



alleged actual and/or impending environmental contamination of the Bum Hollow ravine on the Tri-Realty property and the Bum Hollow Run, a stream in the ravine, caused by heating oil that has escaped from Ursinus's property. Tri-Realty claims entitlement to injunctive relief, together with attorneys' fees pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901, *et seq.* ("RCRA"), because, it claims, the oil presents an imminent and substantial endangerment to human health and to the environment. Specifically, Tri-Realty asks the Court to order Ursinus to "take all actions necessary to investigate, delineate, and remediate the contamination to the College Arms Property caused by [Ursinus's] acts and omissions regarding the Solid Waste." Am. Compl. ¶180.

4. The Court has original jurisdiction of this dispute pursuant to 28 U.S.C. § 1331, 33 U.S.C. § 1365(a), 2717(b) and 42 U.S.C. § 6972(a).

5. On February 13, 2013, Tri-Realty filed the instant motion for a preliminary mandatory injunction [Doc. No. 16]. Following a pre-hearing conference on March 1, 2013, the Court permitted the parties to conduct expedited discovery between March 1, 2013 and April 5, 2013. The Court held a three-day hearing on Tri-Realty's motion during the period April 15-17, 2013, at which the parties were permitted to submit such evidentiary and advocacy offerings as they saw fit. At the conclusion of the hearing the parties were ordered to file proposed findings of fact and conclusions of law, and they have ably done so. The Court rules upon the motion as follows.

## **II. College Arms Apartments & Bum Hollow**

6. Tri-Realty owns real property located at 74 East Fifth Avenue in Collegeville, Montgomery County, Pennsylvania, known as the College Arms Apartments (the "College Arms Property"). Ex. P-1, ¶2.

7. A residential apartment complex consisting of seven residential apartment buildings, a clubhouse and an outdoor swimming pool are situated on the College Arms Property. Tr. I at 29; Ex. P-1, ¶2.

8. DiLucia Management Corporation (“DiLucia Management”) manages the College Arms Property. Tr. I at 25-26.

9. The College Arms Property is adjacent to, downgradient and immediately south of the Ursinus campus. Ex. P-1, ¶3.

10. A ravine known as Bum Hollow runs along, and comprises the southernmost portion of, the College Arms Property. Tr. I at 27-28, 29-30; Ex. P-1, ¶5.

11. At the base of Bum Hollow, on the College Arms Property, is a stream known as Bum Hollow Run. Tr. I at 29-30; Ex. P-1, ¶5.<sup>2</sup>

12. Bum Hollow Run is a tributary of the Perkiomen Creek. Ex. P-8 (November 4, 2010 General Inspection Report of the Pennsylvania Department of Environmental Protection (“PADEP”)).

13. Bum Hollow Run and the remainder of the College Arms Property are downgradient of the Ursinus campus. Ex. P-1, ¶3.

14. Stormwater on the westernmost part of the College Arms Property is collected in storm inlets and then directed to an underground stormwater pipe situated beneath the pavement. Tr. I at 32-33; Ex. P-1, ¶10. This stormwater moves from the stormwater pipe to a catch basin installed at the top of the northern hillside of Bum Hollow (the “Catch Basin”), to the west of the swimming pool and the clubhouse. Tr. I at 32-33; Ex. P-1, ¶10.

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<sup>2</sup> The parties dispute whether the waters running through the ravine are properly described as a perpetual stream, because the level of the waters varies seasonally. For the sake of simplicity, however, the Court will refer to the ravine as “Bum Hollow” and the waters therein as a “stream” or “Bum Hollow Run”.

15. Stormwater exiting the Catch Basin enters into an underground outfall pipe (the “Outfall Pipe”), and is then discharged into Bum Hollow. Tr. I at 33. A natural drainage swale (the “Drainage Swale”) has been formed starting at the point of this discharge from the Outfall Pipe and conveys stormwater to Bum Hollow Run. Tr. I at 34-35; Ex. P-1 at Ex. 1-B.

16. Heating oil was stored on Tri-Realty’s College Arms Property between 1968 and 1990, Ex. D-42, and there was at least one reported incident during that time period when heating oil was released from an underground storage tank at the College Arms Property in 1968. Tr. II at 158.

17. In 2004, a release of “No. 6” oil from an underground storage tank was discovered on Ursinus’s property. Tr. II at 148. Ursinus reported the release to the PADEP. Tr. II at 142; Ex. D-1.

18. Upon discovering the release, Ursinus also engaged Center Point Tank Services, Inc. to delineate and remediate the contamination. Ex. D-22.

19. On June 30, 2004, the PADEP formally raised with Ursinus the Land Recycling and Environmental Remediation Standards Act of 1995 (familarly known as “Act 2”),<sup>3</sup> 35 P.S. §§ 6026.101, *et seq.*, in connection with remediation activities and efforts. Tr. II at 142-143; Ex. D-1.

20. Ursinus subsequently entered into the Act 2 program by filing a Notice of Intent to Remediate in 2010. Tr. II at 185.

