

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 584 MD 2005
	:	Civil Action
PPL GENERATION, LLC and	:	
PPL MARTINS CREEK, LLC	:	
	:	
Defendants.	:	

COMPLAINT

The Plaintiff, the Commonwealth of Pennsylvania, Department of Environmental Protection (“Department”), by and through its undersigned counsel, files this Complaint against PPL Generation, LLC and PPL Martins Creek, LLC (“Defendants”) and hereby alleges the following:

1. This is a civil action brought under the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001 (“Clean Streams Law”); Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-6018.1003 (“Solid Waste Management Act”); Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §§ 4001-4015 (“Air Pollution Control Act”); Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, 35 P.S. §§ 6020.101-6020.1305 (“HSCA”); Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27 (“Dam Safety Act”) and Declaratory Judgments Act, Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 P.S. §§ 7531-7541 (“Declaratory Judgments Act”).

2. Through this action, the Department is requesting that the Court declare the Defendants are in violation of these environmental statutes; order the Defendants to continue to locate and remove deposits of fly ash from the Delaware River and to fully assess the impacts to the air, water, and soil; order the Defendants to take all other appropriate action necessary to remedy, mitigate, or offset the harm to the public health and the environment caused by their

violations; assess a civil penalty against the Defendants; order the Defendants to reimburse the Department for all costs and fees incurred by the Department associated with this matter; and to order the Defendants to assess and restore all damages caused to natural resources of the Commonwealth, to pay for all past and future costs for the abatement and restoration of damaged or impacted natural resources of the Commonwealth, and to pay for replacement of any damaged and unrecoverable natural resources of the Commonwealth.

Jurisdiction

3. This Honorable Court has jurisdiction over this matter pursuant to 42 Pa.C.S. § 761, 35 P.S. § 6018.604, 35 P.S. § 691.601, 35 P.S. 4013.6, 35 P.S. § 6020.1103, 35 P.S. § 691.601.

The Parties

4. The Department of Environmental Protection is the executive agency of the Commonwealth of Pennsylvania with the authority and duty to administer and enforce the Clean Streams Law, the Solid Waste Management Act, the Air Pollution Control Act, the Hazardous Sites Cleanup Act, the Dam Safety Act and the rules and regulations promulgated thereunder.

5. PPL Martins Creek, LLC (“PPL Martins Creek”) is a Delaware Limited Liability Company registered to conduct business in the Commonwealth of Pennsylvania, with a registered business address of 2 North Ninth Street, Allentown, Pennsylvania 18101-1179. PPL Martins Creek owns and operates the Martins Creek Steam Electric Station located in Lower Mount Bethel Township, Northampton County, Pa. (“Facility”) and its associated structures and appurtenances, including Fly Ash Basin No. 4.

6. PPL Generation, LLC (“PPL Generation”) is a Delaware Limited Liability Company registered to conduct business in the Commonwealth of Pennsylvania with a registered business address of 2 North Ninth Street, Allentown Pennsylvania 18101-1179. PPL Generation is the parent company of PPL Martins Creek and is responsible for the operation of approximately 40 power plants in northeastern, northwestern and southwestern portions of the United States, including the Facility.

Factual and Procedural Background

Fly Ash Disposal and the Discharge at the Facility

7. The Facility is an electric generating station, or power plant, located in rolling rural farm country in eastern Pennsylvania approximately 15 miles north of the city of Easton. It is surrounded by farm fields to the north, west and south. The Delaware River is at the eastern edge of the Facility. Warren County New Jersey is just across the River to the east of the Facility.

8. The Defendants generate power at the Facility from four power generation units. Two of the units can be fired by oil, natural gas or a combination thereof ("Units 3 and 4") and two of the units are fired by coal ("Units 1 and 2"). Units 3 and 4 have a generating capacity of approximately 835 megawatts each, and Units 1 and 2 have a generating capacity of approximately 150 megawatts each. Power generated from these units is sent to the power transmission grid.

9. The Defendants generate both bottom ash and fly ash from the combustion of pulverized coal in Units 1 and 2 during the power production process.

10. The Defendants generate bottom ash directly from the combustion of coal and mix it with water to produce a slurry. They then pipe the bottom ash slurry to an unlined lagoon or impoundment at the southern end of the Facility known as Ash Basin No. 1 for disposal.

11. Exhaust gasses from coal combustion passes from the boilers in Units 1 and 2 and through air cleaning devices at the Facility known as electrostatic precipitators. Ash removed from the combustion gasses by the electrostatic precipitators is known as fly ash. The Defendants collect the fly ash and mix it with water to produce a slurry. They then pump the fly ash slurry to a lined lagoon or impoundment known as Ash Basin No.4, for disposal.

12. Ash Basin No. 4 is approximately 40-acres in size and was constructed by the Defendants in or around 1989. PPL Martins Creek is permitted by the Department to dispose of fly ash, as well as other types of waste from the Facility, including bottom ash, sediment from the Facility's Industrial Waste Treatment Basin ("IWTB") and iron sludge from boiler cleaning activities in Ash Basin No. 4. For purposes of this Complaint, the Department will refer to the material discharged from Ash Basin No. 4 beginning on August 23, 2005 as "fly ash" or "fly ash

slurry”, even though the discharge may have contained the other types of waste referenced in this paragraph.

13. In Ash Basin No. 4 the water and ash that form the fly ash slurry from Units 1 and 2 separates and fly ash settles to the bottom of the Ash Basin. Water used to form the slurry then discharges through a discharge structure at the southeastern end of the Ash Basin.

14. The Department has issued permits to PPL Martins Creek for the construction and operation of Ash Basin No. 4 and its appurtenances under the Solid Waste Management Act, the Dam Safety Act and the Clean Streams Law. Specifically the Department issued the following permits on the following dates:

- a. Residual Waste Class II Disposal Impoundment Permit No. 301257 issued on January 5, 1999 and reissued on October 30, 2000 for the operation of Ash Basin No. 4.
- b. Dam Safety Permit No. D48-149 on March 31, 1988 for construction, operation and maintenance of the dam.
- c. Water Quality Part II Permit No. 4887204 on March 31, 1988 and modified on June 21, 1990 which authorizes construction and operation of Ash Basin No. 4.
- d. NPDES Permit No. PA0012823 renewed on September 4, 2001 which authorizes the discharge of treated wastewater to the Delaware River.

15. The Defendants controlled the discharge of water from Ash Basin No. 4 through the use of stacked wooden stop logs placed in the discharge structure. The volume of water that was permitted to pass through the discharge structure was regulated by adding or subtracting stop logs to the stack. Settled fly ash was retained at the bottom of the Basin while water from the Basin was permitted to flow over the top of the stop logs, through 33" discharge piping that directs the flow to the Delaware River upstream of the confluence with the Oughoughton Creek. The discharge piping from Ash Basin No. 4 is combined with the discharge piping from the Facility's IWT Basin and is channeled to a single outfall to the Delaware River.

