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April 24, 2015

Sent via E-mail and First Class U.S. Mail

California District Mining Office
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**Re: Comment on Ram Mining, LLC's permit application for
RAM No. 1 Mine
Permit No. 63131301 (NPDES No. PA0236233)
Noticed in 45 Pa.B 1272 (Saturday, March 14, 2015)**

To Whom It May Concern:

On behalf of the Center for Coalfield Justice ("CCJ"), I respectfully submit the following comment on RAM Mining, LLC's ("Applicant") permit application to operate the RAM No. 1 Mine in Nottingham and Peters Townships, Washington County ("Application"). The relevant Pennsylvania Bulletin notice appeared as follows:

63131301 and NPDES No. PA0236233.
RAM Mining, LLC, (250 West Main Street, Suite 210, Lexington, KY 40507). To operate the RAM No. 1 Mine in Nottingham and Peters Townships, **Washington County**. The operation will not discharge treated waste water and treated mine discharge into unnamed tributaries of Mingo Creek. The operation has an approved non-discharge alternative. Surface Acres Proposed 61.4, Underground Acres Proposed 1,317.7, Subsidence Control Plan Acres Proposed 1,317.7. Application also includes a request for a Section 401 Water Quality Certification. No discharges. The first downstream potable water supply intake from the point of discharge is Pennsylvania American Water Company and intake: Monongahela River. The application was considered administratively complete on February 25, 2015. Application received: October 10, 2014.

This comment is timely filed pursuant to 25 Pa. Code § 86.32(a). On March 25, 2015 the final public notice was published in the Washington *Observer-Reporter*.

The Department should deny and return the Application because it does not meet the criteria for permit approval. 25 Pa. Code § 86.37(a)(1)-(4), (10). There are numerous technical and procedural deficiencies; the antidegradation analysis is insufficient; there is no consideration of the impacts from pre-mining timbering; the proposed discharge to the abandoned Mathies Mine does not meet the requirements of 25 Pa. Code § 89.60; and the information related to impoundments does not meet the requirements of 25 Pa. Code § 89.102. Because it is so deficient, the Department must deny the Application. In the event that it is not denied but is revised, the scope and significance of the necessary revisions merit a second public comment period. In the interim, the Department should issue the necessary deficiency letters to the Applicant.

1. The Department's approval of the Applicant's "non-discharge alternative" ignores the rights of the public to have a say in the process.

The Department's preliminary review of an incomplete application should not be used to approve a wastewater disposal plan in advance of permit issuance, especially when the public is not given an opportunity to participate in that decision-making process. The Legislature's commitment to public involvement in the permit issuance process is apparent from section 4(b) of SMCRA, 52 P.S. § 1396.4(b), where public notification, public comment and public hearing requirements are clearly laid out. The requirement of public notice is the foundation for public involvement in the permit issuance process. 25 Pa. Code §§ 86.31- 86.34; 25 Pa. Code § 92a.82. The filing of the mining application is to be advertised "in a local newspaper of general circulation in the locality of the proposed mining activities." 25 Pa. Code § 86.31(a). Public notice of every complete application for an NPDES permit and every new draft permit or major amendment to a permit must be published in the Pennsylvania Bulletin. 25 Pa. Code §§ 92a.82(a)-(b) "Written comments or objections" on the mining application may be submitted within 30 days after the last publication of the advertisement. 25 Pa. Code § 86.32(a). If one is requested, the Department must hold a conference on the mining application within 60 days after the close of the public comment period and give notice by placing an advertisement in a "newspaper of general circulation in the locality of the proposed mine" at least 2 weeks in advance. 25 Pa. Code § 86.34(b). If one is requested, the Department must hold a public hearing on the NPDES permit application and NPDES draft permit. 25 Pa. Code § 92a.82(d). A record must be made of the conference and the Department must make findings on the issues raised within 60 days. 25 Pa. Code §§ 86.34(b) and (e). Within the same time period, the Department must decide whether or not to issue the permit or to seek additional information from the Applicant. 25 Pa. Code § 86.34(f). All comments received during the NDPEs comment period must be addressed and documented by the Department. 25 Pa. Code § 92a.86. "To residents in the area of the proposed mining site, the opportunity to submit objections, to expound on them at an information conference and to have [the Department] make findings on them is a valuable statutory prerogative." *James Hanslovan, et al. v. DER*, EHB Docket No. 90-076-MR, 1992 WL 211988, *5, (Aug. 12, 1992).

The Department's approval of the Applicant's proposed discharge of wastewater and sludge¹ into the abandoned Mathies Mine as a non-discharge alternative during its pre-application review and without prior public notice of the complete underground mining and NDPES permit application ignores the purpose of the public notice requirement. The permitting procedures are in place to facilitate public involvement in decisions that affect Pennsylvania citizens' way of life and natural environment. The Department cannot forego such an important, fundamental right of the public to be able to participate in permitting decisions at a meaningful point in the review process.

There is an obvious difference between having an opportunity to submit comments to the Department before it makes an initial decision and being limited to commenting on a decision that has already been made. Since there is no public notice that a mining company has initiated the pre-application review process and the Applicant did not submit a complete application to obtain a permit to conduct its coal mining operations, which includes disposing of wastewater, until after the Department approved its antidegradation supplement, the public was excluded during a critical period.

The Department should reconsider its approval of the Applicant's non-discharge alternative, require the Applicant to submit a new antidegradation supplement, and provide the very people who will be impacted by the proposed mining activity with a meaningful opportunity to comment on that proposal.

2. The Application fails to satisfy the antidegradation requirements. The Department cannot issue a permit in the absence of the requisite antidegradation analyses and appropriate showings. This standard means more than simply using labels of "antidegradation," "non-discharge alternatives," and "ABACT".

The Application fails to meet the antidegradation requirements that apply to High Quality Waters such as Mingo Creek and its unnamed tributaries, all of which are designated as High Quality – Cold Water Fishes or HQ-CWF. Specifically, the Application is inadequate because: (1) the required evaluation of non-discharge alternatives is inadequate, (2) the ABACT evaluation is inadequate, and (3) there is no adequate demonstration that the proposed discharge will be non-degrading.

The Clean Streams Law prohibits the discharges of industrial wastes, such a stormwater, without an appropriate permit. 35 P.S. § 691.301. To receive a permit, an applicant must demonstrate that the "existing instream water uses and the water quality necessary to protect those uses must be maintained and protected." 25 Pa. Code §§ 93.4a, 93.4c. Proposed discharges to High Quality or Exceptional Value water are subject to specific antidegradation requirements. 25 Pa. Code § 93.4c. The Applicant failed to demonstrate compliance with the Commonwealth's antidegradation policy and implementation requirements; if the Department were to issue a permit based on the current antidegradation analysis, it would itself be violating the law. *Blue Mountain Preservation Association, Inc. v. DEP*, EHB Docket No. 2005-077-K, 2006 WL 2679895 (Sep. 7, 2006).

¹ See Module 30 of Application.

a. The Applicant failed to adequately evaluate non-discharge alternatives.

The Applicant's evaluation of non-discharge alternatives is unlawfully inadequate. First, for those non-discharge alternatives that the Applicant chose not to use, too little information is given about why that alternative was not used. Section 93.4c(b)(1)(i)(A) (emphasis added below) requires that:

A person proposing a new, additional or increased discharge to High Quality of Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge **and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge.** If a nondischarge alternative is not environmentally sound and cost effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution preventing and wastewater reuse technologies.

