



Fair Shake

Environmental Legal Services

Pittsburgh

3445 Butler Street,
1st Floor
Pittsburgh, PA 15201

(412) 742-4615
(412) 291-1197 (fax)

Akron

159 S. Main Street,
Suite 1030
Akron, OH 44308

(234) 571-1970
(330) 319-8856 (fax)

A new climate of fairness.

July 30, 2014

Sent via electronic mail and First Class U.S. Mail

California District Mining Office
Department of Environmental Protection, District Mining Operations
Commonwealth of Pennsylvania
Attention: Joel Koricich, District Mining Manager, Jay Winter, Permit
Chief
25 Technology Drive
California Technology Park
Coal Center, PA 15423
E-mail: jkoricich@pa.gov

**Re: Comment on Consol's Application to conduct full extraction
mining beneath Polen Run in 1L and 2L panels and to
perform stream restoration
Permit No. 30841316
Notice in 44 Pa.B 3110 (Saturday, May 24, 2014)**

To Whom It May Concern:

On behalf of the Center for Coalfield Justice ("CCJ"), I respectfully submit the following comment on Consol Pennsylvania Coal Company, LLC's ("Applicant" or "Consol") permit application to conduct full extraction mining under Polen Run in the 1L and 2L Panels of the Bailey East Expansion and to perform stream restoration on the same segment of Polen Run ("Application"). The relevant Pennsylvania Bulletin notice appeared as follows:

**30841316. Consol Pennsylvania Coal
Company LLC**, (1525 Pleasant Grove Rd.,
PO Box J, Claysville, PA 15323). To revise
the permit for the Bailey Mine & Prep
Plant in Richhill Township, **Greene
County** for a modification to conduct full
extraction mining under Polen Run in
panels 1L and 2L and to perform stream
restoration on that segment of Polen Run
(Trib 32603) located 1,260 ft. south east of
Rush Run and Polen Run Road
intersection and continuing to point 4,350

ft. south west of the intersection. Restoration area is approximately 4,750 linear ft. and is located on Wind Ridge, PA Quadrangle USGS map located at 39° 53' 26", - 80° 25' 0" W. No additional discharges. The application was considered administratively complete on May 9, 2014. Application received April 16, 2014.

This comment is timely filed pursuant to 25 Pa. Code § 86.32(a). On June 30, 2014 the final public notice was published in the *Washington Observer-Reporter*.

The Department should deny and return the Application because it does not meet the criteria for permit approval. There are numerous technical and procedural deficiencies; there is presumptive evidence of pollution to waters of the Commonwealth; the proposed mining activity does not protect the hydrologic balance of Polen Run; the cumulative impacts analysis is unlawfully inadequate; the proposed mining activity does not protect the values and uses of Polen Run; and the Applicant has a history of past and continuing violations that indicate an inability or lack of intention to comply with the regulations. Because it is so deficient, the Department must deny the Application. In the event that it is not denied but is revised, the scope and significance of the necessary revisions merit a second public comment period. In the interim, the Department should issue the necessary deficiency letters to the Applicant.

Somewhat surprisingly, the Department and the Applicant appear to moving forward based on the same flawed logic: that the Applicant has the right to harm Polen Run so long as it promises to employ feasible mitigation measures. This Application arises out of the Department's approval of Permit Revision No. 180, which included Special Condition No. 83A regarding Polen Run. While CCJ appreciates the Department's efforts to ensure that Polen Run is restored after mining, the applicable law requires the Department to *prevent* anticipated harm to the stream. It cannot use a mitigation plan to approve the harm in advance.

1. The Applicant's proposed longwall mining would violate the Clean Streams Law and the Department's Regulations.

If longwall mining will result in a violation of the Clean Streams Law, the Bituminous Mine Subsidence Act, or the Department's regulations, then the Department must prevent the violation. The Department is the agency of the Commonwealth that is vested with the duty and authority to administer and enforce Pennsylvania's environmental statutes, including the Bituminous Mine Subsidence and Land Conservation Act¹, 52 P.S. §§ 1406.1 *et seq.* ("Mine Subsidence Act") the Pennsylvania

¹ The Bituminous Mine Subsidence and Land Conservation Act ("BMSLCA") requires that any person that operates a bituminous coal mine must apply for an obtain a permit from the Department. 52 P.S. § 1406.5. Section 7 provides that bituminous mines operating under the Act

Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*, and the rules and regulations promulgated under those statutes. The water-protection regulations promulgated pursuant to the Clean Streams Law and codified in 25 Pa. Code Chapter 86, 89, and 93 apply to the subsidence impacts of underground mining on waters of the Commonwealth. It is undisputed that the proposed permit revision will impact Polen Run, a water of the Commonwealth.²

A. The proposed mining is likely to result in pollution of waters of the Commonwealth, which is prohibited by 35 P.S. § 691.611 and 25 Pa. Code § 86.37(a)(3).

