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January 27, 2015

Sent by U.S. Mail, email, and in-person delivery

California District Mining Office
Pennsylvania Department of Environmental Protection
Attention: Joel Koricich, District Mining Manager
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Re: Comment on application by LCT Energy, LP for Coal Mining Activity
Permit No. 65131301
Proposed Rustic Ridge #1 Mine

To Whom It May Concern:

Mountain Watershed Association, through its undersigned counsel, submits the following comment on LCT Energy, LP's (LCT) application for a Coal Mining Activity Permit (Application) for the proposed Rustic Ridge #1 Mine (Mine). The Application contains numerous deficiencies, and the Department of Environmental Protection (DEP) should require LCT to address the deficiencies and then re-notice the revised application. *In its current form, the many significant deficiencies in the Application require DEP to deny issuing a permit.*

1. When DEP considers whether to issue a mining permit, Section 27 of the Pennsylvania Constitution requires DEP to prevent the infringement of Pennsylvanians' environmental rights and to protect public resources held in trust for current and future generations of Pennsylvanians.

Article 1 Section 27 of the Pennsylvania Constitution states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

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In the recent *Robinson Township, Washington County v. Commonwealth* decision by the Pennsylvania Supreme Court, the Court made clear that Section 27 creates individual environmental rights that government cannot infringe.¹ *Robinson Township* also made clear that all levels of government must act as trustees to adequately manage public natural resources through conserving and maintaining them, not for their own benefit but for the benefit of the public to whom they belong.

Government agencies like DEP have an obligation to assess whether its actions would cause an unreasonable “actual or likely degradation” of air or water quality, or of the natural or scenic values of the environment.² They cannot act in a way that infringes on the public’s right to clean air, pure water, or the preservation of natural, scenic, historic, or aesthetic values.³ As trustees of those natural resources owned by the public, DEP has a duty to ensure its proposed actions will “prevent and remedy the degradation, diminution or depletion” of the resources now for the current generation and in the future for future generations.⁴ Trustees like DEP must “deal impartially with all beneficiaries” of the trust, and must “balance the interests of present and future beneficiaries.”⁵

By requiring the preservation of natural, scenic, historic, and aesthetic values, the Constitution protects Pennsylvanians from any action by DEP that unreasonably causes actual or likely deterioration of those values.⁶ To the extent Section 27 requires DEP to be *more protective* than what is required by the water quality laws, it must comply with Section 27 and add any additional protections necessary to ensure the preservation of constitutionally-protected values.

2. DEP cannot issue a mining permit until LCT can establish that it has the rights to mine the coal that is part of the proposed coal acreage, and until LCT has noticed to the public the correct permit area.

An applicant must identify “[e]very legal or equitable owner of record of the coal to be mined....”⁷ An applicant must describe the documents that serve as the basis for its “legal right to enter and commence coal mining within the permit area.”⁸ DEP cannot issue a permit until the applicant has established that it has the right to actually remove the coal from the subsurface through a lease or some other property arrangement.⁹ While DEP is not required to

¹ 83 A.3d 901 (Pa. 2013).

² *Id.* at 951-955.

³ *Id.* at 952.

⁴ *Id.* at 952-959.

⁵ *Id.* at 959.

⁶ *Id.* at 953.

⁷ 25 Pa. Code § 86.62(a).

⁸ 25 Pa. Code § 86.64.

⁹ *Empire Coal Mining and Developing, Inc. v. DEP*, 1992 WL 43376, Dkt. No. 91-115-MR (Pa. Env. Hrg. Bd. Feb. 11, 1992), *4.

resolve property disputes, when a dispute is brought to its attention, it must insist that there be a resolution of the dispute *before* issuing the permit.”

LCT is proposing to mine 2,886.5 coal acres. In Module 5 Attachment 5.2, LCT lists a significant number of adverse coal interest holders. LCT has not established that it has the right to mine the coal held by those adverse interest holders, including the Loyahanna Watershed Association. DEP must require LCT to resolve that dispute *now* before moving forward with further technical review of the Application.

