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July 11, 2016

California District Mining Office
Department of Environmental Protection
Commonwealth of Pennsylvania
Attention: Joel Koricich, District Mining Manager
25 Technology Dr.
California Technology Park
Coal Center, PA 15423

Re: Draft NPDES No. PA0092894 and CMAP 30810703
Proposed Revision to Bailey Coal Refuse Disposal Areas No. 1 and No. 2
Support Area for Proposed CRDA No. 7 and No. 8
Noticed in 46 Pa.B. 2979 (Saturday, June 11, 2016)

Dear Mr. Koricich:

The Center for Coalfield Justice respectfully submits the following comment on Consol Pennsylvania Coal Company's ("Applicant" or "CPCC") permit revision application for a new NPDES permit associated with the support area for the proposed Coal Refuse Disposal Area Nos. 7 and 8 in Morris Township, Greene County ("Application"). CPCC's application seeks to revise the existing Bailey Coal Refuse Disposal Areas No. 1 and No. 2. The relevant Pennsylvania Bulletin Notice appeared as follows:

NPDES No. PA0092894 (Mining Permit No. 30810703), Consol Pennsylvania Coal Company LLC, (1000 Consol Energy Drive, Canonsburg, PA 15317). A revision to the NPDES and mining activity permit for the Bailey Coal Refuse Disposal Areas No. 1 and No. 2 in Richhill Township, **Greene County** addition of 287 acres for CRDA 7 & 8 support area and to construct a sediment pond and Outfall 101. Surface Acres Affected 607.0. Receiving stream: UNT to Boothe Run, classified for the following use: WWF. The application was considered administratively complete on June 26, 2015. Application received February 17, 2015.

Unless otherwise noted for a specific outfall, the proposed effluent limits for all outfalls in this permit are the BAT limits described above for coal mining activities.

The facility location of the non-discharge alternatives are listed below:

Outfall 101 discharges to: Unnamed Tributary to Boothe Run

The proposed effluent limits for Outfall 101 (Lat: 39° 58` 35.7" Long: 80° 22` 45.9") are:

Parameter		30-Day	Daily	Instant.
		Minimum	Average	Maximum
Flow	(mgd)	-	6.5	-
Iron	(mg/l)	3.0	6.0	7.0
Manganese	(mg/l)	2.0	4.0	5.0
Aluminum	(mg/l)	0.75	0.75	0.75
Suspended Solids	(mg/l)	35	70	90
Sulfates	(mg/l)	Monitor and Report		
Total Dissolved Solids	(mg/l)	Monitor and Report		

This comment is timely filed pursuant to 25 Pa. Code § 92a.82(d).

The Center for Coalfield Justice is a Pennsylvania-incorporated not-for-profit organization with federal § 501(c)(3) status located at 184 S. Main Street, Washington, PA 15301. CCJ is a membership organization with a mission to “improve policy and regulations for the oversight of fossil fuel extraction and use; to educate, empower and organize coalfield citizens; and to protect public and environmental health.” The Center for Coalfield Justice has nearly two thousand members and supporters in the area, many of which live in the immediate region of the Bailey, Enlow Fork and Harvey/BMX Mines, as well as Coal Refuse Disposal Areas (“CRDAs”) operated by CPCC.

The Department should deny the permit and return the Application because it does not meet the criteria for permit approval. There are numerous fundamental and fatal flaws in CPCC’s support area development application and associated NPDES permit application. There are numerous technical and procedural deficiencies; there is no supporting documentation in either the draft permit or fact sheet to explain the Department’s rationale and assumptions used in developing the draft permit; it fails to fully evaluate the nature and quantity of the pollutants in the effluent as well as their effect on the receiving stream; there is no consideration of the impacts from land clearing activities associated with the proposed mining activity; there is no

consideration of discharges from immediate access roads; and the Department's Chapter 105 regulations only allow the Department to permit adverse impacts on water resources that are shown to be unavoidably necessary.

1. By segmenting the permitting of different components of a single proposed coal refuse disposal facility, the Department is failing to perform the required comprehensive analysis of the cumulative impacts of the entire proposed CRDA 7 & 8.

