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April 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: 30141301 and NPDES No. PA0235741. Foundation Mining, LLC permit application to operate a new underground mine, build a shaft site and a new NPDES discharge point

To Whom It May Concern,

The Center for Coalfield Justice respectfully submits the following comment on the Coal Mining Activity Permit Application ("Application") submitted by Foundation Mining, LLC ("Applicant"), a subsidiary of Alpha Natural Resources ("Alpha"), for development mining and associated work for a new 9,438-acre mine. The relevant Pennsylvania Bulletin Notice appeared as follows:

> **30141301 and NPDES No. PA0235741. Foundation Mining, LLC**, (158 Portal Road, PO Box 1020, Waynesburg, PA 15370). To operate the Foundation Mine in Center, Jackson and Richhill Townships, **Greene County** and related NPDES Permit to operate a new underground mine, build a shaft site and a new NPDES discharge point. Surface Acres Proposed 25.4, Underground Acres Proposed 9,438.0, Subsidence Control Plan Acres Proposed 6,768.0. Receiving Stream: House Run, classified for the following use: HQ-WWF. The application was considered administratively complete on February 18, 2016. Application received January 20, 2016.

This comment is timely filed pursuant to 25 Pa. Code § 86.32(a). On March 12, 2016, the final public notice was published in the Greene County edition of 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 Greene and Washington counties and many who live in the proposed footprint of the Foundation Mine.

I. The Department must fulfill its duties under the antidegradation program to protect special protection streams.

The antidegradation standards apply to all surface waters. 25 Pa. Code § 93.4a(a).[1] Those standards require that both existing in-stream water uses and the level of water quality necessary to protect those existing uses be maintained and protected. 25 Pa. Code §§ 93.4a(b). In Pennsylvania, "[a] duly promulgated regulation has the force and effect of law, and it is improper for the [agency] for ignore or fail to apply its own regulations." *Teledyne Columbia-Summerhill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665, 668 (Pa. Cmwlth. 1993). *See also Zlomsowitch v. DEP*, 2004 EHB 756, 789 (citing *Teledyne*). "Duly promulgated regulations, of course, are not only binding upon the regulated community but also on the Department itself." *Harriman Coal Corp. v. DEP*, 2000 EHB 1008, 1012 n.1 (citing *Al Hamilton Contracting v. Department of Environmental Protection*, 680 A.2d 1209, 1212-1213 (Pa. Cmwlth. 1996)). Where the Department "does not review an application as required by the statutes and regulations, it abuses its

[1] Chapter 93 Water Quality Standards provides in pertinent part:

> **This Chapter sets forth water quality standards for surface waters of the Commonwealth, including wetlands. These standards are based upon water uses which are to be protected and will be considered by the Department in implementing its authority under The Clean Streams Law and other statutes that authorize protection of surface water quality.** Nothing in this chapter shall be construed to diminish or expand the authority of the Department to regulate surface water quality as authorized by statute.

25 Pa. Code § 93.2(a) (emphasis added).

discretion." *Oley Township v. DEP*, 1996 EHB 1098, 1119; *Tinicum Township v. DEP*, 2002 EHB 822, 832 (Department's duty to evaluate effects of mining on waters of the Commonwealth extends beyond water-quality impacts). Under this fundamental principal of administrative law, the Department is bound by the antidegradation standards. 25 Pa. Code § 93.4a.

The streams above the proposed development mining are designated high quality ("HQ"). As a result, under the antidegradation program, the Department is required, before issuing the permit, to determine whether or not the streams' special protection use will be adversely affected by the proposed activity, and to ensure that the streams' existing water quality will be maintained and protected. 25 Pa. Code §§ 93.4a(b) & (d). See also *Tinicum Township v. DEP*, 2002 EHB 822, 832; *Oley Township v. DEP*, 1996 EHB 1098, 1119.