Applicants must provide adequate public notice of the proposed mining operation, and such notice must include information on the “exact location and boundaries of the proposed permit area[.]...”¹¹ LCT’s initial notice stated that it proposes to mine 2,886.5 coal acres, which includes acres held adversely. If LCT cannot resolve those property disputes and cannot obtain a property interest in the currently adversely held coal, then DEP must require LCT to re-notice a revised version of the Application that states the correct number of coal acres it can legally mine, and thus the correct permit area. Re-noticing is required because LCT’s original notice will have been inaccurate as to the boundaries of the proposed permit area.

3. DEP must require LCT to restart the public notice and comment process because LCT failed to advertise in a local newspaper of general circulation in the locality where mining activity will take place and where variances will be requested.

To notice the application to the public, an applicant must place “an advertisement in a local newspaper of general circulation in the locality of the proposed coal mining activities at least once a week for 4 consecutive weeks.”¹² For this Application, the coal mining activities are proposed to take place in Saltlick Township, Fayette County and Donegal Township, Westmoreland County. In addition, requests for variances must be advertised in “two newspapers of general circulation in the area once a week for 2 successive weeks.”¹³

LCT placed an advertisement in the Laurel Group of newspapers that is managed by Trib Total Media. The Laurel Group consists of the following newspapers: the Scottsdale Independent Observer, the Mt Pleasant Journal, the West Newton Times Sun, the Ligonier Echo, and the Jeanette Spirit. *None* of those newspapers is a local newspaper of general circulation in Saltlick Township. The only possible local newspaper of general circulation in Saltlick Township is the Daily Courier.

Because LCT failed to place an advertisement in a local newspaper of general circulation in Saltlick Township, there is a violation of Sections 86.13 and 86.102. DEP must require LCT to start the public notice and comment process again by advertising in the Daily Courier.

¹¹ *Rausch Creek Land, LP v. DEP*, 2013 WL 5676897, Dkt. No. 2011-137-L (Pa. Env. Hrg. Bd. Oct. 11, 2013), *8.

¹² 25 Pa. Code § 86.31.

¹³ 25 Pa. Code § 86.31(a).

¹⁴ 25 Pa. Code § 86.102(12).

4. DEP must deny the permit given the current Application because LCT has not proved that there will be no pollutional discharges, especially given the history of pollutional discharges in the immediate vicinity.

DEP has a duty to deny a mining permit in order to prevent pollution to waters of the Commonwealth.¹⁴ The applicant must affirmatively demonstrate, and DEP must find, that there will be no presumptive evidence of potential pollution to waters of the Commonwealth; absent that affirmative demonstration and finding, DEP must deny the permit.¹⁵

DEP has articulated this position clearly in legal briefs, such as the post-hearing brief that DEP filed with the Environmental Hearing Board in the appeal docketed at No. 95-161-R (brief filed June 28, 1996). That appeal arose after DEP properly denied deep mining permits to Rand Am, Inc. and Melcroft Coal Co., Inc. LCT has applied to mine the same coal seam in the same area – for many of the reasons articulated by DEP in its briefing in *Rand Am*, and by the Board in its affirmation of DEP’s permit denial, DEP must deny this permit based on the current Application.

