

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD**

SIERRA CLUB,)	
)	
Appellant,)	
)	
v.)	
)	
COMMONWEALTH OF)	EHB Docket No. _____
PENNSYLVANIA DEPARTMENT)	
OF ENVIRONMENTAL)	
PROTECTION,)	
)	ELECTRONICALLY FILED
Appellee,)	
)	
<i>and</i> Transcontinental Gas Pipe Line)	
Company, LLC,)	
)	
Permittee.)	

NOTICE OF APPEAL

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD**

**NOTICE OF APPEAL FORM
APPEAL INFORMATION**

1. Name, address, telephone number, and email address of Appellant:

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2. Describe the subject of your appeal:

(a) What action of the Department do you seek review?

Granting Water Quality Certification under Clean Water Act § 401 for the Atlantic Sunrise Pipeline Project, Department File No. WQ02-001

(b) Which Department official took the action?

Joseph J. Buczynski, P.E., Environmental Program Manager, Waterways and Wetlands Program

(c) What is the location of the operation or activity which is the subject of the Department's action (municipality, county)?

Susquehanna, Wyoming, Luzerne, Columbia, Northumberland, Schuylkill, Lebanon, Lancaster, Clinton and Lycoming Counties, including various municipalities within these Counties

(d) How, and on what date, did you receive notice of the Department's action?

Actual notice on April 12, 2016 (Published in the Pennsylvania Bulletin on April 23, 2016)

3. Describe your objections to the Department's action in separate, numbered paragraphs.

Please see the attached Additional Averments in Support of Notice of Appeal.

4. Specify any related appeal(s) now pending before the Board. If you are aware of any such appeal(s) provide that information.

Related appeals are consolidated under Board Case No. 2016075, with appellants Lancaster Against Pipelines and Geraldine Nesbitt.

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ADDITIONAL AVERMENTS IN SUPPORT OF NOTICE OF APPEAL

A. Summary of objections

1. The Pennsylvania Department of Environmental Protection's (Department) decision to grant Transcontinental Gas Pipe Line Company (Transco) a Clean Water Act § 401 water quality certification (Water Quality Certification) for the construction and operation of the Atlantic Sunrise pipeline project (Project) is arbitrary, capricious, an abuse of discretion and not in accordance with the law because the Department failed to develop or cite any record evidence to support its conclusion that the Project complies with federal and state law requirements.

2. The Department erred by proposing to grant the Water Quality Certification six months before determining that the application for the same was complete.

3. The Department erred by granting the Water Quality Certification before completing, and in some instances hardly starting, the applicable water-related reviews and permitting decisions.
4. The Department erred by prejudging the applicable water-related reviews and permitting decisions—reviews and decisions that if conducted properly pursuant to a complete record and meaningful public participation opportunities could very well dictate the denial or modification of the Project.
5. These acts or omissions by the Department violate Article I, § 27 of the Pennsylvania Constitution, Pa. Const. art. I, § 27; the Pennsylvania Clean Streams Law, 35 P.S. § 691.1 et seq; the Pennsylvania Dam Safety and Encroachments Act, 32 P.S. § 693.1 et seq.; § 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17; the Clean Water Act, 33 U.S.C. §1251 et seq, and their implementing regulations.

B. Factual background

6. The Project is a \$3-billion pipeline expansion project of Williams Companies and its subsidiary Transcontinental Gas Pipe Line Company (Transco). Williams operates the Transco system, which has over 10,000 miles of pipeline moving natural gas across several eastern states, including Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida, for consumption in those states and for export. Cove Point is one of the connected, massive gas export projects, which Sierra Club and other petitioners are challenging in the U.S. Court of Appeals for the D.C. Circuit (Nos. 15-1127 & 15-1205).
7. As proposed, the Project would cut through ten central Pennsylvania counties and the Chesapeake Bay watershed. It would also spur more gas drilling in the Marcellus Shale fields.
8. The Natural Gas Act gives the Federal Energy Regulatory Commission (FERC) broad regulatory authority over interstate gas pipelines, and on March 31, 2015, Transco applied for the required certification from FERC that it could construct and operate the Project (FERC Certification).

