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August 28, 2018

Pennsylvania Department Of Environmental Protection
Office of Environmental Justice
Attn: Allison Acevedo, Esq., Director of Office of Environmental Justice
P.O. Box 7732
Harrisburg, PA 17101

Re: Environmental Justice Public Participation Policy
Document No. 012-0501-002

Dear Ms. Acevedo,

On behalf of the Center for Coalfield Justice ("CCJ"), I respectfully submit the following comments in response to the Pennsylvania Department of Environmental Protection's ("Department") request for public input on its Environmental Justice Public Participation Policy ("Draft Guidance"). The undersigned organizations join these comments. We appreciate the opportunity to provide comment on the Draft Guidance and believe that there are a number of components that can and should be incorporated into a comprehensive plan to advance environmental justice goals in the years to come.

I. In order for the Office of Environmental Justice to achieve any measurable success, the Department must incorporate environmental justice considerations into existing permitting procedures.

The Department's Draft Guidance suggests that permit applicants may not need to comply with the various requirements outlined in the document. CCJ understands that guidance or policy documents published by the Department are not intended to create new law and are therefore not binding. However, CCJ also believes that various environmental statutes and their implementing regulations and Article I, Section 27 of the Pennsylvania Constitution provide the Department with plenty of authority to incorporate environmental justice considerations into existing permitting procedures.

The Department's Office of Environmental Justice ("OEJ") has been largely unable to further the ultimate goal of environmental justice because of the Department's permitting process that both favors development over environmental protection and tends to ignore the negative impacts that development can have on surrounding populations. Without excusing corporations of responsibility for their actions and the

resulting environmental harm, the reality is that industry operates pursuant to statutes, regulations, and permitting policies developed by the Department.

Unfortunately, the Department has done little to integrate environmental justice considerations into existing permitting procedures. Failing to make these changes has and will continue to result in facilities being awarded permits for activities that further burden environmental justice communities. The ease with which companies have been able to obtain permits for the construction, operation and modification of facilities that disproportionately burden minority and low-income communities is alarming.

Under the current permit application process in Pennsylvania, the Department appears unwilling to look beyond the narrow permitting criteria. Consequently, even if a broader analysis revealed multiple environmental justice issues, the Department may not alter its permitting decision. The Department has adopted a rationale that directly undermines its own Office of Environmental Justice: if a facility satisfies the minimum permitting requirements, as currently interpreted by the Department, then the permit will be issued regardless of other effects, including allegations of disproportionate impact. As a result, environmental justice communities continue to shoulder a disproportionate share of environmental burdens. As long as the Department's permitting policies continue to place a greater emphasis on development over the prevention of harmful health and environmental impacts, environmental injustice will continue. However, there are specific changes that can be made to improve the current permitting policies, providing for a better balance between development and the protection of human and environmental health.

The current permitting procedures ignore the importance of requiring some kind of environmental justice analysis at the permit application stage. The Department must address environmental justice concerns during both technical guidance development and permitting processes. Many of Pennsylvania's environmental laws and regulations have environmental justice implications imbedded within them.

By way of example, the Pennsylvania Supreme Court has interpreted the state constitution as requiring a balancing of environmental harms against social benefits, and supporting or requiring procedural safeguards. This interpretation strengthens agency efforts to account for, and mitigate, adverse environmental impacts upon Environmental Justice communities. In *Eagle Environmental,* a proponent of a landfill challenged the treatment of its permit application under a regulation's harm/benefits test, which required the Department to weigh the public benefits of a landfill against the articulated and potential environmental harms to the environment, public health and safety. *Eagle Environmental, L.P. v. DEP*, 884 A.2d 867 (Pa. 2005). The Pennsylvania Supreme Court held that the balancing analysis was a "flexible and effective means to implement and enforce" the provisions of the Solid Waste Management Act. The Court went on to find that the regulation at issue was strengthened by the Act's reference to the constitutional guarantee of the people's right to clean air, pure water and to the preservation of the

natural, scenic, historic and aesthetic values of the environment. *Id.* at 879 (citing Pennsylvania Constitution, Art. I, § 27).

Importantly, *Eagle Environmental* and the landfill regulations themselves to not expressly reference "environmental justice." OEJ should perform an in-depth review of various environmental statutes. CCJ believes that such a review would reveal numerous legal means to incorporate and prioritize environmental justice considerations into planning, permitting and environmental review using existing law.