21. In August 2004, Ursinus requested access to Tri-Realty’s College Arms Property in order to install a monitoring well to investigate the extent of the release of oil. Exs. D-2, D-6.

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<sup>3</sup> Act 2 is a voluntary cleanup program under the auspices of the PADEP that sets forth specific procedures which remediators follow to meet certain cleanup standards, and pursuant to which remediators may be authorized to obtain a limited release of liability under Pennsylvania law. Tr. II at 139; *see also* Pennsylvania Department of Environmental Protection, Land Recycling Program, *available at* [http://www.portal.state.pa.us/portal/server.pt/community/land\\_recycling\\_program/20541](http://www.portal.state.pa.us/portal/server.pt/community/land_recycling_program/20541).

Tri-Realty declined access for this purpose in the absence of the execution of a formal access agreement which, *inter alia*, required Ursinus to pay Tri-Realty's legal fees. Ex. D-6; Tr. II at 149. The parties were unable at that time to agree on a formal access agreement. Tr. II at 148-149.

22. Subsequent efforts to negotiate an access agreement proved unsuccessful as well. Tr. II at 150-151; Ex. D-6.

23. In 2007, Ursinus engaged Marshall Geosciences Inc. ("MGI"), an environmental consulting company, to replace Center Point Tank Services, Inc. Tr. III at 21. Gilbert Marshall, the principal of MGI, became the primary MGI representative in connection with the contamination and remediation issues at the College Arms Property. Tr. III at 3-7.

24. Mr. Marshall has professional experience in the field of remediating underground storage tank release sites and in Act 2 remediations. *Id.* Mr. Marshall's office is approximately a quarter-mile from Bum Hollow. Tr. III at 21.

25. Beginning in 2004 and continuing through March 2010, Ursinus's environmental consultants and their contractors emptied and decommissioned underground No. 6 oil tanks on Ursinus's property, removed thousands of gallons of released No. 6 oil and contaminated water from Ursinus's property, and installed various monitoring wells on Ursinus's property to continue to investigate the extent of subsurface oil contamination on the Ursinus property and the potential for migration of oil. Exs. P-13, D-55.

26. In March or April of 2010 Raymond Duchaine of ENVision, Inc., Tri-Realty's environmental consultant, discovered an accumulation of oil on the slope of Tri-Realty's portion of Bum Hollow. Tr. I at 36; 61; Ex. D-85; Ex. P-2, ¶10. The oil was very thick, dark in color and of tar-like viscosity, being colloquially described by Ursinus as "weathered oil". Tr. II at 8;

Tr. III at 46; Exs. D-22, D-40. The parties have referred to this 2010 discovery as the “First Seep.”

27. The First Seep was manifest at approximately 45 feet from Bum Hollow Run at the point of least distance between the errant oil and the stream. Tr. I at 61-62; Ex. P-2, ¶10.

28. Following the discovery of the First Seep, Tri-Realty initially refused Ursinus access to its property, and on March 15, 2010 the PADEP proposed the issuance of an administrative order that would authorize Ursinus to enter the College Arms Property for purposes relating to environmental investigation and possible remediation efforts. Tr. II at 154-155.

29. An Access Agreement for a two-year term was executed by the parties on April 5, 2010. Ex. P-12 at 3; Tr. II at 160. Under the terms of the Access Agreement, among other matters, MGI was required to notify a Tri-Realty representative in advance of entering Bum Hollow to undertake remedial work. Tr. I at 48-49.

30. In May 2010 MGI constructed an impoundment in the form of a pit carved in the Bum Hollow ravine. This impoundment was intended to contain the oil in the First Seep. Tr. I at 37; Tr. III at 106; Ex. P-2, ¶11.

31. In addition to the impoundment pit, MGI installed a skimmer to intercept and forestall or prevent oil from entering a storm water drainage pipe that empties into Bum Hollow. Ex. P-1 at ¶15. MGI also applied sorbent materials around the impoundment and the Drainage Swale. Tr. I at 37-38, 42-43; Ex. P-1, ¶21.

32. In March 2011 and thereafter MGI has undertaken to vacuum the impoundment on a periodic basis to remove oil and oil-contaminated water captured in the impoundment. Tr. I at 43-44; 108; Ex. P-1, ¶22.

33. For at least two years, from the spring of 2010 into the spring of 2012, MGI maintained the impoundment and skimmer, as supplemented by the use of the sorbent materials and the vacuuming activity. Tr. I at 38-46.

34. On June 21, 2011 Ursinus proposed to PADEP and Tri-Realty a remedial system designed to contain and remove the oil contamination on the College Arms Property. Ex. D-44.

35. PADEP approved the proposal. Tr. II at 24; 88; Tr. III at 30; Ex. D-47. Tri-Realty rejected the proposal. Tr. II at 24; 27.

36. MGI's periodic water sampling activities at the base of Bum Hollow, which commenced in early 2009, have disclosed no reportable or measurable petroleum product contamination. Ex. P-13; Ex. D-55 at Bates 003580-3582.

