



August 7, 2017

Robert Schena, Esquire  
PADEP  
2 East Main Street  
Norristown, PA 19401

**Re: Notice of Citizen Suit Pursuant to the Hazardous Sites Cleanup Act and Clean Streams Law for Offsite impacted areas adjacent to the Bishop Tube Site**

Dear Mr. Schena:

This letter provides notification to your client that the Delaware Riverkeeper Network (DRN), on behalf of itself and its members, intends to file suit against your administrative agency, the Department of Environmental Protection (DEP), in accordance with the citizen suit provisions of the Clean Streams Law (“CSL”), 35 P.S. 691.601, and the Pennsylvania Hazardous Sites Cleanup Act (“HSCA”), 35 P.S. 6020.1115, for failure to fulfill your legal obligations with regards to the Bishop Tube site located in East Whiteland Township, Chester County, PA. Our action will seek injunctive relief to include cleanup of impacted off-site areas and response costs, including our expert investigation and attorney fees.

While the State of Pennsylvania does not have any specified content requirements for a citizen suit notification, the goal of a citizen suit notice letter is to include sufficient information to permit the recipient to identify the components of an alleged violation. See gen. *Pub. Interest Research Grp. of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1247–48 (3d Cir.1995) (quoting 40 C.F.R. § 135.3(a) )

**Introduction**

DEP’s manifest neglect, over a period of seventeen years, to clean up past and present releases at the Bishop Tube Hazardous Waste Site has caused contamination to spread off-site, into the off-site groundwater, and to impact the Little Valley Creek, an exceptional value stream, in violation of both the Hazardous Sites Cleanup Act and the Pennsylvania Clean Streams Law (“CSL”).

HSCA and CSL provide citizens with recourse to abate violations of these important environmental laws. [35 P.S. §691.601\(c\)](#) (“any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act or any rule, regulation, order or permit issued pursuant to this act against the department where there is alleged a failure of the department to perform any act which is not discretionary); § 35 P.S. §6020.1115 (a) (“ A person who has experienced or is threatened with personal injury or property damage as a result of a release of a hazardous substance may file a civil action against any person to prevent or abate a violation of this act or of any order, regulation, standard or approval issued under this act”).

By violating the mandatory duties to administer and to enforce these environmental laws and to protect the Waters of the Commonwealth, the DEP has caused, allowed and contributed to the ongoing and expanding release, discharge and/or migration of contaminants, including TCE, chlorinated VOCs, and metals, causing harm to people, property and natural resources. Among those injured are the Delaware Riverkeeper Network and our members.

### **History of the Site**

The Bishop Tube site is located on South Malin Road in East Whiteland Township, Chester County, Pennsylvania. The DEP has been investigating this site since at least 1999 and placed it on the Pennsylvania Priority List (PPL) in 2010. Environmental investigations have indicated and continue to indicate that the Site is seriously contaminated. In 2008 the ATSDR summarized the nature of the heavy site contamination as follows:

The site is heavily contaminated with chlorinated solvents, acids and heavy metals which were used during manufacturing activities. These contaminants, including (1) TCE and its breakdown products; (2) nitric and hydrofluoric acids; (3) various oils; and (4) other hazardous materials were not properly handled and disposed at this site. As a result, the on-site soils are heavily contaminated (up to 15,000 milligrams per kilogram [mg/kg] TCE) and a substantial chlorinated solvent plume has been identified in the shallow and deep aquifers both on-site and down gradient of the site (PADEP 2002a). Recent groundwater samples collected from under the site in May 2007 showed TCE concentrations up to 780,000 micrograms per liter ( $\mu\text{g/L}$ ) (PADEP 2007). Extensive subsurface studies and tests of the site and surroundings by PADEP have resulted in a well-defined geology and hydrogeology for both the site and the down gradient off-site residential area of concern (AOC1), where a large chlorinated solvent plume has been identified through sampling and mapped via groundwater modeling.

<http://files.dep.state.pa.us/RegionalResources/SERO/SEROPortalFiles/Community%20Info/Bishop%20Tube/ATSDR%20Evaluations/July%202008%20ATSDR%20Health%20Consultation.pdf> at page 3.

