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U.S. Commission on Civil Rights  
1331 Pennsylvania Ave., NW, Suite 1150  
Washington, DC 20425

## **Comments on February 5, 2016 Briefing and Forthcoming Statutory Report Project**

### **Environmental Justice: Examining Environmental Protection Agency's Compliance and Enforcement of Title VI and E.O. 12,898 as it relates to the EPA Final Coal Ash Rule**

#### **I. Introduction to the Center for Coalfield Justice and HOPE for LaBelle**

The Center for Coalfield Justice (CCJ) is a Pennsylvania-incorporated, not-for-profit organization with federal Internal Revenue Service §501(c)(3)-status recognition. Over more than 20 years, we have gradually expanded our mission from a focus on coal mining issues to work on a wide range of issues related to extractive industries in Southwestern Pennsylvania. CCJ's mission is 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. CCJ has nearly two thousand members and supporters, most of whom live in Southwestern Pennsylvania, including the immediate region of the LaBelle Site, and live with the daily impacts of fossil fuel extraction, use, and related waste disposal.

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, particularly longwall coal mining. 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 Southwestern Pennsylvania. To carry out its mission, CCJ offers its support in educating, leading, organizing, and coordinating individuals and groups that have been negatively impacted by

fossil fuel extraction and use. CCJ has been working with and supporting residents of LaBelle, Pennsylvania since 2012 as they fight for justice for their community, which is dominated by a massive coal ash dump. In 2015, CCJ assisted local residents in LaBelle form a group called “HOPE for LaBelle: Helping Organize to Protect our Environment” in order to continue raising awareness about the health and environmental issues their community faces.

## **II. History of the LaBelle Site**

The LaBelle Site has long been a fixture of Luzerne Township, Fayette County, Pennsylvania with an extensive history preceding its current ownership by Matt Cannestrале Contracting. During the early 1950s, LaBelle was the largest coal preparation processing plant in the world. It was constructed to serve as the coal preparation plant for the Vesta #4 and #5 underground mining complex across the Monongahela River operated by Jones and Laughlin Steel Corporation (J&L Steel). Coal was transported across the Monongahela River by a bridge to the LaBelle Prep Plant to be processed for use in steel mills. The LaBelle Site was selected because of the open land available for the disposal of coal refuse. At the peak of its operations, the LaBelle Prep Plant processed enough coal to yield 19,000 tons per day for use, also leaving thousands of tons of coal refuse dumped behind the plant every day. It is estimated that 31.5 million tons of coal refuse were dumped at the LaBelle Site.<sup>1</sup> The LaBelle Site was owned by J&L Steel until the 1960s when LTV Steel took it over.

LTV Steel continued to operate the LaBelle plant even after the Vesta Mines were mined out in the late 1970s, processing coal from other local mines, until 1982 when LTV Steel sold the LaBelle Site to A.T. Massey Coal Co. and finally closed the Vesta Mines. A.T. Massey leased the LaBelle Prep Plant to Interstate Energy Thermal Conversion Corporation (ITEC), which began operations in 1986 under CMAP # 26841601.<sup>2</sup> The LaBelle Processing Company, an affiliate of ITEC, operated the coal refuse disposal area under CMAP #26733701.<sup>3</sup> ITEC ceased operations at the Prep Plant in December 1994 and filed for bankruptcy leaving numerous legacy waste issues over the extent of the 1,357-acre property.<sup>4</sup> MCC entered into negotiations with the Pennsylvania Department of Environmental Protection (PA DEP) in October 1995 regarding the purchase of ITEC’s and LaBelle

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<sup>1</sup> See Templeton, David, “A past, but no future: Suspension bridge coming down.” Pittsburgh Post-Gazette, 29 Feb. 2004.

<sup>2</sup> Consent Order and Agreement (“CO&A”) 14 Apr 1997, at 2-4.

<sup>3</sup> Consent Order and Agreement (“CO&A”) 14 Apr 1997, at 2-4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> See CO&A at 8, Paragraph X. i., “MCC agreed to fully reclaim all portions of the permitted Prep Plant and CRDA

Processing Company's assets.<sup>5</sup> Matt Canestrone Contracting, Inc. (MCC) and PA DEP then negotiated a Consent Order and Agreement (CO&A).<sup>6</sup> The CO&A was entered into on April 14, 1997 and charges MCC with the reclamation of the LaBelle Site, outlining the duties and responsibilities of MCC in undertaking this reclamation and eventual abandonment and closing of the LaBelle Site.<sup>7</sup> The site was later restricted to its current 506-acre footprint,<sup>8</sup> in part through the transfer of 237 acres to the Commonwealth of Pennsylvania for the construction of a state prison facility, State Correctional Institute Fayette (SCI Fayette).<sup>9</sup>

However, the speed at which any alleged reclamation and abandonment has occurred has been torpid at best. For the last several decades, LaBelle has been in a perpetual state of "closing" without actually nearing any point of final close. Indeed, a July 1981 assessment by the Army Corps of Engineers of Slurry Pond #3 and the "significant" hazard dam maintaining the pond mentions plans to abandon and reclaim the site, recommending that the "owner should continue to implement the existing abandonment plan with all possible speed."<sup>10</sup> Yet more than 30 years after this recommendation, the LaBelle Site has not been properly reclaimed and abandoned, neither by MCC nor any other entity. Originally, the 1997 CO&A stipulated that MCC would close the LaBelle Site in ten to twelve years.<sup>11</sup> However, 19 years later the LaBelle Site shows no signs of closing. To the contrary, every indication is that MCC is expanding operations and will continue to operate the LaBelle Site indefinitely instead of properly reclaiming it.

