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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DELAWARE RIVERKEEPER)	
NETWORK, and the DELAWARE)	
RIVERKEEPER, MAYA VAN ROSSUM)	
)	
Petitioner,)	No.
)	
v.)	
)	
PENNSYLVANIA DEPARTMENT)	
OF ENVIRONMENTAL PROTECTION)	
Of THE COMMONWEALTH OF)	
PENNSYLVANIA and ENVIRONMENTAL)	
QUALITY BOARD OF THE)	
COMMONWEALTH OF PENNSYLVANIA)	
Respondents)	

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief within thirty days of service hereof, or within such other time as established by Order of the Court, or a judgment may be entered against you.

Date: 5/16/19

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Attorneys for Petitioners

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Petition for Review in the Nature of An Action for Injunctive and Declaratory Relief

I. Introduction

1. This is a Petition for Review brought by a community nonprofit organization for injunctive and declaratory relief, pursuant to the Citizen Suit Provision of the Pennsylvania Safe Drinking Water Act, 35 P.S. §721.13(b) and the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution.

2. Petitioners seek injunctive relief regarding the Department of Environmental Protection’s (“DEP” or “Department”) failure and refusal to

comply with its legal duties and obligations to issue a report in response to DRN's, May 8, 2017, Petition to the Environmental Quality Board to establish a maximum contaminant level ("MCL") for Perfluorooctanoic Acid (PFOA) between 1 parts per trillion and 6 parts per trillion and/or to otherwise establish an MCL to address the widespread and dangerous toxic contamination of Pennsylvania's public drinking water with per- and poly-fluoroalkyl substances (PFAS), such as PFOA, at levels known to create a health risk and/or harm.

3. PFAS are synthetic carbon-chain compounds that contain large amounts of the element fluorine that repel oil and water. These toxic chemical compounds are presently banned from manufacture due to their known resistance to biodegradation and toxicity. From the 1950's until recently, companies such as DuPont and 3M used these chemical compounds to make products more stain-resistant, waterproof, and/or nonstick (e.g., Teflon). They were also used as a component of aqueous firefighting foam on military bases and have been discharged into groundwater, surface water, and aquifers causing contamination of the public's water supply systems and pollution of the Commonwealth's natural resources.

4. PFAS persist for many years in the human body once ingested. In animal studies, exposure to these compounds at high levels results in changes in function of the liver, thyroid, pancreas and hormones levels. In humans, exposure,

even at very low levels, has been linked with significant health consequences including, among others, kidney cancer, testicular cancer, thyroid disease, high cholesterol, pregnancy-induced hypertension/preeclampsia, and ulcerative colitis.

5. PFOA is significantly elevated in many Bucks and Montgomery County water supplies. Fifteen public and two hundred private wells supplying approximately 84,000 people with water were impacted with some of the highest contamination in the United States. For example, a municipal well in Warminster tested at 1,440 parts per trillion whereas a “safe” maximum contaminant level, per scientific evidence, is between 1 parts per trillion to 6 parts per trillion (over 200 times lower than the tested well).

6. Members of the Delaware Riverkeeper Network have and continue to be impacted by the contamination of their drinking water with PFAS, and members have unwittingly and unknowingly ingested it, to their severe detriment.

7. DEP has failed to take steps necessary to protect health and to prevent degradation of the environment, by refusing to regulate PFAS in drinking water. In particular, the DEP failed and refused to establish an MCL for PFOA to ameliorate the known risks from contaminants entering the water system.

8. This failure has resulted in contamination of drinking water and has further stymied appropriate and protective cleanup goals for degraded and contaminated ground and surface waters.

II. Jurisdiction

9. This Honorable Court has original jurisdiction over this matter, pursuant to 42 P.S. §761 and 35 P.S. §721.13, because this is a lawsuit against Commonwealth agencies and specifically against the DEP for its failure to perform an act required by the Pennsylvania Safe Drinking Water Act.

