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August 24, 2015

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: 30810703 and NPDES No. PA0092894 Revision to Bailey Coal Refuse Disposal Areas No. 1 and No. 2

Dear Mr. Koricich,

The Center for Coalfield Justice respectfully submits the following comment on Consol Pennsylvania Coal Company's ("Applicant" or "Consol") permit revision application for Bailey Coal Refuse Disposal Areas No. 1 and No. 2 ("Application"). The relevant Pennsylvania Bulletin Notice appeared as follows:

> 30810703 and NPDES No. PA0092894. Consol Pennsylvania Coal Company LLC, (1525 Pleasant Grove Road, P. O. Box J, Claysville, PA 15323). To revise the permit and NPDES Permit for the Bailey Coal Refuse Disposal Areas No. 1 and No. 2 in Richhill and Morris Townships, Greene County to add support area acres for proposed Coal Refuse Disposal Areas No. 7 and No. 8. Coal Refuse Disposal Support Acres Proposed 287.0. Receiving Stream: Unnamed Tributary to Enlow Fork, classified for the following use(s): WWF. The first downstream potable water supply intake from the point of discharge is Bailey Deep Mine PWS 5 non-community public water supply and intake Enlow Fork. The application was considered administratively complete on June 26, 2015. Application received February 17, 2015.

This comment is timely filed pursuant to 25 Pa. Code § 86.32(a). On July 24, 2015 the final public notice was published in the *Observer-Reporter*.

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") No. 1 and No. 2 operated by Consol.

The Department should deny and return the Application because it does not meet the criteria for permit approval. There are numerous technical deficiencies: the application relies on a flawed site selection analysis, the archeological survey is ongoing, the PNDI search relied upon is from 2012 and fails to take into account the threatened status of the Northern Long-Eared Bat, measures proposed to minimize disturbances and enhance wildlife habitat are insufficient, and the application proposes dramatic permanent impacts to biologically diverse streams.

I. Applicant Failed to Conduct Required Site Selection Study & Alternative Analysis for the Support Area and Instead Improperly Relies on Flawed Site Selection Study & Alternative Analysis for CRDAs 7 & 8

The Applicant has failed to conduct the required site selection analysis for this major revision to a coal refuse disposal permit. The decision to issue this permit revision will be based on an evaluation of the probable impacts,[1] including cumulative impacts,[2] of the proposed activity and its intended use on the public interest.[3] The Department will not approve a site proposed by the applicant for coal refuse disposal if the Department finds that the adverse environment impacts clearly outweigh the public benefits.[4] This evaluation necessarily requires a general balancing process in which the benefits that reasonably may be expected to accrue from the proposal are balanced against reasonably foreseeable detriments. There are many factors that may be relevant to the Department's balancing analysis including, but not limited to, conservation, economics, environmental concerns, fish and wildlife, land use, recreation, water quality, energy needs, and the general welfare of the people. The applicable regulations define "Coal refuse disposal" as "The storage, placement or disposal of coal refuse. *The term includes engineered features integral to the placement of the coal refuse* including relocations or diversions of stream segments contained within the proposed fill area and the construction of required systems to prevent adverse impacts to surface water and groundwater and to prevent precipitation from contacting the coal refuse." (emphasis supplied).[5] The proposed activities at this site, encompassing 287 acres, will be coal refuse disposal meeting that definition with "construction of

[1] "Refer to the report entitled, Bailey Central Mine Complex, Greene County, Pennsylvania, Alternative Analysis & Site Selection Study for New Coal Refuse Disposal Areas No. 7 and No. 8, that was approved by the PADEP California District Mining Office on June 26, 2013, for a detailed explanation of the project purpose and justification." (Application at 15-1).
[2] 25 Pa. Code §§ 90.35(c), 90.101(a); 25 Pa. Code § 86.37(a)
[3] 25 Pa. Code § 90.202(a)
[4] 25 Pa. Code § 90.202(d)
[5] 25 Pa. Code § 90.1

approximately 11,500 linear feet of conveyor, access roads, pipelines, and other items that will be used to support the future Coal Refuse Disposal Area No. 7 and No. 8 Facility." Accordingly, the Applicant must comply with the site selection requirements of Subchapter E 25 Pa. Code §§ 90.201-90.207, and should have done a Site Selection Study & Alternative Analysis before submitting this application to the Department.

