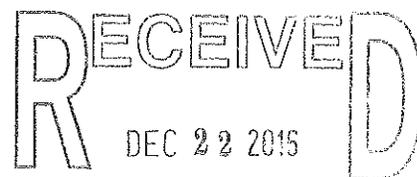


Dec. 22, 2016

Delivered by hand-delivery

Department of Environmental Protection
Clean Water Program
400 Waterfront Drive
Pittsburgh, PA 15222-4745



Water Management
DEP, Southwest Regional Office

Re: Comment on draft NPDES permit No. PA0002208.

To Whom It May Concern:

Louise Loncar, through undersigned counsel, submits this comment on a draft NPDES permit (Draft Permit), No. PA0002208, to discharge to State Waters for the Shell Chemical Appalachia Petroleum Complex, located in Potter Township, Beaver County.

DEP noticed the Draft Permit on September 3, 2016. Due to public requests, DEP held a public hearing on the Draft Permit on December 15, 2016 where individuals and organizations were permitted to present testimony on the Draft Permit. Through her counsel, Louise Loncar presented testimony at the hearing concerning already impacted receiving streams running through her property, and impacts to her groundwater which all appear to have resulted from Shell's recent construction activities. This written comment is purposed to elaborate on and to supplement Ms. Loncar's hearing testimony.

The Draft Permit violates the Clean Water Act, the Clean Streams Law (water quality laws), and the Pennsylvania Constitution. DEP must either revise it significantly or must deny it.

I. Background

Shell Chemical Appalachia is seeking to amend a NPDES permit for Shell's proposed petrochemical plant. The draft permit notices existing discharges of groundwater and storm water, and the draft permit would authorize new industrial waste and storm water discharges into receiving waters Rag Run (stream code 33949), Poorhouse Run (stream code 33932), and the Ohio River (stream code 32317).

A. Related Construction Activities

In order to construct their plant, Shell engaged in significant construction activities that included relocating a portion of SR 18, and which involved a project area of approximately 665 acres. Among other impacted watercourse and wetland within this area, Shell was permitted to:

- Remove several existing culverts and pipes from Poorhouse Run and Rag Run;
- Construct and maintain stream enclosures that will enclose sections of Poorhouse Run and Rag Run;

- Construct and maintain a replacement of an existing stream enclosure of another section of Rag Run with reinforced concrete pipe;
- Reconstruct and maintain another 1,074 lf of Rag Run between the aforementioned stream enclosures;
- Place fill in and encroach upon multiple watercourse, including 40 wetland areas; and
- Construct pipe and culvert connections to the stream enclosures and related storm water management facilities.¹

The encroachment activities for this permit was issued subject to The Clean Streams Law and the regulations promulgated thereunder.² The Encroachment Permit does not “authorize any injury to private property or invasion of private rights, nor any infringement on Federal, State, or Local laws or regulations.”³ In addition, the Encroachment Permit expressly prohibits “unreasonable interference with the free discharge of the river or stream or navigation during construction.”⁴

B. Local Stream Impacts to Poorhouse Run and Rag Run on Louise Loncar’s Property.

Louise Loncar owns property that is located at 203 Simon Field Road, Monaca, PA. Previously, this property was owned by her father, and Louise was raised on the property through her childhood. Two receiving streams subject to Shell’s draft NPDES permit run through Ms. Loncar’s property: Poorhouse Run and Rag Run. An additional stream, Moon Run, also runs through Ms. Loncar’s property. Louise’s family has owned the property since the early 1950s, and has never observed flow issues with these three streams.

Louise recently applied for an onlot septic system for her property. After working with local sewage enforcement officer and engineers to design a system, it was determined that the only possible sewage system would involve a small flow facility that would discharge into Poorhouse Run. Using USGS StreamSTATS data, an Engineering Report was developed for a small flow facility with a discharge point being Poorhouse Run, and received a Water Quality Management Permit (“WQM”) for the system, Permit No. PAG046416. However, after attempting to contract for construction of the system, Louise was informed of significant stream impacts to Poorhouse Run and Rag Run that had affected the flow of the streams on her property. Due to this information, the WQM permit to discharge into Poorhouse Run is now in jeopardy.

¹ Acknowledgement of Appraisal of Permit Terms and Conditions, DEP Permit No. E04-250-A1, found at:

http://files.dep.state.pa.us/RegionalResources/SWRO/SWROPortalFiles/Shell_FINAL/Encroachment.pdf

² See *Id.* at Water Obstruction and Encroachment Permit, p. 2.

