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Re: Bishop Tube Consent Decree Public Comment

Respectfully to the Honorable Joshua D. Wolson and Dustin A. Armstrong,

We begin by asking that this comment be shared in its entirety with Judge Wolson, rather than via a summary prepared by the Pennsylvania Department of Environmental Protection staff.

Article I, Section 27 of the Pennsylvania Constitution, also known as the *Pennsylvania Green Amendment*, recognizes and protects the environmental rights of all the people of the Commonwealth, including future generations. It reads:

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.

Through its plain language and implementing court decisions, the Pennsylvania Green Amendment establishes a constitutional mandate that applies to all government officials within Pennsylvania. Pursuant to the amendment, the Pennsylvania Department of Environmental Protection (“PADEP”) must ensure its actions do not directly, or through the actions of others, infringe on the rights of the people to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

Further, the Amendment establishes that Pennsylvania government, including the PADEP, serves as a trustee of the state’s natural resources, which are owned by present and future generations. The Pennsylvania Supreme Court has made clear that the government’s duty as trustee to conserve and maintain the state’s natural resources “implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013) and subsequently in *PEDF v. Commonwealth of Pennsylvania* (Pa. 2017).

Among the PADEP’s obligations to protect the environmental rights of the people and to fulfill its constitutional duties as trustee of the state’s natural resources, the “Department has a constitutional duty to fully consider the environmental effects of any proposed action in advance of proceeding....” Clean Air Council, Delaware Riverkeeper Network, *et al. v. DEP*, EHB Docket No. 2017-009-L

(Opinion and Order on Motion for Summary Judgment, January 1, 2018); Center for Coalfield Justice v. DEP, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); Friends of Lackawanna v. DEP, EHB Docket No. 2015-063-L (Adjudication, Aug. 15, 2017).

The proposed Bishop Tube Consent Decree fails on all counts.

In addition to this comment submission, after careful review, Green Amendments For The Generations adopts, in full, all of the comments submitted by the Delaware Riverkeeper Network on the proposed Bishop Tube Consent Decree.

The Consent Decree Fails to Ensure that Environmental Rights Shall Not Be Infringed Upon.

The Consent Decree does not ensure the creation or implementation of a Remedial Action that will ensure the right of the people to pure water, clean air and the natural values of the environment will not be infringed upon. To the contrary, it is foreseeable that the Consent Decree put forth by PADEP will not result in full or appropriate remediation of the Bishop Tube site, failing to remediate the contamination in the soils and groundwater, and failing to prevent ongoing pollution impacts to the Exceptional Value Little Valley Creek and associated wetlands which continue to be the recipients of toxic contamination emanating from the site. As a result, historic infringement upon environmental rights due to toxic contamination at (and emanating from) the Bishop Tube site will continue into the future, including after the terms of the Consent Decree are deemed fulfilled.

The rights of impacted community members and the people of Pennsylvania to pure water, clean air and to the natural and aesthetic values of the environment have long been infringed upon by both the contamination at the Bishop Tube site, and the PADEP's intentional failure to enforce existing laws and regulations to ensure the site is cleaned up. The failure of the Consent Decree to articulate a clear, detailed, and understandable Remedial Action provides no assurance that the contamination at the site will be fully cleaned up to all applicable legal standards. In addition, it contains a variety of loopholes and limitations that make it impossible to ensure – by virtue of the Consent Decree as written – that environmental rights will be restored and protected. For example: the Consent Decree only mandates remedial action by the site owner, Constitution Drive Partners, L.P. (“CDP”), until the Trust funds run out and offers no clear plan for what happens thereafter; the Consent Decree repeatedly uses vague and subjective language such as “best efforts”, “reasonable”, “feasible” when describing critical elements of the anticipated remediation work and Consent Decree obligations leaving the amount of remediation effort, the measure of remediation success, and compliance with essential Remedial Action and Consent Decree elements wide open to CDP interpretation, advocacy and legal argument, and; the Consent Decree fails to require monitoring to assess whether the Remedial Action meets legal and constitutional standards and fails to establish a plan for ongoing remediation and clean up activities if monitoring demonstrates they are required to address ongoing environmental, legal, human health and safety, and constitutional obligations and concerns.

The Consent Decree Does Not Fulfill PADEP's Constitutional Trustee Obligations.

As trustee of the Commonwealth's natural resources, including those impacted by the Bishop Tube site, the PADEP has a duty to prevent and remedy the degradation, diminution, or depletion

of the implicated natural resources. This Consent Decree fails to fulfill this constitutional obligation.

Quite simply, the Consent Decree fails to articulate a specific Remedial Action that addresses how the existing contamination and degradation of the site will be cleaned up and addressed. Instead, it merely lays out the steps that will be taken to eventually, hopefully, develop that plan. In the absence of a specific Remedial Action with clearly identified implementation steps and strategies, it is impossible for the PADEP to argue that it is ensuring the Remedial Action necessary to prevent and remedy the degradation, diminution and depletion of the natural resources harmed by the contamination at this site.

As written, the Consent Decree does not ensure the natural resources impacted by the Bishop Tube site are remediated, protected, or restored, at least to the degree required by all applicable statutes and regulations; and it provides no consideration of constitutional obligations. The natural resources located at, and/or impacted by, the Bishop Tube site, to which the state's constitutional trustee obligations apply, include: Little Valley Creek, which is an Exceptional Value stream entitled to a higher level of legal protection; the adjacent wetlands, which also have Exceptional Value status by virtue of their interconnectedness with Little Valley Creek; the soils located at the site, and; the groundwater that flows beneath, and emanates from, the site.

Among the PADEP's fiduciary obligations as the trustee of the natural resources impacted by the Bishop Tube site, is the duty of loyalty. This duty requires the PADEP to conserve and maintain the site's natural resources for the benefit of present and future generations of Pennsylvanians, who are the beneficiaries of the natural resource trust. In fulfilling its trustee obligations, the PADEP may not prioritize the economic interests of the site's responsible parties over the environmental rights and trustee entitlements of the people. And yet, at every turn, the terms of the Consent Decree clearly seek to advance the economic interests of CDP and the companies that are legally responsible for the site's contamination, including by limiting the scope of their financial obligations required to ensure the site is remediated fully, fairly and in compliance with all legal standards. The Consent Decree goes so far as to limit the remediation obligations of all of the responsible parties – CDP, Whittaker Corporation, Johnson Matthey Inc, Marcegaglia USA, Inc, – to the funds placed in the Trust established therein, even though the PADEP does not know the final Remedial Action steps or elements to be funded. How can the PADEP determine a fair representation of the costs of the Remedial Action that should be covered by the responsible parties if it does not know the steps actually to be carried out? As written, the goal of the Remedial Action is not to conserve and maintain the natural resources at the site for the benefit of present and future generations of Pennsylvanians. Instead, the elements of the Consent Decree are primarily focused on developing and implementing a Remedial Action that is ill-informed and unspecific, driven by a deficient and out-of-date costs calculation which was decided upon five years ago, and which limits the legal obligations and legal liability of the responsible parties.

In addition, the Consent Decree evidences a clear goal of helping to not only limit CDP's obligations with regards to remediation of the site (e.g. relieving CDP of the obligation to implement Remedial Action steps as soon as Trust funds are spent regardless of whether or not site remediation and legal standards have been achieved), but to allow CDP to advance its private development plans, goals, interests and profitmaking-objectives as soon as possible. Within this Consent Decree, PADEP even goes so far as to acquiesce to CDPs residential development plans

as soon as certain elements of the Consent Decree are achieved despite there being conflict with the standards and obligations for development put in place by East Whiteland Township for CDPs project; and regardless of the potential for site remediation to falter, fail or not be fully achieved and thereby expose future residents to dangerous toxic contamination while at the same time leaving current residents exposed.

It is notable that since at least 1985, the PADEP has been aware of the dangerous contamination at Bishop Tube and its migration beyond the site's property lines, delivering contamination to neighboring natural resources and communities. That means, for over 40 years the PADEP has been aware of the contamination at Bishop Tube and has not taken the action needed to address it. In that 40 years, some of those future generations the PADEP was constitutionally obligated to protect were actually born, and found themselves exposed to - or living next to - a toxic site the PADEP had known about but was taking no meaningful action to clean up or address. More than that, some individuals may have become ill from the site's contamination (see public comments from others), and/or had to live with the property value and/or mental stress and worry that living next to this site caused. The implications of the toxic contamination at this site and the legal authority the PADEP had for securing its remediation in order to protect all generations of Pennsylvanians, including those yet to be born, seemed to have no effect on PADEP. If the PADEP had any sense of urgency or obligation to the people of Pennsylvania, it could have protected those exposed to the contamination emanating from this site. Instead, we know from our experience and the lengthy legal record that the PADEP prioritized finding pathways to help CDP develop the site while it remained contaminated, neglecting to take action towards the site's remediation and restoration.

The Consent Decree Fails to Fulfill the Constitutional Obligation of Appropriate Review.

Along with the substantive rights and duties articulated by the Pennsylvania Green Amendment, the Amendment creates a constitutional obligation on government officials to undertake an "appropriately thorough environmental review" and to consider the constitutional implications and obligations regarding the people's environmental rights and its own duties as a trustee of impacted natural resources. This review must take place prior to rendering the proposed action or decision the PADEP is seeking to advance. Here, we see no evidence of the PADEP considering the environmental rights implications or constitutional trustee implications of this Consent Decree—not in its individual elements nor the proposal as a whole.

In point of fact, the Consent Decree acknowledges that there is a lack of information to perform an informed and deliberative pre-decisional review by repeatedly calling for more information, studies, and samples to be performed to inform the development and implementation of a Remedial Action for the site. This is, perhaps, because the previously issued Analysis of Alternatives and Remedial Response ("AOA"), which forms the basis of the Consent Decree, was itself deficient.

The AOA, upon which the selected remedy was supposed to be based, recognizes the fundamental failings and inaccuracy of its information. The AOA repeatedly calls for additional data collection, sampling, and studies in order to determine the nature and extent of the contamination on site to determine steps that need to be taken. *See, e.g.*, AOA at p.12 fn. 3, p. 14, p. 15, p. 16, p. 22.

The inadequacy of the selected remedial response from the AOA, and therefore the Consent Decree, is evidenced by the following:

- While the plan assumes a clear boundary for the pollution plume, there is a lack of monitoring wells to support this assertion/assumption.
- Mapping fails to clearly articulate the differences in the pollution plume between the overburdened soils and the bedrock aquifers.
- The site has been determined to be a source of PFOS/PFAS contamination, which was not known at the time the AOA was put out for public comment. The failure to test for, and address, this contamination in advance of selecting a remedial alternative represents a constitutional, legal, and moral failing of the PADEP's proposal. Further, the public had no opportunity to provide comment on this known carcinogen.
- The reports relied upon to create the plan used a modeling approach that is not adequate to evaluate the movement of TCE, a known human carcinogen at the site, and therefore cannot be used to inform or support the plan put forth by the PADEP for consideration.

Based on the amount of analysis yet to be performed, it is clear the PADEP did not base its Consent Decree or the Remedial Action process it advances on a constitutionally adequate, deliberate, pre-decisional process that assessed the implications for environmental rights and natural resource trustee obligations. In addition to the lacking data and information, we do not see any reference to environmental rights or trustee obligation review anywhere within the Consent Decree or supporting documentation.

Further, it is clear that the PADEP did not fulfill its trustee duty of prudence given the lack of critical information.

The PADEP has already locked itself into a selected alternative when it does not have anywhere near the quality nor quantity of information required to understand the true site conditions and the potentially disastrous implications of an underdeveloped Remedial Action.

We Urge That This Consent Decree Be Rejected.

This Consent Decree—in both its development and implementation—fails to protect the Article I, Section 27 environmental rights of the people of Pennsylvania, and fails to fulfill the obligations of the PADEP to serve as trustee of the state's natural resources for the benefit of present and future generations of Pennsylvanians.

We urge the court to reject the proposed Consent Decree as being arbitrary, capricious, and not in the public interest, and for its failure to fulfill the constitutional obligations as articulated in Article I, Section 27 of the Pennsylvania Constitution.

Respectfully Submitted,



Maya K. van Rossum
Founder/Leader