COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2018-020-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSTITUTION DRIVE PARTNERS, LP, Permittee	:	**Issued: April 26, 2019**

A D J U D I C A T I O N

By the Environmental Hearing Board

Synopsis

The Board finds that the 2007 Amendment and the 2010 Amendment (collectively the "Amendments") to a prospective purchaser agreement entered into between the Department and a developer for the remediation and redevelopment of the Bishop Tube HSCA Site are arbitrary and capricious. The Amendments are considered settlements under Section 1113 of the Hazardous Sites Cleanup Act. Under Section 1113, the Department shall provide notice of any settlements when they are proposed, and the settlements are not final until the Department has provided public notice of the settlements and responded to any public comments. Although the Amendments were executed in 2007 and 2010, the Department did not publish notice as required by Section 1113 until 2017, and it did not issue its comment response finalizing the Amendments as settlements until 2018. Conditions at the Bishop Tube HSCA Site evolved during the intervening years and the Department's actions with regards to the Amendments failed to meet

the requirements of Section 1113 and failed to identify and account for the changed circumstances and conditions at the Site.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth of Pennsylvania vested with the duty and authority to administer and enforce the provisions of the Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. §§ 6020.101 – 6020.1305, the Land Recycling and Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908, Section 1917-A of the Administrative Code, 71 P.S. § 510-17, and the rules and regulations duly promulgated thereunder. (Administrative Record Page No. ("AR") 0001.)

2. The site at issue in this appeal is known as the Bishop Tube HSCA Site ("Site"), which is located on Malin Road, south of U.S. Route 30, in Frazier, East Whiteland Township, Chester County. (AR 0002, 0117, 0119, 0485.)

3. The 13.7-acre Site is currently owned by Constitution Drive Partners L.P. ("Constitution Drive"), which purchased it from the Central and Western Chester County Industrial Development Authority in 2005 in order to redevelop the property. (AR 0002, 0117, 0485.)

4. Constitution Drive is a Pennsylvania Limited Partnership with a business address of 700 South Henderson Road, Suite 225, King of Prussia, Pennsylvania 19406. (AR 0002.)

5. The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, the appellants in this appeal (hereinafter collectively "the Riverkeeper"), make up an organization based in Bristol, Pennsylvania that has actively participated in the Department's oversight of the Bishop Tube Site. (AR 0157-0210.)

6. Beginning in the 1950s, the J. Bishop Company used the Site for manufacturing steel tubes. (AR 0486.)

7. The manufacturing and processing of metal alloy tubes and associated equipment continued at the Site until 1999 under the ownership of several companies, including successors to the J. Bishop Company. (AR 0486.)

8. A 2005 remedial action work plan developed for the Site and approved by the Department noted that manufacturing operations at the Bishop Tube facility included the cleaning, shaping, welding, degreasing, annealing, straightening, sandblasting, polishing, and painting of stainless steel and specialty metals into tubes and pipes and other various metal products. (AR 0024, 0120.)

9. The work plan found that the facility utilized a variety of raw materials and chemicals in the manufacturing process, including nitric acid, hydrofluoric acid, caustic materials, motor and gear oils, specialty drawing lubricants, degreasing solvents (primarily trichloroethene (TCE)), anhydrous ammonia, coolants, polishing compounds, and paints. (AR 0024.)

10. The Department has found that hazardous substances were employed in the manufacturing processes throughout the history of manufacturing at the Site, particularly TCE, which it says was utilized in two vapor degreasers, processed in onsite distillation units, and stored in an above-ground tank at the Site. (AR 0486.)

11. The Department has evidence that TCE was released into soil and groundwater as early as the mid-1960s. (AR 0487.)

12. In addition to TCE, monitoring wells at the Site have detected fluoride, chromium, and nickel in exceedance of Pennsylvania's residential medium specific concentrations. (AR 0487.)

13. Soil samples have also detected tetrachloroethene, 1,2-dichloroethene, and 1,1,1-trichloroethane. (AR 0488.)

14. The Department has described the Site as having "extremely high levels of contamination in the subsurface…." (AR 0478.)

15. The Department has determined that a large plume of contaminated groundwater now exists at the Site that originates from the property and extends off-site in a northern and eastern direction, as well as toward portions of Little Valley Creek, a designated exceptional value (EV) stream. (AR 0002, 0023, 0119.)

16. Constitution Drive did not cause the historic releases of hazardous substances or contaminants at the Site. (AR 0003.)

17. On March 17, 2005, the Department entered into a prospective purchaser agreement (the "2005 PPA") with Constitution Drive in the form of a consent order and agreement pursuant to various statutory authorities, including HSCA and Act 2, in connection with Constitution Drive's proposed acquisition and planned redevelopment of the Site. (AR 0120.)

18. The 2005 PPA contained the following provision at Paragraph 3 regarding the work to be performed by Constitution Drive:

> **Work To Be Performed:** In exchange for the benefits conferred by the Department to Developer [Constitution Drive] under this CO&A, and as compensation for response costs incurred and to be incurred by the Department in connection with the Site, Developer hereby agrees that, by March l, 2009, Developer shall undertake investigation and/or remediation of soils at the Site necessary to demonstrate attainment with a non-residential statewide health

> standard or site-specific standard under Act 2 for soils at the Site in accordance with the Remedial Action Work Plan ("Plan"') attached hereto as Exhibit B and incorporated herein by reference. In this regard, Developer shall follow all required procedures and notices under Act 2 within the time frame set forth in this paragraph.

(AR 0005-0006.)

19. Subject to a list of exceptions, the Department in the 2005 PPA covenanted not to sue Constitution Drive for any claims relating to the historic contamination at the Site. (AR 0007-0008.)

20. The Department provided in the agreement that Constitution Drive was entitled to contribution protection pursuant to Section 705 of HSCA, 35 P.S. § 6020.705, and Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613 (f)(2), relating to hazardous substances previously released at the Site. (AR 0008-0009.)

