.

riparian zone to the conservation and management of freshwater fish: a review. *Marine and Freshwater Research*, 54(1), 1-16.

⁹ Jones, K. L., Poole, G. C., Meyer, J. L., Bumback, W., & Kramer, E. A. (2006). Quantifying expected ecological response to natural resource legislation: a case study of riparian buffers, aquatic habitat, and trout populations. *Ecology and Society*, 11(2), 15.

The mere presence of trees can increase the market value of nearby homes by as much as 15%, even 38% in the case of Pennypack Park discussed above.¹⁰ Trees absorb air pollution and help maintain air quality. The shade provided by trees reduces heat, which reduces cooling costs for property owners.

The Valley Creek Trustee Council already identifies urbanization as among the reasons for "an increase in the frequency and intensity of flood events and associated impacts such as streambank destabilization, erosion, and sedimentation" in the Valley Creek Watershed, of which Little Valley Creek is the main tributary. Development of the site as proposed would exacerbate these known adverse conditions. By soaking up water, trees prevent unnatural flooding; whether we are talking about catastrophic floods or water in the basement, trees can help prevent the harm. As discussed, removal of the woodlands at the Bishop Tube site coupled with a stormwater strategy that will collect and discharge that water into the creek, means additional floodwaters and erosion downstream. This will have impacts on the environment, safety (including sense of safety), and market values of homes downstream.

VIII. Stormwater Runoff Will Adversely Impact the Environment

From statements on the record and at public meetings it appears as though a detention based, peak rate strategy will be used for managing stormwater from the site. The increased volume of discharge that could be dumped into Little Valley Creek are significant given the density of development, the level of tree removal and the level of impervious surfaces being proposed.

Absent a stormwater management plan that ensures no increased runoff volume, there will be adverse impacts downstream and for neighboring communities in the form of flood waters, erosion, habitat degradation, and pollution. A detention basin approach will not reduce the volume of runoff. An increased volume of runoff will be detrimental to Little Valley Creek, the hydrologically connected wetlands, and downstream environments and communities.

To what degree there is an intention to include water quality strategies in stormwater management design is unclear, but regardless there will still be increased pollution inputs through the basin and/or in surface runoff to the creek and the adjacent and hydrologically connected wetlands. The nonpoint source pollution that is generated by stormwater runoff includes a myriad of pollutants from urban/suburban areas during a rain event including: sediment, soils, nutrients (including phosphorus and nitrogen), copper, zinc, and other heavy metals (including lead), fecal coliform bacteria, hydrocarbons-oils-greases, atmospheric deposition, vehicle emissions, pavement deterioration, tire and brake pad

¹⁰ Center for Watershed Protection, Better Site Design: A Handbook for Changing Development Rules in Your Community, August 1998, pg. 134

dust, pet waste, chemicals and fertilizers used in lawn care, road salts and de-icing chemicals and their agents, household chemicals, organic and inorganic debris. As noted above, stormwater also increases temperatures.¹¹

Given that Little Valley Creek is already being dosed with dangerous toxins and contaminants from the Bishop Tube site, and will continue to suffer these pollution inputs for an undetermined period of time given that there is no discernable and comprehensive cleanup plan by DEP or the responsible parties in place, introducing a new set of contaminants from the site's development is an increased burden that cannot be justified.

It is not a defensible response to suggest that because the site is contaminated and therefore infiltration strategies are not available that this is an excuse for not addressing stormwater volume and water quality issues. To the contrary, it actually argues against development of a site in this condition where nearby wetlands, streams and communities are already being adversely impacted by pollution inputs. In addition, there are many strategies for reducing stormwater volume and improving quality – detention with direct discharge and infiltration are not the only options. One way, of course, is to avoid development, either in total or by minimizing the development footprint. In addition there are a multitude of strategies that address stormwater volume in other ways, such as evaporation, transpiration, onsite retention and more.

IX. The Public Has not Been Appropriately Informed or Protected Since the PPA was first entered

While the Department has notified the Delaware Riverkeeper Network that it seeks to be transparent with the public and encourages the public's participation with regards to the Bishop Tube site, the Department's actions tell a different story. The Department never published the 2007 PPA proposed amendment and only published this 2010 PPA proposed amendment in 2017, a full seven years after it was signed. Most importantly, on January 28, 2014, DEP Regional Manager Stephan Sinding wrote to Brian Kroker regarding the PPA and subsequent amendments and stated in pertinent part:

The last Amendment to the PPA allowed CDP to cash-out of its potential liability to DEP for releases associated with Bishop Tube under certain conditions. One of those conditions, applicable to both the original PPA and subsequent Amendments, states that CDP "shall not contribute to or otherwise exacerbate...any Existing Contamination attributable to the Site." Another condition states that CDP

¹¹ Cahill Associates, "Stormwater Best Management Practices, Land Use Management for Nonpoint Source Control in the Lower Delaware Coastal Zone", 1993; New York State Department of Environmental Conservation, Reducing the Impacts of Stormwater Runoff from New Development, April, 1992; DNREC and Brandywine Conservancy, Conservation Design for Stormwater Management: A Design Approach to Reduce Stormwater Impacts from Land Development and Achieve Multiple Objectives Related to Land Use, September, 1997

"shall not interfere with or impair any response actions taken by the Department or any other person or entity under the auspices of the Department."

In 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 hereto as Exhibit "H" (emphasis added).

The history of CDP's work at the site and the use of the AS/SVE system raises many questions including but not limited to:

- whether the system is operational,
- whether it is appropriate in light of the water table issues experienced at the site interfering with its functioning, and
- why it has not been operated by the DEP or another party to remove contamination so that it will "minimize the continued off-site migration of contaminated groundwater and discharges to Little Valley Creek" (see 2005 DEP Notice of Proposed Interim Response).

Per DEP's web site, the SVE/AS system appears not to have been operated for years with no other interim emergency response being done; this despite the seriousness and hazards involved and the known potential for migration of pollutants into the groundwater and consequential contamination of the aquifer.

It is further not known if the DEP has shared this information with Chester County Environmental Development Council as it is surely relevant to any grant that CDP may apply to receive.

It is also unclear whether DEP notified the Township of its determination regarding the actions of CDP, the ongoing contamination at the site, and/or with regards to the Covenant

Not to Sue, before the Township agreed to rezone the property in order to allow for residential development – it seems certain the DEP's findings and actions in this regard could have had a significant and meaningful impact on township decisionmaking in this regard.

The DEP has not been transparent with the public and is engaged in a mockery when it asks for comment on an agreement that has already been signed and then voided by its own hand. It is also misleading and deceptive for the DEP to create a web site intended to inform and engage the community with regards to the Bishop Tube site but to omit such critical information.

One must question why the DEP is going to great lengths to protect the reputation and goals of a developer that it found to have potentially exacerbated contamination.

Because CDP potentially exacerbated existing contamination at the site in 2011, DEP determined that the PPA's covenant not to sue clause had been voided. Even assuming arguendo this could be reversed (which it can not and should not), the broad covenant not to sue, which attempts to limit the government's and public's remedy to redress ongoing and future contamination, should not be a part of a PPA, and we urge DEP not to agree to any PPA that includes such a covenant not to sue (particularly one that extends liability protection beyond the Site). Such a covenant is contrary to the goals of HSCA, set forth more fully above.

X. Protecting Peoples Constitutional Rights to a Healthy Environment is Undermined by the Proposed PPA and the partial clean up and development plans it advances.

Article 1, Section 27 of the Pennsylvania Constitution promises:

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

As made clear in the Pennsylvania Supreme Court Case Robinson Twp, Delaware Riverkeeper Network, et. al. v Commonwealth of PA, PADEP officials have a legal obligation to ensure protection of the People's right to pure water, clean air and a healthy environment as promised by Article 1, Section 27 of the Pennsylvania constitution. The partial, and inadequate, remediation encompassed and facilitated by the PPA, for the ultimate purpose of constructing a 228 unit housing development that prioritizes partial clean-up of the site over full clean-up by responsible parties, and includes cutting steep slopes, woodlands, and encroaching on the vegetated buffer of Little Valley Creek, an

exceptional value stream, and associated exceptional value wetlands, is contrary to DEP's constitutional obligations and its duty under Section 301(16) of HSCA.

XI. In Conclusion

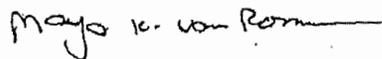
As per the expert analysis secured by the Delaware Riverkeeper Network and other documents on the record, leaving TCE contamination in place while developing the Bishop Tube site for residential purpose is not protective of the neighborhood or downstream resources and would substantially complicate future needed remediation. Accordingly, improvidently amending the PPA and facilitating the proposed residential development of the site is not the action that DEP should be focused upon at this time and certainly such action is not in the public interest. The covenant not to sue CDP is void as DEP noted in 2014.

Therefore, the Delaware Riverkeeper Network urges:

- ✓ DEP confirm that the Covenant Not to Sue pursuant to the PPA is void and so notify all state, county and local officials with any involvement in the Bishop Tube site;
- ✓ DEP prioritize securing a high quality and comprehensive cleanup of the Bishop Tube site;
- ✓ DEP ensure any remediation scope of work be expanded to include the entire affected area around the Bishop Tube site, including neighboring waterways, wetlands and downstream communities affected.
- ✓ DEP ensure full and regular report to, and engagement with, all concerned community members regarding any and all activities taken at, and/or planned for, the Bishop Tube site, including release of draft plans for comment; notification prior to any activity being taken on the Bishop Tube site including a description of the action intended, for what purpose and by whom; and monthly meetings with community leaders to ensure full and fair dialogue and access with the community

The Delaware Riverkeeper Network welcomes the opportunity to work with the DEP to accomplish a proper and protective comprehensive site cleanup.

Respectfully,



Maya K. van Rossum
the Delaware Riverkeeper

Cc:

Secretary Patrick McDonnell, PADEP
Acting Regional Director Anderson Hartzell, PADEP SouthEast Regional Office
Regional Director Patrick Patterson, PADEP SouthEast Regional Office

Senator Andy Dinniman
Senator Daylin Leach
Representative Duane Milne
EPA Region III
Secretary Dennis Davin, DCED



June 7, 2017

We, the undersigned, support and endorse comments made by the Delaware Riverkeeper Network regarding the proposed development of the Bishop Tube Site in East Whiteland Township.

The proposed development will not fully and properly address ongoing contamination at the site; it will negatively impact riparian buffers, stormwater, trees, and waterways.

We would like to see the site fully cleaned up to all applicable legal standards and the property turned over to the community, with soils, trees and buffers intact, for recreational use and open space preservation.

Respectfully,

John Preston
Maureen Preston
Lewis Hitchcock
Stephen Schmid
Pauline Heizenroth
John Bradlee
Carole Buettner
Ann-Sofie, Bjork
Jennifer Ruddy
Jason Baily
Amy Baily
Edward Preston
Havertown, PA
Tamara Hoffritz
Deborah Ryan
Carol Rapp
Kara Hildenbrand
Joan Farb
Wayne Eaton
Thomas Nestor

Kristy Stevens
Paula Warren
Simon Dennis
Jane Wilcox
Al Levenson
Liz Sabo
AnnSofie Bjork
Ashley M.
James R.
John Buckley
Tom Pruette
Maureen Murphy
Sharon Moran
Rachael Thompson
Brett Shallcross
Cynthia Shallcross
Jerome Smith
Dom Paranzino
George Sabo
Bill Coneghen

Diedre Cerrini
George Salvadore
Cristin Smith
Luke Eidenmuller
John Giannone
MaryLou Giannone
Bill Simmet
C. Tazwell
Kristine Rushyte
Ramminas R.
J.R. Lebesman
T. R. Moran
Madison Goldstein
Robin Wilkes
Gwen Griffith
Ryan D.
Marc O'Neill
Michael Tulio
Sarah Funk
Angie Smith

Ronald Lee Smith
Kjisten Robin
Jennifer Preston
Charles Tarloski
Jodi Strzebkowski
Beth
Bella
Cora Weaver
Teresa Hickey
Kim MacGuinness
Clarissa Pugh
Jared Rodeheaver
Bill Mancini
Esther Trauner
Gwen Van Sciver
Maureen Paulson
Hillary Sherwood
Jim Paulson
Ed Andjeski
Lauren Cunningham
C.E. Dawson III
Michael Sweitzer
Pauline Heizenroth
Wendy Toner
David Zielinski
Martina M. Sobolesky
Robert Reinhardt
Beverly Reinhardt
Vicki Sharpless
Lindsay Sharpless
Ken Schmidt
Hollace A. Rutkowski
Lori Bartlett
Kathleen Stauffer
Barbara Tower
Donna McKnight
Carly Sobolesky
Stephanie Sobolesky
Bonnie Rubien
Chris Adams
Elisa Domenick
Bryan Paluch
Martha Drinkwater
B. Kenny
Barbara Casey
Bob Casey
Eileen McEvoy
Marsha W. Peltz