9. On April 9, 2015, Transco applied for the Water Quality Certification.
10. On June 20, 2015, before even determining that Transco's application was complete, the Department issued a notice and opened a 30-day public comment period on its proposal to grant the Water Quality Certification for the Project (Proposal), enclosed as Exhibit A.
11. The Proposal is merely three pages—a one paragraph project description followed by several paragraphs of conditions of certification stating that Williams-Transco must eventually comply with applicable state water permits and standards. The Proposal describes the permits and standards in generic terms, without any project-specific details or deadlines. Nor does the Proposal refer to any project-specific data or analysis to support the Department's conclusion that the Project complies with applicable state and federal requirements. Instead, the Proposal refers the public to the FERC Certification docket (No. CP15-138), stating that “[t]he Environmental Assessment prepared by FERC may be viewed” there. Yet FERC had not issued any sort of environmental review document before or during the public comment period, and FERC's draft environmental review document only became publicly available last week.
12. During the public comment period, commenters urged the Department to correct several fatal errors in the procedures it had followed and the conclusions it had reached in the Proposal. These include:
 - a) the failure to develop a proper record, including a complete application for the Water Quality Certification;
 - b) the failure to complete the project-specific reviews and permitting decisions that state law and federal law require before the Department decides whether to grant or deny the Water Quality Certification;
 - c) the unlawful use of conditions in the Water Quality Certification to try to defer the prerequisite record development, project-specific reviews, and permitting decisions;
 - d) the premature and unsubstantiated conclusion that the Project meets—or even could meet—state and federal requirements; and

- e) the failure to provide any meaningful public participation opportunities in the Water Quality Certification process.
13. As evidence of the Department's ongoing failure to develop a proper record for the Water Quality Certification, on November 20, 2015, the Department responded to FERC's request for input on proposed alternative routes for the Project by averring that the Department lacked sufficient information to evaluate such alternatives. See enclosed Exhibit B (stating the information from Transco "does not contain sufficient specificity or locational information for [the Department] to evaluate the recommended alternatives' proposed discharges to the Commonwealth's water resources").
 14. The Department reports that on December 17, 2015, it made a written determination of the completeness of Transco's application for the Water Quality Certification. See enclosed Exhibit C.
 15. On April 5, 2016, the Department issued the final Water Quality Certification for the Project, without any substantial changes from the Proposal or any acknowledgment of the public comments. See enclosed Exhibit D.
 16. On April 12, 2016, FERC published the notice of the Department's issuance of the final Water Quality Certification. See FERC Docket No. CP15-138.
 17. On April 23, 2016, the notice of the Department's issuance of the final Water Quality Certification appeared in the Pennsylvania Bulletin, available at <http://goo.gl/dmqw1W>.

C. Legal background: Clean Water Act § 401 certification

18. The Clean Water Act § 401 certification process is the same for all projects that require a federal license or permit, including interstate gas pipeline projects:
19. The state develops water quality standards, subject to approval by the U.S. Environmental Protection Agency (EPA). 33 U.S.C. § 1313.

20. Projects that require a federal license or permit must obtain the state's certification of compliance with those water quality standards and other Clean Water Act requirements. Id. § 1341(a)(1).
21. The state has up to one year from the receipt of the complete application to grant or deny such a certification. Id.
22. If the state grants the certification, the Clean Water Act requires the certification to “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure [compliance with enumerated Clean Water Act provisions] and with any other appropriate requirement of State law set forth in such certification.” Id.
23. Any state-determined limitations and requirements in the certification then become a condition on any federal license or permit for the project. Id. § 1341(d). In other words, each federal agency has two options—authorize the project with the state-determined limitations and requirements, or deny the project. Therefore, if the state grants the certification, the certification itself must identify and convey to the relevant federal agencies any and all applicable state-determined limitations and requirements in time and with enough specificity to allow the federal agencies to assess whether to authorize the project with such limitations and requirements.
24. This process also aids EPA's review of whether the project's discharges may affect other downstream states, so that EPA may give any such states the opportunity to protect their water quality by imposing additional conditions on the project. Id. § 1341(a)(2).
25. After a project receives its federal license or permit, the Clean Water Act only allows for changes to the conditions in very narrow circumstances. Therefore, at the time of the initial certification, it is imperative that the state complete a thorough review. Then, if and only if the state decides the project will comply with state and federal requirements, the certification must set forth the specific, enforceable limitations and requirements needed to ensure that the project actually does so.