Therefore, an applicant must first evaluate *every* non-discharge alternative to determine whether or not it is environmentally sound or cost effective before an applicant decides whether to utilize any of them. There must be an affirmative demonstration with respect to environmental soundness. With respect to cost-effectiveness, in its guidance on antidegradation, the Department offers a 2-step process for evaluating cost-effectiveness that comprises and affordability analysis and a direct cost comparison of alternatives. Water quality Antidegradation Implementation Guidance, Doc. No. 319-0300-002, 52-56 (Nov. 29, 2003) ("Antidegradation Guidance").

With respect to Alternative Project Siting, the following are required: site-specific information, a 2-step cost-effectiveness evaluation, and answers to questions that would satisfy Section 93.4c(b)(1)(i)(A) and that are posed by the Antidegradation Guidance. 48-49. In the Antidegradation Guidance, the Department actually provides specific questions that the Applicant must answer: (1) What are the requirements for locating this projects/activity? Infrastructure/ Utilities / Transportation /Raw Materials/Work Force / Other; (2) Is this watershed or specific stream segment the only location that offers these requirements?; (3) Were other sites considered? *Id.* Here, the Applicant merely says that coal resources and opportunities for leaseholds and properties are limited. Limited site-specific information is provided, there is no attempt to perform the 2-step cost effectiveness evaluation; and there are no meaningful answers to the Department's specific project siting questions. In evaluating alternative site locations, the Applicant repeatedly points to zoning restrictions as a reason for rejecting each alternative. This is not persuasive especially since the Applicant was required to apply for and receive conditional use approval from the Township for the currently proposed site location.

With respect to alternative discharge locations or discharging to another watershed, which are considered to be environmentally sound, Antidegradation Guidance at 48, the

Applicant summarily states that the non-HQ watersheds that surround Mingo Creek watershed are too far away to pump the site discharges in an economic manner. However, again the Applicant does not perform the 2-step cost-effectiveness evaluation. The Antidegradation Guidance provides specific considerations for alternative discharge locations that include stream flow augmentation, sewage facility proximity, and assimilative capacity of the non-HQ streams. Antidegradation Guidance at 50-51. The Applicant provides no information on cost effectiveness, such as how expensive and environmentally risky the pumping would be versus, say, hauling the effluent. The Applicant simply states:

In conclusion, from an environmental impact basis, to disturb all the areas within 100 feet of the high quality stream, install stream crossings, and impact wetlands would create more potential to affect the environment than to discharge a nondegrading discharge on a very limited basis to the receiving stream.

The Applicant does not explain why it would be necessary to locate the pipeline within 100 feet of the portion of Mingo Creek that is designated as HQ. Additionally, the Applicant is still proposing to construct a new, more convenient stream crossing to access the mining site, despite the fact that one already exists. Finally, as explained below, there is no support for the Applicant's conclusion that the discharge will be non-degrading.

With respect to recycling/reuse of water on site, in its supposed evaluation on Page 9, the Applicant states that there will be reuse for dust suppression underground and on the surface for roads and stockpiles. However, the Applicant has not made any attempt to provide an evaluation of environmental soundness and cost-effectiveness.

With respect to constructed treatment wetlands, the Applicant does not even attempt to provide an evaluation of cost-effectiveness. The Department encourages wetland construction because they utilize passive technology and are relatively easy to operate. Antidegradation Guidance at 52. However, the Applicant merely states that there is no proposal to construct wetlands “[d]ue to the fact that any supply waters will be eliminated upon reclamation of the site, [...]” There is no explanation as to why no supply waters will be left or whether it is necessary that they all be eliminated. Without such explanation, it is impossible to know whether wetland construction would be feasible. Wetlands are already considered an environmentally sound alternative. *Id.* at 48. Whether they are cost-effective or not depends on the 2-step affordability and direct cost comparison process that constitutes cost-effectiveness. *Id.* at 52-55.

With respect to holding facilities and wastewater hauling, the Applicant provides no evaluation of cost-effectiveness. This is especially concerning since the Applicant proposes to use impoundments as a non-discharge alternative. The Department's Antidegradation Guidance makes clear that “[p]lanning for effective financial management and operation are necessary to ensure the environmental soundness of this alternative.” at 51. The Applicant gives no reason for not proposing hauling of wastewater. The entire idea behind the antidegradation scheme is to avoid a discharge all

together by exploring environmentally sound and cost-effective non-discharge alternatives. The fact that the Applicant prefers to dispose of wastewater in the nearby abandoned Mathies Mine does not preclude the Applicant from obtaining cost estimates for hauling that would go toward determining whether hauling would be cost-effective. Furthermore, the Applicant does not even identify the off-site facility that will be used during site start-up until the underground connection is made to the abandoned Mathies Mine. Without this information, neither the public nor the Department can evaluate the environmental soundness of the Applicant's proposal.

With respect to the specific pollution prevention process, the Applicant provides no evaluation of cost-effectiveness. Pollution prevention and process changes are already considered to be environmentally sound. Antidegradation Guidance at 48. In terms of cost-effectiveness, the Applicant merely says that no such process is proposed without explaining why not. Applicants who propose to mine in a special protection watershed **must at least evaluate** the non-discharge alternatives; they have the burden to prove that they are either environmentally unsound or not cost-effective. 25 Pa. Code § 93.4c(b)(1)(i)(A). Refusing to propose an alternative at all without any antidegradation analysis ignores the law entirely.

With respect to infiltration galleries or land application, the Applicant has stated inaccurately in Section 1, Subsection D that a “[n]on-discharge alternative will be used to address the entire discharge. No point source discharge is proposed.” If this were true, the applicant would not need to evaluate an ABACT-based non-degrading discharge. In fact, the Applicant has stated that non-discharge alternatives will not eliminate all discharges, through an unlawfully flawed analysis, and has proposed to discharge from the emergency spillways during severe rain events.

Before moving further into the antidegradation evaluation to consider the application of ABACT for a non-degrading discharge, 25 Pa. Code § 93.4c(b)(1)(i)(A)&(B), there has to be a real and lawful evaluation of whether non-discharge alternatives would be cost-effective and environmentally sound when compared to discharge alternatives. Without a non-discharge alternative baseline, no comparison is possible and it can never be known whether a discharge could truly be avoided in this case, which is the preference under the law. 25 Pa. Code § 93.4c(b)(1)(i)(A). *See also Blue Mountain Preservations Association, Inc. v. DEP*, EHB Docket No. 2005-077-K, 2006 WL 2679895 (Sep. 7, 2006); *Zlomsowitch v. DEP*, EHB Docket No. 2002-131-C, 2004 WL 2751154 (Nov. 15, 2004).

b. The information provided about how the proposed discharge will use ABACT is not sufficient.

When an applicant demonstrates that none of the non-discharge alternatives are environmentally sound and cost-effective, or that some are but not enough to eliminate the discharge entirely, then the applicant must demonstrate that the proposed discharge “shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies” otherwise known as ABACT. 25 Pa. Code § 93.4c(b)(1)(i)(A). The proposed discharge must meet the ABACT standard

unless water quality-based effluent limits are more stringent, in which case the discharge must meet more stringent effluent limits. Antidegradation Guidance at 68. Finally, the Applicant must demonstrate that the proposed discharge will be non-degrading. 25 Pa. Code § 93.4c(b)(1)(i)(B); Antidegradation Guidance at Chapter 8.