Surface entries and accesses to the mine and barriers of coal left around the underground mine must be located and designed in a manner that prevents gravity discharges from underground mines.¹⁶ The operator must use the best technology currently available to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, and to achieve enhancement of the resources when practicable.¹⁷ Any underground mining must be planned and conducted so as to minimize changes to the prevailing hydrologic balance in the permit area and in areas adjacent.¹⁸ Operation plans must ensure the protection of hydrologic balance and the prevention of adverse hydrologic consequences.¹⁹

The coal barriers that LCT has proposed are totally inadequate to prevent gravity discharges from the mine and more generally to ensure protection of waters of the Commonwealth. This is especially disturbing given the lessons from the *Rand Am* appeal. In the 1990s, DEP correctly denied the mining permit requested by Rand Am because Rand Am failed to affirmatively demonstrate that the proposed mine would not result in post-mining pollutional discharges. DEP based its denial in large part on the fact that other coal barriers from past mining operations in the vicinity of the proposed mine were insufficient to prevent post-mining pollutional discharges. Given that Rand Am proposed narrower barriers than the barriers that failed in the past, DEP rightly denied the permit.

LCT is committing now precisely the same mistake that Rand Am committed then. DEP, therefore, has no choice but to deny LCT’s permit request. Like Rand Am’s proposed mine for

¹⁴ Pa. Const. Art. I Sec. 27; 35 P.S. §§ 391.1 (definition of “pollution”), 391.301, 391.315, 391.401-402.

¹⁵ Pa. Const. Art. I Sec. 27; 25 Pa. Code § 86.37(a)(3).

¹⁶ 25 Pa. Code § 89.54(a)-(b).

¹⁷ 25 Pa. Code § 89.65(a).

¹⁸ 25 Pa. Code § 89.52.

¹⁹ 25 Pa. Code § 89.36(a).

which DEP denied the permit, LCT's proposed mine is in the vicinity of former mines whose barriers failed. Like Rand Am's proposed mine for which DEP denied the permit, LCT is proposing barriers that are narrower than those failed barriers from the past. No proposed coal barrier is larger than 800 feet. In the *Rand Am* case, it was revealed that even barriers of 1,200 or 1,700 feet would not be appropriate given the geologic and other factors in the area. LCT's current proposed barriers are far too small and unjustified. Like Rand Am's proposed mine for which DEP denied the permit, LCT is proposing to mine in an area that contains known fractures that create a preferred pathway for flow of pollutorial discharges to the surface.

5. The proposed discharges into Champion Creek will cause impermissible pollution to the Indian Creek Watershed, Champion Creek, and downstream waters, ultimately leading to the destruction of numerous waters and their protected uses.

Champion Creek is a perennial stream, a tributary to the Youghiogheny River, and part of the larger Indian Creek Watershed. Designated a Cold Water Fishes use under the Pennsylvania Clean Streams Law, it flows through woods, agricultural areas, and residential neighborhoods. The proposed outflow from Rustic Ridge #1 mine into Champion Creek would destroy the uses of the creek in violation of the Clean Streams Law²⁵ and the Clean Water Act.²⁶ The Indian Creek Watershed, of which Champion Creek is an important feeding stream, is a public water source for 7,000 residents and many businesses.²⁷ The existing uses of surfaces waters must be protected.²⁸ The Department cannot issue a permit for the operation of an underground mine where that permit would allow the discharge of an exceptionally high quantity of water into, and at a rate which is detrimental to, Champion Creek and the Indian Creek Watershed because the discharge will overwhelm the stream and watershed and destroy value and uses, which is prohibited by the PA Clean Streams Law. Mountain Watershed Association retained an expert, Dr. Ben Stout, to evaluate impacts of the discharge on the stream, which demonstrates how harmful the discharge will be.²⁹ Therefore, the Department should deny the permit altogether.

The discharge will cause impairment of uses protected by the Clean Streams Law

The volume of water in the proposed discharge into Champion Creek – average 1700 gallons per minute; max 4458 gallons per minute – is an extremely large amount of water compared to Champion Creek's regular flow. This is not immediately clear from the face of the Application. The normal flow of Champion Creek is between 300-400gpm and 648 gpm.³⁰ The proposed flow between 1700 and 4458 gpm, which would make the flow immediately

²⁵ 25 Pa Code § 93.4c.

²⁶ 33 U.S.C. § 1342.

²⁷ May 30, 2014 letter from Indian Creek Valley Water Authority.