The Department cannot allow the Applicant to rely on the Bailey Central Mine Complex, Greene County, Pennsylvania, Alternative Analysis & Site Selection Study for New Coal Refuse Disposal Areas No. 7 and No. 8, that was approved by the PADEP California District Mining Office on June 26, 2013 because it does not consider the 287 acres proposed in this Application for the support area. The Site Selection Study and Alternative Analysis performed for CRDA areas 7 & 8 only considered construction of those sites and did not contemplate a 287 acre support area. Additionally, the Applicant failed to demonstrate that the adverse impacts are clearly outweighed by the public benefit back in 2013 and the site for CRDAs 7 & 8 was erroneously approved. We brought these issues to the Department's attention after the application for CRDA 8 was first submitted in September 2013. We are attaching our comments on the permit application for CRDA 7 & 8 as the points raised in those comments as to the dire insufficiency of the site analysis and approval are relevant for this Application which attempts to improperly rely on the site approval for CRDA 7 & 8.

II. Archeological Survey

Module 4 states that "Phase II Archaeological Surveys were subsequently conducted and the Phase II report recommended that three of the sites be considered as not eligible while a Phase III Survey should be conducted on the other two sites." That statement does not seem to be in accordance with the letter dated December 4, 2015, from the Bureau for Historic Preservation, included in Attachment 4.2. Based on the Phase II Archaeological Report, the Bureau for Historic Preservation concludes that two archaeological sites are eligible for the National Register of Historic Places and requests "site-specific data recovery plans for these two sites for our review and comment" as well as a "project agreement document." The only response that the request appears to be the Applicant's statement to DEP that "Both of these sites are located outside of the Support Area permit boundary (see Exhibit 6.2 for locations)." The Applicant then goes on to list the exclusions of the other potentially eligible sites and the letters that contain those determinations.

This is a perfect example of how piece-meal permitting subverts the requirements of the permitting process when beneficial to the Applicant. Throughout the Application, the Applicant relies on materials that have been produced for CRDAs 7 & 8 and asks the Department to adapt them for this proposed

support area project.[6] The Applicant asks you to turn a blind eye to the fact that the proposed site for CRDAs 7 & 8 may include sites which are eligible for the National Register of Historic Places, as yet to be determined in the Phase III Survey and go forward with permitting all of the infrastructure necessary to operate CRDAs 7 & 8 which have not been permitted yet. Proceeding in this manner exemplifies an attitude that seems to say, "well, we have approved the site for CRDAs 7 & 8 and they will be permitted, so we just need to permit this support area in the manner most convenient for the applicant and according to their timeline." However, this type of attitude is contrary to the CRDA regulations stating that "Department approval of a selected site does not indicate the Department will approve an application for coal refuse disposal activities for the selected site."[7] The Department should not kowtow to Applicants who impose deadlines on the DEP's permitting process by including irrelevant information about the needs of their business inside of their permit applications.[8]

III. Endangered Species: Northern Long-eared Bat

The Application's PNDI search needs to be performed again in order to reflect the threatened status of the Northern Long-eared Bat. The Application, in Module 4, states that "[t]here are no known threatened or endangered species and/or critical habit which have been identified within or adjacent to the proposed surface activity site." The Applicant reports that a "PNDI search for the entire Coal Refuse Disposal Area No. 7 and No. 8 project, including the Support Area, was conducted on July 17, 2012." That search, PNDI #20120717364166, is further discussed in a letter dated November 26, 2013 from Jeffery Painter of the Pennsylvania Game Commission, Division of Environmental Planning & Habitat Protection which is included in Attachment 4.7 to Module 4. In the letter, Mr. Painter states that the *Myotis septentrionalis* or Northern Long-eared Bat is a "species of special concern" and due to "their ecological significance" a seasonal restriction on certain timbering activities is imposed. This response, though recognizing the importance of the Northern Long-eared Bat is the permit area, is now inadequate because the Northern Long-eared Bat is now listed as a threatened species under Interim Rule 4(d) of the Endangered Species Act.

A "threatened species" is one that is likely to become endangered in the foreseeable future. The Bat is predominantly threatened by an illness called "White-nose Syndrome" (WNS). This Syndrome arises from the presence of a fungus called *Pseudogymnoascus destructans*. If a portion of a county falls within 150 miles of a county or district where WNS has been detected, the entire county will be

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[6] The PNDI search, which was conducted for "the entire Coal Refuse Disposal Area No. 7 and No. 8 project, including the Support Area." (Application at 4-3). The Army Corps of Engineers 404 permit application, which includes the support area as well as CRDAs 7 & 8. (Application at 15-27).
[7] 25 Pa. Code § 90.207.
[8] *See* Application at 15-1 for a discussion of the time when the Applicant will need to start constructing the support area in order to operate its proposed coal refuse disposal areas in the future.

considered affected, and subject to modified Interim Rule 4(d) regulation (discussed below). These neighboring counties make up the White-nose "buffer zone." Every county in Pennsylvania is either directly affect by WNS or part of the buffer zone. Greene County and the proposed site for the permit application in question are within the buffer zone.