The purpose of Pennsylvania's antidegradation regulations is to protect the existing quality of High Quality ("HQ") and Exceptional Value ("EV") waters and the existing uses of all surface waters. The Department's Antidegradation Implementation Guidance documents states that the Department will evaluate the effect of proposed projects that do not involve a discharge but that may nevertheless impact HQ or EV surface waters to ensure that the use of those special protections waters will be maintained and protected. The Department's guidance is consistent with the Clean Streams Law, the regulations promulgated under the Clean Streams Law, and Board Precedent. See *Crum Creek Neighbors v. DEP* 2009 EHB 566-567 ("A permittee may not degrade a stream by altering its physical or biological properties any more than it may degrade a stream by a direct discharge of pollutants."); *Oley Township v. DEP*, 1996 EHB 1098, 1119; *Tinicum Township v. DEP*, 2002 EHB 822, 832.

A failure by the Department to make the determinations necessary to fulfill its duties under the antidegradation program to protect the streams' special protection use would be contrary to law and an abuse of discretion. See *e.g., Zlomsowitch*, 2004 EHB 789 ("by failing to properly apply [25 Pa. Code] § 93.4c(b)(1)(i), DEP acted contrary to law when issuing the mining and incorporated NPDES permit," and "where DEP does not review an application as required by the statutes and regulations, it abuses its discretion (quoting *Oley Township*, 1996 EHB 1119)).

II. 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.

The Application fails to meet the antidegradation requirements that apply to High Quality Waters such as Hodge Run, House Run, McCourtney Run, Garner Run and their unnamed tributaries, all of which are designated as High Quality – Warm Water Fishes or HQ-WWF. 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).

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 or not 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 states that the selection of a surface site for access to the underground Foundation Mining, LLC reserves was based on careful considerations of multiple factors. The Applicant admits that most of Foundation's coal reserves lie within sensitive HQ and EV watersheds. However, two alternative sites located in non-HQ watersheds sites were considered by the Applicant but quickly dismissed by as non-feasible due to insufficient space and/or lack of existing infrastructure to transport coal. *See* Antidegradation Supplement Attachment 1C at 1-2. The Applicant makes no attempt to perform the 2-step cost effectiveness evaluation and there are no meaningful answers to the Department's specific project siting questions.

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 the HQ streams are too far away to pump the site discharges in an economic manner. See Antidegradation Supplement Attachment 1C at 2-4. 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 hauling the effluent.

With respect to recycling/reuse of water on site, in its supposed evaluation on Page 6, the Applicant does not actually propose any recycling or reuse of sediment laden water. Instead, the Applicant merely states: "Where there is sufficient room, level spreaders will be used to control discharge from sediment control structures into a vegetated buffer before the discharge reaches a waterway." See Antidegradation Supplement Attachment 1C at 6. With respect to stormwater discharged from permanent facilities, the Applicant concludes that "there will be an opportunity to reuse this water by pumping to the water supply system for underground mining operations and reduce discharges." *Id.* The Applicant has not made any attempt to quantify the amount of water that could be reused. Moreover, 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 "because of the lack of space for constructing wetlands." 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. 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. Instead, the Applicant merely states: "Holding

facilities/waste water hauling are most effective when water volume to be handled is small and the disposal facility is close." 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 near it's underground mining operation does not preclude the Applicant from obtaining cost estimates for hauling that would go toward determining whether hauling would be cost-effective. 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 doesn't evaluate any. Instead, the Applicant states: "No specific pollution prevention processes have been identified as necessary except for the possible alkaline treatment of mine water and treatment of surface run-off with flocculants and coagulants in the treatment/sedimentation pond to enhance the sedimentation process." See Antidegradation Supplement Attachment 1C at 7. 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.

With respect to infiltration galleries or land application, the Applicant does not even attempt to provide an evaluation of cost-effectiveness. Instead, the Applicant concludes that "pumping the discharge into infiltration galleries is not a viable alternative due to significant additional earth disturbance, technical problems, such as constructability of infiltration galleries on sloping hillside, increased potential for landslide, and potential increased impacts to aquatic resources." See Antidegradation Supplement Attachment 1C at 4. Without providing any support for its conclusion and through an unlawfully flawed analysis, the Applicant asserts that the implementation of infiltration galleries as a non-discharge alternative is not feasible and a direct discharge into an HQ watershed is preferable. See Antidegradation Supplement Attachment 1C at 4.