37. In addition to occasions referenced above, since the filing of this suit in September 2011, PADEP has continued to have formal communications in writing and in person with both Ursinus and Tri-Realty. See, e.g., Ex. D-51 (PADEP letter of January 3, 2012 to Robert P. Frank, Esq. of Reed Smith LLP); Tr. II 15, 25-29.

38. The PADEP activities also have included site visits or inspections. Tr. I at 85-86; Tr. II at 161-163, 164-165; Exs. D-59, D-85.

39. On March 14, 2012 MGI submitted a Remedial Investigation Report ("RIR") to PADEP on behalf of Ursinus as a formal Act 2 submission, Tr. II at 184-185; Exs. P-13, D-55, which PADEP rejected on June 29, 2012. Exs. P-16, D-65.

40. When the Access Agreement between Tri-Realty and Ursinus expired on April 19, 2012, Tri-Realty did not agree to renew the Agreement on similar terms. Tr. II at 160-161, 164, 176.

41. Other than a May 2012 site inspection visit conducted by PADEP and MGI, no operations or maintenance efforts were devoted to Bum Hollow by any parties in this litigation until October 2012. Ex. D-85.

42. Following PADEP's June 2012 declination of MGI's RIR, MGI submitted a work plan on August 24, 2012, that outlined additional remedial investigation tasks. Exs. P-17, D-67.

43. Tri-Realty and Ursinus agreed on October 2, 2012 to a limited access agreement that allowed MGI to pursue certain operational and maintenance work on the impoundment and skimmer, but the agreement does not permit further physical investigation or water sampling on Tri-Realty's property by Ursinus or its consultant. Exs. P-18, D- 68; Tr. II at 170, 194.

44. Ursinus contends that the 4-month hiatus of operations and maintenance efforts from May 2012 through September 2012 increased the potential for release of oil contaminants from the impoundment. Tr. III at 17-18.

45. Hurricane Sandy struck the College Arms Property at the end of October 2012. Tr. III at 17.

46. On November 16, 2012, MGI's Gilbert Marshall discovered oil approximately 20 to 25 feet downslope of the impoundment location of the First Seep, perhaps within 15 to 16 feet of Bum Hollow Run. Tr. I at 61; Tr. II at 14. This second appearance of oil has been called by Tri-Realty the "Second Seep." Tr. I at 61-62; Tr. III 69-70, 72; Exs. P-26, D-78. The Second Seep was also observed, or at least observable, by Tri-Realty's Nate Taylor on the date of Mr. Marshall's discovery. Tr. I at 90; Ex. P-27 at 009539. Given that the conditions were openly observable on Tri-Realty's property, there is no credible basis to suggest or argue that Ursinus hid the conditions from Tri-Realty or that Tri-Realty did not have full, fair and unfettered

opportunities to observe the conditions *in situ*. The parties disagree as to whether Tri-Realty actually monitored Mr. Marshall's "mop up" activities of November 16, 2012.

47. MGI, in the person of Mr. Marshall, "mopped up" the Second Seep contamination with absorbent booms and pads and removed oil-contaminated fallen leaves. Exs. D-88, P-27. The "mopping up" was the extent of the efforts at the College Arms Property at that time with regard to the Second Seep. See id.

48. On December 28, 2012, PADEP, Gilbert Marshall of MFI and Raymond Duchaine of ENVision met to discuss possible additional investigation and/or remedial tasks for the College Arms Property matters, and the attendees at that meeting agreed to a plan. Tr. III at 36-38.

49. On January 10, 2013, Mr. Marshall observed additional Second Seep accumulation of weathered oil downslope of the impoundment at approximately the same distance from Bum Hollow Run as that he had observed two months before. MGI again "mopped up" the oil with absorbent pads. Tr. III at 65, 67.

50. Although no Tri-Realty representatives were on site to observe this "mopping up" activity contemporaneously, Tri-Realty management company representative Albert Ambron arrived within 20 minutes of Mr. Marshall's beginning to place absorbent pads, and noted the accumulation of water downslope of the impoundment at the Second Seep site, which prompted a visit to the Bum Hollow site several days thereafter by Mr. Ambron, Mr. Duchaine, and another ENVision representative, Peter Dougherty. Tr. I at 48, 50-52, 59, 94; Tr. II at 5-8; Tr. III at 67.

51. On their January 15, 2013 site visit, Messrs. Ambron, Duchaine and Dougherty observed a standing puddle of water (as and where Mr. Ambron had seen water on January 10) and an accumulation of weathered oil. Tr. I at 60; Tr. II at 7-8.

52. Tri-Realty's representatives reported their January 15 observations to Ursinus's attorney Jonathan Rinde, to MGI, and to PADEP. Tr. I at 62; Tr. II at 172-173; Exs. P-21, D-69.

53. The next day, on January 16, 2013, MGI undertook various remediation efforts to deal with the new accumulation of oil. Tr. I at 62; Tr. II at 173; Ex. D-89 at 009545, 009550. Those efforts include mopping up discharged oil with sorbent booms and pads, digging a 6- to 8-inch trench around the Second Seep, and installing a silt fence in the trench. MGI has continued to monitor the conditions in Bum Hollow on a weekly basis. Tr. I at 63-65, Tr. II at 37, 173; Tr. III 78-79, 123; Exs. P-26, D-78.