The threatened status of Northern Long-eared Bat was effective on May 4, 2015 and the PNDI Environmental Review Tool now reflects the bat's threatened status when searches are conducted. Per the May 16, 2015 notice in the Pennsylvania Bulletin, "With the addition of this bat to the list of threatened species, all PNDI searches in this Commonwealth now have the potential to identify this bat as potential concern in specific areas. Therefore, any search that was done before May 4, 2015, did not encompass the Federally- listed bat and will need to be rerun for this threatened species." Accordingly, the PNDI search for the project area in the Application must be rerun for the Northern Long-eared bat.

Moreover, the United States Department of the Interior, Fish and Wildlife Service conducted surveys at 28 sites in the project area in June and July 2013 to determine whether Indiana bats were present in the project area. The survey report stated that 307 bats of seven species were captured, no Indiana bats, but 68 Northern Long-eared bats ("NLEB"). The US Fish and Wildlife Service, in a letter dated December 18, 2013, recognized that the species was proposed for federal listing at the time and recommended that the Applicant "contact our office to identify and resolve potential conflict regarding NLEB in your project area."

The Department must require the applicant to send another letter to the US Fish and Wildlife Service to receive an opinion on the project's impacts in light of the recent listing of the Northern Long-Eared Bat as a federally threatened species.

IV. Insufficient Measures To Minimize Disturbances and Enhance Wildlife Habitat

The Applicant provides an insufficient response to the prompt in Module 10 to "Describe the measures which will be taken during the development and active phases of operation to minimize disturbances and adverse impacts to fish, wildlife and related environmental values, and achieve enhancement of the resources where practical. If enhancements measures are not proposed, explain why enhancement is not practical." The Applicant responds, "No diminution of stream flow or adverse effects on fish, wildlife, and related environmental values are anticipated. The site has been designed to minimize disturbances and adverse impacts on fish and wildlife."[9] This response omits all of the impacts described in Module 15, including the fact that "The loss of forested riparian habitats along the banks of these streams is likely to have an adverse impact on the nesting and rearing behaviors of avian

[9] Application at 10-8.

species at the point of impact."[10] The Application also describes the project's impact to Tributary 32753, which is biologically diverse and rated moderate for spawning, and concludes that "The temporary impact and spanning of Tributary 32753 is not anticipated to have a permanent effect on the spawning behaviors of fish in this stream. The effect of losing 165 l.f. of potential spawning area on Tributary 32758 is anticipated to be negligible."[11] Additionally, the Applicant does not definitively say that the project's impacts will seriously affect the potential migration habitat for neotropical songbirds, but connecting the dots between its statements makes it clear that there will be a significant loss of migration habitat.[12] The Applicant couches every single one of the statements about impacts in an assertion that the impact is diminished by the existence of similar resources in the vicinity of the project, without specifying what is meant by "vicinity" and whether the existence of such resources within that area is ecologically significant enough to actually make its impacts as negligible as it claims.

Continuing its response in Module 10, the Applicant states, "In addition, brush piles will be placed to provide for wildlife habitat; and disturbed areas will be planted with native warm season grasses that will provide forage for wildlife." The Applicant seems to treat this sentence as its description of how it will achieve enhancement of the resources since there is no explanation of why enhancement is not practical. And yet, nothing in the response suggests whether and why brush piles will truly provide valuable wildlife habitat that would enhance the natural resources. Finally, the Applicant has failed to follow through with its assertion that it will "promptly report to the Department the presence in the permit area of any threatened or endangered species under State or Federal law of which CPCC becomes aware and which was not previously reported to the Department." There is nothing in the permit application file, including correspondence between the Applicant and DEP which indicates that it is has realized that the Northern Long-eared bat is now listed as threatened and undertaken the appropriate steps to account for this species and its listing. The Department should require the Applicant revise this section of the Application.

