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Sent via e-mail and U.S. Mail

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Department of Environmental Protection, District Mining Operations
Commonwealth of Pennsylvania
Attention: Joel Koricich, District Mining Manager, and Jay Winter, Permit Chief
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California Technology Park
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Re: Comment on Coal Refuse Disposal Area No. 8 Application
30130701 and NPDES No. PA0236268
Noticed in 43 Pa.B. 6922 (Saturday, November 30, 2013)

To Whom It May Concern:

The Center for Coalfield Justice (“CCJ”) submits the following comment on Consol Pennsylvania Coal Company, LLC’s (“Applicant”) permit application for a new coal combined course coal refuse facility and slurry impoundment at the Bailey Central Mine Complex in Morris Township, Greene County (“Application”). The relevant Pennsylvania Bulletin notice appeared as follows:

30130701 and NPDES No. PA0236268. Consol Pennsylvania Coal Company, LLC, (1525 Pleasant Grove Road, PO Box J, Claysville, PA 15323). To operate the Bailey Central Mine Complex—Coal Refuse Disposal Areas No. 7 and No. 8 in Morris Township, **Greene County** and related NPDES for the Coal Refuse Disposal No. 8 Area for coarse and fines refuse disposal. Application also includes a request for a Section 401 Water Quality Certification. Coal Refuse Disposal Support Acres Proposed 277, Coal Refuse Disposal Acres Proposed 272. Receiving Stream: Booth Run, classified for the following use: WWF. The application was considered administratively complete on November 7, 2013. Application received September 6, 2013.

Justice for Coalfield Citizens

This comment is timely filed pursuant to 25 Pa. Code § 86.32(a). On December 5, 2013 the final public notice was published in the *Washington Observer-Reporter*.

The Center for Coalfield Justice is a Pennsylvania-incorporated not-for-profit organization with federal Internal Revenue Service § 501(c)(3)-status recognition 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.” CCJ consists of individual members and is governed by a volunteer Board of Directors. The Center for Coalfield Justice has over one thousand members and supporters in the area, many of which live in the immediate region of the Bailey Mine Complex.

The Center for Coalfield Justice was formed as the “Tri-State Citizens Mining Network” in 1994 by a coalition of grassroots groups and individuals concerned about the effects coal mining had on communities and the environment. The people involved recognized the need to work together to build a strong voice in the coalfield community. Tri-state was incorporated in 1999 and re-organized into “Center for Coalfield Justice” in 2007.

In 2011 CCJ’s mission was expanded to include work on all fossil fuel extraction in recognition of the harmful effects of natural gas production on environmental quality and public health in Greene and Washington Counties. To carry out its mission, CCJ offers it support in education, leading, organizing, and coordinating individuals and groups that have been negatively impacted by fossil fuel extraction and use.

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; the alternatives analysis is insufficient; it fails to fully evaluate downstream impacts; the cumulative impacts analysis is incomplete; the public benefits analysis is unlawfully inadequate; and it fails to account for all adverse environmental impacts. Because it is so deficient, the Department should deny it. 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.

1. The Department’s notice in the Pennsylvania Bulletin regarding receipt of the Application is defective.

The Department’s notice violates 25 Pa. Code § 86.31(c), which requires public notice of every “complete application” for surface mining activity. When the Department receives a permit application it conducts an initial administrative screening prior to the application being formally accepted for review and public notice. Once the

application is determined to be administratively complete, the Department may publish notice of the application in the *Pennsylvania Bulletin*.¹

The Department's public notice of its receipt of the Application was published in the *Pennsylvania Bulletin* on November 30, 2013. That notice describes the Application as seeking a permit to operate the Bailey Central Mine Complex Coal Refuse Disposal Areas No. 7 and No. 8. However, the Applicant's public notice in the *Observer-Reporter* is limited to the permit application for CRDA No. 8. Furthermore, when CCJ staff conducted a file review on December 10, 2013 at the California District Mining Office, we were informed that the application for CRDA No. 7 was not complete. Therefore, the Department's *Pennsylvania Bulletin* notice is defective because it is contrary to 25 Pa Code § 86.31(c).

The Department should take immediate steps to remedy the error and provide an opportunity for public participation based on the re-published notice. The Department and the Applicant are still obliged to provide adequate public notice of a complete application for Coal Refuse Disposal Area No. 7 pursuant to 25 Pa. Code § 86.31, with the relevant opportunity for public comment prior to issuance of any permit.

2. The Application fails to demonstrate that the adverse environmental impacts are clearly outweighed by the public benefits.

The decision to issue this permit is based on an evaluation of the probable impacts, including cumulative impacts,² of the proposed activity and its intended use on the public interest.³ The Department will not approve a site proposed by the applicant for coal refuse disposal if the Department finds that the adverse environment impacts clearly outweigh the public benefits.⁴ This evaluation necessarily requires a general balancing process in which the benefits that reasonably may be expected to accrue from the proposal are balanced against reasonably foreseeable detriments. There are many factors that may be relevant to the Department's balancing analysis including, but not limited to, conservation, economics, environmental concerns, fish and wildlife, land use, recreation, water quality, energy needs, and the general welfare of the people. The Department must deny the permit because the Applicant has failed to demonstrate that the adverse impacts are clearly outweighed by the public benefit. The Applicant's cost-benefit analysis is unlawfully inadequate because it ignores the purpose of the proposed activity and the analysis of adverse impacts is insufficient.