²⁸ "Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 25 Pa Code § 93.4a(b).

²⁹ Dr. Ben M. Stout III, Ph.D., *Biological Conditions of Headwater Streams in Fayette and Westmoreland Counties, Pennsylvania, with implication for additional mining discharges* (prepared on December 2, 2014) ("Stout Report") (attached as an exhibit).

³⁰ Stout Report at 11.

downstream between 2000 and 5106 gpm, depending on natural water conditions. Fully three quarters of the water in the downstream segment of Champion Creek would then be waters discharged from the mine workings.

This high rate of wastewater discharge will threaten the existing values and uses of Champion Creek. For example, an expert retained by MWA has identified a strong likelihood that quantities of water, as well as constituents in the water, will create unhealthy, "bank-full" conditions throughout a large portion of Champion Creek.² "Healthy, natural streams don't have continuous bank-full conditions, rather, bank-full floodplain overflow conditions typically occur once per year."²

Furthermore, the discharge poses a serious danger to the integrity of Champion Creek because of its high alkaline content. "The dogma that any mine discharge can be treated and released without consequence to a receiving stream is simply wrong. Like extreme acidity, extreme alkalinity ... emanating from mine treatment can seriously impair a receiving stream."² High levels of alkalinity have been seen to relate to negative ecosystem conditions in numerous coal-producing regions.²

While performing an evaluation of whether waters within Champion Creek meet the requirements for High Quality status, the expert identified that "[s]ome Champion Creek tributaries have benthic macroinvertebrates fauna suitable for High Quality designation, while other do not [sic]."² He adds,

It is interesting that stream communities indicative of High Quality at Site 17 occur in an abandoned, formerly intensive agriculture watershed. The stream meanders through an incipient wetland forest community perhaps 20 years post-abandonment. Streamflow is augmented through collapsing clay field tiles that emerge at or near the streambank. The influx of (virtual) groundwater moderates stream temperature and flow. The emerging old field woods provides for some sunlight but also leaves and sticks as energy sources. The result is a benthic community that is indicative of High Quality conditions owing to diversity and also abundance of pollution intolerant taxa, particularly mayflies. **Site 17 is an example of the potential for Champion Creek tributaries to naturally stream restore themselves when left unperturbed for a long period of time.**²

This recovery is in danger of being halted in its tracks. The Clean Streams Law protects both existing and designated uses, and has as one of its primary goals not only to eliminate current pollution levels but to restore streams "to a clean and unpolluted condition."² The efforts of the

² Stout Report at 11-12.
² Stout Report at 12.
² Stout Report at 11 (internal citation removed).
² Stout Report at 11.
² Stout Report at 10.
² Stout Report at 13 (emphasis added).
² 35 P.S. § 691.4(4).

community, and nature itself, must not be overlooked when considering the current and future value and uses of Champion Creek.

The discharge will cause "pollution" based on the Clean Streams Law

The Clean Streams Law prohibits the discharge of pollution into the waters of the Commonwealth.³⁵ There is no question that Champion Creek is a water of the Commonwealth. The proposed discharge is intended to allow for the dewatering of substrata in order to permit mining. As such, some of the water proposed to be discharged will be water in its natural, undisturbed chemical state, while the rest will be post-treatment discharges. In either case, it is not the chemical composition of the water that will exclusively create pollution, but also the *volume* that is of concern.

Under the Clean Streams Law, pollution includes contamination of waters by alteration of physical and biological properties, not just chemical.³⁶ While it is true that even discharges allowed by the Clean Streams Law will always increase the volume of the receiving water (when comparing downstream-from-discharge volume to upstream-from-discharge volume) this does not mean that increases in volume should be considered acceptable regardless of the proportion of the increase. As discussed, the comparison of downstream-from-discharge volume to upstream-from-discharge volume would be 4:1. The Department cannot, in accordance the Clean Streams Law, allow this extreme level of physical alteration to the receiving water.