As a preliminary matter, while CCJ acknowledges that the installation of erosion and sedimentation controls must precede the construction of the coal refuse disposal area, *see* 25 Pa. Code § 90.108(b), it is strange for a sedimentation pond to be permitted separately from the coal refuse disposal area it would be designed to serve. The fact that the sedimentation pond that is designed to serve CRDA 7 & 8 is being proposed and reviewed as a revision to the existing CRDA 1 & 2 permit is even more bizarre. The sedimentation pond is one part of the overall erosion and sedimentation control plan in the mining permit application for the CRDA 7 & 8.

The Department appears to be taking a segmented, piecemeal approach to the proposed CRDA 7 & 8 that lacks a comprehensive evaluation of all of the potential impacts from the entire project on waters of the Commonwealth. *See e.g.* Module 15 at 15-15 (describing three phases of coal refuse disposal area expansion but failing to detail the stream and wetland impacts within the Enlow Fork watershed). There is no indication that the impacts of the proposed coal refuse disposal impoundments, which represent the vast majority of the proposed facility's permanent impacts on streams, are currently being considered by the Department in its review of CPCC's support area development application and associated NPDES permit application. *Id.*

Before the Department may issue a permit for any component of the proposed CRDA 7 & 8 facility, it must perform a comprehensive evaluation of the cumulative impacts of all phases of the overall facility on waters of the Commonwealth. *See* 35 P.S. §§ 691.4(5), 691.5(1). Segmented, piecemeal analysis and permitting is the opposite of comprehensive.

2. Until the Department makes a final determination to issue a permit authorizing the construction of CRDA Nos. 7 and 8, the Department may not issue a permit authorizing the construction of or a discharge from an in-stream sedimentation pond designed to service CRDA Nos. 7 and 8.

At the risk of stating the obvious, a statute titled "Coal Refuse Disposal Control Act" does not contemplate an application that seeks no authorization to dispose of coal refuse. *See e.g.*, 52 P.S. §§ 30.55(e) (application must set forth manner in which operation will achieve final contour of coal refuse disposal area that is compatible with surroundings); 30.55(j) ("Permit applications shall specify how the operation shall provide for stability within the meaning of this act"); 30.53 (12) (defining stability). CPCC's pending support area development application and associated NPDES permit does not actually seek authorization to dispose of coal refuse. *See* Module 10 at 10-2. Furthermore, CPCC's pending support area development application and

associated NPDES permit application and the Department's review of that application unlawfully assumes that the Department will issue a future permit for CRDA No. 7 and No. 8. Otherwise, there is no reason at all for the drastic and adverse impacts to waters of the Commonwealth described in CPCC's Application.¹

The Department's regulations governing Dam Safety and Waterway Management, 25 Pa. Code Chapter 105, are structured to avoid such a result and "encourage activities that protect the natural condition of the watercourses or other body of water." 25 Pa. Code § 105.16(d). *See also* 25 Pa. Code § 90.108(b) (Ponds may be located in intermittent streams only if the requirements of Chapter 105 are met). The regulations adopt the familiar hierarchy: avoid, minimize, compensate. A permit application must first attempt to avoid any adverse impacts on water resources. If adverse impacts cannot be avoided entirely, then a permit applicant must minimize any adverse impacts to the greatest extent possible and compensate for any remaining adverse impacts. *See* 25 Pa. Code §§ 105.1, 105.13(d)(1)(viii), and (xi), 105.16(a). In order to demonstrate that adverse impacts on water resources are unavoidably necessary, the applicant must prove that there is a current need for the project in its proposed location.

Ordinarily, the Department demands current and specific information to satisfy this requirement of demonstrating the need for the project and the need to adversely affect water resources. Thus, an applicant who lacks a specific, approved land development plan may not obtain a water obstruction and encroachment permit to fill a stream or wetland. Unless an applicant demonstrates a present and specific need, it cannot show that the proposed impacts on water resources are unavoidable. Moreover, unless the applicant can show the adverse impacts are unavoidable, it cannot get a water obstruction and encroachment permit, even if it is willing to compensate for all of the adverse impacts. *See e.g. Pennsylvania Trout, Trout Unlimited – Penns Woods West Chapter and Citizens for Pennsylvania's future v. DEP*, 2004 EHB 310, 364-73; *aff'd* 863 A.2d 93 (Pa. Cmwlth. 2004) (adverse impacts on water resources are to be avoided whenever possible, and kept to an absolutely minimum when such impacts are unavoidable); *Hatchard v. DER*, 612 A.2d 621, 624 (Pa. Cmwlth. 1992) (Department correctly determined that consideration of the applicant's willingness to create new wetlands to replace filled wetlands was unnecessary where the applicant failed to demonstrate a present and specific need).

