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March 10, 2011

Via Certified Mail, Return Receipt Requested

Mr. Regis T. McLaughlin
Chairman
Municipal Authority of the City of McKeesport
100 Atlantic Avenue
McKeesport, PA 15132-3807

Mr. Nickolas J. Shermenti
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Mr. Dale R. McCall
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Mr. Kenneth Kohl
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Masonic Bldg,
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Re: 60 Day Notice of Intent to File Citizen Suit for Violations of the Clean Water Act at the Municipal Authority of the City of McKeesport Sewage Treatment Plant in Allegheny County, Pennsylvania.

Dear Mr. McLaughlin and Each of the Persons Identified on the Attached Notice List:

We are writing on behalf of Three Rivers Waterkeeper and our client, Clean Water Action (“Plaintiffs”), to provide you with notice of Plaintiffs’ intent to file suit for significant and ongoing violations of the Clean Water Act (“CWA” or “Act”),¹ and the Pennsylvania Clean Streams Law (“CSL”),² by the Municipal Authority of the City of McKeesport Sewage Treatment Plant (“Authority”).

As is more fully explained below, the Authority is illegally discharging oil and gas wastewater without a valid National Pollutant Discharge Elimination System (“NPDES”) Permit in violation of section 301 of the CWA.³ Further, despite repeated requests from the United States Environmental Protection Agency (“EPA”), the Authority has failed to account for Industrial Users and Significant Industrial Users who discharge oil and gas wastewater into the Authority’s treatment facilities as part of their pre-treatment program. The Administrative Order (“2008 Order”) issued on October 23, 2008, by the Pennsylvania Department of Environmental Protection (“PADEP”) seemingly enacts a major modification of the Authority’s NPDES permit. As discussed in further detail below, the 2008 Order cannot modify the Authority’s existing NPDES permit. The lack of a NPDES permit modification renders the Authority’s current discharge of oil and gas wastewater illegal. The Authority’s illegal discharges into the Monongahela river, in addition to its failure to incorporate the new wastestream into their pretreatment program, has injured, and will continue to injure, the health, environmental, and aesthetic interests of the Plaintiffs and Plaintiffs’ members. These injuries are traceable to the Authority’s violations, and redressing the ongoing violations is likely to redress the Plaintiffs’ injuries. Plaintiffs provide this 60-day notice pursuant to section 505(b) of the CWA.⁴

Under the CWA, citizens are granted the authority to bring suit against “any person... alleged to be in violation” of an “effluent standard or limitation” established under the CWA. The CWA defines “person” as including a municipality or political subdivision of a state.⁵ The Act defines a “municipality” as a “city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes...”⁶ An “effluent standard or limitation” is defined as “an unlawful act under subsection (a) or section 1311[,],... an effluent limitation or other limitation under section 1311 or 1312[,] [or] a permit condition thereof issued under section 1342.”⁷ Accordingly, citizens may bring suit to enjoin the discharge of pollutants from

¹ 33 U.S.C. § 1251, *et seq.*

² 35 P.S. § 691.1, *et seq.*

³ 33 U.S.C. § 1311.

⁴ 33 U.S.C. § 1365(b)(1)(A).

⁵ 33 USC § 1362(5).

⁶ *Id.* at § 1362(4).

⁷ 33 U.S.C. § 1365(f).

dischargers such as the Authority that are operating without a NPDES permit and compel a party to adhere to the conditions of its NPDES permit, including provisions related to pretreatment.

Pursuant to section 505(b) of the CWA, we are writing to notify you that the Plaintiffs, Clean Water Action and Three Rivers Waterkeeper, intend to file suit in the applicable federal district court any time after the sixty (60) day notice period has concluded to enjoin the violations described below, ensure future compliance, recover attorney fees and cost of litigation, and obtain other appropriate relief.

I. FACTUAL BACKGROUND

A. BACKGROUND OF THE AUTHORITY

The Authority is located in Allegheny County and has a total of 33 outfalls. Outfall 001 is the main outfall for the Authority and discharges treated sewage into the Monongahela River. The remaining outfalls are combined sewer overflows (“CSO”) and the majority of those discharges flow into the Monongahela River. Public drinking water suppliers begin their water intakes just 11.3 miles⁸ downstream of the Authority’s discharge. The Monongahela River was at the time of the 2008 Order, and periodically continues to be impaired or degraded by total dissolved solids (“TDS”) and sulfates.⁹

The Authority submitted a NPDES renewal application in February 2007. Along with their completed renewal application, the Authority submitted several Analysis Results tables for a wide array of pollutants. Notably absent from the Analysis Results Table for the Treatment Facility Influent Sampling Results were figures for TDS.¹⁰ Further omitted from the NPDES renewal application was information related to Industrial Users and Significant Industrial Users that transport oil and gas wastewater to the Authority. It is possible that the Authority was not receiving oil and gas wastewater in early 2007 and began accepting the wastewater sometime before October of 2008, but the Authority failed to provide any indication of its acceptance or planned acceptance of oil and gas wastewater. Under the CSL and the CWA, the Authority was required to apply for a new permit or a permit amendment before they could accept and discharge oil and gas wastewater.¹¹

⁸ AP Interactive: *Marcellus Shale wastewater* http://hosted.ap.org/specials/interactives/_national/marcellus-water/index.html?SITE=AP, (last visited, Mar. 5, 2011).