In order to issue a permit for a surface or underground mine, the Department must determine, among other things, that “[t]he applicant has demonstrated that there is *no presumptive evidence of potential pollution* of waters of the Commonwealth.” 25 Pa. Code § 86.376(a)(3). *See also* 35 P.S. § 691.611 In other words, Consol must prove that pollution will not occur as a result of its mining activities. *Consol Pennsylvania Coal Company and Eighty-Four Mining Company v. DEP*, 2003 WL 22937013, *2, EHB Docket No. 2002-112-L, (Pa. Env. Hrg. Bd. Dec. 1, 2003). In this case, both the Applicant and the Department are anticipating that there will be a detrimental impact to waters of the Commonwealth, specifically Polen Run, and that in-stream repair work and flow augmentation will be necessary. As a result, there is presumptive evidence of pollution and the Department cannot issue the full extraction permit.

The Department has the clear legal authority and duty to prohibit an operation that where there is presumptive evidence of potential pollution of waters of the Commonwealth. 35 P.S. § 691.610 (legal authority to issue orders necessary in the enforcement of the Clean Streams Law); § 691.611 (unlawful to commit water pollution); 25 Pa. Code § 86.37 (no presumptive evidence of pollution to waters of the Commonwealth); § 89.36(a) (ensure protection of the hydrologic balance and prevent hydrologic consequences); § 89.52(a) (protect environmental values); 89.142a(h) (protect values and uses of streams). “Waters of the Commonwealth” is defined broadly in the Clean Streams Law to include “any and all ... streams, creeks, rivulets ... ponds and springs,” without regard to whether and how they flow. 35 P.S. § 691.1. This statutory definition encompasses the portion of Polen Run above the 1L and 2L panels and includes both surface and groundwater. The General Assembly combined the inclusive definition of waters of the Commonwealth with an equally broad definition of the term

shall be subject to the exclusive jurisdiction of the Department, and that the Department shall have the power to enforce the provisions of the Act and its rules and regulations. 52 P.S. § 1406.7.

² The Applicant has admitted that flow loss is likely in Polen Run. *See* Module 8 at 8-19 (“an impact is likely for this stream due to multiple sections of brittle rick outcropping in the streambed.”); Module 8 at Table 8.5 (mining-induced flow loss is predicted in Polen Run). The Department stated that flow loss for Polen Run “is anticipated as demonstrated by past mining in similar conditions.” *See* Department’s deficiency letter to the Applicant dated September 17, 2013.

pollution. The term pollution is not limited by the type of harm, and includes physical alteration of surface waters such as diminution or deviation in flow. 35 P.S. § 691.1. *See also Consol Pennsylvania Coal Company v. DEP*, 2002 WL 31955394, *5, EHB Docket No. 2002-112-L, (Pa. Env. Hrg. Bd. December 31, 2002) (“Consol admits that its proposed mining at the Bailey Mine will cause some increased polling in overlying streams. Such impacts fit within the Clean Streams Law’s definition of ‘pollution,’ which includes physical alteration of surface waters such a diminution or deviation in flow.”)

These statutory definitions make no exception based on the type of industry that may cause pollution to protected waters and contradicts the Applicant’s apparent assertion that only some smaller universe of water - perennial streams as defined by 25 Pa. Code § 89.141(b)(2) - is protected when underground mining is involved.

- i. The Applicant ignored crucial language in the *UMCO v. DEP* opinion; the Department’s authority is not limited to protecting continuously flowing perennial streams.**

On July 8, 2013 the Applicant submitted a document that attempts to summarize the issues decided in the *UMCO Energy, Inc.* appeal. *UMCO Energy, Inc. v. DEP and Citizens for Pennsylvania’s Future, Intervenor*, 2006 WL 2679893, EHB Docket No. 2004-245-L (Pa. Env. Hrg. Bd. Sept. 5, 2006), *aff’d*, 938 A.2d 530 (Pa. Cmwlth. 2007). A copy of that document is attached as Exhibit A. In an effort to make the same kinds of arguments that have proven unsuccessful for the Applicant in past appeals before the Environmental Hearing Board, it ignored language from the *UMCO* opinion that is directly on point. Remarkably, the language that Consol chose to ignore was actually the Board’s reasoning in deciding three different Consol appeals (*Consol I*, *Consol II*, and *Consol III*). The Applicant again relies on Section 89.141(b)(2) of the Department’s mining regulations to seemingly claim that Polen Run deserves less protection. The Applicant’s reliance on Section 89.141(b)(2) is still misplaced.

First, the Environmental Hearing Board has already addressed the interplay between the Clean Streams Law and the Mine Subsidence Act numerous times. In *UMCO*, the Board felt that it’s reasoning in *Consol I* was so on point it decided to quote it at length.

Consol attempts to avoid the rather obvious application of the water protection regulations in Chapter 86 and 89 by arguing that the subsidence impacts of mining are address in a more focused manner in the Subsidence Act and Subchapter F of Chapter 89. 25 Pa. Code §§ 89.141-155. It therefore follows, Consol contends, that the Department may only regulate subsidence impacts on waters of the Commonwealth pursuant to that Act and that limited set of regulations. Consol’s argument flies in the face of Section 9.1(d) of the Subsidence Act, 52 P.S. § 1406.9a(d),

which expressly provides that nothing in the subsidence act is to be construed to amend, modify or otherwise supersede any standard contained in the Clean Streams Law of any regulation promulgated under the Clean Streams Law ... *Similarly, there is nothing in Subchapter F of Chapter 89 that states that it is to serve as the exclusive source of regulatory authority regarding subsidence.* Indeed, in light of Section 9.1(d) of the Subsidence Act, any attempt in Subchapter F to limit the scope of the Clean Streams Law or the regulations promulgated thereunder would have been ineffective and unlawful.