54. While there is no empirical data from any source concerning any possibly contaminated conditions deeper than 6 to 8 inches below ground level or of any migration of any subsurface oil downgradient from the Second Seep, on-site observations are that from January 16, 2013, to date, new accumulation of so-called weathered oil has diminished in surface area, and seepage leading to new accumulation has perceptibly slowed. Tr. III at 65, 106, 131-133.

55. Although aware of the January 16, 2013 observations, PADEP has made no specific recommendations for clean-up or investigation of the Second Seep oil reported at Bum Hollow on January 15, 2013. Tr. II at 173-174; Tr. III at 13.

56. On February 27, 2013, MGI submitted to PADEP a revised work plan developed from the December 28, 2012 meeting among representatives of Tri-Realty, Ursinus and PADEP. Exs. P-23, D-73.

57. On March 12, 2013, PADEP acknowledged the revised work plan and requested MGI to proceed to submit a revised RIR. Exs. P-24, D-75.

58. By mid-April 2013, MGI appeared ready and willing to proceed in accordance with its revised work plan and awaited permission from Tri-Realty to enter the College Arms Property to do so. Tr. III at 44.

59. PADEP is an agency of the Commonwealth of Pennsylvania charged with responsibility for administering Pennsylvania's environmental laws and regulations, including "responding to complaints from persons affected by releases from storage tanks, overseeing and tracking the status of responsible party-lead cleanups, and taking and overseeing state-lead corrective action." See Pennsylvania Department of Environmental Protection, Storage Tank Cleanup Program, *available at* [http://www.portal.state.pa.us/portal/server.pt/community/storage\\_tank\\_cleanup\\_program/20605](http://www.portal.state.pa.us/portal/server.pt/community/storage_tank_cleanup_program/20605); see also Tr. II at 127, 139-140.

60. PADEP has been kept advised of, and monitored and reviewed, the remediation of the College Arms Property from 2004 to date. Tr. II at 144, 146, 203-204.

61. PADEP's involvement with contamination and remediation activities at the College Arms Property has included written and oral communications concerning actions taken or proposed to be taken by Ursinus at the site. Exs. D-1, D-5, D-23, D-47, P-16/D-65, P-24/D-75; Tr. II at 24, 88; Tr. III at 30.

62. Tri-Realty has had unimpeded access to PADEP for purposes of expressing its concerns or opinions about conditions at Bum Hollow and the Ursinus response(s) to those conditions. Tr. II at 24, 141, 144-145, 169; Ex. D-50.

63. Periodic status reports, prepared and issued by Ursinus, have been provided to PADEP, on or about the following dates: April 7, 2007 (Ex. D-17); February 24, 2010 (Ex. D-

22); March 10, 2010 (Ex. D-24); December 30, 2010 (Ex. D-40); June 21, 2011 (Ex. D-44); March 14, 2012 (Ex. P-13/D-55); August 24, 2012 (Ex. P-17/D-67); and February 27, 2013 (Ex. P-23/D-73).

64. PADEP, consistent with its authority under the Pennsylvania Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*, and Pennsylvania Solid Waste Management Act, 35 P.S. §§ 6018.101 *et seq.*, has thus far only made written recommendations that Ursinus take remediation steps and otherwise comply with Act 2 requirements for pursuing voluntary cleanup. Tr. II at 143-144; Exs. D-1, D-5.

65. In addition, PADEP has offered comments about Tri-Realty's restrictions on access to College Arms Property by Ursinus and MGI. Tr. II at 154-155, 157-160; Exs. D-23, D-42.

66. PADEP has also noted its own obligation to monitor the effective remediation of the site and its authority to issue an administrative clean-up order under the above-referenced Clean Streams Law or Solid Waste Management Act, if Ursinus fails to meet the requirements of Act 2. Tr. II at 24, 88, 143-144; Tr. III at 30; Exs. D-1, D-5, D-23, P-13/D-55, P-24/D-75.

67. To date, PADEP has taken no steps to intervene in this litigation (of which litigation PADEP is aware, according to the parties' counsel) or notified the parties that the so-called "Second Seep" required action other than the remediation efforts already undertaken or proposed by Ursinus. Tr. II at 173-174; Tr. III at 13.

68. According to the evidence developed during the hearing, petroleum contaminants have not been detected in the intermittent waters at the base of Bum Hollow or the Perkiomen Creek at any time during the remediation of the site described above, Tr. III at 24-25; Ex. P-13/D-55 at 003580-003582, and stream sampling of the surface water at the base of Bum Hollow

performed by MGI has not shown concentrations of constituents of petroleum at levels above or inconsistent with Pennsylvania statewide standards. Tr. II at 68.