⁹ Appendix A (Department Of Environmental Protection Bureau of Water Standards and Facility Regulation, *Coordinating National Pollutant Discharge Elimination System (NPDES) Permitting in the Monongahela River Watershed*, May 1, 2010, Doc. Number: 362-2100-001; Wastewater Treatment Requirements, 40 Pa.Bull. 4835, Saturday, August 21, 2010).

¹⁰ Appendix B (2007 McKeesport Renewal Application)

¹¹ 33 U.S.C. § 1311(a) (2010); 35 P.S. §§ 691.201, 691.202, 691.301, 691.307, 691.401 (2003); 25 Pa. Code §§ 92.3, 92.5 (2009); 25 Pa. Code §§ 92a.1(b), 92a.9 (2010).

On April 22, 2008, the PADEP issued NPDES Permit No. PA0026913 to the Authority (“NPDES Permit”).¹² The NPDES Permit authorizes the discharge of treated sewage from the Authority’s facility to the Monongahela River, a water of the Commonwealth and a water of the United States, and sets specific effluent limitations and monitoring requirements for the discharge of treated sewage. The NPDES permit does not authorize the acceptance and subsequent discharge of up to 115,000 gallons of oil and gas wastewater because this influent wastestream was not disclosed during the permitting process. Both the PADEP and the EPA have stated that oil and gas wastewater is an industrial waste.¹³ Further, the Authority does not have the treatment capabilities to treat for the high levels of total dissolved solids, bromides, and many other constituents commonly found in oil and gas wastewater and is currently relying on mere dilution to “treat” the industrial wastewater from shale gas development.¹⁴ Facilities that have been permitted to discharge oil and gas wastewater have technology-based effluent limitations from 40 C.F.R. sections 437.10(a), 437.20(a), 437.30(a), and 437.40(a).¹⁵ In addition, the PADEP has applied Best Professional Judgment effluent limitations to facilities accepting oil and gas wastewater for benzene, toluene, xylenes, and Total BTEX.¹⁶ Centralized Wastewater Treatment facilities that will directly discharge treated oil and gas wastewater are also required by the PADEP to monitor and report for Gross alpha and radium 226/228 due to the presence of Naturally-Occurring Radioactive Material in deep shale formations.¹⁷ However, the Authority’s current NPDES permit does not address any of these technology-based limitations and, therefore, does not ensure that appropriate treatment technologies are being utilized prior to discharge.

On October 23, 2008, the PADEP issued administrative orders to Publicly Owned Treatment Works (“POTWs”) on the Monongahela River, including the Authority, that required each POTW to limit its acceptance of oil and gas wastewater to one percent of its average daily flow.¹⁸ The catalyst for these Orders was a set of abnormally high concentrations of TDS in the Monongahela River caused by oil and gas well drilling wastewater and other sources.¹⁹ During this time, high levels of TDS caused multiple problems including bad-tasting water and corrosion

¹² Appendix C (2007 NPDES Permit, PA0026913).

¹³ Appendix D (2008 Dept. of Env’tl. Prot. Order to the Authority), Appendix E (December 2008 Letter from John Lovell, EPA Pretreatment Coordinator, to the Authority).

¹⁴ Wastewater Treatment Requirements, 40 Pa.Bull. 4835, Saturday, August 21, 2010.

¹⁵ See e.g., Appendix I (Water Quality Protection Report for Shallenberger Construction, Inc. (“Shallenberger-Ronco WQPR”), Ronco Industrial Wastewater Treatment Facility, NPDES PA0253723-A1, Masontown Borough, Fayette County, January 4, 2011, Prepared by Ryan Decker, Water Management, PADEP); see also 40 C.F.R., Part 437 (requiring technology-based effluent limitations that include limits on the following pollutants: aluminum, antimony, arsenic, barium, cadmium, chromium, cobalt, copper, total iron, dissolved iron, lead, manganese, mercury, nickel, selenium, silver, tin, titanium, vanadium, zinc, acetone, acetophenone, 2-butanone, o-Cresol, p-Cresol, phenol, pyridine, and 2,4,6-Trichlorophenol).

¹⁶ Shallenberger-Ronco WQPR, p. 9, *supra*, note 15.

¹⁷ *Id.* at pp. 9-10; *supra*, note 15.