A. The Department must consider the intended purpose of the proposed activity in its evaluation.

¹ 25 Pa. Code § 86.31(c)

² 25 Pa. Code §§ 90.35(c), 90.101(a); 25 Pa. Code § 86.37(a)

³ 25 Pa. Code § 90.202(a)

⁴ 25 Pa. Code § 90.202(d)

A critical step in this review is considering the proposed activity and its intended use. With respect to this Application, the proposed activity for which it is seeking authorization is the disposal of coal refuse. More specifically, the Applicant is seeking authorization for the discharge of fill into waters of the United States. There are various intended uses of those fills, the most prominent being coal refuse disposal, but as a general matter the fills will be used in the construction of infrastructure related to the extraction, processing, or transportation of coal and the disposal of coal refuse.

Unlike, for example, transportation structures, the filling activity itself provides no benefit and serves no independent purpose, but instead enables something else to happen that provides the benefit. When coal refuse is dumped into valleys and streams to get rid of it, the disposal has the effect of creating dry land, but not the purpose. Here, the overarching needs to be served are a need for electricity and a need to meet the existing and future demands of manufacturing industries. In other words, the purpose of the Bailey and Enlow Fork Mines is to extract coal for energy, and the only need for the facilities and fills at issue is to enable the extracted coal to be burned. But, unless coupled with coal combustion, the disposal of coal refuse in valley fills is purely detrimental.

The Applicant's cost benefit analysis is limited to direct and indirect income, employment, and energy needs associated with the operation of the Bailey Mine Complex. Although the Application refers to the need for coal in power generation and emphasizes that the operation of the Bailey Mine Complex creates jobs, the Applicant does not offer a rigorous analysis of the disposal of coal waste in valley fills. Moreover, far from quantifying or analyzing the detriments of coal waste disposal, the Applicant completely ignores the overall adverse impacts of the extraction, processing, transporting of coal, and disposal of coal refuse.

i. Framed in terms of aquatic resources loss, the extraction of coal and the disposal of coal refuse may be a net detriment.

Longwall mining is conducted through the use of large machines that extract nearly all of the coal within a rectangular area known as a panel without leaving pillars to support the mine roof. As the mining machine moves through the panel, the mine roof collapses behind the machine, which causes subsidence of the surface overlaying the panel, and often results in loss or damage to natural water resources. "The longwall method of mining is generally favored by the industry because it results in an extremely high recovery rate at a relatively low cost. It also requires fewer employees than the room-and-pillar method and is considered to be relatively safer...however, the major drawback to the longwall method is that as practiced today, it causes subsidence of the surface."⁵

⁵ UMCO Energy, Inc. v. Dep't of Env'tl. Prot., 938 A.2d 530, 532 (2007).

The Department recently determined that the Applicant's mining activities resulted in permanent stream loss. In a letter dated December 27, 2012, the Department determined that "the underground mining operations of Consol's Bailey Mine adversely affected the hydrologic balance of UT-32596 and although Consol has completed all the remediation efforts required by the September 19, 2007 COA and the Amendment of April 24, 2008, UT-32596 has not been restored to conditions that existed prior to undermining." Furthermore, the Department determined that "any additional remediation activities on UT-32596 would be futile."

Loss of streams is not the only adverse impact that the Applicant's mining activities have had on aquatic resources in Greene County. On February 16, 2010, the Department issues an Interim report that found that the Applicant's mining activities had, among other things, caused subsidence damage to the Ryerson Dam. Up until 2005, people from all over the Commonwealth traveled to the Park, especially to enjoy Duke Lake. The primary purpose of constructing Ryerson Dam in 1960 was to create the 62-acre Duke Lake for public recreation. In 2005, the Army Corps of Engineers was forced to order the draining of Duke Lake because of the damage to the Dam. Both DEP and DCNR rightly attributed that damage to the Applicant's underground coal mining at the Bailey Mine. The Applicant has also submitted mining applications to the Department for the Bailey Mine East Expansion and BMX mine, located just next door to the Park, that will create subsidence that could diminish water flow from the streams that would feed Duke Lake.

The Applicant now proposes to bury over 29,000 feet of streams, including headwater streams, and over 7 acres of wetland, including all wildlife living in those streams and wetlands, with coal mining waste, disturbing over 500 acres, potentially releasing toxic pollutants into downstream waters, devastating wildlife and the watershed. The impacts to wildlife and habitat that would occur as a result of the direct loss of vital headwater streams are unacceptable. Headwater streams perform essential functions including: providing wildlife habitat, movement of water and sediments, and transformation of organic matter, such as leaves, into nutrients and energy needed by wildlife throughout the aquatic ecosystem. Headwater streams not only provide habitat for full-time resident wildlife, but also serve as refuge and spawning grounds for aquatic life. The effects on wildlife and the aquatic ecosystem would be immense in scale and lead to irreversible alterations of impacted watersheds.

B. The Application fails to adequately address adverse impacts on the water quality, aquatic ecosystems, and uses of downstream waters.