Furthermore, this discharge would constitute biological pollution prohibited by the Clean Streams Law. As discussed, the increase in flow would allow for near-constant bank-full conditions within Champion Creek. Bank-full conditions are responsible for "great erosion and enlargement of steep, incised channels."³⁷ When these conditions occur naturally, they are a necessary part of a streambed's "life cycle," providing an opportunity for steady changes over time that provide for the life within the stream. However, when bank-full conditions become more common, or, as in this situation, near-constant, they cause flooding, erosion of the stream bed resulting in widening that could endanger buildings and trees along the stream's course, and can even alter a stream's course.³⁸ These changes would be devastating to the biology in Champion Creek.³⁹

The discharge would violate Mining laws governing the protection of the Commonwealth's waters.

³⁵ 35 P.S. § 691.401.

³⁶ 35 P.S. § 691.1 and 25 Pa. Code § 691.1.

³⁷ U.S. Environmental Protection Agency, Hydrologic Processes: Bank-full Discharge, (Jan. 23, 2015, 11:54 AM), <http://water.epa.gov/scitech/datatit/tools/warsss/bank-full.cfm>.

³⁸ University of Minnesota Sustainable Forests Educational Cooperative, *How Land Use Change Changes Bank-full Flow*, available at http://sfec.cfans.umn.edu/prod/groups/cfans/@pub/@cfans/@sfec/documents/article/cfans_article_437497.pdf (last accessed Jan. 27, 2015).

³⁹ Stout Report at 12.

The Department must not issue a permit allowing for this discharge because it would be in violation of Pennsylvania regulations governing mining in the Commonwealth. As discussed, the discharges proposed by the permit would amount to destructive physical and biological pollution, in violation of the Clean Streams Law. As such, the applicant has not shown that there is no presumptive evidence of potential pollution of the waters of the Commonwealth.[»] The applicant has not shown that underground mining activities are planned to minimize changes to the prevailing hydrologic balance in the areas adjacent to the permit area.[»] The discharge will further violate Pennsylvania's mining regulations because it will not protect fish, wildlife, and other related values, as required.[«]

The Department must act to protect Champion Creek and Indian Creek because Acid Mine Drainage has already injured it from past mining in the area

Pursuant to the Clean Streams Law and the Constitution of the Commonwealth of Pennsylvania, the Department may not permit[»] a discharge that will destroy the uses of a stream. In the UMCO case, the Commonwealth Court held that the Clean Streams Law authorizes the Department to limit approval of a mining application where it can be shown that mining activity will lead to the destruction of a stream and its designated uses.[«] The Clean Stream Law also requires the Department to protect present and future uses of streams when evaluating any project.[«]

Champion Creek and the Indian Creek watershed have been the site of mining activities since the 1800s. During the Pre-Primacy period (before state regulation of coal mining activities in the 1970s) coal mining operations both large and small took place throughout the area, usually without any attention paid to the environmental impacts of water runoff from these workings. One particularly problematic mine was the Melcroft #1 mine, which was discharging into the upper Indian Creek Watershed. By the 1920s the acid mine drainage had become such a problem that a court enjoined the Melcroft Coal Company and other coal companies from discharging into that watershed. MCC developed a wastewater management scheme that involved a wooden flume used to transfer the runoff to another water body. The flume operated until the mid 1970s when it degraded beyond the point of repair.

[»] This is a violation of 25 Pa. Code § 86.37(a)(3).

[»] This is a violation of 25 Pa. Code § 89.52(a).

[«] Under the current scheme, the propensity for damage to the environment presents a near insurmountable obstacle for the permit applicant, because they could not operate in accordance with 25 Pa. Code § 89.65.

[«] "The department ... in issuing orders and permits, ... shall, in the exercise of sound judgment and discretion, and for the purpose of implementing the declaration of policy set forth in section 4 of this act, consider, ... the present and possible future uses of particular waters." 35 P.S. § 691.1(a)(2).