16. The wooden stop logs were the only means the Defendants had of controlling the flow of water from Ash Basin No. 4 through the discharge structure to the discharge pipeline.

The Defendants had no backup mechanism or any other way to control the flow of water and fly ash from Ash Basin No. 4 in the event one or more of the wooden stop logs failed.

17. From the date of construction of Ash Basin No. 4 to August 23, 2005, the Defendants did not routinely and thoroughly inspect the stop logs in the discharge structure in order to evaluate their strength and integrity. The Defendants did not have any plans in place to inspect submerged stop logs.

18. On August 23, 2005, wooden stop logs in the discharge structure of Ash Basin No. 4 failed and an uncontrolled discharge of fly ash slurry poured from Ash Basin No. 4 down the discharge pipeline. The flow of fly ash slurry had so much power and intensity that it blew off two manhole covers in the discharge pipeline, throwing them several meters away, and began overflowing from the pipeline through the manholes. Fly ash slurry then traveled across DePues Ferry Road and into adjacent fields, the Oughoughton Creek and the Delaware River. Fly ash slurry also shot through the discharge pipeline and directly into the Delaware River.

19. On August 23, 2005, at approximately 8:45 p.m., personnel from PPL Martins Creek discovered the discharge of fly ash and fly ash slurry from Ash Basin No. 4.

20. On August 23, 2005, at approximately 10:55 p.m., a representative from PPL Martins Creek contacted the Department to report the discharge.

21. The representative from PPL Martins Creek who contacted the Department failed to make it clear what kind of incident the company was reporting or how serious the discharge was. Based on the information provided by PPL Martins Creek, the Department believed that the company was calling to report a minor air emission.

22. On August 24, 2005, at approximately 8:30 a.m., the Department received a complaint from a citizen stating that fly ash and water was covering one of the Township roads around the Facility.

23. On August 24, 2005, at approximately 8:50 a.m., the Department contacted a representative of the Defendants, who indicated that the situation was under control and that fly ash slurry from Units 1 and 2 was being diverted to Ash Basin No. 1.

24. The temporary use of Ash Basin No. 1 for fly ash storage in an emergency situation is permitted by the waste permit for Ash Basin No. 1. The Department requested the

Defendants to increase their sampling and monitoring of groundwater monitoring wells in the vicinity of Ash Basin No. 1 when the Defendants indicated they were disposing of fly ash slurry from Units 1 and 2 in Ash Basin No. 1.

25. On August 24 and 25, 2005, inspectors from the Department were at the Facility to monitor and gather information on the discharge and cleanup. The Department contacted several different entities about the discharge, including the Delaware River Basin Commission, the U.S. Environmental Protection Agency and the City of Easton Water Authority, which uses the Delaware River as its water supply. In addition, the Department began to take steps to form a natural resources damage assessment (“NRDA”) team , which includes various agencies that are designated as trustees over natural resources of the Commonwealth and the United States.

26. The Easton Water Authority, which operates a water supply intake approximately 8.5 miles down river from the fly ash discharge from Martins Creek, immediately shut down its water intake after being notified of the fly ash discharge. Arsenic levels in the River water at the Easton Water Authority raw water intake spiked soon after the discharge. They subsequently went down.

27. On August 26, 2005, results from water samples collected by the Department that same day indicated that there were elevated levels of arsenic in the Delaware River above the drinking water maximum contaminant level as a result of the discharge of fly ash to the River from Ash Basin No. 4.

28. The Defendants failed to stop the discharge from Ash Basin No. 4 until August 27, 2005.

29. During the period from August 23, 2005 through August 27, 2005, fly ash slurry poured continuously at a rapid rate from the manholes and outlet in the discharge pipeline of Ash Basin No. 4 into the fields surrounding Ash Basin No. 4, the Oughoughton Creek and the Delaware River.

30. Sink holes began to form soon after the discharge, and continue to form, along the discharge pipeline. The sink holes are attributable to water and pressure from the discharge from Ash Basin No. 4 that began on August 23, 2005 and are direct conduits to groundwater.

31. The Defendants have estimated that approximately 100 million gallons of fly ash slurry was discharged from Ash Basin No. 4 from August 23, 2005 through August 27, 2005.

32. Significant amounts or deposits of fly ash remain in the Delaware River as of the date of filing of this Complaint. Impact and damage assessments of the fly ash discharge are ongoing and are expected to continue for an indeterminate period of time.

Post-discharge Activities

33. On September 6, 2005, the Department sent a Notice of Violation (“NOV”) to PPL Martins Creek. The Notice of Violation advised the company that the Department observed several violations of Commonwealth environmental statutes and Department regulations during its August 24 and 25, 2005 inspections. Specifically, the NOV advised PPL Martins Creek, LLC that the company:

1. Permitted an unauthorized discharge of fly ash basin waste from Fly Ash Basin No. 4 to the surface of the ground, Oughoughton Creek and the Delaware River, thereby impacting the surface of the ground and causing water pollution in Oughoughton Creek and the Delaware River in violation of the Clean Streams Law and the Solid Waste Management Act, Solid Waste Permit No. 301257 and NPDES Permit No. PA 0012823.
2. PPL failed to immediately contain the discharge from Fly Ash Basin No. 4 in violation of 25 Pa. Code § 289.274(a)(2).
3. PPL failed to construct and operate Fly Ash Basin No. 4 in such a manner that the potential for a release of solid waste constituents to the water and soil that could threaten public health, safety, welfare and the environment was minimized or prevented, in violation of 25 Pa. Code § 289.291 and Solid Waste Permit No. 301257.
4. The failure of PPL to comply with the terms and conditions of its permit, the environmental protection acts and the Department’s regulations constitutes a public nuisance under the Solid Waste Management Act as well as unlawful conduct under the Solid Waste Management Act and the Clean Streams Law.

34. The NOV also requested a full written report from PPL Martins Creek regarding the investigation of and response to the incident within ten (10) days, and scheduled an

enforcement conference at the Department's Northeast Regional Office to review the report with the company and discuss the incident and response.

35. Following the stoppage of the fly ash discharge on August 27, 2005, the Defendants began excavation and removal of fly ash from DePues Ferry Road, fields that were covered with fly ash and the basin of the Oughoughton Creek. In addition, the Defendants began excavating some of the fly ash deposits on the shores and in shallow areas along the Delaware River at the discharge point and the confluence with the Oughoughton Creek. Fly ash that was removed or excavated from these areas was placed in Ash Basin No. 1.

36. On September 8, 2005, the Defendants detected a leak from Ash Basin No. 1.

37. Pursuant to Section 1 of the Department's Residual Waste Regulations, 25 Pa. Code § 287.1, a leak constitutes a "failure" of an impoundment.

38. Under Section 289.274 of the Department's Residual Waste Regulations, 25 Pa. Code § 289.274, if an impoundment fails, an operator is required to, among other things, immediately stop adding waste to the impoundment.

