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July 18, 2013

Sent via Certified Mail, return receipt requested

Mr. Michael Arnold
Waste Treatment Corporation
341 West Harmar Street
Warren, PA 16365-2167

Re: Notice of Intent to File a Citizen Suit for Ongoing Violations of the Clean Water Act, the Pennsylvania Clean Streams Law, and the Endangered Species Act at Waste Treatment Corporation's Plant in the City of Warren, Warren County, Pennsylvania.

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

We are writing on behalf of our client, Clean Water Action, to provide you with notice of Clean Water Action's intent to file suit for significant and ongoing violations of the Clean Water Act ("CWA"),¹ the Pennsylvania Clean Streams Law ("CSL"),² and the federal Endangered Species Act ("ESA")³ by Waste Treatment Corporation ("WTC"), a centralized wastewater treatment ("CWT") plant located in Warren, Pennsylvania.

WTC has self-reported numerous violations of its effluent limitations in its NPDES permit for multiple pollutants, including pH, arsenic, and titanium, violating the CWA and CSL.⁴ These parameters (and other parameters) are the subject of a 2011 Administrative Consent Order and Agreement ("2011 Order") by the Pennsylvania Department of Environmental Protection ("Department"), yet Waste Treatment Corporation still fails to comply with the law and its permit conditions.

WTC is also violating its NPDES permit requirement that its effluent discharge "shall be controlled to levels which will not be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life" and failed to mitigate adverse effects to the environment from its discharge as required by its NPDES permit.⁵ A recent study by the Department and by the U.S. Fish & Wildlife Service determined that WTC's discharge is negatively impacting the macroinvertebrate community of the Allegheny River and contributing to impairment of its uses,

¹ 33 U.S.C. § 1251, *et seq.*

² 35 P.S. § 691.1, *et seq.*

³ 16 U.S.C. §§ 1531-1544.

⁴ 33 U.S.C. § 1317(d); 35 P.S. § 691.307.

⁵ Appendix A (NPDES Permit No. PA0102784, Waste Treatment Corporation), at 7 (Permit Part A, Section I.c), and 13 (Permit Part B(I)(E)).

including the aquatic life uses for the Allegheny River, which serves as habitat for the endangered northern riffleshell (*Epioblasma torulosa rangiana*),⁶ a freshwater mussel species, and other endangered freshwater mussels.

WTC's effluent discharge to the Allegheny River has resulted in significant habitat modification and degradation that is likely to kill and injure the northern riffleshell, a federally-listed endangered freshwater mussel species that currently survives in "less than 5 percent of its former range."⁷ WTC has reported contributing a daily chloride discharge between 61,480-131,725 from November 2009-present day. Most recently, WTC reported a chloride discharge concentration of 78,760 mg/L in April 2013 and 83,560 mg/L in May 2013. The U.S. Fish & Wildlife Service has stated that chloride concentrations of 122 mg/L will reduce the viability of the northern riffleshell glochidia by 50%.⁸ Because of the endangered northern riffleshell's sensitivity to the presence of chloride, WTC's discharge results in an unlawful "take" of the endangered northern riffleshell in violation of Section 9 of the ESA.

In addition, under section 301(a) of the CWA, a person may not discharge a pollutant to waters of the United States from a point source without, or in violation of, a permit issued under section 402 of the CWA. Waste Treatment Corporation has discharged and continues to discharge effluent outside of its "Subcategory A – Metal wastes" authorization under their National Pollutant Discharge Elimination System ("NPDES") Permit in violation of section 301(a) of the CWA.⁹

WTC's illegal discharges into the Allegheny River, in addition to its violations of its permit and causing impairment of the uses of the receiving waters, has injured, and will continue to injure, the health, environmental, and aesthetic interests of Clean Water Action and its more than 150 members in the vicinity of the discharge. These injuries are traceable to Waste Treatment Corporation's violations of "an effluent standard or limitation"¹⁰ and its actions resulting in harm and harassment of the endangered northern riffleshell and other endangered freshwater mussels, and redressing the ongoing violations is likely to redress Clean Water Action's injuries. We provide this 60-day notice pursuant to section 505(b) of the CWA¹¹ and section 11(g)(2) of the ESA.¹²

Clean Water Action is a non-profit, member-based organization incorporated and organized under the laws of Washington, D.C. Clean Water Action is a national organization with a member base of over one million. Clean Water Action has 100,000 members in Pennsylvania and maintains three offices in the Commonwealth: Pittsburgh, Harrisburg and

⁶ The northern riffleshell is listed as endangered at 50 C.F.R. § 17.11. The list is also available online at http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp.

⁷ See U.S. Fish & Wildlife Service, Midwest Region, Northern Riffleshell profile, *available at* <http://www.fws.gov/midwest/endangered/clams/n-riffleshell.html> (last checked July 16, 2013).

⁸ Appendix K (Letter from Clinton Riley, Field Office Supervisor of Pennsylvania Field Office of the US Department of the Interior Fish & Wildlife Service to S. Craig Lobins, Oil and Gas Program Manager, Pennsylvania Department of Environmental Protection, dated March 4, 2011), at 1.

⁹ 33 U.S.C. § 1311; 35 P.S. § 691.301.

¹⁰ 33 U.S.C. § 1365(a)(1)(A) and (f).

¹¹ 33 U.S.C. § 1365(b)(1)(A).

¹² 16 U.S.C. § 1540(g)(2).

Philadelphia. Clean Water Action’s purposes are to empower people to take action to protect America’s waters, to build healthy communities, and to make democracy work for the community through advocacy and litigation.

I. Citizen Suit Authority Under the Clean Water Act and the Endangered Species Act

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.¹³ The CWA defines “person” as including a corporation.¹⁴ 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.”¹⁵ Accordingly, citizens may bring suit to seek civil penalties and enjoin the discharge of pollutants from dischargers, such as Waste Treatment Corporation, and compel that discharger to adhere to the terms of its NPDES permit, including any relevant effluent limitations, narrative criteria, and other conditions. Pursuant to section 505(b) of the CWA, we are writing to notify you that Clean Water Action intends 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, seek penalties, recover attorney fees and cost of litigation, and obtain other appropriate relief.

Section 9(a)(1)(B) of the ESA prohibits “any person subject to the jurisdiction of the United States to . . . take any [endangered] species within the United States.”¹⁶ A “person” includes “. . . an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal government, of any State, municipality, or political subdivision of a State, or any other entity subject to the jurisdiction of the United States.”¹⁷ Congress defined a “take” of fish and wildlife to include the following actions “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁸ The U.S. Fish & Wildlife Service, the agency responsible for administering the ESA, has issued a rule that “harm” is an act that “actually kills or injures wildlife,” including “significant habitat modification or degradation” that results in death or injury to listed species by “significantly impairing essential behavioral patterns, such as breeding, feeding or sheltering.”¹⁹ The term “harass” means an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to disrupt normal behavioral patterns, such as breeding, feeding, or sheltering.²⁰ Modification of the northern riffleshell’s habitat in the Allegheny River through the discharge of pollutants constitutes a section 9 violation of the ESA.

