



Technical Guidance Coordinator
Department of Environmental Protection, Policy Office
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101

August 28, 2017

Dear Secretary McDonnell and staff,

The undersigned public interest organizations write regarding the Department of Environmental Protection's draft technical guidance entitled "*Policy for State Water Quality Certification Issuance for Interstate Natural Gas Transmission Pipeline Projects Regulated by the Federal Energy Regulatory Commission [FERC]*" (DEP ID: 310-2100-001), noticed in the Pennsylvania Bulletin for public comment on July 29, 2017. For the reasons set forth herein, the DEP's draft Policy undermines the purpose of Section 401 of the Clean Water Act, fails to comply with Article I, Section 27 of the Pennsylvania Constitution, and should be withdrawn and revised consistent with this letter. We request that the revised policy state clearly the information that an applicant must submit to receive—and for DEP to deny—a water quality certification. We also request that DEP not issue any water quality certifications until revision has been accomplished.

In particular, the revised policy should advise FERC-regulated pipeline project applicants to complete the relevant state water quality permitting *before* applying for water quality certification. For too long, DEP has allowed applicants to provide information in a piecemeal, irrational sequence where DEP certifies that projects protect water quality, and then, via the permitting process, looks at whether the projects can in fact do so. DEP should immediately discontinue this unlawful practice and cease issuing water quality certifications until it issues a corrected Policy

I. Legal Standard for Water Quality Certification of FERC-Regulated Pipelines

A. Clean Water Act Requirements

Under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, any applicant for a federal authorization to construct or operate a facility that may result in discharge into navigable waters must "provide the licensing or permitting agency" with "a certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1). The state, in turn, must evaluate the proposed project's compliance with certain provisions of the Clean Water Act, including water quality standards

and permitting, and set forth limitations and monitoring requirements “necessary to assure that any applicant for a Federal license or permit will comply” with the Act “and with any other appropriate requirement of State law set forth in such certification.” 33 U.S.C. §1341(d). Should a state be unable to assure that the action will comply with the applicable Clean Water Act standards, the state must deny a Section 401 Certification.

In addition to giving states a primary role in enforcing water quality standards in their jurisdictional waters, see 33 U.S.C. § 1319(a), the Clean Water Act requires that an applicant for a federal license to conduct any activity that “may result in any discharge into the navigable waters” obtain a 401 Certification from the state where such a discharge may occur, *id.* § 1341(a). In order to grant a 401 Certification, the state must be able to certify that any potential discharge from the proposed project “will comply with the applicable provisions of sections [301], [302], [303], [306], and [307]” of the Clean Water Act. *Id.* Section 401 also allows a state to condition the grant of a 401 Certification and provides that a certification “shall set forth any effluent limitations and other limitations... necessary to assure that any applicant” will comply with the various provisions of the Clean Water Act “and with any other appropriate requirement of State law.” *Id.* § 1341 (d)); see also *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Ecology*, 511 U.S. 700, 711 (1994). EPA regulations require a certifying state to find that “there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards,” 40 C.F.R. § 121.2(a)(3), including EPA-approved state standards. Thus, DEP has the critical role of granting certification **only** when and with the necessary conditions to protect Pennsylvania’s water quality. Unless the state waives its rights under Section 401 or grants the 401 Certification, “no license or permit shall be granted,” and “no license or permit shall be granted if certification has been denied by the State.” 33 U.S.C. § 1341(a).

B. Article I, Section 27 of the Pennsylvania Constitution

In the draft policy, DEP does not even acknowledge that Article I, Section 27 of the Pennsylvania Constitution applies to its review of FERC-regulated pipelines, let alone that such actions cannot proceed without the constitutionally-mandated environmental review. The omissions are clear error under binding Pennsylvania Supreme Court precedent in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (“*PEDF*”), that all branches of the Commonwealth government are trustees of Pennsylvania’s public natural resources. We request that DEP implement the trustee duties of Article I, Section 27 of the Pennsylvania Constitution, by considering “in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.”¹ As discussed further below, as trustee, DEP’s duties start—but certainly do not end—with a comprehensive

¹ *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013) [hereinafter “*Robinson Twp.*”].

assessment of potential impacts on the constitutionally-protected feature: here, the impacts on water quality.² Both the review and the substantive decisions informed by that review must comply with Section 27's mandates.

Section 27 provides:

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.