69. No data or evidence of record reliably documents that petroleum contamination at the site is currently moving or originating closer to the intermittent waters at the base of Bum Hollow or the Perkiomen Creek. Tr. II at 73-74, 120, 124-26.

70. No data or evidence of record reflects that contamination has been detected at any location point closer to the intermittent waters at the base of Bum Hollow or the Perkiomen Creek since the report and observations of January 15, 2013. Tr. III at 25.

71. No data or test results in the record document that the presence of weathered oil has caused iron staining on the stream bank in Bum Hollow, Tr. II at 74, and no testing has been done to rule out other sources of the iron staining. Tr. II at 82-84.

72. No data or test results in the record document that the presence of weathered oil has caused the formation of “biomass” on the stream bank in Bum Hollow, Tr. II at 74-75, and no testing has been done to rule out other causes or sources of any biomass. Tr. II at 84-85.

73. No evidence has been presented that animals or wildlife in the Bum Hollow environs are in any danger due to the weathered oil expressing on the slope of Bum Hollow or elsewhere on the College Arms Property. Tr. I at 103.

74. There has been no evidence offered in this litigation that humans are in any danger due to the weathered oil expressing on the slope of Bum Hollow or elsewhere on the College Arms Property. Tr. I at 102-103.

75. There has been no evidence offered in this litigation that drinking water has been contaminated due to the weathered oil expressing on the slope of Bum Hollow or elsewhere on the College Arms Property. Tr. I at 102-103.

76. Construction debris, including concrete, fence posts, and metal and iron pieces, is scattered on the slope of Bum Hollow, and reportedly has been on the premises since at least 2004. Tr. I at 101; 104. It is not disputed that this debris, as well as petroleum, can cause iron staining in soil or water. Tr. II at 42-44.

77. As of April 14, 2013, the interim remedial measures at the First Seep impoundment area and at the Second Seep expression of weathered oil were intact and acting as planned by MGI. Tr. III at 11. There has been no report of any petroleum products in the surface water drainage way or in the surface water at the base of Bum Hollow. Tr. III at 11.

78. Prior to January 15, 2013, Tri-Realty had not made any written proposals or requests for specific investigative work or remedial activity to be completed at the site. Tr. II at 124-125.

79. Prior to the discovery of the accumulation of weathered oil downslope of the first impoundment, Tri-Realty did not communicate to Ursinus any disapproval of the interim remedial systems installed by Ursinus and MGI at Bum Hollow. Tr. I at 88; 99-100; Tr. II at 81.

80. At least one representative of Tri-Realty, most frequently Mr. Ambron, has monitored much of the remedial activity on the College Arms Property, often including taking photographs. Tr. I at 45-46, 54, 56-57, 65, 86; Tr. III at 14.

81. Tri-Realty has not asked Mr. Duchaine or any other consultant to prepare any proposal, formal or informal, to undertake any sampling, testing or remediation on the slope of Bum Hollow, the intermittent waters at the base of Bum Hollow, or elsewhere on The College Arms Property. Tr. II at 125.

82. Tri-Realty itself has not undertaken any remedial action at or physical investigation in Bum Hollow. Tr. I at 84-85; Tr. II at 124-125, 204-205.

83. Other than a January 15, 2013 e-mail, Tri-Realty has not submitted any information to PADEP concerning the alleged exigency of the “Second Seep.” Tr. II at 79-80; P-20/D-69.

84. Ursinus has performed operational and maintenance activities at the College Arms Property once a week, at a minimum, since the report to the PADEP on January 15, 2013. Tr. III at 123.

85. No conditions, exigent or otherwise, have been reported concerning Bum Hollow that are materially more intrusive than those already reported and addressed to date.

### **CONCLUSIONS OF LAW**

1. Tri-Realty has moved for a mandatory preliminary injunction against Ursinus seeking the Court’s order that Ursinus commence and complete an investigation into the proximity to Bum Hollow Run of oil allegedly spilled by Ursinus and the direction in which the oil is allegedly moving, in anticipation of a further directive for remedial action based on the results of the investigation. This investigation, according to Tri-Realty, should follow protocols outlined or approved by Tri-Realty and its consultants, whose costs, fees and expenses should be paid by Ursinus. Thus, the injunction Tri-Realty foresees has a significant financial component and is not, strictly speaking, one that is even primarily, much less exclusively, qualitatively environmental in character.

2. In particular, Tri-Realty, as a private citizen, invokes the Resource Conservation and Recovery Act (“RCRA”), codified as amended at 42 U.S.C.A. §§ 6901, *et seq.*, and specifically § 6972(a)(1)(B), to seek a mandatory injunction requiring Ursinus as a responsible

party to “take action” by attending to the investigation, cleanup and disposal of toxic waste at the College Arms Property. Meghrig v. KFC Western, Inc., 516 U.S. 479, 483-484 (1996).

3. To prevail under § 6972(a)(1)(B), a plaintiff must prove: (1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to human health or the environment. Interfaith Cmty. Org. v. Honeywell Int’l, Inc., 399 F.3d 248, 258 (3d Cir. 2005) (citations and quotations omitted).