Since that initial ATSDR report and since listing the site on the PPL, the DEP has taken virtually no action to remove or to cause the removal of source contamination. TCE, for example, was permitted to simply diffuse, disperse and break down into other contaminants of concern. Unsurprisingly, off-site high levels of contamination have been documented in monitoring wells,

and the contamination has been documented to extend over three hundred feet below ground; this makes remediation increasingly difficult.

A remedial investigation report by Roux commissioned by Potential Responsible Parties (the PRP group) was submitted to the DEP on August 31, 2015.<sup>1</sup> This report documents numerous and significant on-site and off-site impacts to surface water and ground water. By way of example, Roux report, Monitoring Well (MW) number 61, which is across Lancaster Avenue and therefore off-site, as documenting TCE at 1080 µg/L on September 29, 2014. See also MW 37 and MW 63. According to Roux, MW 78, an on-site well, demonstrates the deep impacts of TCE at 86,600 µg/L on July 29, 2014 and MW 77, a well that is approximately 40-50 feet below surface, demonstrates TCE at 524,000 µg/liter on September 2014. The Pennsylvania Medium Specific Standard (MSC - Statewide health standard for ground water) for TCE is 5 parts per billion.<sup>2</sup> There are dozens of monitoring well results for both on-site and off-site locations that demonstrate contamination as well as a contamination at the extreme magnitudes of the aforementioned samples.

With respect to the Little Valley Creek (LVC), contamination is documented along the length of the creek, including off site as far as one mile beyond Bishop Tube, following the path of the creek. The contamination is significantly above MSCs. As an example, surface water sample SE-2 (in LVC) had a concentration of 971 µg/L in May, 2009, and this sample is approximately 0.17 miles off the property and down gradient. See Roux RI/FS report.

Implementation of any remedy by the potentially responsible parties or the DEP has been negligible. While there have been suggestions that various known “hot spots” would be excavated, there has been no final remedial plan for the Site that has been disclosed to the public nor any immediate actions to address “hot spots” or identify additional “hot spots.” Prior testing is no longer sufficient to support an understanding of the full scope, depth and degree of contamination on site or offsite. Data are too sparse and dated to accurately represent the degree of contamination onsite or offsite, or the degree to which the contamination has been negligently allowed, to be released and/or spread to increasingly distant offsite locations, including in groundwater, LVC and potentially other pathways. To this date, the DEP has not cleaned or diligently enforced a cleanup of the Bishop Tube Site. DEP has further refused to identify the impacted off-site areas as a new HSCA site and to have them properly characterized and remediated.

In 2005, the DEP noticed its intention to perform an interim response action at the HSCA site, which involved the use of an air sparging /soil vapor extracting system (AS/SVE). For reasons not entirely known, the DEP, itself, agreed with potentially responsible parties to perform the ground water remediation. Documentation reflects that the AS/SVE system did not perform as expected and that, in July of 2011, a contractor of the purchase/developer of the Site destroyed the liquid boot and piping of that system. The system was never repaired by the developer or DEP. The DEP never tested nor required testing related to this destruction in order to definitively determine whether TCE was newly released in vapor form or from the involved condensation in or around the piping.

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<sup>1</sup> This report includes a summary of data that we reference; however, we do not accept the report's conclusions as to off-site risks to ground and surface water among other things we find deficient.

<sup>2</sup> This converts to 5 ug/L

Despite the knowledge by DEP and PRPs that the aquifer and creek were being impacted and that operation of the AS/SVE System or some other immediate interim remedy was critically important to prevent migration of contamination, the DEP did not engage in any other remediation. Accordingly, the aquifer and Little Valley Creek have continued to be neglected and therefore impacted for an additional six years, without remediation or even a date certain regarding a plan for final remediation.<sup>3</sup>

### **Danger of TCE**

According to the Agency for Toxic Substances and Disease Registry (ATSDR), “there is strong evidence that trichloroethylene [TCE] can cause kidney cancer in people and some evidence that it causes liver cancer and malignant lymphoma (a blood cancer).”

<https://www.atsdr.cdc.gov/phs/phs.asp?id=171&tid=30> Further, even a short-term exposure to TCE can be harmful.