Once filled, streams are completely destroyed and those streams remaining below the fills are impacted significantly.⁶ The Applicant must determine the effects of

⁶ Palmer & Bernhardt (2009).

the proposed activities on the aquatic ecosystems, including the secondary effects.⁷ Pennsylvania's Water Quality Standards require that existing in-stream water uses and the level of water quality necessary to support the existing use be maintained and protected.⁸ Aquatic life is a surface water use and is therefore protected under the Pennsylvania's Water Quality Standards. Furthermore, the Applicant proposes to use coal refuse in the construction of dams. As a result, the Applicant must demonstrate that the "use of the waste material may not have a detrimental effect on downstream water quality or the environment."⁹

The Application fails to adequately evaluate adverse impacts on the water quality, aquatic ecosystems, and the uses of downstream waters in Greene County. The EPA has repeatedly acknowledged the deleterious impacts of valley fill operations on the water quality and the aquatic ecosystems of downstream waters. In the March 2011 final report, *The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems Of The Central Appalachian Coalfields*, EPA emphasized the magnitude and longevity of elevated concentrations of dissolved solids in discharges from valley fills and highlighted the adverse impacts of increased total dissolved solids, conductivity, and ionic stress downstream from valley fills. In 2008 an EPA scientist published a study finding that 93% of streams below valley fills are biologically impaired, compared with 0% of streams surveyed in un-mined watersheds.¹⁰ In a 2010 comment letter concerning a proposed valley fill operation, EPA's Region 3 office stated that "the best scientific information available to EPA, including published, peer-reviewed studies, indicated that surface coal mining activities like those proposed by the applicant are strongly related to downstream biological impairment."¹¹ In the face of growing scientific evidence regarding the adverse impacts of valley fills, the Applicant provides very little discussion of potential water quality impacts to downstream waters.

First, The Applicant concludes that the facilities are not expected to impact area water quality or uses because the facility design includes Best Management Practices ("BMPs"). However, the Applicant does not demonstrate that that these measures will completely prevent contaminated drainage, and does not estimate the volume or quality of drainage that might be discharged from the disposal area.

Second, the Applicant's analysis of how the loss of essential ecosystem functions formerly performed by the headwater streams to be filled might affect the overall

⁷ 25 Pa. Code § 93.4a(b)

⁸ *Id.*

⁹ 25 Pa. Code § 90.113(b)

¹⁰ Pond, G.J., M.E. Passmore, F.A. Borsuk, L. Reynolds, and C.J. Rose. *Downstream effects of mountaintop coal mining: comparing biological conditions using family and genus-level macroinvertebrate bioassessment tools*. Journal of the North American Benthological Society. (2008)

¹¹ Letter dated December 7, 2010 from Shawn Garvin, Regional Administrator, EPA Region 3, to Andrew W. Backus, USACE Norfolk District

aquatic ecosystem, and specifically the aquatic biological community in downstream waters is summary and inadequate. The Application states: “the project may affect the aquatic community and certain aquatic functions (e.g., food chain export) in Tributary 32753; however, it is not anticipated that these alterations will negatively impact the aquatic community in a regional context.”¹² It appears that the “project” the Applicant is referring to is the construction, maintenance, and disposal of coal refuse in CRDA No. 8. Therefore, it is surprising that the Applicant made conclusions about impacts to the aquatic community in a “regional context” without considering its other activities in the region. As explained below, the Applicant must account for the seven other coal refuse disposal sites and its mining operations in the region.

Third and finally, as to impact on fishes, the Applicant asserts that: “the proposed stream impacts are not expected to have a significant impact on fishes in Boothe Run due to the lack of fish that were collected at any of the biological sampling stations in this watershed.”¹³ This is flawed reasoning. The question is whether or not the proposed activity will impair a designated or existing use. The impacted streams have a designated use of Warm Water Fishes. Whether or not this designated use is currently being attained is irrelevant. Designated uses are specified in the Chapter 93 regulations for each water body, whether or not they are currently being met.¹⁴ Thus, since the streams have a designated aquatic life use of Warm Water Fishes, the stream must be protected so that it provides suitable habitat for survival and reproduction of warm water fishes and other aquatic organisms.

* * *

The Department cannot issue the permit because the Applicant has failed to demonstrate that the benefits outweigh the adverse environmental impacts in Greene County. In a pre-combustion context, the aspects that the Applicant touts as benefits also represent a public loss. If, instead, the Applicant and the Department consider the entire process from extraction through combustion, it must take a hard look at the overall detriments and specifically the localized detriments on Greene County.

Furthermore, with respect to the analysis of impacts on downstream aquatic resources, the Department must require the Applicant to present a thorough analysis of the impacts on downstream waters that will result from the filling of headwater streams with coal refuse. It is obviously impossible to comment on the substance of the missing analysis. As a result, to afford CCJ and the public generally of a meaningful opportunity to comment on those important dimensions at a meaningful time, the Department must provide a second public comment period when the Applicant submits all the relevant information.

¹² Application at Module 8

¹³ *Id.*

¹⁴ 25 Pa. Code § 93.1

3. The Application's cumulative hydrologic impacts analysis is unlawfully inadequate.

The Department's regulation establishing the criteria for permit approval or denial, 25 Pa. Code § 86.37, prohibits the Department from issuing a mining permit "unless the application affirmatively demonstrates and the Department finds that...the assessment of the probable and cumulative impacts of all anticipated coal mining in the general area on the hydrological balance as described in § 87.69, § 88.49, § 89.36 or § 90.35 has been made by the Department, and the activities proposed under the application have been designed to prevent material damage to the hydrologic balance outside the proposed permit area." 25 Pa. Code § 86.37(a)(4). The Application contains numerous deficiencies concerning the required cumulative hydrologic impacts analysis.

A. The Applicant's analysis of probable cumulative impacts is deficient because it does not take into account all relevant hydrologic impacts.

As noted above, the Application fails to address adverse impacts from all of the underground mining and coal refuse disposal activities associated with the Bailey and Enlow Fork Mines. The Department's regulations require the Applicant to address the probable cumulative impacts of all anticipated coal mining in the general area on the hydrological balance.¹⁵ This necessarily requires the Applicant to go far beyond the impacts of the Bailey Mine Coal Refuse Disposal Area No 8.