Cameron Peltz
Winslow Murdoch
Joshua Greenwell
Ian Small
Larry Stauffer
Nick Mobile
Ed Howard
Babara Handelin
Liz Merloshiano
Rebecca Spiess
John J. McEvoy
Karen Butow
Deborah Massey
Frank Hunt
Maureen Connelly
Rochelle Krombolz
Keryn Lane
Bill Drinkwater
Frederick L. Haack
Joan Smallwood
Elizabeth Stauffer
Carol Fischer
Donna Radl
Fred Giuffrida
Val Cianci
Tuula Ryde
Cheryl Cramer
Rosemary Rodkey
Todd Rodkey
Mike Willis
Marcia Gasser
Debra Mobile
Laura D.
Sam D.
Pat Carrole
Pat Scerba
Laura Bond
Beth McGarrigle
Gary Fuller
Katie Fuller
John Butow, Environmental
Engineer
Peggy Miros
Paige Harker
Steve Blatman



March 20, 2017

Anderson Hartzell
Acting Regional Director
Pennsylvania Department of Environmental Protection
2 E. Main St.
Norristown, PA 19401

Re: Bishop Tube Site Meetings

Dear Acting Director Hartzell:

As is our practice at the Delaware Riverkeeper Network, we do regular scans of the Pennsylvania Bulletin for issues of concern and interest. Given the high rate of speed that the Bishop Tube development project is being advanced through the PADEP process we have been paying close attention to the PA Bulletin for applicable notices. This past Saturday I did not see any notices regarding the proposed development project at this site. And so I was surprised to see the legal notice posted at:
<http://pa.mypublicnotices.com/PublicNotice.asp?Page=PublicNotice&AdId=4340544>
providing for just 60 days to comment on the "amended Prospective Purchaser Agreement (PPA) with Constitution Drive Partners, L.P. (CDP) regarding the Bishop Tube HSCA Site (Site)".

As you know, the Delaware Riverkeeper Network has significant concerns over this development proposal and the level of transparency associated with PADEP's recent advanced support for the project. I was concerned to learn that there was a 60 day comment period just announced for which neither I nor concerned members of the community received the courtesy of notification to ensure we were aware of the comment opportunity. That, coupled with the failure to provide notification in the PA Bulletin increases my confusion and concern.

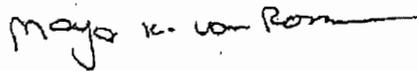
Can you please ensure that I receive an immediate copy of the current Prospective Purchaser Agreement subject to this public comment notification along with clarification regarding the applicable opportunity to comment.

DELAWARE RIVERKEEPER NETWORK
925 Canal Street, Suite 3701
Bristol, PA 19007
Office: (215) 369-1188
fax: (215) 369-1181
drm@delawareriverkeeper.org
www.delawareriverkeeper.org

"A"

Given your request that I stay in direct touch with you over this issue and any concerns I might have, I submit this request directly to you, copying relevant staff.

With regards,

A handwritten signature in black ink, appearing to read "Maya K. van Rossum". The signature is written in a cursive style with a long horizontal line extending to the right.

Maya K. van Rossum
the Delaware Riverkeeper



March 27, 2017

Anderson Hartzell
Acting Regional Director
Pennsylvania Department of Environmental Protection
2 E. Main St.
Norristown, PA 19401

Re: Bishop Tube Site

Dear Acting Director Hartzell:

As you know, the Delaware Riverkeeper Network (DRN) has been conducting an extensive review of the files related to the Bishop Tube Site. We are very concerned that the deliberative review by the Department of Environmental Protection that was underway is now being shifted to a less rigorous review, and that previous concerns of the Department and its staff are now being set aside in order to quickly advance the project.

Attached you will find a second analysis by Dr. Tom Myers regarding the proposed development at the Bishop Tube Site. DRN will submit additional comments in the near future.

Given your request that I stay in direct touch with you over this issue and any concerns I might have, I submit this request directly to you, copying relevant staff.

With regards,

Maya K. van Rossum
the Delaware Riverkeeper

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11

Tom Myers, Ph.D.
Hydrologic Consultant
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Technical Memorandum

Review of Bishop Tube Superfund Site and an Assessment of the Site's Proposed Residential Development

March 23, 2017

Prepared for:

Delaware Riverkeeper Network
Bristol, PA

Introduction

The Bishop Tube site is a 13.7 acre former metals processing plant located in Malvern, PA just south of Lancaster Avenue. It initially had been used for the construction of tubing from stainless steel and more recently operated as a metal alloy tube manufacturing facility until it closed in 1999 (Roux Associates 2015, p 17). "During certain periods of time, chlorinated solvents were used at the site" (Id.).

The area has recently been rezoned for residential purposes, and the current owner, Constitution Drive Partners, L.P. (CDP), proposes to construct townhomes and apartments on the site (Environmental Standards 2017, p 1-1). CDP would excavate soils with high levels of trichloroethane (TCE) from three areas of concern (AOCs) and ship the soil offsite for disposal (Environmental Standards 2017). An AOC is an area where the concentration exceeds various standards.

The purpose of this technical memorandum is to identify issues of concern with respect to developing the site for residential use. Specifics of this technical memorandum include a review of the contaminants and hydrogeology at the site. I reviewed the 2015 Remedial Investigation Report (RIR) (Roux Associates 2015) as a primary source of information, supplemented with a 2009 groundwater investigation (Baker 2009) for an improved description of groundwater flow. In addition, I reviewed the Remedial Scope of Work Addendum dated November 18, 2016 including the attached Remediation Scope of Work dated August 23, 2016

(Environmental Standards 2016). The current remediation proposal is in Environmental Standards (2017, 2016).

Bishop Tube Site

The Bishop Tube Site is a former metals processing plant, as noted in the Introduction. The site is relatively steep, with ground surface contours dipping steeply to the north and to Little Valley Creek (LVC) on the east side of the site. The site lies within the Valley Creek Basin on the west bank of Little Valley Creek (LVC) (Figure 1). LVC flows northward along the east side of the plant site (Figure 1). LVC is an "exceptional value" stream under the PADEP Code, Title 25, Environmental Resources, Chapter 93.

There are substantial amounts of TCE in groundwater throughout the Bishop Tube site (Figure 2). Groundwater flowing beneath the site discharges to springs and to the LVC just east of the site, both increasing the flow and the load of TCE discharging from the site (Figure 2). These streams transport TCE downstream to Valley Creek and the Schuylkill River.

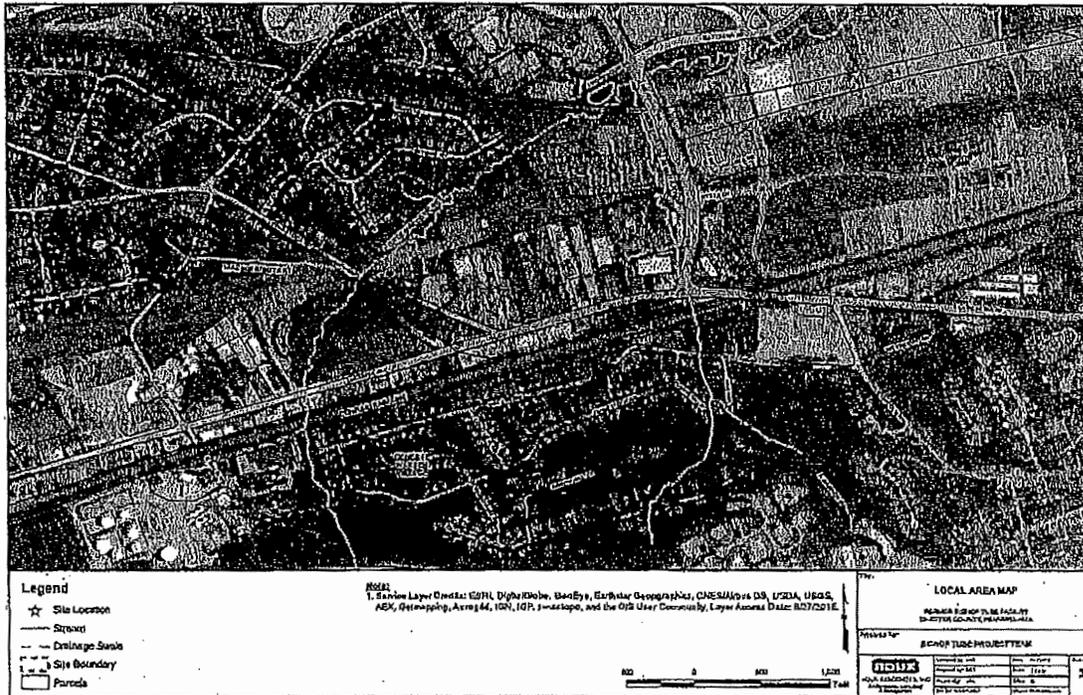


Figure 1: Local area map for the Bishop Tube site, showing the site and proximity to the Little Valley Creek.

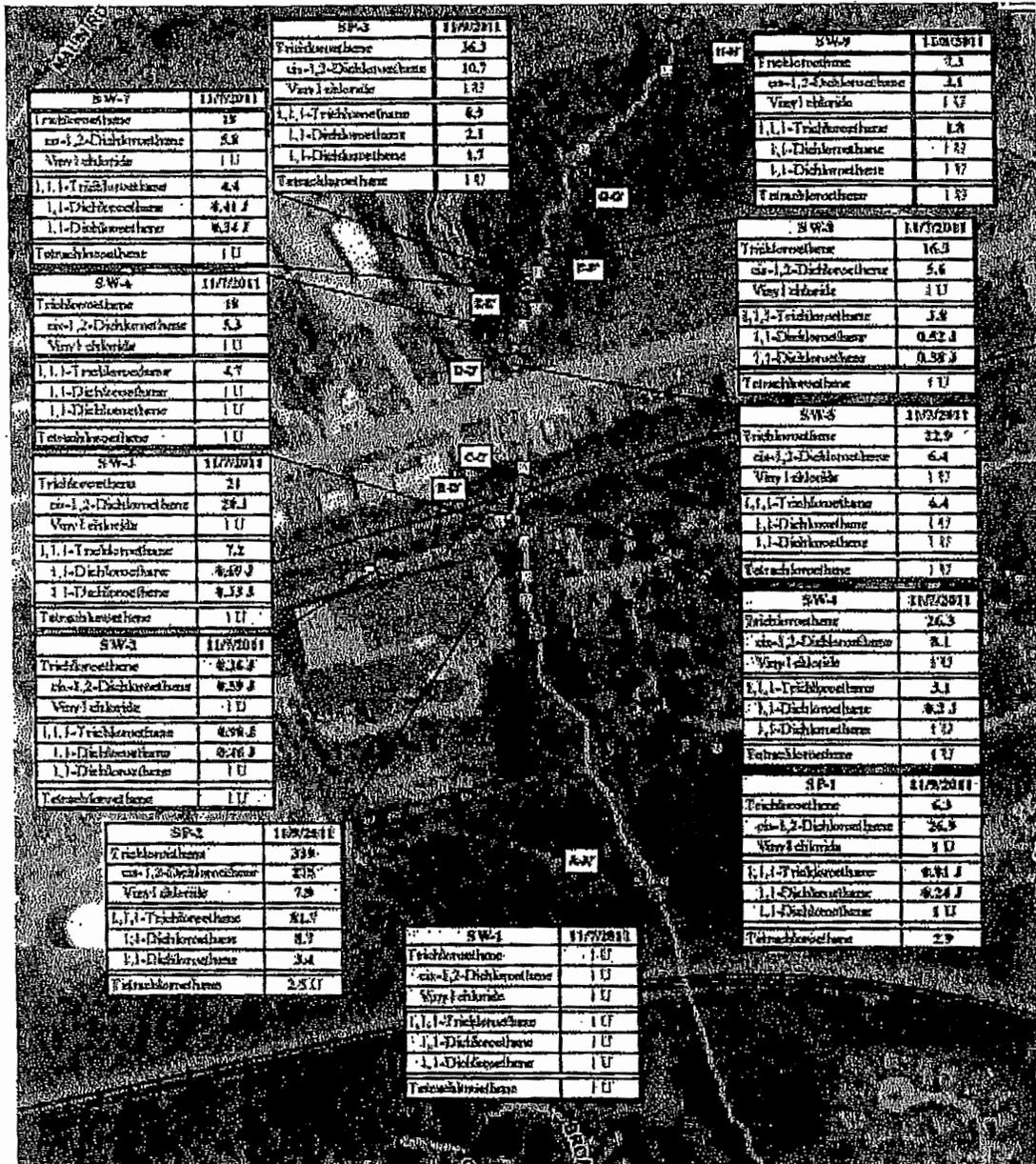


Figure 2: Snapshot of a portion of RIR Figure 6 showing TCE concentrations along Little Valley Creek.