¹⁸ Appendix D (2008 Dept. of Env’tl. Prot. Order to the Authority)

¹⁹ Commonwealth of Penna. Dept. of Env’tl. Prot., *Permitting Strategy for High Total Dissolved Solids (“TDS”) Wastewater Discharges*, at 2-3 (April 11, 2009), available at http://files.dep.state.pa.us/Water/Wastewater%20Management/WastewaterPortalFiles/MarcellusShaleWastewaterPartnership/high_tds_wastewater_strategy_041109.pdf

of industrial machinery.²⁰ The PADEP also raised concerns about increased levels of brominated by-products in drinking water supplies that were “strong[ly] correlat[ed]” to the high levels of bromide being discharged in shale gas wastewater.²¹

Recent sampling results of the Authority’s effluent found high levels of barium, bromide, boron, calcium, manganese, magnesium, strontium, chlorides, sulfates, nitrates, and TDS.²² High levels of bromides, strontium, chloride, sulfates, nitrates, and TDS are indicative of the acceptance and discharge of oil and gas wastewater.²³ The PADEP has conceded that the waters of the Commonwealth, and especially the Monongahela River, do not have high levels of assimilative capacity for several pollutants commonly found in oil and gas wastewater.²⁴ The discharge of high levels of pollutants in oil and gas wastewater, coupled with the ever decreasing assimilative capacity of Pennsylvania waters, necessitates that proper NPDES permitting procedures must be followed to protect both the waters of the Commonwealth and the health and well-being of Pennsylvania residents who depend on those waters. In short, the Authority is operating without a permit to discharge oil and gas wastewater in violation of section 301 of the Act when the PADEP has not been given the opportunity to evaluate the following: a NPDES permit application, the impacts of an oil and gas influent on the Authority’s treatment processes, the potential of the effluent to cause or contribute to a violation of water quality standards, and formal comments from the public.

Since at least October 23, 2008, the Authority has been accepting oil and gas wastewater without applying for a new permit or permit amendment or updating their pretreatment program as required by state law, federal law, and the Authority’s own ordinance.²⁵ Their failure to follow proper procedures for authorization to discharge oil and gas wastewater renders their discharge illegal. Their failure to follow the requirements pertaining to the pretreatment program also leaves them in violation of the CWA.

²⁰ Don Hopey, *State probing contaminants in Mon River [], Problem Could Cause Bad Smell, Bad Taste in Water for Thousands*, Pittsburgh Post-Gazette, Oct. 23, 2008; Don Hopey, *What Can Be Done with Wastewater? Rapid Expansion of Gas Drilling Has Led to Problems with Disposal, Contamination*, Pittsburgh Post-Gazette, Oct. 4, 2009; Don Hopey, *Drillers, sewer authority want state to lift waste limits; DEP blames bad-tasting water on total dissolved solids*, PITTSBURGH POST-GAZETTE, Nov. 22, 2008.

²¹ *Supra*, note 19, at 2.

²² Appendix J. (Sampling Results from October 19, 20, 24 & 25, 2010 Effluent Collection at McKeesport POTW (samples collected by University of Pittsburgh’s Center for Healthy Environments and Communities; samples analyzed by RJ LeeGroup, Inc.)).

²³ *Id.*

²⁴ *Supra*, note 19.

²⁵ 40 C.F.R. § 403.8 (2011); 25 Pa. Code § 94.15; 2007 Codified Ordinances of White Oak, Part Nine - Streets, Utilities and Public Services Code, Article III – Sewers at §§ 931.03(d) and 931.04(d)).

B. WATER QUALITY CHARACTERISTICS OF THE RECEIVING WATER BODY

The Monongahela River has long been used as a public drinking water supply, a recreational waterway for fishing and boating, and industrial water source, and a host for aquatic life. The PADEP received reports of unusually high Total Dissolved Solids (“TDS”) levels in the Monongahela River starting on October 10, 2008.²⁶ Soon after, the PADEP submitted a press release stating that a 70-mile stretch of the Monongahela was exceeding water quality standards for TDS.²⁷ Although upstream of the Authority, at least one public water supplier reported a public water supply use impairment due to excessive concentrations of Total Trihalomethanes from the last three quarters of 2008 and the first quarter of 2009.²⁸ The PADEP determined that the source of high TDS concentrations in the Monongahela River during the third and fourth quarters of 2008 were “most likely” the source of bromides contributing to elevated concentrations of a brominated THM species during the same quarters.²⁹ Meanwhile, concentrations of TDS in the Monongahela River exceeded water quality criteria in October, November, and December 2008, and in August and September 2009.³⁰ The additional loading of TDS, bromide, and other pollutants associated with oil and gas wastewater from the Authority may cause or contribute to violations of water quality standards for drinking water, industrial, recreational, and aquatic life uses.

