



# CENTER FOR COALFIELD JUSTICE

PO Box 4023 • 14 E. Beau Street • Washington, PA 15301 • 724.229.3550  
www.coalfieldjustice.org • info@coalfieldjustice.org

June 13, 2023

California District Mining Office  
Department of Environmental Protection, District Mining Operations  
Attn: Troy Williams, P.E.  
25 Technology Drive  
California Technology Park  
Coal Center, PA 15423  
E-mail: troawillia@pa.gov

**Re: Comment on CPCC's Application – Harvey D1-D6 Development Mining (3,744 acres)  
Permit No. 30121301**

To Whom It May Concern:

The Center for Coalfield Justice (“CCJ”) respectfully submits the following comment on Consol Pennsylvania Coal Company, LLC’s (“CPCC”) application to revise the existing Harvey Mine Permit (No. 30121301) to add 3,744 acres of underground permit boundary and subsidence control plan boundary for development mining. *See* Module 1 at 1-1.<sup>1</sup> The permit application is deficient and therefore should be denied. If it is not denied, the Department should issue the necessary deficiency letters and require CPCC to address the deficiencies before approving development mining.

**I. The Department is obligated to prevent impairment of uses in overlying streams.**

The streams within the proposed permit boundary have a HQ-WWF designated use under 25 Pa. Code Chapter 93. *See* Form 8.4A, General Stream Inventory. A stream’s protected use consists of designated uses and existing uses. 25 Pa. Code § 93.1. Activities and discharges, including those associated with coal mining, are permitted in HQ-WWF watersheds so long as the protected uses of a stream are maintained and protected. 25 Pa. Code §§ 93.3, 93.4a. The Clean Streams Law and the associated regulations plainly mandate that the Department proactively prevent impairment of stream uses. 25 Pa. Code §§ 93.3, 93.4(a), 93.4a(b). Those uses include aquatic life and recreation. 25 Pa. Code §§ 93.3 and 93.4(a). *See also* 40 C.F.R §§ 131.2,

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<sup>1</sup> The project description included in the Act 67 and 68 Notifications appears to be incorrect. It states: “Permit to add 3,971 acres to underground permit and subsidence control plan area for development mining only for the Harvey Mine.”

131.12. Section 93.4(a) provides that “Except when otherwise specified in law or regulation, the uses set forth in Table 2 apply to all surface waters.” 25 Pa. Code § 93.4(a). Protection and maintenance of stream uses is the essential component of the Department’s analysis concerning subsidence-induced stream impacts. *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 843-844.

*The Department should not issue the development mining permit because CPCC has not provided an adequate demonstration that development mining will not degrade High Quality surface waters.*

The Department’s regulations require the permit applicant to make required showings as a prerequisite to obtaining a permit and those showings must be made to the Department during the application process in order for the Department to act reasonably in issuing the permit. See 25 Pa. Code § 86.37(a)(3); *Center for Coalfield Justice v. DEP* 2017 EHB 799; *Blue Mountain Preservation Association, Inc., v. DEP*, 2006 EHB 589, 605; *Hudson*, 2015 EHB at 719. The Department cannot issue a permit based on an application that is incomplete or otherwise deficient.

Module 8 of the Department’s Underground Coal Mining Activity Permit Application requires an applicant to include an evaluation of the potential for underground mining to affect streams above the proposed permit area. An analysis of all the hydrogeologic variables is used to determine the scope and severity of the impact in overlying streams. CPCC acknowledges that development mining may impact the groundwater system. “In the area where the development mining occurs, a minor disturbance of the groundwater flow system may result in a temporary shift in the groundwater table. This may temporarily lower the zone of saturation and may result in a temporary yield reduction of wells, springs, and streams.” Application at Module 8.1(g). Terms like “minor disturbance” and “temporary” are imprecise and subject to various interpretations. See *Center for Coalfield Justice v. DEP*, 2017 EHB at 845. The Department must determine whether the anticipated impacts of development mining could “result in impermissible impairment of streams because the impacts, either as a result of scope of the impacts, the duration of the impacts or some combination of those two, rise to a level that the streams cannot meet their designated use.” *Id.* at 846. CPCC’s application does not provide the information necessary for the Department to make such a determination.