Spills from the Bishop Tube Plant site are the source of TCE in the soils beneath the site. Soil samples reported by Roux Associates (2015) reflect areas with high TCE concentrations in the soil above the water table. Recharge seeps through overburden and leaches residual TCE from unsaturated soils to the water table, whether the water table is in the soils or bedrock. TCE

also sinks deep into the bedrock fractures, as evidenced by high TCE concentrations at substantial depth (up to 400 feet), as described in the next paragraph.

TCE concentrations at the plant site and downgradient to the northeast are very high (Roux Associates 2015, Figure 20). High concentrations occur at various depths in the bedrock, including 128,800 ug/l at 56-66 feet below ground surface (bgs) in MW-51B northeast of the site and 418,000 and 716,000 at 222-232 and 345-360 feet bgs, respectively, in MW-26C and MW-75A on the northeast corner of the site (RIR Figure 20A). TCE has transported substantially off the site to the northeast through the groundwater.

Concentrations are higher in bedrock with some being very high deeper in the bedrock (Baker 2009). Bedrock fractures divert groundwater flow to the east (Baker 2009). Groundwater flow and TCE transport follows the path of least resistance in a direction that is just north of east. Some residences in the subdivision have reported high TCE concentrations in indoor air (Baker 2009, p 4). TCE volatilizes, or evaporates, and the resulting gas accumulates in overlying airspace such as a basement. This could only occur if groundwater with TCE flowed under the subdivision.

Stream TCE concentrations increase where there are springs or where the stream gains flow over fracture zones. Overall concentrations are relatively steady state, especially over the past twenty years (RIR, Appendix D). No evidence supports a conclusion that groundwater at the site is undergoing substantial natural remediation.

Risks from TCE Contamination at the Bishop Tube Site

Until the site is properly remediated, including unsaturated soils and groundwater, the contamination at Bishop Tube will affect water quality throughout the Valley Creek watershed. TCE that remains in unsaturated soil or that has adsorbed into bedrock fractures dissolves into groundwater and therefore is a continuing source until remediated. The potential for contamination to migrate from the site through groundwater to LVC as described above is the most important offsite risk to the environment. 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.

Risks from Developing the Bishop Tube Site

TCE sources will remain until removed or leached out. Removing the sources by excavating buildings and soils, as proposed by CDP, could cause short-term releases from disturbances. Allowing the materials to remain in place and slowly leach out would allow the site to be a long-term source.

Environmental Standards (2017, p 4-4) proposes excavating soils with more than 500 ug/kg of TCE from three AOCs, but not deeper than bedrock or the point of saturated conditions. Excavation could add contaminants to the groundwater and downstream waters in the following ways:

1. Simply excavating the soil will create more surface area for seepage to contact and leach contaminants. If removal occurs slowly or areas are disturbed but not removed, excavation could create a short-term increased source.
2. Future backfills change the amount of seepage reaching the bedrock. This could change the rate of transport through the bedrock. TCE held in shallow fractures will continue to be a source.
3. Heavy excavation equipment could become a temporary source. Mud sticking to trucks could have high amounts of TCE contained in it.
4. Dust leaving the site during excavation could contain high levels of TCE. Downwind sites could accumulate dust which would be a short-term source of TCE leaching into the groundwater.

The plan includes removing "source area soils to reduce ongoing leaching of CVOCs to groundwater and surface water" (Environmental Standards 2016, p 3-1). A CVOC is a chlorinated volatile organic compound and class of compounds that are predominately solvents that includes TCE. TCE and most CVOCs are dense nonaqueous phase liquids (DNAPLs) which essentially means they are denser than water so they sink and they have low solubility so that they exist as masses in the groundwater that will slowly dissolve and thereby be a contaminant source far into the future. Being denser than water, TCE at this site sinks into bedrock fractures below the saturated fill.

This plan will not remove CVOCs that have reached and sunk deeply in to the groundwater because they are denser than water and only slightly soluble. CDP will not extend excavation into saturated soil or below bedrock if unsaturated soil sits atop the bedrock. Therefore, CVOCs that have reached the bedrock through unsaturated soil or groundwater will remain after CDP's excavation and after the residential development has been constructed, and continue to be a contaminant source for an indeterminate period. Development on the surface of this site may make remediation of this groundwater much more difficult in the future.

The installation of a vapor barrier in structures constructed above contaminated groundwater (Environmental Standards 2016, p 3-1) implies that the contaminated groundwater will be allowed to remain in place. Groundwater flows and will discharge TCE to Little Valley Creek or locations further downstream into the future. The proposed remediation will not prevent ongoing offsite flow of TCE because it only includes unsaturated soil. The importance of this has recently been verified by a consultant for CDP completing indoor air sampling at a nearby house.

PADEP should require an analysis of the amount of CVOCs in the groundwater and precipitated from solution in the aquifer; the precipitate will be a source into the future until it has dissolved and transported downgradient. Without knowing the amount, it is not possible to estimate how long it would remain a source, but considering that TCE concentrations in groundwater have been steady for at least two decades, it is likely to be on the order of at least decades. PADEP should commit to measuring the amount remaining.

PADEP has backed down from previous comments made to CDP in a way that will decrease the remediation at the site. In a letter to CDP dated March 13, 2017 (Armstrong 2017), PADEP provided its most recent comments on the January 2017 Remediation Scope of Work (Environmental Standards 2017). The new scope of work (Id.) had not implemented various previous comments made by PADEP (Environmental Standards 2016). The following paragraphs explain how the March 13 comment letter (Armstrong 2017) essentially accepts the new scope with little substantive comment, including failing to ensure that all previous PADEP questions, concerns and recommendations have been appropriately addressed.

Section 4.2, Remedial Activities (Environmental Standards 2017) describes the excavation of three areas of concern (AOCs), the former vapor degreaser area of Building #5, former vapor degreaser area of Building #8, and the former drum storage area. The 2017 estimate was for the removal of 10,788 tons while in 2016 the estimate was for 16,511 tons, with the difference being due to measurements made in December 2016. Rather than ensure this significant discrepancy was fully explained and confirmed, PADEP only suggested the soil volume calculation may be incorrect (Armstrong 2017, p 2) even though they questioned the precision of the instrument used to make the measurements (Armstrong 2017, p 3).

PADEP also gave up on comments regarding the necessary excavation being "greater or smaller than contamination in unsaturated soils" (Environmental Standards 2016a, p 3). PADEP requested sampling outside of the three identified AOCs so that CDP could remove additional contaminated saturated soil (Id.). CDP claims that any contamination outside of the AOCs would be "associated with TCE migration due to groundwater flow" and that "CDP will not chase impact in saturated soil resulting from migration of TCE in groundwater" (Id.). PADEP dropped this concern in the letter even though staff have recognized that CDP's position was different than earlier statements. TCE remaining in unsaturated soils creates a source that with time will expand away from the AOCs both through unsaturated soil and groundwater. Because TCE becomes PADEP's responsibility once it moves from unsaturated soil to groundwater, delaying remediation shifts responsibility to PADEP.

PADEP noted that past investigations have shown TCE concentrations exceeding 500 ug/kg extend far below 12 feet below ground surface (bgs), but Environmental Standards stated that

CDP will not excavate below 12 feet bgs because that "extends well in to the saturated zone at the three AOCs" (Id.). PADEP does not raise any issues regarding contamination going below that level in their current comments on section 4.4 (Armstrong 2017, p 3). PADEP's only comment is to use a more sensitive photo-ionization detector than had been used previously and to base the limits of the excavation on laboratory analytical results (Id.). PADEP has apparently accepted CDP's intent to stop at the point where they encounter saturated conditions.

Environmental Standards claimed that "it is not CDP's intent to achieve Act 2 standards in saturated soil, which is clearly a groundwater issue" (Environmental Standards 2016, p 3). They claim that CDP has "satisfied its remedial obligations at the Site pursuant to a Consent Order" (Id.). They also claim that the current proposed excavation "goes far beyond the legal obligation" at the site (Id.). Environmental Standards also notes that "CDP has no obligation to remediate saturated soils and will not do so, aside from excavating saturated soils below the planned unsaturated soil excavations. The proposed removal ... is a voluntary act on the part of CDP ..." (Environmental Standards 2016a, p 6). CDP is clearly arguing that even this excavation is beyond their responsibility. This will allow TCE in groundwater at the site to continue as a source far into the future. PADEP does not counter this in any way (Armstrong 2017).

CDP's insistence on not excavating into saturated soil could leave more contamination in the ground if they excavate during a wet period. Tables and figures in Baker (2009) shows the groundwater elevation at various wells in the area varied by several feet over the years of sampling. The water level sampling did not necessarily coincide with wet periods nor were measurements made frequently enough to be assured of capturing high water tables. Excavation that occurs during wet periods could end up removing several feet less soil, and significantly less contamination, because of a high water table. PADEP should require remediation during dry periods to assure that more soils are unsaturated.

CDP also refuses to consider whether backfilling with certain materials, such as gravel, would "exacerbate migration of contaminants in groundwater or subsurface vapors" (Environmental Standards 2016, p 6) because they will install "vapor mitigation systems" (Id.) in nearby structures. Clean gravel will cause there to be a vapor pressure gradient established between the remaining contaminated soil and the clean gravel. The gradient could establish transport to the clean gravel and if the sources have sufficient TCE mass in them, they may no longer be clean. CDP considers it a nonissue (Id.) and PADEP is no longer concerned with this, as shown by their remaining comment that fill "must comply with DEP's Clean Fill Policy" (Armstrong 2017, p 4). Backfilling with gravel could cause precipitated TCE in the saturated soil to diffuse into the backfill such that the site could be as much of a source after excavation as before.

Conclusion

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.

The remediation plan implemented as part of developing this site would not protect downgradient or downstream resources from TCE contamination because it leaves too much TCE in place. Also, it would expose the existing contamination to wind and rain which would cause it to erode and pass downstream or downwind where it would contaminate additional areas. Also, much of the contamination would remain in place, especially in groundwater and soils outside of the targeted excavation zone. Other than the additional contamination caused by water and wind erosion, this residential development and remediation will expose substantial amounts of contamination that would be left in place to increased erosion. The development would not contribute substantially to the necessary remediation of downstream and downgradient resources.

PADEP's former comments had urged substantial improvement to the remediation plan, but their most recent comments simply accept the developer's plans and refusals regarding the full removal of TCE from the site. The site will continue to be a source of contamination to groundwater and nearby surface water even after it is developed for residential uses. The uncertainties around the current assessments of the extent of contamination at the site will remain but be underneath a residential development.

References

Armstrong DA (2017) Letter to Mr. Guy Wolfington, Constitution Drive Partners, L.P, Re: Bishop Tube Site, Remediation Scope of Work for Targeted Soil Excavation. PA Department of Environmental Protection, March 13, 2017.

Baker, Michael, Jr. (2009) Shallow Groundwater Feasibility Study Report, Bishop Tube Site, East Whiteland Township, Chester County, Pennsylvania, PADEP Contract No. SAP40000006380, Prepared for Pennsylvania Dept of Environmental Protection.

Environmental Standards, Inc. (2017) Remediation Scope of Work for Target Soil Excavation, Bishop Tube Facility, 1 Malin Road, Malvern Pennsylvania. Valley Forge PA. August 23, 2016, Revised January.16, 2017.

Environmental Standards (2016) Letter to Mr. Dustin A. Armstrong, Pennsylvania Department of Environmental Protection, Norristown PA, Response to Comments, Bishop Tube Site, Remedial Scope-of-Work for Targeted Soil Excavation. October 10, 2016.

Roux Associates (2015) Remedial Investigations Report, Former Bishop Tube Property, Chester County Pennsylvania. Prepared for the Bishop Tube Project Team. August 31, 2015, Logan Township, NY



March 28, 2017

Anderson Hartzell
Acting Regional Director
Pennsylvania Department of Environmental Protection
2 E. Main St.
Norristown, PA 19401

Re: Bishop Tube Site

Dear Acting Director Hartzell:

I am writing to follow up on my March 20, 2017 letter regarding the legal notice for the Perspective Purchaser Agreement (PPA) for the Bishop Tube Site, and the lack of notice in the PA Bulletin. The referenced letter is attached hereto.

I respectfully request a written response to the issues raised in my letter; particularly the notice issue, clarification of the opportunity to comment on the current PPA, and that I promptly receive a copy of the Agreement.

Given your request that I stay in direct touch with you over this issue and any concerns I might have, I submit this request directly to you, copying relevant staff.

With regards,

A handwritten signature in black ink that reads "Maya K. van Rossum".