C. CHARACTERISTICS OF OIL AND GAS WASTEWATER FROM SHALE GAS DEVELOPMENT

Oil and gas wastewater from shale gas development produces heavy metals, radioactive elements, TDS, chloride, benzene, toluene, ethylbenzene, and xylene.³¹ In wells sampled to complete the New York Draft Supplemental Generic Environmental Impact Statement (“DSGEIS”) the median concentration for benzene was nearly 100 times the drinking water

²⁶ Appendix K. Don Hopey, *DEP Seeks Cause of River Pollution*, PITTSBURGH POST-GAZETTE, Oct. 22, 2008 (reporting a statement by former PADEP Secretary John Hanger).

²⁷ Appendix L. DEP, News Release: *DEP Investigates Source of Elevated Total Dissolved Solids in Monongahela River* (Oct. 22, 2008).

²⁸ Appendix M. See Tri-County Joint Municipal Authority, Notice: *Tri-County Joint Municipal Authority Has Levels of Total Trihalomethanes (“TTHMs”) Above Drinking Water Standards* (June 19, 2009) (attaching 2008 Annual Drinking Water Report).

²⁹ See Paul Handke, *Trihalomethane Speciation and the Relationship to Elevated Total Dissolved Solid Concentrations Affecting Drinking Water Quality at Systems Utilizing the Monongahela River as a Primary Source During the 3rd and 4th Quarters of 2008*, at 17 (Apr. 11, 2009), available at http://files.dep.state.pa.us/Water/Wastewater%20Management/WastewaterPortalFiles/MarcellusShaleWastewaterPartnership/dbp_mon_report_dbp_correlation.pdf (last visited March 10, 2011).

³⁰ See DEP, News Release: *DEP Detects Elevated Levels of Total Dissolved Solids in Monongahela River* (Aug. 7, 2009); DEP, Press Release: *DEP Detects Total Dissolved Solids Over Standards in the Monongahela River* (Oct. 14, 2009).

³¹ New York Dept. of Env'tl. Conservation, *Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (“DSGEIS”)*, 5-103 – 5-105 (Sept. 30, 2009), available at <http://www.dec.ny.gov/energy/58440.html>.

standard.³² In addition to the potentially harmful carcinogenic effects of benzene, the EPA has recently expressed concern about the presence of “variable and sometimes high concentrations of materials that may present a threat to human health and aquatic environment, including radionuclides, organic chemicals, metals and total dissolved solids.”³³ Sampling of TDS for the DSGEIS shows that the median concentration of TDS in flowback samples was 93,200 mg/L, with the maximum being 337,000 mg/L.³⁴ EPA explains that many of these constituents are not removed during the treatment process and their discharge into waters of the Commonwealth may “cause or contribute to impaired drinking water” and “may adversely affect the treatment facilities themselves, impairing their ability to remove fecal coliform and other common contaminants in domestic sewage.”³⁵ To rectify some of the public health concerns EPA has asked the Department to require more sampling, reopen NPDES permits of POTWS accepting oil and gas wastewater, and inform the public about whether and at what levels radionuclides occur in their drinking water supplies.

II. VIOLATIONS OF THE CLEAN WATER ACT AND THE SEWAGE NPDES PERMIT

A. DISCHARGE OF INDUSTRIAL WASTEWATER WITHOUT A PERMIT

The Authority has been illegally discharging oil and gas wastewater since at least 2008 and continues to discharge industrial wastewater without authorization under the CWA and the CSL. The Authority (1) never disclosed its discharge of oil and gas wastewater in its 2008 NPDES permit application and, therefore, is not authorized to discharge such wastewater under its current NPDES permit; (2) has failed to apply for a permit amendment that would allow it to legally discharge this kind of industrial wastewater; and (3) did not seek or receive a proper amendment³⁶ to its NPDES permit in the 2008 Order.

1. THE AUTHORITY IS NOT AUTHORIZED TO DISCHARGE OIL AND GAS WASTEWATER UNDER THE 2008 NPDES PERMIT.

The CWA and the CSL prohibit the discharge of “any pollutant by any person” except where authorized by a valid NPDES permit.³⁷ A valid NPDES permit authorizes the discharge of only those pollutants contained in a wastestream disclosed in a permit application or specific

³² *Id.* at 5-106.

³³ Appendix N. United States Env'tl. Protection Agency, Letter from Shawn M. Garvin to Secretary Krancer, Mar. 7, 2011.

³⁴ *Supra* note 31, DSGEIS, at 5-107.

³⁵ *Supra* note 33, United States Env'tl. Protection Agency, Letter from Shawn M. Garvin to Secretary Krancer, Mar. 7, 2011.

³⁶ Pennsylvania uses the term “amendment” to refer to same concept termed a “modification” under the federal Clean Water Act. *See* 25 Pa. Code § 92a2 (2011).