¹³ 33 U.S.C. § 1365(a).

¹⁴ 33 U.S.C. § 1362(5).

¹⁵ 33 U.S.C. § 1365(f).

¹⁶ 16 U.S.C. § 1538(a)(1)(B).

¹⁷ 16 U.S.C. § 1532(13).

¹⁸ 16 U.S.C. § 1532(19).

¹⁹ 50 C.F.R. § 17.3. See also *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 527 U.S. 687 (1995) (upholding the U.S. Fish & Wildlife Service’s definition of harm).

²⁰ *Id.*

In section 11(g) of the ESA, Congress authorized citizens to commence suit after 60 days notice to “enjoin any person...who is alleged to be in violation of any provision [of the ESA] or regulation issued under the authority [of the ESA].”²¹ Citizens such as Clean Water Action may bring suit for WTC’s violation of section 9 of the ESA for the unauthorized take of the northern riffleshell mussel. Pursuant to section 11(g) of the ESA, we are writing to notify you that Clean Water Action intends 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.

II. Factual Background

A. Geographical and Environmental Description

Waste Treatment Corporation is located in the City of Warren, in Warren County, on the bank of the Allegheny River. It is currently operating under an expired, but administratively-extended, NPDES permit issued by the Department in 2003. WTC’s permit (No. PA0102784) authorized the facility to discharge wastewater from the treatment of Subcategory A – Metals wastes,²² municipal wastes, the treatment of small amounts of industrial and municipal sludges, and stormwater.²³

Two permitted internal outfalls (101 and 201) contribute wastewater from WTC’s treatment processes to Outfall 001, which discharges to the Allegheny River at mile 188.6.²⁴ The Allegheny River is designated for protection of the Warm Water Fishery aquatic life use,²⁵ as well as water supply and recreational uses.²⁶

B. History of WTC’s NPDES Authorizations

1. WTC’s 2000 Permit Application

Waste Treatment Corporation has been operating since at least the mid- to late-1980s. The facility’s NPDES renewal application from 2000 (“Application”) states that it treats “residual wastes.”²⁷ According to the Application, the facility “receives wastes from oil & gas

²¹ 16 U.S.C. § 1540(g).

²² “Subcategory A” wastes refer to a subpart of the effluent limitation guideline for centralized wastewater treatment facilities (CWTs) that applies to “wastes from the treatment of, or recovery of metals from, both metal-bearing wastes received from off-site and other CWT wastewater associated with the treatment of, or recovery of metal-bearing wastes.” 40 C.F.R. § 437.10(a). Other subparts may apply to the CWT point source category for Subpart B “oils treatment and recovery,” Subpart C “organics treatment and recovery,” or Subpart D “multiple wastestreams.” 40 C.F.R., Part 437. However, wastes from oils or organics treatment and recovery or mixed wastes were not authorized in WTC’s NPDES permit.

²³ Appendix A (NPDES Permit No. PA0102784, Waste Treatment Corporation), at 2, 3, 5 (Permit Part A, Section I), and 17 (Permit Part C(II)(1)).

²⁴ *Id.*

²⁵ 25 Pa. Code § 93.9q.

²⁶ Appendix B (2003 Fact Sheet for NPDES Permit No. PA0102784, Waste Treatment Corporation), at 5.

²⁷ Appendix C (NPDES Application with Accompanying Influent Analyses, June 2000 from Waste Treatment Corporation) at 1.

wells, a paint manufacturing industry, municipal drinking water treatment facility (sludge), a titanium source, & sewage treatment plant facility (sludge).”²⁸

Along with its Application, WTC submitted analyses of the various waste streams it was accepting for treatment. These included data from waste generated from the manufacture of liquid aluminum sulfate and from a petrowax refining facility, but the only other influent data in the application comes from municipal sewage treatment plants.²⁹ Noticeably absent was any specific information on pollutants attributable to the wastes from oil and gas production.³⁰ Follow up letters from WTC to the Department list the “10 largest customers” in the oil and gas categories.³¹ These letters are accompanied by WTC’s wastewater effluent analyses from 2002. Aside from the inclusion of an “oil recovery flow chart” from an oil recycling facility, WTC did not clearly identify “specific information about the presence and quantity of specific pollutants”³² in the oil and gas wastestream that it stated it was accepting from the oil and gas industry. There is no full description of who is generating the waste and no characterization or other description of pollution concentration levels for those wastes.³³

2. Waste Treatment Corporation’s 2003 NPDES Permit

Although the application was submitted in 2000, the Department did not issue WTC’s permit until 2003. Notably, however, the Department did not issue a permit that explicitly allowed the discharge of effluent resulting from oil and gas wastes. The Department’s effluent limitations in the permit—which were based on the waste characterizations and data provided by Waste Treatment Corporation—do *not* contemplate wastes from oil and gas production. The primary internal outfall, Outfall 101, receives wastes “from treatment of Subcategory A – Metal wastes, ‘low BOD’ municipal wastes, and stormwater from the following areas that must be treated: 1) ‘brine unloading dike’; 2) ‘101 sludge dike’; and 3) ‘truck unload #2 area.’”³⁴ The other internal outfall (designed only for a flow of approximately 7,000 gallons per day) receives wastes “from ‘high BOD’ . . . wastewater from the processing of industrial and municipal

²⁸ *Id.*

²⁹ *See id.* at 21-166. 115 pages of the discussion of influent data and treatment processes pertained to processing municipal wastes. 29 pages were devoted to analysis of the petro wax refining facility. Another 23 discussed wastewater from the Owens-Brockway Glass Company, with the other 74 pages discussing municipal and various other sources of wastewater and treatment processes except for oil and gas wastewater.

³⁰ Interestingly, in its 1995 NPDES Permit application, WTC (then called “Environmental Development Corporation”) did provide wastewater data “Treated Oil & Gas Water” from three different sources. The data from those sources indicated pollutant concentrations of magnesium, manganese, benzene, toluene, chloride, alkalinity, hardness, sodium, calcium, specific conductance, Li, osmotic pressure, TDS, aluminum, TSS, Ammonia-N, oil & grease, bromide, pH, sulfate, surfactants, As, Zinc, phenols, and barium. *See* Appendix I, Water Quality Protection Report from 1995. However, similar information was not provided in the 2000 NPDES Permit application and was not authorized in the 2003 NPDES Permit.

³¹ Appendix M (Letters from WTC to the Pennsylvania Department of Environmental Protection dated May 9, 2003, May 15, 2003, and July 7, 2003.)