First, the only way to know whether the non-discharge alternatives are environmentally sound and cost-effective when compared against the discharge alternatives is to know the environmental soundness and cost-effectiveness of the discharge alternatives. Much like the Application's portion on non-discharge alternatives, its discussion of ABACT lacks any material information on cost-effectiveness and environmental soundness as applied to the site at issue.

Second, the ABACT analysis in the Anti-Degradation Supplement is limited to sediment issues. While sediment is a significant pollutant that is also regulated by 25 Pa. Code Ch. 102, the ABACT analysis in the anti-degradation context cannot be limited to sediment but must also consider other parameters. By way of example, there is no evaluation of the thermal impact of the discharge to the receiving streams. The lack of any evaluation of thermal impacts is the kind of omission that has already been held to be unlawful by the Environmental Hearing Board. See *Blue Mountain Preservation Association* at 19.

Third, after comparing the ABACT standard to water quality-based effluent limits, the Applicant must meet the more stringent of the two. There is nothing in the Application that provides such a comparison.

Fourth, the Applicant must demonstrate that the selected combination of control technologies is the best available combination and will ensure that the existing water quality will be maintained and protected. In order to show that the Applicant will be subjecting the proposed discharge to the best available combination of control technologies, the Applicant must undertake an analysis of the alternatives available. 25 Pa. Code § 94.4c(b)(1)(i)(A). Section 93.4c(b)(1)(i)(B) places a condition on the discharger's use of control methods: before a point source discharge to a special protection watershed can be permitted, the proposed discharger must demonstrate that its selected combination of control methods will maintain and protect the existing quality of the receiving water. The Applicant and the Department cannot shortcut the procedures set forth in the antidegradation regulations by calling an alternative that will in fact result in a discharge a "non-discharge alternative."

The Applicant must demonstrate to the Department that the proposed technology is the best available combination. The antidegradation regulations provide as a next step, "if nondischarge alternative is not environmentally sound and cost effective, a new, additional or increased discharge shall use the *best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.*" 25 Pa. Code § 93.4c(b)(1)(i)(A). (emphasis added). It is not sufficient that some or all of the aforementioned techniques happen to be employed; instead the **best available combination** of them must be employed to ensure against degradation of the receiving water.

It is clear that the antidegradation regulations are meant to be comprehensive. This is obvious from the language of Section 93.4c(b)(1)(i)(B) requiring a permit applicant to “demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters.” Examining all possible impacts on the receiving water from the discharge is the only way to make such demonstration. Such a holistic approach is essential for ABACT. It is impossible to know whether a combination is the “best available” without knowing what pollutants must be addressed so that the combination will in fact “maintain and protect” the water quality. 25 Pa. Code § 93.4c(b)(1)(i)(B). The Department highlights this need to be comprehensive in the Antidegradation Guidance when it says that ABACT “is specific to the discharge type and wastewater characteristics” and “should account for pertinent pollutants and water quality parameters associated with the discharge under consideration.” Antidegradation Guidance at 69. The utility of ABACT is that it forces the Applicant to look at all the available options and chose the best combination for the proposed discharge and receiving stream.

* * *

The Applicant and the Department must analyze not just the impacts of anticipated discharges, but all of the impacts the project might have on a special protection water, to ensure that the quality is maintained and protected and the uses are not impaired. Despite the clear language of Section 93.4c(b)(1)(i) and the Department’s own language in its Antidegradation Guidance, there is no evidence that the required, detailed ABACT was ever conducted by the Applicant. Additionally, the Applicant has not demonstrated that the selected control methods will maintain and protect the existing quality of the receiving water.

c. There is inadequate demonstration that the proposed discharge will be non-degrading.

Any proposed discharge that utilizes ABACT must still be non-degrading. The Applicant and the Department, focusing only on sediment, claim that despite the possibility that the emergency spillway may be overcome by a sufficiently heavy rain event, the discharge would be non-degrading because that heavy rain even on its own would have compromised in-stream water quality. On Page 19 of the Antidegradation Supplement the Applicant states: “With the proposed site features containing up to a 25-year storm event, in the case where this event was exceeded, would mean that the streams will have already received much precipitation and the amount of suspended solids reaching the stream will have substantially increased.” This is not an adequate demonstration of a non-degrading discharge because it only accounts for sediment and, as to sediment, it does not meet the standards of an adequate non-degrading discharge evaluation.

First, the antidegradation requirements from Chapter 93 are distinct from the erosion and sedimentation requirement for special protection watersheds outlined in Chapter 102. While Chapter 102 outlines the standards for sediment, antidegradation has a broader scope and must account for other pollutants. In this case, the Applicant has failed to demonstrate that the discharge caused by emergency spillway failure would not degrade

the stream quality or impair the stream use in terms of temperature. Also, commercial flocculants will be added to the stormwater that may end up running over the emergency spillways during certain rain events. Absolutely no analysis has been performed as to whether pollutants contained in those materials will degrade the existing quality of the receiving stream.

Second, the evaluation of whether the proposed discharge will be non-degrading is summary and inadequate. Chapter 8 of the Antidegradation Guidance provides a detailed two-step process that must be utilized by applicants when evaluating discharge and degradation. There is no evidence of any such analysis in the Application. Just to give one of many possible examples of omission, the Department requires the use of long-term data to know whether the discharge will affect water quality. Antidegradation Guidance at 61 (“The natural quality of surface waters is constantly changing and the use of long term-data assures that these variations are accounted for in the antidegradation permit review process.”). In this case, the Applicant has not even attempted to provide any data regarding the quality of the receiving stream. Instead, the Applicant incorrectly states: “no discharges are proposed from this permit.” The Department’s guidance manual recommends twenty-four samples taken over a twelve-month period, or less frequent samples taken over the course of multiple years. *Id.* In *Zlomsowitch*, the Environmental Hearing Board described a proper demonstration as including “water quality monitoring data and scientific analysis of the effects on the stream from the addition of identified and qualified pollutants in a permitted discharge.” *Zlomoswitch v. DEP*, EHB Docket. No. 2002-131-C, 2003 WL 22321707 (Nov. 15, 2004). No such demonstration exists in this case. The Board made clear in *Zlomsowitch*, when “there was also no substantial evidence presented...that the Permittee demonstrated, and DEP found, that the selected control methods will maintain and protect the existing quality of the receiving water,” DEP failed to comply with this regulatory requirement and thus acted contrary to law and the resulting permit was unlawful. *Id.* Like *Zlomsowitch*, the demonstration by the Applicant is insufficient to allow the Department to conclude that the existing quality of Mingo Creek and its unnamed tributaries will be maintained and protected.

Third, the Applicant’s and the Department’s logic is flawed. The Applicant and the Department have assumed that all stormwater that overflows from the ponds will reach the emergency spillways. However, there is no affirmative demonstration that in the event of a severe storm event, the pond walls themselves will not erode causing stormwater to discharge to the receiving waters directly and not through the emergency spillway.