4. In appropriate circumstances, this Court can look to the “broad scope” of the RCRA to issue a mandatory preliminary injunction, Sanchez v. Esso Standard Oil Co., 572 F.3d 1, 20 (1st Cir. 2009), even where the dispute involves only the “potential” for or threat of harm, as opposed to “actual” harm being already underway. Interfaith, 399 F.3d at 258.

5. As the movant here seeking injunctive relief, Tri-Realty must establish (i) that it is likely to succeed on the merits of its RCRA claim overall; (ii) that it is likely to suffer irreparable harm in the absence of preliminary equitable relief; (iii) that the balance of equities tips in its favor and, finally; (iv) that an injunction as requested is in the public’s interest. Winter v. Natural Res. Def. Counsel, Inc., 555 U.S. 7, 20 (2008); see also United States v. Price, 688 F.2d 204, 211 (3d Cir. 1982).

6. At a minimum, however, in addition to the familiar foregoing four-part framework for injunctive relief that will be addressed below, such relief requires (i) the Court’s confidence that the enjoined party is a “responsible party” and (ii) the identification of an

identified and recognized (or reliably identifiable or recognizable) potential harm, not merely a theoretical one. See Sliti v. Bush, 407 F. Supp. 2d 116, 118 (D.D.C. 2005) (citing Wis. Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985)).

7. Tri-Realty has not sustained its burden to persuade the Court of the likelihood that it will succeed on the merits of its claim for at least the following reasons:

a. To prevail on its RCRA claim, Tri-Realty must show that the waste at issue “may present an imminent and substantial endangerment” to human health or the environment. 42 U.S.C.A. § 6972(a)(1)(B).

b. In order for there to be an imminent and substantial endangerment to human health or the environment, the threat of harm must be “serious.” Interfaith, 399 F.3d at 258.

c. The contamination issues in Interfaith present a compelling distinction between the dire straits extant when injunctive assistance may be appropriate, and the markedly less severe, less threatening, and far more contained alleged contamination at the College Arms Property. In Interfaith, for example, amounts of hexavalent chromium for which the site’s owner was indisputably responsible far exceeded all applicable state contamination standards for soil, groundwater, surface water, and river sediments adjacent to the site; the containment measures installed by the owner had been damaged and were leaking; and there was extensive evidence of human trespass and animal habitation at the site. Interfaith, 399 F.3d at 261-63.

d. Here, however, the Court finds that Tri-Realty has presented no objective data or credible evidence regarding the likelihood that the weathered oil on the

slope of Bum Hollow will in fact cause any harm (much less imminent and substantial harm) to human health or the environment. See Tilot Oil, LLC v. BP Prods. N. Am., Inc., 907 F. Supp. 2d 955, 966 (E.D. Wis. 2012) (holding that, in combination, the facts that plaintiff rarely used the contaminated location, that defendant was currently engaged in remediation, and that benzene did not exceed applicable standards when remedial ventilation fan was running, “place[d] the threat of harm outside that sufficient for a RCRA violation”); id. at 967 n.16 (“Ultimately, [plaintiff]’s argument appears to be that [defendant] is simply not doing enough regarding the speed of cleanup. However, RCRA is not intended to remedy such a situation so long as there is no potentially imminent and substantial endangerment.”)

e. Tri-Realty has not offered any evidence to quantify the severity of the harm which it alleges would occur absent injunctive relief. The Court recognizes that no *particular* quantitative showing is required to find liability under the RCRA. See Interfaith, 399 F.3d at 259-60. For example, Tri-Realty is not required to prove contamination in excess of state standards to succeed on its RCRA claim, see id. at 261 & n.6 (holding that “state standards do not define a party’s federal liability under RCRA,” but finding state standards “relevant and useful in determining the existence of an imminent and substantial endangerment”). Nevertheless, Tri-Realty’s failure here to provide *any* measure of potential harm weighs heavily against imposing the requested injunctive relief.

f. The evidence is insufficient for the Court to conclude at this time that a “reasonable prospect of future serious harm exists.” See Lewis v. FMC Corp., 786 F. Supp. 2d 690, 710 (W.D.N.Y. 2011).

g. Tri-Realty’s obvious and interested awareness (as well as PADEP’s similar awareness, addressed below) of the weathered oil on the slope of Bum Hollow lessens the potential for unattended harm to Tri-Realty, its residents, or others. See Davies v. Nat’l Coop. Refinery Ass’n, 963 F. Supp. 990, 999 (D. Kan. 1997) (abstaining from exercising jurisdiction under the RCRA where the Kansas Department of Health and Environment was actively involved in completing a site investigation and developing a remedial plan, but stating in dicta that, even accepting as true the increased carcinogenic health risk to individuals exposed to benzene in well-water, plaintiffs had not established the likelihood that any person actually would be exposed to benzene, where plaintiffs had been warned of the danger and were able to occupy the property without serious health risk by using an alternative water supply).