39. Upon discovering the leak, the Defendants discontinued use of Ash Basin No. 1 for storage of fly ash. In addition, increased sampling of monitoring wells surrounding Ash Basin No. 1 required by the Department indicated that there were increased levels of selenium in groundwater surrounding Ash Basin No. 1. Monitoring wells in the vicinity of Ash Basin No. 1 continue to show high levels of selenium.

40. The Defendants continued to operate Units 1 and 2 at the facility and continued to dispose of fly ash from units 1 and 2 in Ash Basin No. 1 until the leak was detected on September 8, 2005.

41. After discovery of the leak from Ash Basin No. 1, the Defendants halted river cleanup operations pending receipt of approval to use Ash Basin No. 4 for disposal of fly ash from river cleanup operations.

42. On September 16, 2005, PPL Martins Creek submitted the Phase I River Cleanup Workplan for ash removal in the wet at the discharge pipe outfall to the Delaware River ("Phase I Workplan"). The Phase I Workplan called for the use of excavators to dig fly ash and fly ash impacted sediments out of the river bottom. The Department approved the Phase I Workplan

that same day after discussing the proposed cleanup measures in the plan with the NRDA team.

43. On September 17, 2005, PPL Martins Creek began implementing the Phase I Workplan.

44. On September 19, 2005, PPL Martins Creek stopped operations under the Phase I Workplan after determining that no more fly ash was accessible through the use of excavators. Large amounts of fly ash remained in the river following completion of the Phase I Workplan.

45. On September 21, 2005, the Defendants began cleanup work in the area around the Easton Water Authority intake under a Department approved plan. Cleanup work at the intake continued until September 23, 2005. During that time, fly ash and fly ash impacted sediment from the Ash Basin No. 4 fly ash discharge was removed from the area within the Easton Water Authority intake and intake structures.

46. On September 22 and 23, 2005, PPL Martins Creek submitted a finalized Phase II River Cleanup Workplan for ash removal in the dry at the discharge pipe outfall to the Delaware River and at the confluence with Oughoughton Creek ("Phase II Workplan"). The Phase II Workplan required, among other things, construction of an interceptor trench along the river shoreline, de-watering of the area contained within a Portadam, excavation of fly ash and fly ash impacted sediment within the Portadam, reconstruction of the boat launch, and site restoration.

47. On September 23, 2005, the Department approved the Phase II Workplan after discussing the proposed cleanup measures in the plan with the NRDA team. Construction of the Portadam called for in the Phase II Workplan had begun on or about September 19, 2005, with Department approval. Other activity called for under the Workplan began to move forward after receipt of Department approval of the Workplan.

48. On September 24, 2005, PPL Martins Creek submitted the Phase III River Cleanup Workplan for ash removal from two pools (Pool #1 and Pool #2) in the Delaware River where recoverable ash deposits were identified ("Phase III Workplan"). As part of the Phase III Workplan, PPL Martins Creek requested permission to conduct a pilot demonstration of the river dredging operation as called for by the Workplan.

49. On September 26, 2005, the Department granted approval for the pilot demonstration of the river dredging operation discussed in the Phase III Workplan after

reviewing the proposed pilot project with the NRDA team. The Department, however, had concerns with the proposed Phase III Workplan and submitted comments to PPL Martins Creek.

50. On September 28, 2005, an enforcement conference between representatives from the Department, PPL Martins Creek and PPL Generation was held at the Department's Northeast Regional Office in Wilkes-Barre. During the enforcement conference the Department indicated that it intended to pursue enforcement action and assess a civil penalty against PPL for the fly ash discharge from Ash Basin No. 4 that began on August 23, 2005. The Department also requested information from PPL regarding its investigation of and response to the fly ash discharge.

51. On or about October 7, 2005, prior to completion of the Phase II Workplan and before the Department's comments on the Phase III Workplan were addressed, heavy rainfall began causing the Delaware River levels to rise and the river flow to increase significantly. The high flow destroyed the Portadam that was being used to control water flow in areas of large fly ash deposits under the Phase II Workplan. Consequently, the River cleanup area was flooded and the Defendants halted cleanup operations that were being conducted prior to completion of the Phase II Workplan. Cleanup work under the Phase III Workplan pilot demonstration was also stopped. Rain continued off and on until October 14, 2005 and river flow remained high for several days thereafter.

52. River water sampling conducted during the high water and heavy rain that occurred from October 7, 2005 through October 14, 2005 indicated that there was an increase in arsenic levels in the river as a result of fly ash being stirred up by increased water flow. This continues to be a water pollution problem that results directly from the fly ash discharge that began on August 23, 2005.

53. By the last week of October, 2005, river flow decreased enough to allow the Defendants to re-survey some areas of the River in an effort to determine what effect the rains and increased flows had on fly ash deposits in the River. This surveying work indicated that previously identified pockets of fly ash had been broken up and spread around by the increased water flow.

54. Fly ash recovery being conducted pursuant to the Phase II Workplan remains halted since October 7, 2005 and significant deposits of fly ash remain in the river.

55. Defendants have not addressed the Department's comments on the Phase III Workplan and have not begun implementation of the Phase III Workplan. The Defendant's must revise or submit a new workplan in order to recover fly ash deposits that remain in the Delaware River.

56. The Department is continuing its monitoring, sampling and evaluation of conditions in the Delaware River in order to identify and assess any threats or potential threats posed to human health, safety, welfare and the environment. Impacts to land, waters of the commonwealth (including groundwater and residential wells) and other natural resources outside the river are also being evaluated to determine the full extent of the impact of the discharge of fly ash and fly ash slurry from Ash Basin No. 4. Evaluation of the impacts of the fly ash discharge will continue for an indeterminate period.

57. The fly ash discharge from the Defendant's Facility that began on August 23, 2005 continues to impact the Delaware River and groundwater in the area of the discharge. Impacts may continue for an indeterminate period of time.

58. In response to the fly ash discharge from Ash Basin No. 4, the Department has spent, and continues to spend, significant time and resources on evaluating and addressing the effects of the discharge.

COUNT I
SOLID WASTE MANAGEMENT ACT AND RESIDUAL WASTE REGULATIONS
STORAGE AND DISPOSAL OF RESIDUAL WASTE

59. Paragraphs 1 through 58, above, are re-alleged and incorporated herein by reference.

60. The Defendants are "persons" as that term is defined in Section 103 of the Solid Waste Management Act, 35 P.S. § 6018.103.

61. The fly ash and fly ash slurry that was contained in Ash Basin No. 4 and that was discharged from Ash Basin No. 4 from August 23, 2005 through August 27, 2005 is "residual waste" and "solid waste", as those terms are defined in Section 103 of the Solid Waste Management Act, 35 P.S. § 6018.103.

62. The discharge of fly ash and fly ash slurry from Ash Basin No. 4 from August 23, 2005 through August 27, 2005, and the deposition, spilling and leaking of that fly ash and fly ash slurry on the surface of the ground, the basin of the Oughoughton Creek and the Delaware River constitutes “disposal”, as that term is defined in Section 103 of the Solid Waste Management Act, 35 P.S. § 6018.103.

