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**Written Testimony of Adam H. Cutler, Director of the Public Health and Environmental Justice Project of the Public Interest Law Center of Philadelphia,
to the Majority Policy Committee of the Pennsylvania Senate
Regarding the Pennsylvania Department of Environmental Protection Permitting Process**

My name is Adam H. Cutler, and I am an attorney at the Public Interest Law Center of Philadelphia (the “Law Center”), where I serve as the Director of the Public Health and Environmental Justice Project. The Law Center was founded in 1969 as the Philadelphia affiliate of the Lawyers’ Committee for Civil Rights Under Law and was incorporated as an independent non-profit in 1974 by the Philadelphia Bar Association. The Law Center is dedicated to advancing the Constitutional promise of equal citizenship to all persons irrespective of race, ethnicity, national origin, disability, gender or poverty. The Law Center uses public education, continuing education of clients and client organizations, research, negotiation and, when necessary, the courts to achieve systemic reforms that advance the central goals of self-advocacy, social justice and equal protection of the law for all members of society.

The mission of the Law Center’s Public Health and Environmental Justice Project (the “EJ Project”) is to provide legal and technical expertise and assistance to communities of color and of poverty in Southeast and Northeast Pennsylvania that seek to overcome disproportionately distributed burdens of environmental impacts. We engage and empower residents and other stakeholders in these overburdened communities to improve the environmental and socioeconomic conditions that affect their daily lives. The EJ Project currently serves environmental justice (“EJ”) communities in Delaware County, Luzerne County, Montgomery County, and Philadelphia.

It is very important that the Majority Policy Committee consider the unique concerns of EJ communities, as well as the interests of the general public, in its evaluation of the Pennsylvania Department of Environmental Protection’s (“DEP”) permitting process. My written testimony is not intended to suggest that efforts to improve the pace of DEP’s permitting process are unwelcome. However, I wish to impress upon the Committee that it is crucial not to sacrifice community involvement to the interest of streamlining DEP permitting.

Community involvement – public input – produces good results under DEP’s permitting process. It allows for an open and frank exchange between DEP and developers or facility owners, on the one hand, and the communities affected by permits on the other hand. Public input thereby provides DEP and permit seekers with an early opportunity to clarify plans and debunk frequently unfounded rumors that swirl in a community whenever a major new project is proposed. Community involvement at early stages has also saved the Commonwealth money and time by exposing problems in permits that have not been foreseen by the permit seeker or the Department. In a world in which public confidence in the transparency of our governmental institutions is falling ever farther from its ideal heights, robust public input in DEP’s permitting process is a critical tool for reversing that slide in the Commonwealth. As my testimony will illustrate, the often insignificant delays in the permitting process that might accompany community involvement are a small price to pay for the benefits that result. The permitting process timeline should not be shortened at the expense of omitting this valuable opportunity for the residents of EJ communities and the general public.

DEP’s Environmental Justice Public Participation Policy

DEP defines environmental justice as the fair treatment and meaningful involvement of all people with respect to the identification of environmental issues, and the development, implementation, and enforcement of environmental policies, regulations, and laws. Broadly speaking, EJ communities are those residential communities that bear a disproportionate share of historic and continuing environmental impacts, such as siting and zoning decisions, significant pollution sources, or poor environmental enforcement. Residents in EJ communities are typically lower in socioeconomic status and have little political influence – and thus, no effective way to have their voices heard in the political or regulatory process. EJ communities are very often communities of color, and sometimes are also challenged by language barriers. DEP has defined an “EJ Area” explicitly by reference to demographic information, such that a census tract with 30% or higher minority population or 20% or more of its population living under the federal poverty level would qualify.

Pursuant to Title VI of the Civil Rights Act of 1964, federal and state governmental entities are prohibited from taking actions that discriminate on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. As a state agency that receives federal funds, DEP is subject to the restrictions of Title VI. Accordingly, in 2004 DEP established the Environmental Justice Public Participation Policy, Document ID No. 012-0501-002 (the “Enhanced Participation Policy”), to expand the public input process for EJ communities under certain defined circumstances. The Enhanced Participation Policy is implemented when a facility owner seeks to obtain or to renew certain types of permits (including, without limitation, air permits for major sources, NPDES permits for industrial wastewater facilities discharging over 50,000 gallons per day, or waste permits for landfills or waste processing facilities), and the facility or activity that is the subject of the permit is located within a half-mile radius of an EJ Area – that is, any census tract with 30% or more minority population or 20% or more of its population living under the federal poverty level. The Enhanced Participation Policy does not supersede the Department’s Money Back Guarantee Program and is not intended to have an effect on the identified tasks in the permit review process or the number of days to complete those tasks.