As the Pennsylvania Supreme Court has affirmed, the text establishes a duty for the Commonwealth government to "prohibit the degradation, diminution, and depletion of [Pennsylvania's] public natural resources, whether the harms result from direct state action or the actions of private parties." *PEDF*, 161 A.3d at 933 (citing *Robinson Township v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013) (plurality) ("*Robinson Twp.*"). This "offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term." *Robinson Twp.*, 83 A.3d at 959 (Pa. 2013).

II. The Draft Policy Does Not Conform to the Applicable Legal Standards

We take issue with the draft policy because it fails to identify the applicable legal standards for water quality certification and it misstates the legal consequences for failing to meet the standards. DEP's draft policy states:

At the time an applicant files an application with FERC for a Certificate of Public Convenience and Necessity, the applicant may not have sufficient information to apply for necessary State environmental permits and authorizations from DEP, particularly permits associated with stream or wetland crossings. For example, an applicant may not yet have access to all privately owned land along the proposed pipeline route necessary to delineate and field verify these water resources. For purposes of its FERC application, an applicant may use various resources in making a preliminary identification of water resources and a

² We refer DEP to the discussion of these constitutional duties set out in our comments regarding the Governor's Pipeline Infrastructure Task Force, available at goo.gl/BHApGv. We also incorporate the comments here by reference.

preliminary determination of potential project impacts to the water resources prior to field verification. This preliminary identification may be based on remote sensing, digital geo-spatial data, geographic information systems (GIS), light detection and ranging (LiDAR), eMAP, and other similar available sources.

If an applicant requests a SWQC, DEP can issue, deny, or condition a SWQC. DEP must act within a reasonable period, not to exceed one year from its receipt of a complete SWQC application. Through its review, DEP will determine if the applicant can protect waters of the Commonwealth during construction and operation of the proposed natural gas pipeline project by obtaining permits, authorizations or approvals required under existing State water quality programs. If so, DEP may issue a SWQC conditioned upon the applicant acquiring such permits, authorizations, or approvals.

First, this is a gross oversimplification of the certification process. It fails to specify the critical information that an applicant must submit to obtain a water quality certification under Pennsylvania law and federal law. Pipeline companies have a good deal of information available at the time they file an application to FERC. They have the proposed route. They know what streams and wetlands will be crossed by that route. They know the topography and the proposed method of construction and drilling. They know what alternatives they have considered and whether they are feasible. They have consultants who can verify the water resources affected.

Issuing conditional approvals without an informational foundation hides potential problems from public view and is contrary to the purpose of Section 401 of the Clean Water Act. For example, during the past year, DEP has issued a conditional water quality certification for Williams Transco's Atlantic Sunrise Pipeline project without having reviewed *any* environmental analysis or *any* permit applications for stream crossings and waterways encroachments. After conveying the conditional water quality certification to FERC, DEP subsequently sent nine notices of technical deficiency to Transco, listing multiple significant deficiencies in the permit applications.

A water quality "certification" is supposed to be a legal instrument that assures fellow regulators and the public that a project will in fact comply with state water-quality standards and will not degrade water quality. Because DEP initially fails to perform or review an environmental impact analysis, its "conditional certification" gives no such assurance. Instead, DEP certifications merely indicate that an applicant such as Transco—at some indefinite time in the future—should submit the pre-requisite environmental impact analysis and thereupon obtain the permits that would assure compliance with water quality standards. The technical deficiency letters DEP sent to Transco exemplify the significant environmental problems that are obscured and deferred by this approach, including

inadequate erosion and sedimentation control plans, the lack of identification of threatened and endangered species along the pipeline path, and the crossing of stocked trout stream during stocking season—all reasons that would likely hinder compliance with the requisite standards that the Section 401 Certification must assure. Clearly, DEP's practice undermines the very purpose of water quality certification—assuring the protection of water quality in Pennsylvania through compliance with state water-quality standards and associated state law requirements.³