D. Legal background: Article I, § 27 of the Pennsylvania Constitution

26. Article I, § 27 of the 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.

27. The location of § 27 in the Commonwealth's Declaration of Rights signifies a particular constraint on Commonwealth actions because this portion of our charter "delineates the terms of the social contract between government and the people that are of such 'general, great and essential' quality as to be ensconced as 'inviolable.'" Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901, 950, 947 (Pa. 2013) (plurality) (citing Pa. Const. art. I, Preamble & § 25).

28. Each of the "three mandatory clauses" in § 27 establishes distinct "substantive" constraints, and they all reinforce the Department's duty to complete robust environmental reviews before taking action. Robinson Twp., 83 A.3d at 950, 957; see also Sierra Club et al, Comments of Dec. 29, 2015 (discussing application of § 27 to Commonwealth agency decisions concerning pipeline infrastructure) available at <http://goo.gl/WPQMLE>.

29. The third clause of § 27 prohibits the Department from infringing upon the people's environmental rights, and from permitting or encouraging the degradation, diminution, or depletion of public natural resources. Robinson Twp., 83 A.3d at 953.

E. Legal background: Pennsylvania's water quality standards and § 401 certification procedures

30. Pennsylvania's water quality standards and procedures for § 401 certification are mainly codified in the Clean Streams Law, 35 P.S. § 691.1 et seq., the Dam Safety and Encroachments Act, 32 P.S. § 693.1 et seq., and their implementing regulations.

31. These state laws set out broad information requirements such as an “environmental assessment” that any entity seeking a § 401 certification must submit to the Department. 25 Pa. Code § 105.15.
32. The Department’s own internal guidance integrates the applicable state permits into § 401 certification. PADEP, Permitting Policy and Procedure Manual, Section 400.2 Procedure for 401 Water Quality Certification (October 1, 1997), available at <http://goo.gl/36uLtB>.
33. In recent year, however, Pennsylvania has failed to meet these plain regulatory requirements for interstate natural gas pipelines; rather than collecting the required pre-certification information and completing the reviews and permitting decisions in advance, Pennsylvania now tries to somehow defer the required record-development, reviews, and decisions through the use of conditions in the certifications, as it did here.
34. While Pennsylvania has not cited any authority or reasoned basis for doing so in the record for the Water Quality Certification for the Project, the Department has suggested elsewhere that its recent practice is spurred by the increasing number of pipelines requiring certification, see e.g., PADEP Brief of Sept. 10, 2015, in Delaware Riverkeeper v. DEP and Transcontinental Gas Pipe Line Co., No. 15-2122 (3d Cir.) (“With the development of the Marcellus and other shale gases, an associated increase in construction activities related to natural gas pipelines has occurred. Consequently, [the Department] has experienced a significant increase in requests for environmental review of natural gas pipeline projects regulated by FERC in Pennsylvania.”). Also, by the one-year deadline for responding to certification requests to avoid waiver. See, e.g., J. Cignan, Email of April 29, 2016 (“I did confirm that the timing of the Department’s issuance of the [Water Quality Certification for the Project] was in part to avoid waiver the Department’s ability to impose conditions on its [Water Quality Certification] by not acting within one year from receipt of a request in addition to the associated review being satisfactorily completed.”), enclosed as Exhibit E.
35. Pennsylvania’s reliance on the one-year deadline to try to justify its actions appears to rest on a misunderstanding of how the deadline operates. Here, the Department appeared to ignore that the one-year clock starts from the date of receipt of a complete application, and that state

law requires the Department to collect certain information and undertake applicable reviews and permitting decisions before certification.

36. Pennsylvania also has options for tolling or restarting the one-year clock, as needed, see, e.g., EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes, 13, 16-17 (April 2010) available at <http://goo.gl/oY1Ph4>, though it failed to use that authority here.