21. Constitution Drive agreed to complete this work by March 1, 2009. (AR 0005.)

22. On April 9, 2005, pursuant to Section 1113 of HSCA, 35 P.S. § 6020.1113, the Department published notice of the 2005 PPA in the *Pennsylvania Bulletin*, 35 Pa.B. 2166, and opened a 60-day public comment period. (AR 0033-0034, 0120.)

23. No person commented on the 2005 PPA during the public comment period, and the 2005 PPA became final under Section 1113 of HSCA when the Department notified Constitution Drive that no comments had been received. (AR 0014, 0120.)

24. The Department and Constitution Drive subsequently sought to amend the 2005 PPA on two separate occasions. (AR 0120.)

25. In the first amendment, dated January 22, 2007, the parties agreed to modify certain performance obligations of Constitution Drive related to the investigation and remediation of unsaturated soils at the Site (the "2007 Amendment"). (AR 0035-0095, 0120.)

26. The 2007 Amendment "amended and restated" Paragraph 3 of the 2005 PPA in several key respects. (AR 0037-0042.)

27. Apart from modifying Constitution Drive's performance obligations, the 2007 Amendment generally left the 2005 PPA unmodified and in full force and effect. (AR 0044, 0122.)

28. The 2007 Amendment provided that Constitution Drive would partner with the Department to design, install, and operate a physical treatment technology, known as an air sparging/soil vapor extraction system (the "AS/SVE system") at the Site and provided a timeline for the specific tasks necessary to complete the work on the AS/SVE system. (AR 0037-0042, 0092-0093, 0120, 0478.)

29. The AS/SVE system was intended to reduce contamination present in soils and groundwater. (AR 0065-0066.)

30. Among other things, Constitution Drive was required to operate the AS/SVE system for a 30-day start up period, and then operate the system for 60 days in accordance with certain specifications, while removing an average of ten pounds of volatile organic compounds (VOCs) per day. (AR 0039-0040.)

31. The 2007 Amendment at Paragraph 1(c)(2) provided in part that, once it was determined that the AS/SVE system was operational in accordance with the performance standards, Constitution Drive "shall have no further remedial obligations to the Department relating to the Site pursuant to the CO&A [the 2005 PPA], and the Department shall be solely responsible, with no cost or liability to Developer, to operate the AS/SVE System at the Site, with the objective of demonstrating attainment with one or a combination of remediation standards pursuant to Act 2 for unsaturated soils at the Site." (AR 0040-0041.)

32. In 2008, the AS/SVE system was installed and operated by Constitution Drive. (AR 0121.)

33. The AS/SVE system ultimately did not meet the performance standards. There were operational difficulties resulting from the shallow water table and system flooding. As a result, operation of the system was halted. (AR 0121.)

34. On June 4, 2010, the Department and Constitution Drive entered into a second amendment to the 2005 PPA (the "2010 Amendment") that further modified Constitution Drive's work obligations that were established in the 2005 PPA and amended by the 2007 Amendment. (AR 0100-0103, 0121.)

35. The 2010 Amendment contained the following WHEREAS clauses:

> WHEREAS, Developer has installed and commenced operation of the AS/SVE System and has made significant progress towards meeting the system operational criteria established in the First Amendment, and Developer and the Department believe that future operation of the AS/SVE System will assist in the remediation of hazardous substances in soil and groundwater at the Site;
>
> WHEREAS, Developer and the Department desire to further amend the CO&A to allow the Department to assume operational control of the AS/SVE System ….

(AR 0099.)

36. The 2010 Amendment "amended and restated" Paragraph 3 of the 2005 PPA in several key respects. (AR 0100-0103.)

37. The 2010 Amendment required Constitution Drive to: (1) make repairs to the air sparging system as necessary for the system to be fully operational for a 72-hour startup period; (2) be solely responsible for the system during the startup period and demonstrate that it operated continuously without incident for 72 hours; (3) provide the Department with operational manuals and as-built drawings for the system; (4) pay the Department $30,000; (5) repair a road along the

north side of the main building at the Site in accordance with certain specifications; and (6) install 7-foot fencing around certain areas of the Site. (AR 0100-0102.)

38. In exchange for completing this work, the 2010 Amendment included the following provision:

> Upon satisfaction of Developer's obligations pursuant to Paragraph 3(a) above, the Department shall provide Developer with a letter within fourteen (14) days of satisfaction of Developer's obligations confirming that Developer has satisfied its obligations pursuant to Paragraph 3(a), and Developer shall have no further remedial obligations at all to the Department relating to the Site pursuant to the CO&A and First Amendment (including, but not limited to any obligation to remediate soil, groundwater, or surface water at or beyond the Site, or for the operation and maintenance of the AS/SVE System at the Site).

(AR 0102-0103.)

39. As with the 2007 Amendment, the 2010 Amendment provided that it was to be made a part of the original 2005 PPA, which otherwise would remain unmodified and in full force and effect. (AR 0103.)

40. During the 72-hour startup period, the AS/SVE system is estimated to have removed 23.75 pounds of contaminant mass. (AR 0108-0112.)

41. In total, the system is estimated to have removed approximately 680 pounds of VOCs during a two-month period that it operated. (AR 0132.)

42. On September 11, 2010, the Department placed the Site on the Pennsylvania Priority List of contaminated sites to be addressed by the Department under HSCA. (AR 0119.)

43. In a letter dated December 22, 2010, the Department determined that Constitution Drive had satisfied its obligations under the 2010 Amendment to the 2005 PPA. (AR 0115.)

44. However, during visits to the site in June 2011, the Department discovered that a consultant hired by Constitution Drive damaged the AS/SVE system through the use of heavy equipment on the Site. (AR 0263-65.)

45. In a letter dated July 26, 2011, the Department requested that Constitution Drive repair the AS/SVE system. (AR 0263-0265.)