³² UNITED STATES ENVTL. PROT. AGENCY, REVISED POLICY STATEMENT ON SCOPE OF DISCHARGE AUTHORIZATION AND SHIELD ASSOCIATED WITH NPDES PERMITS, at 2 (1994), *available at* <http://www.epa.gov/compliance/resources/policies/civil/cwa/shield.pdf> (“REVISED POLICY”).

³³ *Id.*

³⁴ Appendix A, at 3.

sludge.”³⁵ Effluent from the two internal outfalls is combined with any collected stormwater and discharged through Outfall 001 to the Allegheny River.

i. Monitoring Requirement and Effluent Limitations

The Department based the permit’s requirements for monitoring and effluent standards according to the “anticipated . . . characteristics” of the wastes discussed above.³⁶ Waste Treatment’s permit allows the facility to discharge up to 213,000 gallons of wastewater per day.³⁷ At the external outfall, WTC is required to monitor for chlorides, osmotic pressure, and toxics in the final effluent. However, many effluent limitations apply to the effluent passing through the facility’s internal outfalls.

Over 95% of the final effluent comes from Outfall 101, which is permitted to discharge treated metals and municipal wastes as well as stormwater.³⁸ The effluent from this outfall is subject to effluent limitations, which limit the effluent concentrations for a number of metals (Aluminum, Cadmium, Selenium, Tin, Titanium, and Vanadium), and other parameters such as pH, Arsenic, and Total Suspended Solids.³⁹ As discussed below, Waste Treatment Corporation has discharged effluent that has violated the limitations for each of these, and continues to violate the effluent limitations for some of them, even after Department action.

ii. Special Conditions Governing Waste Acceptance

The section of Waste Treatment’s permit containing effluent limitations for Outfall 101 directs the permittee to “refer to Special Conditions Nos. 1 and 2 describing permitted waste acceptance.”⁴⁰ These conditions restrict the types of waste that the facility may accept as influent for treatment, thus protecting the receiving waters from pollutants which the facility does not or cannot remove from incoming wastes. Special Condition 1 states:

Unless and until this permit is amended, the permittee is only allowed to accept and treat trucked in Subcategory A – Metals wastes, and *is prohibited from accepting and treating trucked in wastes that fall under Subcategory B – Oils, Subcategory C – Organics, or Subcategory D – Mixed Wastes* as described under 40 CFR § 437.⁴¹

Although Waste Treatment Corporation stated in its application that it treated wastes from oil and gas wells, the Department specifically prohibited the facility from accepting those wastes. Subcategory A – Metals wastes consist of “both metal bearing wastes received from off-site and

³⁵ *Id.* at 5.

³⁶ *Id.* at 3, 5.

³⁷ *Id.* at 2.

³⁸ *Id.* at 3.

³⁹ *Id.* at 3-4.

⁴⁰ *Id.*

⁴¹ Appendix A, at 17 (emphasis added).

other CWT wastewater associated with the treatment of, or recovery of metal-bearing wastes.”⁴² Subcategories B – Oils, and C – Organics, consist of oily and organic wastes, respectively.⁴³ The Mixed Wastes subcategory allows the operator of a CWT which desires to treat more than one subcategory of waste to elect to have a single set of effluent limitations cover its mixed waste streams.⁴⁴

iii. Additional Narrative Water Quality Criteria

Finally, in addition to the specific effluent limitations, monitoring requirements, and specific limitations on the categories of acceptable wastes, WTC’s permit contains a narrative water quality standard.⁴⁵ This standard ensures that a waterbody’s uses are being attained and protected by prohibiting point and nonpoint source discharges in amounts which are “harmful to the water uses . . . or to human, animal, plant or aquatic life.”⁴⁶ Called “General Water Quality Criteria” in Pennsylvania, these criteria “shall be achieved in surface waters at all times at design conditions.”⁴⁷

To that end, WTC’s permit requires that “[a]ll discharges of floating materials, oil, grease, scum, sheen and substances which produce color, tastes, odors, turbidity or settle to form deposits shall be controlled to levels which will not be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.”⁴⁸ The discharge of oil, grease, and substances in such quantities that harm aquatic life runs afoul of this permit condition, and constitutes a violation of the Clean Water Act and the Clean Streams Law.

3. 2008 Permit Application and Correspondence of Deficiencies

Waste Treatment Corporation applied to renew its NPDES permit in May of 2008, however it has not yet been issued. The renewal application proposed to “only accept oil and gas wastewaters, including that from ‘Marcellus wells.’”⁴⁹ “[T]he Department determined that it could not renew the NPDES Permit because WTC was not in compliance with the existing NPDES Permit and Clean Streams Law.”⁵⁰ The noncompliance cited by the Department includes effluent limitation violations, sampling and record keeping problems, and failing to obtain a Water Quality Management Permit.⁵¹

⁴² 40 C.F.R. § 437.10(a).

⁴³ 40 C.F.R. §§ 437.20(a), 437.30(a).

⁴⁴ See 40 C.F.R. § 437.40(a); U.S. ENVTL. PROT. AGENCY, SMALL ENTITY COMPLIANCE GUIDE: CENTRALIZED WASTE TREATMENT EFFLUENT LIMITATION GUIDELINES AND PRETREATMENT STANDARDS (40 CFR 437) §7-3 (June, 2001), available at http://water.epa.gov/scitech/wastetech/guide/treatment/upload/2006_12_28_guide_cwt_CWTcompliance_guide.pdf (“SMALL ENTITY COMPLIANCE GUIDE”).

⁴⁵ *Id.* at 7.

⁴⁶ 25 Pa. Code § 93.6(a).

⁴⁷ 25 Pa. Code § 96.3.

⁴⁸ Appendix A, at 7 (Part A, Section I.c).

⁴⁹ Appendix I, Waste Treatment Corporation, Warren, Warren County, NPDES No. PA0102784, Water Quality Protection Report, at 1.

⁵⁰ Appendix E (2011 Consent Order and Agreement between the Pennsylvania Department of Environmental Protection and Waste Treatment Corporation), Other Issues ¶ Z.

⁵¹ See Appendix E, Violations ¶¶ U-W.

In addition to WTC's noncompliance with its administratively extended permit, the permit renewal application submitted in mid-2008 was found to be deficient in a number of ways.⁵² Aside from missing or outdated data and schematic drawings, WTC had significantly changed the wastestreams it was accepting, despite the limitations on changing wastestreams contained in its permit. By late 2008, according to the Department, Waste Treatment was no longer accepting any "municipal waste streams or industrial waste for processing" and was accepting "oil and gas production-related streams."⁵³ It is apparent that a number of these problems and deficiencies still exist, because Waste Treatment Corporation still has not been issued a new permit, and has been operating under the expired permit for almost five years.