In January 2013, FirstEnergy Corp., an energy company operating in Maryland, New Jersey, Ohio, Pennsylvania, Virginia, and West Virginia, announced that it entered into an agreement with

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<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> See CO&A at 8, Paragraph X. i., "MCC agreed to fully reclaim all portions of the permitted Prep Plant and CRDA facilities in accordance with the terms of any permits subsequently issued to MCC regarding the subject property and an approved corrective action plan for those portions of the subject properties which MCC does not seek to permit."

<sup>8</sup> Fayette County, Pennsylvania, Deed Book 3116: 1637; Contractual Consent of Landowner for a General Permit, Matt Canestrone Contracting, Inc., 3 March 2010; Recorder of Deeds, Uniontown, PA. [Labelle Refuse Site set at 506.7 acres].

<sup>9</sup> Fayette County, Pennsylvania, Deed Book 2476: 314; Matt Canestrone Contracting, Inc. & Commonwealth of Pennsylvania,

Department of General Services, 9 February 2000; Recorder of Deeds, Uniontown, PA. [Transfer of 237.82 acres].

<sup>10</sup> "LaBelle Slurry Pond #3, Phase I Inspection Report, National Dam Inspection Program," Department of the Army, Baltimore District, Corps of Engineers, July 1981 (hereinafter "ACOE Report") at 18.

<sup>11</sup> See CO&A at 8, Paragraph X. v., "MCC also intends to submit to the Department a reclamation-only permit application (the "ROP application") to authorize MCC's reclamation of the CRDA over a ten to twelve (10-12) year period of time. Specifically, MCC proposes to stabilize and complete the regrading and covering of the CRDA over this period of time by transporting onto the CRDA structural fill, sealing, capping and cover materials including, but not limited to, coal combustion by-products, river dredgings and other reclamation materials consistent with the beneficial use regulations at 25 Pa. Code §§ 287.661 - 287.665, as approved by the Department."

MCC that would transport three million tons of coal ash annually to LaBelle upon the closure of the Little Blue Run coal ash disposal site in Beaver County, Pennsylvania in 2016.<sup>12</sup> (It is important to note that Little Blue Run is a coal ash disposal site subject to closure because of the massive destruction it exacted on the environment. Both CCJ and the citizens of Luzerne Township fear that the continued coal ash disposal at the LaBelle Site will create a similar impact.) Although the exact terms of this agreement are unknown, FirstEnergy has stated that it is a “long-term agreement.”<sup>13</sup> With new ash and smokestack scrubber sludge from the Bruce Mansfield Power Plant expected to be disposed at LaBelle beginning on January 1, 2017,<sup>14</sup> MCC will have been operating the LaBelle Site under the CO&A for 20 years without any demonstrable signs of progress in reclaiming the site. Indeed, all appearances suggest that MCC is no longer operating LaBelle for the purpose of reclamation, but rather for the highly profitable endeavor of running a waste disposal site.

This expansion of operations violates the CO&A and consequently violates a bevy of statutory provisions, including “Section 5 of the Clean Streams Law, 35 P.S. §691.5; Sections 4.2 and 4.3 of the Surface Mining Act, 52 P.S. §§1396.4b and 1396.4c; Section 3.1 of the Coal Refuse Disposal Act, 52 P.S. §30.53a; Section 602 of the SWMA, 35 P.S. §6018.602; Section 20 of the Dam Safety Act, 32 P.S. §693.20; and Section 1917-A of the Administrative Code, 71 P.S. §510-17[.]” as stipulated by the parties in the CO&A.<sup>15</sup> Further, as the CO&A explicitly states, “The failure of MCC [et. al.] to comply with any term or condition of this Consent Order and Agreement shall subject MCC [et. al] to all penalties and remedies provided by those statutes for failing to comply with an order of the Department.”<sup>16</sup> And yet, the Department has done nothing to indicate it will prohibit MCC from accepting coal ash and scrubber sludge from Bruce Mansfield in the coming years.

There is ongoing litigation related the impacts to water under the Resource Conservation and Recovery Act, which was undertaken by the Environmental Integrity Project and Citizen’s Coal Council on behalf of a group of residents of LaBelle, PA. First Energy has been involved in the

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<sup>12</sup> See Hopey, Don “FirstEnergy to ship Little Blue Run coal wastes to Fayette County.” Pittsburgh Post-Gazette. January 25, 2013, available at: <http://www.post-gazette.com/stories/local/region/firstenergy-to-ship-little-blue-run-coal-wastes-to-fayette-county-671916/>

<sup>13</sup> *Id.*

<sup>14</sup> See FirstEnergy, “FirstEnergy Announces Plans to Beneficially Use Scrubber Material from Bruce Mansfield Plant in Pennsylvania Mine Reclamation Project,” 22 Jan. 2013, available at: [https://www.firstenergycorp.com/content/fecorp/newsroom/news\\_releases/firstenergy-announces-plans-to-beneficially-use-scrubber-materia.html](https://www.firstenergycorp.com/content/fecorp/newsroom/news_releases/firstenergy-announces-plans-to-beneficially-use-scrubber-materia.html).

<sup>15</sup> CO&A at 12.