ATSDR has stated:

People who are overexposed to moderate amounts of trichloroethylene may experience headaches, dizziness, and sleepiness; large amounts of trichloroethylene may cause coma and even death. Some people who breathe high levels of trichloroethylene may develop damage to some of the nerves in the face. Other effects seen in people exposed to high levels of trichloroethylene include evidence of nervous system effects related to hearing, seeing, and balance, changes in the rhythm of the heartbeat, liver damage, and evidence of kidney damage.

<https://www.atsdr.cdc.gov/phs/phs.asp?id=171&tid=30>

TCE and its breakdown products can also be toxic to aquatic organisms.

[http://www.turi.org/TURI\\_Publications/TURI\\_Chemical\\_Fact\\_Sheets/Trichloroethylene\\_TCE\\_Fact\\_Sheet/TCE\\_Facts/Health\\_and\\_Environment](http://www.turi.org/TURI_Publications/TURI_Chemical_Fact_Sheets/Trichloroethylene_TCE_Fact_Sheet/TCE_Facts/Health_and_Environment)

### **Impacts to Off-site Areas violate HSCA and require Investigate, and Remediation**

Off-site areas, including to the northeast of the Site, have become impacted through the diffusion and dispersion of TCE (and breakdown products) and active release of TCE but have inexplicably not been included in the HSCA site or a new HSCA site. TCE and other chlorinated VOC contamination has been and will continue to be transported substantially off the site to the northeast through the groundwater and surface water. Additional off-site areas surrounding the Site have never been investigated and need to be. Moreover, areas of potential vapor intrusion should be evaluated on the northern and northwestern sides of LVC in residential areas at greater distances

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<sup>3</sup> Moreover, as recently as June 26, 2017, DRN learned that DEP on June 20, 2017 notified the developer of liquid dripping from a rusted pipe that crosses Little Valley Creek, sampled the discharge and upstream and downstream impacts. The sampling revealed elevated levels of Total Chromium, Total Nickel and Total Aluminum. It is not known whether this impact has been remediated or will be.

than previous sampling since surface water and groundwater contamination has been documented over one mile away from the Site and thus pathways of exposure have not been addressed.

The DEP has unreasonably refused to require known responsible parties to cleanup impacted off-site areas as HSCA areas, including but not limited to LVC, an exceptional value stream. DEP retains the discretion as to how to remediate the off-site impacted areas but does not have the option of endlessly ignoring the contaminated Site to the degree that it becomes more difficult to clean and impacts additional off-site soils, water and air. DEP has a mandatory legal obligation to respond to the off-site contamination and to act to affirmatively investigate and prevent additional off-site impacts and harms to public health, and the environment. 35 P.S. 6020.501. See *Diess v. Pennsylvania Dep't of Transp.*, 935 A.2d 895 (Pa. Commw. Ct. 2007) (Landowners, whose properties were allegedly contaminated with power plant fly ash when road embankment constructed out of the ash collapsed, stated a claim against the DEP under the citizens suit provision of the Hazardous Site Cleanup Act (HSCA) by alleging that DEP failed to perform a mandatory duty under the HSCA by not taking action in regard to their neighborhood which was a hazardous site.)

Full investigation of all media and full characterization of adjacent off-site areas surrounding the Site on all sides is warranted.<sup>4</sup> Remediation of known and identified impacted areas of off-site contamination is required.

### **Impacts to Off-Site Ground and Surface Water, Little Valley Creek, violates CSL**

Chlorinated VOCs impacts to Little Valley Creek (LVC) waters are documented as far away as approximately 1.3 miles from the Bishop Tube site. The LVC is an exceptional value stream that must be accorded the highest level of protection against degradation. See 25 Pa. Code § 93.9(f). The DEP has a mandatory duty to act with sound discretion in implementing the declarations of policy in the Clean Streams Law. See 35 P.S. § 691.5. The conduct of the responsible parties while in control of or while occupying the Bishop Tube site violates the Clean Streams Law, 35 P.S. § 691.401 and 35 P.S. § 691.611 and constitutes a nuisance, since contamination has now moved beyond the boundaries of the Bishop Tube Site. The DEP has a mandatory duty to act on complaints and to reclaim and restore Little Valley Creek. See 35 P.S. § 691.5; See also 35 P.S. § 691.4. Impacts to groundwater must be remediated so additional impacts to LVC are halted.