Fourth, it appears that neither the Applicant nor the Department has interpreted “non-degrading discharge” correctly. The antidegradation scheme requires the **maintenance of existing High Quality water** unless an applicant is prepared to demonstrate a social and economic justification for degradation below that quality, which this Applicant has not provided. 25 Pa. Code § 93.4c. The Applicant claims that because its discharge of stormwater runoff will be joined by nonpoint source discharges themselves laden with sediment, then in-stream water quality will not be degraded. This is flawed reasoning. The question is whether the *point source discharge itself* will be degrading, not whether the point source discharge will degrade water quality as much as other discharges. No

evaluation has been performed to answer that question. Also, applicants have a distinct obligation to employ nonpoint source control in the antidegradation scheme, so it cannot be correct that the existence of a degrading nonpoint source discharge can cancel out the degrading nature of a point source discharge. Allowing the Applicant to bootstrap a degrading discharge to the poor quality of another discharge would amount to authorizing the re-designation of the water body to that poor quality in circumvention of the Commonwealth's antidegradation policy.

Fifth and finally, the Applicant fails to provide any description of the baseline water quality. One of the main purposes of antidegradation is to maintain existing quality and uses. In this case, the receiving stream is High Quality, which means that the quality of the water exceeds that which is necessary to sustain its uses. It is that better-than-necessary level of quality that the antidegradation scheme protects in the case of a Special Protection Water. The only way to know if a discharge will degrade that level of quality is to know what that level of quality is. Without that information, the Applicant cannot evaluate the level of degradation that its discharge will cause. If the law prohibited raising the temperature of a body of water, the only way to know whether the addition of material to that body of water would raise the temperature is to know the temperature is in the first place and then to evaluate the impact on temperature of adding the material. In this case, the Applicant is essentially saying that the addition of material will not raise the temperature of the water without ever stating what the baseline the temperature is.

The Commonwealth's antidegradation policy requires that existing uses and quality be maintained and protected. The Applicant has done nothing to demonstrate that its activities will protect Mingo Creek's uses. Nor has it demonstrated that its activities will not degrade the existing quality, which is High Quality. Because issuing a permit based on this inadequate Anti-Degradation Supplement would be unlawful, see *Blue Mountain*, the Department must deny the permit and return the Application.

* * *

The Antidegradation supplement must be entirely revised or the Application should be denied. Due to the scope and significance of the necessary revisions, the Department should open the revised application to a new public comment period should the Applicant decide to make the necessary revisions.

3. The Department has incorrectly applied the antidegradation regulations by labeling a point source discharge as a non-discharge alternative. The Applicant's facilities as currently designed to not constitute a "non-discharge alternative" for the purposes of 25 Pa. Code § 93.4c(b)(1)(i).

The Pennsylvania Bulletin notice indicates that the Applicant has an "approved non-discharge alternative." In fact, the proposed mine site has at least one point source discharge from the stormwater control facilities. During severe storm events, the stormwater control facilities will release pollutant-laden water into an Unnamed Tributary to Mingo Creek, which has a designated aquatic life use of High Quality, Cold

Water Fishes (HQ-CWF).² See 25 Pa. Code § 93.9z (Drainage List V). Additionally, the proposed discharge into the abandoned Mathies Mine is not an environmentally sound non-discharge alternative.

a. There is no exception for severe rain events.

The Department has committed the same error as in *Crum Creek Neighbors*, *Zlomsowitch*, and *Blue Mountain Preservation Association, Inc.* of focusing on the non-discharge alternative step at the exclusion of the remaining two steps of the antidegradation process. The Applicant has not satisfied the antidegradation requirements simply because the applicant has proposed to implement several Best Management Practices (“BMPs”) that are qualified as “non-discharge alternatives,” including basins that are designed to provide enough capacity to infiltrate up to a 10-year, 24-hour storm event. Best Management Practices are discharge limitations for the purpose of compliance with water quality standards. 40 C.F.R. 122.44(k).

The Environmental Hearing Board has already rejected this approach. Over a decade ago, the Environmental Hearing Board made clear that in order to qualify as a “non-discharge alternative” under 25 Pa. Code § 93.4c(b)(1)(i), engineering controls must prevent any discharge to special protection waters under any and all circumstances, including extraordinary, catastrophic storm events. *Zlomsowitch v. DEP*, EHB Docket. No. 2002-131-C, 2003 WL 22321707 (Nov. 15, 2004). In *Zlomsowitch*, the applicant for a noncoal surface mining permit proposed erosion and sedimentation controls of sufficient size to contain a 10-year/24-hour storm event. The Department and the applicant argued that this approach, which they inaccurately described as “complete containment”, constituted a non-discharge alternative within the meaning of 25 Pa. Code § 93.4c(b)(1)(i), and thus obviated the remainder of the antidegradation analysis. Finding that “DEP’s position [was] illogical and untenable”, *Id.*, the Environmental Hearing Board specifically rejected the Department’s interpretation of ‘non discharge alternative’ as allowing exceptions for severe rain events in the surface mining context. *Id.* (An impoundment system at a mining operator that would overflow into an exceptional value water during severe rain events did not constitute a ‘non discharge alternative.’).

Relying in part on the *Zlomsowitch* opinion, in the *Crum Creek Neighbors* case, the Board found that BMPs did not qualify as “non-discharge alternatives” because the basins would in fact overflow in “five year storms and larger” causing a discharge to Holland Run. *Crum Creek Neighbors v. DEP*, EHB Docket. No. 2007-287-L, 2009 WL 3550279 (October 22, 2009). As a result of the discharge, the operator needed to demonstrate that it was using ABACT and that any discharges during large storms would not degrade the existing quality of Holland Run. *Id.* The problem, according to the Board, was that “to a large extent [DEP and the operator] approached this issue by listing BMPs, describing compliance with DEP’s checklists, policy manuals, the local ordinance and accepted engineering practices, and justifying the use of particular engineering models

² In Section 2 of the Antidegradation Supplement the Applicant states: “The operator is proposed to contain an entire 25-year/24-hour storm event. Should precipitation occur that exceeds this event, a discharge over the emergency spillway is possible.”

instead of showing that there would in fact be no discharge to the stream. *Id.* at *16. Rejecting this approach, the Board explained that “there is either a discharge or there is not. Determining whether there will be a discharge is not about checking off boxes on the form.” *Id.* at *17.

In *Blue Mountain Preservation Association, Inc.*, the Board found that the use of BMPs prescribed by the erosion and sedimentation control regulations for earth disturbance activities that may result in a discharge to a special protection water does not automatically constitute compliance with the antidegradation regulations. *Blue Mountain Preservation Association, Inc. v. DEP*, EHB Docket No. 2005-077-K, 2006 WL 2679895 (Sep. 7, 2006).

Like the stormwater controls addressed in *Zlomsowitch, Crum Creek Neighbors*, and *Blue Mountain Preservation, Inc.*, the failure of the Applicant’s controls to prevent discharges into nearby special protection waters under *all* circumstances does not constitute a “non-discharge alternative.” Any discharge of pollutants to the nearby High Quality waters of the Commonwealth from the erosion and sedimentation control ponds must be expressly authorized by an individual NPDES permit that satisfies all of the antidegradation requirements of 25 Pa. Code § 93.4c(b)(1).

b. The proposed discharge into the abandoned Mathies Mine is not an environmentally sound non-discharge alternative.