<sup>16</sup> CO&A at 12.

settlement negotiations and it remains to be seen whether the case will be settled and how that may affect First Energy's use of the LaBelle Site as a disposal area for more coal ash and scrubber sludge in the near future.

### **III. LaBelle, Pennsylvania**

LaBelle, located in Luzerne Township, Fayette County, Pennsylvania, is a small community of approximately 200 people next to the Monongahela River. LaBelle was formerly a coal-mining town that is now almost completely surrounded by about 40 million tons of waste, two coal slurry ponds, and millions of cubic yards of coal ash spanning about 500 acres. Appendix A to this comment is an aerial photo of LaBelle, SCI Fayette, the MCC LaBelle Site and other infrastructure which provides a visual representation of the magnitude and proximity of the site to people in the area.

To provide some insight into the local culture, values, struggles, and dreams of the people in the close-knit community of LaBelle, we are going to share some stories from some of LaBelle's residents.

#### **A. Gary Kuklish**

Gary Kuklish is a retired coal miner and community leader in LaBelle.<sup>17</sup> He maintains close relationships with people in town, spreading the word when there is a new permit up for consideration and encouraging people to attend public hearings to speak their minds on the PA DEP's action and lack of action at the coal ash site. You may find him leaning against the doorframe of the local fire hall wearing a black leather jacket, his gray hair in a flat top, before such hearings to welcome people. He may even slip outside during such hearings if he becomes tired of hearing the same rehearsed lines from MCC and PA DEP over and over about the safety of coal ash and measures being taken at the site to minimize fugitive dust emissions. He has lived just over the hill from the site for decades and has noticed the impacts of the site over the years, from the slow disappearance of deer and other game from the valley to the accumulation of fine black dust on his neatly kept yellow house with white trim.<sup>18</sup> He has noticed that the local water authority regularly digs up and replaces water lines

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<sup>17</sup> Biegelsen, Amy "Dispute in Pennsylvania town highlights EPA's coal ash dilemma." Center for Public Integrity. December 3, 2010, available at: <http://www.publicintegrity.org/2010/12/03/2273/dispute-pennsylvania-town-highlights-epas-coal-ash-dilemma>

<sup>18</sup> *Id.*

that run through the town, particularly one line near his house that seems to be replaced every few months because the pipes are constantly corroding. This pipeline runs under a stream, Meadow Run Creek, which has orange water trickling through its narrow streambed on its way to the Monongahela River. He has also noticed the increase in cancer rates and other illnesses among local residents, including ten cases of cancer on his street of nine homes and a rise in kidney problems.

## **B. Jeremy & Katie Ulery**

Jeremy has a lot of energy; he speaks with a deep sense of conviction, looking over his glasses at times for emphasis when he describes the injustices that LaBelle has been forced to bear. He grew up in the community and, his ex-wife, Katie Ulery, and two children still live there today. Although he has moved out of LaBelle, his strong family ties to the community have kept him engaged in the struggle for change and justice. He has explained their seemingly simple goal as, “What we want to see is our town cleaned up again and made safe.” At a recent meeting with PA DEP regarding a new NPDES permit for the site, Jeremy spoke out to the people gathered there, “Our cancer rates are high, people are getting sick, and yet the PA DEP is considering allowing them to bring more of this toxic stuff into places people can’t even find on a map.” He explained, “They choose towns like ours because they think we don’t matter.”<sup>19</sup> Jeremy has underscored this point by also saying, “I was always told that the American dream is for everyone to achieve, you shouldn’t be told where you should have to live...As I have said before, if coal ash is that safe, then put it everywhere.”

Katie Ulery lives in LaBelle with their two children and is becoming increasingly distressed by the health problems that their son and daughter are experiencing. Last year, their 8-year-old son missed 27 days of school due to respiratory problems and rashes, and their daughter developed breathing problems. Jeremy has said that when they take their son to doctors for his skin conditions, doctors cannot explain what is causing the issues, except to say that their best determination is that it is due to their environment. “I’m buying bottled water because the problems are not just in the air but also the water,” Katie recently said. “It’s killing all of us and I can’t stand it anymore.”<sup>20</sup>

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<sup>19</sup> Hopey, Don “Tiny La Belle plans big fight against more coal ash dumping.” Pittsburgh Post Gazette. January 11, 2016, available at: <http://powersource.post-gazette.com/powersource/consumers-powersource/2016/01/11/Tiny-La-Belle-plans-big-fight-against-more-coal-ash-dumping/stories/201601110012>

<sup>20</sup> *Id.*

### **C. Yma Smith**

Yma Smith was born in LaBelle and she still lives on the land where she was raised. She and her husband Rudy built their house there twenty years ago. Many of her family members still live down the street and she maintains close relationships with people in the town. “I’ve lived here all my life. LaBelle’s the only place I know.”<sup>21</sup>

Yma suffers from debilitating migraines, fatigue, a respiratory disorder, and kidney problems. Yet, she still smiles a warm, wide smile when talking with friends in the community, like Gary and Sonny. She speaks with a raspy voice and blinks slowly; her eyes are often swollen. Each breath is labored as she shares stories of her life, marked by the developments in that imposing grayish black mountain of coal ash and waste rising up behind her home. “Sometimes,” she says, “my sinuses hurt so bad I feel like somebody’s sticking a knife in my eye.”<sup>22</sup>