Maya K. van Rossum
the Delaware Riverkeeper

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March 20, 2017

Anderson Hartzell
Acting Regional Director
Pennsylvania Department of Environmental Protection
2 E. Main St.
Norristown, PA 19401

Re: Bishop Tube Site Meetings

Dear Acting Director Hartzell:

As is our practice at the Delaware Riverkeeper Network, we do regular scans of the Pennsylvania Bulletin for issues of concern and interest. Given the high rate of speed that the Bishop Tube development project is being advanced through the PADEP process we have been paying close attention to the PA Bulletin for applicable notices. This past Saturday I did not see any notices regarding the proposed development project at this site. And so I was surprised to see the legal notice posted at:
<http://pa.mypublicnotices.com/PublicNotice.asp?Page=PublicNotice&AdId=4340544>
providing for just 60 days to comment on the "amended Prospective Purchaser Agreement (PPA) with Constitution Drive Partners, L.P. (CDP) regarding the Bishop Tube HSCA Site (Site)".

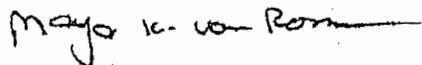
As you know, the Delaware Riverkeeper Network has significant concerns over this development proposal and the level of transparency associated with PADEP's recent advanced support for the project. I was concerned to learn that there was a 60 day comment period just announced for which neither I nor concerned members of the community received the courtesy of notification to ensure we were aware of the comment opportunity. That, coupled with the failure to provide notification in the PA Bulletin increases my confusion and concern.

Can you please ensure that I receive an immediate copy of the current Prospective Purchaser Agreement subject to this public comment notification along with clarification regarding the applicable opportunity to comment.

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Given your request that I stay in direct touch with you over this issue and any concerns I might have, I submit this request directly to you, copying relevant staff.

With regards,

A handwritten signature in black ink that reads "Maya K. van Rossum". The signature is written in a cursive style with a long horizontal flourish at the end.

Maya K. van Rossum
the Delaware Riverkeeper



April 5, 2017

Anderson Hartzell
Acting Regional Director
Pennsylvania Department of Environmental Protection
2 E. Main St.
Norristown, PA 19401

Dear Mr. Hartzell,

According to a June 20, 2016 email from Jonathan Spergel of Manko Gold & Katcher law firm to PADEP employee Sachin Shankar and former employee Cosmo Servidio, Bishop Tube has sought advanced agreement from PADEP for the following for its proposed development project:

"c. Relief Required:

- i. Managing volume for 2-year 24-hour storm on-site
 1. Need relief from infiltration on at least the bottom 2/3ds of site;
 2. Such relief cannot come at the expense of requiring utilization of slow-release BMPs that would reduce townhome units.
- ii. Riparian buffers – CDP can remain outside of the 100-foot buffer, but CDP simply cannot secure the required amount of density without disturbing 100' to 150'. Further, it is impossible for CDP to satisfy the current Department equivalency demonstration worksheets for disturbance between 100' and 150'. These worksheets are not regulation, and the Department should allow CDP to make an alternative, more qualitative equivalency demonstration. **Anti-degradation requirements would still be satisfied.**

In addition, in the same email, Spergel sought requests, on behalf of Constitution Drive Partners,

- "3. Rescission of covenant not to sue termination letter. CDP is fully committed to trying to successfully redevelop and remediate the site, and in fact has identified the real possibility

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of securing a \$1 Million grant, as well as agreeing to contribute up to \$500,000 of private matching funds. CDP believes it is time to rescind the letter, which has been a further stigma for the project."

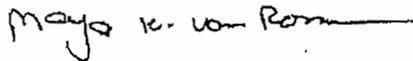
None of these requests are appropriate for a project that is already fraught with so much negative environmental and community impact. What is PADEP's current stance on these issues?

In this same June 24, 2016 email it is asserted that the limit of CDP's commitment to remediate the site is \$1.5 million with \$1 million of that being in the form of a grant from the State and only \$500,000 being from CDP itself. Anything above the \$500k commitment from CDP seems, as suggested by the email, to be out of bounds, and instead CDP is asking if DEP can secure any additional needed funds from other parties involved with this contaminated site. Can you please provide the status of these conversations regarding funds?

We note that according to a January 22, 2016 email from Jonathan Spergel of Manko Gold & Katcher, there was a threat of a claim of taking if PADEP took the position that full remediation of the site would be required prior to development. This is, of course, a spurious and charged claim. What position has PADEP taken on this false legal claim?

We will be submitting comments to you as new and concerning information emerges and comes to our attention. Given the speed with which PADEP is suddenly seeking to advance this project in partnership with CDP, and given the severity of the concerns at issue, we feel this is the most appropriate and responsible path for us to take.

With regards,



Maya K. van Rossum
the Delaware Riverkeeper

cc:

Senator Andy Dinniman
Representative Duane Milne
PADEP Acting Secretary Patrick McDonnell



April 6, 2017

Anderson Hartzell, Acting Regional Director
Pennsylvania Department of Environmental Protection
2 B. Main St.
Norristown, PA 19401

Re: Bishop Tube Site Perspective Purchaser Agreement

Dear Acting Director Hartzell:

I am writing to follow up on the multiple calls placed and letters submitted to your office seeking to review (either in person or by receiving a copy) the Perspective Purchaser Agreement (PPA) noticed in the PA Bulletin on April 1, 2017. On Friday March 31, Delaware Riverkeeper Network employee Molly Atz left Dustin Armstrong a voicemail per the PA Bulletin Notice, in an attempt to examine the PPA. She never received a response. On Wednesday, April 5, Delaware Riverkeeper Network employee Corinne Bell left voicemails for both Mr. Armstrong and Mr. Schena, and never received a response. Both Messrs. Schena and Armstrong were called again on Thursday, April 6, and no response was received. In addition, Maya van Rossum, the Delaware Riverkeeper, also left messages with Mr. Armstrong and Mr. Schena seeking immediate access to a copy of the PPA when they failed to answer their phones.

It is now nearly a week into the public comment period for the PPA and after multiple attempts to obtain a copy of the PPA, there has been no response.

Please provide DRN with a copy of the PPA by April 6, 2017 via email address keepermaya@delawareriverkeeper.org.

Respectfully,

A handwritten signature in black ink that reads "Maya K. van Rossum".

Maya K. van Rossum
the Delaware Riverkeeper

cc: Senator Andy Dinniman & Representative Duane Milne

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April 19, 2017

Anderson Hartzell, Acting Regional Director
Pennsylvania Department of Environmental Protection
2 E. Main St.
Norristown, PA 19401

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

Dear Acting Director Hartzell,

I write with a number of concerns about the Pennsylvania Department of Environmental Protection's (PADEP) approach to the proposed development of the Bishop Tube Site in East Whiteland Township, Chester County, PA. The Delaware Riverkeeper Network has been meeting with a growing number of residents who are increasingly concerned about the project and the failure of decisionmakers to hear their concerns and their goals for the site.

Community Goals - Full Cleanup and Public Open Space

Those with whom we have been meeting would like to see the entire site - including saturated soils, unsaturated soils, groundwater, releases to air - fully cleaned up to the highest standards that will protect direct contact and turned into public open space for the community.

There is not community support for the granting of up to \$1 million of state grant funds to a private developer only to accomplish a partial remediation that supports maximum development of the site for residential development, which will bring more families to an area of known and dangerous contamination and will result in the loss of wooded open space that is valued by the surrounding community. This is particularly so given the lack of a plan for ensuring full cleanup of the site by a date and time certain for the protection and benefit of the community.

Holding the Responsible Parties Fully, Including Financially, Accountable, Rather Than Supporting a Private Developer with Public Funds. If DEP Can't Do It, EPA Should

The Delaware Riverkeeper Network and the community with whom we are working cannot understand why PADEP has spent so much time and resources on trying to advance development of this site with a private developer who will only be undertaking partial remediation if, and only if (as we understand it), they get a significant (we understand \$1 million) grant of state funds to carry out this work, knowing the developer will be securing a likely significant profit from the site's sale. Why has DEP not spent the past ten years investing its time and resources, just as firmly, diligently, and passionately pursuing the responsible

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parties, thereby ensuring full cleanup of the site at their expense, not at the public's expense. The identified responsible parties have significant financial resources to undertake this work.

According to documents on the record, the PRPs for this site include Johnson Matthey and the Whitaker Corporation. Johnson Matthey on its own is financially equipped to address the contamination at this site.

If DEP is unable to accomplish the job of securing full cleanup of the site, it should reach out to the EPA and urge that the site be placed on the National Priority List of the Superfund Program.

PPA – Full Public Comment Period Should be Provided

The PADEP published a 60 day public comment period on the prospective purchaser agreement for the site in the PA Bulletin on April 1, providing two phone numbers to contact in order to secure the ability to review the document at issue. Three members of the Delaware Riverkeeper Network staff repeatedly reached out over the course of the week after publication to secure access to a copy of the document for review. We placed phone calls, emails and even had a staff member at the PADEP Southeast Regional office who was willing and able to pick up the document had there been any responsive communication. Unfortunately, as documented in our letter of April 6, our outreach was ignored by PADEP staff. It was only on April 7, after my placing a number of firm phone calls and documenting this failing for the record that the Delaware Riverkeeper Network finally secured a copy of the document.

Given that our inability to secure a copy of the PPA document for review was the result of PADEP ignoring our multiple efforts, we request that the public comment period be extended by a full 7 days to ensure we have been provided a full 60 day period to review and comment on the document.

Assertions by Constitution Drive Partners to the Community That Need Information or Clarification.

Brian O'Neill sent a letter to many in the community making a number of assertions which PADEP needs to address, deny or confirm.

Investment in the site?

Mr. O'Neill asserts that he intends to "spend millions of dollars" to clean up contamination from the site. Yet, from a communication between Mr. O'Neill's legal counsel and DEP dated June 24, 2016, it is asserted that the limit of CDP's commitment to remediate the site is \$1.5 million, with \$1 million of that being in the form of a grant from the State and only \$500,000 being from CDP itself. Anything above the \$500k commitment from CDP would have to be provided by other parties (their emails suggests perhaps the "PRPs?")...

It is my understanding that Mr. O'Neill is supposed to be documenting with the PADEP the amount of investment he is making in the site. Given that Mr. O'Neill asserts to the public he is spending "millions" on the site, while he is telling PADEP he will spend no more than \$500,000, it is important to understand the truth of the matter. Can you please provide the information that fully documents any and all investment Mr. O'Neill has made or intends to make in this site.

Mr. O'Neill's letter tries to blunt the community concern that he is seeking \$1 million of public monies to fund the remediation portion of his private development venture by asserting that if

the state had to clean up the site with HSCA funds that they too would be using public dollars. Of course, that ignores the fact that a state cleanup could result in a healthy, safe and beautiful community park, while Mr. O'Neill's proposal would result in a site still plagued by significant contamination in the saturated zone and groundwater, would take from the community the natural woodlands it enjoys, and would result in a high level of impervious surfaces that would have serious adverse stormwater consequences for the creek.

At this point I would like to inquire about – and confirm – the outcome of the conversations about the developer's desire to include demolition of the buildings at the site as part of the scope of work covered by the state ISRP grant being sought. According to an email exchange from the developer's attorney, Jonathan Spergel, to PADEP officials:

"As you know, we are trying to see if we can include building demo within the approved PADEP scope; DCED would approve this, but as Dustin communicated to Guy today, PADEP would not want this included if it meant that the rest of the planned remedial activities could not be funded."

I would like to inquire about the additional testing done by Roux to:

- "Further characterize soil conditions in the northeast corner of the Property; and
- Respond to DEP's comments regarding an undiscovered residual source area associated with the northeast corner of the Property."

What was the outcome of this testing? Did it include the unsaturated soils that are proposed for development but not remediation in the current development proposal?

DEP unable to enforce against PRPs?

Mr. O'Neill's letter asserts that PADEP is ill equipped to hold the PRPs accountable for addressing contamination at this site.

- "The companies responsible for this contamination have been 'ducking' East Whiteland ... and the DEP for over 40 years."
- "DEP has been unable to force these companies to take remedial action."

If this is in fact the case, it undermines assertions that the proposed partial cleanup and development is part of an effort that will ultimately result in a safe environment for present and new residents....

- If, as Mr. O'Neill suggests, PADEP is in fact unable to secure full remediation of the saturated zone and highly contaminated groundwater, then how can the community (including the new residents from the new development) have confidence that they will not continue to be exposed to contamination coming off of this site in either the near term or the long term?
- And doesn't this also mean that with only a partial remediation and construction of 228 homes on the site, PADEP and Mr. O'Neill would knowingly be bringing new residents, families and children to a site that is underlain, and bordered (in the form of a Little Valley creek that is receiving ongoing contamination from the site's groundwater) by serious contamination, including toxins as dangerous as TCE, that

they do not expect to be cleaned up in full any time soon, and also would be knowingly supporting a situation of ongoing contamination to exceptional value streams?