II. The Office of Environmental Justice should increase the likelihood that communities will be apprised of projects with potentially adverse consequences.

Community members cannot effectively participate in the environmental decision-making process without dependable access to information about existing and proposed environmental activities of industry. Dependable access to information is also critical to the ability of community members to know what environmental risks they may face or are currently facing in their communities. Information empowers people with knowledge about environmental conditions in places where the live, work, or recreate.

The OEJ should seek to increase transparency and public participation. The policy must include a robust plan to educate and inform communities when the Department is making permitting decisions. Ensuring that mechanisms are put in place to provide early notification of activities affecting overburdened communities is vital. Environmental Justice communities enter the environmental decision-making process with fewer resources than other stakeholders. These community members often have less time, less information, and less specialized knowledge about the legal, technical, and economic issues involved. Meaningful engagement requires educating communities about application requirements and procedures, including the regulatory requirements for permit approval and enforcement procedures.

The draft Guidance Document explains that "[a] public participation strategy should be developed between DEP's OEJ and appropriate regional or district office program, Community Relations Coordinators, and Local Government Liaisons for each application." Draft Guidance at 5. While CCJ believes that flexibility in developing and implementing the public participation strategy is necessary to meet the needs of the particular community, CCJ encourages the Department's Office of Environmental Justice to develop and publish minimum requirements for the public participation strategies.

The Department should increase the likelihood that Environmental Justice communities will be apprised of projects with potentially adverse consequences by requiring permit applicants to submit a written public participation plan describing how

the applicant will identify and notice stakeholders, produce easily understood project information at various stages of the application process, schedule public meetings that are convenient for residents of the affected community, and establish various venues where the community can review permit application documents. The Department should review and approve the public participation plan as part of its administrative completeness review of permit applications. In addition, the Department should require permit applicants to submit progress reports, as well as a final certification that it has complied with the approved public participation plan, prior to final approval of the permit. This type of policy would have the effect of internalizing the environmental costs of projects on project proponents. It would also ensure an open dialogue between permit applicants and community members throughout the permit application process.

Finally, since the success of such a strategy is largely dependent upon the OEJ's ability to identify and address gaps that may lead to environmental inequities or impede the achievement of environmental justice, the OEJ should also prepare and publish annual implementation reports.

III. Permits related to oil and gas development should be considered trigger permits.

The draft guidance document defines Trigger Permits as "permits relating to regulated activities that have traditionally led to significant public concern due to potential impacts to the environment, human health, and communities." Draft Guidance at 3. Surprisingly, according to Appendix A of the Draft Guidance, permits related to oil and gas development are not considered trigger permits. CCJ believes this is unacceptable.

Today's oil and gas operations are what landfills and toxic dumpsites were to the early environmental justice movements. The industrial operations conducted on oil and gas sites pose comparable, if not greater, threats to residents' health, safety and economic security. Oil and gas development has a disproportionate impact on poor, rural communities. It is not surprising that rural, low-income communities have more drilling operations – in sparsely populated areas there is more space to locate a well, and rural residents are far removed from economically and politically powerful urban centers. Evidence suggests that the degree to which oil and gas drilling imposes environmental risks on the poor justifies the environmental justice concerns articulated by the Pennsylvania Supreme Court in *Robinson.* See *Robinson Twp.*, 83 A.3d 980.

The financial implications of oil and gas operations are no less frightening than the environmental ones. National lenders have become more cautious about financing mortgages for properties located near oil and gas operations. *See* https://www.citylab.com/equity/2013/08/how-fracking-boom-could-lead-housing-bust/6588/. Likewise, local mortgage brokers in Pennsylvania have become increasingly interested in the location of oil and gas wells or water impoundments relative to an

applicant's property. *Id*. This raises real concerns for prospective homebuyers and low-income applicants living in rural areas are particularly vulnerable. The Federal Housing Administration (FHA) prohibits lending to homes within three hundred feet of a property with an active or planned drilling site. *Id.* Moreover, FHA's appraisal process recommends caution or rejection of loan applications for reasons likely associated with current or future oil and gas operations. *Id.* Beyond the environmental risks associated with oil and gas development, industrial activities on a neighbor's land make property owners vulnerable to negative economic impacts.

In addition to the dramatic environmental hazards and economic risks associated with oil and gas operations, local residents must cope with the secondary impacts on their communities' roads, schools, fire, police and emergency response systems. Given the disproportionate effects of oil and gas operations on low-income rural communities, this kind of industrial development deserves a place in the Department's Draft Guidance. The gravity of the environmental and economic issues associated with oil and gas development justifies inclusion of related permits on the Trigger Permit list.

