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Sent via electronic mail

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Re: Comment on CPCC's Application to conduct full extraction mining beneath Polen Run and Kent Run in Panels 3L through 5L and to perform post-mining stream restoration activities
Permit No. 30841316
Noticed in 46 Pa.B. 4981 (Saturday, August 13, 2016)

To Whom It May Concern:

On behalf of the Center for Coalfield Justice and Sierra Club, I respectfully submit the following comment on Consol Pennsylvania Coal Company, LLC's ("Applicant" or "CPCC") permit application to conduct full extraction mining under Polen Run and Kent Run in Panels 3L through 5L of the Bailey Lower East Expansion and to perform post-mining stream restoration activities in Polen Run and Kent Run. The relevant Pennsylvania Bulletin notice appeared as follows:

30841316 and NPDES No. PA0213535. Consol Pennsylvania Coal Company LLC, (1000 Consol Energy Drive, Canonsburg, PA 15317). To revise the permit for the Bailey Mine & Prep Plant in Richhill Township, **Greene County** and related NPDES permit for full extraction mining under Polen and Kent Run in Panels 3L through 5L and perform stream restoration/remediation. No additional discharges. The application was considered administratively complete on July 29, 2016. Application received February 23, 2016.

This comment is timely filed pursuant to 25 Pa. Code § 86.32(a).

I. The Department should not issue the permit before the Environmental Hearing Board adjudicates the consolidated appeals docketed at 2014-072-B.

CPCC's Application for full-extraction underground mining beneath Kent Run and Polen Run in Panels 3L through 5L and to perform post-mining stream mitigation work gives rise to many of the same legal issues that are currently pending before the Environmental Hearing Board in the consolidated appeals of Permit Revision No. 180 and Permit Revision No. 189 (EHB Docket No. 2014-072-B). CPCC's predictions related to subsidence-induced impact have not changed since the Department's issuance of Permit Revision Nos. 180 and 189. CPCC now asks the Department to issue much the same approval using the same theories as justification.

It should come as no surprise that, at this time, CCJ and Sierra Club intend to appeal any permit authorizing longwall mining and post-mining stream mitigation activities that will impair the recreational and aquatic life uses of Kent Run and Polen Run within Ryerson Station State Park. *See e.g.* Module 8 of Permit Rev. 180 Application at 8-18 and 8-19. As discussed below, the Department should deny the Application. CCJ and Sierra Club also acknowledge that, at this time, CPCC would likely appeal the Department's denial of its Application. Since the Board's adjudication in the consolidated appeals of Permit Revision No. 180 and Permit Revision No. 189 will likely resolve many of the disputed legal issues, CCJ and Sierra Club believe that the best, most efficient way forward is for the Department to review the Board's final adjudication prior to making a decision about whether to approve or deny CPCC's Application.

II. The Clean Streams Law and its associated regulations do not authorize the Department to permit an activity where it predicts or anticipates that such activity will cause impairment of stream uses based on a post-mining mitigation plan.

The legal briefing in the consolidated appeals of Permit Revision No. 180 and Permit Revision No. 189 reveals that CPCC believes that temporary loss of protected stream uses is acceptable, and the Department disappointingly believes the same. The proposed restoration plans in CPCC's Application to conduct full extraction mining beneath Polen Run and Kent Run in Panels 3L through 5L are nothing more than an attempt to mitigate predicted harm that is not authorized by the Clean Streams Law or the Department's mining regulations, specifically 25 Pa. Code § 86.37(a)(3). The Department's obligation to protect waters of the Commonwealth is not limited to making sure that an operator has an adequate mitigation plan.

The Clean Streams Law and the associated regulations mandate that the Department protect various water uses. 25 Pa. Code § 93.3. Those uses include aquatic life and recreation. 25 Pa. Code § 93.4(a). Section 93.4(a) provides that "Except when otherwise specified in law or regulation, the uses set forth in Table 2 apply to all surface

waters.” 25 Pa. Code § 93.4(a). Protection of stream uses is the fundamental component of the Department’s analysis concerning subsidence-induced stream impacts. *P.U.S.H.*, 789 A.2d 319 (Pa. Cmwlth 2004); *UMCO*, 2006 EHB 557-58. The Department must protect recreational uses and aquatic life uses from mining-induced impairment in all streams within the permit area. 25 Pa. Code § 93.4(a) (Table 2). The Department’s position that the Clean Streams Law only prohibits permanent use impairment is inconsistent with these provisions.