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.

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 ABACT analysis is completely absent from the Application.

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.

Unfortunately, the required ABACT analysis is completely absent from the Application. Rather than providing an ABACT analysis, the Applicant submitted an SEJ. Without even knowing whether or not using the best available combination of control technologies would result in a non-degrading discharge, the Applicant proposes to degrade HQ waters. The Department must require the Applicant to revise its Application to include the required ABACT Analysis.

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. In order to show that the Applicant will be subjecting the proposed discharged 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 simply allowing a degrading discharge.

Additionally, the ABACT analysis in the Anti-Degradation Supplement must consider but cannot be 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, the Applicant must perform an evaluation of the thermal impact of the discharge to the receiving streams. The lack of any evaluation whatsoever 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.

After comparing the ABACT standard to water quality-based effluent limits, the Applicant must meet the more stringent of the two. The Application must be revised to provide such comparison. The Application that provides such a comparison.

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.

C. Without performing an adequate non-discharge alternative analysis or even attempting an ABACT analysis, the Applicant simply proposes to degrade HQ streams.

Any proposed discharge that utilizes ABACT must still be non-degrading. An adequate demonstration of a non-degrading discharge must account for sediment as well as and other pollutants (e.g. temperature). Moreover, it must 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. Instead, the Applicant merely assumes that its discharge will degrade the stream.

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. 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.

The antidegradation scheme requires the **maintenance of existing High Quality water** unless an applicant demonstrates a social and economic justification for degradation below that quality, which this Applicant has not done.[2] 25 Pa. Code § 93.4c. The Applicant

[2] The Applicant's Social or Economic Justification provides little to no support that the benefits of the proposed operation outweigh the loss of HQ streams. Unsupported claims related to economic benefits are not sufficient to justify the degradation of waters of the Commonwealth. By way of example, Applicant states that the proposed mine will "likely [offer] 887 new and full time high-paying jobs with good benefits and also likely [maintain] opportunities for the approximate average of 2,500 indirect local jobs dependent upon coal mining." Later, the Applicant threatens that if the Foundation Mine is not developed, Greene County will suffer from a significant loss of employment and tax base. The Applicant provides no evidence that the approximate average of 2,500 indirect

seems to assume that because its discharge of stormwater runoff will be joined by nonpoint source discharges themselves laden with sediment, then in-stream water quality will already 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.

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 cannot be designed in a way that will protect the special protection uses of the receiving streams. 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.

III. 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

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jobs would be lost if the Foundation Mine is not permitted to degrade the HQ streams. Moreover, Greene County cannot lose the potential 887 jobs, since those jobs currently do not exist.

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 proposed Foundation Mine site.

First, with respect to the antidegradation requirements from Chapter 93, the Department cannot issue a mining permit for the Foundation Mine 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 receiving streams' HQ-WWF 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 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).

IV. 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-WWF, 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 NDPES 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 that 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 NDPES permit unless the requirements of Chapter 92a are met. 25 Pa. Code § 92a.36.

V. The Applicant's evaluation of the potential for mining induced impacts to public water supply sources is inadequate.

Module 8, Section 8.14(a)(vi) requires applicants to "[a]ddress the potential for mining-induced material damage to public water supply aquifers and bodies of water, which are sources of public water supplies." Moreover, an applicant is required to include a "description of the measures to be taken to prevent material damage to perennial streams and aquifers which serve a significant source to a public water supply system." 25 Pa. Code § 89.141(b)(12). Underground mining must be prohibited unless an applicants' subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of bodies of water or aquifers which serve as significant sources to a public water supply system(s).