Id. at *46. (emphasis added). The Board went on to point out that “[i]n *Consol II*, we reaffirmed that ‘the Department has the authority under the Clean Streams Law and 25 Pa. Code Chapters 86 and 89 to regulate the impacts of subsidence on waters of the Commonwealth.’” *Id.* at *47. The Board reaffirmed several of these principals yet again in its “one-judge opinion in *Consol III*, 2003 EHB 792, where we repeated that subsidence impacts can constitute pollution and that a deep mine operator must show that unacceptable pollution will not occur as a result of its mining activities.” *Id.* (emphasis added). If the Applicant were correct in its conclusion about the applicable law and the Board’s holding in *UMCO*, there would be no need for any hydrologic review of mining applications. Instead, coal operators would be free to destroy surface waters so long as their application included mitigation measures that may or may not be successful. Such a result would be absurd.

Second, it’s worth pointing out that Section 89.141(b)(2) describes what information must be submitted to the Department as part of a subsidence control plan. That regulation requires the Applicant to report in its pre-mining permit application the average annual flow of any stream or part of a stream that flows continuously throughout the calendar year. 25 Pa. Code § 89.141(b)(2).³ Just because the Department limited the universe of hydrologic information that must be submitted in a permit application, does not mean that a stream that does not flow continuously throughout the year lacks protection under the Clean Streams Law or the Department’s mining regulations. The General Assembly established what waters are protected under the Clean Streams Law by defining the term “waters of the Commonwealth” to include perennial and intermittent streams. 35 P.S. § 692.1. Regardless of whether or not the Department requires the submission of pre-mining flow data for a particular stream, the protections afforded to waters of the Commonwealth by the Clean Streams Law remain the same. Furthermore, although the definition of perennial stream in Section

³ Consistent with its duty to prevent pollution and harm to the hydrologic balance, CCJ believes that the Department should require pre-mining flow data for waters of the Commonwealth, not just continuously flowing streams. Regardless, the standards in Subchapter F of Chapter 89 neither limit the Department’s authority nor change its duty.

89.141(b)(2) applies to all of Subchapter F, including the subsidence control standards in Section 89.142a, the Environmental Hearing Board has already rejected the idea that Subchapter F of Chapter 89 is the exclusive regulatory authority regarding subsidence. *See UMCO Energy, Inc.* at *46. The Department has an obligation to prevent potential pollution of waters of the Commonwealth and an obligation to protect the hydrologic balance of Polen Run. The Department's nondiscretionary duty is not limited by the information requirements by the requirements of Subchapter F of Chapter 89.

Third and finally, Chapter 89 of the Department's regulations distinguishes between perennial, intermittent, and ephemeral streams. 25 Pa. Code § 89.5. "Perennial stream" is defined by consideration of physical and biological characteristics. *Id.* The Applicant's reliance on Section 89.141(b)(2) to define and characterize Polen Run completely misses the point: the protections of the Clean Streams Law extend well beyond just perennial streams, however that term is defined. The Clean Streams Law itself protects all waters of the Commonwealth against pollution. 35 P.S. § 691.11. The definition of waters of the Commonwealth broadly encompasses all streams, continuously flowing or not. 35 P.S. § 691.1. The Department's Water Quality Standard regulations define protected uses for waters of the Commonwealth. 25 Pa. Code § 93.1 – 93.9. Those regulations protect all "surface waters for the minimum uses set forth in Table 2 of Section 93.4. 25 Pa. Code § 93.4. The term "surface waters" not only includes perennial streams, but also intermittent streams, ponds, seeps, wetlands, and other water bodies. 25 Pa. Code § 93.1. Finally, the Department's mining regulations require that in order to receive a permit a mining company must demonstrate that there is no presumptive evidence of potential pollution to any waters of the Commonwealth 25 Pa. Code § 86.37(a)(3).

While longwall mining is generally permitted even though it causes planned subsidence, it must be performed in a way that complies with the Clean Streams Law and the regulations promulgated under the Clean Streams Law. Since the Applicant predicts that the flow of Polen Run will be diminished or eliminated, whether temporarily or permanently, the Department must deny the Application because such impacts constitute pollution. 25 Pa. Code § 86.37(a)(3); 35 P.S. § 691.611.

B. The Department must deny the Application because the proposed mining does not ensure protection of the hydrologic balance. The Applicant predicts adverse hydrologic consequences within the permit area and then proposes to mitigate predicted damage by permanently diminishing the hydrologic balance of Polen Run.

Longwall mining under Polen Run in the 1L and 2L panels will significantly alter the hydrologic balance of Polen Run and dewater the stream. Consol admits that mining in the 1L and 2L panels will alter the hydrologic balance of Polen Run and cause dewatering, but claims that the impacts on the stream will be "temporary". Though there is absolutely no evidence in the Application that supports the latter conclusion,

either way the Department must prohibit full extraction mining in the 1L and 2L panels beneath Polen Run.