As explained in the *Pennsylvania Trout, Trout Unlimited – Penns Woods West Chapter and Citizens for Pennsylvania's future v. DEP* adjudication, when a project proponent applies for an encroachment permit, the Department must scrutinize that application rigorously. 2004 EHB 310, 364-73; *aff'd* 863 A.2d 93 (Pa. Cmwlth. 2004). The applicant must include an extensive alternatives analysis, which includes an evaluation alternative site locations and alternative means for accomplishing the project purpose. *Id.* If the structure or activity can be reoriented or reduced in size to avoid water resources, it must be. *Id.* If the operation methods can be changed

¹ Application at 15-2. "Twenty-three streams, totaling 10,466 feet, were identified and delineated within 100 feet of the proposed surface mining activities....Of these, ten (10) streams, totaling 1,927 feet, will be permanently impacted by the proposed activities[.]"

to avoid impacts of water resources, the more protective methods of operation must be employed. *Id.* Only if impacts on water resources cannot be avoided entirely, then the size and degree of the impacts must be reduced to the bare minimum necessary to accomplish the project, and a permit might be issued to authorize those remaining impacts. *Id.*

The Department cannot and should not treat CPCC's application any differently. Where the construction of the source of the sediment must be authorized by a Department permit, the Department may not issue a permit to put a sedimentation pond in the waters of the Commonwealth unless and until it issues a permit authorizing the construction of the source of the sediment to be controlled: CRDA No. 7 and No. 8. The unusual segmenting of the CRDA Nos. 7 and 8 application makes it impossible for CPCC to show that the associated adverse impacts on waters of the Commonwealth are necessary and unavoidable. In order make such showing, CPCC must show that CRDA Nos. 7 and 8 will definitely be permitted and constructed at their proposed locations, making the proposed siting and discharge of the sedimentation pond appropriate. *See* 25 Pa. Code § 90.108(b) (requiring that sedimentation ponds be located as near as possible to the area to be disturbed by coal refuse disposal). However, such an advance determination to issue the permit for CRDA Nos. 7 and 8 is unlawful.

Only if CRDA Nos. 7 and 8 are permitted before or simultaneously with the sedimentation pond could the Department possibly make the required finding that any adverse impacts on waters of the Commonwealth are unavoidably necessary. The proposed sedimentation pond and associated discharge are certainly not necessary for the existing CRDA Nos. 1 and 2.

Particularly given that the proposed sedimentation pond and associated NPDES discharge point are within the proposed CRDA Nos. 7 and 8 permit boundary, it seems rather obvious that the proposed support area *for CRDA Nos. 7 and 8* should be reviewed and permitted simultaneously with the coal refuse disposal permit for CRDA Nos. 7 and 8, not CRDA Nos. 1 and 2. In addition, the vast majority if the proposed 14,000 linear feet of a coal refuse conveyance system is located outside of the existing CRDA No. 1 and No. 2 permit boundary; only 3,900 feet of the new conveyor will be constructed within the existing CRDA No. 1 and No. 2 permit boundary. *See* Module 10 at 10.1. As it stands and assuming the Department has not unlawfully decided to issue the permit for CRDA Nos. 7 and 8, CPCC is asking the Department to permit an in-stream sedimentation pond and associated discharge, coarse coal refuse conveyor, two 24-inch slurry pipelines, a 36-inch slurry return pipeline, a 12-inch fire water pipeline (non-potable), a 12-inch stream augmentation pipeline (non-potable), a 12-inch potable water pipeline, and access roads to nowhere.² It goes without saying that such a request is ridiculous. It is also contrary to the Chapter 105 regulations.³

² Application at 15-3. "It is anticipated that the utility line crossing of Tributary 32753 will include the following six pipes: two 24-inch slurry lines within casing pipes, a 36-inch slurry

3. Timber removal and clearing of the proposed CRDA No. 7 and No. 8 area prior to the issuance of coal refuse disposal permit would constitute mining activities without a permit and violate Federal regulations.