III. Parties

10. Petitioner Delaware Riverkeeper Network (“DRN”) is a Pennsylvania non-profit organization with its principal place of business at 925 Canal Street, 7th Floor, Suite 3701, Bristol, Pennsylvania. It was established in 1988 and has approximately 20,000 members. DRN’s mission is to protect and restore the Delaware River and its tributaries, habitats, and resources. To achieve these goals, DRN organizes and implements stream bank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the four states of the Delaware River watershed and, when necessary, at the national level.

11. Some members of DRN live in Bucks and Montgomery County, including members who live near and are impacted by PFOA contamination from

the former Naval Air Station Joint Reserve Base at Willow Grove, the current Horsham Air Guard Station in Horsham, and the site of the former Naval Air Warfare Center in Warminster. Other members live near other PFAS contamination sites including in Doylestown, Harrisburg and Pittsburgh. DRN members have drunk, cooked, washed dishes, and/or gardened with PFAS-contaminated water.

12. DRN brings this action on behalf of the organization and on behalf of its impacted members.

13. DRN has petitioned and advocated to have PFAS regulated in both Pennsylvania and New Jersey drinking water law. DRN has been working on the problems posed by the presence of PFAS in the local and regional environment since 2005, when DRN staff first collected tap water samples in the neighborhoods close to DuPont's Chambers Works facility in Deepwater, NJ, on the Delaware River. DRN suspected that there was a problem because of news reports about attorney Robert Bilott's lawsuit that had been brought in West Virginia against DuPont, a manufacturer of PFOA, for releasing the contaminant into the environment.

14. DRN has actively worked since 2005 to bring the health harms and environmental degradation caused by PFAS to the public's attention through its website and via press outreach. Since it began this advocacy campaign DRN has

submitted technical information, scientific analysis, and policy analysis, through comments, testimony, and correspondence to government agencies, as well as making public appearances and public statements to highlight these issues for affected communities.

15. As set forth in full below, DRN has invested its time and resources to bring a Petition to Set a Pennsylvania Drinking Water MCL for PFOA between 1 parts per trillion and 6 parts per trillion.

16. Petitioner Maya van Rossum, the Delaware Riverkeeper, is the full-time Executive Director of DRN and is responsible for the organization's mission: championing the rights of our communities to a Delaware River and tributary streams that are free-flowing, clean, healthy, and abundant with a diversity of life.

17. Ms. van Rossum is also a member of DRN and a supportive financial donor.

18. Ms. van Rossum, as the Delaware Riverkeeper, regularly visits the Delaware River, its tributaries and communities and areas affected by PFAS.

19. Ms. van Rossum has also authored a book, The Green Amendment, Securing Our Right to a Healthy Environment (2017), which discusses Pennsylvania's Environmental Right Amendment and constitutional environmentalism as a response to the degradation of the environment and harms of contamination, including those created by the presence of PFOAs.

20. The Delaware River is a source of drinking water for the Commonwealth of Pennsylvania and impacted by its tributaries, some of which are known to suffer PFAS contamination via samples of the Delaware River waters and its aquatic life.

21. DRN and the Delaware Riverkeeper are gravely concerned by the potential health harms and environmental degradation caused by the ever-growing PFAS contamination within groundwater, surface water, and drinking water in the Commonwealth. While the most alarming impact for human health consequences is to drinking water, PFAS contamination of ground water, surface water, and air also results in adverse impacts to aquatic creatures, animals, vegetation, and the overall ecosystem.

22. Respondent Pennsylvania Department of Environmental Protection is a Commonwealth agency with a principal office at the Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA, 17101, and is entrusted with a fiduciary and legal duty to protect and preserve the environment and to establish and enforce rules and regulations governing water quality, including the provision of safe drinking water standards. The Department also governs the cleanup of hazardous substances in the Commonwealth of Pennsylvania.

23. Respondent, the Environmental Quality Board (hereinafter the “EQB”), is a 20-member independent departmental administrative board of the

Commonwealth of Pennsylvania, having its principal office and place of business located at the Rachel Carson State Office Building, 400 Market Street, 16th Floor, Harrisburg, Pennsylvania 17105.