PADEP must either make the commitment necessary to hold the responsible parties fully accountable and secure full cleanup at their expense, or acknowledge its inability to do so and seek assistance from the EPA Superfund program. To map out a plan for only partial cleanup in order to accommodate a development project that will expose new families to an ongoing hazard for which you are unable to confirm how, when or to what degree the contamination will ultimately be addressed in full is inexcusable.

If PADEP is going to take the position that Mr. O'Neill is wrong and that it has been diligently and effectively pursuing the responsible parties and can identify how, when and to what degree it will secure full cleanup of the site, then a full report of your efforts is needed. If in fact, Mr. O'Neill's assertions are correct and PADEP is unable to bring the responsible parties to the cleanup table then, also, a full accounting of your efforts is warranted as well as an effort to secure National Priority List status for the project under the federal superfund program.

In his attack on a local resident, as well as myself, Mr. O'Neill asserts that this project has not been identified by the federal Superfund program as a site of concern. In fact, documents on EPA's website belie that assertion. See attached.

Development is necessary to ensure proper cleanup of the site?

In many ominous ways, Mr. O'Neill suggests that without his development project the Bishop Tube site will not be properly cleaned up, near term or long term, and as a result the community will continue to be exposed to the hazards found at the site. But this is simply not the case.

Mr. O'Neill's letter asserts:

- "Unless CDP redevelops the Site, these dilapidated structures will remain at the property for the foreseeable future. Any future remediation by PADEP or the PRPs under HSCA would likely not result in the demolition of these dilapidated structures."
- "...the proposed soil remediation through excavation and off-site disposal may NEVER take place if the redevelopment does not occur."
- "...it is inaccurate and counterproductive to argue that waiting for PADEP or the PRPs to remediate the site under the HSCA process will be better for the environment, Little Valley Creek and East Whiteland Township. To the contrary, not only will this path result in significant delay (likely additional years) in the remediation of contaminated soil at the site, this path will likely result in a HSCA remedy that will call for contaminated soils to REMAIN at the site forever."

And while failing to acknowledge that he is himself seeking state funds to provide only a partial cleanup that will knowingly leave contamination at the site, including in groundwater and the saturated zone with pathways for ongoing contamination to enter Little Valley Creek and the environment, Mr. O'Neill asserts:

- "During this delay, these contaminated soils will continue to contribute to the contamination of groundwater at the site, as well as the contamination of Little Valley Creek ..."

The assertions that without Mr. O'Neill's development project the community cannot expect the government to ensure full cleanup of this highly contaminated site is patently false. It would only be through an abject failure of the agencies to fulfill their legal obligations to the community and the environment that this would be the case. In fact, assuming PADEP and/or EPA do their jobs properly; the community can and should expect a clean and safe site within their community.

Importantly, if the agencies were to hold the responsible parties fully accountable, not only would the site be fully cleaned up, but it would be done at the expense of the responsible parties, not through government grant.

And, as stated in an email exchange from PADEP representative Ragesh Patel:
"The site has to meet Act 2 standards at the end of the remediation, regardless of who performs the work including the responsible party, developer or the HSCA Program."

Strictly Voluntary?

In his letter to residents Mr. O'Neill repeatedly states that his remediation efforts at the site are purely voluntary, and that he has no obligation to undertake them. Mr. O'Neill asserts that "CDP has already satisfied ALL of its remedial obligations under a consent order and agreement that CDP entered into with the PADEP prior to purchasing the site in 2005, CDP has NO LEGAL OBLIGATION at all to clean up any remaining contamination at the site."

Of course, he neglects to recognize that if he wants to build on the site, he does in fact have to undertake remedial action. And he certainly has to undertake remediation work if he expects to receive the \$1 million grant he is seeking. The question is—how much? And it appears that, until recently, PADEP continued to express significant concerns and voice the need for greater intervention. More recently, however, the Department seems to be taking a much lighter stance with regards to the proposed project.

With regards to fulfilling his obligations under the PPA ... that is yet to be determined. The Delaware Riverkeeper Network will be carefully reviewing the PPA document, the requirements it does (or does not) contain, and CDP's compliance therewith.

It is irrelevant that Mr. O'Neill is not legally responsible for the contamination as he continually complains. The fact is he bought the site knowing it was highly contaminated and that if he wanted to build there it would require significant action, activity and investment. He also knew that there was always the risk that, at the end of the day, he may not be allowed to undertake the work he desires in the manner and to the limited degree with the limited investment that he was willing to undertake. This was a business decision and a business risk.

Stormwater Management and Tree Cutting

While Mr. O'Neill recognizes that he will need a stormwater management permit to build on the site, we are unaware of any permit application being placed before PADEP that would give the community a full understanding of what is being proposed. At a public meeting Mr. O'Neill talked about a discharge to the Little Valley Creek. The increased volume of discharge that could be

dumped into Little Valley Creek, as proposed by Mr. O'Neill in his public statements, and the downstream ramifications, are significant given the density of development; the level of tree removal and the level of impervious surfaces being proposed. There is also a request in writing from Mr. O'Neill to PADEP that he be allowed relief from stream buffer mandates.

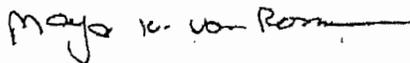
Can you please confirm whether or not PADEP is engaged in review of a stormwater permit application for this site and to what degree it has agreed to provide relief from stream buffer mandates?

Mr. O'Neill's assertion that this is not a "greenfield", fails to recognize the ecological and community value of the woodland located at the site, and of the pollution prevention, stormwater management, ecological habitat, property value enhancement, and noise and light buffering those trees provide. That portion of the property is very green, and loss of the woodlands would have a profound impact on the community and the environment - an impact they are not willing or wanting to bear.

Attacking Residents - a Concern

I conclude by observing that not only does Mr. O'Neill's letter provide misleading information, and at times make some oddly extreme representations with red lettering, capital letter callouts and a harsh tone, but the letter also makes a point of attacking an East Whiteland Township resident for sharing with her neighbors her concerns. His attacks on me are silly but not surprising. His attacks on Carla Zambelli are inappropriate, harsh, and frankly his underlying premise for the attacks on either of us is flat out wrong. I do not think that PADEP should continue to ally itself with such abusive tactics represented in this letter and in harsh public statements blasted out at the community when they try to communicate their concerns and opposition to his plans.

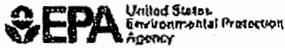
Respectfully for the Record,



Maya K. van Rossum
the Delaware Riverkeeper

Cc:

Secretary Patrick McDonnell, PADEP
Senator Andy Dinniman
Senator Daylin Leach
Representative Duane Milne
EPA Region III
Secretary Dennis Davin, DCED



Superfund Site Information

BISHOP TUBE CO (EPA ID: PAD081868309)

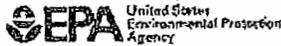
Site Information

[Site Info](#) | [Aliases](#) | [Operable Units](#) | [Contaminants](#) | [Contacts](#)
[Administrative Records](#) | [Special Collection Documents](#)

Site Name: BISHOP TUBE CO
Street: RTE 30 & MALIN RD.
City / State / ZIP: FRAZER, PA 19355
NPL Status: Not on the NPL
Non-NPL Status: Other Cleanup Activity: State-Lead Cleanup
EPA ID: PAD081868309
EPA Region: 03
County: CHESTER
Latitude: +40.116667
Longitude: -075.541667
Federal Facility Flag: Not a Federal Facility

[Return to Search Results](#)

[Return to Search Superfund Site Information](#)



Superfund Site Search Results

Disclaimer:

The CERCLIS Public Access Database, which contained a selected set of publicly releasable Superfund program data, has been retired. The EPA is transitioning to the Superfund Enterprise Management System, or SEMS. SEMS includes the same data and content as CERCLIS. As SEMS is made operational, nightly data refresh routines will be reestablished. This webpage will be updated to reflect the status of data updates.

Search Results

Search Criteria:

Active vs. Archived: *Active What are active and archived sites?*

Site Name: *BISHOP TUBE*

State(s): *Pennsylvania*

Region(s): *03*

Found **1** site(s) that match your search criteria listed above.

To conduct another search, return to the [Search Superfund Site Information](#) page.

[Save results in Excel format](#)

Displaying sites 1 through 1

EPA ID	Site Name	City	County	ST	Non-NPL Status	Non-NPL Status Date	NPL Status
PAD081868309	BISHOP TUBE CO	FRAZER	CHESTER	PA	OS	07/18/2002	Not NPL

Displaying sites 1 through 1



May 16, 2017

Anderson Hartzell, Acting Regional Director
Pennsylvania Department of Environmental Protection
2 E. Main St.
Norristown, PA 19401

Re: DEP May 12, 2017 letter

Dear Mr. Hartzell,

I am writing in partial response to your letter of May 12, 2017. I am very disappointed to see your blatant mischaracterization of what the Delaware Riverkeeper Network has said about the remediation plans for the Bishop Tube site. Your letter falsely asserts that I and the Delaware Riverkeeper Network have suggested that the only work DEP is pursuing for remediation of the Bishop Tube site is this inadequate, partial clean-up plan being proposed by Constitution Drive Partners and O'Neill Developers.

Our letters to PA DEP very clearly lay out our position, concerns and questions regarding the partial clean up proposal for the near term and our efforts to redirect your energies towards pursuing the full clean-up plan instead. We have never stated that the current, inappropriate partial clean-up is your only effort at the site

That being said, it is very clear that DEP is currently pursuing an inadequate partial clean-up of the site in order to accommodate a massive residential development project without a plan for when, how and to what degree the site will be fully cleaned up. And in so doing, you are seeking a near term plan that will allow ongoing contamination to continue, that will exacerbate environmental degradation with the new development, and will be bringing new families (over 200 of them if the developer has his way) to this ongoing contamination.

Respectfully for the Record,

A handwritten signature in black ink that reads "Maya K. van Rossum".

Maya K. van Rossum
the Delaware Riverkeeper

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925 Canal Street, Suite 3701
Bristol, PA 19007
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drm@delawareriverkeeper.org
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6 11

Cc:

Secretary Patrick McDonnell, PADEP

Regional Director Patrick Patterson, PADEP SouthEast Regional Office

Senator Andy Dinniman

Senator Daylin Leach

Representative Duane Milne

EPA Region III

Secretary Dennis Davin, DCED

Deanna Tanner, Attorney, Delaware Riverkeeper Network

Jordan Yeager, Curtin & Heefner, Counsel for the Delaware Riverkeeper Network



pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION

SOUTHEAST REGIONAL OFFICE

January 28, 2014

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

Dear Mr. Kroker:

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

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

January 28, 2014

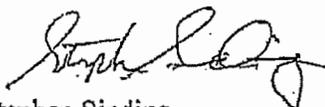
DEP also met with representatives of VIST Bank back in September in order to encourage them to concur with CDP's demolition of the buildings, something that later became moot once a new investor was secured by CDP. Lastly, during a meeting in mid-December, Regional Director Cosmo Servidio was assured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

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

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

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

Sincerely,



Stephan Sinding
Regional Manager
Environmental Cleanup and Brownfields

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



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

RP

December 1, 2015

Jonathan H. Spergel, Esq.
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004

Jonathan:

By letter dated October 7, 2015, you requested that the Department of Environmental Protection (DEP) reconsider its rescission of the covenant not to sue involving Constitution Drive Partners (CDP) for the Bishop Tube site. At this time, DEP feels that granting such a request is premature.

DEP rescinded the covenant not to sue based on concerns raised by CDP's actions at the site despite DEP's attempt to assist CDP in the remediation and redevelopment of the site. At present, DEP is not aware of any changes at the site that support granting of your request.

As a reminder, while the remedy selection process has not started, the responsible parties and their contractors will need unrestricted access to the site to implement the proposed remediation.

Please don't hesitate to contact me if you have any comments or concerns related to the above request.

Sincerely,

Stephan Sinding
Regional Manager
Environmental Cleanup and Brownfields

Re 30 (eh15ecb)329

11



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

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.

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-

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

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

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 **Due Process** 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 Env'tl. 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 Env'tl. 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

absence of state intervention."

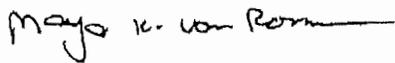
Wright v. City of Philadelphia, 2015 WL 894237, at *8 (E.D. Pa. Mar. 2, 2015)(city potentially liable for exposing PHA residents to asbestos)

⁶ The State's natural resources.