The anticipated impacts to the groundwater table and its connection to overlying streams has the potential to degrade the quality of the High Quality overlying streams. Development mining in anticipation of longwall mining is part of the underground mining operation that will impact waters of the Commonwealth. As a result of development mining activities, the groundwater table may shift below the zone of saturation and become disconnected from surface waters. See Application at Module 8.1(g). The Department cannot evaluate the degrading potential of development mining in isolation; nor the Department rely on the Applicant’s assurance that such impacts will be temporary. If the groundwater table shifts below the zone of saturation and the Department does not require CPCC to submit surface flow and groundwater monitoring results as part of its development mining application, then the range of flows documented in the future longwall application will be artificially diminished. CPCC cannot reduce groundwater recharge in overlying streams and

then use the post-development mining stream condition as the “pre-mining” condition of the stream for purposes of longwall mining. The baseline water quality, flow, and biological score of the High Quality overlying streams must be assessed prior to any underground coal mining activity, and CPCC must then demonstrate that its coal mining activities (development mining and longwall mining) will not cause or contribute to the degradation of that baseline quality.<sup>2</sup> See 25 Pa. Code § 86.37(a)(3); *Center for Coalfield Justice v. DEP*, 2017 EHB at 846.

The Department cannot issue the development mining permit because doing so would constitute a violation of the Clean Streams Law and the Commonwealth’s antidegradation standards. Without more information about the groundwater system and the existing, pre-mining condition of the overlying High Quality streams, CPCC nor the Department can adequately evaluate whether development mining and the anticipated shift in the groundwater table will degrade the High Quality streams.

*The Department must safeguard public natural resources as required by the Environmental Rights Amendment of the Pennsylvania Constitution*

Article I, Section 27 of the Pennsylvania Constitution, otherwise known as the Environmental Rights Amendment, grants the people of the Commonwealth two distinct rights. *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017) (“PDEF”). The first “inherent and infeasible” right guarantees “clean air, pure water, and the preservation of the natural scenic, historic and esthetic values of the environment.” *Id.* The second grants common ownership to “all the people” of “Pennsylvania’s public natural resources.” *Id.* The final clause of the Environmental Rights Amendment creates a trust designating the Commonwealth and all of its subdivisions as the trustee, the natural resources of the Commonwealth composing the trust res, and all the people and future generations as the beneficiaries *Id.*

The Commonwealth’s duties as a trustee require the conservation and maintenance of the corpus of the trust—the public natural resources of the Commonwealth. *Id.* at 932 (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956–57 (Pa. 2013)). Importantly, the trust corpus includes the streams within the proposed permit expansion. *Friends of Lackawanna v. Commonwealth*, 2017 DEP 1123, 1162. Browns Creek and other streams within the proposed permit boundary are popular fishing locations. “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” PDEF 161 A.3d at 932. The Commonwealth has a further duty to

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<sup>2</sup> CPCC incorrectly assumes that it is not required to collect and submit information about the hydrogeologic variables because it is seeking authorization to conduct development mining for the purposes of future longwall mining, but it is not seeking authorization to conduct longwall mining *yet*. See Module 8.9 and 8.10 (CPCC asserts that potential areas of flow loss within overlying streams and potential areas of pooling within overlying streams is “not applicable”).

“act toward the corpus of the trust . . . with prudence, loyalty, and impartiality.” *Id.* Put more simply, the Commonwealth must act to conserve and maintain public natural resources in a prudent, loyal, and impartial manner. See *Friends of Lackawanna*, 2017 DEP at 1160–61; *Center for Coalfield Justice v. DEP*, 2017 EHB at 854–56.

Private trust principles,<sup>3</sup> and not the public trust doctrine, govern the fiduciary duties imposed on the Commonwealth as trustee. *Center for Coalfield Justice v. DEP*, 2017 EHB at 933 n. 26. “Under Pennsylvania trust law, the duty of prudence requires a trustee to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” *Id.* at 932 (quoting *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979)). But “if the trustee has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has.” *Mendenhall*, 398 A.2d at 953 n. 1 (quoting Restatement (Second) of Trusts § 174 (1959)). The trustee accordingly, and consistent with the expertise possessed, may exercise discretion in the administration of the trust so long as that discretion is in furtherance of the purposes of the trust. *PDEF*, 161 A.3d at 933 (citing *Robinson Twp.* 83 A.3d at 978).