63. Section 302(a) of the Solid Waste Management Act, 35 P.S. § 6018.302(a), provides, in relevant part, that it shall be unlawful for any person to dispose, or permit the disposal of, any residual waste in a manner which is contrary to the rules and regulations of the Department.

64. Section 610(1) of the Solid Waste Management Act, 35 P.S. § 6018.610(1), provides, in relevant part, that it shall be unlawful for any person to permit the dumping or depositing of any solid waste onto the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping has been obtained from the Department.

65. Section 201 of the Department’s Residual Waste Regulations, 25 Pa. Code § 289.201, provides, in relevant part, that a person that operates a residual waste disposal impoundment shall comply with the Solid Waste Management Act, the Department’s Residual Waste Regulations and other applicable regulations promulgated under the Act.

66. From August 23, 2005 through August 27, 2005, the Defendants disposed of, and permitted the disposal of, residual waste, to wit, fly ash from Fly Ash Basin No. 4, to the surface of the ground, the basin of the Oughoughton Creek and the Delaware River without a permit or authorization from the Department. Such conduct is a violation of Sections 302(a) and 610(1) of the Solid Waste Management Act, 35 P.S. §§ 6018.302(a) and 6018.610(1) and the rules and regulations of the Department, including, but not limited to, Section 201 of the Department’s Residual Waste Regulations, 25 Pa. Code § 289.201

67. Section 604 of the Solid Waste Management Act, 35 P.S. § 6018.604 provides, in relevant part, that in addition to any other remedies provided in the Act, the Department may institute a suit in equity in the name of the Commonwealth where a violation of law or nuisance exists for an injunction to restrain a violation of the Act or the rules and regulations adopted or

issued thereunder and to restrain the maintenance or threat of a public nuisance. In any such proceeding, the court shall, upon motion of the Commonwealth, issue a prohibitory or mandatory preliminary injunction if it finds that the Defendant is engaging in unlawful conduct as defined by this act or is engaged in conduct which is causing immediate and irreparable harm to the public. In addition to an injunction, the court in such equity proceedings, may levy civil penalties as specified in Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605.

68. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 604 of the Solid Waste Management Act, 35 P.S. § 6018.604.

COUNT II
SOLID WASTE MANAGEMENT ACT AND RESIDUAL WASTE REGULATIONS
FAILURE TO DESIGN CONSTRUCT, MAINTAIN AND OPERATE FACILITIES

69. Paragraphs 1 through 68, above, are re-alleged and incorporated herein by reference.

70. Section 302(b) of the Solid Waste Management Act, 35 P.S. § 6018.302(b), provides, in relevant part, that it shall be unlawful for any person who stores or disposes of residual waste to fail to design, construct, operate and maintain facilities and areas in a manner which shall not adversely affect or endanger public health safety and welfare or the environment or cause a public nuisance.

71. The Defendants failed to design, construct, operate and maintain the discharge structure in such a manner that the stop logs would not fail or that a discharge from Ash Basin No. 4 could be prevented or controlled in the event a stop log or logs failed.

72. The failure of the stop logs in Ash Basin No. 4 resulted in a discharge of fly ash and fly ash slurry that adversely impacted public safety, welfare and the environment by covering the soil and the basin of the Oughoughton creek and causing water pollution in the Delaware River and groundwater.

73. The failure of the Defendants to use methods and facilities to prevent or control the discharge and runoff of fly ash that began on August 23, 2005 from Fly Ash Basin No. 4 in

accordance with the Department's regulations and failure to design, construct, operate and maintain Fly Ash Basin No. 4 and its discharge structure in a manner that would not adversely affect or endanger public health safety, welfare of the environment or cause a public nuisance is a violation of Section 302(b) of the Solid Waste Management Act, 35 P.S. § 6018.302(b).

74. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 604 of the Solid Waste Management Act, 35 P.S. § 6018.604.

COUNT III
SOLID WASTE MANAGEMENT ACT AND RESIDUAL WASTE REGULATIONS
FAILURE TO CONTAIN DISCHARGE

75. Paragraphs 1 through 74, above, are re-alleged and incorporated herein by reference.

76. Section 289.274 of the Department's Residual Waste Regulations, 25 Pa. Code § 289.274, provides, in relevant part, that if an impoundment fails, the operator shall immediately contain discharges that have occurred or are occurring.

77. The Defendants failed to immediately contain the discharge of fly ash and fly ash slurry from Ash Basin No. 4 that began on August 23, 2005. Such conduct is a violation of Section 289.274 of the Department's Residual Waste Regulations, 25 Pa. Code § 289.274.

78. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 604 of the Solid Waste Management Act, 35 P.S. § 6018.604.

COUNT IV
SOLID WASTE MANAGEMENT ACT AND RESIDUAL WASTE REGULATIONS
VIOLATIONS OF CHAPTER 105 REGULATIONS

79. Paragraphs 1 through 78, above, are re-alleged and incorporated herein by reference.

80. Section 142 of the Department's Residual Waste Regulations, 25 Pa. Code § 299.142, provides, in relevant part, that a person storing residual waste in a surface impoundment

shall comply with Chapter 105 of the Department's Regulations relating to dam safety and waterway management.

81. The Defendants failed to comply with relevant sections of the Department's Chapter 105 regulations by not operating and maintaining Fly Ash Basin No. 4 and its appurtenant structures, such as the discharge structure and its stop logs, in a safe condition; by not sufficiently evaluating the safety of Ash Basin No. 4 and the discharge structure, including its stop logs, and making necessary modifications; by not providing immediate notice to responsible authorities in adjacent and downstream communities; and by not constructing Fly Ash Basin No. 4 with sound and durable materials. Such conduct is a violation of the Department's Chapter 105 Regulations, as discussed in Counts XII and XIII, below, and as such is a violation of Section 142 of the Department's Residual Waste Regulations, 25 Pa. Code § 299.142.

82. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 604 of the Solid Waste Management Act, 35 P.S. § 6018.604.

COUNT V
SOLID WASTE MANAGEMENT ACT AND RESIDUAL WASTE REGULATIONS
EMERGENCY PROCEDURES

83. Paragraphs 1 through 82, above, are re-alleged and incorporated herein by reference.

84. Section 289.291 of the Department's Residual Waste regulations, 25 Pa. Code § 289.291, provides, in relevant part, that disposal impoundments shall be designed, constructed, maintained and operated to prevent and minimize the potential for release of solid waste constituents to the air, water or soil that could threaten public health or safety, public welfare or the environment.

85. Section 289.293 of the Department's Residual Waste regulations, 25 Pa. Code § 289.293, provides, in relevant part that the operator of the facility shall immediately implement the approved contingency plan if there is an emergency, including a spill that threatens public health or safety, public welfare or the environment. During an emergency, the operator shall,

among other things, assess hazards that are occurring or may occur and immediately telephone the Department and report a description of the nature of the emergency, the type and quantity of the solid waste involved, and what dangers to public health and safety, public welfare and the environment exist or may occur.