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,



Maya K. van Rossum
the Delaware Riverkeeper



Deanna K. Tanner
Staff Attorney

Cc:

Secretary Patrick McDonnell, PADEP
Regional Director Patrick Patterson, PADEP SouthEast Regional Office
Senator Andy Dinniman
Senator Daylin Leach
Representative Duane Milne
EPA Region III
Secretary Dennis Davin, DCED
East Whiteland Township Board of Supervisors



July 6, 2017

We, the undersigned, support and endorse comments made by the Delaware Riverkeeper Network regarding the proposed development of the Bishop Tube Site in East Whiteland Township.

The proposed development will not fully and properly address ongoing contamination at the site; it will negatively impact riparian buffers, stormwater, trees, and waterways.

We would like to see the site fully cleaned up to all applicable legal standards and the property turned over to the community, with soils, trees and buffers intact, for recreational use and open space preservation.

Respectfully,

John Preston
Maureen Preston
Lewis Hitchcock
Stephen Schmid
Pauline Heizenroth
John Bradlee
Carole Buettner
Ann-Sofie, Bjork
Jennifer Ruddy
Jason Baily
Amy Baily
Edward Preston
Havertown, PA
Tamara Hoffritz
Deborah Ryan
Carol Rapp
Kara Hildenbrand
Joan Farb
Wayne Eaton
Thomas Nestor

Kristy Stevens
Paula Warren
Simon Dennis
Jane Wilcox
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Liz Sabo
AnnSofie Bjork
Ashley M.
James R.
John Buckley
Tomi Pruette
Maureen Murphy
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Rachael Thompson
Brett Shallcross
Cynthia Shallcross
Jerome Smith
Dom Paranzino
George Sabo
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Cristin Smith
Luke Eidenmuller
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Madison Goldstein
Robin Wilkes
Gwen Griffith
Ryan D.
Marc O'Neill
Michael Tulio
Sarah Funk
Angie Smith

Ronald Lee Smith
Kjisten Robin
Jennifer Preston
Charles Tarloski
Jodi Strzebkowskie
Beth
Bella
Cora Weaver
Teresa Hickey
Kim MacGuinness
Clarissa Pugh
Jared Rodeheaver
Bill Mancini
Esther Trauner
Gwen Van Sciver
Maureen Paulson
Hillary Sherwood
Jim Paulson
Ed Andjeski
Lauren Cunningham
C.E. Dawson III
Michael Sweitzer
Pauline Heizenroth
Wendy Toner
David Zielinski
Martina M. Sobolesky
Robert Reinhardt
Beverly Reinhardt
Vicki Sharpless
Lindsay Sharpless
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Lori Bartlett
Kathleen Stauffer
Barbara Tower
Donna McKnight
Carly Sobolesky
Stephanie Sobolesky
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Chris Adams
Elisa Domenick
Bryan Paluch
Martha Drinkwater
B. Kenny
Barbara Casey
Bob Casey
Eileen McEvoy
Marsha W. Peltz

Cameron Peltz
Winslow Murdoch
Joshua Greenwell
Ian Small
Larry Stauffer
Nick Mobile
Ed Howard
Babara Handelin
Liz Merloshiano
Rebecca Spiess
John J. McEvoy
Karen Butow
Deborah Massey
Frank Hunt
Maureen Connelly
Rochelle Krombolz
Keryn Lane
Bill Drinkwater
Frederick L. Haack
Joan Smallwood
Elizabeth Stauffer
Carol Fischer
Donna Radl
Fred Giuffrida
Val Cianci
Tuula Ryde
Cheryl Cramer
Rosemary Rodkey
Todd Rodkey
Mike Willis
Marcja Gasser
Debra Mobile
Laura D.
Sam D.
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Pat Scerba
Laura Bond
Beth McGarrigle
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Katie Fuller
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Engineer
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Paige Harker
Steve Blatman
Denise Campbell
Anneke Walsh
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Kecia Lee
Gary Taiariol
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Lawrence Stauffer
Nicholas Stauffer
Michael Stauffer
Ramya Shetty
Meredith Schuster
Marylou Sands
Adam Grimes
Tracey Deschaine
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Kelly Richards
Kathleen Reid
Karen Stalker
Katelyn stalker
Robert stalker
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Vicki Briscoe
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Nanette Tolson
Tina Richards
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Tracey Hillman
Kevin Fabian
Benjamin Giese
Tim Carbone
John Rissi
Donna Hitchcock
William Belmonte
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Jessica DiGuiseppe

Julie Cunningham
Jennifer Touhill
Joanne Beck Porter
Sharon Bunting Lady
Pat Gorman
Robert D. Missimer Jr.
Sara Busch
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Crystal Abel
Katharine Jordan
Alexandra Manning
Bryn Richard
William Montgomery
Sidne Baglini
Heather Nelson
Catherine Smith
Joanne Tenaglio
Moir Kirk
Deb Kline
Steven Holsclaw
Kathleen Clarkin

ATTACHMENT C

Forensic Environmental Services Inc.
Exton, PA
(Comment 4)

comment - received June 13, 2017

Forensic Environmental Services, Inc.

113 John Robert Thomas Drive
The Commons at Lincoln Center
Exton, Pennsylvania 19341

Telephone: (610) 594-3940

Telecopier: (610) 594-3943

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June 7, 2017

Via Email and Certified Mail; Return Receipt Requested

Mr. Dustin Armstrong
Project Officer, Environmental Cleanup Program
Pennsylvania Department of Environmental Protection
2 East Main Street,
Norristown, PA 19401

**Re: Remediation Scope of Work for Targeted Soil Excavation Bishop Tube Facility
1 Malin Road, Malvern, PA, Prepared by Environmental Standards, Inc.**

This correspondence provides comments regarding Constitution Drive Partners' (CDP) proposed plan to excavate and dispose of certain soils from the former Bishop Tube Facility in accordance with the above-noted April 25, 2017 (Second Revision) work plan. We are aware of and have reviewed comments previously provided (September 20, 2016 and March 13, 2017) by the Pennsylvania Department of Environmental Protection (PADEP) on earlier versions of this plan. It is our understanding that, to date, the PADEP has not provided final approval of the work plan.

Specific comments regarding the work plan include the following:

1. As stated in the Introduction to the work plan (Section 1.0), CDP plans to redevelop the property for residential use and in this context the "The proposed targeted soil removal activities will reduce or eliminate the risk of exposure to the compounds of concern for the future occupants." As currently described, the targeted soil excavation program will remove soils exhibiting trichloroethene (TCE) with concentrations above the PADEP 0.5 mg/kg Act 2 Statewide Health Standard (SHS) from three specified areas: 1) Building 8 AOC; 2) Building 5 AOC and 3) the former Drum Storage Area. The Remedial Investigation by the PADEP during the period 2002 - 2008, identified compounds other than TCE (or other degreasing solvents, e.g., tetrachloroethene, 1,1,1-trichloroethene) at concentrations above Act 2 residential standards (i.e., Media Specific Concentrations - MSCs). For example, certain PCB, polynuclear aromatic hydrocarbon (PAH) and metal compounds were present at concentrations that exceeded the residential MSC but not the non-residential MSC. Given the reported presence of these compounds in soils at the site, the proposed soil removal program cannot and will not "reduce or eliminate the risk of exposure to the compounds of concern" for future residential occupants as stated by CDP if only chlorinated solvent compounds are considered.
2. Although CDP did conduct (December 2016) a focused soil investigation to delineate the spatial distribution of volatile organic compounds (VOCs) in the three above-noted areas,

Mr. Dustin Armstrong
June 7, 2017
Page 2

no sampling was conducted to assess the presence/absence¹ of other non-VOC compounds (e.g., PCBs, PAHs and metals) above the residential MSCs in any other area of the site. In the absence of these data the suitability of the site conditions for residential use is in question.

3. CDP's response to item f on Form U (Appendix B), is not consistent with the disposition of investigation derived waste generated in conjunction with post-2008 Remedial Investigation activities. Specifically, delisting requests were made and received from PADEP to dispose of groundwater and soils from the site. It appears that CDP has only considered the characteristic nature of the soils but not whether they are listed hazardous wastes.
4. Although reference is made to a "perimeter air monitoring plan" (Section 4.1), no information is provided to understand the scope and details regarding this plan. Given that CDP anticipates that the soil excavation program will continue for a period as long as three months, control of vapor emissions and particulate matter while excavating, loading and transporting contaminated soils is important.
5. In Section 4.2, CDP states that "the horizontal limit of impacted unsaturated soil for the three AOCs ... will be restricted to the identified horizontal limits unless field observations during excavation activities dictate otherwise." The work plan needs to clearly specify the circumstances under which the excavation limits will be extended and how these conditions will be identified. For example, what field photoionization meter reading or laboratory quantified concentration will serve as a threshold triggering additional excavation?
6. In Section 4.2.2, CDP states that "saturated soil impacts" in the Building 5 AOC and the former Drum Storage Area will not be "chased" outside of the defined excavation boundaries illustrated on Figure 2. This statement begs the question whether CDP plans to leave soils with CVOCs above the residential MSCs in the area surrounding the proposed excavation areas for the Building 5 AOC and the former Drum Storage Area. Moreover, it is not clear to what extent, if at all, "saturated soil impacts" will be "chased" laterally in the Building 8 AOC. Potentially, soils exhibiting residential MSC exceedances as shallow as three feet in the area surrounding the proposed Building 8 AOC excavation area could potentially be left in place.
7. Available site data indicate that soils saturated with groundwater will be encountered at depths as shallow as three feet in the Building 8 AOC. CDP's anticipated soil excavation

¹ Some limited soil sampling was conducted for a broader list of analytes in the three target areas for purposes of waste characterization and disposal of TCE impacted soils.

depth (i.e., to bedrock) in the Building 8 AOC will extend, in some areas, as deep as 22 feet. Soil excavation below the water table in shallow groundwater conditions is extremely challenging, therefore CDP's technical plan in this regard needs to be comprehensive and appended to the soil excavation plan before it can be approved. Two references in the current plan suggest, that the management of groundwater and saturated soils has not been fully assessed. First, CDP proposes to pump an unspecified volume of groundwater (simultaneously with soil excavation) from the Building 8 AOC excavation into a frac tank (Section 4.7). Pumping of this nature will continuously weaken the toe of the excavation walls, resulting in sluffing of sidewall soils into the excavation and precluding the excavation of soils to the top of bedrock. In this circumstance, dewatering is typically conducted from outside the perimeter of the excavation or sheeting/shoring is used to stabilize the excavation walls. Second, CDP proposed to deposit groundwater saturated soils on the ground surface to be "allowed to dry" prior to off-site disposal (Section 4.6). A detailed plan must address, at a minimum: a) the anticipated volume of groundwater generated; b) the surface area and requisite time required to facilitate soil drying; and c) vapor/particulate mitigation of the drying beds. Details regarding these soil management activities are essential prior to review and approval of the proposed plan.

8. CDP provides limited information regarding the collection of post-excavation samples in Section 4.8. What is not addressed is the plan of action in the event post-excavation samples demonstrate chlorinated volatile organic compounds (CVOCs) at concentrations above residential MSCs. Will additional soil be excavated above and/or below the water table? Is the plan of action different for each of the three AOCs? Additionally, CDP is not committing ("if desired by CDP", Section 4.8 and 6.0) to prepare a Final Report pursuant to Act 2 documenting implementation and attainment of applicable SHS/MSCs.
9. CDP proposes to use "non-impacted" soils from the southern portions of the site for backfill (Section 4.9). Has CDP collected/analyzed soil samples documenting compliance with clean fill requirements, prior to depositing soils of unknown quality below the water table?
10. Given the volume of water saturated soils that is anticipated to be stockpiled on site to "dry", details regarding the Sedimentation Control Plan (Section 4.10) are integral to the excavation plan and must be reviewed before it can be approved.
11. As approved by PADEP, one of the assumptions underlying Johnson Matthey's and Whittaker's Feasibility Study is that CDP will conduct a soil remedy that is consistent with (and is ultimately determined to support) residential site use. To this end, a soil remedy that complied with Act 2 in all respects (both in implementation and documentation) is an integral and essential component to PADEP's ultimate evaluation and selection of a site-wide remedy based on a Feasibility Study assessing residential use.

Mr. Dustin Armstrong
June 7, 2017
Page 4

12. We note that the Work Plan has estimated the mass of soil to be excavated for off-site disposal at 11,263 tons (5,727 tons from Building 8, 4,139 tons from the DSA, and 1,397 tons from Building 5). This estimated mass of soil exceeding the proposed remedial action goal of 0.5 mg/kg is significantly less than what was estimated previously by PADEP. Referring to the Final Supplemental Soil Characterization Report (Baker, June 30, 2003), Baker estimated the mass of soil containing TCE greater than 0.5 mg/kg as follows: Building 8 = 6,294 tons, Building 5 = 688 tons, and Drum Storage Area = 7,185 tons (Tables 8.1, 8.2 and 8.3 respectively). The total of impacted soil estimated by Baker was 16,227 tons, which is 44% more soil than estimated in the work plan. Further, Baker only assumed a depth of soil impact to 10.7 feet in Building 8 (versus the much deeper excavation in Building 8 contemplated in the CDP Work Plan). PADEP should investigate why there is such a discrepancy in the mass of soil and inquire as to what CDP's contingency is for dealing with the extra soil mass if this is what is actually removed.