The applicable regulations prohibit mining that will cause such a change to the stream's hydrologic balance that de-watering will result. 25 Pa. Code § 86.37(a)(3) (no presumptive evidence of pollution); 25 Pa. Code § 89.36(a) (specifically with respect to underground mining, the operator must take measures to "ensure the protection of the hydrologic balance and to prevent adverse hydrologic consequences."); 35 P.S. § 691.611. Mining beneath Polen Run in the 1L and 2L panels will substantially alter the groundwater upon which Polen Run depends, resulting in a loss of flow to the stream and an adverse hydrologic consequence.⁴ Once adversely impacted, the hydrologic balance of Polen Run cannot be restored in any significant way unless the conditions of the groundwater were re-created. There is nothing in the Application that even suggests that would occur.

Restoring a stream that has been damaged by mine subsidence and has lost flow as a result of mine subsidence is very difficult and may be impossible. Mitigation techniques like filling cracks with bentonite or lining the streambed may repair a stream channel. However, such techniques will not restore a stream's hydrology and recharge an impacted aquifer system.⁵ Quite the opposite actually, the proposed streambed mitigation plan would permanently diminish Polen Run's hydrologic balance. Polen run receives most of its water from groundwater, not surface water.⁶ The Applicant proposes to install a geosynthetic clay liner ("GCL"), the same barrier system widely accepted in municipal solid waste landfill and coal refuse disposal applications, thereby permanently changing the hydrologic balance of Polen Run. The function of a GCL is to prevent seepage through the system and improve stream flow conveyance at the *surface*.

⁴ See Module 8 at 8-2 ("Groundwater from the hilltops and valley sides moves toward the groundwater discharge zone of Kent Run, Polen Run, Whitethorn Run and North Fork ... Shallow ground water makes up the base flow of many small streams in the upland area as well as the larger higher order streams ... Groundwater in the underground permit area has a key relationship to supplying water to the surface water flow system."); Module 8 at 8-3 (In areas where full-extraction underground mining occurs, a disruption of the ground water flow system ensues that may shift the groundwater table.); Module 8 at 8-19 ("Unfavorable variables include the high percentage (51%) and lengthy sections of bedrock observed in the streambed...An impact is likely for this stream due to multiple sections of brittle rock outcropping in the streambed."); Module 8 at Table 8.5 (mining induced flow loss is predicted in Polen Run as a result of full extraction mining activities); Module 15 at 15-13 ("For the purposes of evaluating [groundwater discharge and recharge], it was assumed that the stream flow of higher order streams are maintained by groundwater base flow discharge, contributory flow from tributary streams and springs, and periodic rainfall events and associated stormwater runoff."); Module 15 at 15-5 (Polen Run is a first-order headwater stream of the North Fork Dunkard Fork.).

⁵ See Module 8 at 8-1 ("Ground water in the proposed Bailey East Expansion Permit Area is discussed here in terms of shallow unconfined, semi-confined, and confined aquifers.").

⁶ See footnote 4.

The Applicant did not quantify or estimate what lining the stream would mean for preventing or restoring stream flow. At best, the Applicant's hypothesis would account for repair of any loss of surface flow into surface fractures. However, most of the stream flow is as a result of shallow groundwater.⁷ Therefore, there is no reason to believe that the restoration activities proposed by the Applicant would restore the hydrologic balance.

* * *

The Department must deny the Application. The Department cannot issue a permit when there is a *potential* that pollution will result from mining operations. 35 P.S. § 691.611; 25 Pa. Code § 86.37(a)(3). Furthermore, the Department must ensure the *protection* of the hydrologic balance and *prevent* adverse hydrologic consequences. 25 Pa. Code § 89.36(a). Based on the Applicant's own predictions, longwall mining would substantially alter the hydrologic balance of Polen Run and result in such a loss of flow and changed condition to the stream so as to constitute pollution.

2. Adopting technologically and economically feasible mitigation measures is not legally sufficient to allow mining.

To the extent that either the Applicant or the Department believe that the Applicant may extract coal using the longwall mining method, regardless of predicted harm to the Commonwealth's water resources, so long as the Applicant proposed technologically and economically feasible post-mining measures, namely pumping water into the stream and reconstructing the stream profile, they are mistaken. The idea that the Department may issue a permit, and that a mining company may longwall mine under a stream where it predicts harm to the hydrologic balance of the stream, contradicts the plain language of the Department's regulations. Not only does the Applicant predict harm in its Application, the consideration of augmentation, whether short or long term, necessarily means that pollution of a water of the Commonwealth and harm to the hydrologic balance is predicted. The Clean Streams Law and the Department's mining regulations require that pollution and harm to the prevailing hydrologic balance be prevented, as opposed to predicted and mitigated. 35 P.S. § 691.611; 25 Pa. Code § 86.37(a)(3); 25 Pa. Code § 89.36(a).

The Department's authority is not limited to making sure an operator has an adequate mitigation plan. This was clearly established by the Environmental Hearing Board in *UMCO Energy, Inc.*, an appeal hard-fought and won by the Department and Penn Future. It is difficult to understand why the Department now appears to be

⁷ See footnote 4. It's important to note that the Applicant initially sought to undermine 70% of the Polen Run watershed in the Bailey East Expansion Area in its Permit Revision No. 180 application. See Module 8 at Table 8.5.

limiting its own authority to making sure the Applicant has an adequate mitigation plan, something that the Department argued against in *UMCO*.