Second, the draft policy presupposes that water quality certifications will be granted. But DEP has options, when faced with insufficient information, to carry out Section 401 reviews consistent with DEP's statutory and constitutional duties. For instance, DEP can deny a water quality certification with instructions for the applicant to submit a new application with the requisite information. Other states certainly do so. And a court may uphold such a denial when the applicant "refuse[s] to provide relevant information" the agency deems significant. *Constitution v. New York State Dep't of Env'tl. Conservation*, No. 16-1568, Document No. 240-1 at *26 (2d Cir. Aug. 18, 2017). Indeed, the converse is also true: "an agency's decision may be found 'arbitrary and capricious' for 'issuing a permit with insufficient information.'" *Id.* (quoting *Utahns For Better Transportation v. United States Department of Transportation*, 305 F.3d 1152, 1192 (10th Cir. 2002) (emphasis in original). And yet DEP's draft policy is silent as to when and how DEP may deny a Section 401 certification. Indeed, the entire policy presupposes that DEP *will* issue a conditional certification; even the title of the draft policy precludes the alternative actions available to DEP when it receives an application for a 401 certification.⁴

Third, DEP needs certain information to conduct a meaningful review. How can DEP "determine if the applicant can protect waters of the Commonwealth during construction and operation of the proposed natural gas pipeline project by obtaining permits, authorizations or approvals required under existing State water quality programs" without reviewing the details of the proposed operations? The quoted statement assumes (correctly) that for some projects, obtaining and complying with state water quality permits will not be enough to ensure that the waters of the Commonwealth will be protected (i.e., it presupposes that there may be exceptions to the general rule that the state permits will be enough). What the draft policy does not explain, however, is *how* DEP makes the project-by-project determination that the state permits will or will not be enough to protect water resources, and *what information* DEP must have in order to make that project-by-project determination. To make a

³ Notably, Section 401 provides that a state may rescind a certification should the applicant fail to meet conditions therein. 33 U.S.C. § 1341(c). Yet DEP's draft Policy fails to acknowledge this option, which the Atlantic Sunrise pipeline proposal indicates is necessary.

⁴ The title states that the policy is for the "issuance" of a certification for FERC-regulated pipelines, rather than the "review" or "consideration" of an application for Section 401 certification. Note also that the Clean Water Act acknowledges that even conditional certifications may not assure compliance with water quality standards and permits, in which case a Section 401 water quality certification shall not be issued. 33 U.S.C. § 1341(a)(2).

defensible, informed decision, DEP must first obtain information from the applicant, and the policy should specify the minimum information DEP needs to determine whether or not, for any particular project, obtaining and complying with state water quality permits will provide adequate protection for the waters of the Commonwealth. Of course, the most straightforward, defensible approach is for the applicant to complete all of the relevant state permit proceedings *before* applying for a certification. This way, DEP will have the benefit of the record developed in those proceedings when it reaches the critical decision of whether to grant, condition, or deny certification.

For example, many of these construction and operation details were not made available at the time DEP issued its water quality certification for the Atlantic Sunrise project. In a submission to FERC just prior to issuance of the Final Environmental Impact Statement, Transco proposed at least 388 waterbody crossings as part of its Atlantic Sunrise project: 208 crossings would impact perennial waterbodies, 84 would impact intermittent waterbodies, and 41 would impact ephemeral waterbodies.⁵ In addition, another 21 perennial waterbodies, 20 intermittent waterbodies, 10 ephemeral waterbodies, and 1 pond would be within construction workspaces or crossed by access roads. Of these crossings, 66 would impact high-quality, cold water fisheries (“HQ-CWF”) waters, which is eight more HQ-CWF crossings than were initially identified by Transco.⁶ Methods for preventing spills and accidents are also important. In determining if an applicant can protect waters of the Commonwealth, DEP must consider the applicant's past history in protecting the Commonwealth's waters and its proposals to prevent spills and accidents during construction.

DEP's decision whether to issue permits for Transco to cross dozens of HQ streams is a significant matter, which has not yet been resolved. Transco is proposing to use trenchless crossing methods at just two of the HQ stream crossings.⁷ Moreover, of all the water crossings, Transco has proposed trenchless crossings at just 11 of these waterbodies.⁸

The methods of stream crossing are relevant to water quality certification, and the methods alone could prevent the applicant from complying with state water quality standards. Absent the requirement to use trenchless crossing techniques for many more of these water crossings, the Atlantic Sunrise Project will have significant water impacts that should be fully disclosed and weighed towards denial of permits and certification. Compare the recent water quality certification denial for the proposed Constitution Pipeline. There, the New York Department of Environmental Conservation (“NYDEC”) explained that “[o]pen trenching is a highly impactful construction technique involving

⁵ See FEIS at 4-52.

⁶ Compare FEIS at 4-58 – 4-59 with DEIS at 4-54 – 4-55.