In this case, the Applicant relies exclusively on a letter from the Department dated May 27, 2008 to conclude that there are no public water supply systems that have surface water intakes within approximately 10 miles downstream or groundwater sources (spring or well) within one half (1/2) mile of the proposed permit area. Somewhat surprisingly, the Applicant has done nothing to determine whether the Department's determination eight (8) years ago is still applicable. Especially since the Applicant is seeking approval to conduct to development mining in anticipation of future longwall mining, the Department cannot allow the Applicant to delay or dodge its responsibilities to evaluate and protect public water supplies based on a letter from 2008. *See* 25 Pa. Code § 89.141(b)(12).

VI. The Applicant's description of the measures that will be used to restore or replace private water supplies that may be contaminated, diminished, or interrupted by underground mining operations is inadequate.

The Bituminous Mine Subsidence and Land Conservation Act ("BMSLCA") and the Department's mining regulations require operators to *promptly* replace water supplies that have been impacted by mining. See 52 P.S. § 1406.5a(a), 52 P.S. § 1406.5b(a), and 25 Pa. Code §§ 89.145a(a)-(f). In approving this provision as part of Pennsylvania's regulatory program under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"),

OSMRE required Pennsylvania to place an obligation on the operator to replace water supplies promptly both on a temporary and permanent basis. See 30 C.F.R. § 817.41(j) and 66 Fed. Reg. 670110-01 (December 27, 2001). OSMRE defined prompt replacement as within two years of notification. *Id.* ("As noted in the preamble to the federal rules, a permittee should connect the user to a satisfactory permanent water supply within two years of notification." Moreover, OSMRE made clear that "[a]llowing an operator up to three years to replace a water supply is not a 'prompt' replacement[.]" 66 Fed. Reg. 670110-01 (December 27, 2001). As a condition of a mining permit, a permittee must comply with all conditions of the permit, all applicable performance standards, and the requirements of the regulatory program. See 30 C.F.R. § 773.17(c). The requirement to promptly replace protected water supplies is an enforceable standard. As a result, the Application must contain a description of the measures the Applicant intends to take to promptly restore or replace water supplies. See Module 8 at 8.14(a)(v) (requiring applicant to identify private water supplies that may be impacted and describe measures that will be used to restore or replace those supplies).

Rather than describing the measures that will be taken to promptly restore or replace affected water supplies and in an effort to dodge its responsibilities, the Applicant states: "In the event that a new water supply needs to be developed, Foundation Mining, LLC will review viable options for replacement on a case-by-case basis. These options may include deepening the existing well, drilling a new well, or developing springs." It is unacceptable for the Department to issue the permit based on the Applicant's stated commitment to perform this pre-mining evaluation at a later date, especially given Foundation Mining, LLC's pending petition for relief under the Bankruptcy Code (Case No. 15-33965). Furthermore, The Department cannot bury its head in the sand at the permitting stage. Since the Department prefers to encourage voluntary compliance one mining adversely impacts a water supply, the Department must actually evaluate the likelihood of voluntary compliance before issuing the permit.

VII. Applicant has failed to submit any compliance information which would allow the Department to make its legally-required finding that the applicant will comply with relevant laws and regulations.

The Department may not issue an underground mining permit unless it makes the finding that "[t]here are no past or continuing violations which show the applicant's, a person owned or controlled by the applicant or a person who owns or controls the applicant… lack of ability or intention to comply with the acts or the regulations promulgated thereunder, whether or not the violation relates to an adjudicated proceeding, agreement, consent order or decree, or which resulted in a cease order or civil penalty assessment." 52 P.S. § 1406.5(f)(2); 25 Pa. Code § 86.37(a)(10). And "if the Department makes a finding that the applicant or the operator specified in the application or a person who owns or controls the applicant or operator or a person owned or controlled by the applicant or operator, has demonstrated a pattern of willful violations of the acts of a nature and duration and with resulting irreparable damage to the environment as to indicate an intent not to comply with the acts, a permit will not be issued." 25 Pa. Code § 86.37(a)(10).