Her husband Rudy’s kidneys both failed at the same time several years ago. Both Yma and Rudy are currently on dialysis and continue to struggle with a variety of serious health issues.<sup>23</sup> They raise a 12-year-old nephew named Jamar who has a chronic cough and uses an inhaler for regular breathing. “It makes me sad, because I worry,” Smith says. “I worry about him. And I worry about my friends.”<sup>24</sup>

### **D. Sonny Markish**

Sonny Markish lives on a several acre plot of land that used to function as a small farm where he grew apples in a small orchard composed of a few trees, kept bees to produce honey, and grew other fruits and vegetables.<sup>25</sup> He also made jam from his strawberries and other fruit, generously giving out jars to friends. His home and property are closest of all of the homes in LaBelle to the coal ash site. On any given day when the weather is nice and he is feeling up to it, you might see him riding around his yard on a riding lawn mower, greeting you with a smile and a hoarse laugh, his eyes behind a pair

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<sup>21</sup> Castle Miller, Joanna “What’s Killing LaBelle, PA?” The Marginalized. November 3, 2010, available at: <http://themarginalized.com/2010/11/03/whats-killing-labelle-pa/>

<sup>22</sup> *Id.*

<sup>23</sup> Morgan, Rachel “W. Pa. residents worry about coal ash impacts.” Contra Costa Times. August 9, 2013, available at: [http://www.contracostatimes.com/ci\\_23830207/w-pa-residents-worry-about-coal-ash-impacts](http://www.contracostatimes.com/ci_23830207/w-pa-residents-worry-about-coal-ash-impacts)

<sup>24</sup> Castle Miller, Joanna “What’s Killing LaBelle, PA?” The Marginalized. November 3, 2010, available at: <http://themarginalized.com/2010/11/03/whats-killing-labelle-pa/>

<sup>25</sup> Kahn, Natasha and Frazier, Reid R. “Two men. One coal ash dump. No answers.” Public Source and The Allegheny Front. June 26, 2015, available at: [http://publicsource.org/investigations/two-men-one-coal-ash-dump-no-answers#.Vt2L\\_owrJz9](http://publicsource.org/investigations/two-men-one-coal-ash-dump-no-answers#.Vt2L_owrJz9)

of aviator sunglasses. Sonny has been on and off chemotherapy over the years for lung, colon, and prostate cancer, even enduring surgery for colon cancer. He has also developed asthma in the last few years. His wife Colleen is in remission after battling kidney cancer. She now lives without part of her right kidney, which had to be removed. Sonny and Colleen have lost six pets, all to mouth cancer.<sup>26</sup> He explains, “I have had three kinds of cancer (lung, colon, prostate); my wife had part of her right kidney removed ... the early death rate around here is phenomenal,” Markish said.<sup>27</sup>

He discusses the connection between people in the town of LaBelle and inmates at SCI-Fayette, saying, “I know those people have done something wrong or they wouldn’t be there, but Christ, all of those people don’t have a death sentence. But they can’t get out of the prison.” In a parallel way, LaBelle’s residents are stuck there as well because as the coal ash dump has grown to dominate the area, blowing a fine black material all over their homes and yards and looming over the town, lowering property values and deterring any prospective buyers. As Sonny explained, “I own two properties here and I would probably have to give them away on 10 cents on the dollar. ... I am 78, by the time I would get rid of them and find a place in the country, I’d be a 104 years old.”<sup>28</sup>

Sonny’s statement in a recent interview summarizes the way that many people in LaBelle feel about the coal ash site, why it was put in their community, and why there has been so little enforcement action and efforts to actually remediate and close the site. “We are a small community and that is why we were chosen for the fly ash. We don’t have \$500,000 homes, and no one here is independently wealthy. So they just shit all over us and get away with it.”<sup>29</sup>

#### **IV. SCI Fayette**

As mentioned earlier, a portion of the larger LaBelle Site suffering from legacy pollution issues was transferred to the Commonwealth of Pennsylvania around 1997 for the construction of a state prison facility, State Correctional Institute Fayette (SCI Fayette). Ground was broken March 30, 2000 and the first inmates arrived in August 2003.<sup>30</sup> The LaBelle Site wraps around SCI Fayette on

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<sup>26</sup> Castle Miller, Joanna “What’s Killing LaBelle, PA?” *The Marginalized*. November 3, 2010, available at: <http://themarginalized.com/2010/11/03/whats-killing-labelle-pa/>

<sup>27</sup> Williams, Kevin “‘Poisonous Lands’: Pennsylvania prison built next to toxic dump.” *Aljazeera America*. February 25, 2016, available at: <http://america.aljazeera.com/articles/2016/2/25/prison-pennsylvania-toxic-dump.html>

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Department of Corrections “SCI Fayette” <http://www.cor.pa.gov/Facilities/StatePrisons/Pages/Fayette.aspx#.Vt3a2IwrJz8>



three sides, nearly surrounding the facility. There are 690 employees at SCI Fayette and it is currently over its 1,826-person capacity as 1,998 people are currently incarcerated there.<sup>31</sup>

People incarcerated at SCI Fayette have suffered from some disturbing health issues much like the people living in LaBelle. We will not cover all of those issues and the struggle for justice for prisoners at the facility, we recommend reading the Abolitionist Law Center's Report, "No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette."