³ *Id.*

⁴ *Id.* at p. 3.

When Louise visited the property after being informed of these changes, she personally observed the loss of flow to all three streams running across her property. Furthermore, Louise had a plumber turn her water well pump on and observed that her water supply had been dewatered. Given the nature of Shell's recent construction activities in the watershed, it appears that recent activities have impacted the surface and groundwater on and around Louise's property.

Exhibit 1 consists of pictures of Poorhouse Run during normal flow conditions. Exhibit 2 consists of recent pictures reflecting the recent changes to the stream flow. It is clear that stream conditions have changed significantly from the hydrological conditions within Appendix E. Moreover, these conditions were caused by Shell's significant construction and diversion activities, which have caused flow loss in Poorhouse Run and Rag Run, and have affected the hydrological conditions in the area in a way that has impacted Ms. Loncar's groundwater and dewatered her water supply. For the reasons that follow, the DEP cannot issue the Draft Permit on the current information contained within Shell's Application, and should conduct a site specific investigation into the current status and characteristics of the receiving streams and the hydrologic regime.

II. The DEP Must Not Issue the Draft Permit Because it is Incomplete and Would Violate the Clean Water Act and The Pennsylvania Clean Streams Law

The DEP must consider the impact of every surface water discharge on the quality of the receiving stream. The DEP will not issue a NPDES permit for discharges into receiving waters of the State where the application is incomplete or where the application is inconsistent with applicable environmental laws.⁵ The Draft Permit proposes effluent limitations for a wide range of pollutants from several discharge outfalls into Poorhouse Run and Rag Run.⁶

A. The Information Relied Upon for Receiving Streams Rag Run and Poorhouse Run in the Application is Incorrect

Appendix E of Shell's Application for a NPDES Permit Amendment, submitted November of 2015, contains "Hydrological and Hydraulic References." Therein, it is noted that Pa StreamSTATS was relied upon to determine the flow of Poorhouse Run and Rag Run. Flow information from StreamSTATS is utilized by the DEP and the permittee, in addition to other information, in order to calculate waste load allocations and water quality-based effluent limitations for receiving streams. Design stream flow is a required input to PENTOXSD, or some other water quality analysis modeling, in order to calculate effluent limitations for toxic

⁵ 25 Pa. Code § 92a.36.

⁶ See generally NPDES Permit Fact Sheet, Application No. PA0002208 A-1, found at: <http://files.dep.state.pa.us/RegionalResources/SWRO/SWROPortalFiles/Shell/DRAFT%20-%20Fact%20Sheet%20for%20PA0002208%20A-1.pdf>

and other pollutant discharges.⁷ Curiously, Shell has not provided water quality analysis modeling data, such as PENTOXSD, for Poorhouse Run and Rag Run within its application, despite proposing numerous discharges of pollutants into both streams. The DEP should require appropriate modeling analysis before permitting shell to discharge into these receiving streams.

Furthermore, based upon the information provided by Louise regarding reduced flow in Poorhouse Run, it is clear that the information from Pa StreamSTATS is likely inaccurate and out-of-date. As a result, the proposed effluent limitations are based on incorrect data. The DEP must consider the actual flow of Rag Run and Poorhouse Run before Shell is permitted to discharge toxins into the streams. Accurate effluent limitations are especially important considering the fact that Poorhouse Run is proposed to receive overflows of storm water from the Accidentally Contaminated Pond (Outfall 004) and storm water runoff from the former coal pile storage area and plant yard areas (Outfall 010). This is in addition to the numerous Outfall points that will discharge storm water to both Rag Run and Poorhouse Run.

In the Draft NPDES Permit Fact Sheet, flow data for Rag Run and Poorhouse Run is not provided. In the information provided on the receiving waters for each Outfall, the Q7-10 flow is provided for the Ohio River, but is inexplicitly left blank for both Rag Run and Poorhouse Run. It is, therefore, impossible to know how the DEP established effluent limitations for either Rag Run or Poorhouse Run. Without the necessary flow information, the DEP's proposed effluent limitations hold little meaning. There is no guarantee that the limitations will actually be protective of the receiving streams.