An analysis must include, at a minimum, the impacts of: existing CRDAs Nos. 1-6 and all of the impacts associated with them; the existing and future impacts of the underground longwall mining operations in the Bailey and Enlow Fork Mines; any additional CRDAs that the Applicant will have to site, permit and construct in order to provide further coal refuse disposal capacity needed for the Bailey Mine and Enlow Fork Mine; and all of the impacts associated with the construction, operation, maintenance, and restoration of CRDA Nos. 7 & 8.

All of these mining operations are indisputably anticipated and associated with the current permit Application. However, the Application fails to include any figures for future CRDA applications, including figures for CRDA No. 7, in its calculation of stream impacts. The permitting of CRDA No. 7 is undoubtedly a connected action because the Applicant framed its entire site selection analysis based on the capacity of CRDAs Nos. 7 & 8. Even more concerning is that, apparently, even though the Applicant was unwilling to consider each of these sites as distinct alternatives in its Alternative Analysis and Site Selection Study, it now wants to evaluate the impacts separately. Aside from the limited

¹⁵ 25 Pa Code § 86.37(a)(4).

information provided in Alternatives Analysis and Site Selection Study¹⁶, there is no evidence that the Applicant has even attempted to evaluate the collective hydrological impacts of Alternative 2. Furthermore, the Application totally ignores the foreseen and inevitable impacts on streams from future mining. The permitting of the Bailey Mine East Expansion and BMX Mines are clearly connected because without such extraction there would presumably be no need for additional waste disposal areas. The inevitable impacts, including the ecosystem impacts of eliminating more streams and their functions and services, must be evaluated and accounted for now. Additionally, the mitigation for those impacts should be planned and approved now.

B. There is no determination of the probable hydrologic consequences of the proposed coal refuse disposal activities on the proposed permit area and adjacent area.

An application for Coal Refuse Disposal Activities must contain “a determination of the probable hydrologic consequences of the proposed coal refuse disposal activities on the proposed permit area and adjacent area, with respect to the hydrologic regime and the quantity and quality of water in surface and groundwater systems under all seasonal conditions, including total dissolved solids, total suspended solids, total iron, pH, total manganese, acidity, alkalinity, sulfates and other parameters required by the Department.”¹⁷ Neither in the Hydrology module nor in the alternatives analysis nor in the NPDES module does the Applicant adequately address the probable hydrologic consequences of the proposed coal refuse disposal activities on the proposed permit area and adjacent area.

The Applicant has done almost nothing to predict the probable hydrologic consequences of the proposed coal refuse activities nor has it evaluated the hydrologic regime and the quantity and quality of water in the surface and groundwater systems under all seasonal conditions. The Applicant’s discussion of groundwater seasonal fluctuations is grossly inadequate. In Module 8 § 8.1(b) the Applicant states: “Seasonal fluctuations in the groundwater flow systems are dependent upon the amount of infiltration from precipitations with more of the recharge occurring between late fall and early spring. Groundwater fluctuations are influenced by sustained periods of precipitation events and/or prolonged drought. Fluctuations of groundwater may also be dependent to a large degree on topography.” The Department’s regulations and application instructions clearly require the Applicant do to more than recite basic hydrology principals.

¹⁶ The Applicant’s Alternatives Analysis states that Alternative 2, which consists of adjoining valleys 3A and 4, has a total disposal surface area of approximately 996 acres and the highest wetland impact of 9.68 acres.

¹⁷ 25 Pa. Code § 90.35(c)

The Department must require the Applicant to provide an adequate determination of probable hydrologic consequences and the significantly revised Module 8 should be made available again for public review and comment.

C. There is no description of possible alteration in the site development plan or method of disposal in response to adverse impacts on hydrologic balance.

To ensure protection of the hydrologic balance, an application for Coal Refuse Disposal Activities must include a plan that contains “a description of possible alteration in the site development plan or method of disposal, in response to adverse impacts on the hydrologic balance as indicated by the groundwater monitoring system.”¹⁸ This required plan is completely absent from the Application.

In Module 8 at § 8.14 the Applicant is required to provide a narrative description that addresses potential groundwater contamination resulting from treatment pond leakage or infiltration of water that has come into contact with coal refuse or coal ash. The Applicant’s narrative description simply describes the measures it plans on taking during the initial construction of the sediment pond, slurry impoundment and coarse refuse disposal areas, but does not include any kind of plan for responding to adverse impacts on the hydrologic balance as indicated by groundwater monitoring. Similarly, in Module 8 at § 8.15 the Applicant is required to provide a narrative description of how the proposed monitoring points relate the detection and mitigation of impacts. However, the Applicant’s description falls short because it only addresses how the monitoring points relate to the detection of impacts but does not describe how the monitoring points relate to the mitigation of impacts.

The Application must be revised to include a description of possible alteration in the site development plan or method of disposal in response to adverse impacts on hydrologic balance if detected by the groundwater monitoring system.

* * *

The hydrologic impacts analysis must be entirely revised or the Application should be denied. First, The Applicant’s discussion of cumulative impacts, which is limited to the impacts of Coal Refuse Disposal Area No. 8, must be expanded to include all direct and indirect impacts resulting from past activities, currently proposed activities, and foreseeable impacts from future mining activities. The analysis of cumulative impacts is a central component of the Department’s evaluation of the permit Application.¹⁹ Therefore, the Department should issue the necessary deficiency letters and the public should be given the opportunity to review and comment on the cumulative impacts analysis that will actually inform the basis for the Department’s

¹⁸ 25 Pa. Code § 90.35(d)

¹⁹ 25 Pa. Code § 86.37(a)(4)

permitting decision. Second, the Application does not contain the required determination of the probable hydrologic consequences of the proposed coal refuse disposal activities on the proposed permit area and adjacent area. Finally, a plan for possible alteration in site development or method of disposal in response to adverse impacts on hydrologic balance is completely absent from the Application. 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 revisions.