24. Respondent EQB is not accused of direct wrongdoing but is protectively included since it may be a necessary and indispensable party, as the DEP's compliance with its legal obligations may also require the EQB's cooperation and/or the EQB's regulatory authority may be affected by an Order entered in this case. See 35 P.S. § 721.4 (Pennsylvania Safe Drinking Water Act, EQB Duties).

IV. Operative Facts

25. PFAS contamination from harmful and/or defective products has been released into the environment of the Commonwealth of Pennsylvania causing contamination to soil, air, groundwater and surface water and migration into drinking water.

26. PFAS contamination is recognized as a growing problem throughout the nation and in the Commonwealth of Pennsylvania, with numerous affected sites, municipalities and water authorities.

27. PFAS is toxic to humans in even very small amounts (parts per trillion).

28. Among the Sites severely impacted in the Commonwealth are the former Naval Air Station Joint Reserve Base at Willow Grove, the current Horsham Air Guard Station in Horsham and the site of the former Naval Air Warfare Center in Warminster. These facilities used firefighting foam (aqueous film-forming foam) containing PFAS, such as PFOA, for various purposes, including training with test “fires” that were put out with the foam, sometimes on a weekly basis.

29. Sampling done in Warminster, Warrington, and Horsham Township demonstrated that the groundwater that feeds public and private wells was among the worst in the nation, most all in the vicinity of the aforementioned military facilities.

30. Beginning in 2014, numerous public and private wells in Horsham, Warrington, and Warminster Township have been closed due to the PFOA levels recorded in the water but unfortunately not before the unknowing public, including DRN members, consumed the contaminated drinking water.

31. In 2012, the EPA included PFOA in its Third Unregulated Contaminant Monitoring Rule, which required certain water providers, including Warminster Municipal Authority, Warrington Township Water and Sewer Authority, and Horsham Water and Sewer Authority, to test their waters for PFOA.

Many of the samples exceeded or far exceeded the EPA's now-enacted Health Advisory Level of 70 parts per trillion.

32. There are numerous PFAS contamination sites throughout the Commonwealth under investigation by the DEP, including the following sites, per the DEP's Website:

NORTH-CENTRAL

AVCO-Lycoming NPL Site
Penn State Former Fire Training Site

NORTHEAST

High Quality Plating HSCA Site
Tobyhanna Army Depot TCE NPL Site
Valmont TCE Superfund NPL Site

SOUTHWEST

Pittsburgh Air National Guard Base
Pittsburgh Air Reserve Station

SOUTH-CENTRAL

Letterkenny Army Depot NPL Site
Susquehanna Area Regional Airport Authority (HIA) Site

SOUTHEAST

ChemFab NPL Site
CRC Industries
Easton Road HSCA Site
Former Naval Air Station Joint Reserve Base Willow Grove -
Horsham (NPL Site)
Former Naval Air Warfare Center - Warminster (NPL Site)
Horsham Air National Guard Station
Lower Darby Creek NPL Site
Nike PH 98/99 (Control) - Warrington
North Penn Area 5 NPL Site
North Penn US Army Reserve Center (Nike PH 91 - Launch)
Ridge Run HSCA Site

See https://www.dep.pa.gov/Citizens/My-Water/drinking_water/Perfluorinated%20Chemicals%20%E2%80%93PFOA%20a

[nd%20PFOS%20%E2%80%93%20in%20Pennsylvania/Pages/PFC%20Sites%20Under%20DEP%20Investigation.aspx.](https://www.penn.gov/dep/investigation/PFC%20Sites%20Under%20DEP%20Investigation.aspx)

33. The lack of a binding and appropriately low Pennsylvania MCL means that homeowners on well-water and other drinking water system operators will have difficulty in their efforts to recover the costs of adopting necessary treatment and cleanup from responsible polluters.