<https://abolitionistlawcenter.files.wordpress.com/2014/09/no-escape-3-3mb.pdf>. In addition, many informative articles have been written about the situation at SCI Fayette, and individual inmates.<sup>32</sup>

## **V. HOPE for LaBelle**

A community group composed of LaBelle residents, HOPE for LaBelle, formed over the last year with support from CCJ, and is making independent decisions about the type of work and strategies they want to pursue to achieve their goals. This is representative of CCJ's approach in supporting community groups. There have been other organizing efforts in LaBelle in the past, but for the first time, CCJ is encouraging people to set their own agenda and supporting them in their work. Recognizing that there are many people in the community suffering from serious health issues, HOPE for LaBelle has created a community health survey which is based on the health survey created by the Abolitionist Law Center and completed by people incarcerated at SCI-Fayette. They are currently collecting health surveys from the community to document health conditions that people are experiencing to publicize the information and see whether it can be correlated to coal ash. The group discussed contacting the Agency for Toxic Substances and Disease Registry (ASTDR) to perform an assessment of the area. However, faith in regulatory authorities has evaporated after years of neglect and lack of enforcement, so the group decided to conduct their own health survey first to find out better status of overall impact to community and then use results for advocacy and public pressure.

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<sup>31</sup> <http://www.cor.pa.gov/Administration/Statistics/Documents/current%20monthly%20population.pdf>

<sup>32</sup> See Markowitz, Eric "Poison Prison: Is toxic dust sickening inmates locked up in coal country?" International Business Times. July 2, 2015, available at: <http://atavist.ibtimes.com/poison-prisonj653t>  
See Rakia, Raven "Coal Ash May Be Making Pennsylvania Inmates Sick, and Now They're Fighting to Shut Their Prison Down." VICE. May 5, 2015, available at: <http://www.vice.com/read/ashes-to-ashes-0000651-v22n5>  
See Hopey, Don "Groups say fly ash near state prison in Fayette County causing health problems." Pittsburgh Post Gazette. September 2, 2014, available at: <http://www.post-gazette.com/news/health/2014/09/02/Groups-say-fly-ash-near-state-prison-in-Fayette-County-leads-to-health-problems/stories/201409020040>

HOPE for LaBelle is also working with national Sierra Club on the ongoing permitting process to dispose of coal ash at the site, as well as collaborating with partner groups, like Put People First, the Human Rights Coalition, and the Abolitionist Law Center. Each of these groups has a different focus, but the issue of coal ash in LaBelle has united all of them to work together to raise awareness of these issues and connect the families of people who are incarcerated at SCI Fayette, former inmates from SCI Fayette, former and current guards at SCI Fayette, and residents of LaBelle. One aspect of HOPE for LaBelle's work is an ongoing pen pal project, writing letters back in forth with people incarcerated at SCI Fayette to connect with them and hear their perspectives on the LaBelle Site.

## **VI. Environmental Justice Issues in LaBelle**

In Pennsylvania, the Environmental Justice Office is responsible for working with permit applicants to carry out notice and public participation processes according to Environmental Justice (EJ) guidelines, and to notify citizens of proposed permits affecting their community. The EJ Office reviews existing PA DEP programs and policies "to ensure equal protection," and is tasked with making sure that citizen EJ concerns are answered in a timely manner.<sup>33</sup> Additionally, permit applicants and the EJ office must ensure there are plain language summaries of permit application information to promote community understanding so that community members are better equipped to inform the industry of their concerns at community meetings.<sup>34</sup> The enhanced notice and public participation requirements for EJ Areas are a critical part of promoting community understanding and engagement around permitting decisions.

LaBelle, Pennsylvania is not a designated Environmental Justice Area under state or federal Environmental Justice guidelines.<sup>35</sup> However, LaBelle is proximate to Brownsville, PA which is a designated EJ Area. LaBelle is part of Pennsylvania State Representative Pam Synder's district and after meeting with her over several years to educate her about the situation in LaBelle, she put pressure on the Office of Environmental Advocate (now the Office of Environmental Justice) to

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<sup>33</sup> Department of Environmental Protection "Environmental Justice Public Participation Policy" April 24, 2004, available at: <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-48671/012-0501-002.pdf>

<sup>34</sup> *Id.*

<sup>35</sup> Map of Environmental Justice Area in Pennsylvania, Pennsylvania Department of Environmental Protection, available at: [https://www.portal.state.pa.us/portal/server.pt/document/1457429/environmental\\_justice\\_areas\\_pa\\_pdf](https://www.portal.state.pa.us/portal/server.pt/document/1457429/environmental_justice_areas_pa_pdf)  
EPA Environmental Justice Screening and Mapping Tool, available at: <http://ejscreen.epa.gov/mapper/>

ensure that enhanced public participation and EJ protections were provided for LaBelle residents when permit applications or renewals are submitted and under consideration. It is unclear whether that will continue as Office of Environmental Justice has a new Director, Carl Jones, Jr., who is responsible for the entire state as of October 2015.<sup>36</sup> Formerly, there were three Environmental Advocates, housed in offices across the state and each responsible for a different geographic area: west, east, and central. Today, the Director of Environmental Justice is housed in the PA DEP's Southeast Regional Office in Norristown, PA. We have reached out to the Office of Environmental Justice a number of times regarding different matters, through emails and phone calls, and we have not received a response from the new Director to date.