86. The Defendants failed to either design, construct, maintain and/or operate Ash Basin No. 4 to prevent and minimize the potential for release of solid waste constituents. Such conduct is a violation of Section 289.291 of the Department's Residual Waste regulations, 25 Pa. Code § 289.291.

87. The Defendants failed to immediately implement contingency plans or to immediately notify the Department of the nature of the incident or how serious the discharge was. Such conduct is a violation of Section 289.293 of the Department's Residual Waste regulations, 25 Pa. Code § 289.293.

88. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 604 of the Solid Waste Management Act, 35 P.S. § 6018.604.

COUNT VI
SOLID WASTE MANAGEMENT ACT AND RESIDUAL WASTE REGULATIONS
PUBLIC NUISANCE AND UNLAWFUL CONDUCT

89. Paragraphs 1 through 88, above, are re-alleged and incorporated herein by reference.

90. Section 601 of the Solid Waste Management Act, 35 P.S. § 6018.601 provides, in relevant part, that any violation of any provision of the Solid Waste Management Act, any rule or regulation of the Department shall constitute a public nuisance and that any person committing such a violation shall be liable for the costs of abatement of any pollution and public nuisance caused by such violation.

91. Section 610(4) of the Solid Waste Management Act, 35 P.S. § 6018.610(4) provides, in relevant part, that it shall be unlawful for any person to store, collect, or dispose of

or assist in the storage, collection or disposal of solid waste in any manner as to create a public nuisance or to adversely affect the public health, safety, and welfare.

92. Section 610(9) of the Solid Waste Management Act, 35 P.S. § 6018.610(9), provides, in relevant part, that it shall be unlawful for any person to cause or assist in the violation of any provision of the Solid Waste Management Act or any rule or regulation of the Department.

93. The acts and omissions of the Defendants that are violations of the Solid Waste Management Act, as set forth in Counts I through IV above, and the violations of the rules and regulations of the Department, as set forth in Counts I through XVI of this Complaint, constitute a public nuisance, unlawful conduct and subject the Defendants to the costs of abatement of the pollution and public nuisances caused by the discharge of fly ash from Ash Basin No. 4 that began on August 23, 2005, pursuant to Sections 601, 610(4) and 610(9) of the Solid Waste Management Act, 35 P.S. §§ 6018.601, 6018.610(4) and 6018.610(9).

94. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 604 of the Solid Waste Management Act, 35 P.S. § 6018.604.

COUNT VII
CLEAN STREAMS LAW
DISCHARGE OF INDUSTRIAL WASTE TO WATERS OF THE COMMONWEALTH

95. Paragraphs 1 through 94, above, are re-alleged and incorporated herein by reference.

96. The Defendants are “persons” as that term is defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

97. The Oughoughton Creek, the Delaware River and the groundwater in the area surrounding the Facility are “waters of the Commonwealth” as that term is defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

98. Fly ash and fly ash slurry generated from Units 1 and 2 at the Facility and stored in Fly Ash Basin No. 4 is “industrial waste” as that term is defined under Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

99. Section 301 of the Clean Streams Law, 35 P.S. § 691.301, provides, in relevant part, that no person or municipality shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, in any of the waters of the Commonwealth, any industrial wastes, except as provided in the Clean Streams Law.

100. Section 307(a) of the Clean Streams Law, 35 P.S. § 691.307(a), provides, in relevant part, that no person shall discharge or permit the discharge of industrial waste in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the Department or such person has first obtained a permit from the Department.

101. From August 23, 2005, the Defendants placed, discharged or permitted the flow and discharge of industrial waste, to wit, fly ash and its constituents from Ash Basin No. 4, to the Oughoughton Creek, the Delaware River, and groundwater in the area around the Facility without a permit or authorization from the Department. Such conduct is a violation of Sections 301 and 307(a) of the Clean Streams law, 35 P.S. §§ 691.301 and 691.307(a).

102. Section 601 of the Clean Streams Law, 35 P.S. § 691.601, provides, in relevant part, that any activity or condition declared by this act to be a nuisance or which is otherwise in violation of this act, shall be abatable in the manner provided by law or equity for the abatement of public nuisances. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

103. The conduct described above subjects the Defendants to injunctive relief and this Court may award injunctive relief against the Defendants for such conduct pursuant to Section 601 of the Clean Streams Law, 35 P.S. §§ 691.601.

COUNT VIII
CLEAN STREAMS LAW
FAILURE TO NOTIFY/INCIDENTS CAUSING POLLUTION

104. Paragraphs 1 through 103, above, are re-alleged and incorporated herein by reference.

105. Section 91.33 (a) of the Department's Water Quality regulations, 25 Pa. Code § 91.33 (a), provides, in relevant part, that if, because of an incident a substance which would result in pollution or create a danger of pollution of the waters is discharged into these waters, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the facility from or on which the substance is discharged 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.

106. Section 91.33 (b) of the Department's Water Quality regulations, 25 Pa. Code § 91.33 (b), provides, in relevant part, that the person shall immediately take or cause to be taken steps necessary to prevent injury to property and downstream users of the waters from pollution or a danger of pollution.

107. Section 91.33 (b) of the Department's Water Quality regulations, 25 Pa. Code § 91.33 (b), provides, in relevant part, that within 15 days of the incident, the person shall remove from the ground and from the affected waters the residual substances contained thereon or therein.

108. The Defendants failed to immediately notify the Department and downstream users of the waters of the discharge and pollution; failed to immediately take or cause to be taken steps necessary to prevent injury to property and downstream users of the waters from the pollution; and failed to remove from the ground and from the affected waters the residual substances contained thereon or therein in a timely manner. Such conduct is a violation of Section 91.33 of the Department's Water Quality regulations, 25 Pa. Code § 91.33.

109. The conduct described above subjects the Defendants to injunctive relief and this Court may award injunctive relief against the Defendants for such conduct pursuant to Section 601 of the Clean Streams Law, 35 P.S. §§ 691.601.

COUNT IX
CLEAN STREAMS LAW
PUBLIC NUISANCE AND UNLAWFUL CONDUCT

110. Paragraphs 1 through 109, above, are re-alleged and incorporated herein by reference.

111. The discharge of fly ash, fly ash slurry and their constituents to the Oughoughton Creek, the Delaware River and the groundwater in the area around Ash Basin No. 4, and the contamination associated with the discharge and the impacts of the discharge on the Oughoughton Creek, the Delaware River and the groundwater in the area around Ash Basin No. 4 constitutes “pollution” as that term is defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

112. Section 3 of the Clean Streams Law, 35 P.S. § 691.3, provides, in relevant part, that the discharge of industrial waste or any substance into the waters of the Commonwealth, which causes or contributes to “pollution”, as defined in the Clean Streams Law, or creates a danger of such pollution is not a reasonable or natural use of such waters, is against public policy and is a public nuisance.