34. The delivery of contamination-free water is not uniform in the Commonwealth, with municipalities having set different policies and not implementing uniform treatment techniques. In fact, some water companies and municipal authorities are blending water that contains a higher level of PFAS with cleaner water to dilute the concentrations, instead of implementing treatment of the contamination.

35. Initially, the Federal Environmental Protection Agency had a non-binding health advisory level (guidance value) of .2 ug/L (200 parts per trillion) for PFOS and .4 ug/L (400 parts per trillion) for PFOA.

36. In May 2016, EPA revised its level and set a combined lifetime health advisory level (“HAL”) of 0.007 ug/l (70 parts per trillion) for PFOA and PFOS.

37. Scientific studies – including extrapolations of the research released by the U.S. Department of Health and Human Services, Agency for Toxic

Substance and Disease Registry (“ATSDR”) on the Toxicological Profile of Perfluoroalkyls – have concluded that the EPA’s 2016 health advisory level is not adequately protective and that a safe level should be many times lower (7 parts per trillion for PFOS and 11 parts per trillion for PFOA), since even a low level of exposure could cause significant health harms, especially in infants and children as well as other sensitive individuals, including those with a compromised immune system.

38. In addition to other health harms, epidemiologic studies have shown PFOA immunotoxicity suppresses the immune response. This is particularly important to children and infants who are being vaccinated, because a study in Norway (Granum et al. 2013) found strong evidence of decreased rubella-induced antibodies in young children whose mothers were exposed to PFOAs during pregnancy.

39. According to the ATSDR 2018 Draft Toxicological Profile, epidemiologic studies have also linked PFOAs to immune system hypersensitivity (asthma) and autoimmune disorders.

40. According to the ATSDR 2018 Draft Toxicological Profile, epidemiologic studies have also linked PFOAs to decreased fertility and to decreased birth weight in offspring.

41. Alarming, after exposure, there are no medical treatments that can remove PFAS from the human body, and the half-life of PFOA in humans is approximately 4 years, depending on a variety of factors.

42. Upon information and belief, despite the wealth of scientific evidence of the need for regulation and significant public outcry, the Federal Government has been unwilling to establish standards for PFAS, in part because of numerous law suits throughout the Country against the Federal Department of Defense, who used the firefighting foam for decades, and are being sued for cleanup and tortious injury to persons and property.

43. The Federal Safe Drinking Water Act requires the EPA to establish certain national standards for common contaminants in a public water supply, but also allows states to regulate additional contaminants and establish more stringent standards as necessary to protect their citizens.

44. The Pennsylvania Constitution recognizes that the people have a constitutional right to pure water and that the Commonwealth has an affirmative duty to ensure the preservation and maintenance of the Commonwealth's natural resources from degradation. Pennsylvania Constitution, Article I Section 27.

45. Pennsylvania also has a State Drinking Water Act ("SDWA"), in which the General Assembly declared that "an adequate supply of safe, pure drinking water is essential to the public health, safety and welfare and that such a

supply is an important natural resource in the economic development of the Commonwealth.” 35 P.S. § 721.2.

46. The General Assembly further declared that the purpose of the Safe Drinking Water Act was “to further the intent of section 27 of Article I of the Constitution of Pennsylvania by: Establishing a State program to assure the provision of safe drinking water to the public by establishing drinking water standards and developing a State program to implement and enforce the standards.” 35 P.S. 721.2.

47. The Pennsylvania SDWA provides that an MCL must be no less stringent than those promulgated under the Federal Act and regulations but explicitly permits the DEP to establish additional and/or more stringent levels for target contaminants, such as PFOA, which is not regulated at the Federal level.

48. Because PFAS contamination has plagued the nation, other states faced with the toxic contamination have issued state guidance levels or adopted maximum contaminant levels to safeguard their residents and inform cleanup response. Eighteen states have taken some governmental action regarding PFAS contamination. Ten states have promulgated regulation, including New Jersey.