³⁷ 33 U.S.C. § 1311(a) (2006); 35 P.S. §§ 691.201, 691.202, 691.301, 691.307, 691.401 (2003); 25 Pa. Code §§ 92.3, 92.5 (2009); 25 Pa. Code §§ 92a.1(b), 92a.9 (2010).

pollutants disclosed in a permit application.³⁸ The Authority's failure to disclose pollutants commonly found in oil and gas wastewater in their NPDES permit renewal application, such as very high levels of TDS, bromides, and sulfates, means that neither the wastestream nor the specific pollutants were authorized during prior permitting processes.

2. THE AUTHORITY HAS NOT APPLIED FOR A PERMIT AMENDMENT

Under the CSL, the Authority is required to apply for a permit amendment where there is a "change in wastestream . . . which would include any new or increased pollutant not identified in a previous permit application."³⁹ The Authority did not disclose pollutants commonly found in oil and gas wastewater in their permit application; the acceptance of shale gas wastewater constitutes a change in the wastestream. Therefore, the Authority is not permitted to accept and discharge shale gas wastewater.

Similarly, under the CWA a NPDES permit modification is permitted where there are "material and substantial alterations or additions to the permitted facility or activity . . . which occurred after permit issuance," where "[t]he Director has received new information . . . if the information was not available at the time of permit issuance" or where "the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c)."⁴⁰

There are several reasons why it is particularly important in this case to follow proper procedures for modification of a NPDES permit. First, without proper oversight, the acceptance and discharge of this new wastestream has the potential to affect public drinking water supplies.⁴¹ High levels of TDS can cause bad taste, malodors, corrosion, and possible adverse health effects.⁴² Additionally, the Authority consistently accepts wastewater that may be harmful to the facilities' treatment processes and cause interference.⁴³ For example, the Authority accepts oil and gas wastewater with pH levels as low as 5.5 and as high as 11.75.⁴⁴ EPA guidance explains that "[t]he pH of a wastewater can also cause interference if it is too high or too low, or is widely fluctuating."⁴⁵ Finally, instances of bypass may be occurring at the Authority's treatment facilities. The most recent Discharge Monitoring Report ("DMR") on file

³⁸ 33 U.S.C. § 1342(k) (2006); 25 Pa. Code § 92a.6 (2011), 25 Pa. Code § 92.3 (2000); UNITED STATES ENVTL. PROT. AGENCY, REVISED POLICY STATEMENT ON SCOPE OF DISCHARGE AUTHORIZATION AND SHIELD ASSOCIATED WITH NPDES PERMITS, at 2-3 (1995).

³⁹ 25 Pa. Code § 92.7 (2000); *cf.* 25 Pa. Code § 92a.24 (2011) (requiring written permission from the PADEP).

⁴⁰ 40 C.F.R. 122.62 (2011).

⁴¹ See EPA Hydraulic Fracturing Study Design, available at <http://www.epa.gov/indian/pdf/discussion-document-study-design.pdf>; *supra* note 19, at 3-4.

⁴² *Id.*

⁴³ 40 C.F.R. § 403.3

⁴⁴ See Appendix F (NPDES Discharge Monitoring Report, December 2010, at pages 43-47).

⁴⁵ United States, Environmental Protection Agency, *Guidance Manual for Preventing Interference at POTWs*, September 1987.

includes a report on the analysis of the Authority's influent and effluent for parameters such as TDS, TSS, Biological Chemical Oxygen Demand, and chlorides.⁴⁶ The effluent results tend to show higher levels of TDS than normally found in the effluent from a sewage treatment plant. The Authority notes that the influent samples do not contain "well water,"⁴⁷ meaning that the influent samples taken do not account for oil and gas wastewater. The omission of oil and gas well water from the influent analysis indicates that the Authority may be introducing oil and gas wastewater past the headworks of the treatment facilities where an influent sample is normally taken, which constitutes a bypass under the CWA.⁴⁸ Any bypass that may be occurring is in direct violation of the CWA and the Authority's permit.⁴⁹

3. THE PADEP'S 2008 ORDER IS INVALID FOR THE PURPOSES OF MODIFYING A NPDES PERMIT

The PADEP's decision to issue the 2008 Order, in lieu of requiring the Authority to apply for and receive an amended or modified permit, subverted the public notice and comment requirement of the Clean Streams Law rendering the Order invalid for the purposes of modifying a NPDES permit.⁵⁰ Courts have held that an administrative order may not effectively modify permit terms if proper procedures for modification, including notice and comment, are not followed.⁵¹

In order to comply with the CWA requirements for State NPDES programs, the PADEP must go through the following steps to enact a major modification of a NPDES permit:

- Ensure that an applicant has fully complied with application requirements,⁵²
- Issue a draft permit containing all conditions required to meet water quality standards, all compliance schedules, all monitoring requirements,⁵³
- Prepare a fact sheet for any draft permit which "is the subject of wide-spread public interest or raises major issues," and set forth in the fact sheet the "principal

⁴⁶ *Supra*, note 44, at 42

⁴⁷ *Id.*

⁴⁸ 40 C.F.R. § 122.41(m), Municipal Authority of the City of McKeesport, NPDES Permit PA0026913, at 11.