4. The Application's alternatives analysis fails to demonstrate that the site selected and the methods for disposal represent the least damaging and practicable alternative.

A person conducting coal refuse disposal activities must "minimize disturbances and adverse impacts of the activities on fish, wildlife, and related environmental values, and achieve enhancement of resources when practicable."²⁰ One factor that obviously may affect the severity of the impacts of is the location of the disposal activities, including the quality and uses of the waters to be filled.²¹ If a preferred site does not exist within the search area, then the applicant is required to demonstrate to the Department that the proposed site is the "most suitable based on environmental, economic, technical, transportation and social factors."²²

Section 4.1(b) of the CRDA prohibits the Department from approving a site for coal refuse disposal activities "where the adverse environmental impacts of the proposed site clearly outweigh the public benefits."²³ The implementing regulations similarly provide that the Department cannot approve "a site proposed by the applicant for coal refuse disposal activities when the Department finds that the adverse environmental impacts of using the site for coal refuse disposal activities would clearly outweigh the public benefits."²⁴ This balancing test requires the Applicant to identify any adverse environmental impacts of using a particular site for coal refuse disposal activities and the public benefits of using that particular site for coal refuse disposal.²⁵ In this case, the site selection process is particularly troubling for a couple of reasons. First, the Department did not seek public participation until after it had completed its analysis and found the proposed site suitable. Second, it appears that the Department simply accepts suggestions made by the Applicant without considering the individual characteristics of each site or evaluating the impacts of the proposed coal refuse disposal activities.

²⁰ 25 Pa. Code § 90.150(a)(1)

²¹ 40 C.F.R. § 230.70

²² 25 Pa. Code § 90.204(b)(3)

²³ 52 P.S. § 30.54a(c), (d)

²⁴ 25 Pa. Code § 90.202(d)

²⁵ *Id.*

A. The site selection process should be repeated to allow public participation.

One of the fundamental flaws of Pennsylvania's site selection process for coal refuse disposal areas is that the public is excluded from the process during this critical period.²⁶ Once the Department has approved the site selection, the operator may submit an application to obtain a permit to dispose of coal refuse on the selected site.²⁷ Since there is no public notice that a mining company has initiated the site selection process, the public does not have an opportunity to provide input until after the Department approves the applicant's site selection and the applicant files a permit application. Despite the fact that the Department is required to make a determination of whether the adverse environmental impacts of using a particular site for coal refuse disposal would clearly outweigh the public benefits, the Department has chosen not to involve the very public to whom those public benefits supposedly aid, and which is forced to experience any adverse environmental impacts.²⁸

There is an obvious difference between having an opportunity to submit comment to the Department before it makes an initial decision and being limited to commenting on a decision that has already been made. Furthermore, nothing in Section 4.1 of the CRDA suggests that the initial site selection phase must be conducted without public notice or an opportunity for public input.²⁹ In fact, CCJ believes that it would actually be more efficient for the Department to provide public notice and comment at the outset of the site selection process because it would eliminate the possibility that, based on public comments on the application itself, the Department would have to repeat various analyses and perhaps reconsider the sites previously found to be acceptable.

CCJ believes that the Department should reconsider its approval of the Applicant's preferred alternative and require the Applicant to submit a new alternatives analysis. The Department should not make a determination on whether the environmental impacts clearly outweigh the public benefit without involving the very public that will be impacted by the activity.

B. Neither the Department nor the Applicant adequately evaluated public benefits or the adverse environmental impacts during site selection.

The Department's review of the alternatives analysis is inadequate. It is clear that Section 90.202(b) is meant to be comprehensive in the sense that it requires an analysis of all potential adverse impacts. Specifically, the language of Section 90.202(b) requires that

²⁶ 52 P.S. § 30.54a; 25 Pa. Code §§ 90.201 – 90.207

²⁷ 25 Pa. Code § 90.202(f); Coal Refuse Disposal – Site Selection Guidance Document (Doc. No. 563-2113-660)

²⁸ 25 Pa. Code § 90.202(d)

²⁹ 52 P.S. 30.54a

a permit applicant demonstrate that the public benefits clearly outweigh the adverse environmental impacts. Furthermore, a permit applicant must demonstrate to the Department that the proposed site is the most suitable based on environmental, economic, technical, transportation, and social factors.³⁰ Examining all environmental impacts, public benefits, and public costs is the only way the Applicant can make such a demonstration and is the only way for the Department to make the required determination that the public benefits outweigh adverse environmental impacts.

i. The Applicant's inventory of public benefits is misleading.

When balancing the public benefits against adverse environmental impacts, it appears that both the Applicant and the Department viewed this analysis through the lens of coal combustion. The Applicant started with the premise that coal refuse disposal cannot be viewed in isolation because it is an inherent part of the mining process and cannot be eliminated. The Applicant's Alternative Analysis and Site Selection Study states that it has "been prepared to document potential environmental impacts versus the public benefits of continues development of an existing energy resources and the prolongation of significant employment."³¹ The Applicant emphasized that because coal is both domestically abundant and less expensive than other fields used to generate electricity, ensuring that coal continues to be a major component of America's energy portfolio is good public policy³², that "coal is by far the least expensive source of power fuel per million Btu," that "fuel diversity helps protect consumers against the threat of supply disruptions or price volatility," and that "it is estimated that mining coal from the Bailey and Enlow Fork Mines generated 1,350 direct jobs and approximately 10,000 indirect jobs."³³ The Applicant concluded:

"The public benefits associated with the development of a new coal refuse disposal area within Alternative 2 clearly outweigh the environmental impacts discussed in this report. The proposed new coal refuse disposal area represent a planned commitment by CPCC to continue operation of the Bailey and Enlow Fork Mines. The BCMC, including the Bailey and Enlow Fork mines, employs approximately 1,350 direct jobs at the mine, and average of 450 daily contractors, and many more indirect local employees. Through their employment, these workers

³⁰ 25 Pa. Code § 90.204(b)(3)

³¹ Consol Pennsylvania Coal Company, LLC Bailey Central Mine Complex Alternatives Analysis and Site Selection Study for New Coal Refuse Disposal Areas No. 7 & No. 8, pg. 1.3.