49. On August 2018, the New Jersey’s Drinking Water Quality Institute (“NJDWQI”) unanimously voted to approve a recommendation for an MCL for PFOS of 13 parts per trillion and PFOA of 14 parts per trillion.

50. New Jersey Drinking Water Quality Institute's review was a thorough analysis. The complete report, in excess of 450 pages, is set forth on the New Jersey Drinking Water Quality Institute's Web Site.

<https://www.state.nj.us/dep/watersupply/pdf/pfoa-appendixa.pdf>.

51. The report highlighted the fact that negative health outcomes, including but not limited to the cancers and diseases in paragraph 4, were linked with exposure to PFOA contaminated drinking water.

52. The NJDWQI report highlighted that "PFOA has been measured in amniotic fluid, maternal serum, umbilical cord blood, and breast milk" and that "breast-fed infants whose mothers ingest contaminated drinking water and infants fed with formula prepared with contaminated drinking water receive much greater exposures to PFOA than older individuals who consume drinking water with the same PFOA concentration."

53. To reach its conclusion, the NJDWQI report reviewed animal toxicology data and 54 epidemiological studies from the general population, and communities with drinking water exposures including the C8 Health Study, a large study of about 70,000 Ohio and West Virginia residents exposed to a wide range of PFOA concentrations in drinking water.

54. The New Jersey Department of Environmental Protection is proposing the amendment of New Jersey's Safe Drinking Water Act with

NJDWQI's MCL and has emphasized (among other factors) the economic benefit to its residents from avoiding medical costs and the loss of productivity due to illness.

55. On May 8, 2017, DRN petitioned the DEP and EQB to establish a maximum contaminant level for drinking water in Pennsylvania of between 1 parts per trillion to 6 parts per trillion for drinking water for PFOA. The intention of this level – one lower than proposed by New Jersey -- was to offer protection for the population's most vulnerable exposure group, children. The NJDWQI MCL of 14 parts per trillion was based on an adult exposure value.

56. DRN's Petition was a thorough and well researched document in support of the MCL and contained scientific studies and references including the draft 2016 NJDWQI PFOA Report and the technical analysis of DRN's independent consultant, Cambridge Environmental Consulting. (Attached hereto as Exhibit "A" is a true and correct copy of DRN's Petition including all the attachments.)

57. The procedure for establishing an MCL in Pennsylvania is governed by regulations of the Environmental Quality Board, 71 P.S. § 510-20, 25 Pa. Code §§ 23.1–23.8.

58. Under the EQB's petition process, after the DEP determines that a petition is complete, the petition is sent to the EQB. 25 Pa. Code § 23.2.

59. At the next scheduled EQB meeting, the petitioner and the DEP make presentations. 25 Pa. Code § 23.4. If the EQB accepts the petition, then the next required step is for the Department to prepare a report within sixty days and to make a recommendation on rulemaking to the EQB. 25 Pa. Code § 23.6.

60. The petitioner has the right to receive a copy and to respond to the DEP's report. 25 Pa. Code § 23.7, 25 Pa. Code § 23.8. Afterward the report is sent to the EQB, who votes on whether or not to adopt any proposed regulation. If so, public notice and comment and rulemaking procedures follow.

61. In accordance with the aforesaid procedures, at the August 15, 2017, EQB meeting, DRN's Petition was presented. Attached hereto as Exhibit "B" is a true and correct copy, of the DEP's letter of June 22, 2017, by Laura Edinger, regarding the presentation of the DRN's Petition to the EQB, on August 15, 2017.

62. The DEP recommended that the Petition be accepted for further evaluation to inform what measures were necessary to protect public health, and provided that the DEP's report on the Petition would be presented by June of 2018.

63. The Board voted and unanimously accepted the Petition for review.

64. Typically, a report on a Petition (not related to a stream) would have been due within sixty days, but there is the option for the DEP to specify a different date, to be accepted by the EQB. With regard to DRN's Petition, the DEP specified June of 2018.