The law on antidegradation requires that the water quality of High Quality waters shall be maintained and protected. 25 Pa. Code § 93.4a(c). This law then sets up

a very specific and particular process and procedure which an applicant proposing a new, additional or increased discharge to High Quality or Exceptional Value Water must follow in making certain affirmative demonstrations to the Department as a prerequisite to the Department’s granting of a permit for such a new, additional or increased discharge. 25 Pa. Code § 93.4c(b)(1).

Blue Mountain Preservation Association v. DEP, EHB Docket No. 2005-077-K (Adjudication issued September 7, 2006). The Applicant proposes to discharge treated wastewater directly into the mine pool located in the abandoned Mathies Mine workings. Such a proposal does not constitute an appropriate non-discharge alternative.

First, the Clean Streams Law protects against, among other things, the pollution of groundwater and surface water. 35 P.S. §§ 691.1, 691.301. “Waters of the Commonwealth” is defined broadly in the Clean Streams Law to include “any and all ... streams, creeks, rivulets ... ponds, springs...and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.” 35 P.S. § 691.1. This statutory definition encompasses the mine pools located in the abandoned Mathies Mine,

the groundwater surrounding those mine pools, and any and all surface waters that may be impacted by drainage from the abandoned mine workings.

Second, there is no information provided in the application establishing that the abandoned mine pool will actually function to prevent a discharge to surface waters. 35 P.S. § 691.301. *See also* 35 P.S. § 691.611; 25 Pa. Code § 86.37(a)(3); 25 Pa. Code § 89.36(a). The Applicant merely concludes that the mine pool is “stable”.³ One of the most serious effects of underground coal mining has and continues to be the escape of polluted water from both old and current mine workings. “Acid mine drainage is the principal cause of contaminated water arising from coal mining.”⁴ Despite the obvious potential for underground mine waters to escape and enter the surface water regime,⁵ the Applicant has neither conducted nor provided an adequate hydrogeological investigation. Such investigation is essential to understand the movements of groundwater around and within the mine workings.

In fact, CCJ has serious doubts about whether injecting wastewater into this mine pool will effectively prevent a discharge into surrounding surface waters. 35 P.S. § 691.301. More likely, the injection of water from new mining operations will increase the rate that the mine pool is rising, which will eventually result in mine water spilling over the anticline from the western section of the mine to the eastern section and adding to the water volume already discharging from the eastern side. 35 P.S. § 691.301. *See also* 35 P.S. § 691.611; 25 Pa. Code § 86.37(a)(3); 25 Pa. Code § 89.36(a). Since October 2005, WVU Hydrology Research Center (HRC) has monitored the mine pool level in Mathies at Pollock Shaft. Between 2005 and December 2014, HRC documents a rate of rise of about three feet per year. In December 2014 the mine pool was measured at an elevation of 802 feet. The elevation of the crest of the anticline is approximately 870 ft. If the pool level is not managed by pumping, flooding is likely to continue. Continued flooding will eventually result in mine water spilling over the anticline from the western section of the mine to the eastern section and adding to the water volume already discharging from the eastern side. Assuming the rate of rise of the mine pool remains constant, then spilling over the anticline can be expected in the next 20 to 25 years. However, injecting water from new mining operations will increase the flooding rate and reduce the time until spillage over the anticline and additional discharge from the eastern section of the mine.

* * *

Proposals to discharge directly to waters of the Commonwealth are not non-discharge alternatives. The failure of the Applicant’s proposal to prevent discharges into nearby special protection waters under *all* circumstances does not constitute a “non-discharge

³ The Applicant’s basis for concluding that the western mine pool is “stable” remains unclear. Section 3.4.3 of the Monongahela Basin Mine Pool Project report, which the Applicant submitted with its Application, contains a summary of the results of hydrologic head estimates and concludes that the Mathies mine shows a continued rise in water level from January 2003 to February 2004.

⁴ Thomas, Larry. *Coal Geology*. West Sussex: John Wiley & Sons Ltd, 2002.

⁵ The Department has and continues to treat a mine discharge from the abandoned Mathies Mine.

alternative.” Additionally, any discharge of pollutants to the nearby waters of the Commonwealth from the abandoned Mathies Mine must be expressly authorized by an individual NPDES permit that satisfies all of the antidegradation requirements of 25 Pa. Code § 93.4c(b)(1).

4. The Department must deny the Applicant’s proposed wastewater disposal plan because it does not comply with 25 Pa. Code § 89.60.

The Department is the agency of the Commonwealth that is vested with the duty and authority to administer and enforce Pennsylvania’s environmental statutes, including the Bituminous Mine Subsidence and Land Conservation Act,⁶ 52 P.S. §§ 1406.1 *et seq.* (“Mine Subsidence Act”) the Pennsylvania Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*, and the rules and regulations promulgated under those statutes. The Department cannot issue a permit that would result in a violation of applicable law. Protecting waters of the Commonwealth is a primary concern of the mining regulations in 25 Pa. Code Chapters 86 and 89. The Applicant’s proposed mining activities can only be permitted in accordance with these regulations.

Section 89.60 of the Department’s underground mining regulations prohibits the Applicant from diverting or discharging water from the surface or from the proposed Ram No. 1 Mine into other underground mine workings, unless the Applicant demonstrates to the Department that the discharge will: (1) abate water pollution or otherwise eliminate public hazards resulting from the underground mining activities, (2) be discharges as a controlled flow, and continue as a controlled and identifiable flow that is ultimately treated by an existing treatment facility, or will otherwise meet applicable water quality standards, (3) be limited to wastes approved by the Department, (4) any discharge from the underground mine to a surface water will not cause, result in or contribute to a violation of the applicable water quality standards, (5) minimize disturbance to the hydrologic balance, and (6) meet with the approval of the Mine Safety and Health Administration (MSHA) and the Office of Deep Mine Safety of the Department. 25 Pa. Code §§ 89.60(1)-(7). The Application, more specifically Module 30, fails to meet this requirement.

First, the Applicant has not demonstrated that the proposed discharge will abate water pollution or otherwise eliminate public hazards resulting from underground mining activities. As discussed above, the Applicant has not submitted any information affirmatively demonstrating that the proposed injection into the abandoned mine pool will prevent ground and surface water pollution. In fact, the more recent data collected by the WVU Hydrology Research Center suggests that the Applicant’s proposal to inject water from new mining operations will increase the flooding rate and reduce the time

⁶ The Bituminous Mine Subsidence and Land Conservation Act (“BMSLCA”) requires that any person that operates a bituminous coal mine must apply for an obtain a permit from the Department. 52 P.S. § 1406.5. Section 7 provides that bituminous mines operating under the Act shall be subject to the exclusive jurisdiction of the Department, and that the Department shall have the power to enforce the provisions of the Act and its rules and regulations. 52 P.S. § 1406.7.

until spillage over the anticline and additional discharge from the eastern section of the mine.

Second, the Applicant has not even attempted to evaluate whether or not the proposed discharge increase will cause or contribute to a violation of applicable water quality standards or effluent limitations. As explained above, the Applicant has not provided any information related to the existing quality of the receiving waters. This analysis is especially important given the likelihood that injecting water from the proposed mining operations will increase the flooding rate of the western mine pool and eventually cause additional discharge from the eastern section of the mine. The antidegradation requirements apply to increased discharges. 25 Pa. Code § 93.4c(b)(1)(i)(A).