8. PADEP’s knowledge of events and conditions at the site, as well as its authority pursuant to Act 2, the Pennsylvania Clean Streams Law, and Pennsylvania’s Storage Tank and Spill Prevention Act, weighs against a finding of an imminent and substantial endangerment to human health or the environment to support injunctive relief. See Bd. Of Cnty. Comm’rs v. Brown Grp. Retail, Inc. 768 F. Supp. 2d 1092, 1111 (D. Colo. 2011).<sup>4</sup>

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<sup>4</sup> PADEP’s involvement, by itself, does not preclude a judicial remedy under the RCRA. Likewise, a party is not required to exhaust or rely upon other resources or remedies before seeking relief under the RCRA. See Interfaith, 399 F.3d at 267-68. In Interfaith, the Court of Appeals found that the defendant’s dilatory tactics and NJDEP’s apparent inability to deal with those tactics weighed in favor of awarding injunctive relief as “an alternative and supplement” to other remedies, such as state agency-directed cleanups. See id. at 267. Here, however, the parties have presented a number of instances where PADEP

9. Although Ursinus has undertaken the clean-up of the seep on Tri-Realty's property, and this might be (but is not inexorably) construed as an admission of some responsibility, Tri-Realty has not presented sufficiently conclusive evidence or data that the weathered oil expressing on Tri-Realty's property is in fact causally attributable to Ursinus.

10. At this juncture of the litigation, there can be reasonable doubts as to whether Tri-Realty ultimately can meet its burden to show that Ursinus caused or materially contributed to the alleged harm as required by RCRA § 6972(a)(1)(B).

11. Thus, Tri-Realty has not yet met its burden to show that Ursinus is in fact responsible for the weathered oil expressing on the slope of Bum Hollow.

12. Courts have the power under the RCRA to order persons to take action "as may be necessary" to remedy a violation of the Act. 42 U.S.C.A. § 6972(a).

13. In order to exercise that power and grant injunctive relief, the Court must have sufficient evidence to be able to order relief "no broader than required by the precise facts." Friends of Earth, Inc., v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 193 (2000) (citation and quotation omitted).

14. To date, Tri-Realty has not presented sufficient evidence for mandatory injunctive relief pursuant to its RCRA claim.

15. To succeed on a claim of injunctive relief, Tri-Realty must show that irreparable injury is *likely* (not merely *possible*) in the absence of an injunction. See Winter, 555 U.S. at 22. "Irreparable harm is not presumed from a violation of RCRA." Wilson v. Amoco Corp., 989 F. Supp. 1159, 1177 (D. Wyo. 1998) (citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531,

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has been actively and continuously involved with Ursinus's investigation and clean-up efforts since 2004, and that, to the extent the clean-up has been delayed, the delay is in large part attributable to Tri-Realty's refusals (or limitations) to allow Ursinus access to the subject property. This evidence permits the conclusion that PADEP involvement has been meaningful and not merely passive.

545 (1987)). “[T]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge . . . is not mechanically obligated to grant an injunction for every violation of law.” Amoco, 480 U.S. at 542 (internal citation and quotation omitted).

16. However, “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury *is sufficiently likely*, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” Id. at 545 (emphasis added). As the Court of Appeals for the Third Circuit has noted, by enacting the endangerment provisions of the RCRA, Congress “enhanced the courts’ traditional equitable powers by authorizing the issuance of injunctions when there is but a risk of harm, a more lenient standard than the traditional requirement of threatened irreparable harm.” Price, 688 F.2d at 211. Accordingly, “[t]he irreparable harm standard is not necessarily met by a given quantity of harm; rather, it is met by showing that the quality of the harm is irreparable by a monetary damage award.” Wilson, 989 F. Supp. at 1177. Notwithstanding these principles, “the Court should be cautious when considering preliminary injunctive relief, and will not find that an imminent and substantial endangerment exists if the risk of harm is remote in time, speculative in nature, and de minimis in degree.” Wilson, 989 F. Supp. at 1172; Christie-Spencer Corp. v. Hausman Realty Co., 118 F. Supp. 2d 408, 420 (S.D.N.Y. 2000).

17. Here, the record presented to the Court is not sufficient to find with sufficient confidence that irreparable injury to Tri-Realty is likely to occur if an injunction does not issue.

18. The threat of harm in Wilson is readily distinguishable from the threat of harm in this case. In Wilson, the extent of contamination was far greater than the contamination present

here, and the contamination in Wilson had caused established and continuous discharges into a major river, was shown to then be putting human and animal populations at significant risk, and was not fully defined. See Wilson, 989 F. Supp. at 1177. See also Christie-Spencer Corp., 118 F. Supp. 2d at 422 (noting that the court in Wilson had granted injunctive relief only “in light of clear evidence of massive contamination and great danger to the public”).<sup>5</sup>

19. The threat of harm in this case is more analogous to that in Grace Christian Fellowship v. KJG Invs. Inc., No. 07-0348, 2009 WL 2460990, at \*12 (E.D. Wis. 2009). In Grace, the court found irreparable harm to be insufficiently likely because there was no evidence of a completed exposure pathway between the source of contamination and the area of concern. Here, irreparable harm can presently be considered unlikely because Tri-Realty has offered no evidence that an exposure pathway exists between the expression of weathered oil and the waters of Bum Hollow Run. See also Interfaith, 399 F.3d at 260 n.5 (holding that a pathway for current and/or future exposure is “implicit” in a finding of liability under § 6972(a)(1)(B)).