65. Unfortunately, the DEP has failed to issue its Report, and accordingly there has been no further action on DRN's Petition for approximately two years, despite the evidence of the compelling and exigent need for an MCL to protect Pennsylvanians (including DRN members) from health harms due to PFOAs.

66. On June 1, 2018, the undersigned counsel for DRN contacted Patrick McDonnell, Secretary of Environmental Protection and Chairman of the EQB, by email and mail to request further action on DRN's Petition and to offer DRN's assistance. Attached hereto as Exhibit "C" is a true and correct copy of DRN's letter.

67. Respondent DEP did not respond to DRN's letter of June 1, 2018.

68. Notwithstanding the failure to respond to DRN's letter and without any notice to DRN, the DEP, at the June 19, 2018 Environmental Quality Board Meeting, provided an "update" that DEP needed an undefined amount of additional time "to evaluate the science of the petition" and had been working for the past six months to hire a toxicologist.

69. The DEP has not otherwise established an MCL on its own initiative to address the growing and serious PFAS and PFOA contamination in the Commonwealth.

70. The DEP and Department of Defense are using the EPA HAL in the Commonwealth as if it were a safe drinking water level – which it is not – and refusing action unless PFOA and PFOS concentrations exceed 70 parts per trillion.

71. Further, for reasons unknown, the DEP also appears to have selected the target level of 40 parts per trillion as a measure that requires water wells to undergo further testing.

72. On September 19, 2018, Pennsylvania Governor Tom Wolf created a PFOA “action team” but thus far the meetings have not led to concrete results, including but not limited to the filing of the aforementioned DEP Report on the DRN MCL Petition, or the establishment of any Interim MCL.

73. The Governor announced on September 19, 2018 that the government will “prioritize” hiring toxicologists to establish drinking water limits and strategy.

74. On January 4, 2019, Jessica Shirley, Policy Director of the Department of Environmental Protection, informed Tracy Carluccio, DRN’s deputy director, that the DEP was conducting interviews to hire a toxicologist

75. On April 29, 2019 at the Department of Health blood study report meeting, they announced that a toxicologist was hired but would not begin working until July and that they would be interviewing to hire a second toxicologist.

76. Ms. Carluccio has also been told by the Department of Health’s Sharon Watkins, the state’s epidemiologist, that multiple toxicologists may be

necessary and DEP will not be able to even begin any analysis until they have a qualified staff person.

77. DEP's lengthy delay in establishing a protective MCL for the Commonwealth and even filing the requisite Report on DRN's Petition is a derogation of the Department's mandatory duty to assure the provision of safe drinking water to the public by establishing drinking water standards. 35 P.S. 721.2.

78. The Pennsylvania Department of Health has done a recent health impact study in impacted areas in Bucks and Montgomery County that shows their PFAS blood levels exceed national averages. This report is on the Pennsylvania Department of Health website, <https://www.health.pa.gov/topics/envirohealth/Pages/PFAS.aspx>.

79. The DEP has long been aware of the toxicity of PFOA and the PFAS contamination to ground and surface waters and to drinking water supplies and resultant health harms from consumption of contaminated water.

80. The Department could have relied upon NJDWQI's Report for its MCL and/or could have relied upon DRN's experts, Cambridge Environmental Consulting, to reach a report conclusion with respect to establishing an MCL or Interim MCL.

81. The Department also could have created a state science advisory board with volunteers from science and academia.

82. The Department instead has taken no meaningful action to regulate PFOAs in the Commonwealth's drinking water, aside from the announcement of a statewide sampling plan.

83. On May 3, 2019, DEP Secretary Patrick McDonald was quoted in the Philadelphia Inquirer as indicating that an MCL should be completed within three years.

84. This matter is ripe for review, because the failure and refusal of DEP to take any action in the past two years to either accept or reject the DRN's Petition for an MCL, means that the Pennsylvania Environmental Hearing Board did not have administrative jurisdiction over the action and that it could languish without final decision, to the severe detriment of DRN's members and DRN's ability to fulfill its mission of protecting its members' health through assurance of unadulterated safe drinking water and protection of the environment, including the Delaware River and its tributaries.