The Department’s reliance on CPCC’s ability to mitigate anticipated harm after the harm has occurred is contrary to law because the Department has an obligation to prevent harm from occurring in the first place. *See e.g.* 35 P.S. §§ 691.1, 691.401, 691.601, 691.611; 25 Pa. Code §§ 89.37(a)(3), 93.3, 93.4(a); *Birdsboro v. Department of Environmental Protection*, 2001 EHB 377, *aff’d*. 795 A.2d 444 (Cmwlth. Ct. 2002); *UMCO Energy, Inc. v. Dep’t of Env’tl. Prot.*, 938 A.2d 530 (Pa. Cmwlth 2007); *Consol I*, 2002 EHB 1038, 1042; *Consol II*, 2003 EHB 239, 243; *Consol III*, 2003 EHB 792, 795, 800; *Tinicum Township*, 2002 EHB 822; *Oley Township*, 2002 EHB 1098, 1117-19; *UMCO*, 2006 EHB 566-569; *Crum Creek Neighbors*, 2009 EHB 566-567. One of the criteria for denying a mining permit is an applicant’s failure to demonstrate that “there is no presumptive evidence of potential pollution of the waters of this Commonwealth.” 25 Pa. Code § 86.37(a)(3). For a mining permit, not only must the Department prevent pollution; it must prevent *potential pollution*. The idea that the Department may issue a permit authorizing an operator to longwall mine under a stream even where it predicts flow loss, even temporarily, so long as the company commits to post-mining augmentation and stream restoration reveals an abject disregard for the legal authority that protects waters of the Commonwealth.

In *UMCO*, the Environmental Hearing Board clearly explained the purpose and function of stream mitigation plans. Because the Board’s explanation is directly relevant here, it’s worth quoting at length:

Despite the best-laid plans, things do go wrong. It is perfectly sensible when permitting, not only in the mining program but in virtually every program administered by the Department, to plan for unexpected contingencies. Applicants should be made to describe how they will handle a situation if things go bad. This is not to say that it is acceptable for things to go bad, or that it is expected that things will go bad. Quite the opposite. If it is known in advance that things will go bad, the permit cannot be issued in the first place. The fact that the Department requires deep mining permit applicants to describe how they will repair streams if they are damaged does not mean that it is acceptable to damage the streams. Stream mitigation plans are designed to address unanticipated

damage, not to excuse or approve damage in advance. By way of analogy, the Department will not permit a mine when it is known that it will cause acid mine discharges. (T. 995.) The mine does not become permissible because an operator promises in advance to treat the discharges in perpetuity.

UMCO Energy Inc. v. DEP, 2006 EHB 570. In this case, it is known that “things will go bad.” CPCC’s Application predicts subsidence-induced use impairment in Kent Run and Polen Run. See e.g. 25 Pa. Code § 86.37(a)(3); 35 P.S. § 691.611. A mitigation plan, whether adequate or not, does not make it lawful to approve predicted use impairment in advance.

III. The Department cannot merely assume compliance with the law and minimization of harm based on promises by a permittee to perform post-mining stream repairs.

The Department has a constitutional duty to comply with all applicable statutes and regulations relevant to the public natural resources; to exercise a reasonable effort to reduce the environmental incursion to a minimum; and to make a permitting decision after it weighs the environmental harm against the benefits to be derived. See *Stedje v. DEP*, EHB Docket No. 2014-042-L, slip op. at 40-41 (Adjudication, Aug. 21, 2015) (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), aff’d, 361 A.2d 263 (Pa. 1976)); *Brockway Borough Mun. Auth. v. DEP*, EHB Docket No. 2013-080-L, slip op. at 29 (Adjudication, Apr. 24, 2015); *Snyder et al. v. DEP*, EHB Docket No. 2015-027-L, (Opinion and Order on Motion to Dismiss Dec. 21, 2015); *Hudson et al. v. DEP*, EHB Docket No. 2015-096-L (Opinion In Support Of Order Granting Petition For Supersedeas Sept. 1, 2015).