B. Discharges Pursuant to the Change In Flow will Impair Uses

Considering that there have apparently been considerable flow reductions in Rag Run and Poorhouse Run, it is likely that the proposed discharges will degrade both streams. As acknowledged in the DEP's Public Notice, Rag Run and Poorhouse Run are classified for Warm Water Fishes, aquatic life, water supply and recreation. When permitting a proposed discharge, the DEP must ensure that the discharge will not compromise a stream's existing uses.⁸

"Existing uses" are defined as "[t]hose uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." Title 25 Pa. Code Section 93.1. Section 93.4a(b) further provides that, "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and

⁷ Technical Reference Guide (TRG) PENTOXSD for Windows PA Single Discharge Wasteload Allocation Program for Toxics Version 2.0.

⁸ See *Water Quality Antidegradation Implementation Guidance*, Department of Environmental Protection, Bureau of Water Supply & Wastewater Management (Nov. 29, 2003), available at <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-47704/391-0300-002.pdf> ("It is the policy of the Department of Environmental Protection to protect the existing uses of all surface waters . . . Existing uses are protected when DEP makes a final decision on any permit or approval for an activity that may affect a protected use.").

protected.” As such, the DEP must ensure that neither Rag Run nor Poorhouse Run’s existing use for Warm Water Fishes, aquatic life, water supply and recreation is impaired.

Additionally, Poorhouse Run must be protected for Louise’s existing water supply use. Shell has proposed to use Rag Run and Poorhouse Run for wastewater discharge; however, Louise has also proposed to use Poorhouse Run for personal wastewater discharge and is already permitted to do so. On December 29, 2010, Louise was issued two permits from DEP in order to install a single residence sewage treatment plant: NPDES Permit No. PAG046416 and WQM Part II Permit No. WQG016181. Accordingly, Louise has established an existing use for Poorhouse Run, based on the stream’s water supply.

Due to the decrease of flow in Poorhouse Run and related tributaries, it is likely that Shell’s proposed discharge will degrade Poorhouse Run, making it incompatible with existing uses. In effect, the DEP would be permitting Shell to utilize the streams as an industrial sewer. Without the proper flow data, the DEP is unable at this time to make a determination on antidegradation of either Rag Run or Poorhouse Run.

C. The Reduced Flow of the Receiving Streams Could Result in Contamination of Groundwater

As previously mentioned, when Louise visited her property to investigate the reduced flow in the streams on her property, she discovered that her well water had also been significantly depleted. After calling a plumber to investigate the situation, the plumber noted that the pump for the well was working normally but that the well went dry after only 10 minutes of use. This suggests that not only has surface water been impacted by Shell’s construction activities but also groundwater has been impacted.

Louise is now concerned that if Shell is permitted to discharge effluent that has not been limited by the actual flow of the receiving streams, both the streams and groundwater will become contaminated with various toxins. If this should occur, the well water that is relied upon for the residence on Louise’s property could become unsafe for human consumption.

III. The DEP has Constitutional Obligations to Pennsylvanians with Regard to Protection of Resources

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.

Under Section 27, DEP has constitutional obligations that it owes to the public. First, it cannot unreasonably infringe on a Pennsylvanian’s right to clean air, pure water, and the

preservation of various environmental values.⁹ Second, as a trustee, the DEP has a fiduciary duty to ensure that it is conserving and maintaining the public's natural resources.¹⁰

Any DEP permitting decision must comply not only with the statutes and regulations that apply, but “must also evince a reasonable effort to reduce to a minimum the environmental incursion of the project under review.”¹¹ Even after minimizing the environmental incursions, the remaining environmental harms cannot outweigh the benefits of the project.¹² As the DEP engages in this balancing as part of its permit decision-making, Section 27 is a “thumb on the scale” in favor of environmental protection.¹³

It is imperative that the DEP keep these constitutional requirements in mind when it determines whether to issue NPDES Draft Permit No. PA0002208. Failing to gather all necessary information to make an informed and pragmatic decision would certainly be in violation of DEP's trustee responsibilities to all citizens of Pennsylvania.

IV. Conclusion

Based on the current Draft Permit and Fact Sheet, it would be unlawful to issue a NPDES permit for this facility. Please contact the undersigned counsel with any questions.

Respectfully submitted,



Rose Monahan, Esq.
rmonahan@fairshake-els.org
James Yskamp, Esq.
jyskamp@fairshake-els.org
Emily A. Collins, Esq.
ecollins@fairshake-els.org

Fair Shake Environmental Legal Services
3495 Butler Street, Suite 102
Pittsburgh, PA 15201

⁹ *Pennsylvania Env'tl. Def. Found. v. Com.*, 108 A.3d 140, 156-67 (Pa. Cmwlth. 2015), reargument denied (Fed. 3, 2015) (referred to as *PEDF*).