[10] Application at 15-13.
[11] Application at 15-13.
[12] "The biologically diverse perennial reaches of the onsite streams were assigned moderate ratings for potential migration habitat based on potential use by neotropical songbirds. The remaining streams were assigned low ratings for this function. The proposed project will eliminate forested habitat from large areas of the site that may be used by migratory songbirds. However, the onsite resources are not unique or rare in the project vicinity and there will be large tracts of contiguous forest remaining outside of the project. Therefore, no substantial adverse impacts to the habitat suitability for songbirds or other seasonal migrants in the Enlow Fork watershed are expected." Application at 15-13.

V. Severe Stream Impacts

The Application predicts serious temporary and permanent impacts to streams in the permit area, "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…."[13] In terms of the impacts on aquatic life, "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."[14]

The impacts to one stream in particular are deeply troubling, Tributary 32753, due to a utility line crossing and temporary road crossing over the stream. Specifically, "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 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."[15] This is concerning because "Tributary 32753 has a protected aquatic life use designation of Warm Water Fishes (WWF), as per 25 PA Code Chapter 93 Protection Water Use Classification. The WWF protected use is defined as 'maintenance and propagation of fish species and additional flora and fauna which are indigenous to a warm water habitat'."[16] Then the Application goes on to describe all of the ecological functions of this tributary, including food chain production, spawning, rearing, resting, feeding, escape cover, floodwater and storm water control, and how they will be impacted by the project.[17]

Surely there are alternative site plans and site development measures which could reduce some of the aforementioned impacts, because as currently proposed, this project will have a serious impact on aquatic life, wildlife, and the streams in the permit area. If the Applicant had complied with the coal refuse disposal regulations and completed a Site Selection Study & Alternative Analysis, then there would have been some consideration of other routes for the conveyor, access roads and associated infrastructure which could have presented less adverse impacts. The impacts outlined in the permit further reinforce the need for the Applicant to complete a Site Selection Study & Alternative Analysis for this revision.

The Application mentions a 12-inch stream augmentation line in Module 15 as crossing Tributary 32753. Yet, in Module 8 when asked to describe augmentation measures used to maintain flow in affected stream segments, the Applicant responds "Not applicable to this surface activity permit." No other modules in the Application describe augmentation activities—when, how, and where they will be

[13] Application at 15-2.
[14] Application at 15-12.
[15] Application at 15-3.
[16] Application at 15-6.
[17] *See* Application at 15-7 through 15-15.

conducted. This gap in information needs to be corrected before the permit can be evaluated further.

VI. Clean Water Act Section 404 and 401 Approval Process is Contrary to Law

The discussion of the Section 404 permit application to the Army Corps of Engineers and Section 401 water quality certification in Module 15 of the Application demonstrates the dangers of piecemeal permitting.[18] The Army Corps of Engineers cannot issue a Section 404 permit without a corresponding Section 401 water quality certification.[19] The Application states that "The Section 404 permit application was submitted to the USACE in December 2013 as a single project, including the cumulative aquatic resource impacts resulting from the proposed Coal Refuse Disposal Area (CRDA) No. 7 and No. 8 Support Area (Phase I), CRDA No. 8 (Phase II), and CRDA No. 7 (Phase III)." Thus, the Army Corps is considering a Section 404 permit application for the entire project and the Applicant confirms that it "understands that the USACE would issue one permit covering all three phases of development…." However, the Applicant purports that the project will be authorized one phase at a time following DEP's issuance of Section 401 water quality certifications for each phase individually. The Section 404 permit cannot be issued with "provisional authorization for Phase II and Phase III, pending PADEP's issuance of the corresponding Section 401 WQCs for these phases" as outlined by the Applicant. That proposed permitting scheme is illegal.

Additionally, by asking the Department to issue a 401 water quality certification only for the support area, Phase I, in order to receive initial Section 404 authorization from the Army Corps, the Applicant effectively asks DEP to ignore the potential that it may not approve the 401 certifications for Phases II and III. Indeed, Craig Burda of the California District Mining Office, explained the permitting plan this way, "The ACOE will approve all parts at one time. DEP will likely approve the project in four parts…Consol can begin development of any part of the project once approved by the Department, as long as they also have approval from the ACOE. In other words, Consol does not need all parts to be reviewed and approved to start construction of any one part."[20] This type of permitting process would allow

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[18] *See* Application at 15-27.