When a company like CPCC requests a permit from the Department, the Department is obligated to ensure that the environmental and public health will be protected. The three-prong *Payne* analysis is a one way of assessing whether the Department has fulfilled its constitutional obligations under Article 1, Section 27, and serves as an important reminder that there is more to environmental permitting than a checklist of application requirements and permit conditions that apply statewide. Even if CPCC were able to demonstrate compliance with the regulatory standards, the Department must still minimize the environmental incursion and weigh any remaining harm with the benefits of the proposed project. See *Sludge-Free UMBT v. DEP*, EHB Dkt. No. 2014-015-L, p.5.

Especially given that the proposed full-extraction mining and predicted stream impacts are within Ryerson Station State Park, the Department must make every effort to reduce the harm to a minimum. See, e.g., *Sludge-Free UMBT*, at 6-7; *Coolspring Twp. v. DER*, 1983 EHB 151, 178 (“overly blind reliance” on regulations to minimize environmental harm and protect public health and safety, especially when the natural

conditions are complex, is an abuse of discretion). It is reasonable for the Department to evaluate alternative methods of mining that would reduce or eliminate subsidence-induced stream use impairment and the need for disruptive post-mining stream mitigation measures.

Moreover, “[s]trict compliance with all regulatory requirements is not necessarily coextensive with a reasonable effort to reduce the environmental incursion to a minimum, and notwithstanding compliance with all regulatory requirements and the application of a reasonable effort to reduce the environmental incursion to a minimum, the environmental harms remaining might nevertheless clearly outweigh the benefits of the project.” *Sludge-Free UMBT*, at 6-7. The balancing of harms and benefits must be done on a site-specific level, and must include a holistic view of the project and the site in question. *Id.* at 9, n.1; *Hudson*, EHB Docket. No. 2015-096-L, pp.22-23. The Department’s piecemeal review of longwall mining at the Bailey Lower East Expansion is artificial and inadequate to fulfill its trustee obligations under Article 1, Section 27. Therefore, we urge the Department to carefully consider the ongoing impacts to streams previously undermined by the Bailey and Enlow Fork Mines (*e.g.* UT-32596 and Polly Hollow), the impacts that have already been observed as a result of CPCC’s longwall mining at the Bailey Lower East Expansion (*e.g.* UT-32620, 7R Tributary to UT-32620, UT-32618, Whitethorn Run, and Polen Run), the predicted impacts to other streams within and around Ryerson Station State Park (*e.g.* North Fork Dunkard Fork, UT-32604, UT-32605, UT-32619), and the predicted impacts to those portions of Kent Run and Polen Run that flow through Ryerson Station State Park.

IV. Request for Informal Public Conference

Pursuant to 25 Pa. Code § 86.34(a), CCJ and Sierra Club request that the Department hold a informal public conference regarding CPCC’s Application to conduct full extraction mining beneath Kent Run and Polen in Panels 3L through 5L and to conduct post-mining stream mitigation activities. Many of CCJ’s members and Sierra Club’s members share the concerns outlined above. Especially since the CPCC’s proposal includes stream impacts within Ryerson Station State Park, CCJ and Sierra Club believe 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 and Sierra Club request that an informal public conference be held in the locality of the proposed activity, specifically at the Park Building in Ryerson Station State Park. Additionally, CCJ and Sierra Club request that the informal public conference be held in the evening so that working members of the community have an opportunity to attend and participate.

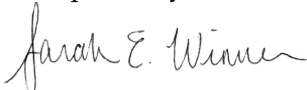
V. Conclusion

As discussed above, the Application is severely flawed and should be denied. At the very least, CCJ and Sierra Club urge the Department to review the Environmental

Hearing Board's adjudication of the consolidated appeals of Permit Revision Nos. 180 and 189 (EHB Docket No. 2014-072-B) prior to making a decision about whether to approve or deny the Application. CCJ and Sierra Club would be willing to meet with Department staff and counsel in order to discuss what more can be done to ensure the minimum level of protection required for the surrounding community, and for Polen Run and Kent Run, and Ryerson Station State Park.

Should you have any questions, please contact me anytime.

Respectfully,



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