When the Enhanced Participation Policy is triggered, DEP requires that information be disseminated, in easily understandable form (and, as necessary, in other languages), to the members of the affected community describing the project and its scope. The Enhanced Participation Policy also requires that public input meetings be held in the affected community so residents and other community stakeholders can obtain information about the proposed project or permit. Further, public input meetings are an opportunity – perhaps the first, and perhaps the only opportunity – for the applicant to better understand the issues that the affected EJ community faces on a day-to-day basis. These issues can range from existing poor health in the community, to concerns about ongoing pollution or contamination, to the economic opportunities that the proposed project might offer the community. Separate and apart from any public comment requirements that may or may not apply to the general public, EJ community members are typically given time to submit to DEP written questions and comments on the proposed permit. DEP takes these questions and comments, as well as input from the public meeting, into

account in its decision-making process. As a result, the permitting process may take additional time in order for DEP to respond to the questions and comments, while working with the applicant to address any and all valid concerns raised during the Enhanced Participation process.

The Enhanced Participation Policy expressly states DEP's intention to involve the permit applicant at an early stage in the Enhanced Participation process. Although it behooves the applicant to cooperate with the DEP and the affected community so that a public input meeting may be scheduled at the earliest opportunity, my experience with Enhanced Participation over the past two years has been that some applicants are not eager to participate in the public input process. Applicant recalcitrance can itself create delays in resolving applications for permits or renewals.

Public Input Identifies Unforeseen Problems in Permits

When DELCORA recently applied to DEP for re-rating to increase DELCORA's wastewater treatment capacity at its treatment facility in the City of Chester, Delaware County, it also received a permit amendment allowing it to bring a million gallons per day of wastewater from Marcellus Shale hydrofracturing ("fracking") to Chester for treatment – many miles away from the Marcellus Shale activities in the western and central portions of Pennsylvania. The wastewater from fracking – "frac water" – is known to contain chemicals and pollutants that have proven difficult to treat through regular treatment methods.

In this instance, the community – indeed, the public in general – was *not* given an opportunity for comment on the aspect of the permit relating to acceptance of frac water. In its apparent haste to dispose of the permit application, no one at DEP stopped to evaluate the serious environmental concerns regarding DELCORA's ability to treat frac water safely and effectively, or the impact on public health in Chester of a massive increase in the diesel truck traffic – and thus the ambient air pollution – resulting from the proposal to haul a projected million gallons of wastewater per day into the city. As a result, Chester residents and local and regional environmental groups had to operate outside of the Enhanced Participation Policy, through local media and through public comment at a meeting of the Delaware County Council, to make their

voices heard. Fortunately, DEP Secretary Hanger correctly and promptly recognized that the permit amendment for the acceptance of Marcellus Shale wastewater was granted prematurely. DEP asked DELCORA to withdraw the portion of the application relating to Marcellus Shale wastewater to accurately reflect that it was not applying to accept frac water, and DEP issued a corrected permit. As a result of DEP's failure to allow for public comment and Enhanced Participation in the first place, DELCORA also had to correct its application to the Delaware River Basin Commission ("DRBC") for approval of the desired re-rating of the Chester facility. That application remains pending before the DRBC, where consideration was postponed from DRBC's March 2010 meeting until the May 2010 meeting (at the earliest). Had the normal public comment and Enhanced Participation policies been followed, it is likely that all of DELCORA's permitting for the re-rating of the Chester facility would now be complete, and an embarrassing public spectacle for both DELCORA and DEP could have been avoided.

Even though the permit process may have been extended as a result, these opportunities for input provided Chester residents with pertinent information about the developments in their community. Most importantly, as expressly evidenced in the DELCORA case, community involvement – notwithstanding the belated opportunity – prevented an inaccurate and premature permit amendment from being pushed through the process and potentially harming the community.