4. 2011 Consent Order and Agreement

Waste Treatment Corporation and the Pennsylvania Department of Environmental Protection entered into a Consent Order and Agreement in August 2011 for numerous violations of its permit. The Order found WTC exceeded its permit effluent limitations for, among other things, titanium, arsenic, and pH at various times from 2008 through May of 2011.⁵⁴ It also found that the facility was not properly testing for pollutants and keeping records of its analysis.⁵⁵ According to the Order, these exceedances constituted "violations of Sections 301, 307, and 401 of the Clean Streams Law, 35 P.S. §§ 691.301, 691.307, and 691.401."⁵⁶

In response to the violations, the Department ordered Waste Treatment Corporation to pay a civil penalty that was solely "in settlement of . . . the violations set forth" in the Order; it did *not* cover any future violations.⁵⁷ The Order also requires compliance "with all relevant provisions of the Clean Streams Law, all relevant Regulations, and this Consent Order and Agreement."⁵⁸ There was no schedule for compliance; Waste Treatment was required by the Order to operate in compliance with its permit immediately.⁵⁹

5. 2013 PADEP Aquatic Biological Investigation

Though it was never finalized, the Department issued drafts of Waste Treatment Corporation's renewal permit for commenting in early and late 2010. In response, the United States Fish and Wildlife Service raised concerns about sensitive mussel populations and aquatic life near WTC's discharge point.⁶⁰ In October 2012, a Department Water Pollution Biologist sampled benthic organisms upstream, downstream, and at WTC's discharge point. The Department also sampled sediment and water to test for various contaminants. "The purpose of

⁵² See Appendix F (Letter of Technical Deficiencies, NPDES Application No. PA0102784, March 11, 2009); Appendix G (Department Internal Emails re: Permit Application Deficiency, Jan. 2009).

⁵³ Appendix D (NPDES General Inspection Report: November 4, 2008).

⁵⁴ See Appendix E, Permit Violations ¶¶ H–L.

⁵⁵ *Id.*, Violations ¶¶ M–O.

⁵⁶ *Id.*, Violations ¶ U.

⁵⁷ *Id.*, Order § 4(a).

⁵⁸ *Id.*, Order § 3.

⁵⁹ *Id.*

⁶⁰ Appendix K (Letter from Clinton Riley, Field Office Supervisor, U.S. Fish and Wildlife Service, to S. Craig Lobins, Oil and Gas Program Manager, Pennsylvania Department of Environmental Protection (March 4, 2011)).

the aquatic biological investigation was to examine and determine if the . . . WTC discharges are having a negative impact on the Allegheny River.”⁶¹

When the results of the study were released in January 2013, the Department noted “significant shifts in the macroinvertebrate community structure and dominant taxa between stations.”⁶² The reference stations upstream from Waste Treatment Corp. “displayed an aquatic community typical of the upper Allegheny River” while the stations downstream for WTC’s discharge were dominated by “a greater proportion of pollution-tolerant groups.”⁶³ The study also indicated black, oily sediment and a violation of the water quality standard for osmotic pressure downstream from Waste Treatment Corp.⁶⁴ As will be further discussed below, the sampling stations downstream from Waste Treatment Corporation indicated “substantial” negative changes to the macro invertebrate communities which “can be attributed to the WTC discharge.”⁶⁵

III. Violations of the Clean Water Act, the Pennsylvania Clean Streams Law, and the Federal Endangered Species Act.

A. Waste Treatment Corporation Has Routinely and Continually Exceeded the Effluent Limitations in Its NPDES Permit.

As discussed above, the Department and Waste Treatment Corporation executed a Consent Order and Agreement in 2011 stemming from, among other things, discharges which contained pollutant levels exceeding the effluent limitations in the facility’s administratively-extended NPDES permit. Despite this, Waste Treatment Corp. has continued to violate effluent limitations for numerous parameters since that time. Discharges exceeding the effluent limitations in the permit violate the Clean Water Act and the Clean Streams Law, but also violate the terms of the Consent Order.⁶⁶ WTC’s self-reported discharge monitoring reports (DMRs) demonstrate ongoing and continuing violations of section 301(a) of the CWA and violations of the Consent Order and Agreement.⁶⁷ “Violations of ‘average’ limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved.”⁶⁸

Waste Treatment Corporation’s Permit prohibits effluent from having a pH of less than 6 or greater than 9. The facility exceeded that limit only a few months after the Consent Order was executed, with a pH level of 9.2 being recorded on WTC’s Discharge Monitoring Report (“DMR”) for December 2011. In July of 2012, Waste Treatment recorded an even higher pH of 9.8. Most recently, the facility exceeded their effluent limitation for pH in January 2013, recording another level of 9.8. Since 2009 and continuing into the year 2013, WTC has violated its pH effluent limitation a total of 16 times as shown in the table below.

⁶¹ Appendix H (Aquatic Biological Investigation, Warren City Wastewater Treatment Plant (PA0027120) and Waste Treatment Corporation (PA0102784), PADEP, January 10, 2013), at 1.

⁶² *Id.* at 4.

⁶³ *Id.*

⁶⁴ *Id.* at 8.

⁶⁵ *Id.* at 9.

⁶⁶ Appendix E, Order § 3.

⁶⁷ *Id.*; 33 U.S.C. § 1311(a).

⁶⁸ *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.* 791 F.2d 304, 317 (4th Cir. 1986).

DMR Date	Outfall #	Effluent Limit	Permit Limit	Reported Discharge
November 2009	101A	pH	9.0 s.u. maximum	9.2 s.u.
February 2010	101A	pH	9.0 s.u. maximum	9.8 s.u.
March 2010	101A	pH	9.0 s.u. maximum	9.6 s.u.
April 2010	101A	pH	9.0 s.u. maximum	10.2 s.u.
April 2010	101A	pH	6.0 s.u. minimum	3.0 s.u.
May 2010	101A	pH	9.0 s.u. maximum	9.8 s.u. ⁶⁹
May 2010	101A	pH	6.0 s.u. minimum	4.9 s.u.
December 2010	101A	pH	9.0 s.u. maximum	9.8 s.u.
January 2011	101A	pH	9.0 s.u. maximum	9.2 s.u.
April 2011	101A	pH	9.0 s.u. maximum	9.7 s.u.
May 2011	101A	pH	9.0 s.u. maximum	9.1 s.u.
August 2011	101A	pH	9.0 s.u. maximum	9.9 s.u.
December 2011	101A	pH	9.0 s.u. maximum	9.2 s.u.
July 2012	101A	pH	9.0 s.u. maximum	9.8 s.u.
July 2012	101A	pH	6.0 s.u. minimum	4.6 s.u.
January 2013	101A	pH	9.0 s.u. maximum	9.8 s.u.