Although people who are incarcerated are included in the United State Census in the area where they are incarcerated,<sup>37</sup> they are not considered to be residents of that area for the purpose of defining Environmental Justice Areas. If the prison population living inside SCI Fayette was considered, then Luzerne Township would likely be a designated EJ Area, extrapolating from the most recent Pennsylvania Department of Corrections data which reports that 48.4% of inmates in the system are Black.<sup>38</sup> Unfortunately, the Department of Corrections does not release demographic data specific to each of its facilities. Currently, there are no notice requirements and no practice or policy of disseminating information inside of state correctional facilities regarding PA DEP permitting of proposed projects that could affect the environment around them. This is a major issue for people who are incarcerated at SCI Fayette because they have no notice of permit applications and permitting decisions at the LaBelle Site which effectively surrounds the facility where they live.

## **VII. Issues with New EPA Coal Ash Rule**

PA DEP has an abysmal record of enforcing the law as written, a history of lax permitting, failure to engage in meaningful enforcement activities, and failure to address complaints from citizens and environmental advocacy groups. Look no further than the saga of Little Blue Run, the largest coal ash pond in the United States, spanning 1,700 acres, located in Beaver County,

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<sup>36</sup> Hess, David E. "Carl E. Jones, Jr. Appointed Director DEP Office of Environmental Justice." PA Environment Digest. October 19, 2015, available at: <http://paenvironmentdaily.blogspot.com/2015/10/carl-e-jones-jr-appointed-director-dep.html>

<sup>37</sup> See "Prison Gerrymandering Project" Prison Policy Initiative <http://www.prisonersofthecensus.org/impact.html>

<sup>38</sup> Pennsylvania Department of Corrections "Annual Statistical Report." 2014, available at: <http://www.cor.pa.gov/Administration/Statistics/Documents/Reports/2014%20Annual%20Statistical%20Report.pdf>

Pennsylvania for a nightmarish story of PA DEP negligence and willful blindness.<sup>39</sup> A look at the permitting and enforcement history for the LaBelle Site confirms PA DEP's frightening pattern and practice of leniency toward MCC's operations.

The current State Only Operating Permit for Air Quality at the LaBelle Site sets out a broad range of activities that are permitted to create fugitive emissions<sup>40</sup> and the only limit on fugitive particulate matter is "A person may not permit fugitive particulate matter to be emitted into the outdoor atmosphere from a source specified in 123.1(a)(1)-(9) [citation to the previous section detailing permitted activities] if such emissions are visible at the point the emissions pass outside the person's property."<sup>41</sup> In other words, the only restriction on fugitive dust emissions at the site is visible emissions that pass MCC's property line. Accordingly, it comes as no surprise that MCC has never had a violation assessed under this air quality permit. Granted, the site is not currently accepting more coal ash as it is waiting for the First Energy contract to potentially go into effect and begin accepting fly ash and scrubber sludge in 2017. However, residents of LaBelle will tell you that dust still blows off the site, as evidenced by the accumulation of fine black dust on their homes, vehicles and anything outdoors which has continued even though new ash is not being dumped at the site currently.<sup>42</sup>

Review of the history of violations at the site reveals that most violations relate to water quality and safety issues, like discharging water that does not meet water quality limits and failure to properly design, construct or maintain sedimentation ponds. There is a history of air quality violations at the site as well, but notably only eight violations over thirteen years and PA DEP never assessed monetary penalties for these violations, they were all resolved by being "corrected" by the operator.<sup>43</sup>

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<sup>39</sup> Lombardi, Kristen "One town's recurring coal ash nightmare: Little Blue Run is anything but: Would Federal regulation help?" Center for Public Integrity. November 17, 2010, available at:

<http://www.publicintegrity.org/2010/11/17/2312/one-town-s-recurring-coal-ash-nightmare>

<sup>40</sup> Construction or demolition of building or structures, grading, paving, and maintenance of roads and streets, use of roads and streets, clearing of land, stockpiling of materials, open burning operations, and other sources for which the operator has obtained a determination from DEP that fugitive emissions from the source, after appropriate control, meet the following requirements: (i) the emissions are of minor significance with respect to causing air pollution; and (ii) the emissions are not preventing or interfering with the attainment or maintenance of any ambient air quality. *See* Section C "Site Level Requirements" #002 of Matt Canestrone Contracting Inc. State Only Operating Permit No. 26-0057 for Plant Code 25-1288759-1, effective June 24, 2014-June 24, 2019.

<sup>41</sup> Section C "Site Level Requirements" #003 Matt Canestrone Contracting Inc. State Only Operating Permit No. 26-0057 for Plant Code 25-1288759-1, effective June 24, 2014-June 24, 2019.

<sup>42</sup> Department of Environmental Protection eFacts page for LaBelle Site, available at:

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleSite.aspx?SiteID=465372](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleSite.aspx?SiteID=465372)

<sup>43</sup> Failure to employ adequate air pollution controls. 10/22/2013:

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=2216755](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=2216755)

Recently obtained documents from PA DEP reveal that both fly ash and bottom ash were permitted for disposal at the LaBelle Site. After nine years of dumping fly ash, which has high arsenic levels, PA DEP asked MCC to stop accepting fly ash because of excessive aluminum leachate levels. However, at the same time, there were excessive dry weight arsenic levels. It appears from emails that the PA DEP had or has a practice of allowing permittees to exceed “secondary parameters” (i.e. dry weight arsenic and other trace metals) and only stepping in if “primary parameters” are exceeded (i.e. leachate levels of aluminum and other pollutants). This specific issue will require further investigation, but the documents obtained from PA DEP raise red flags on their face regarding the nature of their program and enforcement policies.