⁴⁹ 40 C.F.R. § 122.419(m)(4).

⁵⁰ 35 P.S. § 691.1; 25 Pa. Code § 92.7.

⁵¹ See *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1012 (3d Cir. 1988) (stating that the EPA may not dispense with public notice and comment when an amendment to a discharge permit effects a substantial change in the terms of the permit); *U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 525 (4th Cir. 1999) (holding that orders issued by the Virginia State Water Control Board did not modify the permittee's NPDES permit because the Board did not follow proper modification procedures); *Ohio Valley Envtl. Coal, Inc. v. Apogee Coal Co., LLC*, 555 F. Supp. 2d 640, 646 (S.D.W.Va. 2008) (holding that for a major modification to be effective, a draft permit must be issued and the public must be advised of that draft permit); *Citizens for a Better Env't-California v. Union Oil Co. of California*, 83 F.3d 1111, 1118 (9th Cir. 1996) (holding that a settlement agreement containing interim permit limits did not change the terms of a previously-issued permit, in part due to non-compliance with public notice procedures).

⁵² 40 C.F.R. § 124.3(a); 25 Pa. Code 92.61.

⁵³ 40 C.F.R. § 124.6(a),(c), and (d); 25 Pa. Code 92.51.

facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit,”⁵⁴

- Give public notice and comment,⁵⁵
- Allow for any interested person to submit written comments and request a public hearing,⁵⁶ and
- Issue a response to comments when any final permit decision is issued.⁵⁷

The PADEP’s 2008 Order did not follow any of the requirements described above. While the PADEP “may issue an order to a person or municipality regulating a particular activity,” they may only do so when the activity to be regulated does “not otherwise require[e] a permit under this act.”⁵⁸ A new permit, or a permit modification, is required in this instance because the constituents of the oil and gas wastewater being accepted are substantially different in nature from the constituents of the wastewater that were disclosed during the permit application process. Finally, the EPA has emphasized that current permits issued to POTWs accepting oil and gas wastewater “do not now include critical provisions necessary for effective processing and treatment.”⁵⁹ In order to rectify these issues the EPA has urged the Department to reopen permits for such POTWs in order to establish monitoring requirements and effluent limits that will protect drinking water and aquatic life.⁶⁰

B. FAILURE TO COMPLY WITH PRETREATMENT REQUIREMENTS

The main purposes of the pretreatment program established by the CWA are to prevent pass-through and interference and improve opportunities for the recycling of municipal and industrial wastewaters.⁶¹ To serve these purposes the pretreatment regulations require the development of a pretreatment program by any facility with a design capacity over 5 million gallons per day (“mgd”) that is receiving pollutants from Industrial Users.⁶² An Industrial User is defined as the source of any indirect discharge; an indirect discharge is the “introduction of pollutants into a POTW from any non-domestic source.”⁶³ An established pretreatment program must do the following: “[d]eny or condition new or increased contributions of pollutants, or changes in the nature of pollutants[,]” “[c]ontrol through Permit, order, or similar means, the contribution to the POTW by each Industrial User[,]” and “[r]equire compliance with applicable

⁵⁴ 40 C.F.R. § 124.8; *see also* 25 Pa. Code 92.61.

⁵⁵ 40 C.F.R. § 124.10, 25 Pa. Code 92.61.

⁵⁶ 40 C.F.R. § 124.11, 25 Pa. Code 92.61

⁵⁷ 40 C.F.R. § 124.17.

⁵⁸ 35 P.S. § 691.402.

⁵⁹ United States Env’tl. Protection Agency, Letter from Shawn M. Garvin to Secretary Krancer, Mar. 7, 2011, *supra* note 33.

⁶⁰ *Id.*

⁶¹ 40 C.F.R. 403.2 (2011).

⁶² 40 C.F.R. 403.8 (2011).

⁶³ 40 C.F.R. 403.3 (2011).