Waste Treatment Corporation posted similar exceedances of its permit effluent limitation for titanium. Its permit limits titanium in the effluent to a maximum of 0.0947 mg/L daily and 0.0618 mg/L for the monthly average. In January, the facility discharged nearly 175% of the maximum for the monthly average effluent limitation (0.1072 mg/L). WTC violated both the daily maximum and monthly average limits for titanium in its effluent in February and September 2012 as well, according to the DMRs. Since violations of average effluent limits encompass a full calendar month, a single average limit violation is treated as a violation for each day of the month.⁷⁰ Each exceedance is listed in the table below and represents a total of 183 violations.

DMR Date	Outfall #	Pollutant	Permit Limit	Reported Discharge
February 2011	101A	Total Titanium	0.0618 mg/L average monthly	0.0751 mg/L
April 2011	101A	Total Titanium	0.0618 mg/L average monthly	0.0941 mg/L
April 2011	101A	Total Titanium	0.0947 mg/L daily maximum	0.1340 mg/L

⁶⁹ Reported as 98450, but appears to be an error and should have been reported as 9.8 s.u.

⁷⁰ *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.* 791 F.2d 304, 317 (4th Cir. 1986).

May 2011	101A	Total Titanium	0.0618 mg/L average monthly	0.0712 mg/L
January 2012	101A	Total Titanium	0.0618 mg/L average monthly	0.1072 mg/L
January 2012	101A	Total Titanium	0.0947 mg/L daily maximum	0.1360 mg/L
February 2012	101A	Total Titanium	0.0618 mg/L average monthly	0.1012 mg/L
February 2012	101A	Total Titanium	0.0947 mg/L daily maximum	0.1130 mg/L
September 2012	101A	Total Titanium	0.0618 mg/L average monthly	0.0776 mg/L
September 2012	101A	Total Titanium	0.0947 mg/L daily maximum	0.1040 mg/L

Arsenic is another toxic metalloid which WTC has routinely discharged in excess of its permit limitations. The permit limits the concentrations of arsenic to 0.104 mg/L for a monthly average and to 0.162 mg/L as the maximum over any given day.⁷¹ WTC was violating its permit and the Consent Order before the ink on the Order had a chance to dry. It exceeded both the monthly and daily limits in September and October 2011. It exceeded the daily maximum effluent limitation again in November 2011. Exceedances of the arsenic limit (a total of 188 violations) are listed in the table below.

DMR Date	Outfall #	Effluent Limit	Permit Limit	Reported Discharge
April 2010	101A	Total Arsenic	0.104 mg/L average monthly	0.131 mg/L
September 2010	101A	Total Arsenic	0.104 mg/L average monthly	0.120 mg/L
September 2010	101A	Total Arsenic	0.162 mg/L daily maximum	0.164 mg/L
October 2010	101A	Total Arsenic	0.104 mg/L average monthly	0.133 mg/L
August 2011	101A	Total Arsenic	0.104 mg/L average monthly	0.142 mg/L
August 2011	101A	Total Arsenic	0.162 mg/L daily maximum	0.171 mg/L
September 2011	101A	Total Arsenic	0.104 mg/L average monthly	0.177 mg/L
September 2011	101A	Total Arsenic	0.162 mg/L daily	0.219 mg/L

⁷¹ Appendix A, at 5.

			maximum	
October 2011	101A	Total Arsenic	0.104 mg/L average monthly	0.120 mg/L
October 2011	101A	Total Arsenic	0.162 mg/L daily maximum	0.287 mg/L
November 2011	101A	Total Arsenic	0.162 mg/L daily maximum	0.172 mg/L

Finally, WTC violated its average monthly selenium limit in September 2010 for a total of 30 violations.

DMR Date	Outfall #	Pollutant	Permit Limit	Reported Discharge
September 2010	101A	Total Selenium	0.408 mg/L average monthly	0.426 mg/L

Waste Treatment Corporation’s own reporting shows that it cannot discharge without recurring violations of its NPDES permit and the 2011 Consent Order. With this letter, Waste Treatment Corporation is put on notice that Clean Water Action will seek civil penalties and an injunction to prevent these and the other violations of the Clean Water Act and Clean Streams law any time after 60 days from the date of this notice.

B. Waste Treatment Corporation is Causing Impairment of the Aquatic Life Use of the Allegheny River by Violating Part A, Additional Requirement C of its NPDES Permit and the Commonwealth’s Antidegradation Policy.

The Clean Water Act and Clean Streams Law require designated and existing uses of a water body to be protected.⁷² To protect those uses, the Department is required to promulgate water quality criteria and an antidegradation policy.⁷³ The general water quality criteria and antidegradation policy are separate from specific effluent limitations, such as those discussed above, but are part of “water quality standards,” and apply to all surface waters.⁷⁴ Part A, Section I., Additional Requirement (c) of WTC’s NPDES Permit provides a narrative standard that requires that “[a]ll discharges of floating materials, oil, grease, scum, sheen and substances which produce color, tastes, odors, turbidity or settle to form deposits shall be controlled to levels which will not be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.”⁷⁵ Violation of the narrative standard in the permit and the antidegradation policy constitutes violation of an “effluent standard or limitation” pursuant to section 505(a)(1) and (f) of the CWA.⁷⁶ Accordingly, Waste Treatment Corporation’s discharges that are causing or contributing to the impairment of Allegheny River are violations of WTC’s NPDES Permit, the Clean Water Act and the Clean Streams Law. WTC’s discharge has been the

⁷² 25 Pa. Code § 96.3(a).

⁷³ 40 C.F.R. § 131.6(c),(d).

⁷⁴ 35 P.S. § 691.402; 25 Pa. Code § 96.3(a)–(c)

⁷⁵ Appendix A, at 7.

⁷⁶ 33 U.S.C. § 1365(f).

source of consistent negative impacts on the river and its aquatic life by causing exceedances of the narrative standard in WTC's NPDES permit, the antidegradation policy, and water quality criteria, contaminating sediment, and impairing the Warm Water Fishery aquatic life use.⁷⁷

1. Waste Treatment Corporation's Discharges Degrade Water Quality and Cause or Contribute to the Allegheny River Exceeding Water Quality Criteria for Its Designated Uses.