The federal Office of Surface Mining (“OSM”) has made it absolutely clear that timbering and land-clearing activities that precede coal refuse disposal constitute mining activity. *See* OSM’s April 13, 2010 letter for Michael Terretti regarding CPCC’s Bailey Mine refuse disposal permit. *See also* OSM’s August 22, 2012 letter to Mr. Mirza of the Northwest Regional Office regarding proposed Hoffer Mine (surface coal mining application No. 10120101 and NPDES permit No. PA0259292). That means that such activity can only take place after a permit for coal refuse disposal is issued for the site. It also means that that like all other mining activity, the timbering and land clearing must be accounted for in the Application and ultimately the permit.

Even if the support area is permitted as a revision to the existing CRDA No. 1 and No. 2 permit, CPCC cannot conduct timbering and land-clearing activities within the proposed CRDA No. 7 and No. 8 area until it receives a coal refuse disposal permit for CRDA No 7 and No. 8. The existing permit for CRDA No. 1 and No. 2 does not include the proposed CRDA No. 7 and No. 8 area. Timbering and land-clearing activities that preceded coal refuse disposal activities (which includes the support activities described in the Application) within the proposed CRDA No. 7 and No. 8 area (which necessarily includes the CRDA No. 7 and No. 8 support area) can only take place after a permit for coal refuse disposal is issued for CRDA No. 7 and No. 8.

Without a coal refuse disposal permit for the proposed CRDA No. 7 and No. 8, timbering and land-clearing activities within the proposed permit boundary would constitute mining activities without a permit and implicate the Office of Surface Mining’s oversight jurisdiction. Moreover, the discharge of industrial waste without a permit is prohibited. 35 P.S. § 691.301. Earth disturbance activities, including timbering and land clearing activities, lead to discharges of industrial waste and are so regulated by the Clean Streams Law. This Application contains nothing that would account for the discharges related to pre-mining timbering. Any failure to account for pre-mining timbering would implicate the Office of Surface Mining’s oversight jurisdiction as ignoring pre-mining timbering would be a failure by both the Applicant and the Department.

4. There are deficiencies in the draft permit and fact sheet that must be corrected; in this case there is no supporting documentation to explain the Department’s rationale and assumptions used in developing the draft permit.

return line within a casing pipe, a 12-inch fire water line (non-potable), a 12-inch stream augmentation line (non-potable), and a 12-inch potable waterline.”

³ Application at 15-12. “Construction of the CRDA No. 7 and No. 8 Support Area will permanently impact a total of 1,927 l.f. of stream including approximately 165 l.f. of biologically diverse perennial stream, 1,184 l.f. of biologically variable perennial streams, and 578 l.f. of intermittent streams.”

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 and final permit. 25 Pa. Code § 92a.53; 40 C.F.R. § 124.27. *See also* 25 Pa. Code § 92a.82 (adequate public notice of a draft permit includes a fact sheet). The fact sheet must also 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 associated with the permit 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 # 362-0400-001 (2007). The draft permit and fact sheet fail to provide any explanation for the Department's rationale and assumptions used in developing the draft permit.

First, neither the Department nor the Applicant has provided an affirmative demonstration or a sufficient reason for its conclusion that a discharge of pollutants above legal limits is unlikely. The fact sheet merely states that the receiving stream's assimilative capacity is probably sufficient to handle the pollutants in the proposed discharge. The fact sheet fails to provide any information about the Department's evaluation of the receiving stream's assimilative capacity, the supporting calculation for the mass balance equation are completely absent, and there is no explanation of the data sources, assumptions and other factors that form the basis for the permit requirement

Second, the Department has failed to provide sufficient explanation, supporting calculations, or data sources for their reasonable potential assessment. The draft permit does not contain any evidence of a pollutant-specific reasonable potential analysis and the fact sheet does not contain any information about pollutants of concern, receiving stream parameters, or the anticipated concentration of pollutants in the wastewater. In order to submit a complete NPDES permit application for an individual NPDES permit, the applicant must present data to properly characterize its discharge and 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. § 121.21. According to Module 12 of the Application, CPCC expects sulfates to be present in the discharge. *See* Module 12 at 6. However, the Department has not provided any information to support its contention that "monitor and report" is sufficient to protect the receiving stream. The Department is obligated to provide the public with a derivation of effluent limitations or other conditions and the reasons for the conditions in the NPDES draft permit. All of this supporting data is absent from the draft permit and the corresponding fact sheet.