Third, the Applicant has not demonstrated that the proposed discharge will minimize disturbance to the hydrologic balance. In Section 30.7 of Module 30 the Applicant states:

The water that comprises the fluid portion of the water will have been treated, and will be alkaline and of BAT quality. The travel distance of the flow path required for the water to pass through the mix complex to the stabilized mine pool is long and circuitous, both horizontally and vertically. This long travel discharge would allow ample retention time for the solid portions of the water to settle and be retained within the mine.

This explanation is unlawfully inadequate. First, it completely ignores the potential groundwater contamination. Nothing in the Application suggests that the mine complex has been adequately sealed to prevent mine wastewater from escaping and contaminating surrounding groundwater. Second, according to Module 30, the Applicant also proposes to inject sludge.⁷ While the Applicant may treat the mine wastewater, there is nothing to suggest that the quality of the sludge will also be alkaline and of BAT quality. The Applicant has done nothing to evaluate the impact of sludge on the mine wastewater once it is injected into the abandoned mine complex. Third and finally, the Applicant does not explain what is meant by the phrase “long travel distance”. The Department cannot

⁷ In Section 30.1 of Module 30 the Applicant states: “The proposed Ram No. 1 Mine lies in a HQ watershed. The peak of the Amity Anticline lies just west of the proposed portal site, and the adjacent abandoned Mathies workings lie north of the proposed portal. The operator is proposed to pump underground its sedimentation pond discharges, treatment pond discharges, and pond sludge into the abandoned Mathies mine workings on the western side of the Amity Anticline. . . injected waters and sludge would travel westerly through the workings until encountering a stabilized mine pool.” In Section 30.2 of the Module 30 the Applicant states: “The runoff gravity flows into Sedimentation Pond A, the treatment ponds, and accumulations of sludge and solids are retained in the bottom of the ponds. This material along with the pond discharges is now proposed to be injected to the abandoned Pittsburgh deep mine on the west side of the Amity Anticline. The volume of sludge/sediment water is from the sludge level of the dewatering pipe to the pond bottom or approximately 61,625 cu. ft. of material.” In Section 30.7 of Module 30 the Applicant states: “. . . This long travel distance would allow ample retention time for the solid portions of the water to settle and be retained within the mine.”

possibly evaluate whether the retention time is sufficient to allow the solid portions of the water to settle and remain in the mine without this information.

Fourth and finally, the Applicant has not provided approval for the proposed discharge from MSHA and the Department's Bureau of Mine Safety. 25 Pa. Code § 89.60(7). Section 30.10 of Module 30 requires the applicant to "[p]rovide approval for this operation from the Mine Safety and Health Administration and the Department's Bureau of Mine Safety." Rather than providing such approval, the Applicant states: "MSHA and Deep Mine Safety typically do require review of plans for this type of operation into abandoned or inactive deep mined and do receive a copy of this plan from the Department for comments prior to Department approval of the permit." It is not the District Mining Office's responsibility to obtain MSHA or the Bureau of Mine Safety approval for the Applicant.

Since Module 30 of the Application is not technically adequate, does not address all applicable regulatory and statutory requirements, and does not contain all of the information needed by the Department to make a decision, the Department should deny the permit and return the Application to the Applicant. In the event that it is not denied but is revised, the scope and significance of the necessary revisions merit a second public comment period. In the interim, the Department should issue the necessary deficiency letter to the Applicant.

5. The Application fails to account for the impacts of land clearing, including timbering, which is part of the mining activities.

The discharge of industrial waste without a permit is prohibited. 35 P.S. § 691.301. Earth disturbance activities like land clearing lead to discharges of industrial waste and so are regulated by the Clean Streams Law and most specifically Chapters 93 and 102 of the Pennsylvania Code. Neither in the NPDES module nor in the antidegradation module nor in the Erosion and Sedimentation Control module does the Applicant adequately address the impacts that will inevitably be caused by land clearing, including timbering, which is part of the mining activities proposed at the Ram Mine No. 1 site.

First, with respect to the antidegradation requirements from Chapter 93, the Department cannot issue a mining permit for the Ram Mine No. 1 site without first requiring the Applicant to account for the pollution that will result from the land clearing activity at the site. Module 12, which provides NPDES information, lists information about the sedimentation and treatment ponds. Nowhere in the Application does it account for stormwater discharges related to land clearing. The Anti-Degradation Supplement is equally as silent about the pollution that will occur from land clearing, and whether that would threaten the ability to protect and maintain the HQ-CWF use and quality. In clearing the land in anticipation of coal mining and to construct the support facilities, the Applicant cannot foul the stream with sediment and then say that since the quality has been degraded already by that land clearing-related sedimentation, its point source discharge of sediment from the emergency spillways will not further degrade the stream. The baseline quality of the High Quality receiving streams must be assessed prior to any pollution-causing activity at the mining site, including land clearing, and the Applicant

must then demonstrate that its eventual point source discharges from the emergency spillways will not cause or contribute to the degradation of that baseline quality.

Second, the Application fails to account for land clearing in its assessment of erosion and sedimentation. Chapter 102 (Erosion and Sedimentation) regulated earth disturbance activities. 25 Pa. Code § 102.1. Clearing land at a coal-mining site is an earth disturbance activity to which Chapter 102 applies. *Id.* In this case, 26.8 acres will be affected. Because of its proximity, the proposed earth disturbance activity has the potential to discharge to water classified as High Quality. 25 Pa. Code § 102.4(b)(2)(iii). As a result, the Applicant must develop and implement a written Erosion and Sedimentation Control Plan. There is no evidence that the Department has required the Applicant to obtain a Chapter 102 authorization for land clearing in anticipation of coal mining activities. There is also no evidence that the Department has evaluated the potential for degradation of the receiving streams from land clearing activities under its antidegradation policy. To that extent, the Department is violating the Clean Streams Law; and without the proper authorization, the Applicant would be in violation too as soon as it timbered the site.

Land clearing impacts are relevant in the antidegradation context because the Applicant must demonstrate that its point source discharge will be non-degrading. Before issuing the mining permit, as stated above, the Department must account for the sedimentation that will pollute the streams as a result of the land clearing activity, and must ensure that the baseline water quality against which non-degradation is measured is the quality of water prior to the land clearing. If the Department complied with the law and required the Applicant to obtain Chapter 102 authorization for land clearing, then there could be less pollution to the stream from land clearing, which would reduce the chance that the emergency spillway discharges would degrade water quality as to sedimentation.

However, compliance with Chapter 102 does not satisfy the non-degradation demonstration requirement of Section 93.4c(b)(1)(i)(B). Section 93.4c(b)(1)(i) clearly requires that the permit applicant demonstrate that the discharge will maintain and protect the existing quality of the receiving water. Chapter 102 cannot by itself satisfy the comprehensive focus of Section 93.4c(b)(1)(i) because it is focused on only two possible impacts to water quality: erosion and sedimentation. 25 Pa Code § 102.2(a) (purpose is to “require persons proposing or conducting earth disturbance activities to develop, implement and maintain BMPS to minimize the potential for accelerated erosion and sedimentation”). Given this narrow focus, it is impossible for Chapter 102 compliance to satisfy the full range of what Section 93.4c(b)(1)(i) requires. In this case, the Department must analyze whether the Applicant’s land clearing activities will achieve compliance with the Antidegradation Policy because the “minimization” of impacts under a Chapter 102 authorization may not adequately protect the HQ waters at issue here from all pollutants of concern. The Applicant may present the Department with detailed data showing that the Chapter 102 BMPs would maintain and protect the HQ receiving water from water quality degradation due to erosion and sediment, but it must also demonstrate that the receiving streams’ water quality will be maintained and protected from any other pollutants of concern from its land clearing activities. The Department should require the Applicant to identify all pollutants of concern related to its land clearing activities. After

identification of those pollutants, the Department should require that the Applicant provide sufficient data to perform an antidegradation analysis for each pollutant's potential impact to the receiving waters.