The Department's 2013 Aquatic Biological Investigation states that "excellent water quality exists in the upper portion of the Allegheny River" above WTC's discharge and that all the parameters sampled "appear to be within normal limits and protective of aquatic life use."⁷⁸ Even after accounting for the contributions of an upstream municipal sewage plant, water sampled 400 meters downstream of WTC's discharge showed levels of hardness over 8 times higher than background, levels of specific conductivity and total dissolved solids from 10 to 20 times higher than background, and bromide levels 150 times higher than background levels.⁷⁹

Even more concerning is the impact WTC's discharges have on the osmotic pressure of the water. The Department's water quality standard for aquatic life use Warm Water Fishery states that osmotic pressure shall not exceed 50 milliosmoles per kilogram ("mOs/kg").⁸⁰ When the Department sampled in early October of 2012, background osmotic pressure, accounting for other dischargers, measured 19 mOs/kg. Sampling approximately 50 meters downstream from Waste Treatment Corporation's discharge showed a reading of 126 mOs/kg. 400 meters from the discharge point, osmotic pressure was still 2.5 times above background, just meeting the criterion's threshold at 49 mOs/kg.

WTC's true impact becomes clearer with data from its monthly discharge monitoring reports.⁸¹ For the October 2012 reporting period during which the Department conducted sampling for the Aquatic Biological Investigation, WTC reported a daily maximum of 1,242 mOs/kg for the final effluent that it discharged. In every monthly discharge monitoring report after from November 2012 through May of 2013, WTC's effluent has reported a daily maximum exceeding 3,200 mOs/kg. In May 2013, WTC reported osmotic pressure readings of 3,989 mOs/kg. In addition, WTC has reported contributing a daily chloride discharge between 61,480-131,725 from November 2009-present day. Most recently, WTC reported a chloride discharge concentration of 78,760 mg/L in April 2013 and 83,560 mg/L in May 2013.

The Department's October 2012 data shows that Waste Treatment Corporation's discharges have impaired the aquatic life use of the Allegheny River by degrading water quality and violating specific water quality criteria for osmotic pressure. Since that time, WTC's discharge concentrations have not varied significantly, resulting in an ongoing designated use impairment of the Allegheny River. Furthermore, the facility's own DMRs indicate that the

⁷⁷ See 25 Pa. Code §§ 93.3, 93.4, 93.4a(b).

⁷⁸ Appendix H, at 7.

⁷⁹ *Id.* at 4.

⁸⁰ 25 Pa. Code § 93.7

⁸¹ DMR data from 2007 to present day are available at the Pennsylvania Department of Environmental Protection's NPDES eDMR Data System, *available at* http://www.ahs.dep.state.pa.us/NRS/broker.exe?_service=tim&_program=nrs101.nrs101e.sas.

impairment likely has become more significant since the Department's investigation. By causing this impairment, Waste Treatment Corp. is violating the Clean Water Act and Clean Streams Law.⁸²

2. Waste Treatment Corporation's Contamination of Sediment Negatively Impacts the Allegheny River and Violates the General, or Narrative, Water Quality Criteria and the Clean Water Act and Clean Streams Law.

WTC's permit contains a provision of general water quality criteria.⁸³ To that end, WTC's permit requires that "[a]ll discharges of floating materials, oil, grease, scum, sheen and substances which produce color, tastes, odors, turbidity or settle to form deposits shall be controlled to levels which will not be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life."⁸⁴ Any such discharges by Waste Treatment Corporation that are harmful to the Allegheny River's uses are thus prohibited.

The Department's 2013 Aquatic Biological Investigation notes that "WTC discharge sediment was black with a strong petroleum odor and petroleum oils were present. [Downstream stations also] has some petroleum related sediment odor and oil with black sediment occurring in depositional and erosional areas."⁸⁵ The Investigation notes that Waste Treatment Corp. is negatively impacting the receiving water.⁸⁶ The Department also notes that radionuclides were "elevated" in WTC's discharge, including lead-212 (8,550 pCi/kg +/- 575 pCi/kg), radium-226 (55,400 pCi/kg +/- 3,890 pCi/kg), lead-214 (41,100 pCi/kg +/- 2,650 pCi/kg), and radium-228 (24,300 pCi/kg +/- 1,920 pCi/kg).⁸⁷ The sediment in WTC's discharge was also found to be elevated in barium (3,076 mg/kg), sodium (1,062 mg/kg), and strontium (366 mg/kg).

These deposits of black sediment with a strong petroleum odor and petroleum odors in and along the Allegheny River originating from WTC's discharge are inimical and harmful to the aquatic life and contact recreation uses of the Allegheny River. In addition, these petroleum-laden sediments are harmful to human, animal, plant and aquatic life in and along the River. WTC's discharge of this sediment constitutes a violation of Part A, Additional Requirement (c) of its NPDES Permit. Furthermore, WTC's NPDES Permit requires it to "take all reasonable steps to minimize or prevent any discharge...in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment."⁸⁸ WTC has not taken any measures to mitigate the negative impact of its discharge, which constitutes yet another violation of its NPDES permit.

⁸² See 40 C.F.R. §122.44(d) (incorporated by 25 Pa. Code § 92a.44).

⁸³ See 25 Pa. Code § 93.6

⁸⁴ Appendix A, at 7.

⁸⁵ Appendix H, at 8.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Appendix A, at 13 (Part B.I.E.).

3. WTC Is Causing or Contributing to the Impairment of the Warm Water Fishery Use of the Allegheny River.

In addition to testing water and sediment quality, the Department sampled the macroinvertebrate community above and below WTC's discharge point. The Department then used a number of different indices to gauge how similar the upstream and downstream reference stations were, as well as an overall Index of Biotic Integrity to gauge whether a portion of a stream is attaining its aquatic life designated use.⁸⁹ "In general, if a stream scores greater than 63.0 [on the IBI], it is considered to be attaining its aquatic designated use. . . . If the IBI score is less than 50, the stream is considered to be not attaining its designated aquatic life use."⁹⁰

The Department's data showed that the reference station just above the Waste Treatment Corporation point of discharge had an IBI score of 63.9.⁹¹ However, approximately 55 meters downstream of the discharge point, the IBI score dropped to 25.8, barely half of what is required for the stream segment to be attaining its designated use.⁹² At 400 meters downstream, the stream still had not recovered to the point it was attaining the aquatic life use.⁹³ These are significant impairments of the River, the cause of which falls squarely upon Waste Treatment Corporation.⁹⁴

As a result of the Department's Aquatic Biology Investigation, it is clear that Waste Treatment Corporation's unpermitted and illegal discharges are harming and continue to threaten the ability of the Allegheny River to support its designated uses in further violation of Part A, Additional Requirement (c) of its permit. In addition, WTC has failed to mitigate the adverse affects of its discharge in violation of Part B, I. Management Requirements, E. Duty to Mitigate, of its NPDES Permit.⁹⁵ Further discharges of oil and gas wastewater from the facility will continue to degrade water quality and violate the Clean Water Act and Clean Streams Law.

4. WTC Has Violated, and Continues to Violate, Its NPDES Permit and Pennsylvania's Antidegradation Policy Because Its Discharge Occurs Within the Vicinity of the Critical Habitat of a Federally-listed Endangered Mussel Species, the Northern Riffleshell.