Public Input Can Lead to Win-Win Solutions That Are Sensitive to Community Interests

In the Hunting Park neighborhood of Philadelphia, people suffer from disproportionately poor health and environmental impacts. Poor air quality, urban stormwater runoff, numerous vacant and/or abandoned lots, and close proximity to industrial and solid waste processing facilities are some of the serious problems faced by this densely populated residential neighborhood. So when an existing processing facility, which is located close to schools and a densely populated residential community, sought to nearly double its daily permitted capacity of construction and demolition waste, residents relied on DEP's Enhanced Participation Policy to register their concerns and objections. As a result, the facility owner chose to withdraw its request for additional capacity, while making community-friendly changes to its truck routes to

avoid residential streets. Since then, the facility owner has met with community residents to discuss ways to work together to improve the environmental conditions in the neighborhood. More recently, through the Enhanced Participation process, Hunting Park residents worked with another facility that was seeking a permit to develop a list of commitments that will respect the community's health and environment – an arrangement akin to a community benefits agreement. Without meaningful public participation in the DEP permitting process, Hunting Park residents would not have achieved these positive outcomes, and a community whose health is already adversely impacted would have been subjected to further public health and environmental harms. The facility owners may have incurred some delay in obtaining their permits, but that minor delay was a small price to pay in light of the significant good created in the community through DEP's Enhanced Participation Policy.

Residents Use the Opportunity for Public Input and Comment

A recent Enhanced Participation process arising from a permit application in Hazelton, Luzerne County, provided DEP with important information regarding a proposed experimental mine reclamation project. The public input meeting held in November 2009 gave community members the opportunity to hear and speak about possible harms and benefits from the project, and DEP accepted written public comments for an extended period of time. DEP considered over 700 comments submitted by the community and other interested parties – pro and con – regarding their concerns and interests. This process took over three months, but the time was invaluable to the members of the community who otherwise would not have had a voice in the process.

In Chester, the Enhanced Participation Policy has provided opportunities for community residents to comment on the permits for the new soccer stadium and on DELCORA's pending application to increase its wastewater treatment capacity. The meeting for the soccer stadium permit provided an opportunity for Chester residents to voice concerns about the impacts of construction on a neighboring Superfund site, and about the responsible remediation of existing contamination at the stadium site and the proposed mixed-use development site to the south. As a result, the developers' environmental consultant provided detailed information about the safety

of the construction and remediation processes and provided assurances that the existing remedy at the former Superfund site would not be disturbed below the clean fill cap currently in place.

Taking the Time for Public Participation Allows All Interested Parties to Strike an Appropriate Balance Between Development and Environmental Protection

Finding the balance between economic development and job creation on one hand, and public health, community interests, and environmental protection on the other, requires that the DEP take the time to hear from all concerned parties, not just those who seek permits. Although community members do not want to create undue delays in the permitting process, the fact remains that these residents will have to live, on a daily basis, with the consequences of DEP's permitting decisions. This simple truth necessitates the full participation of residents of EJ communities in the decision-making process. Particularly when DEP is relying more and more frequently on permits by rule (which require public notice but no application process) and General Permits (which require public notice and a streamlined application, but do not involve a particularized assessment of the proposed project in the context of its community), the need for robust and vibrant public comment on projects in EJ communities, and indeed in any communities in this Commonwealth, is absolutely critical.

A currently pending permit in Eddystone Borough, Delaware County, is illustrative. There, a pending proposal to relocate a metal-shredding facility from Southwest Philadelphia to a site along the Delaware River could have adverse impacts on nearby residential areas, including, among other things, air and water pollution from the facility's operations, increased truck traffic to and from the facility, and soil and groundwater contamination from outdoor scrap metal piles. Because of the potential negative health and environmental effects that could result from the proposed relocation, it is important that community members be provided every opportunity to participate meaningfully in the permitting process. Only through residents' voices can a community truly ensure that responsible development occurs.

Rushing to a permitting decision without meaningful public participation from community members may force individuals and families to bear a disproportionate share of public health and environmental risks. As such, it is essential that this Committee not allow

perceived efficiencies to trump the legitimate environmental, health, and community development concerns of real people – your individual constituents. I urge this Committee to preserve the voice of the residents of Pennsylvania’s environmental justice communities. I urge this Committee not to disturb DEP’s Enhanced Public Participation Policy or public notice and comment periods in the Committee’s laudable effort to assess ways to improve DEP’s permitting process. In your exploration of ways to streamline permitting decisions, do not hamper a public participation process that provides real environmental, health, and civic benefits for all residents of our Commonwealth.

Thank you once again for this opportunity to provide my written testimony to the Committee. I would be happy to answer any questions that the Committee Members might have. You may contact me by phone at (267) 546-1304, or via e-mail at acutler@pilcop.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Adam H. Cutler". The signature is fluid and cursive, with the first name "Adam" and last name "Cutler" being clearly legible.

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