F. Objections

37. Objection No. 1: The Department erroneously granted the Water Quality Certification prior to receiving an application for and/or making a determination on a Chapter 102 Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment issued pursuant to Pennsylvania's Clean Streams Law and Storm Water Management Act (32 P.S. §§ 680.1-680.17), and the applicable implementing regulations (25 Pa. Code Chapter 102).
38. Objection No. 2: The Department erroneously granted the Water Quality Certification prior to receiving an application for and/or making a determination on Chapter 105 Water Obstruction and Encroachment Permits for the construction, operation and maintenance of all water obstructions and encroachments associated with the project pursuant to Pennsylvania's Clean Streams Law, Dam Safety and Encroachments Act (32 P.S. §§ 673.1-693.27), the Flood Plain Management Act (32 P.S. §§ 679.101-679.601), and the applicable implementing regulations (25 Pa. Code Chapter 105).
39. Objection No. 3: The Department failed to properly consider whether the discharges from the Project will comply with the applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act before granting the Water Quality Certification.
40. Objection No. 4: The Department erroneously granted the Water Quality Certification without receiving and/or approving in writing an Environmental Assessment pursuant to 25 Pa. Code § 105.15.

41. Objection No. 5: The Department erroneously prejudged the applicable water-related reviews and permitting decisions—reviews and decisions that if conducted properly pursuant to a complete record and meaningful public participation opportunities could very well dictate the denial or modification of the Project.
42. Objection No. 6: The Department failed to include sufficiently specific limitations and requirement in the Water Quality Certification to meet state and federal requirements, including, without limitation, the Clean Water Act, the Pennsylvania Constitution, the Clean Streams Law, the Dam Safety and Encroachments Act, the Flood Plain Management Act, the Storm Water Management Act, the Administrative Code of 1929, and their implementing regulations.
43. Objection No. 7: The Department failed to properly and fully consider the impacts of other inter-related projects, such as upstream fracking projects and downstream fracked gas export projects. The Department therefore failed to properly and fully consider the reasonably foreseeable, cumulative short and long-term impacts and the potential overlapping zones of impact of all such inter-related projects.
44. Objection No. 8: The Department failed to acknowledge its constitutional duty to prevent the degradation, diminution, or depletion of public natural resources by the Project, much less perform the robust advance environmental review required to fulfill this duty under Article I, § 27 of the Pennsylvania Constitution.
45. Objection No. 9: The Department’s review and granting of the Water Quality Certification for the Project violated its own regulations, policies, and procedures.
46. Objection No. 10: The Department erroneously granted the Water Quality Certification on an incomplete application.
47. Objection No. 11: The Department failed to consider alternative routes for the Project.
48. Objection No. 12: The Department failed to provide the public with any meaningful opportunity to comment on the Water Quality Certification

- for the Project, including access to a complete application and a complete record.
49. Objection No. 13: The Department failed to properly supply notice to the public, thereby preventing interested parties from engaging in the Water Quality Certification process.
 50. Objection No. 14: The Department failed to develop an administrative record before the Federal Energy Regulatory Commission, as required by 15 U.S.C. § 717n(d).
 51. Objection No. 15: Construction activity for the Project will result in the long-term conversion of palustrine forested wetlands to palustrine emergent wetlands that adversely impact numerous “exceptional value” wetlands, as prohibited by 25 Pa. Code § 105.18a(a)(1).
 52. Objection No. 16: The process followed and/or decision reached by the Department to grant the Water Quality Certification otherwise violates Article I, § 27 of the Pennsylvania Constitution; the Clean Water Act, the Clean Streams Law, the Dam Safety and Encroachments Act, the Flood Plain Management Act, § 1917-A of the Administrative Code of 1929, and their implementing regulations.
 53. Objection No. 17: The process followed and/or decision reached by the Department to grant the Water Quality Certification is otherwise arbitrary, capricious, an abuse of discretion and not in accordance with the law.
 54. Appellant hereby reserves the right to amend this Notice of Appeal.

Date: May 12, 2016

Respectfully submitted,

s/ Joanne Kilgour
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Attorneys for Appellant Sierra Club

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CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing was filed by Electronic Filing with the Pennsylvania Environmental Hearing Board and was served on the following on the date listed, and in the manner indicated, below:

By Electronic Filing System

Office of Chief Counsel, Litigation Support Unit
Pennsylvania Department of Environmental Protection
Attention: Glenda Davidson
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Joseph J. Buczynski, P.E., Environmental Program Manager
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Pennsylvania Department of Environmental Protection
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By Overnight Mail

Transcontinental Gas Pipe Line Company, LLC
c/o Mr. Brent Simons
2800 Post Oak Boulevard
Houston, TX 77056

Date: May 12, 2016

Respectfully submitted,



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