113. Section 401 of the Clean Streams Law, 35 P.S. § 691.401, provides, in relevant part, that it shall be unlawful for any person or municipality to put or place into any of the water of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person into any of the waters of the Commonwealth, any substance of any kind or character resulting in “pollution”. Any such discharge is hereby declared to be a nuisance.

114. Section 503 of the Clean Streams Law, 35 P.S. § 691.503 provides, in relevant part, that a violation of the regulations adopted by the Department, pursuant to Section 501 of the Clean Streams Law, 35 P.S. § 691.501, relating to protection of public water, shall constitute a nuisance, and is abatable in the manner provided by the Clean Streams Law.

115. Section 611 of the Clean Streams Law, 35 P. S. § 691.611, provides, in relevant part that it shall be unlawful to fail to comply with any rule or regulation of the Department, to violate any of the provisions of the Clean Streams Law or rules and regulations adopted thereunder or to cause air or water pollution.

116. From August 23, 2005 through the present, the Defendants have caused a public nuisance and engaged in unlawful conduct by discharging or permitting the discharge of industrial waste, to wit, fly ash, fly ash slurry and their constituents, from Ash Basin No. 4 to the Oughoughton Creek, the Delaware River and groundwater in the area around the Facility, which caused water “pollution” as that term is defined in Section 1 of the Clean Streams Law, 35 P.S. §

691.1, pursuant to Sections 3, 401, 503 and 611 of the Clean Streams Law, 35 P.S. §§ 691.3, 691.401, 691.503 and 691.611. Such conduct is not a reasonable or natural use of waters of the Commonwealth and is against public policy, pursuant to Section 3 of the Clean Streams Law, 35 P.S. § 691.3.

117. The conduct described above subjects the Defendants to injunctive relief and this Court may award injunctive relief against the Defendants for such conduct pursuant to Section 601 of the Clean Streams Law, 35 P.S. §§ 691.601.

COUNT X
AIR POLLUTION CONTROL ACT AND AIR RESOURCES REGULATIONS
CAUSING AIR POLLUTION

118. Paragraphs 1 through 117, above, are re-alleged and incorporated herein by reference.

119. The Defendants are “persons” as that term is defined in Section 3 of the Air Pollution Control Act, 35 P.S. § 4003.

120. Section 121.7 of the Department’s Air Resources Regulations, 25 Pa. Code § 121.7, provides that no person may permit “air pollution” as that term is defined in the Air Pollution Act.

121. Section 3 of the Air Pollution Control Act, 35 P.S. § 4003, defines “air pollution”, in relevant part, as the presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, the discharging from any source of any soot, fly ash or dust in such place, manner or concentration which may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.

122. From August 23, 2005 through the present the Defendants have permitted air pollution by permitting exposed fly ash on the dike of Ash Basin No. 4, the surface of the ground, on DePuess Ferry road, in the fields surrounding Fly Ash Basin No. 4 and in the basin of the Oughoughton Creek, to dry and be emitted into the outdoor atmosphere in a manner and in concentrations that unreasonably interfered with the comfortable enjoyment of life and property for citizens in the vicinity near and around the Facility. Such conduct is a violation of Section 4003 of the Air Pollution Control Act, 35 P.S. § 4003.

123. Section 13.6 of the Air Pollution Control Act, 35 P.S. § 4013.6 provides, in relevant part, any activity or condition declared by the Act to be a nuisance or which is otherwise in violation of the Act shall be abatable in the manner provided by law or equity for the abatement of public nuisances. In addition, a court in equity may levy civil penalties in the same manner as the Department in accordance with Section 9.1 of the Air Pollution Control Act, 35 P.S. 4009.1.

124. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 13.6 of the Air Pollution Control Act, 35 P.S. § 4013.6

COUNT XI
AIR POLLUTION CONTROL ACT AND AIR RESOURCES REGULATIONS
PUBLIC NUISANCE AND UNLAWFUL CONDUCT

125. Paragraphs 1 through 124, above, are re-alleged and incorporated herein by reference.

126. Section 4013 of the Air Pollution Control Act, 35 P.S. § 4013, provides, in relevant part, that a violation of the Air Pollution Control Act, or of any rule or regulation promulgated under the Act shall constitute a public nuisance, and any person who causes the public nuisance shall be liable for the cost of abatement.

127. Section 4008 of the Air Pollution Control Act, 35 P.S. § 4008, provides, in relevant part, it shall be unlawful to fail to comply with or to cause or assist in the violation of any of the provisions of the Act or the rules and regulations adopted thereunder; or to cause a public nuisance; or to cause air pollution, soil or water pollution resulting from an air pollution incident.

128. From August 23, 2005 through the present, the Defendants have caused a public nuisance for the acts, omissions and violations discussed in above pursuant to Section 4013.6 of the Air Pollution Control Act, 35 P.S. § 4013.6, and have engaged in unlawful conduct pursuant to Section 4008 of the Air Pollution Control Act, 35 P.S. § 4008.

129. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 13.6 of the Air Pollution Control Act, 35 P.S. § 4013.6

COUNT XII
DAM SAFETY ACT AND DAM SAFETY AND WATERWAY MANAGEMENT
("CHAPTER 105") REGULATIONS
CONSTRUCTION, OPERATION, MAINTENANCE & EVALUATION

130. Paragraphs 1 through 129, above, are re-alleged and incorporated herein by reference.

131. Ash Basin No. 4 is a "dam" as that term is defined in Section 3 of the Dam Safety Act, 32 P.S. § 693.3.

132. The discharge structure of Ash Basin No. 4, including the wooden stop logs, are "appurtenant works" as that term is defined in Section 3 of the Dam Safety Act, 35 P.S. § 693.3.

133. The Defendants are "persons", as that term is defined under Section 3 of the Dam Safety and Encroachments Act, 35 P.S. § 693.3.

133. Section 13(a) of the Dam Safety Act, 35 P.S. 693.13(a), provides, in relevant part, that the owner of any dam shall have the legal duty to monitor, operate and maintain the facility in a safe condition in accordance with the regulations terms and conditions of permits and approved operating plans.

134. Section 51 of the Department's Chapter 105 Regulations, 25 Pa. Code § 105.51, provides, in relevant part, that the permittee or owner of a dam shall operate and maintain the facility and appurtenant structures in a safe condition in accordance with permit terms and conditions and the provisions of Chapter 105 so that the facility cannot imperil life, health, safety or property located above or below the facility.

135. The Defendants failed to monitor, operate and maintain Fly Ash Basin No. 4 and its discharge structure in a safe condition in accordance with the Department's Chapter 105 regulations and in a manner that would have prevented or stopped the discharge of fly ash and fly ash slurry and prevented threats to life, health safety and property. Such conduct is a violation of

Section 13(a) of the Dam Safety Act, 35 P.S. § 691.13(a), and Section 51 of the Chapter 105 regulations, 25 Pa. Code § 105.51.