Pretreatment Standards and Requirements by Industrial Users[.]”⁶⁴ Finally, where there is a Significant Industrial User, which is defined as an Industrial User discharging “an average of 25,000 gallons per day or more of process wastewater to the POTW,”⁶⁵ the POTW must develop “individual permits or equivalent individual control mechanisms” to ensure compliance with applicable Pretreatment Standards and Requirements.⁶⁶ The Authority is subject to this requirement because they have several Industrial Users who regularly contribute over 25,000 gallons per day of oil and gas wastewater.⁶⁷

Based on the information we have available to us, the Authority has never incorporated indirect discharges of oil and gas wastewater from various Industrial Users into their pretreatment program. The Authority has failed to do so despite repeated requests from the EPA.⁶⁸ Further, the Authority is violating its own ordinance by failing to “require haulers of industrial waste to obtain wastewater discharge permits,⁶⁹ “to obtain permits that include pretreatment requirements that will “prevent pass through or interference... protect the quality of the water body... and protect against damage to the POTW.”⁷⁰ In order to rectify these violations, the Authority must include Industrial Users and Significant Industrial Users discharging oil and gas wastewater in the Authority’s pretreatment program.⁷¹

C. THE DISCHARGE OF OIL AND GAS WASTEWATER MAY VIOLATE THE TOXICS NOTIFICATION PERMIT CONDITIONS IN THE 2008 PERMIT.

As demonstrated by effluent data collected by the Center for Healthy Environments and Communities,⁷² the Authority may have been in violation of the toxics notification requirements in its permit.

Part A(d) of the NPDES Permit requires the permittee to notify the Department “as soon as it knows or has reason to believe” that activities have occurred that would result in an unlawful and unpermitted discharge of a toxic pollutant. Threshold levels for toxic effluent that

⁶⁴ 40 C.F.R. 403.8(f) (2011).

⁶⁵ 40 C.F.R. 403.3 (2011).

⁶⁶ 40 C.F.R. 403.8(f)(1)(iii) (2011).

⁶⁷ See Appendix F (McKeesport, NPDES Discharge Monitoring Report, December 2010, at 41); Appendix C (Municipal Authority of the City of McKeesport, NPDES Permit PA0026913, at 14g-14i).

⁶⁸ See Appendix C (December 2008 Letter from John Lovell, EPA Pretreatment Coordinator, to the Authority); Appendix G (October 2009 Letter from John Lovell, EPA Pretreatment Coordinator, to the Authority).

⁶⁹ While we are aware that the Sewage Plant has issued permits to haulers of oil and gas wastewater it does not seem that the Sewage Plant requires any pretreatment of the oil and gas wastewater.

⁷⁰ See Appendix H (2007 Codified Ordinances of White Oak, Part Nine - Streets, Utilities and Public Services Code, Article III – Sewers at §§ 931.05(b).

⁷¹ Unites States Env'tl. Protection Agency, Letter from Shawn M. Garvin to Secretary Krancer, Mar. 7, 2011, *supra* note 33.

⁷² *Supra* note 22, Appendix J. (Sampling Results from October 19, 20, 24 & 25, 2010 Effluent Collection at McKeesport POTW (samples collected by University of Pittsburgh’s Center for Healthy Environments and Communities; samples analyzed by RJ LeeGroup, Inc.)).

would trigger notification are different depending on whether the discharge occurred on a routine or frequent basis. Where discharge exceeded one hundred micrograms per liter on a routine or frequent basis or five hundred micrograms per liter on a non-routine or infrequent basis, notification is required.⁷³ There is no definition of “routine” or “frequent.” However, Part A(c), which governs the reporting requirements, requires that noncompliance reporting be accomplished within 24 hours. Therefore, the specific periodicity of “routine” and “frequent” should be bounded by the beginning and end of a twenty-four hour period, especially since the facility releases its effluent once per day.

Barium is a toxic substance under Pennsylvania law.⁷⁴ On October 19 and 20, 2010, the Center for Healthy Environments and Communities took 24 effluent samples in a twenty-four hour period with samples taken every hour and then had those samples analyzed for various pollutant analytes. Barium levels on October 19 and 20, 2010 were: 808 micrograms per liter (maximum), 553 micrograms per liter (mean) and 582 micrograms per liter (median).⁷⁵ The maximum value of 808 micrograms per liter demonstrates that notification was required under Part A(d)(2)(a) for discharges that on a non-routine or infrequent basis exceeded five hundred micrograms per liter.⁷⁶ In addition to the infrequent non-routine exceedance, all twenty-four samples of barium exceeded the 100 microgram per liter frequent and routine notification threshold. One full day of uninterrupted exceedances constituted discharges of barium that routinely and frequently exceeded the 100 microgram per liter threshold of Part A(d)(1)(a).⁷⁷

Boron is a toxic substance under Pennsylvania law.⁷⁸ The sampling results from October 19 and 20, 2010, reveal boron levels at: 159 micrograms per liter (maximum) and 129 micrograms per liter (mean and median). Out of twenty-four samples, only one sample was below the 100 microgram threshold, meaning that for nearly the entire day of October 19, 2010, there was an exceedance of the notification threshold for boron that merited notice to the Department. One full day of nearly uninterrupted exceedances constituted discharges of boron that routinely and frequently exceeded the 100 microgram per liter threshold of Part A(d)(1)(a).