[«] *UMCO Energy, Inc. v. DEP*, 938 A.2d 530 (2007)

[«] 35 P.S. § 691.5(a)(2).

After the flume was destroyed, discharges began anew, resulting in approximately 184 million gallons of acid mine discharge into Indian Creek from what is known as the "Kalp Discharge." This outflow is now being controlled by the Anna and Steve Gdosky Indian Creek Restoration Project (also called the KALP AMD Treatment System). This facility was constructed at a cost of \$1.1 million and has an expected annual operating cost of \$24,000.

In 1994, the Department refused to issue a permit to Rand Am Inc. and Melcroft Coal Company, Inc. to mine a functionally-similar area on the basis that the proposed mining plan would fail to provide sufficient protections to the already-injured Indian Creek and Champion Creek watersheds.*

The Champion Creek and Indian Creek watersheds have been in a state of recovery since the construction of the first water treatment system. Because of these efforts, the quality of the watershed is, on balance, better every year than it was the year before, since the initial plume of polluted water was successfully drawn down. In 1994, the Department gave tacit recognition to this fact. If the Department were to allow this mining activity, now, it would result in the first significant degradation of the watershed in recent history and would destroy these waters' reasonably anticipated rehabilitation. Over a million dollars in both public and private funds have been spent to address the damage to this watershed. LCT's proposed discharged would overburden the treatment system to the point of total collapse, jeopardizing the watershed and the people who live within it.

6. LCT has not adequately responded to concerns about noise, as required by the Nuisance Control Plan portion of Module 16 § 16.3.

LCT has not adequately considered the impact that noise from its ventilation fans will have in the area surrounding the Mine. In Module 16 LCT states, "The combination of the remoteness of the surface activity site and the sparseness of the population will make noise a non-issue for this project." The comment is logically unsound and belies a disregard for the wellbeing of the local population. If the population surrounding the facility is sparse, there is still a population to be bothered by excessive noise. Despite being "remote" the Mine is surrounded, however sparsely, by those who live in "remote" areas. The Department should refuse any permit where the Application incorporates the assumption that only noise impacts experienced in densely occupied, centrally located communities are worthy of more than a cursory dismissal.

The Application is worryingly deficient in terms of technical information, providing nothing about the size, sound power (or acoustic power), capacity, or proposed location of future additional ventilation fans, which will be installed as the mining proceeds. As such, it has been nearly impossible to determine the impact that these fans will have on the surrounding population. Pennsylvania provides a right to protection from excessive industrial noise⁶. The

* This decision was later upheld by the Environmental Hearing Board. 1997 EHB 351.

⁶ "The utmost protection that persons dwelling in an industrial community are entitled to from smoke, odors, gases, smudge, and noises is from such things in amounts that are unnecessary and unreasonable under the circumstances, and if devices or more efficient management can

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noise from mine ventilation fans is usually a low frequency sound capable of traveling great distances without dissipating and can even penetrate into buildings due to their long wavelengths. It is loud enough to disrupt the normal lives of regular people. These mine fans operate 24 hours a day, 365 days a year. They are known to be disruptive to people of normal hearing sensitivity and can create a significant sleep disturbance for those living in the area. Because the potential injuries caused by these fans is great, it is important for the residents living in the area to be aware of the full impact of these activities so that they can take the appropriate protective measures.

* * *

Submitted for Mountain Watershed Association, home of the Youghiogheny Riverkeeper,

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reduce smoke, odors, gases, smudge, and noises and vibrations at a reasonable expense and the owner of the plant fails to avail himself of them, smoke, noises, etc., must be regarded as 'unnecessary' and 'unreasonable.'" *Hannum v. Gruber*, 346 Pa. 417, 424 (Pa., 1946), *citing Ebur v. Alloy Megal Wire Co.*, 155 A. 280 (Pa., 1931).