Despite this history of failure to enforce regulations as written in Pennsylvania, in relation to the LaBelle Site and others, EPA has still given PA DEP the authority to operate their coal ash program as they choose with zero oversight through the self-implementing nature of the new coal ash rule. It is highly unlikely they will see any improvements in PA DEP’s state enforcement when compliance with the new rule is voluntary. It is negligent for EPA to rely on voluntary compliance when the state is failing to manage its existing program properly. The future also looks bleak as Pennsylvania failed to pass a budget last year and the upcoming budget proposals fail to provide enough funding for PA DEP to meet the needs of any of its programs, according to DEP Secretary, John Quigley.<sup>44</sup>

The new coal ash rule and regulations essentially rely on citizen suits for enforcement because the low standards set for these sites in the permitting process are baffling and enforcement from PA DEP is sporadic and rarely results in monetary penalties for entities involved in coal ash disposal

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Fugitive Emissions, Prohibition of certain fugitive emissions. Failure to take reasonable actions to prevent particulate matter from becoming airborne. 08/05/2013:

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=2195856](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=2195856)

Failure to employ adequate air pollution controls. 04/01/2011:

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=1962399](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=1962399)

Fugitive Emissions, Prohibition of certain fugitive emissions. Failure to take reasonable actions to prevent particulate matter from becoming airborne. 01/05/2011:

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=1941071](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=1941071)

Fugitive Emissions, Prohibition of certain fugitive emissions. Failure to take reasonable actions to prevent particulate matter from becoming airborne. 04/06/2005. 03/23/2005. 02/18/2004. 04/24/2003.

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=1436955](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=1436955)

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=1435893](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=1435893)

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=1309491](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=1309491)

[http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleViol.aspx?InspectionID=1229745](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleViol.aspx?InspectionID=1229745)

<sup>44</sup> Hess, David E. “DEP Budget Hearing: DEP Does Not Have Enough Staff To Meet Needs In Any Of Its Programs.” PA Environment Digest. February 25, 2016, available at: <http://paenvironmentdaily.blogspot.com/2016/02/dep-budget-hearing-dep-does-not-have.html>.

projects. The communities we are talking about are cannot afford to hire law firms and technical experts to pursue these cases, this is an impossible burden for them to bear.

An additional threat from coal ash to drinking water supplies and air quality results from its transport through shipping of the ash by barge down the Ohio and Monongahela Rivers. The Monongahela River is a major drinking water source for communities in Southwestern Pennsylvania and is already suffering from water quality problems.<sup>45</sup> The Ohio River has the distinction of being the most polluted river in the United States, as designated by the EPA.<sup>46</sup> However, “because coal ash is not classified as a hazardous material, its transport on the rivers is not regulated by the Coast Guard. She [Lt. Junior Grade Alyssa McDonald of the U.S. Coast Guard's boat operation and law enforcement division in Pittsburgh] also said there are no requirements that the ash be transported in covered barges to prevent it from blowing into the rivers and river banks.”<sup>47</sup> So, fly ash and scrubber sludge will travel almost 100 miles on the Ohio and Monongahela Rivers in uncovered barges from the Bruce Mansfield Plant in Beaver County, northwest of the city of Pittsburgh, all the way to LaBelle in Fayette County. It remains an open question how much ash will blow off into economically depressed, impoverished river towns, many of them designated EJ areas like Brownsville, PA, along the way.

### **VIII. What Can EPA Do Differently?**

- EPA should re-issue its final rule regulating the disposal of coal combustion residuals<sup>48</sup> and regulate coal ash and associated waste in accordance with the dangerous, harmful nature of

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<sup>45</sup> Seventy miles of the Monongahela River were subject to a Total Maximum Daily Load for sulfates between 2010-2014. Hopey, Don “Monongahela River is cleaner, Allegheny ‘impaired’ state report says” Pittsburgh Post Gazette. December 29, 2014, available at: <http://www.post-gazette.com/news/environment/2014/12/29/Report-on-water-quality-says-Mononghela-River-no-longer-degraded-by-sulfates/stories/201412290187>.

In 2010, the Monongahela River was named the ninth on the list of America’s Most Endangered Rivers due to pollution from natural gas drilling and fracking of the Marcellus Shale. See American Rivers “Monongahela River Among America’s Most Endangered Rivers: Natural Gas Extraction Threatens Clean Drinking Water” June 2, 2010, available at: <http://www.americanrivers.org/newsroom/press-releases/monongahela-river-among-americas-most-endangered-rivers/>

<sup>46</sup> Cory, Caroline “Environmental Protection Agency call Ohio River the most polluted in country.” The News Record. March 7, 2016, available at: [http://www.newsrecord.org/news/environmental-protection-agency-calls-ohio-river-the-most-polluted-in/article\\_5d6a04a6-9304-11e5-bf5c-c70efe02bafb.html](http://www.newsrecord.org/news/environmental-protection-agency-calls-ohio-river-the-most-polluted-in/article_5d6a04a6-9304-11e5-bf5c-c70efe02bafb.html)

<sup>47</sup> Hopey, Don “FirstEnergy to ship Little Blue Run coal wastes to Fayette County” Pittsburgh Post Gazette. January 25, 2013, available at: <http://www.post-gazette.com/neighborhoods-west/2013/01/25/FirstEnergy-to-ship-Little-Blue-Run-coal-wastes-to-Fayette-County/stories/201301250140#ixzz2kjUC38xk>

<sup>48</sup> Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at 40 C.F.R. pt. 257 and pt. 261). <https://www.gpo.gov/fdsys/pkg/FR-2015-04-17/pdf/2015-00257.pdf>

the material under subtitle C of the Resource Conservation and Recovery Act (RCRA). If regulated under subtitle C of RCRA, EPA could then require utility companies to handle coal refuse as a hazardous waste, from “cradle to grave.”