There is no evidence that the facility provided notice to the Department of the barium and boron levels that exceeded the notification thresholds. Without such notice, the facility would have been and may continue to be in violation of Part A(d) of its permit.

Even if Part A(d) does not apply, Part A(c)(5) addresses other forms of noncompliances and states that despite compliance with specific permit conditions, the permittee must provide “immediate notification of incidents causing or threatening pollution pursuant to 25 Pa. Code, Chapter 91.33” (emphasis in original). Section 91.33 states:

⁷³ *Supra* note 12, NPDES Permit, Part A(d)(1) & (2).

⁷⁴ 25 Pa. Code § 93.8c (Table 5).

⁷⁵ *Supra*, note 22.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 25 Pa. Code § 93.8c (Table 5).

If, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, or would damage property, is discharged into these waters—including sewers, drains, ditches or other channels of conveyance into the waters—or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters.

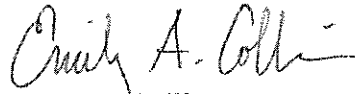
The appended sampling data reveals high concentration values of signature oil and gas activity pollutants such as bromides, chlorides, TDS, barium, calcium and strontium. The Authority should have provided immediate notification of these high concentration values pursuant to Part A(c)(5). The failure to notify the Department constitutes a violation of the permit conditions described above.

III. CONCLUSION

As described above, the Authority is discharging oil and gas wastewater from its treatment facilities without proper authorization in an ongoing violation of the Clean Water Act and Clean Streams Law. The Authority has failed to update its pretreatment requirements to include the acceptance of oil and gas wastewater, an industrial waste. Consequently, Clean Water Action and Three Rivers Waterkeeper intends to file suit to enjoin these violations, ensure future compliance, and recover attorney fees and litigation costs, and to obtain other appropriate relief.

If you have any questions regarding the allegations in this notice, believe any of the information in this notice to be in error, wish to discuss any exchange of information showing that the information in this notice is incorrect, or would like to discuss settlement of this matter prior to litigation, please contact Emily A. Collins, counsel for Clean Water Action, or Patrick Greuter, Legal Director for Three Rivers Waterkeeper, at the numbers listed below.

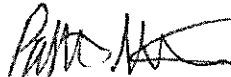
Sincerely yours,



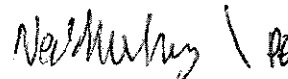
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APPENDIX KEY

Appendix A:

Department Of Environmental Protection Bureau of Water Standards and Facility Regulation, *Coordinating National Pollutant Discharge Elimination System (NPDES) Permitting in the Monongahela River Watershed*, May 1, 2010, Doc. Number: 362-2100-001.

Appendix B

Municipal Authority of the City of McKeesport NPDES Permit Renewal Application, February 2007.

Appendix C

The Municipal Authority of the City of McKeesport, 2007 NPDES Permit, PA0026913.

Appendix D

2008 Pennsylvania Dept. of Env'tl. Prot. Order to the Municipal Authority of the City of McKeesport.

Appendix E

Letter from John Lovell, EPA Pretreatment Coordinator, to the Municipal Authority of the City of McKeesport, December 2008.

Appendix F

Municipal Authority of the City of McKeesport, NPDES Discharge Monitoring Report, December 2010.

Appendix G

Letter from John Lovell, EPA Pretreatment Coordinator, to the Municipal Authority of the City of McKeesport, October 2009.

Appendix H

Codified Ordinances of White Oak, Part Nine - Streets, Utilities and Public Services Code, Article III – Sewers at §§ 931.03(d) and 931.04(d).

Appendix I

Water Quality Protection Report for Shallenberger Construction, Inc. ("Shallenberger-Ronco WQPR"), Ronco Industrial Wastewater Treatment Facility, NPDES PA0253723-A1, Masontown

Borough, Fayette County, January 4, 2011, Prepared by Ryan Decker, Water Management, PADEP.

Appendix J

Sampling Results from October 19, 20, 24 & 25, 2010 Effluent Collection at McKeesport POTW (samples collected by University of Pittsburgh's Center for Healthy Environments and Communities; samples analyzed by RJ LeeGroup, Inc.).

Appendix K

Don Hopey, *DEP Seeks Cause of River Pollution*, Pittsburgh Post-Gazette, Oct. 22, 2008 (reporting a statement by former PADEP Secretary John Hanger).

Appendix L

DEP, News Release: *DEP Investigates Source of Elevated Total Dissolved Solids in Monongahela River* (Oct. 22, 2008).

Appendix M

Tri-County Joint Municipal Authority, Notice: *Tri-County Joint Municipal Authority Has Levels of Total Trihalomethanes ("TTHMs") Above Drinking Water Standards* (June 19, 2009) (attaching 2008 Annual Drinking Water Report).

Appendix N

United States Env'tl. Protection Agency, Letter from Shawn M. Garvin to Secretary Krancer, Mar. 7, 2011.