[19] "the Corps district office will not issue the federal Section 404 permit until DEP issues an Individual Water Quality Certification pursuant to Section 401 of the FWPCA, certifying that the activity will comply with the provisions of sections 301-303, 306 and 307 of the FWPCA and will not violate applicable federal and state water quality standards." Application at 15-27.
"If the activity would include the discharge of dredged or fill material into the waters of the United States…the application must include the source of the material; the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. Certification under section 401 of the Clean Water Act is required for such discharges into waters of the United States." 33 C.F.R. 325.1

[20] Email from Craig Burda, Mining Engineer, PA Department of Environmental Protection, California District Mining Office, to Ellie Davis, VP Business Development, Affiliated Products, Inc. (June 24, 2015, 11:45 EST). This explanation of the permitting process is contrary to an explanation advanced

projects to proceed without a meaningful consideration of all of the anticipated impacts. Consideration of such environmental factors is at the heart of the National Environmental Policy Act ("NEPA"), which is implicated here due to the need for the Army Corps to issue a Section 404 permit which constitutes a major federal action significantly affecting the quality of the human environment.

Neither the Application, nor the correspondence file for the Application provide evidence of the permit qualifying for a categorical exclusion from NEPA. Also, it does not appear as though any of the Army Corps' categorical exclusions in their NEPA regulations would apply to this project. *See* 33 C.F.R. Part 325 Appendix B (6). The permit application triggers NEPA although it is a nonfederal project because it will not be able to go forward without federal action, the granting of a Section 404 permit. "To determine whether action is or is not 'major federal action' within meaning of 42 USCS § 4332(C), court shall consider following factors: (1) whether project is federal or non-federal; (2) whether project receives significant federal funding; and (3) when project is undertaken by non-federal actor, whether federal agency must undertake 'affirmative conduct' before non-federal actor may act; no single factor of these three is dispositive." *Mineral Policy Ctr. v Norton*, 292 F Supp 2d 30 (D.C. Dist. Col. 2003). Additionally, "when the Supreme Court discussed two circuit court decisions which held that private actions permitted by the federal government might necessitate the preparation of an impact statement, the Court's examples of federal 'permission' were such concrete acts as decisions 'to issue a lease, approve a mining plan, issue a right-of-way permit, or take other action to allow private activity . . . .' *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244, (D.C. Cir. 1980) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976)). *See also Save Our Sonoran*, 227 F. Supp. 2d at 1115 (D. Ariz. 2002) (finding that the need for 404 approval of access roads throughout a project area subjected the entire project to NEPA analysis because the project could not go forward without the Section 404 permit). Accordingly, before the Section 404 permit can be issued by the Army Corps of Engineers, the Department must provide Section 401 water quality certifications for *all three phases* of this project and the Army Corps must perform an Environmental Assessment in accordance with NEPA before issuing the Section 404 permit.

As discussed earlier with regard to the Archeological Surveys, the Applicant is once again asking the Department to look only at one section, the support area, of a large, complex project, CRDAs 7 & 8. Once the permit for the construction of the support area is issued, the Applicant can use it as leverage against the Department, pushing for issuance of the other permits according to their timeline of need, which should not be something the DEP considers at all, let alone find compelling. The Department is entrusted with a duty to uphold the law as a regulator, and not to

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by Craig Burda one month prior when he wrote that "ACOE approvals must be obtained for the entire disposal area prior to the commencement of any coal refuse disposal activities." Email from Craig Burda, Mining Engineer, PA Department of Environmental Protection, California District Mining Office, to Jaculyn Duke, et. al. (April 22, 2015, 14:55 EST).

pave the way, quite literally, for regulated entities according to the timelines that best suit their profit margins.

In fact, upon review of the timeline included in the permit application in Module 15, the Applicant notes that "Site preparation for the Support Area must begin no later than mid-2015 to provide for *continued* CCR disposal capacity in CRDA No. 8."[21] (emphasis supplied). We hope that this sentence is a typographical error and that the Department has not been allowing the Applicant to store coarse coal refuse without a permit in the proposed CRDA 8 area. Yet perhaps this explains why Paul Cestoni, Licensed Professional Geologist for District Mining Operations, has been sending letters to the PA Fish Commission, PA Game Commission, PA Historical & Museum Commission, and PA Department of Transportation, among many others, regarding Construction of a Sediment Pond for Future Coal Refuse Disposal Area 8 emphasizing, "We would like your comments within thirty (30) business days because our review time frame is very tight," despite the 550 business day Permit Decision Guarantee timeframe for the permit set on July 22, 2015. We are quite surprised that Department staff is spending time taking on the applicant's responsibility to notify state agencies and other entities of this permit application.

VII. Conclusion

The Application is severely flawed. The Department should 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 submitted by,

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[21] Application at 15-1.