The correctness of the exercise of a trustee’s discretion is judged “as it appeared at the time” of the action. *In re Glauser’s Estate*, 38 A.2d 64, 69 (Pa. 1944) (quoting *In re Heyl’s Estate*, 200 A. 617, 619 (Pa. 1938)); *In re Brown’s Estate*, 85 Pa. D. & C. 452, 456 (1953); *In re Wood’s Estate*, 197 A. 638, 641 (Pa. Super. Ct. 1938). It cannot be examined in light of successive events. *Glauser’s Estate*, 38 A.2d at 69. Absent negligence or willful default at the time the trustee made a decision concerning the trust a trustee shall not be held liable for loss to the trust. *In re Hart’s Estate*, 53 A. 364, 367 (Pa. 1902) (quoting *Appeal of Chambersburg Sav. Fund Ass’n*, 76 Pa. 203 (1874)). As a corollary, where a trustee is “negligent in not knowing the facts or does not exercise his best judgment [he] makes himself liable . . .” *Wood’s Estate*, 197 A. at 641 (citing *Hart’s Estate*, 53 A. at 367). Of course, a trustee’s discretion does not extend to decisions based on speculation. *In re Cope’s Estate*, 50 Pa. D. & C. 189, 200 (1944); *Wood’s Estate*, 197 A. at 641; *Hart’s Estate*, 53 A. at 367. This is because speculation on the part of the trustee demonstrates negligence in “being ignorant of the facts which ordinary intelligence would have disclosed to him, or, if known, in not exercising his best judgment upon them.” *Hart’s Estate*, 53 A. at 367. Indeed, the Supreme Court remarked, “the trustee’s fiduciary duties . . . [do] not equate to mere subjective judgment.” *PDEF*, 161 A.3d at 933 (quoting *Robinson Twp.*, 83 A.3d at 978).

The trust created by the Environmental Rights Amendment imposes on the Department the duty to act with prudence in its exercise of its expert discretion to maintain and conserve the corpus of the trust for the benefit of all people and future generations. The Department cannot discharge its fiduciary duties by ensuring bare compliance with environmental statutes and regulations. *Center for Coalfield Justice v. DEP*, 2017 EHB at 860. And it certainly cannot meet its duty of prudence where its decisions are based on a speculative and incomplete information.

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<sup>3</sup> The Supreme Court noted that private trust principles extent at the time of the Environmental Rights Amendment was adopted apply to the interpretation of the substance and scope of the Commonwealth’s duties as a trustee. *PDEF*, 161 A.3d at 933.

The purpose of this trust is to conserve and maintain the public natural resources of the Commonwealth. *Id.* at 932. Consequently, “the first essential thing for a fiduciary to consider is the safety of the principal ...” *In re Flagg’s Estate*, 73 A.2d 411, 416 (Pa. 1950); *see also Wood’s Estate*, 197 A. at 641 (“[A] primary thought of the trustee should be the preservation of the estate from loss.”).

Key to the three duties imposed on a trustee, of prudence, loyalty, and impartiality, is that each of these duties must be exercised in furtherance of the purpose of the trust. In regard to the Environmental Rights Amendment this purpose is to preserve the “natural, scenic, historic and esthetic values of the environment” and to conserve public resources as “the common property of all the people, including generations to come.” Pa. Const. Article 1, § 27. This responsibility should be at its highest when exercised to consider the possible degradation and diminution of public natural resources that are designated High Quality. CPCC has failed to provide basic information about the High Quality streams within the proposed permit expansion.

The Department cannot make an informed decision regarding the environmental effects of its actions if it does not have an adequate understanding of what those effects are or will be. *Friends of Lackawanna* 2017 EHB 1159-60. Likewise the Department cannot be said to have acted with prudence when it acts on speculative or incomplete information. *Center for Coalfield Justice v DEP*, 2017 DEP at 860. Here the Department cannot meet its constitutional duties without properly analyzing the susceptibility of the High Quality streams during dry periods, without gathering necessary information about impacts that have already occurred in the Browns Creek watershed from prior mining, and without careful consideration of the data that is required by its underground mining permit application.