A promise to perform repairs is not enough. There is nothing in the law that supports the theory that the Applicant should be authorized to destroy streams so long as feasible repairs are promised. "The Subsidence Act contains no language supporting such a position, and the position flies in the face of the Clean Streams Law. Everything in the applicable laws point to the common sense notion that *prevention* of pollution and the *protection* and *maintenance* of values and uses." *UMCO Energy Inc.* at *47. See also 35. P.S. §§ 691.5, 610, 611; 25 Pa. Code §§ 86.37(a)(3), 89.36(a). Nothing in the BMSLCA supports the idea that a mitigation plan authorizes the destruction of streams. *Id.*

The Department is placing far too much weight on an adequate mitigation plan and misunderstanding its purpose and function.⁸ The Environmental Hearing Board has very clearly explained the purpose of 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 permittable because an operator promises in advance to treat the discharges in perpetuity.

Id. Both the Applicant and the Department agree that longwall mining beneath Polen Run will cause flow loss. A mitigation plan, whether adequate or not, does not make it lawful to damage Polen Run. It cannot excuse or be used to approve the damage in advance, as both the Applicant and the Department have suggested.

⁸ Ironically, *UMCO Energy, Inc.* made the same mistake.

* * *

If the stream is predicted to lose so much flow that augmentation is required in order to protect its uses, then augmentation means nothing more than an attempt to mitigate predicted harm that is not authorized by the Clean Streams Law or the Department's mining regulations, which require that a stream's hydrologic balance be protected and pollution be prevented. 35 P.S. § 691.611; 25 Pa. Code §§ 86.27(a)(3), 89.36(a). The Applicant may not knowingly cause pollution or harm to the hydrologic balance of Polen Run, regardless of its willingness to perform post-mining flow augmentation and streambed mitigation measures.

Section 86.37(a)(3) and 89.36(a), separate or together, specifically prevent the Department from issuing a permit where the Applicant predicts, as in this case, that it will cause pollution or harm the hydrologic balance of the stream. The Department cannot and should not consider augmentation as an integral part of the conditions that would allow mining to proceed. If stream augmentation would likely be necessary, the mining that would necessitate it cannot be permitted. Both the Department and the Applicant have predicted that longwall mining beneath Polen Run in the 1L and 2L panels would necessitate augmentation of the stream. Therefore, the Department cannot authorize longwall mining beneath Polen Run.

3. Even if a promise to mitigate predicted pollution and harm to the hydrologic balance were legally sufficient, the Application still does not meet the criteria for permit approval.

A. The Application does not contain a timetable for the completion of each major step in the reclamation plan.

The instructions to Module 15 section 15.6(c)(ii)(1) direct the Applicant to provide "[a] description of the proposed restoration activities and the time frame in which the activities will occur." The Applicant's narrative in Subsection C of Module 15: Stream Dewatering Restoration is inadequate because it does not provide any time frame for the completion of each phase of the restoration plan. Therefore, the Department should deny the Application.

B. The predicted incidences of flow loss or flow diminution, as set forth in the Application, at the very least threaten the uses and values of Polen Run.

Polen Run has a designated use of Trout Stocking ("TSF") and existing uses may include esthetic qualities and recreation as well as the stream's use as a wildlife water supply. Additionally, a naturally flowing shallow ground water regime, like Polen Run, has value beyond its ability to sustain Trout Stocking, both as an independent unit and as a contributor of flow and biological support to larger downstream waters. Subsidence, by changing or eliminating stream flow, can cause adverse impacts on fish,

wildlife and related environmental values. Pennsylvania's water quality standards approved under Section 303 of the CWA, 33 U.S.C. § 1313, are codified in 25 Pa. Code Chapter 93. The sixteen "protected water uses" listed in Pennsylvania's water quality standards, 25 Pa. Code § 93.3, may fall into either or both of two broad categories: existing and designated. The Department must protect any designated uses of the stream and, under its antidegradation regulation, any existing uses, and the quality necessary to protect those uses, when it issues any permit or approval. 25 Pa. Code §§ 93.4a(b) and 93.6. Additionally, the environmental values of a stream must be protected. An operator must use the best technology currently available to minimize disturbances and adverse impacts of the activities on fish, wildlife, and related environmental values. 25 Pa. Code § 89.65(a). The Applicant proposes to augment flow to the stream in order to maintain the stream's uses and presumably its values. Even if flow augmentation were not presumptive evidence of pollution and disruption of the hydrologic balance, the Applicant neither offers justification for its apparent conclusion that augmentation will maintain Polen Run's existing and designated uses, nor provides any explanation for why augmentation is the best technology currently available to minimize disturbances and adverse impacts on fish and wildlife.

Subsidence that is predicted to cause pollution or an unacceptable alteration of the hydrologic balance will almost certainly result in impairment of the stream's existing uses and designated uses. If water ceased to flow in Polen Run, the stream would no longer support a TSF designated use because the fish would quickly die. Over time, the macroinvertebrates would also be lost. The Applicant's proposed augmentation plan is inadequate because it fails to identify the source of water that will be used to augment flow. Obviously, the quality of the water used for flow augmentation will have a significant impact on the stream's aquatic life. For example, augmentation of flow by use of public water would not maintain the macroinvertebrates and the fish. Public water is necessarily sterile, and provides no nutrients to the stream system. Over time, the ecology of the stream will collapse. Without knowing the source of water that will be used for augmentation, the Department cannot possibly evaluate whether or not it will maintain the uses and values of the stream. Even if the Applicant does not intend to use public water to augment flow, augmentation is not substitute for natural stream flow. Natural stream recharge, provided by surface flow and by groundwater, carries dissolved organic matter, which supports the biological community. Therefore, the Department should deny the permit. 25 Pa. Code §§ 93.4a(b), 93.6; 25 Pa. Code § 89.65(a).