¹⁰ *PEDF* at 167 (citing to *Robinson Twp., et al. v. Com.*, 83 A.3d 901, 857 (Pa. 2013) (plurality)).

¹¹ *Sludge-Free UMBT et al. v. DEP, et al.*, EHB Dkt. No. 2014-015-L, at 5 (Opin. and Order on Motions for Partial Summary Judgment, July 1, 2015) (citations omitted).

¹² *Id.*

¹³ *PEDF* at 170.

Comment on draft NPDES permit No. PA0002208

December 23, 2016

Page 7 of 7

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Counsel for Louise Loncar

Louise Loncar

3 School Street

Apartment #1

Tilton, New Hampshire 03276

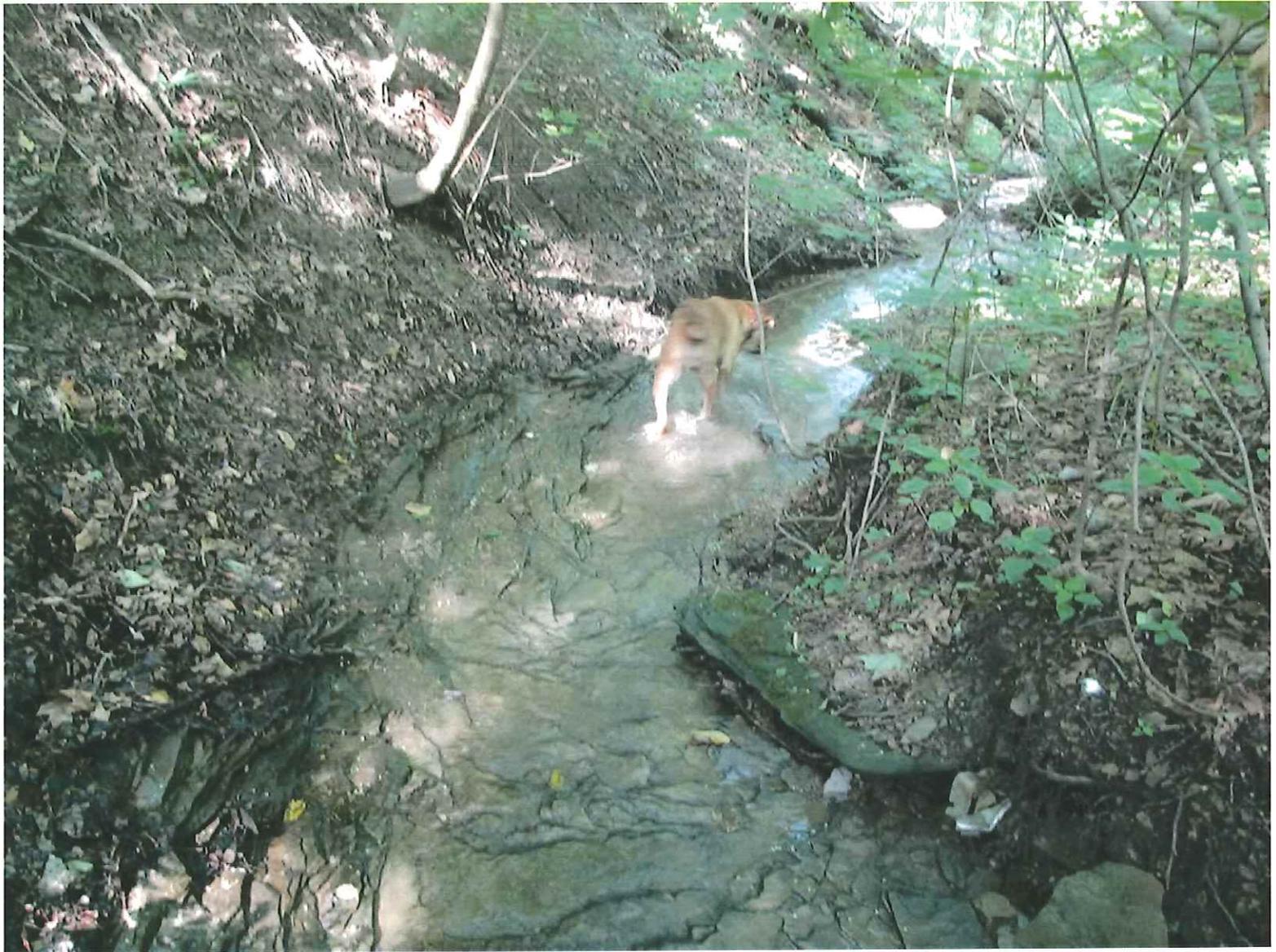
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EXHIBIT 1