The most critical period for a stream in terms of both hydrology and biological health is during the dry season in the late summer and early fall. In an unmined system groundwater in the underground aquifer holds water throughout the year, gradually discharging water to the stream, and providing baseflow. In mined streams, however, the situation is different. Fracturing and the creation of increased pore space causes the aquifer to become depleted more quickly. Because of a disruption between the groundwater recharge system and the stream, undermined streams experience a rapid draw down and decoupling from the groundwater system, which would normally provide water to the pools and hyporheic zone. *See* Application at Module 8.1(g). The maintenance of the groundwater and surface water connection has important implications not only for the stream hydrology, but also for the stream biology. It is critical for stream macroinvertebrates to have moist respiratory surfaces in order to breathe. Without such moisture they will experience a rapid death—within 24 hours. In a natural system they can take refuge in pools or in the hyporheic zone. If development mining causes the groundwater table to drop, as CPCC anticipates, then even these portions of the stream may dry up and there will be no place for macroinvertebrates to survive. It is well documented that undermined streams are less biologically diverse.

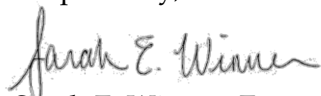
As a result of the hydrological and biological consequences of a stream disconnected from groundwater during the dry season, it is critical to understand and be able to predict the effects of mining on a stream during that time. The information submitted by CPCC is simply not sufficient to understand the existing condition of the overlying streams much less to make predictions about the consequences of underground mining within the proposed expansion.<sup>4</sup> If the groundwater table shifts below the zone of saturation as a result of development mining and the Department does not require CPCC to submit pre-mining surface flow and groundwater monitoring as part of the development mining application, then the range of flows documented in the future longwall application will be artificially diminished. The Department is constitutionally obligated to consider the environmental consequences of the permitting action and to act as a prudent trustee of the public resources.

## II. Natural Gas Storage Reservoirs

The proposed expansion of the Harvey Mine overlies the Swartz Field and Hunters Cave storage reservoirs. *See* Pa. C.S. § 3203. Many wells have been drilled into and through these storage reservoirs. Such wells include storage wells, observation wells, withdrawal/injection wells, production wells, and abandoned wells. The Pittsburgh Coal seam overlies the Swartz Field and Hunters Cave reservoirs and their respective protective areas. *See* 58 Pa. C.S. § 3203. If CPCC's coal mining activities in the strata above the Swartz Field and Hunters Cave storage reservoirs encounter and damage a well that had not been properly plugged or reconditioned, the damaged well could allow gas from the storage reservoirs to flood the mine, posing an extreme danger of asphyxiation or fire/explosion in the mine. *See* Department's Order to Equitrans Midstream Corporation at ¶ L (December 26, 2018). "On several occasions, [CPCC's] coal mining operations in the Harvey Mine or nearby coal mines have encountered abandoned wells[.] *Id.* at ¶ M.

The Department must require Equitrans Midstream Corporation to locate and plug gas wells within the storage reservoirs and their protective areas prior to underground coal mining activities. Alternatively, the Department must confirm that ownership of those wells has been transferred to CPCC and CPCC has plugged those wells before conducting underground mining activities.

Respectfully,



Sarah E. Winner, Esq.

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<sup>4</sup> According to the Department's Act 54 Yearly data, the Department is actively investigating 17,760 linear feet of stream above the Harvey mine for flow reduction or flow loss. <https://www.dep.pa.gov/Business/Land/Mining/BureauofMiningPrograms/Act-54-Yearly-Data/Pages/Streams.aspx>

Senior Attorney

[Sarah@centerforcoalfieldjustice.org](mailto:Sarah@centerforcoalfieldjustice.org)

Ethan Story, Esq.

Advocacy Director

[Ethan@centerforcoalfieldjustice.org](mailto:Ethan@centerforcoalfieldjustice.org)