Reviewing Module 3 of the Application, the Applicant responds to every question and prompt by stating that "Foundation Mining, LLC does not hold or have any pending coal mining permits in Pennsylvania or in the United States." Application at 3-2. Accordingly, when asked about violations, the Applicant asserts that it has a clean record. *See* Application at 3-3 ("Foundation Mining, LLC has not had any violations in the last three years."). *See also* Application at 3-2 ("Not applicable. Foundation Mining, LLC nor any related party have had a mining permit or bond suspended, revoked, or forfeited in the last 5 years.").

This is misleading and not in compliance with applicable regulations because, although the Applicant may not have any violations to its name, its parent corporation, Alpha Natural Resources, has the distinction of being assessed the largest fine in history ($227.5 million) under the federal Clean Water Act in 2014.[3] Alpha owns or controls the applicant under the definition of "owned or controlled" or "owns or controls" in chapter 86.1 of title 25 of the

[3] http://triblive.com/business/headlines/5710782-74/alpha-coal-federal

Pa Code. Accordingly, Foundation Mining LLC needs to report the very long list of violations committed by Alpha. In the 2014 case alone, Alpha was found to be responsible for violations of NPDES permits at its sites in Pennsylvania and four other states over seven years until the federal government stepped in to enforce the seemingly endless list of violations. The bold disregard for the law evidenced in those violations is shocking, "Alpha and its subsidiaries discharged heavy metals and other contaminants harmful to fish and other wildlife from nearly 800 pipes directly into rivers, streams and tributaries, according to the government. Monitoring records attached to the complaint show that in some cases, the releases exceeded permit limits by 35 times."[4] By the time that the Department of Justice tallied up all of those violations, "Alpha's mines dumped illegally high amounts of iron, aluminum, selenium and other pollutants at least 6,289 times, creating a risk to aquatic life, according to the federal Environmental Protection Agency."[5] And out of the five states where these violations occurred, "More than a quarter of those violations came from sites in Greene and Westmoreland counties, according to the Justice Department."[6] It is impossible to imagine a past history of violations that more dramatically and effectively "indicate an inability or lack of intention to comply with the regulations." 25 Pa. Code § 86.37(a)(10). Although Alpha signed a consent decree with commitments and plans to bring their facilities into compliance with the law, it remains to be seen how and whether Alpha will achieve those timelines and standards, particularly now that it has filed for chapter 11 bankruptcy protection.

It is understandable why the Applicant would want to distance itself from its parent corporation given those appalling violations over years and years which reveal Alpha's widespread, systemic disregard for regulations. Yet, the Applicant is quite closely tied to Alpha as it is also weathering the current storm of Alpha's bankruptcy filings, "Foundation Mining, LLC operates as a subsidiary of Alpha Natural Resources, Inc. On August 3, 2015, Foundation Mining, LLC filed a voluntary petition for reorganization under Chapter 11 in

[4] http://triblive.com/business/headlines/5710782-74/alpha-coal-federal
[5] *Id.*
[6] *Id.*

the US Bankruptcy Court for the Eastern District of Virginia. It is in joint administration with Alpha Natural Resources, Inc."[7]

There is conflicting information that has been released to the public regarding Alpha and Foundation's plans for the proposed Foundation Mine. In February 2016, an Alpha spokesman spoke on behalf of Foundation Mining LLC, asserting that, "The fact the company is continuing with the permit process doesn't necessarily mean it will ever proceed with plans to construct the mine."[8] Then, in March 2016, when "[a]sked how Alpha's current bankruptcy will impact the project, Eric Salyer, vice president of Alpha's Pennsylvania operation said he didn't know. "We wouldn't be spending the money to permit (the mine)," he said, if the company didn't plan to move forward with it."[9] However, a week before that, Alpha had released a statement describing the potential sale of its assets through a "stalking horse bid" as part of its bankruptcy proceedings, and stating that it "contemplates the purchase of the following: …All of the company's coal operations and reserves located in Pennsylvania, including the debtors' Cumberland and Emerald mine complexes, their Freeport, Sewickley and Foundation coal reserves, and all related assets."[10] This offering up of the Foundation coal reserves directly contradicts statements made by the Applicant in its Application, that a contractor would not be conducting the operation. *See* Application at 3-1 ("Not applicable. All mining at the Foundation Mine will be performed by Foundation Mining, LLC and will not be conducted by a contractor.") As soon as the results of the stalking horse bid and other auctions are known, Alpha and Foundation should update the Application and make that information available to the Department because it may soon become clear that another company will be operating the mine whether all on its own or as a contractor under Foundation to save itself from paperwork.