Photos were taken between 2013 and 2014 of Poorhouse Run

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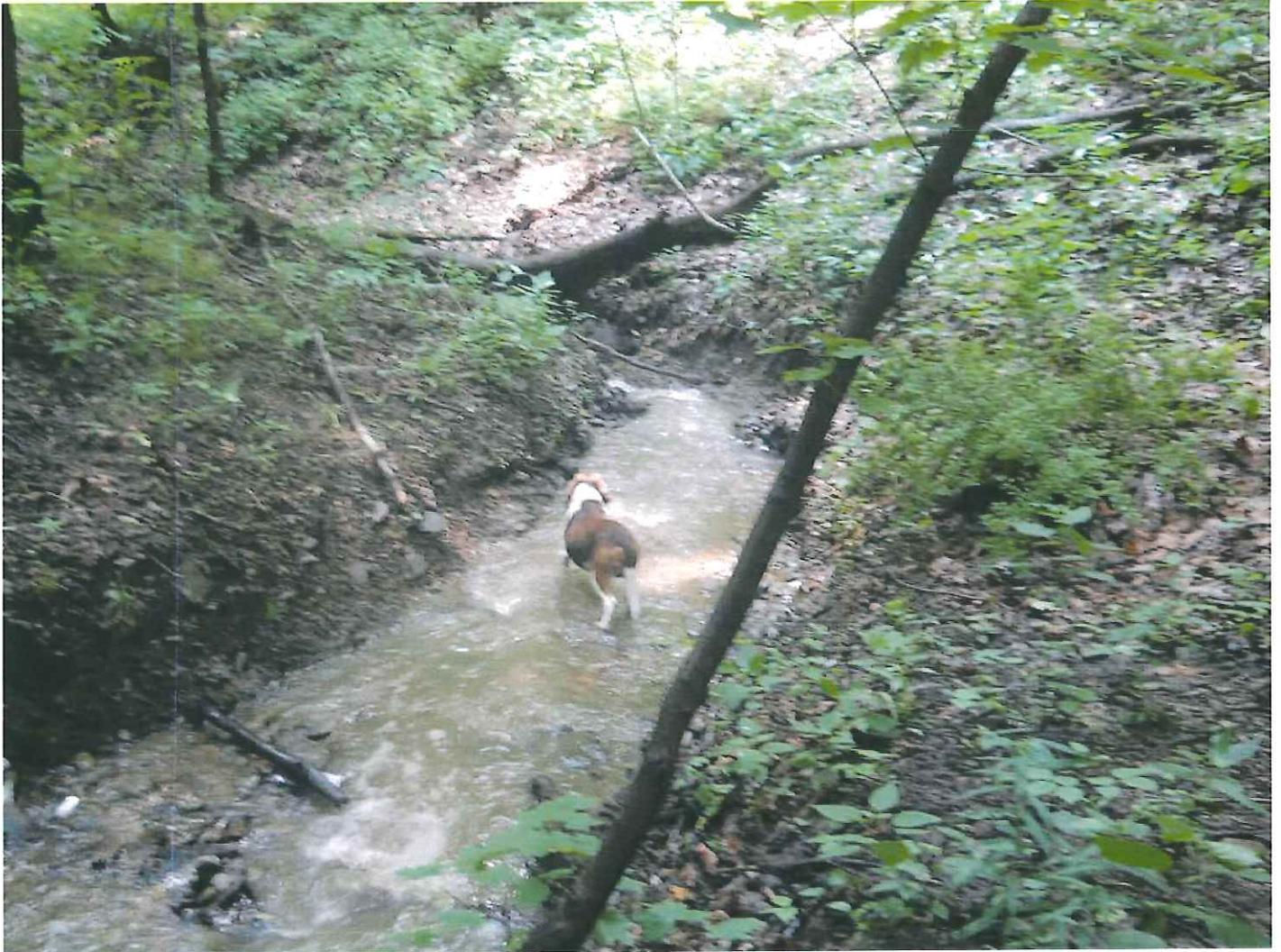


















EXHIBIT 2

Photos were taken on November 11, 2016 of Poorhouse Run

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