It is important to recognize that *zero* water can be flowing through the stream channel while the Applicant is performing streambed mitigation work. CCJ is at a loss to understand how this protects the stream's existing and designated uses. There is no support whatsoever in the language of the Clean Streams Law, the BMSLCA, or the Department's mining regulations for the temporary degradation of existing uses or impairment of designated uses. Although the BMSLCA and the Department's mining regulations contemplate stream mitigation, as discussed above, the stream mitigation

plan is for *unanticipated* impacts, not predicted harms. Authorizing even temporary impairment of Polen Run's uses would violate the Department's duty to ensure existing uses are *maintained and protected*. 25 Pa. Code § 93.4a(b). (emphasis added).

C. Issuing the permit for full extraction beneath Polen Run in panels 1L and 2L without accounting for the impacts associated with full extraction beneath Polen Run in panels 3L – 5L and Kent Run in panels 3L and 4L, would be contrary to existing law.

The Department's regulation establishing the criteria for permit approval or denial prohibits the Department from issuing a permit unless the Application affirmatively demonstrates and the Department finds, in writing, that an assessment of the probable cumulative impacts of all anticipated coal mining activities in the general area on the hydrologic balance has been made and proposed activities have been designed to prevent damage to the hydrologic balance. 25 Pa. Code §§ 86.37(a)(4), 89.36(a). Furthermore, the Clean Streams Law requires an application to include a determination of the probable hydrologic consequences of the operations, on and off the site of operation with respect the hydrologic regime, quantity, and quality of water in surface and ground water systems" and sufficient data so that the Department can make an assessment of the "probable cumulative impacts of all anticipated mining in the area upon the hydrology of the are and particularly upon water availability." 35 P.S. 691.315(c). In order to adequately assess the probable cumulative impacts of all anticipated coal mining activities, both the Applicant and the Department must, at the very least, account for impacts associated with full extraction mining beneath Polen Run in panels 3L – 5L and full extraction mining beneath Kent Run in panels 3L and 4L.⁹

First, full extraction mining beneath Kent Run and Polen Run in the Bailey East Expansion Area are not distinct projects. The Department has effectively created a two-step permitting process where any application for full extraction mining beneath Kent Run and Polen Run is as a result of Permit Revision No. 180. The Applicant proposed full extraction mining beneath Kent Run and Polen Run in its application for the Bailey East Expansion and neither intends to conduct development mining beneath any portion of Polen Run nor beneath Kent Run in the 3L and 4L panels. Simply because this Application only seeks to conduct full extraction mining beneath Polen Run in panels 1L and 2L, does not mean that the Department should evaluate it as a separate and distinct project.

⁹ Interestingly, the Applicant proposed using a GCL to mitigate flow loss in Polen Run above the 1L and 2L panels in its application for Permit Revision No. 180. However, the Applicant indicated that approximately 3,500 feet of Polen Run could not be lined in the 3L and 4L panels and therefore proposed shallow and mid-depth grouting. In its September 17, 2013 deficiency letter to the Applicant, the Department stated it was not likely to approve shallow and mid-depth grouting in Polen Run.

Second, even if the Department decided not to treat Polen Run above the 3L – 5L panels and Kent Run above the 3L and 4L panels as part of the proposed permit area the required cumulative impacts analysis does not change. The Applicant and the Department are required to address the probable hydrologic consequences of the proposed mining activities within the proposed permit area and adjacent areas. Since Kent run above the 3L and 4L panels and Polen Run above the 3L – 5L panels is within the Bailey Lower East Expansion permit area as defined by Permit Revision No. 180, they are clearly within the adjacent area of this Application. As a result, the probable hydrologic consequences of the entire proposal must be considered before authorizing full extraction in any one panel.

D. The pre-mining or baseline hydrologic information for Polen Run is inadequate.

All underground coal mining permit applications must contain baseline hydrologic information. 25 Pa. Code § 89.34(a)(2). Furthermore, all information set forth in the application must be current. 25 Pa. Code § 86.15. The purpose of baseline data-collection is to characterize the pre-mining environment. Hydrologic and geologic information for the cumulative impact area is necessary to assess the probable cumulative hydrologic impacts of the proposed operation and all anticipated coal-mining activity on surface and ground water systems. Once collected, the data must be used by the Department to evaluate the potential hydrologic impacts that may occur as a result of the proposed coal mining. From there, a monitoring plan can be developed, which would document any changes that occur as a result of mining. The Applicant's baseline hydrologic information is inadequate because it appears that the flow data for Polen Run is at least seven years old.¹⁰ The Department should require the Applicant to submit more recent flow data so that it can determine whether or not adverse impacts might result to the hydrologic balance as it is today.

4. The Applicant has a history of past and continuing violations that indicate an inability or lack of intention to comply with the applicable regulations.