85. DRN's interest in DEP's fulfillment of its duties and the establishment of an MCL is substantial, direct, and immediate.

86. DRN's interest is substantial, because of its work in filing the aforesaid Rulemaking Petition and because of the aforesaid health harm and threat of harm to its members by the unconscionable delay in acting on its Petition.

87. DRN's interest is direct and immediate, because without Court intervention its Petition will remain unaddressed and DEP will not take necessary, immediate and requisite action to address the continuing and emergent situation causing harm and threat of harm to its members' health, property and to the environment.

88. There is no adequate monetary remedy at law that can compensate for the resulting harms to people, property, and the degradation of natural resources.

89. DEP had sufficient information to establish a state-wide MCL for PFOAs to protect the public water supply.

90. DEP retains some discretion as to the magnitude of the MCL, but does not have the option of simply ignoring DRN's Petition and the known hazardous contamination of drinking water and health risks, which imperils the health of DRN members, and/or adversely impacts their property and/or degrades the surrounding environment to their detriment.

V. Claims for Relief

Count I: Pennsylvania Safe Drinking Water Act

(Failure to Assure the Provision of Safe Drinking Water and to Implement a Public Water Supply Program by establishing drinking water standards)

91. All preceding paragraphs are incorporated herein by reference as if fully set forth.

92. The General Assembly stated that the purpose of the Pennsylvania Safe Drinking Water Act is to “further the intent of section 27 of Article I of the Constitution of Pennsylvania by:

(1) Establishing a State program to assure the provision of safe drinking water to the public by establishing drinking water standards and developing a State program to implement and enforce the standards....

35 P.S. §721.2(b).

93. The DEP’s mandatory role and obligation under the Commonwealth’s Safe Drinking Water Act is to be the administrator for the Commonwealth’s primary enforcement responsibility under the Federal Act. 35 P.S. 721.5.

94. The Department is obligated “to adopt and implement a public water supply program.” “The public water supply program shall include but not be limited to maximum contaminant levels or treatment technique requirements establishing drinking water quality standards, monitoring, reporting, recordkeeping and analytical requirements, requirements for public notifications, standards for construction, operation and modification to public water systems, emergency procedures, standards for laboratory certification and compliance and enforcement procedures.” 35 P.S. §721.5(a).

95. The DEP's obligation is to develop and implement procedures as may be necessary and appropriate to obtain compliance with the Act or rule and regulations promulgated under it. 35 P.S. §721.5(b).

96. Contrary to the DEP's duties necessary for the implementation and enforcement of a public water supply program, the DEP has failed and refused to comply with its duty under the EQB's Petition Process, 25 Pa. Code § 23.6, and to issue its substantive report on the DRN's Petition for the MCL within a sixty-day time period or alternatively within the defined time period that DEP requested of the EQB, June, 2018.

97. Section 23.6 provides as follows:

If the EQB accepts the petition, a notice of acceptance will be published in the *Pennsylvania Bulletin* within 30 days. In addition, a report will be prepared in accordance with one of the following procedures:

(1) *Petitions other than stream redesignation petitions.* **The Department will prepare a report evaluating the petition within 60 days. If the report cannot be completed within the 60-day period, at the next EQB meeting the Department will state how much additional time is necessary to complete the report.** The Department's report will include a recommendation on whether the EQB should approve the action requested in the petition. If the recommendation is to change a regulation, the report will also specify the anticipated date that the EQB will consider a proposed rulemaking...

25 Pa. Code § 23.6 (emphasis added).

98. To this date, contrary to its clear statutory duty, the DEP has not prepared the report and has not given any indication if or when it will complete the report.

99. DEP did not give DRN any notice that it intended to delay completion of the report beyond June of 2018 or intended to address the EHB regarding any alleged reasons for a delay.

100. Because of the grave health risks presented by the yet-regulated PFOAs in the Commonwealth's drinking water, DEP should have completed its evaluation and issued its report in a time is of the essence manner.