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<sup>4</sup> Further, numerous off site neighborhood residents have reported cancer diagnosis and pets with cancer; this may be related to the chronic and continuing chlorinated VOC contamination. The ATSDR has indicated that there are data gaps, which do not permit them to do a full assessment of the involved risks. Yet people continue to reside and recreate immediately adjacent to the site and are impacted by the off-site contamination. A preliminary health assessment, with all requisite data, would be appropriate for the off-site impacted community. HSCA recognizes this as a response cost that can be recovered from responsible parties. 35 P.S. 6020.702(a)(5). Yet, the DEP has not undertaken the effort to obtain any missing data so that Federal agencies can complete their evaluation. This too is a violation of DEP's duty to work with agencies of the Federal government. 35 P.S. 6020.301(4).

## **Violation of the Pennsylvania Constitution**

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*

Under Article I, Section 27 of the Pennsylvania Constitution, DEP has particular constitutional obligations as the lead environmental agency of the Commonwealth. *See Pennsylvania Envtl. Def. Found. v. Com., ---Pa--, (June 20, 2017) n. 23.* (“PEDF”). DEP’s duties under Article 1, Section 27 are also concomitantly recognized as mandatory duties within the Hazardous Sites Cleanup Act. 35 P.S. 6020.301(14), 35 P.S. 6020.301(16). DEP has violated these sacred duties by failing to protect and preserve Little Valley Creek and by failing to enforce HSCA and CSL for a period of seventeen or more years and allowing contamination to be released and to continue to migrate off-site to the surrounding groundwater and surface waters and further failing to remediate or cause the remediation of on-site and off-site contamination. The DEP has and continues to violate its obligations as a trustee of Pennsylvania’s public resources.

## **Identification of Plaintiffs**

The Delaware Riverkeeper Network (DRN) is a public interest organization that champions 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. Maya K. van Rossum has served as the Delaware Riverkeeper and leader for the Delaware Riverkeeper Network since 1994. The role of the Delaware Riverkeeper is to give the Delaware River, and the communities that depend upon it and appreciate it, a voice at every decision-making table that could provide help or do harm. DRN via its members, some of whom reside in the neighborhood immediately adjoining the site, are adversely affected by the continued and unabated release and discharge of TCE, breakdown products, metals and other contaminants to offsite locations.

The address of the Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya K. van Rossum, is listed above. DRN has repeatedly brought to the DEP’s attention its failure to fully investigate and remediate the source TCE contamination on the Bishop Tube site, the active discharge of TCE into off-site surface and ground waters, and concerns about other migrating contaminants. In response, DEP has refused to take affirmative action under said environmental laws on DRN’s complaints. There is no adequate monetary remedy at law that can compensate for the resulting harms to people, property, the degradation of natural resources and the impacts on the aesthetic, recreational, economic, and quality of life values that have been inflicted.

## **Relief Requested**

This letter serves as the notice of DRN's intention to file a civil action to require abatement of new and continuing releases to the Little Valley Creek and to soils and ground water in surrounding off-site areas, primarily to the northeast, which are not presently included in the aforesaid HSCA Site, and to require prompt and thorough remediation of same via a meaningful method within DEP's discretion, including requiring responsible parties to clean up the contamination to levels protective of health and the environment.

The relief requested includes, but is not limited to, investigation and removal of all releases and associated impacts onsite, off-site and to the environment related to the Bishop Tube property. Further, immediate remedy to the contaminated unsaturated soils on the site, which could be accomplished in mere months, would serve to limit further off-site dispersal.

If you have any questions regarding this notice, please feel free to contact DRN. We intend to file suit at the expiration of this sixty-day notice period to protect the interests of our members and to fulfill our mission. However, we remain willing to discuss settlement options to resolve the serious issues and assure the expeditious, full and comprehensive cleanup of impacted areas while avoiding litigation, as long as any agreement would be timely and enforceable, to ensure that the interests of our organization, our members and the environment are fully protected.

Respectfully submitted,

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Maya K. van Rossum

the Delaware Riverkeeper

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