The Department may not issue an underground mining permit unless it makes the finding that there is no history of past on continuing violation by the application 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). The permit must be issued conditionally if the applicant submits proof that a violation is in the process of being corrected. 25 Pa. Code § 86.37(a)(11). To the best of CCJ's knowledge, there are enforcement actions of the Department against the Applicant for damage to five streams at the Bailey mine that are ongoing. In a letter dated December 27, 2012, the Department concluded that undermined lengths of Polly Hollow, UT-32511, UT-32595, Crows Nest, and UT-21534 have not recovered from the effects of underground mining activities at the Bailey Mine,

¹⁰ See Module 8 at 8-19 and Table 8.4A.

despite 48 months of various remediation efforts.¹¹ The Department has indicated that further efforts to restore stream flow would also be unsuccessful. Therefore, the Applicant has demonstrated an inability to comply with the applicable regulations and the Department should deny the Application.

5. The Proposed activity is located in an Environmental Justice Area and therefore requires heightened public participation and scrutiny during the permit review process.

According to the Department, "Environmental Justice is the fair treatment and meaningful involvement of all people with respect to the identification of environmental issues, and the development, implementation, and enforcement of environmental justice policies, regulations, and laws." Environmental Annual Report, 2002, ("Annual Report") at 3. In 1999, then-Secretary of the Department James Seif created the Environmental Justice Work Group (EJWG) to address the important issues of both civil rights and environmental protection, and to ensure that minority and low-income residents of Environmental Justice Areas in Pennsylvania have the opportunity to live in a quality environment.¹²

One of the stated objectives of the EJWG is to assess cumulative impacts on communities and to determine whether the Department's current permitting process could adequately address environmental justice issues. In its June 2001 Report, EJWG stated, "DEP should seek additional authority where needed to make permit decisions based on cumulative impact." Environmental Justice Work Group, Report to the Pennsylvania Department of Environmental Protection ("EJWG Report"), June 2001 at 16. After undertaking a cumulative analysis, EJWG recommends that the Department engage in "heightened scrutiny and enhanced public participation" regarding permit affecting Environmental Justice Areas. EJWG Report at 17.

The EJWG Report makes clear that "[m]inority and low-income communities should be given the same access to information, consultation and accommodation by DEP at the same level historically granted to non-minority and non-low-income communities" and that "DEP needs to make fundamental changes in how it provides information, elicits input, and communicates with individuals within minority and low-income communities before, during and after the permitting process." *Id.* The EJWG even goes so far as to provide the Department with the means to "ensure a cautionary approach throughout its permit review process" where minority and low-income communities will be impacted. *Id.*

¹¹ The Applicant also admits that long-term impacts on the quantity of some local resources have been noted in excess of several years as a result of its previous mining activities. Application, Module 8 at 8-3.

¹² Environmental Justice Work Group:

http://www.portal.state.pa.us/portal/server.pt/community/environmental_justice_work_group/14052.

In addition, the EJWG recommended that certain permits be treated as “Trigger Permits” that “warrant heightened scrutiny” by the Department when they will affect minority and low-income communities. *Id.* EJWG defined Trigger Permits as “those DEP regulated activities that may lead to significant public concern due to potential impacts on human health and the environment.” *Id.* “Recognizing the “legacy of environmental impacts from abandoned mines and streams destroyed by acid mine drainage[.]” the EJWG recommended including mining permits amongst the permits that trigger an enhanced permitting process. Report at 12.

When evaluating Trigger Permits, the Department’s policy is to determine whether the permitted activity affects an “area of concern.” Public Participation Policy at 4. The policy document defines an area of concern as (1) “A circle defined by a radius of one-half mile from the center of a proposed permit activity or, where an activity is not centralized, an area extending one-half mile beyond the boundary of the proposed activity[.]” and (2) “Areas of impact for which DEP is authorized to require analysis, such as traffic corridors, groundwater plumes and areas of significant air impact.” *Id.* In addition, the policy document outlines the factors the Department should consider in making its determination for including Opt-in Permits, such as: “1) identified community concerns; 2) present or anticipated environmental impacts; and 3) reasonably anticipated significant adverse cumulative impacts.” *Id.* at 8.

The Department must undertake an enhanced review of the Application and account for all of the concerns that this particular Environmental Justice community faces. The EJWG expressed concerns about coalfield communities like Greene County in its initial report and that concern is reflected in the Department’s establishment of Trigger Permits that include longwall coal mining. Greene County residents have already endured countless adverse impacts as a result of the Applicant’s mining activities. Perhaps most relevant to the Department’s review of this Applicant is the significant adverse impacts to aquatic resources. The Department must undertake a comprehensive evaluation of the Applicant’s extraction activities in the areas and at a minimum include conditions in the final permit to ensure protection of public health and the environment.

6. Conclusion

The Application is severely flawed. The Department should deny the permit and return the Application to the Applicant. If the Application is not returned, the Department must issue the necessary deficiency letter 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,



Sarah E. Winner, Esq.

Fair Shake Environmental Legal Services

3445 Butler St., Suite 102

Pittsburgh, PA 15201

(412) 904-1746 Office

(412) 291-1197 Fax

swinner@fairshake-els.org

Copied by electronic mail:

Barbara Grabowski, Esq.

Michael J. Heilman, Esq.