136. Section 52 of the Department's Chapter 105 regulations, 25 Pa. Code § 105.52, provides, in relevant part, that regardless of the date of construction of a dam, it shall be the duty of the permittee or owner to evaluate the safety of the facility and appurtenant structures and to modify the facility in accordance with the permit requirements of § 105.11 to ensure protection of life, and property in accordance with changed conditions and current safety criteria.

137. From 1989 through August 23, 2005, the Defendants failed to evaluate the safety of Fly Ash Basin No. 4 and its discharge structure by not fully inspecting the wooden stop logs for evidence of weakness or failure and failed to replace or modify the stop logs to ensure protection of property and prevent the unpermitted discharge of water, fly ash and fly ash slurry from Ash Basin No. 4. Such conduct is a violation of Section 52 of the Department's Chapter 105 Regulations, 25 Pa. Code § 105.52.

138. Section 97 of the Department's Chapter 105 regulations, 25 Pa. Code § 105.97, provides, in relevant part, that dams shall be structurally sound and shall be constructed of sound and durable materials. The completed structure shall be stable under all probable conditions of operation.

139. The Defendants failed to construct Ash Basin No. 4 and the discharge structure in a structurally sound manner and of sound and durable materials so that it was stable under all probable conditions of operation, including, inter alia, the retention of fly ash and water with wooden logs that were continuously submerged for approximately fifteen years and under pressure from the material in Fly Ash Basin No. 4. Such conduct is a violation of Section 97 of the Department's Chapter 105 Regulations, 25 Pa. Code § 105.97.

COUNT XIII
DAM SAFETY ACT AND DAM SAFETY AND WATERWAY
MANAGEMENT ("CHAPTER 105") REGULATIONS
FAILURE TO NOTIFY

140. Paragraphs 1 through 140, above, are re-alleged and incorporated herein by reference.

141. Section 63(a) of the Department's Chapter 105 regulations, 25 Pa. Code § 105.63(a), provides, in relevant part, that the permittee or owner of a dam shall immediately

notify the Department and responsible authorities in adjacent and downstream communities, including emergency management authorities, of a condition which may threaten the safety of the facility and take necessary actions to protect life and property, including action required under an emergency plan.

142. The Defendants failed to immediately notify responsible authorities in adjacent and downstream communities, including emergency management authorities, of the failure of, and discharge of water and fly ash from, Ash Basin No. 4, and did not take all necessary actions to protect life and property, including but not limited to, actions under applicable emergency plans. Such conduct is a violation of Section 63(a) of the Department's Chapter 105 regulations, 25 Pa. Code § 105.63(a).

143. Section 19 of the Dam Safety Act, 32 P.S. § 693.19, provides, in relevant part, that any activity or condition declared by this act to be unlawful conduct shall be restrained or prevented in the manner provided by law or equity for abatement of public nuisances, and the expense thereof shall be recoverable from the violator in such manner as may now or hereafter be provided by law.

144. The conduct described above subjects the Defendants to injunctive relief and this Court may award injunctive relief against the Defendants for such conduct pursuant to Section 19 of the Dam Safety Act, 32 P.S. § 693.19.

COUNT XIV
HAZARDOUS SITES CLEANUP ACT
RELEASE OF HAZARDOUS SUBSTANCES AND CONTAMINANTS

145. Paragraphs 1 through 145, above, are re-alleged and incorporated herein by reference.

146. The Defendants are "persons" as that term is defined in Section 103 of HSCA, 35 P.S. § 6020.103.

147. Fly ash and fly ash slurry discharged from Fly Ash Basin No. 4 and deposited on the surface of the ground, the basin of the Oughoughton Creek and the Delaware River are "hazardous substances" as that term is defined in Section 103 of HSCA, 35 P.S. § 6020.103.

148. Fly ash and fly ash slurry discharged from Fly Ash Basin No. 4 and deposited on the surface of the ground, the basin of the Oughoughton Creek and the Delaware River are “contaminants” as that term is defined in Section 103 of HSCA, 35 P.S. § 6020.103.

149. The deposition, spilling and leaking of fly ash, fly ash slurry and their constituents from Ash Basin No. 4 to the surface of the ground, the basin of the Oughoughton Creek and the Delaware River beginning on August 23, 2005 constitutes “disposal” and a “release”, as those terms are defined in Section 103 of HSCA, 35 P.S. § 6020.103.

150. Section 103 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.103, defines “site” as any structure; installation; equipment; pipe or pipeline, lagoon; impoundment; ditch; or area where a contaminant or hazardous substance has been deposited, stored, released, disposed of, placed or otherwise comes to be located.

151. Ash Basin No. 4 and the areas that have been impacted by the discharge from Ash Basin No. 4 that began on August 23, 2005, including, but not limited to, DePues Ferry Road, the fields surrounding Ash Basin No. 4 that were covered with fly ash discharge, the bottom of the Oughoughton Creek and the Delaware River is a “site” within the meaning of Section 103 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.103

152. Section 701 of HSCA, 35 P.S. § 6020.701 provides, in relevant part, that a person shall be responsible for a release of hazardous substances from a site when the person owns or operates the site where a hazardous substance is placed or comes to be located or during the time of a release of a hazardous substance.

153. The Defendants, as owners and operators of the Facility, including Ash Basin No. 4 and the area surrounding Ash Basin No. 4 with the boundaries of the Facility, at the time of the release of fly ash and fly ash slurry from Ash Basin No. 4 that began on August 23, 2005, are “responsible persons”, as that term is defined in Sections 103 and 701 of HSCA, 35 P.S. §§ 6020.103 and 6020.701.

154. Section 702 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.702, provides, in relevant part, that a person who is responsible for a release or threatened release of a hazardous substance from a site is strictly liable for response costs and damages which result from the release, or to which the release significantly contributes, including but not limited to, reasonable

and necessary or appropriate costs of remedial response incurred by the Commonwealth and other reasonable and necessary or appropriate costs of response incurred by any other person.

155. The Defendants, as responsible persons within the meaning of Sections 103 and 701 of HSCA, 35 P.S. §§ 6020.103 and 6020.701, are strictly liable for response costs and damages resulting from the release, reasonable costs of remedial response incurred by the Commonwealth and other reasonable costs of response incurred by any other person pursuant to Section 702 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.702.

156. Section 1103 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1103, provides, in relevant part, that in addition to any other remedy provided in the Act, the Department may institute a suit in equity in the name of the Commonwealth, where a violation of law or nuisance exists, for an injunction to restrain a violation of the Act or the regulations promulgated thereunder and to restrain the maintenance or threat of a public nuisance. In addition to an injunction, the court may levy civil penalties under Section 1104 of the Act, 35 P.S. § 6020.1104.

157. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 1103 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1103.