³² It is unclear how much of the coal mined from the Bailey and Enlow Fork Mines ultimately contributes to America's energy portfolio. In its video "The Journey of Coal", Consol boasts that it exports 15 million tons of coal annually to nineteen different countries across the world.

³³ *Id.* at iii.

contribute greatly to the economic health of the region. Operation of the Bailey and Enlow Fork Mines assured a continues and increased source of disposable income within the local community, which will bring about continued opportunities for growth in sales volumes, continued development, and the stability of local businesses...it is estimated that the BCMC operations provide approximately \$29 million annually in the form of federal, state and local income taxes, sales taxes, property and production taxes, and payroll taxes. Approximately \$9.0 million of this amount is for the state and local taxes.”³⁴

In short, when evaluating the public benefits, the Applicant viewed coal refuse disposal as one element of coal mining and energy production, which generates jobs and income for state and local government. However, the Applicant’s evaluation is misleading.

First, the Applicant’s account of public benefits fails to specify how many Greene County residents it employs at the Bailey Mine Central Complex. The Department must evaluate the public benefits to the community that will bear the full brunt of the adverse impacts.

Second, the Applicant’s account of the economic impact of the coal industry only presents coal’s benefits. Accounting of both benefits and costs “is important particularly given coal’s relatively small contribution to state revenues and employment, while the negative impacts resulting from coal industry activity will result in ongoing costs to the Commonwealth and its citizens.”³⁵

In 2012, the CCJ released a report entitled, *The Impact of Coal on the Pennsylvania State Budget* (“Report”). This Report found that the coal industry benefits the state budget through the payment of taxes and fees that contribute to the General Fund, either directly or indirectly. In Fiscal Year 2010-11, the coal industry provide an estimated \$10.9 million in revenues from the corporate net incomes, sales and use, and capital stock/foreign franchise taxes, while support activities for coal mining generated an additional \$15.6 million. Although these numbers look impressive on their face, it is crucial to put them into context. In total, contributions from the coal industry and support activities to the General Fund amounted to approximately 0.1% of the total state generated revenues for fiscal year 2010-11.³⁶

³⁴ *Id.* at 7.1 – 7.3.

³⁵ McIlmoil, Rory, Evan Hansen, Meghan Betcher, Anne Hereford, and Jason Clingerman, *The Impact of Coal on the Pennsylvania State Budget*, prepared for the Center for Coalfield Justice (October 3, 2012).

³⁶ *Id.* at 9.

The Report also analyzed state expenditures and concluded that when comparing only the on-budget expenditures to the direct revenues generated by the industry (not including support activities), it is estimated that the coal industry directly resulted in a net cost to the state budget of approximately \$5.7 million in fiscal year 2010-11.³⁷ In addition to on-budget expenditures, the Report accounted for tax expenditures. Tax expenditures are foregone revenues resulting from the provision of tax exemptions, credits, and reduced or preferential tax rates and have the same fiscal impact as direct on-budget government expenditures. They both result in a loss of tax revenue to state government, thereby reducing the funds available for other government programs and services. The report estimated that total tax expenditures provided to the coal industry amounted to \$161.9 million in Fiscal Year 2010-11. The largest expenditure is the sales and use tax exemption for the purchase of coal, which accounted for 72% of the total tax expenditure for supporting the coal industry. The tax expenditures directly supporting coal mining exceed the total direct revenue impact by approximately \$150.9 million.³⁸

Finally, the Report examined employment revenues and expenditures from the coal industry: “A reported 8,268 Pennsylvania residents were directly employed in the coal industry in 2010. We estimate that total tax revenues related to direct employment in the coal industry amounted to \$39.4 million. However, state expenditures to support those employees amounted to approximately \$38.8 million. Therefore, we estimate that tax benefits for the state budget contributed by direct employees of the coal industry exceeded state expenditures for supporting those employees by approximately \$0.6 million.”³⁹ Additionally, the Report examined indirect and induced impacts of the industry. The coal industry, like other industries, relies on other companies and generates economic activity and employment. For fiscal year 2010-11, the Report estimated that indirect employment attributable to coal industry activity amounted to 16,609 jobs and generated approximately \$64.4 million in state revenues. However, state expenditures to support those employees amounted to approximately \$78.0 million. As a result, the Report concluded that that employment indirectly supported by the Pennsylvania coal industry resulted in a net cost of approximately \$13.6 million for fiscal year 2010-11.⁴⁰

ii. The Applicant failed to account for all of the environmental impacts.

When identifying public benefits, the Applicant looked at the proposed coal refuse disposal activities in the context of coal mining more generally, tallying all of the direct and indirect benefits to the public of coal mining and coal combustion associated with the coal refuse disposal. In contrast, when identifying adverse environmental

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

impacts, the Applicant viewed the proposed coal refuse disposal activities in isolation, looking only at the disposal site.