The United States Department of the Interior' Fish and Wildlife Service has stated that "available data indicate that northern riffleshell is present in the Allegheny River in the vicinity of the WTC outfall and that the outfall may affect this species."⁹⁶ The Pennsylvania antidegradation policy, encompassed in the use protection requirement of WTC's NPDES Permit in Part A., Section 1, Additional Requirements (c), requires existing use protection for

⁸⁹ *Id.* at 3, 5.

⁹⁰ *Id.* at 5.

⁹¹ *Id.*, Table 3.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.* at 8–9.

⁹⁵ Appendix A, at 13.

⁹⁶ Appendix K (Letter from Clinton Riley, Field Office Supervisor of Pennsylvania Field Office of the US Department of the Interior Fish and Wildlife Service to S. Craig Lobins, Oil and Gas Program Manager, Pennsylvania Department of Environmental Protection, dated March 4, 2011), at 1.

endangered species such as the northern riffleshell and other endangered freshwater mussels. The U.S. Fish and Wildlife Service has stated that the northern riffleshell is “extremely sensitive to chloride.” The Service estimates that in-stream concentrations of chloride at 122 mg/L will reduce the survival of the endangered mussel by 50%, which the Service would consider an “unauthorized take” pursuant to the Endangered Species Act. The Department’s Aquatic Biology Investigation found chloride concentrations of 20.4 mg/L and 45.1 mg/L upstream of WTC’s discharge. The Investigation report shows that WTC’s effluent contained 8,080 mg/L of chloride. WTC has reported contributing a daily chloride discharge between 61,480-131,725 from November 2009-present day. Most recently, WTC reported a chloride discharge concentration of 78,760 mg/L in April 2013 and 83,560 mg/L in May 2013. At sampling stations downstream of WTC’s discharge, the in-stream chloride concentrations were found at 2,725 mg/L at one station and 1,065 mg/L at another station. These downstream concentrations far exceed the U.S. Fish & Wildlife Service’s unauthorized take criteria for the endangered northern riffleshell. Such impairment of the habitat for endangered aquatic life such as the northern riffleshell constitute a violation of Pennsylvania’s antidegradation policy and the existing use protection afforded by WTC’s NPDES Permit in Part A, Additional Requirement (c).

C. WTC Has Taken Endangered Species in Violation of the Endangered Species Act.

WTC’s discharge contains pollutants that have modified and continue to modify the habitat of the northern riffleshell and other freshwater endangered mussel species to the extent that its actions constitute an unauthorized take of the endangered mussel by harassment. The Department’s Aquatic Biology Investigation and the U.S. Fish & Wildlife Service’s own study of WTC’s discharge demonstrate that WTC’s plume of discharged pollutants, especially its discharge of chloride, result in injury and death of the northern riffleshell in the Allegheny River. The U.S. Fish & Wildlife Service has determined that at the hardness levels of the Allegheny River around WTC’s discharge, chloride concentrations of 122 mg/L will reduce the viability of the northern riffleshell glochidia by 50%.⁹⁷ Since WTC’s discharges of chloride result in downstream concentrations of chloride at 2,725 mg/L and 1,065 mg/L, and the northern riffleshell glochidia has been found upstream and downstream of WTC’s effluent plume in the Allegheny River, WTC is “harassing” the northern riffleshell by intentionally or negligently creating the likelihood of injury and modification of habitat.⁹⁸ WTC is causing “harm” to the endangered northern riffleshell by discharging chloride concentrations that kill or injure the mussel within its discharge plume and significantly modify and degrade the Allegheny River habitat of the mussel.⁹⁹ WTC’s taking of the northern riffleshell is ongoing as WTC reported a chloride discharge concentration of 78,760 mg/L in April 2013 and 83,560 mg/L in May 2013. WTC’s actions in the past, in the present, and in the future will result in injury and death to the

⁹⁷ *Id.*

⁹⁸ 16 U.S.C. § 1532(19) (defining “take” in the ESA); 50 C.F.R. § 17.3 (defining “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”).

⁹⁹ 50 C.F.R. § 17.3 (defining “harm” to mean “an act which actually kills or injures wildlife...[including] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns....”).

northern riffleshell and other freshwater endangered species as a result of the destruction and degradation of its habitat.

D. Waste Treatment Corporation Has and Continues to Discharge Subcategory B, C or D Oil and Gas Wastewater Without Authorization.

Waste Treatment Corporation has been illegally discharging oil and gas wastewater since at least 2003, and continues to discharge such wastewater without authorization under the Clean Water Act and the Clean Streams Law. Although WTC disclosed that it received wastes for treatment from oil and gas wells in its 2000 NPDES permit application, the permit granted by the Department in 2003 expressly prohibited the facility from accepting Subcategory B – Oils wastes, Subcategory C – Organics, or Subcategory D – Mixed Wastes. In addition, the presence and concentration of pollutants of concern for oil and gas wastewater were not disclosed in the 2000 permit application and were not addressed in the 2003 NPDES permit.

The Clean Water Act and the Clean Streams Law prohibit the discharge of “any pollutant by any person” except where authorized by a valid NPDES permit.¹⁰⁰ Compliance with a permit is deemed compliance with the CWA.¹⁰¹ The discharge of a specific pollutant from a point source is illegal unless authorized by a permit.¹⁰² EPA rules require that applicants provide a full characterization of the wastewater it intends to accept, including estimated concentrations of each pollutant.¹⁰³ Even though WTC identified its oil and gas wastestream in correspondence following the 2000 Permit Application, it did not identify all oil and gas pollutants of concern that have subsequently been found in WTC’s effluent and it appears to be discharging wastes in the Subcategory B-D wastestreams.

DEP has stated that pollutants of concern from unconventional oil and gas wastewater include benzene, arsenic, mercury, selenium, total dissolved solids, chlorides, sulfate, pH. Alkalinity, bromide, gross alpha, radium 226 & 228, uranium.¹⁰⁴ A more full list of pollutants of concern identified in hydraulic fracturing fluid has been identified by EPA in its Study of the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources: Progress Report.¹⁰⁵ One of the pollutants of concern identified in EPA’s Study that has also been found in WTC’s

¹⁰⁰ 33 U.S.C. §1311(a); 35 P.S. §§ 691.201–202, 691.301, 691.307, 691.401; 25 Pa. Code §§ 92a.1(b), 92a.9.

¹⁰¹ 33 U.S.C. § 1342(k); 40 C.F.R. §§ 122.5(a), 123.25(a)(2).

¹⁰² REVISED POLICY, at 3.

¹⁰³ 40 C.F.R. §§ 123.25(a)(4) (requiring state implementation of the permit application requirements in 122.21(h)(4) and (k)(5)) (incorporated by reference at 25 Pa. Code § 92a.3(b)(2)).