EXHIBIT A

UMCO Case Commonwealth Court Holdings

Following is a brief discussion of the three issues decided by the Pennsylvania Commonwealth Court in *UMCO v. DEP*, 938 A.2d 530 (Pa.Cmwlt. 2007) (“*UMCO*”) and the Court’s statement that there is only one applicable definition of “perennial stream,” in Subchapter F of 25 Pa. Code Chapter 89, which expressly regulates the surface affects (i.e., subsidence impacts) of underground mining.

1. **The first issue**, raised by UMCO, was whether the language of Section 5(e) of the Subsidence Act, 52 P.S. § 1406.5(e) exempted UMCO from having to comply with the standards of the Clean Streams Law (CSL). The Court framed UMCO’s first issue as follows:

“UMCO reads this provision [Section 5(e)] to mean that a mining operator is required to “prevent subsidence” but only to the extent technologically and economically feasible.” (Citation omitted.) A mining operation that adopts such a plan, UMCO argues is exempt from the standards of the Clean Steams Law.”

938 A.2d at 535.

The Court rejected this claim because: (1) Section 5(e) does not state that other statutes or regulations have no application to a mine operators activities and, the language of this section which requires an operator to adopt measures which prevent subsidence to the extent technologically and economically feasible, as clarified by the proviso in that subsection, simply means this planning requirement “should not be construed to mean that a mine operator’s plan must prevent any and all subsidence,” *UMCO* at 535-536; (2) it was “directly contradicted by Section 9.1 of the Subsidence Act...which specifically preserves the statutory protections for the waters of the Commonwealth,” *UMCO* at 536; and, (3) it was inconsistent with the Court’s prior decision in *People United to Save Homes v. DEP*, 789 A.2d 319, because that holding upheld the EHB’s conclusion that the permitted mining “would not cause pollution to the waters of the Commonwealth, as the term is defined in the CLS.” *UMCO* at 537-537.¹

2. **The second issue** on appeal was UMCO’s claim that the “EHB erred in its application of...25 Pa.Code § 89.142a(h)...[because] the regulation only applies to ‘large,’ continuously flowing perennial streams...” *UMCO* at 537.

To support this claim UMCO argued there was an ambiguity in the regulations, in part, because Chapter 89 contains two definitions of “perennial stream,” the continuously flowing definition applicable to Subchapter F of Chapter 89 (which regulates the impacts of subsidence) and a biological definition which is applicable to erosion and sedimentation control; and this ambiguity authorized the Court to consider language from the preamble to the final rulemaking for § 89.142a(h), which suggested only “large” continuously flowing perennial streams were covered by § 89.412a(h) not “small” ones. *Ibid* at 538.

¹ Specifically what the Court held in *PUSH* was that the EHB correctly concluded that the permittee’s proposed operations would not result in the type of damage to continuously flowing perennial streams (as defined by § 89.141(b)(2)) covered by § 89.145a(h), and that the CSL would not be violated if post-mining the mine became flooded with polluted waters.

**UMCO Case
Commonwealth Court Holdings**

In rejecting this argument the Court stated: “there is no ambiguity because there is only one definition applicable to subsidence control, i.e., the subchapter including 25 Pa.Code § 89.142a;” and went on to hold:

the “In sum, there is no ambiguity in the **mine subsidence control regulation**. The EHB correctly interpreted the plain language of 25 Pa.Code § 89.142a (h) to mean that Department has the authority to regulate a mining activity in order to protect the ‘values and reasonably foreseeable uses of [continuously flowing] perennial streams’ regardless of their size. Accordingly, we will affirm the EHB in this regard.” (Emphasis added.)

Ibid at 539.

3. **The third issue** raised by UMCO, was that its right to equal protection of the laws was violated. As characterized by the Court, the claim was one of “alleged discriminatory enforcement” of the CSL. *UMCO* at 540.

The Court also rejected this claim, concluding:

“In short, UMCO failed to establish that the Department enforced the Clean Streams Law in a way to discriminate against UMCO. The Department permitted UMCO to longwall mine under the 4E/5E Stream on three occasions. It was only after UMCO caused the 4E/5E Stream to become dewatered that the Department took action....while....allowing UMCO to continue to longwall mine other mine panels and to room-and-pillar mine the 6E panel. **UMCO has presented no evidence to support its position that the Department’s permitting decisions have been driven by malicious intent. (Cites omitted). UMCO has failed to prove factually that the Department enforced any statute....in a manner that discriminates against UMCO.** Accordingly we hold that UMCO’s right to equal protection under the law was not offended by the Department’s revision to UMCO’s mining permit.

Ibid. (Emphasis added.)

In summary, none of these holdings support the Department’s claim that *UMCO* validates, or otherwise supports, its position that it cannot accept compensatory mitigation measures to supplement mitigation of material damage to streams.

4. **The Court’s statement** that there is only one definition of “perennial stream” in Subchapter F of Chapter 25 is discussed in section 2 above. To reiterate, the Court stated: “Most significantly, there is no ambiguity because there is only one definition applicable to subsidence control, i.e., the subchapter including 25 Pa.Code § 89.142a. This unequivocal statement means: (1) only continuously flowing perennial streams are covered by 25 Pa.Code § 89.142a(h); and, (2) material damage to intermittent and ephemeral streams is covered by 25 Pa.Code § 89.142a(e) (repair of damage to surface lands) and 25 Pa.Code §§ 93.4(a) and 96.3(a) (relating to the maintaining stream uses).