The Application contains nothing that would account for the discharges related to land clearing. Any failure to account for land clearing at a coal mining site would implicate the Office of Surface Mining's oversight jurisdiction as it would be a violation by both the Applicant *and* the Department. Also, to the extent that any unlawful land clearing occurs before the issuance of a mining permit, the Department should account for that violation when deciding whether to approve the Applicant and to ultimately issue a permit. 52 P.S. § 1396.3a(d).

6. The plan for proposed impoundments is inadequate.

Module 13, Section 13.1(d) of the Application is unlawfully inadequate. Section 89.102 of the Department's underground mining regulations requires the Applicant to provide a plan for each proposed impoundment. The Applicant's plan for each proposed impoundment within the permit area is inadequate because it does not adequately describe the potential effect of subsidence from past underground mining operations on the structure. 25 Pa Code §§ 89.102(3).

The Department's underground mining regulations require the Applicant to provide a plan for each proposed impoundment within the permit area that includes "a survey describing the potential effect on the structure from subsidence of the subsurface state resulting from past underground mining operations." 25 Pa. Code § 89.102(3). Ponds TP-1 and TP-2 are situated over an abandoned Pittsburgh deep mine. The Applicant has not even attempted to evaluate or describe the potential effect on the two impoundments from subsidence of the subsurface from past underground mining operations. Seeking to dodge its responsibility to provide a complete and technically adequate application, the Applicant concludes: "no subsidence is anticipated" because the deep mine "has been abandoned for a long period of time." There is absolutely no basis for the Applicant's conclusion. Subsidence occurs on a random basis for many decades after mining has occurred.⁸ The Applicant further states that the "treatment ponds will have synthetic liners so leaking should not occur." Nothing in the Application even suggests that the Applicant evaluated the impact of subsidence on the synthetic liners and the Applicant does not provide any explanation for why synthetic liners protect the impoundment from the impacts of subsidence.

The Applicant must submit a technically adequate application that meets all applicable regulatory and statutory requirements and contains all information needed by the Department to make a final permit decision. Since the Application does not meet the requirements of 25 Pa Code § 89.102(3), the Department should deny the permit and return the Application to the Applicant.

⁸ The legislative history § 516 of SMCRA, acknowledges that "[subsidence occurs *** on a random basis, at least up to 60 years after mining." H.R Rep. No. 218, 95th Cong., 1st Sess. 126 (1977).

7. The Applicant’s proposed plan for sludge removal and disposal in Module 12 of the Application is inadequate.

The Application neither provides the anticipated volume of sludge that will be generated by each treatment system nor identifies the disposal site nor provides any kind of analysis regarding the sludge density, ability to flow, settle or dewater. Without this information, the Department cannot possibly evaluate whether or not the Applicant’s plan for sludge removal and disposal is adequate.

Rather than providing all of the information specifically requested by Section 12.7 of Module 12,⁹ the Applicant explains that sludge from treatment pond No. 1 and treatment pond No. 2 will be pumped to a small dam formed on the coal stockpile area for dewatering and drying. According to the Application, “[t]he small dam will simply be a bermed up area, 2 or three feet in height to contain the sludge until it dewater sufficiently to transport the material.” Without knowing the anticipated volume of sludge that will be generated by each treatment system, it is impossible to determine whether a berm two or three feet in height will be sufficient to contain the sludge until it dewater. Furthermore, the Applicant states: “the berm material will be relatively clean earthen material with a clay content and no rock fragments greater than approximately 3 to 4 inches in size sufficient so that leakage of sludge is minimal or prevented.” Especially since the proposed mining activities are located in a Special Protection watershed, the Department must ensure that the sludge drying area is designed to prevent any and all leakage of sludge.

The Applicant must submit a technically adequate application that meets all applicable regulatory and statutory requirements and contains all information needed by the Department to make a final permit decision. The Applicant’s failure to submit a technically adequate application is particularly alarming given the unusually long pre-application review process during which the Department issued many deficiency letters. It is not the Department’s responsibility to tutor the Applicant on permit application requirements. Since the Application does not even provide the information specifically requested by Module 12, the Department should deny the permit and return the Application.

8. The Application provides insufficient information to determine whether the plan to manage fugitive dust from mining will comply with air quality laws.

Applicants for underground mining permits must provide a plan to manage fugitive dust emissions that is compatible with the air quality laws. 25 Pa. Code § 89.64(2). The Department must evaluate whether the applicant’s plan will comply with applicable air quality laws. 25 Pa. Code § 123.1. If the plan does not, the Department cannot issue the permit.

⁹ Section 12.7 of Module 12 asks the Applicant to “[d]escribe the anticipated volume of sludge that will be generated by each treatment system and the frequency of sludge removal operations. Describe the means of sludge disposal and the disposal site.”

In Module 16, the Applicant states that “good housekeeping and yard management practices will be employed to minimize wind-blown fugitive emissions” and indicates a water spray system will be used in dry conditions. This is inadequate. First, it is unclear what is meant by the phrase “good housekeeping and yard management”. Second, the Applicant must describe how it will regularly determine whether or not watering is needed to control fugitive dust emissions. Without such information, the Department cannot possibly evaluate whether the plan will comply with applicable air quality laws.

9. Since there will be at least one point source discharge and likely a second point source discharge in the future, the Department must prepare an adequate NPDES draft permit and fact sheet for public comment.

The Department must fulfill its mandatory duty to provide the public with a derivation of the effluent limitations or other conditions and a summary of the reasons for the conditions in the NPDES Draft Permit. 25 Pa. Code § 92a.53 (The Department must prepare a Fact Sheet that includes documentation that the applicable effluent limits and standards were considered in developing the draft permit, documentation that applicable water quality standards will not be violated, and a summary of the basis for the Draft Permit conditions.); 25 Pa. Code § 92a.82 (adequate public notice of a Draft Permit includes a Fact Sheet).

First, the Department is required to prepare a Fact Sheet on the derivation of the effluent limitations or other conditions and the reasons for the conditions of both the draft final permit. 25 Pa. Code § 92a.53; 40 C.F.R. 124.27. The Fact Sheet must include documentation that applicable water quality standards will not be violated. 25 Pa. Code § 92a.53(4). The supporting calculations, data sources, assumptions and other factors that form the basis for the permit requirement must be clearly stated in the Fact Sheet and must be made part of the official permit file for future reference by any interested party. PA DEP, *Technical Guidance for the Development and Specification of Effluent Limitations*, Document No. 362-0400-001 (2007); 25 Pa. Code § 92a.53(4)-(5) (requiring that the effluent limits and the methodology used in determining those limits be documented in the Fact Sheet); 40 C.F.R. § 124.56(a) (NPDES Fact Sheets must contain any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions). Since the watershed is a Special Protection Watershed designated as HQ, the Department must provide supporting documentation for the antidegradation analysis. Although the Department incorrectly approved the antidegradation supplement, the Department has not provided the public with the rationale for its review of the antidegradation assertions made by the Applicant.