- Instead, under subtitle D, there is a lax compliance structure that allows states total freedom over planning, regulating, implementing and control without a requirement to meet a federal threshold standard for handling, disposal and storage of these waste materials.
- Regulation under subtitle D is hardly regulation at all, holding coal ash to similar standards as household trash, despite the National Academy of Sciences and other leading scientific authorities finding that coal ash is harmful to human health and the environment.<sup>49</sup>
- State environmental agencies, like PA DEP, should be required to collaborate with the EPA under a comprehensive RCRA subtitle C regulatory program.
- States should have to follow mandatory guidelines for coal ash management, disposal and containment, develop a program that complies with guidelines, and seek EPA approval of their regulatory program. This is particularly important for Pennsylvania, which has a long history of negligent oversight of coal combustion waste sites.
  - One such guideline should protect nearby communities from fugitive dust by setting air quality limits enforced by air monitors set up around the site.
  - Another guideline should be created in light of radioactivity levels in coal ash and require monitoring for radioactive elements such as radium isotopes and lead-210.<sup>50</sup>
- EPA needs to conduct regular audits of current state programs that permit and regulate coal ash disposal and beneficial re-use activities to assess their compliance with guidelines.
- EPA should abolish beneficial use and set meaningful standards for coal ash disposal that require the ash and other combustion waste to be stored in a dry, concrete-like form with a thick liner separating it from the soil and groundwater with a leachate system to capture leaks.

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<sup>49</sup> “What the National Academy of Sciences and Other Researchers Say About Coal Ash Hazards,” available at: [https://www.kftc.org/sites/default/files/docs/resources/scientific\\_studies\\_on\\_coal\\_ash\\_toxicity\\_final\\_20110712.pdf](https://www.kftc.org/sites/default/files/docs/resources/scientific_studies_on_coal_ash_toxicity_final_20110712.pdf)

<sup>50</sup> Hays, Brook “Researchers find radioactive contaminants in coal ash.” United Press International. September 2, 2015, available at: [http://www.upi.com/Science\\_News/2015/09/02/Researchers-find-radioactive-contaminants-in-coal-ash/7841441211980/?spt=su&or=btn\\_tw](http://www.upi.com/Science_News/2015/09/02/Researchers-find-radioactive-contaminants-in-coal-ash/7841441211980/?spt=su&or=btn_tw)



- EPA should require an enhanced Environmental Justice review process for coal combustion waste disposal sites proposed near low income communities, communities of color and/or state and federal prisons. This review should require consideration of possible alternative sites and require an affirmative demonstration of safety protocols to protect human health and the environment.
  - This process should also include informational meetings to discuss the nature of the project, handouts which describe the project and protections in terms understandable for a layperson, and information on how to report potential permit violations.
- The Agency for Toxic Substances and Disease Registry (ATSDR) should perform an assessment of LaBelle, PA and SCI-Fayette as well as other coal ash beneficial use sites that are proximate to people's residences to document and analyze the health issues in these communities.<sup>51</sup>

## IX. Conclusion

We need strong protections for coal combustion waste disposal that are created to protect human health and the environment, rather than facilitating the easiest methods of disposal for the industry with minimal oversight and accountability. People are dying while PA DEP and the EPA claim they are responsibly regulating coal ash disposal and permitting beneficial use. The location of coal ash disposal sites in low-income communities like LaBelle and the lack of meaningful standards and enforcement are not coincidences. This is part of a pattern and practice of environmental injustice as politically disenfranchised communities: low-income, minority and incarcerated are forced to bear these environmental harms.

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<sup>51</sup> There is some precedent for investigations of coal ash-related health issues. *See* Fort Wainwright case: <http://www.atsdr.cdc.gov/hac/pha/pha.asp?docid=932&pg=2>

Forward Township, Allegheny County, PA coal ash landslide in 2005:

<http://www.atsdr.cdc.gov/HAC/pha/CoalFlyAshLandslide/CoalFlyAshLandslideHC060106.pdf>

Mazzaro Landfill, Findlay Township, Allegheny County, PA coal ash and industrial waste landfill on old coal mine site in 1998: <http://www.atsdr.cdc.gov/HAC/pha/PHA.asp?docid=299&pg=0>



## Appendix A

# AERIAL VIEW OF SURFACE PERMITS — LABELLE, PA



### Legend

- Canestrale Prep Plant Permit Area
- Canestrale Refuse Permit Area
- Alpha Resources Permit Area

1 inch = 1,000 feet

Feet  
0 500 1,000 2,000



This map shows the aerial extents of the Canestrale Prep Plant Permit Area, Canestrale Refuse Permit Area, and Alpha Resources Permit Area of LaBelle, Fayette County, PA.

Sources:  
Permit areas were digitized off mine maps located at the PA DEP California District Office. Aerial Imagery was obtained from PAMAP Program, PA DCNR.

Coordinate/Projection System:  
NAD\_83\_UTM\_Zone\_17N

Prepared by:



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Department of Environmental Protection  
California District Office  
Mine Subsidence Section  
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The Department assumes no responsibility for the accuracy or completeness of this information.