101. The Department's failure and omission violates its duty to implement a public water supply program, which includes the evaluation of maximum contaminant levels.

102. DEP has the mandatory and ministerial duty aforementioned to respond to a Petition to set an MCL and to abide by EQB Petition Process and to issue their Report evaluating the MCL within a clear and definitive time period.

103. A citizen may bring an action against the Department where there is a failure of the Department to perform any nondiscretionary act. 35 P.S. §721.13.

104. Petitioners and counsel have repeatedly reached out to the DEP regarding the violation of its duties and have no adequate remedy at law.

105. The aforesaid conduct of DEP subjects it to injunctive relief in the form of an order that the DEP issue their Report on DRN’s MCL Petition in sixty days or such other clearly defined time as the Court deems reasonable.

Count III. Violation of The Environmental Rights Amendment

106. The preceding paragraphs are incorporated herein by reference as if fully set forth.

107. Article 1, Section 27 of the Pennsylvania Constitution guarantees the following:

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.

108. The Environmental Rights Amendment places an affirmative duty on the Commonwealth to “prevent and remedy the degradation, diminution, or depletion of our public natural resources.” *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 934–35 (Pa. 2017) (“PEDF”) quoting *Robinson Township, Delaware Riverkeeper Network et al. v. Com.*, 83 A.3d 901 (Pa. 2013) (plurality).

109. Protection of “safe, pure drinking water is essential to public health, safety and welfare” and is an integral part of Section 27. See 35 P.S. §721.2.

110. Our Pennsylvania Supreme Court found in PEDF that a trustee of the Commonwealth's natural resources has the fiduciary duty to act toward the "corpus" with prudence, loyalty, and impartiality. The surface, subsurface and the drinking water of the Commonwealth are part of that "corpus."

111. DEP has violated its Constitutional obligations by failing to establish an MCL to respond to the health risk and reality that PFOA contaminants have and will enter the drinking water supply and to inform necessary treatment and cleanup.

112. Regulation, treatment and cleanup of drinking water to remove PFOAs will also assist in addressing the continued degradation of groundwater, surface water and the environment.

113. DEP's above-referenced failures have violated and continue to violate DRN members' Constitutional rights.

Count III: Declaratory Judgement Act

114. The preceding paragraphs are incorporated herein by reference as if fully set forth.

115. An actual controversy exists between the Petitioners and Respondent, because Respondent denies the obligation and legal liability to regulate and/or abate PFOA contamination in drinking water, and that Respondent has the aforesaid legal duties.

116. Respondent has acted or refrained from action in violation of their aforesaid obligations under the Pennsylvania Safe Drinking Water Act and the Pennsylvania Constitution's Environmental Rights Amendment.

117. Petitioners request a judicial determination of the rights and obligations of the DEP.

118. Petitioners request a judicial determination that Respondent is liable to reimburse Petitioners for their attorney's fees, incurred as a result of Respondent's statutory and regulatory violations and continued arbitrary and vexatious failure and refusal to correct same.

VI. Prayer for Relief

WHEREFORE, Petitioners pray this Honorable Court enter judgment in their favor and against Respondents and provide relief as follows:

- a) Declare that the DEP must comply with its obligations under said environmental laws and fulfill its duty to implement a public water supply program and to evaluate maximum contaminant levels, including by issuing the DEP Report in response to DRN's Petition;
- b) Declare that DEP must comply with its obligations under said environmental laws and fulfill its duty to act as a trustee of the Commonwealth's natural resources and its duty to protect residents from PFOA contamination in drinking water by establishing an MCL;

- c) Order the Respondent to reimburse the Petitioners for the costs of this suit, including attorney fees in accordance with 42 Pa. C.S. 2503 (7) and (9);
- d) Retain jurisdiction over this action to ensure compliance with the Court's decree; and
- e) Order such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

Date: 5/16/19

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently from non-confidential information and documents

Respectfully submitted,

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