Given the above-noted shortcomings, and in some cases the absence of information critical to assessing its adequacy, it is premature to approve CDP's proposed soil excavation program.

Very Truly Yours,

Thomas Maguire

Thomas Maguire, PG
Forensic Environmental Services Inc.
President
Environmental Consultant for Johnson Matthey Inc.

Paul C. Miller

Paul C. Miller, PE
Environmental Alliance, Inc.
Principal Engineer/Vice President
Environmental Consultant for Whittaker Corporation

ATTACHMENT D

Hamburg, Rubin, Mullin, Maxwell & Lupin, HRMM&L, PC Attorneys at Law on behalf of East Whiteland Township
(Comment 5)

comment - received July 7, 2017

Rec'd by fax 7/7/17 (Bmc)



HAMBURG, RUBIN, MULLIN,
MAXWELL & LUPIN, PC
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LIMERICK
HARRISBURG

July 7, 2017

SENT VIA EMAIL: darmstrong@pa.gov
AND HAND DELIVERY

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

Re: Bishop Tube/Comments to Prospective Purchaser Agreement

Dear Mr. Armstrong:

Please accept the following comments on behalf of East Whiteland Township ("Township") regarding the Prospective Purchaser Agreement ("PPA") between the Pennsylvania Department of Environmental Protection ("DEP") and Constitution Drive Partners ("CDP"), for the Bishop Tube property ("Site") located in East Whiteland Township.

Notice of the aforementioned PPA and its amendments was published in the April 1, 2017 *Pennsylvania Bulletin*, which notice provided for a sixty (60) day public comment period. The public comment period was subsequently extended to July 7, 2017. The DEP's website indicates that comments in this matter are "on the 2010 amended PPA between DEP and CDP;" however, the Pennsylvania Bulletin notice specifically permits comments "regarding this PPA and its amendments."

The Township understands that Trichloroethene ("TCE") and certain breakdown products have been detected in soil, surface water, groundwater and indoor air at the Site. According to DEP, there are three main sources of TCE in the soil: two former vapor degreasers and a drum storage area. (DEP Information Sheet for Bishop Tube HSCA Site, June 2017).

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In 2005, DEP entered into a PPA with CDP, under the Hazardous Sites Cleanup Act ("HSCA"), pursuant to which CDP agreed to develop the Site for commercial purposes. In so doing, CDP agreed to remediate the soils at the Site "in order to demonstrate attainment of a remediation standard for soils established pursuant to Act 2" (non-residential statewide health standard or site-specific standard for soils). (PPA, Paragraph K). In exchange for this remedial undertaking, CDP received both a Covenant Not To Sue and Contribution Protection from DEP. Significantly, the remediation of soils was directed solely at "soils located within the unsaturated zone between the ground surface and the groundwater." (PPA, Paragraph K).

In 2007, DEP amended the 2005 PPA with CDP to require the design, installation and operation of a physical treatment technology known as an air sparging/soil vapor extraction ("AS/SVE") system. However, due to operational difficulties resulting from the shallow water table and system flooding, DEP entered into a second amendment to the PPA in 2010, wherein DEP assumed operational control of the system in exchange for a monetary settlement.

The Township has reviewed the various documents associated with the PPA and offers the following comments:

1. DEP notes on its website that "DEP's responsibility under the Hazardous Sites Cleanup Act, is to select and assure a remedy that is protective of human health and the environment . . .". The 2007 amendment to the PPA addressed the design, installation and operation of the AS/SVE system. Under the 2010 amendment to the PPA, DEP assumed operational control of the system, which system has not been in use since 2010 because of operational deficiencies and the planned use of in-situ Bioremediation technology to address the three main sources of TCE at the Site (commonly referred to in this matter as the three "hot spot" areas). Has DEP decided to permanently forego the use of the AS/SVE system? Who is responsible for the implementation of the in-situ Bioremediation technology, and will this technology be included within the remediation scope of work for the Site?

2. The 2005 PPA and its amendments are predicated on a non-residential remediation of the Site. As DEP is aware, the proposed use of the Site is now residential. How will DEP address this change of use at the Site within the context of the existing PPA, which was based upon a non-residential use of the Site? Will DEP require another amendment to the PPA or other agreement to address residential-related issues, specifically the more stringent remediation standards required for residential use purposes?

3. Although the PPA was entered into under HSCA, does DEP have any plans to now require attainment with Act 2 and its remediation standards, given the proposed residential use of the Site? Does DEP have any plans to negotiate additional amendments to the PPA to include, among other things, the more stringent statewide health standards for soil under Act 2?

Dustin Armstrong
Page 3
July 7, 2017

4. At the June 7, 2017 Bishop Tube Site Information Session, DEP noted that DEP's Soil Investigation in the 2000-2003 time frame revealed three (3) "hot spots." (Page 10 of DEP's Slide Presentation). During the meeting, there were references made to other possible contaminants at the Site, including metals, which contaminants are not addressed in the PPA. Has DEP identified any other contaminants of concern at the Site, other than those specifically identified in connection with the aforementioned "hot spots?"

5. The 2005 PPA discussed the attainment of a remediation standard for soils established pursuant to Act 2, but limited the remediation of such soils to those located between the unsaturated zone, between the ground surface and the ground water. (PPA, Paragraph K). Has DEP considered or will DEP consider the remediation of soil to include soils within the saturated zone at the Site?

6. Has DEP or any other party identified any additional source areas of contamination or contaminants of concern at the Site, subsequent to the identification of the three (3) soil hot spot areas (referred to in comment #4) or the genesis of the PPA process?

7. The full slide presentation posted on DEP's website regarding the Bishop Tube Site notes that "[a]fter review and approval of JM/W's RI and FS: DEP will propose a comprehensive response action to fully address the contamination (soil, ground and surface water)." (Page 28 of Slide Presentation). Since the aforementioned RI and FS are being undertaken post-PPA, will DEP consider any amendments to the PPA, or will DEP consider another path forward for the remediation of the Site, based on the RI and FS?

8. The PPA and its amendments refer to the remediation of the Site. When does DEP expect to receive/approve a final remediation plan for the Site?

9. During the June 7, 2017 Bishop Tube Site Information Session, there was some discussion relating to possible impacts to the environment in the general area of the Bishop Tube Site from sources other than Bishop Tube. Has DEP made any determination as to possible source areas of contamination other than the Bishop Tube Site and, if so, was this determination considered in the PPA negotiation or amendment process?

10. During the June 7, 2017 Bishop Tube Site Information Session there was specific input from ATSDR regarding the prospective use of the Site. Was DEP in contact with ATSDR during the PPA negotiation or amendment process?

11. The 2005 PPA provides CDP with both a Covenant Not To Sue and Contribution Protection under HSCA for any "Existing Contamination" determined to be present at the Site. In 2014, DEP advised CDP that the Covenant Not To Sue provision is void. Please confirm that DEP's present position is that the Covenant Not To Sue provision is indeed void. If DEP does not consider the Covenant Not To Sue provision to be void, then please explain any change in position since DEP's 2014 determination. Furthermore, do the Contribution Protection provisions in the PPA still apply to CDP? (PPA, Paragraph K).

Dustin Armstrong
Page 4
July 7, 2017

Thank you for the opportunity to submit the above comments. If you have any questions, please contact the undersigned.

Very truly yours,

HAMBURG, RUBIN, MULLIN,
MAXWELL & LUPIN

By: 

STEVEN A. HANN

SAH:clp



HAMBURG, RUBIN, MULLIN,
MAXWELL & LUPIN, PC
ATTORNEYS AT LAW

FILE# 29448-092

www.HRMM.com

TO: Dustin Armstrong

FAX: 484-250-5961

PHONE: 484.250.5723

FROM: Steve Hann, Esquire

DATE: July 7, 2017

TIME:

PAGES INCLUDING THIS COVER SHEET: 5

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OUR FAX NUMBER IS 215-661-0315.

- J. Edmund Mullin
- Steven H. Lupin
- Douglas J. Zeiders
- Carl N. Weiner
- Jonathan Samuel, LL.M.
- Merle R. Ochrach
- Mark F. Hilmsworth
- Steven A. Hann
- Steven B. Barrett
- Christen C. Pionzio
- Joseph J. McCroory, Jr.
- Ethan R. O'Shea
- Bernadette A. Kearney
- Paul G. Mullin
- John J. Innozzi
- Lisa A. Shearman, LL.M.
- William G. Roark
- Andrew P. Grau, LL.M.
- Susan E. Plette
- Nathan M. Murawsky
- Timothy P. Briggs
- John F. Walko
- James S. Lee
- Jonathan L. Shaw
- Joseph W. Cntuzzi
- Kevin M. McGrath
- Robert M. Sebla

MESSAGE:

Dustin:

Attached is a letter with comments on behalf of East Whiteland Township regarding the Bishop Tube Prospective Purchaser Agreement, in response to the April 1, 2017 Pennsylvania Bulletin Notice requesting such comments. The attached has also been emailed to you and hand delivered to your office today.

Please respond to today's email acknowledging receipt..

Thank you,
Steve

LANSDALE
ACTS Center - Blue Bell
375 Morris Road
Post Office Box 1479
Lansdale, PA 19446-0773
Phone 215-661-0400
Fax 215-661-0315

LIMBRICK
HARRISBURG

(02068616jv1)THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. PLEASE CALL US COLLECT IF THIS IS RECEIVED IN ERROR.

ATTACHMENT E

Ms. Pauline Heizenroth, Resident
Malvern, PA
(Comment 6)

comment - received April 17, 2017

April 13, 2017

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

RECEIVED
DEP-SERO
EGP/WASTE MGMT

17 APR 17 PM 2:13

Dear Mr. Armstrong,

I am responding to the Public Notice related to the Bishop Tube site. I am a resident of the General Warren Village. I am concerned about the proposed development next to my neighborhood, especially since my house is close to the Bishop Tube site.

I don't know the full history of what has happened at the Bishop Tube site since it was abandoned many years ago. Knowing what your department has already done and plans to do would help make this notice clearer. I have enclosed segments of your notice that I rewrote and paraphrased with my questions or comments in red, hoping that you can clarify these sections for me.

I know that many of my neighbors are also trying to get a handle on all the important legal processes and approvals going on within the upcoming weeks regarding the Bishop Tube proposed development. It would be helpful to have a better understanding from your department's perspective. We were hoping that you or a PADEP representative planned to attend the April 19, 2017 Informational Meeting hosted by the Board of Supervisors to accomplish this but we were told that no one from your department could come. Since we can't hear from anyone in person please clarify the questions in the enclosed by mail. Doing this would help me and those neighbors that I share it with make informed comments to your notice and better understand the Bishop Tube site items coming up in the next weeks for approval with the township.

A concerned resident,



Pauline Heizenroth

Malvern, PA 19355

CC: Patrick McDonnell, Acting Secretary, PA DEP
Dana Aunkst, Office of Water Programs, PA DEP
George Hartenstein, Waste, Air, Radiation and Remediation, PA DEP
Anderson Hartzell, Acting Regional Director, PA DEP
William Holmes, East Whiteland Board of Supervisors
Veronica Holmes, East Whiteland Environmental Advisory Council

PUBLIC NOTICE on April 1, 2017 in Daily Local News

Excerpts or paraphrases from the notice are in black.

My questions/comments are in red.