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[7] http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=129129355

[8] http://www.observer-reporter.com/20160219/alpha_continues_permitting_process_for_new_mine

[9] http://www.observer-reporter.com/20160317/informational_meeting_held_on_proposed_foundation_mine_near_holbrook

[10] http://www.register-herald.com/news/alpha-files-restructuring-plan/article_cfa16b90-aa16-5486-a7da-6ab9600561a1.html

In light of the Applicant's failure to submit any information on violations and compliance history, it is impossible for DEP to make the finding required by law that there is no history of past or continuing violations by the Applicant and Alpha, which owns the Applicant, that would indicate an inability or lack of intention to comply with the regulations. 52 P.S. § 1406.5(f)(2); 25 Pa. Code § 86.37(a)(10). This is particularly problematic because the heavy weight of Alpha's 2014 consent decree with the EPA has not been factored into the compliance history for this application at all.

VIII. The Application presents other policy issues which the Department should consider in the permitting process.

If the Department approves this permit application, it be engaging in an act of willful blindness as it knowingly gives the Applicant the leverage it desires to request a full extraction, longwall mining permit and exert significant pressure on the Department until it is issued. Alternatively, it will make these reserves a more attractive asset to be sold as part of the liquidation of assets in the bankruptcy process to meets its obligations to its creditors. Then after a quick transfer process, another company will have the mining permit and can begin mining the area.

We understand that the Department is not required to take into account the massive decline of current market for coal, both nationally and internationally, and the projections that show coal flatlining into the future before dropping out of the energy mix completely. However, in light of DEP's work on the Pennsylvania Climate Change Action Plan and associated updates as well as the Climate Change Impact Assessment, the Department should be considering the amount of CO2 emissions from these activities as part of the permitting process, especially with regard to coal mining, as a total of 9.10 MMTCO2e were emitted from "underground and surface coal mining, coal processing, and abandoned underground mines" in 2012. 2016 Climate Change Action Plan Update at 26. If DEP considers the amount of CO2 emissions which are part of the mining process as well as the emissions which will occur as a result of burning the coal later, it will quickly become clear that these activities are seriously contributing to global climate change and endangering the health and welfare of Pennsylvanians and people around the world.

IX. Informal Public Conference Request.

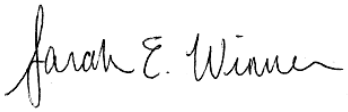
We respectfully request that the Department of Environmental Protection hold an informal conference regarding Foundation Mining LLC's permit for development mining of 9,438 acres to operate a new underground mine, build a shaft site and a new NPDES discharge point.

This request comes pursuant to 25 Pa. Code § 86.34(a), stating, "A person...may in writing, request that the Department hold an informal conference on an application for a permit." As required, this request briefly summarizes the issues or objections and states whether CCJ desires to have the conference conducted in the locality of the propose coal mining activities.1 This request for an informal conference is timely made pursuant to 25 Pa. Code§ 86.34(a)(3).

The concerns outlined above are shared by many of CCJ's members. CCJ believes that Greene County residents deserve to have a forum to convey these issues to the Department and to have a meaningful response provided by the Department before the project moves forward. As a result, CCJ requests that the conference be conducted in the locality of the proposed activity, for example at the Center Township Volunteer Fire Department Building. Additionally, the meeting should be held at night so that working members of the public have the opportunity to attend, particularly because this mine is proposed for a designated Environmental Justice area.

Thank you for the opportunity to provide these comments.

Respectfully,



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