IV. The Area of Concern should not be limited to a one-half mile radius from the proposed activity.

The Draft Guidance defines the "Area of Concern" as the geographic area around the proposed permit activity with potential impact to the environment or community. Draft Guidance at 1. The Draft Guidance later states that "[t]he Area of Concern is identified by a radius of one-half mile from the center of a proposed permit activity or, where an activity is not centralized, an area extending one-half mile beyond the boundary of the proposed activity."[1] Draft Guidance at 4. It is unclear what the Department's rationale is for limiting the Area of Concern to a one-half mile radius. Still, the Department acknowledges that areas and communities outside of the this one-half mile radius could be impacted by a particular permitted activity when it states that the Area of Concern should also include "other areas or communities that may experience reasonably anticipated impacts such as noise, subsidence, vibration or odor associated with the type of facility proposed." Draft Guidance at 4.

The Section II(B)(1)(b) of Draft Guidance makes clear that the policy will only be implemented "[i]f there is an EJ Area, entirely or in part, that falls within the Area of Concern and the permit application is a trigger permit[.]" Draft Guidance at 5. CCJ respectfully requests that the Department clarify that the Area of Concern in Section II(B)(1)(b) is not limited to the one-half mile radius. It must include "any area of impact for which DEP is authorized to require analysis" and "other areas or communities that may experience reasonably anticipated impacts[.]" Draft Guidance at 4.

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[1] It is not clear what kind of proposed permit activity would qualify as centralized and what kind of activity would not be considered centralized.

V. The Office of Environmental Justice should improve research and data collection methods related to determining the cumulative environmental, social and economic impact of industrial activities.

Generally speaking, information is critically important to the development, application and enforcement of environmental law and policy. An effective environmental protection system relies upon environmental decision makers and stakeholders having access to the necessary information. Access to information is particularly important, and lack of access particularly acute, in areas disproportionately burdened by harmful industrial nuisances. The Department cannot effectively regulate activities without access to information about how those activities affect human health and the environment. Information is necessary to accurately define the causes of environmental degradation and to design appropriate solutions and programs.

The OEJ should work to improve research and data collection methods related to determining the environmental, social and economic impact of industrial activities on disadvantaged communities. In order to improve information gathering, the OEJ should develop strategies and build a strong scientific foundation for supporting environmental justice and conducting disproportionate impact analyses, particularly methods to appropriately characterize and assess cumulative impacts. Since many environmental statutes require permit applicants to evaluate cumulative impacts, the Department's permitting staff should work closely with OEJ staff to collect and evaluate existing cumulative impacts based upon the information submitted by project proponents.

VI. OEJ's environmental justice strategy should focus on both decreasing impacts and increasing benefits.

Lastly, the environmental justice strategy should focus on both decreasing impacts and expanding benefits. For instance, access to parks, open spaces, and green areas is vital to healthy communities. Equally as important is revitalization through environmental cleanup and development of previously impacted sites. By addressing the disparity in part through expansion, rather than redistribution, OEJ would have the opportunity to work creatively with the community and collaborate with other state agencies, which would ultimately increase the Office's visibility and accessibility.

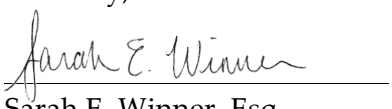
One way to increase benefits is to establish environmental benefit districts, communities identified as disadvantaged based on environmental, health or economic factors, including consideration of local school district ratings. The concept of environmental benefit districts acknowledges that many of the needed programs to protect and revitalize communities already exist, although not focused or coordinated in many instances. Establishing environmental benefit districts would provide much needed geographic focus and identification of needs to make existing programs more successful. It would also allow OEJ to identify much needed programs that do not

currently exist and work with other state agencies to launch such programs.

OEJ should also establish a fund for community environmental projects. Such a fund should receive funding from Department enforcement actions. CCJ suggests that thirty percent of environmental penalties collected should be diverted into the community fund to finance projects that mitigate or eliminate pollution; remove risks to human health or the environment; or improve wildlife habitat and recreational opportunities. CCJ further suggests that all community environmental projects should benefit the community in which the underlying violation occurred.

Thank you for your consideration. If you have any questions, please contact me anytime.

Sincerely,



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