¹⁰⁴ See Appendix J (DEP Form 26R Chemical Analysis of Residual Waste Annual Report by the Generator Instructions at 3); see also Letter from Pennsylvania DEP Acting Secretary Michael L. Krancer to U.S. EPA Region III, Regional Administrator Shawn M. Garvin, April 6, 2011, at 2, available at http://www.epa.gov/region3/marcellus_shale/Shawn_Garvin_Letter-April_6_2011.pdf.

¹⁰⁵ Study of the Potential Impacts of Hydraulic Fracturing on drinking Water Resources: Progress Report, U.S. EPA, December 2012, App. A, available at <http://www2.epa.gov/hfstudy/study-potential-impacts-hydraulic-fracturing-drinking-water-resources-progress-report-0> (last checked May 17, 2013) (hereinafter “EPA Progress Report”).

effluent is 2-butoxyethanol.¹⁰⁶ WTC did not identify 2-butoxyethanol as present in its wastestream in the 2000 Application and later correspondence with DEP.

Even if disclosure of the acceptance of “wastes from oil and gas wells”¹⁰⁷ and the follow up letters disclosing effluent concentrations from 2002¹⁰⁸ constitutes “specific information about the presence and quantity of a number of specific pollutants in the facility’s effluent,”¹⁰⁹ the Department has the authority to limit or altogether prohibit those waste streams.¹¹⁰ In this case, the Department did just that. The permit that was issued restricts acceptance of wastes to Subcategory A – Metals wastes, and does not allow the Oils or Organics subcategories of wastes¹¹¹ despite a specific request by WTC for authorization to discharge wastes from both Subcategory A - Metals and C - Organics wastestreams.¹¹² On its face, WTC’s permit prohibits oil and gas production wastewater discharges that fall into either Subcategory B, C or D wastestreams rather than Subcategory A. WTC’s current wastestream contains organics and oils (more likely mixed wastes) that its NPDES Permit does not authorize.

The Environmental Protection Agency’s guidance document on effluent limit guidelines for centralized waste treatment facilities is illustrative.¹¹³ In a table of examples falling into the Metals Subcategory, *none* have anything to do with oil and gas production or petroleum products.¹¹⁴ On the other hand, Subcategory B – Oils Wastes examples *all* are related to petroleum production or products, but does not specifically list oil and gas wastewater.¹¹⁵ As described in a Memorandum from James A. Hanlon, Director of the U.S. EPA’s Office of Wastewater Management, when a waste source such as oil and gas development is not listed in EPA’s guidance on applying the Subparts of Part 437, a permit writer may check the oil and grease and metals concentrations to determine the appropriate Subcategory to apply.¹¹⁶ Mr. Hanlon states that “[a]vailable data for Marcellus shale extraction waste water show that the waste does not fit under the Oils or Metals Subcategories.”¹¹⁷ As the Metals Subcategory is the only allowed wastestream in WTC’s 2003 NPDES Permit, the permit does not authorize the discharge of oil and gas wastewaters.

While Special Condition 1 is unambiguous evidence that WTC is prohibited from discharging effluent resulting from oil and gas wastes that fall under the Subcategory B-Oils, C-Organics, or D-Mixed Wastes, the permit’s Fact Sheet provides another clue, as well. The 2003

¹⁰⁶ Appendix L (E-mail exchange between John Holden, P.E., Environmental Program Manager, PA DEP Clean Water Program and Kenneth Scott, PA DEP, June 18, 2012 regarding sampling results from Waste Treatment Corporation’s effluent on April 27, 2012).

¹⁰⁷ See Appendix C, at 1.

¹⁰⁸ Appendix M.

¹⁰⁹ REVISED POLICY, at 1.

¹¹⁰ See REVISED POLICY, at 2, note 2.

¹¹¹ Appendix A, at 17.

¹¹² Appendix M, at 6.

¹¹³ See SMALL ENTITY COMPLIANCE GUIDE, *supra* note 44.

¹¹⁴ *Id.* at § 5-4, Table 5-1.

¹¹⁵ *Id.*

¹¹⁶ Memorandum from James A. Hanlon, Dir., Office of Wastewater Mgmt., U.S. Env’tl. Prot. Agency to the Water Div. Dirs., Regions 1-10 (Mar. 17, 2011), at 12, *available at* <http://cfpub.epa.gov/npdes/hydrofracturing.cfm> (last checked Jul. 19, 2011).

¹¹⁷ *Id.*

NPDES Permit's Fact Sheet shows that the Department developed the effluent limits using Subcategory A – Metals wastes, municipal wastes, and stormwater for Outfall 101.¹¹⁸

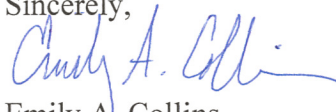
Based on all the above, WTC has been violating section 301(a) of the CWA since at least 2003 by accepting oil and gas wastewater that falls outside of the Subcategory A wastes that it was authorized to accept for treatment.

Conclusion

As described above, Waste Treatment Corporation has violated the Clean Water Act and Pennsylvania's Clean Streams Law in a number of ways. Furthermore, WTC has demonstrated and continues to demonstrate recurring violations of certain effluent limitations and other provisions of its NPDES Permit and the ESA. Waste Treatment Corporation continues to violate its permit's effluent limitations for multiple parameters. Waste Treatment Corporation's discharges are causing and contributing to the degradation of the water quality of the Allegheny River as well as the impairment of its designated aquatic life use in violation of Part A, Additional Requirement (c) of its NPDES Permit. Finally, WTC's discharge is causing and has caused harm and harassment of the northern riffleshell, a protected federally-listed endangered species, and other endangered freshwater species in violation of section 9 of the federal Endangered Species Act. The illegal discharge of Subcategory B-D wastewater from Waste Treatment Corporation's facility is an ongoing violation of the Clean Water Act and Pennsylvania's Clean Streams Law. It has failed to obtain the required amendment or modification of its permit which would allow it to discharge that wastestream. Consequently, Clean Water Action intends to file suit to enjoin these violations as described above and to ensure future compliance, to seek penalties, to 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 to be incorrect, or would like to discuss settlement of this matter prior to litigation, please contact Emily A. Collins, the attorney representing Clean Water Action in this matter at the number listed below.

Sincerely,



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¹¹⁸ Appendix B, at 3.

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<u>Appendix L</u>	E-mail exchange between John Holden, P.E., Environmental Program Manager, PA DEP Clean Water Program and Kenneth Scott, PA DEP, June 18, 2012 regarding sampling results from Waste Treatment Corporation's effluent on April 27, 2012.

Appendix M

Letters from WTC to the Pennsylvania Department of Environmental Protection dated May 9, 2003, May 15, 2003, and July 7, 2003.