"The site was acquired by the Central and Western Chester County Industrial Development Authority and sold to the Constitution Drive Partners (ie. CDP or O'Neil) for the purposes of redevelopment." *How long ago did this happen?*

Prior to CDP buying the site, your department had the CDP agree to 3 conditions:

1. **Assess and clean up the soil contamination at the site to one of the standards set forth in the Land Recycling and Environmental Remediation Standards Act 2.**
 - *Was the full area assessed already? If so, when?*
 - *What were the results of the assessment? Did it only find contamination in the three spots noted by CDP on their map of the proposed development plan?*
 - *Why does it say "one of the standards"? Are there different types of remediation in Standards Act 2? What type of remediation is needed to fully restore this property to a non-contaminated area? What type of remediation is CDP planning to do?*
 - *From what I recall from an East Whiteland township presentation, CDP said they plan to remediate the site to residential standards. What specifically does that mean?*
2. **Not to exacerbate any existing contamination at the site.** *Wouldn't doing the extensive excavation of the area to put in 228 houses exacerbate any existing soil contamination through the dust it creates and spread contamination through the air?*
3. **To provide access and right of entry to the department (PADEP) for potential future remediation of groundwater contamination in exchange for a covenant not to sue and contribution protection from the PADEP** *Won't it be difficult to remediate in the future if the site is covered with 228 homes? Does this "covenant not to sue" protect CDP from being sued by anyone in regard to its Bishop Tube development??? What is meant by "contribution protection" from the PADEP?*

It says that the PADEP amended the Prospective Purchaser Agreement (PPA) on two occasions:

January 22, 2007: The CDP would design, provide mechanical equipment and demonstrate performance of a soil vapor extraction and air sparing remedial system (AS/SVE), which the PADEP would install and take over upon performance demonstration. *Was this done? If so, when? Was it successful?*

June 4, 2017: The CDP would repair and run the AS/SVE system for 72 hours after which it would relinquish control to the PADEP and pay it \$30,000. *What happened during the 72 hours? Did the system work? Did it remediate the site? Is the PADEP still running this system?*

The final paragraph says "the agreements may be examined by the PADEP offices at (your address and contact information)." It says that the public may comment on the PPAs and its amendments for 60 days. *This is confusing. Are we to comment on the amendments of Jan 22, 2007 and June 4, 2017? Were they amended on those dates or are they still up for debate?*

ATTACHMENT F

Mr. John Preston, Resident
Devon, PA
(Comment 9)

comment - received July 7, 2017

Also Rec'd by fax 7/7/17

John Preston
[REDACTED]
Devon, PA 19333

July 7, 2017

Mr. Dustin A. Armstrong
Environmental Protection Specialist
Department of Environmental Protection
Southeast Regional Office
2 East Main Street, Norristown, PA 19401
RE: Public Comment Period on Bishop Tube PPA / Scope of Work

Dear Mr. Armstrong:

As a very concerned resident of Pennsylvania and Chester County, I would like to convey **my fervent and unyielding opposition to proposed development and remediation plans for the Bishop Tube site in Malvern, PA.**

As stated on the DEP website:

DEP's responsibility, under the Hazardous Sites Cleanup Act, is to select and assure a remedy that is protective of human health and the environment and otherwise complies with all statutory and regulatory requirements.¹

Based on facts and disclosures, many of which have only recently been presented or discovered by the public, there are clear human and environmental dangers that would be augmented by the proposed remediation plan. As a result, the DEP's position, as mandated by law, warrants the immediate termination of all prior agency agreements with Constitution Drive Partners / O'Neill Properties and the denial of all ongoing and future applications for residential or commercial development.

For years, the public has remained an outsider and left uninformed about the proposed Bishop Tube development. As noted in an email to me by East Whiteland Township Supervisor Rich Orlow:

It has become painfully and unfortunately obvious that the surrounding community was apparently largely unaware and not nearly as involved [as it is now]...we really don't know enough FROM THE DEP about the intention and course of the remediation. We [or I] don't know the "facts" of the extent of the contamination.²

¹ Pennsylvania Department of Environmental Protection website
(<http://www.dep.pa.gov/About/Regional/SoutheastRegion/Community%20Information/Pages/Bishop-Tube.aspx>)

² Orlow, Richard. "Official Bishop Tube Position." Message to John Preston. May 13, 2017. Email.

The proposed remediation plan by Constitution Drive Partners / O'Neill Properties includes an unacceptable cleanup of the Bishop Tube site. This plan, under the Scope of Work:

- Places the residents of East Whiteland Township in direct and imminent danger from exposure to extremely high levels of toxic airborne particles and vaporous contaminants including, but not limited to, trichloroethylene, a chemical substance known by multiple agencies of the United States government to be a likely cancer-causing carcinogen.³ The levels of trichloroethylene at the Bishop Tube site far exceed an acceptable level of exposure. Further, DEP has not considered or conducted any exploration of prevailing wind patterns from the Bishop Tube site, and as such has not considered where toxic soil particles and vapors may land during excavation.
- Reflects a partial cleanup of contaminated soil on only a portion of the property, and neglects other contaminated parts of the landsite.
- Completely neglects cleanup of highly contaminated saturated soils and bedrock, and would effectively allow for highly toxic carcinogens to remain on the property and contaminate groundwater and neighboring residential areas in perpetuity. If DEP truly intends to consider a long-term cleanup solution for the Bishop Tube land site, then that plan should be established and approved by the public before any consideration of development; otherwise, a full cleanup will be undermined / prohibited by any development.
- Places cleanup and technology management, under the responsibility of a real estate developer who is seeking to be absolved from all public accountability, including pursuit of a covenant not to sue in the event of failure, neglect, or mismanagement. This developer has already displayed gross negligence in management of a AS/SVE system by damaging a liquid boot and potentially exacerbated the existing contamination of the site in 2014, requiring the DEP to come in and bail out the developer from mismanagement of the system. Based on this history, the applying developer is not qualified / cannot be trusted with safe, effective remediation of soil – especially under such dangerous conditions for the public.

³ Agency for Toxic Substances & Disease Registry: Division of Toxicology and Human Health Services. "Public Health Statement for Trichloroethylene." November 2016.

- Conveys stark disagreements in agreement conditions between DEP and the developer. The prior covenant not to sue in the Prospective Purchaser Agreement, as declared by DEP in documentation and public acknowledgment, is void. However, Brian O'Neill is under the impression that the covenant not to sue remains in full force. At a minimum, this conveys stark differences in opinions relative to the conditions within the PPA, and a need to terminate the entire agreement effective immediately. Further, the DEP's own language conveys a lack of faith in CDP to manage the remediation process based on prior errors, and apparent issues with DEP in on-site cooperation.

Position of DEP on Covenant Not to Sue:

"By letter dated October 7, 2015, you requested that the Department of Environmental Protection (DEP) reconsider its rescission of the covenant not to sue involving Constitution Drive Partners (CDP) for the Bishop Tube site. At this time, DEP feels that granting such a request is premature. DEP rescinded the covenant not to sue based on concerns raised by CDP's actions at the site despite DEP's attempt to assist CDP in the remediation and redevelopment of the site."

Letter from Pennsylvania Department of Environmental Protection in response to Constitution Drive Partners' request to rescind removal of covenant not to sue dated Jan. 28, 2014

Position of Brian O'Neill / O'Neill Properties / Constitution Drive Partners on Covenant Not to Sue:

"It is still CDP's position that PADEP's covenant not to sue remains in full force and effect, pursuant to the PPA. In addition, the contribution protections contained pursuant to the PPA also still remain in full force and effect."

Complaint from J. Brian O'Neill, O'Neill Properties Group L.P. and Constitution Drive Partners, LP filed in Chester County Court of Common Pleas vs. May van Rossum, Carla Zambelli, and Delaware Riverkeeper Network and John Does. 1 Through 10. Filed Jun 27, 2017.

- Indicates a lack of DEP knowledge of or interest in exploring more recent and more effective remediation solutions remove TCE from bedrock / groundwater, such as aerated oxidant candles. Please see reference links below on alternative cleanup solutions.⁴

As a concerned citizen whose mother resides in General Warren Village – just a few hundred feet away from the Bishop Tube site and within the potential toxic fallout zone – I respectively demand the termination of the Prospective Purchaser Agreement between DEP and Constitution Drive Partners. I would also like to add the following personal comments about the proposed development / cleanup plan for Bishop Tube:

- The history of Bishop Tube conveys that **elected officials and agencies have long been negligent in cleaning this site, and that people have sadly been subjected to cancerous risks and death by working at or residing near the facility.** Those same risks are flowing in groundwater underneath neighboring homes today. This proposal is immensely unsafe, and any other option than full cleanup is unacceptable to the community.

Reference:

<https://mediahub.unl.edu/media/7880/>

<http://airliftenvironmental.com/>

Multiple academic papers available here: <http://snr.unl.edu/aboutus/who/people/faculty-member.asp?pid=21>

- **The people of Chester County and East Whiteland Township consider this proposal to be a threat to the lives of those we care about – family, children, parents, spouses, friends, pets – and we will defend them at all costs.**
- **This proposal a threat to our economic wellbeing and property values, which will assuredly decline with development of low-cost property on toxic land.**
- **This is a threat to our environment – to wildlife, deer, birds, vegetation – and to Little Valley Creek and larger waterways.**
- **This proposal reflects the economic benefit of a few very wealthy men vs. an entire community. In the public interest, DEP cannot let developers threaten the health and safety of entire communities just to maximize profit.**
- **The DEP and its officials are placed in trust to represent the community interest, public health, and the environment, and human health and environment should be the sole focus of all decisions in management of this toxic site. What are the values of DEP if it would place the lives of an entire community in danger to benefit an already rich developer?**
- **The CDP partnership with the Chester County Economic Development Council (CCEDC) should not provide any legitimacy to the proposed development. CCEDC is a private group and holds no official authority. Further, O'Neill Properties Group is listed as a "Strategic Investor" in CCEDC, indicating that positions of CCEDC on Bishop Tube are impacted by investment from the applying developer.⁵**
- **All levels of our government, including DEP, have not treated the community with the full respect it deserves. Requests have gone ignored, questions have gone unanswered, legally required comment periods have not been provided. There is a strong narrative that all levels of government want to keep the community out of the know in this proposal, but we rely on you to communicate with us and to keep the public engaged on important issues.**

Based on the imminent dangers and deep public opposition to this proposal and any development at the Bishop Tube site from this proposal, I strongly urge DEP to terminate all agreements with Constitution Drive Partners and O'Neill Properties. The public deserves complete safety, and this proposal threatens our health and environment.

Thank you for the opportunity to comment on this pending disaster. Many of us consider this to be the Chernobyl of Chester County – a disaster that could entirely be avoided with effective public support from you and the broader PA Department of Environmental Protection.

Sincerely,

John Preston

⁵ Chester County Economic Development Council. Strategic Investors; <https://ccedcpa.com/Invest-in-ccedc/current-investors/>

Armstrong, Dustin

From: J [mailto:██████████@██████████.com]
Sent: Friday, July 07, 2017 1:35 PM
To: Armstrong, Dustin
Cc: Bram, Adam N; Cain, Virginia; Hartzell, Anderson; McClennen, Bonnie; Patel, Ragesh; Patterson, Patrick; Schena, Robert; Shankar, Sachin; Staron, Richard
Subject: Re: Public Comment
Attachments: Public Comment on Bishop Tube.pdf

Dear Mr. Armstrong:

Attached are my comments on the proposed Bishop Tube PPA / Scope of Work.

Thank you.

John Preston

On Thu, Jul 6, 2017 at 9:24 AM, Armstrong, Dustin <darmstrong@pa.gov> wrote:

Yes. Whichever is easiest for you.

Dustin A. Armstrong | Environmental Protection Specialist

Department of Environmental Protection | Southeast Regional Office

2 East Main Street | Norristown, PA 19401

Phone: [484.250.5723](tel:484.250.5723) | Fax: [484.250.5961](tel:484.250.5961)

www.dep.pa.gov

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From: J [mailto:██████████@██████████.com]
Sent: Thursday, July 06, 2017 9:10 AM

fax

TO: Dustin Armstrong FROM: John Preston
FAX: (484) 250-5961 PAGES: 5 (including cover)
PHONE: DATE: July 7, 2017
RE: Bishop Tube Comment Period CC:

Urgent For Review Please Comment Please Reply Please Recycle

Comments:

Dear Mr. Armstrong:

Attached are my public comments regarding the Bishop Tube PPA / SOW.

Thanks.

John Preston

~~XXXXXXXXXX~~
Devon, PA 19333

ATTACHMENT G

Stauffer, Resident

(Name is illegible, & no address was provided)

(Comment 11)

comment - received April 12, 2017

DUSTIN ARMSTRONG
2 EAST MAIN STREET
NORRISTOWN, PA. 19401

APRIL 6, 2017

DEAR MR ARMSTRONG,

COMMENT IN REPOSE TO THE PUBLIC
NOTICE IN THE APRIL 1ST ISSUE OF THE
DAILY TIMES, THE PA DEP SHOULD HOLD THE
RESPONSIBLE PARTIES FOR FULL CLEAN UP OF
THIS SITE. BEFORE ANY CONSIDERATION OF
REDEVELOPMENT. NOT ALLOW A DEVELOPER
TO USE STATE GRANT MONIES TO DO A PARTIAL
CLEAN UP AND CONSTRUCT A RESIDENTIAL
COMMUNITY ON KNOWN CONTAMINATED LAND,
THIS IS HIGHLY INAPPROPRIATE AND IRRESPONSIBLE.

IN ADDITION WITH THIS SITE HAVING
ONLY ONE NARROW UNDERPASS THAT IS USED
FOR TANKER REFUELING AS THE ONLY ACCESS
IN VERY CONCERNING FOR FUTURE REDEVELOPMENT.

I AM URGING THE PA DEP TO DO THE
RIGHT THING AND INSURE PROPER CLEAN UP.

THANK YOU

Ray Stauff