The Department is still 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 any issuance of a NPDES permit authorization. Because the draft permit and fact sheet do not contain an adequate explanation for the Department's rationale and assumptions used in developing the draft permit and contain no supporting data, the Department has not met the requirements of 25 Pa. Code § 92a.53. As a result, the Department

has failed to provide proper public notice as required by 25 Pa. Code § 92a.82. The Department cannot issue a NPDES permit unless the requirements of Chapter 92a are met. 25 Pa. Code § 92a.36.

5. The Department has failed to provide a technically defensible analysis to assess the potential impact of the proposed discharge on the receiving stream.

The draft permit and fact sheet do not contain an adequate reasonable potential analysis or demonstrate that the discharge that would be authorized under the draft permit will not cause or contribute to an excursion above an applicable water quality standard. A review of the application, draft permit, and fact sheet raises questions about the accuracy and completeness of the information. The uncertainty regarding the accuracy and completeness of permitting information makes it difficult, if not impossible, to confirm that the permit contains effluent limits stringent enough to meet water quality standards.

The Department must formulate limits for all parameters and should not utilize a process in which a report function is used to replace the required limitations.

Somewhat surprisingly, the draft permit does not contain any limitations for sulfate. The Applicant admits that sulfate has been detected at similar CPCC facilities. *See* Module 12 at 6. In the fact sheet the Department explains: “Through a mass balance equation, it was determined there is assimilative capacity in the stream for iron, manganese, aluminum, sulfate and total dissolved solids for the proposed outfall.” Without any information about the assimilative capacity in the receiving stream, the draft permit would allow CPCC to discharge an unknown quantity of sulfate so long as CPCC agrees to monitor and report.

In addition, the draft permit does not contain any limitations for an unknown type and quantity of pollutant that the Applicant intends to use in certain circumstances. In Module 12, the Applicant states that it might add flocculants in some situations. *See* Module 12 at 4. However, neither the Applicant nor the Department has revealed what specific circumstances would require the addition of flocculants. In accordance with the applicable regulations, it is the responsibility of the applicant to characterize the wastewater and to provide the information necessary for the Department to make an informed decision. The Department should seek to obtain the relevant data independently if the applicant does not submit it. 40 C.F.R. § 122.21(e).

The Clean Water Act and its implementing regulations require that permits contain effluent limits for all discharges that have the reasonable potential to cause or contribute to a violation of water quality standards at the time of permit issuance. 25 Pa. Code § 92a.44; 40 C.F.R. § 122.44(d)(1)(i). An adequate reasonable potential analysis cannot be conducted during the permit term; it must be conducted prior to authorization of a discharge.

The Department must set effluent limitations that protect the designated uses of the receiving streams.

The draft permit does not address the protection of water quality standards in both the immediate receiving waters and downstream waters. EPA’s regulations state that permit

limitations must be established at a level as stringent as necessary to protect numeric and narrative water quality standards, which includes protection of any downstream segment that would be affected by the new mining-related discharge. 40 C.F.R. §§ 122.44(d)(1)(i-iv). Rather than implementing protective effluent limits and monitoring requirements at both the point of discharge and the public water supply (PWS) intake, the Department has simply noted that the closest down stream water supply intake is located more than 15 miles downstream of the sediment pond outfall. However, the draft permit and fact sheet offer no information of receiving stream flow or dilution rates. There is no evidence that the Department performed adequate modeling or calculation to support its assumption that traveling 15 miles is sufficient to protect existing uses and water quality. As a result, the draft permit and fact sheet are not consistent with the Clean Water Act.

6. There is no evaluation of the potential effect of subsidence on the proposed sediment pond from future underground mining operations.

Chapter 105 of the Department's regulations requires the Applicant to provide a plan for each proposed impoundment and assure structural stability under all probable conditions. *See* 25 Pa. Code § 105.92(b)(3). The Applicant has not even attempted to evaluate or describe the potential effect on the sediment pond from subsidence of the subsurface from future underground mining operations.

Rather than describing the potential effect of mine subsidence on the impoundment structure, the Applicant states: "No longwall mining has been performed or is *currently planned* beneath the proposed SP1 impounding embankment. Regardless, both the impounding earth embankment and the principal spillway system are tolerant of subsidence." Application Module 13.1 (emphasis added). The Applicant does not provide any support for its conclusion. Nothing in the Application even suggests that the Applicant evaluated the impact of subsidence on the sedimentation pond and the Applicant does not provide any explanation for why the impounding embankment and principal spillway are "tolerant" of subsidence. The fact that longwall mining is not currently planned beneath the proposed sediment pond does not relieve CPCC of the obligation to evaluate the potential effect of subsidence. As the Department well knows, CPCC's plans are subject to change.