In accounting for public benefits, the Applicant examined the entire process of coal mining and power generation. However, when it came to identifying the adverse environmental impacts, the Applicant's focus was much more narrow. Remarkably, the Applicant limited its analysis of adverse environmental impacts to the impacts of the proposed coal refuse disposal activities themselves. This is particularly surprising given that the Applicant itself started with the basic premise that coal refuse disposal cannot be viewed in isolation. The Applicant made no attempt to account for the adverse environmental impacts of the underground mining, or coal combustion activities it had considered in identifying the public benefits associated with the coal refuse disposal sites. For example, it did not evaluate or even mention: impacts of mine subsidence on streams and other aquatic resources; air impacts resulting from the coal preparation, transportation, or combustion; disposal of combustion wastes; or the impacts of the construction and operation of coal waste disposal sites.

The Department must deny the permit because the analysis of adverse impacts and public benefits is clearly inadequate. In order for the Department to fulfill its duty to balance the public benefits against the adverse environmental impacts, the scope of the activities considered on each side of the scale must be the same. Furthermore, as noted above, the Applicant's evaluation of downstream impacts and impacts to aquatic life, is unlawfully deficient.

C. The Applicant fails to consider, or rejects without sufficient analysis, alternatives that would reduce impacts on aquatic resources.

The burden of demonstrating that the most suitable alternative has been chosen falls squarely on the Applicant, and the perfunctory analysis of alternatives falls short of meeting the Applicant's burden. The Applicant must demonstrate that the alternative is most suitable based on environmental, economic, technical, transportation and social factors.⁴¹

One of the central issues in reviewing an applicant's alternative analysis is whether the Applicant has given sufficient consideration to possible alternatives. The Applicant's proposal to construct yet another coal refuse disposal site thereby obliterating nearly 6 miles of streams stems from its proposal to expand its mining operations. Because the operations that create the waste to be disposed of is also located in Greene County, it is especially important for the Department to evaluate whether there are practicable alternatives that would have less of an impact on aquatic ecosystems, without other significant adverse environmental consequences.

⁴¹ 25 Pa. Code § 90.204(b)(3).

The mechanism of the alternatives analysis and the requirement to adopt the least damaging practicable alternative are most important in a situation like this one, in which a large area of valuable aquatic resources have already been affected by longwall mining, disposal of coal refuse, and other related construction activities. Furthermore, the Applicant's proposal would eliminate important headwater streams. Resources like these should only be affected as a last resource. Because this area has already been forced to endure many adverse impacts, the Department must be particularly exacting when performing its duty to independently analyze the Applicant's alternatives analysis.

The order to protect the hydrologic balance coal refuse disposal activities must be planned and conducted to minimize disturbances to the prevailing hydrologic balance in the permit and adjacent areas to prevent material damage to the hydrologic balance.⁴² The Applicant's alternatives analysis rejects one technique, room and pillar coal extraction, and dismisses another, underground disposal of coal refuse, that might reduce impacts of the Bailey Mine Complex on aquatic resources by reducing the generation and/or surface disposal of coal refuse. The Applicant fails to present evidence demonstrating that these impact-reducing alternatives are impracticable.

An obvious alternative of recovering coal is room and pillar extraction. Use of room and pillar mining would not only reduce the amount of coal refuse generated that must be discarded in valley fills, but it would also protect streams from subsidence damage. The Applicant briefly discusses this option but is quick to dismiss it. It is simply presumed that future mining will be longwall mining despite the fact that longwall mining method would generate most of the coal refuse that the Applicant now says requires a seventh and eighth disposal site. The Applicant does not adequately address the possibility of reducing the amount of coal refuse and thus reducing the number, size, and impact of the refuse disposal areas by using a different extraction method. It might be, for example, that the use of room and pillar extraction would eliminate the need for a site capable of operating for at least 10 years.⁴³

The Applicant's analysis of underground disposal is skewed from the outset by its assumption that a fast moving longwall machine must be employed. First, the Applicant fails to truly analyze the alternative of room and pillar extraction, which creates long-lived void spaces that would eliminate most of the logistical obstacles that the Applicant raises.⁴⁴ The whole point of the requirement to analyze alternatives and to adopt the most suitable is that methods, including deviations from preferred practices, that might reduce impacts to aquatic resources must be seriously and thoroughly

⁴² 25 Pa. Code § 90.101(a)

⁴³ The Applicant eliminated site alternatives that did not have the capacity to operate for at least 10 years.

⁴⁴ The Applicant bases its conclusion that underground disposal is not feasible in part on limited capacity due to subsidence.

evaluated, not summarily tossed aside based on an implicit but unsubstantiated assertion that an alternative method is not a viable option. Accordingly, even if longwall mining is ultimately chosen, the Applicant must analyze the alternative of room and pillar with underground disposal. Moreover, the Applicant must do more than refer to vague and generalized risks like “increased flooding hazards” to demonstrate that room and pillar mining with underground disposal is unfeasible or environmentally more harmful. In order for the Applicant to demonstrate that it has chosen the most suitable, least environmentally damaging alternative as required by 25 Pa. Code § 90.204(b)(3), it must present a thorough and site specific analysis of all potential options based on reliable data.

CCJ understands that underground disposal presents its own set of risks and environmental harms. These risks and environmental harms would have to be evaluated by the Applicant and by the Department in order to determine whether or not underground disposal would be available in this instance. The time for this evaluation is during the site selection analysis. The Department cannot accept Alternative 2 based on an alternatives analysis that either improperly rejected a potential alternative or completely failed to consider a potential alternative. All of the alternatives must be adequately evaluated in order for the Department to make the requisite determination that the site and method of disposal are the most suitable.