20. The Court finds that irreparable injury to Tri-Realty is not likely under these circumstances.

21. Tri-Realty is seeking a “mandatory” preliminary injunction. Injunctive relief has been characterized by the Supreme Court as “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter, 555 U.S. at 22. Mandatory injunctive relief is “granted sparingly, because mandatory injunctions are more burdensome than prohibitory injunctions, and disturb the status quo prior to final adjudication.”

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<sup>5</sup> To put the extent of contamination in Wilson in perspective, it was estimated that at one point as much as 800,000 barrels of contamination were in the soils and groundwater beneath the Amoco Refinery, a “plume” of contamination represented as being the equivalent of 32,000,000 gallons, or three times the size of the Exxon Valdez oil spill. See Wilson, 989 F. Supp. at 1163 & n.1. Here, by comparison, Tri-Realty has alleged that Ursinus’s environmental consultants have removed more than 33,000 gallons of oil-contaminated liquid from the Ursinus campus. Am. Compl. ¶47.

Christie-Spencer Corp., 118 F. Supp. at 418 (citing Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995) (requiring movant to “meet a higher standard where: (i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits”)).

22. Tri-Realty seeks, among other demands, a potentially costly and burdensome diagnostic study that could prove “impractical and unfair” to Ursinus, under the circumstances. See Price, 688 F.2d at 214.

23. Preliminary mandatory injunctive relief very likely would result in disproportionate financial harm to Ursinus.

24. Given the cost of the proposed relief, the current uncertainty of Tri-Realty’s RCRA claim succeeding on the merits, and the failure of Tri-Realty to demonstrate yet a sufficient likelihood of irreparable injury, the Court refuses Tri-Realty’s request for preliminary relief at this time, recognizing that Tri-Realty can perform its own investigation on its property, subject to PADEP oversight, and later seek reimbursement if Ursinus is ultimately found liable for the contamination. See id.<sup>6</sup>

25. Furthermore, to the extent there has been delay in the investigation and remediation of the weathered oil on the slope of Bum Hollow, Tri-Realty has contributed materially to the delay by its refusal or failure to permit reasonable access to Ursinus to do investigative and remedial work.

26. There is a public interest in deferring to state or regulatory agencies such as PADEP in matters for and as to which they have actual knowledge or particular expertise. See,

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<sup>6</sup> A private party cannot recover the costs of a past cleanup effort under the RCRA, but the statute does not preclude a party from recovering its cleanup costs under other federal or state laws. Mehrig, 516 U.S. at 487-88.

e.g., Del. River Port Auth. v. Transam. Trailer Transp., 501 F.2d 917, 923-24 (3d Cir. 1974) (“weight must be given” to the Federal Maritime Commission’s “statutory responsibility to establish and maintain uniform maritime practices and policies”).

27. The PADEP has been substantively aware of the remediation (as well as the demands and disputes relating to it) and has not mandated or even offered support for the specific plan of investigation sought to be compelled by Tri-Realty’s proposed injunction.<sup>7</sup> Despite being notified of each accumulation of weathered oil at or about the time it was discovered, the PADEP has not expressed a view that further subsurface investigation of Bum Hollow (beyond that which is currently being conducted or has been proposed by Ursinus) is urgent or necessary. The PADEP’s action and, of equal moment, its inaction weigh against the issuance of a preliminary injunction, and in favor of continuing to look to Ursinus, under the watchful eye of PADEP, to meet all of its undertakings pursuant to Act 2. See Christie-Spencer Corp., 118 F. Supp. at 421-22 (holding that the continued monitoring of defendant’s cleanup efforts by the New York State Department of Environmental Conservation (“DEC”) and the fact “[t]hat DEC does not see the need for [plaintiff’s requested] testing now is powerfully persuasive . . . of the lack of any need for judicial interference”).

28. RCRA is not principally designed to effectuate the cleanup of toxic waste sites. “RCRA’s primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated . . . .” Mehrig, 516 U.S. at 483. The preliminary injunction sought is therefore not demonstrably

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<sup>7</sup> At most, PADEP has informally commented that, as to ENVision’s February 11, 2013 proposed “Plan of Investigation”, Ex. D-71, “the soil-boring concept is a good idea, but over a wider area and with less-dense spacing.” Ex. P-24/D-75 (Email from Sarah Pantelidou of PADEP to Gilbert Marshall of MGI (March 12, 2013)).

consistent with the purposes of RCRA and the public's interest in the careful and uniform administration of the Act's provisions.

29. Accordingly, the relief requested by Tri-Realty is not in the public interest.

For the foregoing reasons, Tri-Realty's Motion for a mandatory preliminary injunction is DENIED.

BY THE COURT:

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE