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August 1, 2016

Via email and electronic filing in FERC docket CP15-138

**Re: Comments on Application No. CENAB-OPR-P-2014-00475-P12,
Williams-Transco's Atlantic Sunrise Project, PN16-30**

Dear Chief Chandler and Project Manager Dombroskie:

We submit these comments on behalf of the undersigned organizations: Lower Susquehanna Riverkeeper, Middle Susquehanna Riverkeeper, Appalachian Mountain Advocates, Allegheny Defense Project, Waterkeepers Chesapeake, Clean Air Council, Concerned Citizens of Lebanon County, Lebanon Pipeline Awareness, Lancaster Against Pipelines, and Sierra Club.

Through the notice on the Baltimore District's website,¹ we learned of the 30-day extension to the public comment deadline on the above referenced permit application ("the Application"). Because the extended deadline fell on Saturday, July 30, 2016, we confirmed with Project Manager Dombroskie that the Baltimore District would accept comments sent via email through midnight on Monday, August 1, 2016. Therefore, our comments are timely.

We respectfully submit that the Baltimore District has every reason to deny the Application because the underlying project ("the Project") by Williams-Transco ("Transco") appears to be one of most destructive to come before the District in recent memory. As we detail below, Transco is not properly avoiding, minimizing, or mitigating the Project's potential to harm or destroy hundreds of waterways and wetlands, so the Application falls short of the requirements of the Clean Water Act (CWA) and its implementing regulations. The District should therefore deny the Application.

Alternatively, the Baltimore District should at least defer deciding the merits pending further record development, including the issuance of a supplemental environmental impact statement and a new public notice and comment period on the Application. At the time of this writing, at least two federal agencies—the U.S. Environmental Protection Agency and the U.S. Department of the Interior—averred the need for an SEIS and more meaningful public participation opportunities in the inter-related permitting processes for the Project.² We have asked for the

¹ <http://goo.gl/ej243D>.

² See EPA letter of June 27, 2016; DOI letter of July 8, 2016, on file in FERC Docket No. CP15-138.

same—both at public meetings and in written comments. With these comments, we respectfully reiterate our request to the Baltimore District.

While we reserve the right to submit additional comments as we identify additional issues, here we discuss the following outstanding issues that the District should address through the record development referenced above:

- ◊ whether any part of the Project is water dependent;
- ◊ whether the Project is the “least environmentally damaging practicable alternative”;
- ◊ whether the Project’s impacts to the aquatic environment have been avoided and minimized;
- ◊ whether there are sufficient mitigation measures available to compensate for the tremendous landscape-scale impacts that would occur if the Project were constructed;
- ◊ whether the Project is justified in light of its substantial cost and impacts on wetlands, streams, and historic resources;
- ◊ whether Pennsylvania can develop sufficient information and impose sufficient permitting requirements to certify that the Project will not impact water quality;
- ◊ when the “insufficient information”³ in the FERC DEIS will be revised/supplemented as required by the National Environmental Policy Act (NEPA), especially given the Corps’ independent NEPA implementation duties; and
- ◊ whether the Project fulfills the Corp’s own public interest review criteria for Section 404 permits.

BACKGROUND

The Project consists of the following proposed facilities in Pennsylvania: (1) 183.7 miles of new 30- and 42-inch diameter greenfield natural gas pipeline known as the Central Penn Line (“CPL”) North and CPL South; (2) 11.5 miles of new 36- and 42-inch diameter pipeline looping known as the Chapman and Unity Loops; (3) two new compressor stations; and (4) additional compression and related modifications at existing compressor stations.⁴

On March 31, 2015, Transco filed an application with FERC under Section 7(c) of the Natural

³ See EPA letter of June 27, 2016, on file in FERC Docket No. CP15-138.

⁴ See FERC Draft Environmental Impact Statement, ES-1 (“Draft EIS”).

Gas Act⁵ for a certificate of public convenience and necessity for the Project.⁶

Transco also filed the Application with the Baltimore District for permission to perform work associated with the Project in myriad waters and wetlands. Specifically, at last count, Transco proposes at least 329 water body crossings, including 204 perennial waterbody crossings, 79 intermittent waterbody crossings, 40 ephemeral waterbody crossings and 6 open waterbody crossings.⁷ A total of at least 32,529.56 linear feet (over 6 miles) of waterbodies would be impacted by the Project.⁸ Transco also proposes to impact a total of at least 48.24 acres of wetlands, including 41.72 acres that would be temporarily impacted and 6.52 acres that would be permanently impacted and converted to lower quality wetland habitat.⁹

Since Transco filed its applications with FERC and the Baltimore District, commenters including the undersigned organizations submitted extensive comments on the information gaps in the public record concerning the Project's impacts on the aquatic environment. This includes our comment letter of June 20, 2016, on the District's defective public notice (PN16-30) and other circumstances that have precluded meaningful public participation in the District's review of the Application.¹⁰ Along with the other commenters, we specified the data and analysis that the Baltimore District should develop and publicly disclose to properly characterize the Project's impacts and allow for meaningful public participation going forward.

Transco and the Baltimore District have yet to cure the defects and the circumstances identified in our June 30 letter, or to develop the required but missing information for the District's review of the Application. In fact, despite our proactive efforts to gain access to all the material that make up the Application, and the "wetlands mitigation plan" that Transco is allegedly "designing" for the Project, we still do not have access to this material.

DISCUSSION

I. Transco's Section 404 Permit Application Fails to Satisfy the CWA and the 404(b)(1) Guidelines and Therefore Must Be Denied

The CWA and EPA's Section 404(b)(1) Guidelines dictate the circumstances under which the U.S. Army Corps of Engineers, including the Baltimore District, may permit discharges of

⁵ 15 U.S.C. § 717f.

⁶ See FERC Docket No. CP15-138.

⁷ See Public Notice at 8.

⁸ *Id.* at 9.

⁹ *Id.* at 11-12.

¹⁰ Here, we incorporate by reference all of the comments filed by our organizations with FERC and the Corps, individually or collectively, as well as the comments filed by PennFuture in the FERC docket.

dredged or fill material into wetlands or other waters.¹¹ The “Guidelines” are binding regulations that impose substantive standards for evaluating permit applications. The Corps’ own regulations recognize that the Corps must deny a Section 404 permit if the discharge for which a permit is sought would violate the Guidelines.¹²

The 404(b)(1) Guidelines prohibit issuance of a permit where:

- (i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or
- (ii) The proposed discharge will result in significant degradation of the aquatic ecosystem...; or
- (iii) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or
- (iv) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.¹³

Here, the Application fails to meet all four of the above regulatory criteria. Notably, many project impacts have yet to be fully disclosed, analyzed, or addressed. Accordingly, the Corps cannot lawfully permit the Project.

A. Transco and the Baltimore District Have Failed to Examine Whether Other Practicable Alternatives Exist that Would be Less Environmentally Damaging

The Baltimore District must deny a Section 404 permit “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”¹⁴ An alternative is practicable “if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.”¹⁵ The Corps and EPA have explained in a regulatory guidance letter that “the proposed discharge...must represent the *least environmentally damaging practicable alternative* in order to comply with the alternatives analysis requirement of the Guidelines[.]”¹⁶

¹¹ See 33 U.S.C. §1344; 40 C.F.R. § 230.10.

¹² 33 C.F.R. § 320.4(a)(1).

¹³ 40 C.F.R. § 230.12(a)(3).

¹⁴ 40 C.F.R. § 230.10(a).

¹⁵ 40 C.F.R. § 230.10(a)(2).

¹⁶ RGL 92-2, Water Dependency and Cranberry Production, June 26, 1992 (emphasis added).

Where a discharge is proposed for a wetland or other special aquatic site, all practicable alternatives to the proposed discharge that do not involve a discharge to the wetland “are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.”¹⁷ Similarly, if the activity associated with a discharge to a wetland does not require access or proximity to or siting in a wetland (*i.e.*, is not “water dependent”), practicable alternatives that do not involve wetland sites “are presumed to be available, unless clearly demonstrated otherwise.”¹⁸

In addition, an applicant for a Section 404 permit for a non-water dependent activity (such as the Project here) must “clearly demonstrate” that no practicable alternatives exist that do not require a discharge into wetlands or other special aquatic sites.¹⁹ “[T]he applicant and the [Corps/Baltimore District] are obligated to determine the feasibility of the least environmentally damaging alternatives that serve the basic project purpose. If such an alternative exists... the CWA compels that the alternative be considered and selected unless proven impracticable.”²⁰ Under the CWA, “the test is whether the alternative with less wetlands impact is ‘impracticable,’ and the burden is on the applicant...with independent verification by the [Corps/Baltimore District], to provide detailed, clear and convincing information *proving* impracticability.”²¹

The Baltimore District and Transco have not yet shown that the proposed pipeline route would be the least damaging practicable alternative. As EPA explained in its June 27, 2016, letter to FERC, the analysis of route corridors, alternatives, and slim data on indirect and cumulative impacts render FERC’s DEIS inadequate. The Baltimore District’s reliance on the DEIS, here, to bolster its own analysis, suffers from the same lacking analysis. Indeed, the inadequacies of FERC’s DEIS for the Project does not excuse the Baltimore District from its independent obligation to analyze and select the less-damaging alternatives that the CWA and its implementing regulations presume are available.

i. The Project’s Aquatic Resource Impacts

Transco proposes to build nearly 184 miles of large diameter pipeline, which would include hundreds of stream and wetland crossings. The Baltimore District stresses that most affected sites will be restored, yet the restoration standard entails only 80% restoration, which by any

¹⁷ 40 C.F.R. § 230.10(a)(3).

¹⁸ 40 C.F.R. § 230.10(a)(3).¹⁸

¹⁹ 40 C.F.R. § 230.10(a)(3). See *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169 (D. Md. 1983), *aff’d*, 725 F.2d 677 (4th Cir. 1984).

²⁰ *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1188-1189 (10th Cir. 2002).

²¹ *Id.* at 1186 (emphasis in original).

accounting is not restoration capable of recreating the ecological values of the previously intact wetland area. While we recognize that Transco and the District are considering the use of HDD technology to mitigate impacts at certain crossings, the fact remains that such least damaging technology is seldom required, and the breadth of disturbance contemplated by the Project also indicates that indirect and cumulative impacts will be substantial.

Transco estimates that the project would not permanently impact *any* wetlands, yet the Baltimore District's public notice contemplates permanent *conversion* of 6.52 acres of high-value forested wetlands to lower quality emergent wetlands in a number of areas where new or expanded pipelines would cross these wetland areas. In fact, in the notice, the District admits that the conversion will in essence be high-quality to low-quality wetland. Likewise, the District admits that primary impacts of these conversions include impairment and reductions in ecological processes like nutrient and sediment reduction. However, there is no further analysis or data provided on the quality of these wetlands, what that impact means for local waterways, and next to no discussion of the indirect and cumulative effects this and other wetland and stream degradation will have on watersheds' natural ecological ability to retard sedimentation and uptake nutrients. There is also no analysis or discussion of alternatives that would avoid disturbing these areas.

The Project would also impact 32,529.56 linear feet of streams and allow approximately 650 acres of additional disturbance, apparently adjacent to sensitive wetland project areas, and describes these impacts only as temporary. There is next to no discussion of these impacts aside from a disclaimer that 'restoration' will occur, but without caveats as to how this restoration will be mandated. Restoration accountability is essential not only for the Baltimore District's determination of Project impacts, but also because of the well-documented regulatory failures of the Pennsylvania Department of Environmental Protection (PADEP) to enforce environmental protections.

For example, in December 2014, the PADEP announced that it had reached an \$800,000 settlement agreement with Tennessee Gas Pipeline Company ("Tennessee") for "multiple violations of the [Pennsylvania] Clean Streams Law during the construction of [the 300 Line Project] in 2011 and 2012 through four counties in northeast and north-central Pennsylvania."²² According to PADEP's press release:

During 73 inspections of the "300 Line Project," inspectors with the Potter, Susquehanna, Wayne and Pike County Conservation Districts discovered violations including the discharge of sediment pollution into the waters of the commonwealth, some of which are protected as "High Quality" or "Exceptional Value Waters," and failure to implement required construction best management practices to protect water quality.²³

²² PADEP, DEP Announces \$800,000 Settlement against Tennessee Gas Pipeline Company for Violations in Pipeline Construction (Dec. 22, 2014), *available at* <http://goo.gl/gaetw1>.

²³ *Id.*

Had PADEP adequately enforced its permits issued to Tennessee for the 300 Line Project, it may have prevented damage to High Quality and Exceptional Value Waters. While Tennessee was ultimately held accountable for the damage it caused, the goal must be to prevent this kind of damage from occurring in the first place. Unfortunately, this was not the first time that construction along Tennessee's 300 Line caused impacts to aquatic resources.

In documents filed by Tennessee in support of its Susquehanna West Project (FERC Docket No. CP15-148-000), it acknowledged that construction of its original 300 Line ROW "highly impacted" a stream that flowed from a wetland complex.²⁴ In fact, the impacts were so severe that the stream is now a "former stream" that consists of "barely discernable, sheet flow on [the] ROW."²⁵ When PADEP issued the permits for this construction, it is unlikely that destruction of this stream was intended. Nevertheless, this stream was "highly impacted" and substantially disrupted the hydrological connectivity with its associated wetland.

Similarly, construction of a pipeline through the Tamarack Swamp Natural Area caused significant impacts to this natural area, "one of the few examples of a black spruce-tamarack palustrine woodland community in Pennsylvania."²⁶ According to the Western Pennsylvania Conservancy:

Selective logging, fire and most recently, *laying of gas pipelines* have altered and compromised the natural community at Tamarack Swamp. *Construction of the gas pipeline appears to have been particularly disruptive, physically separating contiguous sections of wetland, altering hydrological patterns and introducing strips of highly altered substrate that will not easily recover.* The present natural area falls short in providing substantial protection to even the area contained within its boundaries. Part of the uniqueness and viability of this wetland is related to its size and low fertility. Runoff from lawns and roads, and channelized flow along pipeline ROW's introduces water and nutrients into interior sections of the swamp. Long-term protection must address these inputs.²⁷

Had PADEP and USACE adequately performed their obligations when reviewing the proposal to construct a pipeline in large wetland that is also a state-designated natural area, perhaps the

²⁴ See Tennessee, Susquehanna West Project, Resource Report 2, App. 2-A, Fig. 4 at 11 (available in FERC Docket CP15-148-000, Accession No. 20150402-5213).

²⁵ *Id.*

²⁶ Western Pennsylvania Conservancy, Clinton County Heritage Review at 79 (2002), *available at* <http://goo.gl/2we9RE>.

²⁷ *Id.* (emphasis added).

agencies could have persuaded the company to consider an alternative location and the natural community of Tamarack Swamp would not have been so compromised. There certainly should have been a “practicable alternative” that would involve less adverse effect on the aquatic ecosystem.²⁸

Here, nearly all of the Project’s impacts will occur within the critically important, but threatened Chesapeake Bay watershed, implicating PADEP’s obligations under PA’s Watershed Implementation Plans for the historic Chesapeake Bay Total Maximum Daily Load. Yet there is next to no analysis of the indirect and cumulative effects of converting existing, functional, high-value wetlands to low value wetlands in terms of pollution reduction functionality, nor any substantive discussion on alternatives to adversely modifying these ecologically-significant areas.

ii. *The Project’s Other Environmental Impacts*

The Project is also likely to have significant impacts on a number of non-aquatic resources that have not yet been adequately studied. The FERC DEIS shows that hundreds of acres of forested habitat and farmlands will be impacted,²⁹ and considerable additional natural resources (all types) could be at risk due to indirect effects and induced infrastructure growth.

In addition, we have yet to see analysis—either in the DEIS or elsewhere—of the potential impacts that building the proposed pipeline would have as a growth-inducing action on shale gas development and, in turn, reasonable foreseeable and connected potential impacts like increased greenhouse gas emissions. These indirect and cumulative impacts are related because the discrete actions proposed here—sanctioning the destruction of wetlands and forests—impact natural ecological services that can store and trap carbon, as well as reduce water-borne pollution. These and other climate-change and Bay-TMDL related issues were raised in the DEIS comments and scoping comments for the Project.³⁰ In addition, the Council on Environmental Quality recently issued guidance explaining the importance of considering these and other climate-change related factors in environmental reviews, as well as indicating it is well-within agencies’ current abilities to conduct meaningful analysis of these issues.³¹

According to the 404(b)(1) Guidelines, “the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines.”³² But, where

²⁸ 40 C.F.R. § 230.12(a)(3)(i).

²⁹ See FERC DEIS at 4-26; 4-80.

³⁰ See e.g., June 27, 2016 DEIS Comments of Allegheny Defense Project, *et al.*, pp. 14-22 (available in Docket No. CP15-138-000, Accession No. 20160627-5296).

³¹ See CEQ, “Revised Draft Guidance for Federal Department and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews,” 79 Fed.Reg. 77823 (Dec. 24, 2014).

³² 40 C.F.R. § 230.10(a)(4).

NEPA documents “may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines[.]” “it may be necessary to supplement these NEPA documents with this additional information.”³³ Where the existing NEPA documents do not contain sufficient information, the Baltimore District has authority to require Transco to provide the additional information needed for “an informed, considered analysis of the environmental impact” of project alternatives.”³⁴ The Baltimore District must require Transco to provide the information on practicable alternatives before it can legally proceed with this permit action.

B. The Baltimore District Lacks Sufficient Information to Make a Reasonable Judgment as to Whether the Proposed Discharge Will Comply With the Guidelines

Neither Transco, FERC, nor the Baltimore District has ever studied the indirect and cumulative impacts of the Project. Thus, Transco and the Baltimore District have failed to demonstrate the impact that the proposed project will have on the structure and function of the aquatic system. This error has undermined the alternatives analysis as well as the requirement to show that the project has avoided and minimized the direct, indirect, and cumulative impacts to the maximum extent practicable. The Guidelines require the Baltimore District to make certain factual determinations addressing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment.³⁵ For example, the Guidelines require the following factual determinations:

Aquatic ecosystem and organism determinations. Determine the nature and degree of effect that the proposed discharge will have, both individually and *cumulatively*, on the structure and function of the aquatic ecosystem and organisms. Consideration shall be given to the effect at the proposed disposal site of potential changes in substrate characteristics and elevation, water or substrate chemistry, nutrients, currents, circulation, fluctuation, and salinity, on the recolonization and existence of indigenous aquatic organisms or communities.³⁶

According to the Guidelines, these factual determinations shall be used in conducting the alternatives analysis and in determining whether the proposed discharge includes all appropriate and practicable avoidance and minimization measures.³⁷

³³ *Id.*

³⁴ *Lakewood Assocs. v. United States*, 45 Fed. Cl. 320, 332-33 (Ct. Cl. 1999).

³⁵ *See* 40 C.F.R. § 230.11.

³⁶ 40 C.F.R. § 230.11(e) (emphasis added).

³⁷ *See* 40 C.F.R. § 230.11 (saying “[s]uch factual determination shall be used in § 230.12 in making findings of compliance or non-compliance with the restrictions on discharge in § 230.10”).

There is no evidence that Transco or the Baltimore District has ever studied the indirect effects on the aquatic ecosystem. As stated above, EPA has expressed concern over the inadequate study and data collection for the broader Project. Similarly, there is no evidence that Transco or the District ever considered the cumulative impact of the project's selected route on the environment. The District cannot legally complete its permit analysis until it secures this information.

II. Absent an SEIS, as well as Meaningful Public Participation Opportunities on the Same, the Baltimore District Cannot Grant the Application for the Project

A. To Comply with NEPA and to Provide the Information Needed to Comply with the 404(b)(1) Guidelines, a Supplemental EIS is Needed for the Entire Project

To grant this 404 permit, the Baltimore District must have sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Guidelines. Although FERC issued a DEIS for the project, the current route will run through sensitive headwaters of the Susquehanna. Even if Transco were to build the Project with the best possible design, construction, and land management practices, there could be severe degradation to the rivers and tributaries of the Susquehanna by virtue of the project's undisclosed indirect and cumulative developmental impacts. The science regarding pipeline impacts on watershed ecosystems and water resources supports the concern that a project of this magnitude cannot be constructed without negative impacts to diverse watersheds. These types of impacts need to be fully analyzed and disclosed in a supplemental EIS.

NEPA requires that every EIS discuss the adverse environmental effects of the proposed action and the alternatives to the proposed action which may avoid or minimize these adverse effects.³⁸ The "effects" that must be discussed in an EIS include, among other considerations, the direct environmental impacts of the proposed action, the indirect effects of the proposed action, and the cumulative impacts of the proposed action.³⁹ Although FERC recently completed its DEIS for the project, its analyses of indirect and cumulative effects is distinctly lacking.⁴⁰

For example, regarding Transco's proposed additional temporary workspace ("ATWS") within 50 feet of waterbodies and wetlands, FERC asked Transco to submit "additional justification" for dozens of locations identified in bold in Table K-5 of Appendix K (waterbodies) and in Table L-2 of Appendix L (wetlands).⁴¹ Appendix K identifies at least 58 instances in which

³⁸ 42 U.S.C. § 4332(2)(c), (E).

³⁹ 40 C.F.R. § 1502.16(a)-(h); 40 C.F.R. § 1508.27(b)(7).

⁴⁰ See e.g., June 27, 2016 DEIS Comments of Allegheny Defense Project, *et al.*, pp. 22-34, 37-69 (available in Docket No. CP15-138-000, Accession No. 20160627-5296).

⁴¹ See FERC DEIS at 5-27.

FERC is requesting “additional justification” for ATWS within 50 feet of waterbodies.⁴² Appendix L identifies at least 36 instances in which FERC is requesting “additional justification” for ATWS within 50 feet of wetlands.⁴³ In numerous instances, FERC says that it needs “additional site-specific information and mitigation measures” to justify ATWS in wetlands, including exceptional value wetlands.⁴⁴

Such information gaps pervade the DEIS. FERC similarly requests that Transco provide:

- ◊ Updates to list of water wells and springs within 150 feet of construction workspaces based on completed surveys and indicating any water wells and springs that are within areas of known karst.⁴⁵
- ◊ Updates to Transco’s Abandoned Mine Investigation and Mitigation Plan regarding proposed mitigation measures to manage and dispose of contaminated groundwater.⁴⁶
- ◊ Proposed mitigation measures that Transco would implement to protect all Zone A source water protection areas.⁴⁷
- ◊ All outstanding geotechnical feasibility studies for HDD crossing locations and the mitigation measures that Transco would implement to minimize drilling risks.⁴⁸
- ◊ The locations where Transco proposes to use biocides, the name of the specific biocide(s) to be used, material safety data sheets for each biocide, copies of relevant permits, and a description of the measures that would be taken to neutralize the effects of the biocides upon discharge of the test water.⁴⁹
- ◊ A final copy of the PRM Plan, including any comments and required approvals from the USACE and PADEP.⁵⁰
- ◊ Complete results of noxious weed surveys and the final Management Plan.⁵¹

⁴² See DEIS, App. K, Table K-5.

⁴³ See DEIS, App. L, Table L-2.

⁴⁴ See DEIS, App. L at L-11-15, 18, 31-32, 34, 39-43.

⁴⁵ DEIS at 4-41.

⁴⁶ DEIS at 4-47.

⁴⁷ DEIS at 4-51.

⁴⁸ DEIS at 4-66.

⁴⁹ DEIS at 4-67.

⁵⁰ DEIS at 4-75.

⁵¹ DEIS at 4-83.

- ◇ All documentation of Transco’s correspondence with the PGC and the PADCNR and any avoidance or mitigation measures developed with these agencies regarding the SGL and Sproul State Forest crossings.⁵²
- ◇ Any updated consultations with the FWS regarding migratory birds and a revised Migratory Bird Plan incorporating any additional avoidance or mitigation measures.⁵³
- ◇ All fall 2015 hibernacula survey results for the Indiana bat, and any avoidance and mitigation measures developed based on the results.⁵⁴
- ◇ All fall 2015 hibernacula survey results for the northern long-eared bat, and any avoidance and mitigation measures developed based on the results.⁵⁵
- ◇ All survey results for the bog turtle, including any FWS comments on the surveys and their conclusions.⁵⁶
- ◇ All survey results for the northeastern bulrush, including any FWS comments on the surveys and their conclusions, and proposed mitigation that would substantially minimize or avoid the potential impacts.⁵⁷
- ◇ All survey results for the Allegheny woodrat, permit requirements, agency correspondence, and avoidance or mitigation measures developed in consultation with the PGC.⁵⁸
- ◇ All documentation of Transco’s correspondence with the PGC and any avoidance or mitigation measures developed with the agency regarding the eastern small-footed bat.⁵⁹
- ◇ All survey results for timber rattlesnake, permit requirements, agency correspondence, and avoidance or mitigation measures developed in consultation with the PFBC.⁶⁰
- ◇ The results of any mussel surveys conducted within the Susquehanna River and any additional avoidance or mitigation measures included in Transco’s site-specific HDD contingency crossing plans.⁶¹

⁵² DEIS at 4-88.

⁵³ DEIS at 4-94.

⁵⁴ DEIS at 4-107.

⁵⁵ DEIS at 4-108.

⁵⁶ DEIS at 4-112.

⁵⁷ DEIS at 4-114.

⁵⁸ DEIS at 4-119.

⁵⁹ DEIS at 4-120.

⁶⁰ DEIS at 4-121 – 4-122.

⁶¹ DEIS at 4-123.

- ◊ All documentation of Transco’s correspondence with the VDGIF and any avoidance or mitigation measures developed with this agency regarding state-listed mussels in Virginia.⁶²
- ◊ Revised site-specific residential plans for all residences located within 10 feet of the construction work area.⁶³
- ◊ An update of the status of the development of the site-specific crossing plans for each of the recreation and special interest areas listed as being crossed or otherwise affected in table 4.8.6-1.⁶⁴
- ◊ Updated information regarding the identified landfill adjacent to the CPL South right-of-way near MP 66.8, including any mitigation measures that Transco would implement to avoid the landfill site or address any contamination that is encountered.⁶⁵

The Baltimore District cannot depend on these faulty documents to bolster its decision here. Rather, it must create its own NEPA analysis for this major federal action to determine whether “the proposed discharge will result in significant degradation of the aquatic ecosystem” and whether the Project, as proposed, is the least damaging practicable alternative.

B. The Baltimore District’s Supplement EIS Should, At the Very Least, Capture the Record Development, Considerations, and Conclusions of the PADEP Water Quality Permitting and Certification Processes

The PADEP must issue a valid Clean Water Act Section 401 certification before the Project may commence. Currently, PADEP’s 401 certification for the Project is being contested as unlawful.⁶⁶ The Corps at the very minimum should wait until the finalization of that permit and related court proceedings are concluded so as to understand the current significant adverse impact to the structure and function of the aquatic system.

III. The Project’s Discharge Would Cause or Contribute to Violations of Water Quality Standards

EPA regulations provide: “No discharge of dredged or fill materials shall be permitted if it causes or contributes...to violations of any applicable State water quality standard.”⁶⁷ PADEP

⁶² DEIS at 4-123.

⁶³ DEIS at 4-134.

⁶⁴ DEIS at 4-152.

⁶⁵ DEIS at 4-159.

⁶⁶ Notices of the appeals are cross-filed in the FERC docket. Enclosed for ease of reference is the Sierra Club’s notice of appeal to the Pennsylvania Environmental Hearing Board, because it sets out the key issues on appeal.

⁶⁷ 40 C.F.R. § 230.10(b).

must provide legally valid certification that this Project will not contribute to violations of water quality standards before the Corps can make a valid determination, under its regulations, of the likelihood of water quality violations.

In any case, PADEP does not have the information that it needs to make such a certification. With a faulty and incomplete DEIS that does not address indirect and cumulative impacts, PADEP cannot possibly make a determination that the indirect and cumulative effects of the Project will not affect water quality standards. Watershed impacts to Lancaster and Lebanon counties may affect drinking water supplies and traditional recreation. Runoff from reasonably foreseeable development arising from the Project will flow into several tributaries of the Susquehanna, many of which are impaired or threatened.

In fact, on several of the last publications of PA's 303(d) lists, many waterways proposed for crossing or which will be affected by wetland conversion are listed as impaired due to siltation/sedimentation, habitat alteration, and nutrient impairment. Scientific evidence and long-experience in the Susquehanna River Basin demonstrate that sediment pollution from both construction activities and from post-construction hydrologic changes persist downstream for the entire length of a river and for many decades following rainfall events.⁶⁸ Based on the current plans for the Project, on current experience of construction runoff modeled in the Bay TMDL and on reasonably foreseeable expected indirect growth impacts, it is highly likely that the Project will cause increased sediment, nutrient, and temperature pollution into several tributary waterways of the Susquehanna, let alone the Susquehanna itself, most of which are impaired for those very pollutants.

Similarly, the Susquehanna River Basin is also suffering from mixed results in terms of ongoing restoration efforts pursuant to the Bay TMDL.⁶⁹ PADEP has not—but must—consider how the direct and indirect effects of the Project (during construction and upon potential use) may affect the health and recovery of these waters.

Even for pollutant levels in affected waterways that are currently below water quality standards, the Corps and PADEP must take into account the degradation of water quality that would result from the Project.⁷⁰ Runoff from construction, from pesticides and herbicides and petroleum byproducts, increased impervious surface cover, increased erosion and sedimentation from storm water, eutrophication, and changes in temperature, turbidity and dissolved oxygen in water segments due to the removal of vegetation and/or the placement of fill may all occur with the Project.

⁶⁸ T.J. Beechie, *et al.*, *Process-based Principles for Restoring River Ecosystems*. BioScience: Vol. 60(3) 209-222 (2010); G.G. Kondolf, *et al.*, *Process-based ecological restoration: Visualizing three-dimensional connectivity and dynamic vectors to recover lost linkages*. Ecology and Society 11:5 (2006).

⁶⁹ See EPA, Evaluation of Pennsylvania's 2014-2015 Milestone Progress and 2016-2017 Milestone Commitments to Reduce Nitrogen, Phosphorous and Sediment, June 2016, *available at* <https://goo.gl/Q6aCIF>.

⁷⁰ 40 C.F.R. § 230.10(c).

IV. The Proposed Project Cannot Survive the Public Interest Review

Applications for Section 404 permits are subject to the Corps' Public Interest Review requirements set forth at 33 C.F.R. § 320.4. Under the regulation, "the decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."⁷¹ This evaluation requires a balancing test, in which "[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments."⁷² In making this decision, the Corps must consider all relevant factors, including:

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.⁷³

Every public interest review must also consider these general criteria:

- (i) the relative extent of the public and private need for the proposed structure or work;
- (ii) where there are unresolved conflicts as to the resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- (iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.⁷⁴

The Corps' public interest regulations explicitly recognize the importance of wetlands to the public interest, stating that "[m]ost wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."⁷⁵ Accordingly, the regulations provide that "[n]o permit will be granted which involves the alteration of wetlands identified as important [to the public interest] unless the district engineer concludes...that the benefits of the proposed alteration outweigh the damage to the wetlands resource."⁷⁶

⁷¹ 33 C.F.R. § 320.4(a)(1).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 33 C.F.R. § 320.4(a)(2).

⁷⁵ 33 C.F.R. § 320.4(b)(1).

⁷⁶ 33 C.F.R. 320.4(b)(4). See *Shoreline Assoc. v. Marsh*, 555 F. Supp. 169, 179 (D. Md. 1983) (upholding Corps' denial of permit based on its finding that wetlands were important to the public interest).

Applying the Corps' public interest analysis, the permit here should be denied. The entire 180+ mile project could potentially have one of the single largest impacts to the Susquehanna River Basin in a decade. If constructed the entire Project will impact myriad streams, forests, and wetlands. While the Corps' proposed permit makes light of wetlands by saying there will be no permanent loss, but only conversion, the facts show that the reality entails conversion to wetlands with lesser ecological functionality (which is to say distinctly less-valuable wetlands when considered in sub-watershed pollutant reduction and ecological system functional effectiveness). The Project will impact water quality, including public drinking water,⁷⁷ fish and wildlife, recreation such as fishing and hiking opportunities, and aesthetics – all relevant factors under the Corps' public interest regulations. It will destroy and marginalize habitat and wetlands on tributaries of the Susquehanna – a river of utmost importance to the restoration of the downstream Chesapeake Bay. The Project will likely entail eminent domain proceedings for valuable farmland and private property, against the landowners' wishes, and will impact local businesses. The scope of all the cumulative and indirect impacts are not fully known because PADEP, FERC, and the Corps have not completed adequate analysis of these impacts. When the full scope and intensity of adverse impacts is considered, they outweigh any potential public benefits.

V. The Corps Provides Insufficient Detail to Fully and Meaningfully Comment on the Mitigation Package

As an initial matter, the Corps' notice does not provide sufficient detail regarding the proposed mitigation. The Corps regulation on this issue, states:

For an activity that requires a...permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for...*The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts.*⁷⁸

The Corps' notice simply does not contain sufficient information on the proposed mitigation in light of the scope and scale of the Project, which involves significant impacts to significant aquatic resources. The notice pays lip service to meaningful discussion of mitigation or analysis of each impact. For example, the notice states that, when practicable, right-of-ways will be co-located with existing easements. Elsewhere the notice states that non-permanent, non-ROW disturbed areas “will be restored to preconstruction contours, stabilized, and vegetated following the completion of construction activities per landowner and applicable agency requests.” When considering the at least 650 acres of supplemental landscape that will be disturbed for the project, plus new road construction, this type of impact looms significant, and by making restoration contingent on landowner or agency follow-up, provides no surety of meaningful restoration.

⁷⁷ See FERC DEIS at 4-49 – 4-51

⁷⁸ 33 C.F.R. § 332.4(b)(1) (emphasis added).

The Corps' entire mitigation section in fact only includes one full paragraph, and three 1-2 sentence descriptions of mitigation. Considering the 600' impact zone of the Project, not to mention its hundreds of miles of length, the mitigation section falls woefully short in terms of substantive discussion and analysis. There is no indication in the proposal of the magnitude of mitigation that might be achievable, or the type of mitigation that will, or should, ultimately be selected (preservation vs. enhancement vs. restoration). In short, there is no meaningful explanation of how the identified mitigation sites will fully compensate for all of the aquatic impacts of the Project.

The proposal suggests that a mitigation plan is in the works, but doesn't disclose any elements thereof to the public. Specifically, the Corps' proposal fails to disclose, for example, the quantity of mitigation credits required, the location of the mitigation credits aside from stating a certain county, how PADEP and/or the Corps selected the proposed mitigation sites, what standards and criteria will be used to determine whether the plan appropriately compensates for lost aquatic functions and values, and what adaptive management measures will be used to manage risks inherent in any restoration and enhancement activities proposed. The documents also lack baseline information about the current state of the impacted watershed and the aquatic resource needed to be fulfilled through mitigation. Without this information—including a full functional assessment of the streams and wetlands to be impacted—the available materials cannot provide reasonable assurance that the impacts of the Project will be adequately mitigated, nor can the public adequately comment on the proposal.

VI. Transco has Failed to Avoid and Minimize Impacts

The Corps' notice also fails to demonstrate that Transco has avoided and minimized impacts to the maximum extent practicable. Compensatory mitigation is, and has always been, a last resort. Under the Corps' Guidelines for Preparing a Compensatory Mitigation Plan, a mitigation plan must provide a statement demonstrating the permittee's efforts to first avoid and minimize impacts. This statement must identify and specifically address impacts to outstanding resources (i.e., rare, unique, or high quality aquatic resources). Here, the Corps' discusses, in a couple sentences, that it has considered time-of-year restrictions for only high-value waters. However, there is no explanation as to how those restrictions will be implemented – the frequency, scope, monitoring or an accountability framework.

Similarly, while the proposal notes that 40 impaired waterbodies will be crossed, there is no discussion of how the Project will ensure it minimizes impacts to those already impaired waterways. One-sentence-long statements as to intended restoration practice – like the use of erosion control matting, contouring, and seeding – do not fulfill the standard of restoration, and certainly do not encompass the concepts of avoidance and minimization.

Furthermore, as discussed above, the DEIS and other documents indicate that adverse impacts, including impacts to outstanding resources, could be avoided and minimized, but are not required. And, while we applaud the Corps for considering the use of HDD in certain waterways, we question why this technique is not uniformly required, and other avoidance alternatives not robustly considered. As the 404(b)(1) Guidelines provide: no permit shall be issued “unless appropriate and practicable steps have been taken which will minimize potential

adverse impacts of the discharge on the aquatic ecosystem.”⁷⁹ As described above, this has not been done.

CONCLUSION

The Baltimore District should deny the Application. The Project has not been adequately analyzed, nor have the less damaging, practicable alternatives that would harm fewer water resources been considered. The cumulative and indirect effects of the Project, and how this Project will serve as a growth-inducing mechanism for further upstream shale gas infrastructure and gas well development, are not understood let alone analyzed, as they have never been studied. Until the cumulative and indirect effects of this Project are fully analyzed in conjunction with direct impacts, PADEP cannot issue a valid 401 water quality certification and the Corps cannot approve the Project under its Public Interest balancing test.

Thank you for the opportunity to submit these comments on the proposed project.

Respectfully,

Michael Helfrich
Lower Susquehanna Riverkeeper

Joanne Kilgour, Thomas Au, Diana Csank
Sierra Club

Ryan Talbott
Allegheny Defense Project

Ben Lockett
Appalachian Mountain Advocates

Ann Pinca
Lebanon Pipeline Awareness

Eva Telesco, Malinda Harnish Clatterbuck, Tim Spiese
Lancaster Against Pipelines

Joseph Otis Minott
Clean Air Council

Pam Bishop and Doug Lorenzen
Concerned Citizens of Lebanon County

Betsy Nicholas

⁷⁹ 40 C.F.R. § 230.10(d).

Waterkeepers Chesapeake

**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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Diana Csank, Esq., Sierra Club
(pending *pro hac vice* admission)
50 F St. NW, 8th Floor; Washington, DC 20001
Tel: 202-548-4595; Email: diana.csank@sierraclub.org

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.

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

SIERRA CLUB,)	
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Appellant,)	
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COMMONWEALTH OF)	EHB Docket No. _____
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Appellee,)	
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<i>and</i> Transcontinental Gas Pipe Line)	
Company, LLC,)	
)	
Permittee.)	

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

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

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PROTECTION,)	
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Appellee,)	
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and Transcontinental Gas Pipe Line)	
Company, LLC,)	
)	
Permittee.)	

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
Waterways and Wetlands Program
Pennsylvania Department of Environmental Protection
Northeast Regional Office
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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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