COUNT XV
HAZARDOUS SITES CLEANUP ACT
PUBLIC NUISANCE AND UNLAWFUL CONDUCT

158. Paragraphs 1 through 157, above, are re-alleged and incorporated herein by reference.

159. Section 1101 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1101, provides, in relevant part, that a release of a hazardous substance or a violation of any provision or regulation under the Act shall constitute a public nuisance. Any person allowing such a release or committing such a violation shall be liable for the response costs caused by the release or the violation. The board and any court of competent jurisdiction is hereby given jurisdiction over actions to recover the response costs.

160. Section 1108 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1108, provides, in relevant part, that it shall be unlawful for a person to cause or allow a release of a hazardous substance or cause or assist in a violation of any provision of the Act or a regulation of the Department or cause or allow release of a contaminant in a manner that creates public nuisance.

161. The Defendants created a public nuisance and engaged in unlawful conduct by allowing the release of a hazardous substance and contaminant, to wit, fly ash and fly ash slurry, from Ash Basin No. 4 beginning on August 23, 2005.

162. The Defendants, as responsible persons within the meaning of Sections 103 and 701 of HSCA, 35 P.S. §§ 6020.103 and 6020.701, and are strictly liable for response costs and damages resulting from the release, reasonable costs of remedial response incurred by the Commonwealth and other reasonable costs of response incurred by any other person pursuant to Section 702 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.702.

163. The conduct described above subjects the Defendants to civil penalty liability and injunctive relief and this Court may levy a civil penalty and award injunctive relief against the Defendants for such conduct pursuant to Section 1103 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.1103.

COUNT XVI
HAZARDOUS SITES CLEANUP ACT
NATURAL RESOURCES DAMAGES

164. Paragraphs 1 through 163, above, are re-alleged and incorporated herein by reference.

165. Article 1, Section 27 of the Pennsylvania Constitution, Pa. Const. Art. 1, § 27, provides that the people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. It further provides that Pennsylvania's public natural resources are the common property of all the people, including generations yet to come, and that as trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

166. Section 103 of HSCA, 35 P.S. § 6020.103, defines "natural resources" as land, fish, wildlife, biota, air, water, groundwater, drinking water supplies and other resources

belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States, the Commonwealth or a political subdivision. The term includes resources protected by section 27 of Article I of the Constitution of Pennsylvania.

167. Section 301(14) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.301(14), provides, in relevant part, that the Department has the duty to act as trustee of this Commonwealth's natural resources. The department may assess and collect damages to natural resources for the purposes of this act and the Federal Superfund Act for those natural resources under its trusteeship.

168. Section 702 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.702, provides, in relevant part, that a person who is responsible for a release or threatened release of a hazardous substance from a site is strictly liable for damages for injury to, destruction of, or loss of, natural resources within this Commonwealth or belonging to, managed by, controlled by or appertaining to the United States, the Commonwealth or a political subdivision. This paragraph includes the reasonable costs of assessing injury, destruction or loss resulting from such a release.

169. The release of fly ash and fly ash slurry from Ash Basin No. 4 by the Defendants that began on August 23, 2005 and which is ongoing, caused and continues to cause damage to air, land, waters of the Commonwealth and other "natural resources" as that term is defined in Section 103 of HSCA, 35 P.S. § 6020.103 by polluting air, land, water and the Commonwealth's natural resources with fly ash and its constituents.

170. The cleanup measures undertaken by the Defendants to date, including but not limited to dredging and excavation work and the construction of dam structures in the Delaware River have impacted the surface of the ground, the basin of the Oughoughton Creek and the Delaware River and caused injury to and/or the destruction of soil, waters of the Commonwealth and other "natural resources" as that term is defined in Section 103 of HSCA, 35 P.S. § 6020.103, for which the Department is a trustee.

171. The Department has incurred and continues to incur costs related to the assessment of the loss of natural resources resulting from the release of fly ash from Fly Ash Basin No. 4 by the Defendants.

172. The full impact of the Defendants' acts and omissions, as discussed above, to the air, land, waters of the Commonwealth and other natural resources cannot currently be determined and the assessment is ongoing and expected to continue for an indefinite period of time.

COUNT XVII
DECLARATORY JUDGMENT

173. Paragraphs 1 through 172, above, are re-alleged and incorporated herein by reference.

174. The Declaratory Judgments Act empowers courts within their respective jurisdictions to "declare rights, status and other legal relations" between parties. Such declarations "shall have the force and effect of a final judgment or decree." 42 P.S. § 7532.

175. Fly ash deposits remain in the Delaware River at the time of filing of this Complaint following the discharge from Ash Basin No. 4 that began on August 23, 2005.

176. The Defendants are liable for the discharge of water, fly ash and fly ash slurry from Ash Basin No. 4 that began on August 23, 2005 and ended on August 27, 2005, and for the associated damage and impacts to the soil, air, water and natural resources of the Commonwealth, which began on August 23, 2005 and are ongoing, under the relevant provisions of the Solid Waste Management Act, the Clean Streams Law, the Air Pollution Control Act, Hazardous Sites Cleanup Act and the Dam Safety Act, as set forth above.

177. There will continue to be damage and impacts to the soil, air, water and natural resources from the Ash Basin No. 4 discharge for some as yet undetermined time.

178. The Department will continue to incur costs in assessing the damage and impacts of the Ash Basin No. 4 discharge to the soil, air, water and natural resources of the Commonwealth. The Department will also continue to incur costs for review of cleanup plans and measures proposed and undertaken by the Defendants. Such costs will be incurred by the Department until it makes a determination that the Ash Basin No. 4 failure that began August 23, 2005 has sufficiently been addressed by the Defendants.

PRAYER FOR RELIEF

WHEREFORE, the Department requests that the Court:

1. Declare the Defendants are in violation of the Solid Waste Management Act, the Clean Streams Law, the Air Pollution Control Act, the Dam Safety and Encroachment Act, and the Hazardous Sites Cleanup Act and the regulations promulgated under those Acts;
2. Order the Defendants to continue to locate and remove deposits of fly ash from the Delaware River and Oughoughton Creek and to fully assess the impacts to the air, water, including groundwater, and soil from the fly ash discharge;
3. Order the Defendants to take all other appropriate action necessary to remedy, mitigate, or offset the harm to the public health and the environment caused by their violations of the Solid Waste Management Act, the Clean Streams Law, the Air Pollution Control Act, the Dam Safety Act, and the Hazardous Sites Cleanup Act;
4. Assess a civil penalty against the Defendants for each violation of the Solid Waste Management Act, the Air Pollution Control Act and the Hazardous Sites Cleanup Act in the amount of \$25,000 per day per offense;
5. Order the Defendants to reimburse the Department for all costs and fees incurred by the Department associated with this matter;
6. Order the Defendants to assess and restore all damages caused to natural resources of the Commonwealth and to pay for all past and future costs for the abatement and restoration of damaged, or impacted natural resources of the Commonwealth, and to pay for replacement of any damaged and unrecoverable natural resources of the Commonwealth; and

7. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION:

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