The Applicant must submit a technically adequate application that meets all regulatory and statutory requirements and contains all information needed by the Department to make a final permit decision. Since the Application does not describe potential effect of mine subsidence on the impoundment structure and there is a possible that longwall mining will occur beneath the sedimentation pond in the future, the Department should deny the permit and return the Application to the Applicant.

7. The Coal Refuse Disposal Control Act precludes approval of the proposed project area because it contains northern long-eared bats.

Section 4.1(b) of the Coal Refuse Disposal Control Act (CRDCA) prohibits coal refuse disposal activities from taking place on any non-preferred site “known to contain Federal threatened or endangered plants or animals[.]” 52 P.S. § 30.54a(b). *See also* 25 Pa. Code § 90.202(e)(7).

The Department’s preliminary approval of a coal refuse disposal site during the site selection process is not a final, appealable determination. To the contrary, the Department’s coal refuse disposal regulations make clear that “Department approval of a selected site does not indicate that the Department will approve an application for coal refuse disposal activities on the selected site.” 25 Pa. Code § 90.207.

CPCC’s 2013 mist net survey found 68 northern long-eared bats within the proposed CRDA No. 7 and No. 8, 48 of which were reproductively active (i.e. pregnant, lactating, post-lactating) females. In a letter dated February 10, 2016, the US Fish and Wildlife Service stated that the presence of 48 reproductively active females was enough to suggest “the presence of a northern long-eared bat maternity colony” within the proposed project area. Thus, according to 52 P.S. § 30.54a(b) and 25 Pa. Code § 90.202(e)(7), the Department is prohibited from permitting coal refuse disposal within the proposed the CRDA No. 7 and No. 8 area. *See* 52 P.S. § 30.54a(b) (The Department is prohibited from permitting coal refuse disposal on non-preferred sites that contain federally listed endangered or threatened species); 25 Pa. Code § 90.202(e)(7) (same). In turn, the Department is precluded from permitting the activities described in CPCC’s support area development and associated NPDES permit application. In other words, Section 4.1(b) of the CRDCA and 25 Pa. Code § 90.202(e)(7) prohibit the use of the proposed CRDA No. 7 and No. 8 site for coal refuse disposal and make it unnecessary and unlawful to authorize the construction of and discharge from an in-stream sedimentation pond, a coarse coal refuse conveyor, two 24-inch slurry pipelines, a 36-inch slurry return pipeline, a 12-inch fire water pipeline (non-potable), a 12-inch stream augmentation pipeline (non-potable), a 12-inch potable water pipeline, and various access roads.

Rather than investing more time and resources into permit applications for a site the CRDCA and its implementing regulations plainly make unacceptable, the Department should deny the pending support area development and associated NPDES permit application and encourage CPCC to redirect their efforts toward finding an area that meets the site selection criteria.

8. 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 *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 review of the site selection and alternatives analysis, 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 I, Section 27 of the Pennsylvania Constitution guides the discretionary authority of the Department under the Clean Streams Law, Dam Safety and Encroachments Act, and Coal Refuse Disposal Act by imposing a duty to prevent 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 Clean Streams Law, Dam Safety and Encroachments Act, and Coal Refuse Disposal Act, it must comply with Section 27 and add

any additional protections necessary to ensure preservations of constitutionally protected values.

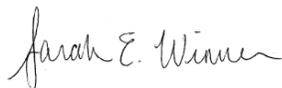
9. Request for Public Hearing

Pursuant to 25 Pa. Code § 92a.82(d), CCJ requests a public hearing for Draft NPDES Permit No. PA0092894. Many of CCJ's members share the concerns outlined above. CCJ believes that concerned residents deserve to have a forum to convey these concerns to the Department and to have a meaningful response provided by the Department. As a result, CCJ requests that a public hearing be held in the locality of the proposed activity. Additionally, CCJ requests that the public hearing be held in the evening so that working members of the community have an opportunity to attend and participate.

10. Conclusion

The Application, NPDES draft permit and fact sheet are severely flawed. The Department should deny the Application and return it to the Applicant. If the Application is not returned, the Department should issue the appropriate 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.

Respectfully,



Sarah E. Winner, Esq.
Staff Attorney

/s/ Steve Kelly
Legal Intern

/s/ Katharine Richter
Legal Intern