Second, the Department must provide supporting calculation, data, sources, or explanation of effluent limits. All NPDES permits must include technology-based effluent limitations, 40 C.F.R. § 122.44(a)(1), plus any more stringent effluent limitations necessary to achieve compliance with water quality standards. 25 Pa. Code § 92a.11; 40 C.F.R. § 122.44(d)(1); 25 Pa. Code § 92a.44 (incorporating 40 C.F.R. § 122.44 by reference). Water quality standards encompass uses, criteria and the antidegradation policy. As a result, any one or all of these three prongs of water quality standards may serve as the basis for effluent limitations in the NPDES permit. The Department must

consider the impact of the proposed discharge on the receiving stream and determine whether technology based effluent limitations are sufficiently stringent to ensure that water quality standards will be attained in the receiving water. 40 C.F.R. § 122.44(d). If the Department determines that technology-based effluent limitations are not sufficiently stringent to ensure that all three prongs of the water quality standards are attained in the receiving stream, then the Clean Water Act and NPDES regulations require that the Department develop more stringent water quality-based effluent limits. 33 U.S.C. § 1311(b)(1)(c); 40 C.F.R. § 122.44(d).

If all of the effluent limits in the Draft Permit and Fact Sheet are technology based effluent limits, the Department must provide an explanation for why the technology based effluent limits are sufficient to protect water uses, existing water quality, and to satisfy the antidegradation policy. The Department should perform a water body specific analysis to support their conclusion that technology based effluent limits will ensure compliance with all applicable water quality standards. 25 Pa. Code § 92a.11 (Chapter 93 governs whenever the application of Chapter 93 produces a more stringent effluent limitations than would be produced by application of federal technology-based limitations.); 33. U.S.C. § 1311(b) (when a water quality based effluent limitation is more stringent than the federal technology-based effluent limitation, the water quality-based effluent limitation must be enforced.); *Vesta Mining Company v. Commonwealth of Pennsylvania Department of Environmental Resources*, Docket. No. 88-0500MJ, 1993 WL 64745 (Pa. Env. Hrg. Bd. Feb. 10, 1993) (“In establishing effluent limitations, DER must apply the more stringent of technology-based or water quality-based effluent limitations.”)

Third, the Draft Permit and Fact Sheet must contain supporting calculations, data, assumption or other factors that would ensure that aquatic life is adequately protected. More specifically, the Department should summarize the evaluation and the measures taken to prevent a violation of the Aquatic Life narrative Water Quality Standard in the Fact Sheet.

Fourth, the Department must provide sufficient explanation, supporting calculations, or data sources for its reasonable potential assessment. In order to submit a complete application for an individual NPDES permit, the applicant must present data to properly characterize its discharge to enable a reasonable potential analysis to be completed by the permit writer. 25 Pa. Code § 92a.32(e); 40 C.F.R. § 122.44(g)(7). Additionally, the permitting authority may request any additional data as necessary to support an assessment of potential water quality impacts. 40 C.F.R. § 122.21. In order to perform a pollutant-specific reasonable potential analysis, the Department must consider all information about pollutants of concern, receiving stream parameters, and the concentration of pollutants in the wastewater. At this stage, there is no evidence that the Department has performed any kind of water body specific analysis for assimilative capacity, aquatic life, or degradation of current water quality.

The Department is obligated to provide adequate public notice of a complete NPDES application pursuant to 25 Pa. Code § 92a.82, with the relevant opportunity for public comment prior to the issuance of any NPDES authorization. In order to meet the

requirements of 25 Pa. Code § 92a.53, the Draft Permit and Fact Sheet must contain an adequate explanation for the Department's rationale and assumptions used in developing the permit and any supporting data. The Department cannot issue a ND PES permit unless the requirements of Chapter 92a are met. 25 Pa. Code § 92a.36.

10. Article 1, Section 27 of the Pennsylvania Constitution requires the Department to prevent the infringement of Pennsylvanians' environmental rights and to protect public resources held in trust for current and future generations.

Article 1, Section 27 of the Pennsylvania Constitution states:

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. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In the recent *Robinson Township, Washington County v. Commonwealth* decision by the Pennsylvania Supreme Court, the Court made clear that Section 27 creates individual environmental rights upon which the government cannot infringe. 83 A.3d 901 (Pa. 2013). *Robinson Township* also made clear that all levels of government must act as trustees to adequately manage public natural resources through conserving and maintaining them, not for their own benefit but for the benefit of the public to whom they belong.

Government agencies like the Department have an obligation to assess whether its actions would cause an unreasonable "actual or likely degradation" of air or water quality, or of the natural or scenic values of the environment. *Id.* at 951-955. They cannot act in a way that infringes on the public's right to clean air, pure water, or the preservation of natural, scenic, historic, or aesthetic values. *Id.* at 952. As trustees of those natural resources owned by the public, local governments have a duty to ensure their proposed actions will "prevent and remedy the degradation, diminution or depletion" of the resources now for the current generation and in the future for future generations. *Id.* at 952-959. Trustees like the Department must "deal impartially with all beneficiaries" of the trust, and must "balance the interests of present and future beneficiaries." *Id.* at 959.

The Department must, at the very least, ensure compliance with all applicable statutes and regulations. These statutes and regulations include the Clean Streams Law and the Mine Subsidence Act, and all regulations and policies promulgated pursuant to those acts. However, even if the Department determines that the application and the resulting permit comply with the applicable statutory and regulatory requirements, the Department must still ensure that the issuance of any permit will prevent the degradation, diminution or depletion of Constitutionally protected resources. There is no evidence in either the Application materials or in the correspondence file, which includes correspondence

regarding the Department's pre-application review, that the Department has considered the effects of the proposed activity on the surrounding environment.

By requiring the preservation of natural, scenic, historic, and aesthetic values, the Constitution protects Pennsylvanians from any action by the Department that unreasonably causes actual or likely deterioration of those values. *Id.* at 953. Compliance with the applicable statutes and regulations may not be enough. Article 1, Section 27 of the Pennsylvania Constitution guides the discretionary authority of the Department under the Clean Streams Law and Mine Subsidence Act by imposing a duty to prevent the degradation, diminution or depletion of constitutionally protected resources for the current generation and future generations. *Id.* at 952-959. To the extent Section 27 requires the Department to be more protective than what is required by the water quality laws, it must comply with Section 27 and add any additional protections necessary to ensure the preservation of constitutionally protected values.

Conclusion

The Application is severely flawed. The Department should deny the permit and return the Application to the Applicant. If the Application is not returned, the Department must issue the necessary deficiency letters to the Applicant in light of this comment and its own evaluation. Due to the significant revisions that would be necessary, the Department should make available for a second public comment period the next version of the Application. CCJ would be willing to meet with the Department and the Applicant (and respective counsel if necessary) in order to discuss what more can be done to ensure the minimum level of protection required for the surrounding community, and for wildlife, and the environment.

If there are questions about this comment, please contact us anytime.

Respectfully submitted,

For Center for Coalfield Justice



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