46. As of January 2014, the AS/SVE system had not been repaired. (AR 0267.)

47. On January 28, 2014, the Department sent Constitution Drive a letter which advised it that, because of the damage to the AS/SVE system caused by Constitution Drive's contractor and it potentially exacerbating the existing contamination at the Site, the Department viewed Constitution Drive as having violated the 2005 PPA and its Amendments, and the Department considered these violations to have voided the covenant not to sue established in the 2005 PPA. (AR 0267-0268.)

48. Constitution Drive disputed the Department's factual findings and asked that the Department rescind its January 28, 2014 letter. (AR 0269-0274.) Constitution Drive appealed the Department's letter to the Board but that appeal was dismissed because the Board determined that the letter was not an appealable action. *Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465. (AR 0275-0309.)

49. Constitution Drive has been unsuccessful in redeveloping the Bishop Tube Site for commercial purposes. (AR 0269-0273.)

50. Constitution Drive engaged in discussions with East Whiteland Township about the potential rezoning of the Site to allow for residential redevelopment. In 2014, East Whiteland Township approved Constitution Drive's request to adopt a zoning amendment that changed the zoning of the Site from industrial to residential. (AR 0121-0122, 0125, 0144.)

51. In 2016, Constitution Drive submitted a Remediation Scope of Work to the Department that proposed targeted soil removal activities to reduce or eliminate the risk of future Site occupants. (AR 0333-0352, 0447-0451, 0481.)

52. In January 2017 and April 2017, Constitution Drive submitted a first and second revised Remediation Scope of Work for Targeted Soil Excavation in response to comments from the Department on the Remediation Scope of Work. (AR. 0333-0352, 0371-0375, 0445-0451.)

53. As part of the Remediation Scope of Work, a consultant for Constitution Drive stated that Constitution Drive planned to develop the Site for townhouses and apartments. (AR. 0337.)

54. Under HSCA, the Department is required to publish notice of proposed prospective purchaser agreements and any amendments thereto in the *Pennsylvania Bulletin* and a newspaper of general circulation in the area of the Site and provide a 60-day public comment period. 35 P.S. § 6020.1113.

55. Public notice for the 2007 Amendment and the 2010 Amendment was not published at the time Constitution Drive and the Department drafted the respective Amendments. (AR 0122.)

56. There is no support in the administrative record for the Department's assertion that the failure to publish timely notice was an "inadvertent administrative oversight." (See, e.g., DEP Brief at 2, 10, 10 n.8.)

57. On April 1, 2017, the Department for the first-time published notice in the *Pennsylvania Bulletin* of the Amendments. 47 Pa.B. 1902. The notice provided as follows:

> The Department of Environmental Protection (Department), under the authority of the Hazardous Sites Cleanup Act (HSCA), 35 P.S. §§ 6020.101—6020.1305, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9601—9675, has entered into an amended Prospective Purchaser Agreement (PPA) with Constitution Drive Partners, L.P. (CDP) regarding the Bishop Tube HSCA Site (Site).
>
> The Site is located approximately .25 mile south of US Route 30 in East Whiteland Township, Chester County. The Site consists of land totaling approximately 13.7 acres and was formerly used as a precious metals and

> stainless steel manufacturing facility. The Department has determined that there is significant soil and groundwater contamination at the Site.
>
> The Site was acquired by the Central and Western Chester County Industrial Development Authority for potential redevelopment and was subsequently sold to CDP for purposes of redevelopment. Under the terms of the Agreement with the Department, which was executed immediately prior to CDP's acquisition of the Site, CDP agreed to (1) assess and clean up soil contamination at the Site to one of the standards set forth in the Land Recycling and Environmental Remediation Standards Act (Act 2), 35 P.S. §§ 6026.101—6026.908; (2) not to exacerbate any existing contamination at the Site; and (3) to provide access and right of entry to the Department for potential future remediation of groundwater contamination in exchange for a covenant not to sue and contribution protection from the Department. The Department and CDP subsequently amended the PPA on two occasions. On January 22, 2007, the Department and CDP agreed that, in order to satisfy its remediation obligations under the PPA, CDP would design, provide mechanical equipment and demonstrate performance of a soil vapor extraction and air sparging remedial system (AS/SVE System), which the Department would install and take over upon performance demonstration. On June 4, 2010, the Department and CDP amended the PPA for a second time and agreed that, to satisfy its remediation obligations, CDP would repair and run the AS/SVE system for a seventy-two (72) hour period, after which it would relinquish control to the Department and pay the Department an amount of $30,000.
>
> This notice is provided under section 1113 of HSCA, 35 P.S. § 6020.1113. The agreements may be examined at the Department's offices at 2 East Main Street, Norristown, PA 19401 by contacting Dustin Armstrong at 484.250.5723 or Robert Schena at 484.250.5865. The Department will accept public comments for a period of 60 days from the date of publication of this notice. 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.

(AR 0117.)

58. The Department also published notice in *The Daily Local News* on March 18, April 1, April 29 and June 14, 2017. (AR 0122.)

59. The public comment period initially ran from March 18 through June 7, 2017, but the Department agreed to extend the public comment period to July 7, 2017 at the request of East Whiteland Township. (AR 0122.)

60. The only mention in the public notice of the failure of the AS/SVE system is in noting that Constitution Drive was required to repair the system as part of the 2010 Amendment.

There is no mention of the subsequent damage to the system and it being rendered inoperable. (AR 0117.)

61. The public notice does not mention Constitution Drive's plan to now redevelop the Site for residential use or the 2014 change in zoning at the Site. (AR 0117.)

62. The public notice does not mention the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation submitted by Constitution Drive and reviewed by the Department. (AR 0117.)

63. The Riverkeeper, among several others, submitted written comments to the Department on the Amendments. (AR 0157-0210.)

64. East Whiteland Township submitted comments regarding the 2010 Amendment in a letter dated July 7, 2017. (AR 0217-0220.)

65. Among other things, the Township provided the following comments:

> 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?
>
> ….
>
> 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).

(AR 0218-0219.)

66. Whittaker Corporation and Johnson Matthey, Inc., potentially responsible parties (PRPs) at the Site, submitted lengthy comments to the Department on June 7, 2017, supplemented on July 7, 2017. (AR 0141-0153.)

67. Among other things, they commented that the Amendments do not properly account for the changed proposed use of the Site from nonresidential to residential purposes. They commented that the 2005 PPA and its Amendments inaccurately provide that Constitution Drive is entitled to contribution protection. They point out that the Department rescinded its covenant not to sue, yet the Amendments were proposed for finalization. (AR 0141-0151.)

68. On January 26, 2018, the Department issued its comment response document titled "Response to Significant Public Comments Regarding Second Amendment to Prospective Purchaser Agreement Between the Department and Constitution Drive Partners," in which the Department determined that entry and finalization of the Amendments complied with the requirements of HSCA. (AR 0119-0137.)

69. Pursuant to Section 1113 of HSCA, the Amendments became final on the date the Department issued the comment response document. 35 P.S. § 6020.1113.

70. In response to comments regarding the delay in public notice of the Amendments, the Department only stated that "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." (AR 0126.)

71. In response to comments regarding the change in development to a residential use and the change in zoning at the Site, the Department stated that "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 Department further stated that "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." (AR 0125, 0127.)

72. In response to comments regarding the covenant not to sue and contribution protection, the Department said that "[t]hose 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." (AR 0126.)

73. The Department did not address the substance of many of the comments because the Department viewed them as irrelevant to the Amendments. Instead, the Department invited commenters to "continue with active interest in this matter" as their comments "may be germane to the Department's selection of a final remedy for the Site." (AR 0125, 0126, 0127, 0129-0133, 0135, 0136, 0137.)

74. While the Department was working with Constitution Drive, in 2008 and 2009 the Department entered into a consent order and agreement with Johnson Matthey Inc. and Whittaker Corporation, two PRPs at the Site. (AR 0121, 0241-0262.)

75. Pursuant to this consent order and agreement, Johnson Matthey and Whittaker agreed to complete a Remedial Investigation and Feasibility Study for the Site. (AR 0121, 0241-0262.)

76. According to the Department, upon completion of the Remedial Investigation and Feasibility Study, a final comprehensive Site remedy will be proposed by the Department, and the Department says the public will have an opportunity to review and comment on the proposed remedial response. (AR 0121.)

77. Once this process is complete, the Department says it will select a final remedial response for the Site that meets the substantive and procedural requirements of HSCA. (AR 0121.)

78. As of January 2018, the Remedial Investigation and Feasibility Study agreed to in 2008 and 2009 has not been completed. (AR 0121.)

DISCUSSION

The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (hereinafter collectively "the Riverkeeper"), have appealed the Amendments to the 2005 PPA entered into by the Department of Environmental Protection (the "Department") and Constitution Drive Partners, L.P. ("Constitution Drive"). The 2005 PPA was executed on March 17, 2005, in the form of a consent order and agreement and addressed an abandoned steel tube manufacturing facility located in East Whiteland Township, Chester County, known as the Bishop Tube HSCA Site ("Site"). The Site has a history of contamination with hazardous waste, primarily trichloroethene ("TCE"). Constitution Drive bought the contaminated property originally with the intent of redeveloping it for commercial purposes. Pursuant to the 2005 PPA, Constitution

Drive agreed by March 1, 2009, to undertake an investigation and/or remediation of soils at the Site necessary to demonstrate attainment with a nonresidential statewide health standard or site-specific standard under Act 2 in accordance with a remedial action work plan that was attached and incorporated into the PPA. In exchange for Constitution Drive's work relating to the existing contamination at the site, the Department entered into a covenant not to sue Constitution Drive and agreed that Constitution Drive was afforded contribution protection pursuant to HSCA and CERCLA.

The 2005 PPA was amended twice, the first time on January 22, 2007, and the second time on June 4, 2010. The 2007 Amendment "amended and restated" Constitution Drive's remedial obligations established under the 2005 PPA. The 2007 Amendment mostly concerned the installation of an air sparging/soil vapor extraction system ("AS/SVE system"), which was intended to expedite the remediation of soils and groundwater at the Site. (AR 0036.) Among other things, Constitution Drive was required to operate the system for 60 days under certain specifications while removing an average of ten pounds of volatile organic compounds (VOCs) per day in order to complete its remedial obligations. (AR 0039-0041.) After Constitution Drive had fulfilled these obligations, it would be released of its remedial obligations at the Site and the Department would then assume operation of the AS/SVE system. (AR 0040-0041.) Unfortunately, the AS/SVE system never worked as planned and Constitution Drive could not get it to meet the agreed-upon performance standards.

The Department and Constitution Drive then entered into a second amendment to the 2005 PPA in June 2010 that again "amended and restated" Constitution Drive's remedial obligations. Under the 2010 Amendment, Constitution Drive was to repair the AS/SVE system and get it to operate continuously without incident for 72 hours (a significantly shorter time than

the 30-day startup period and 60-day operational period called for under the 2007 Amendment). Constitution Drive was also required to pay the Department $30,000, repair a road, and install some security fencing.[1] Constitution Drive completed its remedial obligations under the 2010 Amendment, and in December 2010, the Department released Constitution Drive from all further remedial obligations established in the 2005 PPA and the Amendments.[2]

A number of additional events involving Constitution Drive have taken place at the Site after the remedial tasks were completed and the Department's release letter was issued in December 2010. In June 2011, the Department discovered that a contractor for Constitution Drive had damaged the AS/SVE system and rendered it inoperable. (AR 0115, 0263-0267.) In July 2011, the Department requested that Constitution Drive repair the AS/SVE system. Constitution Drive and the Department appear to have conducted discussions regarding the continuing necessity and viability of the AS/SVE system but, as of January 2014, the AS/SVE system had not been repaired. In a January 2014 letter, the Department declared the covenant not to sue to be void because of Constitution Drive's failure to repair the AS/SVE system. The covenant not to sue was important to Constitution Drive and its efforts to redevelop the Site and formed part of the consideration for the 2005 PPA and the Amendments. (AR 0007-0008, 0269-0273.) Constitution Drive appealed the January 2014 letter to the Board, but the Board ruled that the letter was not an appealable action by the Department. (*Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465, Judge Beckman dissenting.) Also, in 2014, East Whiteland Township changed the zoning at the Site from industrial to residential at the request of Constitution Drive, which decided to pursue a residential development at the Site after being unsuccessful in

[1] Constitution Drive paid the Department $32,000 over two installments in 2010 and 2011, which included a $2,000 delay penalty. (AR 0121.)

[2] The 2010 Amendment did provide that Constitution Drive would be financially responsible for certain additional Engineering Controls if the Department deemed them necessary as part of Remedial Action for the Site. (AR 0103.)

redeveloping it for commercial purposes. (AR 0121-0122, 0125, 0144, 0337.) Finally, in 2016/2017, the Department reviewed and commented on a new remediation workplan for the Site proposed by Constitution Drive that provided for targeted soil excavation that Constitution Drive claimed would reduce or eliminate the risk of exposure to the compounds of concern for the future occupants. In addition to these post-2010 actions involving Constitution Drive, there also were other remediation activities and Department actions at the Site that did not directly involve Constitution Drive based on documents included in the administrative record.

There is no disagreement among the parties that the Amendments to the 2005 PPA constitute orders issued pursuant to Section 1102 of the Hazardous Sites Cleanup Act (HSCA), 35 P.S. § 6020.1102. There is also no disagreement that the Amendments to the 2005 PPA are settlement agreements within the purview of Section 1113, 35 P.S. § 6020.1113. *See also Chirico v. DEP*, 2002 EHB 25, 34. Section 1113 of HSCA states certain procedures for noticing settlement agreements and it defines how the Board must review these agreements if there is an appeal:

> 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.

Notably, under Section 1113, settlements do not become final until notice is provided, and the Department responds to any comments. This is where we find an odd wrinkle in this

case. Although the Amendments were drafted and signed in 2007 and 2010, due to what the Department without any record support terms an "inadvertent administrative oversight," the notice required under Section 1113 was not published for either the 2007 Amendment or the 2010 Amendment until 2017, seven and ten years after the fact. A notice for both of the Amendments was published in the *Pennsylvania Bulletin* on April 1, 2017, and notice was published in *The Daily Local News* on March 18, April 1, April 29, and June 14, 2017. In response to the Department's notice, extensive comments were submitted, including by the Riverkeeper, East Whiteland Township, local residents, and potentially responsible parties (PRPs). The Department issued its response to those comments on January 26, 2018. Accordingly, even though Constitution Drive and the Department undertook performance pursuant to the 2007 and 2010 Amendments, the Amendments did not legally become final until the Department issued its comment response document in January 2018.

The Riverkeeper filed this appeal of both of the Amendments on February 21, 2018. Under Section 1113, any appeal of a HSCA settlement is to be decided on the basis of an administrative record, as opposed to the *de novo* review afforded by the typical Board appeal, *see United Ref. Co. v. Dep't of Envtl. Prot.*, 163 A.3d 1125, 1135-36 (Pa. Cmwlth. 2017). The administrative record for purposes of Section 1113 is limited to the notice of the settlements, written comments to the settlements, and the Department's responses to the comments. Under the language of Section 1113, the Riverkeeper has the burden of showing that the Amendments are arbitrary and capricious on the basis of the administrative record that has been filed with the Board.[3] The Department, in its Brief, states the "standard for the Board's review in this appeal is

[3] The Department tells us in its brief that there are a number of other actions pertaining to the Bishop Tube site in other courts. Despite acknowledging at the outset of its brief that the Board's review is "based exclusively" on the administrative record filed with the Board, the Department invites us to take "judicial notice" of the other court actions and pleadings filed in them. The Department even goes so far

limited solely to whether the Department acted arbitrarily or capriciously in finalizing the Amendments through the DEP Response." (DEP's Response Brief, at 6.)

On June 21, we issued an Order staying all proceedings and scheduling an in-person case management conference with the parties on June 26. At the conference, we discussed with the parties how this matter should move forward in terms of compiling the administrative record and submitting briefs. We thereafter issued an Opinion and Order on Case Management wherein we outlined procedures for the appeal going forward, including when the Department would provide the other parties with a proposed administrative record, when the Department would file the administrative record with the Board and in what form, and when the other parties could move the Board to include additional documents or exclude certain documents from the administrative record. 2018 EHB 666. We also issued an Opinion and Order on the Department's motion to quash the Riverkeeper's discovery requests, wherein we determined that discovery was generally inconsistent with the administrative record review envisioned by Section 1113 of HSCA. 2018 EHB 672. The parties were subsequently able to agree upon the contents of the administrative record and filed the administrative record on our docket. We accepted that record as the basis for our review.

Before delving into the merits of this appeal, it is important to keep in mind the underlying goals and policies of HSCA and Act 2 in terms of advancing the cleanup of contaminated sites. "HSCA's Declaration of Policy expressly declares that the cleanup of

---

as to attach to its brief a petition for review filed by the Riverkeeper in a matter before the Commonwealth Court. Relying on case law to make legal arguments is one thing; relying on pleadings in actions before other tribunals and courts in an administrative record review proceeding is quite another. We think this attempt to essentially supplement the administrative record is inappropriate and it is contrary to Section 1113, what the parties agreed upon during our in-person case management conference, and what we laid out in our Opinion and Order on Case Management, 2018 EHB 666. We decline the Department's invitation to dig into the pleadings in those matters for purposes of evaluating the propriety of the PPA amendments.

properties contaminated with hazardous materials is vital to the economic development of the Commonwealth and that the Department should be provided with flexible and effective means to enter into various settlement agreements with responsible parties at contaminated sites." *Chirico v. DEP*, 2002 EHB 25, 32 (citing 35 P.S. §§ 6020.102(3), 6020.102(12)(vii) and (ix)). *See also Guerin v. DEP*, 2014 EHB 18, 24-25 (HSCA provides the Department broad authority to effectuate its provisions and further its goals). Along the same lines, the Pennsylvania Legislature has created programs to incentivize the cleanup of contaminated sites, *see, e.g.*, 35 P.S. § 6026.102 (Act 2 declaration of policy), while the Department pursues responsible persons to recover costs, *see, e.g.*, 35 P.S. § 6020.507 (recovery of response costs under HSCA). Cognizant of these policies, we must not lose sight of the fact that Constitution Drive did not cause the historic contamination at the Site. Rather, at the time of the 2005 PPA, it was an innocent purchaser seeking to redevelop a brownfield property for a new use, a property that might otherwise remain abandoned and contaminated. We do not wish to erect unnecessary barriers to cleaning up a site or discourage innocent purchasers from contributing to cleaning up and redeveloping contaminated property.

The crux of the Riverkeeper's primary argument in this appeal is that the Department's ratification of the Amendments was arbitrary and capricious due to the passage of time, the inadequacy of the 2017 public notice and the changed circumstances between when the Amendments were signed by the Department and Constitution Drive in 2007 and 2010, and when they became final in January 2018. The Riverkeeper contends that, by January 2018, (1) the AS/SVE system was not operable because it had been damaged by one of Constitution Drive's contractors, (2) the Department indicated that the covenant not to sue established in the 2005 PPA was either void or would be deemed void at some point in the future, (3) the

redevelopment plans for the site changed from commercial to residential without appropriate changes in the Amendments, and (4) the Bishop Tube site has remained severely contaminated and the Amendments did not materially advance any cleanup. The Riverkeeper also argues that, in finalizing the Amendments, the Department has failed to uphold its duties as a trustee of the Commonwealth's natural resources under Article I, Section 27 of the Pennsylvania Constitution.[4]

Initially, the Riverkeeper focuses on the Department's public notice of the Amendments and argues that the notice was defective because it was so late. The Riverkeeper cites the language in Section 1113 providing that notice shall be published "[w]hen a settlement is proposed," and says that this means notice must be published at the time a settlement is entered into, not years later. In addition to the arguments that the statutorily required notice took place several years too late, the Riverkeeper also challenges the wording of the notice and argues that it did not contain any meaningful information on what had changed in the intervening years. It says the late and inadequate notice published by the Department denied the public its right to comment on the agreements when they were proposed, which could have affected the public's ability to meaningfully comment and potentially influence the final agreements.

The Department repeatedly asserts that the failure to publish timely notice was an "inadvertent administrative oversight," but it fails to point to anything in the administrative record substantiating that claim.[5] The Department merely states that no one in this appeal has questioned that the failure to publish notice was an administrative oversight. There is nothing in the administrative record that explains or justifies the belated notice. In response to the Riverkeeper's comments directed at the untimely notice and its inadequate wording, the

[4] Because we find the 2007 and 2010 Amendments arbitrary and capricious for other reasons, we do not reach, and there is no need to decide the Riverkeeper's Article 1, Section 27 argument.

[5] We note that the procedures for publishing notice and receiving comments, and an explanation of the effect of the Department responding to comments, are detailed in the 2005 PPA. (AR 0013-0014.)

Department, in the January 2018 comment response document, unhelpfully states that it "has now provided proper notice and opportunity for public comment on the 1st and 2nd Amended PPAs as required by Section 1113 of HSCA." (AR 0126.) Constitution Drive for its part asserts that the Department's failure to timely publish public notice of the 2007 Amendment and the 2010 Amendment was cured with the 2017 publication. It also contends that the delay allowed the public to comment on a more informed and developed record for the site, and that the public had a more meaningful opportunity to review and comment on the Amendments because of the delay. Constitution Drive points to nothing in the administrative record to support these assertions.

The Board has not previously addressed the issue presented in this case by the Riverkeeper's claim of untimely and inadequate notice of a HSCA settlement agreement. The Department identified *Chirico v. DEP*, 2002 EHB 25, as the only prior case in which the Board has considered a challenge to a similar agreement and states that the outcome of this case is controlled by the Board's decision in *Chirico* upholding the Department's entry into the prospective purchase agreement in that case. We disagree with the Department's conclusion that *Chirico* controls this case. The facts in *Chirico* regarding the Department's actions in finalizing the agreement under Section 1113 of HSCA are completely different. In *Chirico*, the agreement was entered into on May 24, 2000 and notice of the agreement was published in the *Pennsylvania Bulletin* a month later on June 24, 2000. *Chirico*, 2002 EHB at 26-27. There is nothing in the Board's opinion in *Chirico* to suggest that the challengers raised inadequate wording in the public notice as an issue in the case. Further, there is no indication that any significant changes took place at the site in *Chirico* in the one month of time that elapsed

between the execution of the agreement and the publication of the required notice in the *Pennsylvania Bulletin*.

In other cases, unlike *Chirico*, the Board has been required to evaluate public notice issues, and we have been hesitant to overturn Department actions in these cases. These cases have involved challenges to permitting actions by the Department and have raised both untimely notice and inadequate notice issues. *See Groce v. DEP*, 2006 EHB 856; *Hopewell Township v. DEP*, 1996 EHB 956, *Fontaine v. DEP*, 1996 EHB 1333; *Anjar Trust v. DEP*, 2001 EHB 927, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002); *Kleissler v. DEP*, 2002 EHB 737. We are not convinced that these permitting cases are a good analog for our current case because of their different and distinct notice requirements when compared to those in Section 1113. The overall principal we derive from these cases is that issues with public notice should be viewed from the perspective of the Department action and what impact the public notice shortcomings had on the public's ability to meaningfully comment on the Department's actions. For various reasons, including the role of public comments in permitting decisions, in most cases, it seems likely that the party challenging the action will have an uphill climb to convince the Board that public notice issues rise to a level where the party has been denied an opportunity for meaningful comment and, as consequence, the Board should undo the Department's action.

Despite our concerns expressed above, we find that the Riverkeeper's notice arguments have merit under the relevant HSCA statute and the unique facts present in this case. The notice and public comment process play a key role in HSCA settlements under the terms of Section 1113 of HSCA. The legislature expressly provided that a settlement agreement is not final until certain enumerated steps are completed including: (1) notice is sent to all responsible parties and published in the *Pennsylvania Bulletin* and a local newspaper; (2) a 60-day window for public

comment is completed; and (3) the Department responds to the significant written comments. Consistent with the central role that the notice and comment procedures created by the legislature play in HSCA settlements, we conclude that the Department is required to provide a timely and meaningful notice and comment process in order to finalize HSCA settlements under Section 1113. The steps taken by the Department in this case were woefully inadequate in satisfying this requirement. Therefore, in the language of the standard of review set forth by the Department in its Response Brief, we hold that "the Department acted arbitrarily or capriciously in finalizing the Amendments through the DEP Response." (DEP's Response Brief, at 6.)

We agree with the Riverkeeper that the Department's egregiously late public notice is a clear violation of the requirement that notice of a HSCA settlement be published when it is proposed. There is no reasonable reading of the Section 1113 language that allows for publication seven and ten years later and the Department's excuse—that there was an "inadvertent administrative oversight"—finds no support in the administrative record and in any event is hardly a legitimate excuse. This is not a case where the required notice was a few weeks or even a few months late, a circumstance where any impact from the late notice might be negligible and/or readily mitigated by subsequent publication. The Department's action initially placed the public, and now places the Board, in a bizarre situation of evaluating the propriety of the Department finalizing the Amendments to the 2005 PPA years removed from the execution of those Amendments with Constitution Drive. The lapse in time presents obvious challenges for the public's ability to provide timely and meaningful comment on the Amendments.

The problems created by the unacceptably late publication of the notice are compounded, in our opinion, by the shortcomings in the content of the notice and how it fails to address the changed circumstances at the Site between 2010 and 2017. The notice is not at all forthcoming

on revealing how dramatically late it is or what has changed in the intervening years since the Amendments were entered into. For instance, the AS/SVE system had not worked for several years before the Department sought comment on whether it would be a good idea to install an AS/SVE system. The only allusion in the public notice to any issues with the AS/SVE system occurs in the description of the 2010 Amendment wherein it states that Constitution Drive agreed to "repair" the AS/SVE system. (AR 0117.) The notice does not reveal that a contractor for Constitution Drive subsequently damaged the AS/SVE system and it has not been operated ever since. The Riverkeeper also notes that the notice does not mention the Department's rescission of the covenant not to sue that followed the contractor's damaging of the AS/SVE system. Nor does the notice mention that the zoning of the site changed from industrial to residential in 2014. Further, the notice makes no mention of the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation submitted by Constitution Drive and under review by the Department. Although most of the commenters appear for the most part to be aware of the ongoing issues with the remediation of the site, the notice is wholly unhelpful to anyone who was not paying close attention to the developments over the course of the last decade.

The Department's response to comments is at times equally frustrating. For example, the Department asserts that the Riverkeeper's comments do not address the Amendments, but this is just not true. The Riverkeeper's comment says that the AS/SVE system "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." (AR 0161.) The AS/SVE system, of course, was not part of the 2005 PPA and only became part of the remediation during the 2007 Amendment. The Department deals with this comment in its response by saying the actions taken pursuant to the

2005 PPA and the Amendments are just an interim response and a final response action is forthcoming. (AR 0127.) Indeed, the Department repeatedly tries to minimize the importance of the Amendments by assuring the commenters that further investigation and cleanup is needed and a final response action will come someday. However, this is a bit of a dodge that is not particularly helpful in evaluating whether the Amendments should have been finalized by the Department. The AS/SVE system was almost a complete failure and appears to have not materially advanced the cleanup of the site, yet the Department seems unwilling to acknowledge this reality in its response to comments. The Amendments are premised on basic assumptions that have not existed for years.

This is somewhat emblematic of the Department's entire comment response document. The Department says that the majority of comments it received were not related to the Amendments themselves and the modifications of Constitution Drive's performance obligations. Perhaps some of that that can be forgiven since the commenters were asked to comment on two agreements that the passage of time had rendered nearly superfluous. Further, the notice of public comments says that "[i]nterested persons may submit written comments **regarding this PPA and its amendments**…." (AR 0117 (emphasis added).) Yet in its response the Department repeatedly criticizes the commenters for offering comments on the 2005 PPA. The Department says in its brief that the Amendments may not have been fully understood by the public without reference to the original PPA, so the notice offered the public the opportunity to comment solely on the Amendments but viewed in the context of their relation to the 2005 PPA. Although we are in no way saying that the language in the notice opens up the 2005 PPA to challenge, it is illustrative of the Department's less than careful approach to seeking public input on the Amendments. The Department defends its response and construes its effort in responding to

comments as "painstaking," but it instead reads like a series of pro forma statements meant to belatedly satisfy its obligations under Section 1113 but go no further. The Department goes through the motions but does not earnestly address some of the comments, and its response almost treats it as a foregone conclusion that the Amendments would be finalized, without modification or further consideration.

The Department's response to extensive comments about the change in zoning of the Bishop Tube site from industrial to residential is similarly unsatisfying. The zoning change was made by East Whiteland Township in 2014 at the request of Constitution Drive. The 2005 PPA provided that Constitution Drive "plans to develop the site for commercial purposes." (AR 0003.) It also provides that Constitution Drive would remediate the soils at the site to a level "necessary to demonstrate the attainment of a non-residential statewide health standard or site-specific standard…." (AR 0005.) The 2007 Amendment to the PPA altered that obligation. In exchange for Constitution Drive getting the AS/SVE system up and running for 60 days, the 2007 Amendment provided that the Department would assume the responsibility of demonstrating attainment with an unspecified remediation standard:

> [t]he Department agrees…to expeditiously perform (or require responsible parties other than Developer [Constitution Drive] to perform) other necessary remedial actions at the Site in order to **demonstrate attainment with one or a combination of remediation standards under Act 2 for soils and groundwater at the Site that are consistent with Developer's intended redevelopment activities**.

(AR 0041 (emphasis added).) It is unclear whether the 2010 Amendment further modifies that obligation or not. The 2010 Amendment again provided a mechanism to relieve Constitution Drive of any further remediation obligations at the Bishop Tube site under the PPA in exchange for running to AS/SVE system for 72 hours:

> Upon satisfaction of Developer's obligations pursuant to Paragraph 3(a) above, the Department shall provide Developer with a letter within fourteen (14) days of satisfaction of Developer's obligations confirming that Developer has satisfied its obligations pursuant to Paragraph 3(a), and Developer shall have no further remedial obligations at all to the Department relating to the Site pursuant to the CO&A and First Amendment (including, but not limited to any obligation to remediate soil, groundwater, or surface water at or beyond the Site, or for the operation and maintenance of the AS/SVE System at the Site).

(AR 0102-0103.)

There is very little support in the administrative record to show that the Department gave serious consideration to the change in zoning from industrial to residential. One commenter noted that "[n]owhere in the 2007 [Amendment] did the parties address whether these remediation measures were appropriate for property that would later be rezoned for residential use." (AR 0143.) But the Department widely panned such comments on the change in zoning, saying "zoning and land use decisions are outside of the Department's purview but are the responsibilities of local municipalities." (AR 0125.) Nor did the Department make any mention in the comment response document of the ongoing discussions between itself and Constitution Drive regarding the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation that appears related to the zoning change and revised development plans. While zoning decisions themselves are largely outside of the Department's authority, that is not to say that zoning decisions do not influence the cleanup for the site. The 2007 Amendment makes clear that remediation must be consistent with the Site's intended use after redevelopment. Nowhere in the comment response document does the Department explain why the AS/SVE system will further the cleanup of the Site for its use for residential purposes

Instead, the Department simultaneously attempts to use the passage of time as a sword and a shield by saying things like it is "pure speculation" whether the Department would have acted differently in 2010 if the property had been zoned residential. (AR 0127.) This completely

ignores the fact that the 2010 Amendment was not final until the Department issued its response to the public comments. We do not have to speculate what the Department would have done in 2010 because the 2010 Amendment is being finalized in 2018, and the Department does not at any point explain what it will do now on the basis of the zoning change. The Department also says that "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 [Constitution Drive's] request to residential in 2014." (AR 0121-0122.) But that again misses the point. The Amendments were not final and were still subject to change. The Department could have changed the Amendments in light of its understanding of the proposed use of the property in 2018. The Department never explains why, based on its understanding of the zoning now, and the apparent ongoing efforts surrounding the 2016/2017 Remediation Scope of Work, these Amendments are still appropriate to finalize. The Department cannot cure its initial failure to comply with the notice and comment requirements in Section 1113 by the significantly late publication of an inadequate notice compounded with responding to the public comments it did receive as though nothing had changed at the Site or relative to the provisions of the Amendments since 2010.

The Department's action to finalize the Amendments in the face of the unique circumstances in this case is arbitrary and capricious in the opinion of this Board. We therefore sustain the appeal of the Riverkeeper and find that the 2007 Amendment and the 2010 Amendment are void because they were never properly finalized under Section 1113 and, at this point, we see no pathway for properly finalizing them in their current form.[6]

[6] We take no position on the continuing viability of the 2005 PPA. The Riverkeeper's appeal did not challenge that HSCA settlement document. Constitution Drive, in its Brief in Response, asserts that among the Riverkeeper's proposed relief is a request that the 2005 PPA be declared null and void. (Constitution Drive's Brief in Response, at 22.) In its Reply Brief, the Riverkeeper states that "DRN did

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514; 35 P.S. § 6020.1113.

2. The Board's review of a settlement under HSCA is limited to determining whether the settlement is arbitrary or capricious on the basis of an administrative record. 35 P.S. § 6020.1113.

3. A prospective purchaser agreement in the form of a consent order and agreement, and any amendments thereto, are settlements of a proceeding under Section 1113 of HSCA. *Chirico v. DEP*, 2002 EHB 25, 24.

4. A person appealing a settlement under Section 1113 of HSCA bears the burden of proving that the settlement is arbitrary and capricious on the basis of the administrative record. 35 P.S. § 6020.1113.

5. The Department's actions addressing the 2007 Amendment and the 2010 Amendment under Section 1113 of HSCA were arbitrary and capricious and render those two settlements themselves arbitrary and capricious.

6. The Amendments were never properly noticed and made final in accordance with Section 1113 of HSCA and are, therefore, void because the Department's attempt to notice and finalize the Amendments in 2018 was inadequate, untimely and failed to identify and account for the changed circumstances and conditions at the Site

---

not request that the Board do anything about that 2005 PPA" while restating its belief that the 2005 PPA is void because it was unperformed by the March 1, 2009 deadline. (Riverkeeper's Reply Brief, at 15.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2018-020-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSTITUTION DRIVE PARTNERS, LP, Permittee	:	

O R D E R

AND NOW, this 26th day of April 2019, it is hereby ordered that this appeal is **sustained**. The 2007 Amendment and the 2010 Amendment are declared void.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 26, 2019

c: **DEP, General Law Division:**
Attention: Maria Tolentino
(*via electronic mail*)

For the Commonwealth of PA, DEP:
Anderson Lee Hartzell, Esquire
(*via electronic filing system*)

For Appellants:
Deanna Kaplan Tanner, Esquire
(*via electronic filing system*)

For Permittee:
Jonathan Spergel, Esquire
Nicole R. Moshang, Esquire
James McClammer, Esquire
(*via electronic filing system*)