* * *

A final permit should not be issued until the Department performs an independent assessment that takes into account site-specific conditions. The Department cannot simply adopt the Applicant’s alternatives analysis and its conclusions without articulating a reasoned explanation for doing so. In order to perform an adequate assessment of the adverse environmental impacts, public benefits, and potential alternatives, Department must actually evaluate all of the relevant information and request any missing information from the Applicant.

5. The Applicant’s public notice is deficient because all public notices of requests for a stream buffer zone variance must be published in two newspapers.

A public notice of a request for a variance from the 100-foot stream buffer zone restriction must appear in two local newspapers. Section 6.1(h)(5) of the Coal Refuse Disposal Act provides: “the operator shall be required to give public notice of his application for the stream variance in two newspapers of general circulation in the area once a week for two consecutive weeks.”⁴⁵ The Office of Surface Mining Reclamation and Enforcement (OSM) has made clear that Section 6.1(h)(5)’s two-week newspaper

⁴⁵ 52 P.S. § 30.65a(h)(5); 25 Pa. Code 90.49(c)(2).

notice requirement is in addition to the four-week newspaper notice required by 25 Pa. Code § 86.31(a).⁴⁶

To CCJ's knowledge, the only public notice of the pending Application that appeared in a newspaper was published once a week for four consecutive weeks during November and December in just one local newspaper, the *Observer-Reporter*. That weekly notice satisfies the general requirements for public notice of permit applications under 25 Pa. Code § 86.31(a), but it does not satisfy the additional requirement for publication in two newspapers when the Applicant requests a stream variance. Even though the public notice that appeared in the *Observer-Reporter* mentions the stream variance request, public notice for these kinds of requests requires publication in two newspapers. The Department must insist on adherence to this unambiguous requirement. Unless the Application has already published notice in a second newspaper for at least two consecutive weeks, the Department must require it do so.

6. The Application provides insufficient information to determine whether the plan to manage fugitive dust will comply with air quality laws.

Applications for surface mining activity permits must provide a plan to manage fugitive dust emissions in a manner compatible with the air quality laws.⁴⁷ The Department must evaluate whether an applicant's plan will comply with applicable air quality laws.⁴⁸ If the plan does not, the Department cannot issue the permit.

In Module 16 at §§ 16.2(b), (c) the Applicant states that "coarse coal refuse loading and unloading operations are not expected to create fugitive dust problem because of the materials coarse nature and moist condition" and "coarse coal refuse is not expected to present a dust control problem during transport because of its coarse nature and moist condition." The Applicant further states that these areas will be watered on an "as-needed basis to control fugitive dust." The Applicant must describe how it will regularly determine whether or not watering is needed to control fugitive dust emissions. Will the Applicant be conducting visual inspections to determine the need for watering? Will the Applicant determine need by measuring the moisture content in the coarse coal refuse? Without that information, it is not possible to know whether the plan will comply with applicable air quality laws.

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

⁴⁶ 63 Fed. Reg. 19801, 19814 (April 22, 1998).

⁴⁷ 25 Pa. Code § 87.137.

⁴⁸ 25 Pa. Code § 123.1.

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.”⁴⁹ 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.⁵⁰

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.”⁵¹ After undertaking a cumulative analysis, EJWG recommends that the Department engage in “heightened scrutiny and enhanced public participation” regarding permits affecting Environmental Justice Areas.⁵²

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.”⁵³ 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.⁵⁴

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.⁵⁵ EJWG went on to define Trigger Permits as “those DEP regulated activities that may lead to significant public concern due to potential impacts on human health and the environment.”⁵⁶ Recognizing the “legacy of

⁴⁹ Environmental Annual Report, 2002, (“Annual Report”) at 3.

⁵⁰ Environmental Justice Work Group: http://www.portal.state.pa.us/portal/server.pt/community/environmental_justice_work_group/14052.

⁵¹ Environmental Justice Work Group, Report to the Pennsylvania Department of Environmental Protection (“EJWG Report”), June 2001 at 16, available at: <http://www.portal.state.pa.us/portal/server.pt?open=18&objID=505092&mode=2>.

⁵² EJWG Report at 17.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

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 Department permitting process.⁵⁷ Additionally, pursuant to EJWG’s recommendations for Trigger Permits, the Department issued a policy statement in April 2004 elaborating its policy on these Trigger Permits.⁵⁸ Included in the list of Trigger Permits are Coal Refuse Disposal and also any revisions to the listed permits.⁵⁹

When evaluating Trigger Permits, the Department’s policy is to determine whether the permitted activity affects an “area of concern.”⁶⁰ 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[.]”⁶¹ 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.”⁶² 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.”⁶³

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 coal refuse disposal. 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 Application is the significant adverse impacts to aquatic resources. The Department must undertake a comprehensive evaluation of the Applicant’s extraction activities in the area and include adequate conditions in the final permit to ensure protection of public health and the environment.

8. Conclusion

The Application is severely flawed. The Department should return it to the Applicant. If the Application is not returned, the Department should issue the appropriate deficiency letters to the Applicant in light of this comment and its own

⁵⁷ Report at 12.

⁵⁸ See “Environmental Justice Public Participation Policy”, Document ID 012-0501-002, April 24, 2004.

⁵⁹ *Id.* at 8.

⁶⁰ Public Participation Policy at 4.

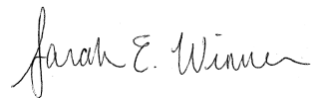
⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 8.

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.

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