⁷ See Transco Final Environmental Impact Statement (FEIS), FERC Docket No. CP15-138-000, App. K, Table K-1.

⁸ See *id.*

significant disturbance of the existing stream bed and potential long-term stream flow disruption, destruction of riparian vegetation and establishment of a permanently cleared corridor.”⁹

In addition, NYDEC explained the importance of looking at the cumulative impacts of pipeline construction:

Cumulatively, impacts to both small and large streams from the construction and operation of the [Constitution Pipeline] Project can be profound and include loss of available habitat, changes in thermal conditions, increased erosion, creation of stream instability and turbidity, impairment of best usages, as well as watershed-wide impacts resulting from placement of the pipeline across water bodies in remote and rural areas.¹⁰

NYDEC’s water quality certification denial for the Constitution Pipeline is a cautionary tale for DEP. According to NYDEC, Constitution Pipeline’s “Trenchless Feasibility Study” did not include information requested by multiple agencies and “did not provide a reasoned analysis to enable [NYDEC] to determine if the [Constitution Pipeline] Project demonstrates compliance with water quality standards.”¹¹ NYDEC further explained that:

Of the 251 streams to be impacted by the [Constitution Pipeline] Project, [the Trenchless Feasibility] Study evaluated only 87 streams, in addition to the Schoharie Creek, as part of the Phase I desktop analysis which Constitution used to determine if surface installation methods warranted consideration for a trenchless design. Of the 87 streams reviewed, Constitution automatically eliminated 41 streams from consideration for trenchless crossing because those streams were 30 feet wide or less . . . Using its review criteria, Constitution’s [Trenchless Feasibility] Study finally concluded that only 11 stream crossings of the 251 displayed preliminary evidence in support of a potentially successful trenchless design and were chosen for the Phase III geotechnical field analysis. [NYDEC] staff consistently told Constitution that its November 2013 Trenchless Feasibility Study was incomplete and inadequate.¹²

⁹ NYDEC, Notice of WQC Denial for Constitution Pipeline, p. 8 (Apr. 22, 2016) (“Constitution WQC Denial”), available at http://www.dec.ny.gov/docs/administration_pdf/constitutionwc42016.pdf.

¹⁰ Id. at 12.

¹¹ Constitution WQC Denial at 10-11.

¹² Id. at 11 (emphasis added) (citation omitted).

In contrast, DEP issued Transco a conditional water quality certification without requiring it to prepare a similar trenchless feasibility study for the Atlantic Sunrise project. Absent such a study, the project may very well suffer from the same inadequacies that plagued the Constitution project. For example, did Transco “automatically eliminate” streams from consideration for trenchless crossing because they were 30 feet wide or less? This is a critically important question that must be answered because the Atlantic Sunrise project would cross more waterbodies than the Constitution project, but with even fewer using trenchless crossing methods.

Moreover, it is vital that such a trenchless crossing feasibility study be scrutinized by DEP before acceptance. Another recent pipeline project provides a cautionary tale. In an effort to rush through the Sunoco Mariner East 2 pipelines, DEP ignored inadequate trenchless crossing and alternatives analyses despite red flags. As a result, DEP greenlighted a project where horizontal directional drilling was declared not feasible—and thus not considered—for pipeline segment lengths of less than roughly a thousand feet even as the plans included such short HDD segments where Sunoco preferred. Likewise, the information given to DEP in Mariner East 2’s alternatives analysis was in large part copied and pasted from one crossing to the next, rather than providing detailed site-specific analysis. DEP should insist on *meaningful, detailed, and site-specific analysis* in applications for Section 401 Certifications.

Returning to Atlantic Sunrise as an example, since multiple HQ and EV streams are being crossed in the Atlantic Sunrise project, in issuing a certificate, DEP must adhere to anti-degradation requirements and, in accordance with 25 Pa. Code 93.4c, find:

- whether the activity has social or economic justification (for HQ streams)
- whether there are feasible alternatives to the activity (including non discharge alternatives)
- all potential water quality impacts associated with to the project, both direct and indirect, over the life of the project, including impacts on existing and classified uses; physical, chemical, and biological impacts, including cumulative impacts; the effect on circulation patterns and water movement; and the cumulative impacts of the proposed activity and reasonably foreseen similar activities of the applicant and others.¹³

Large scale environmental analysis is important to determine the scale of impacts along the entire length of a pipeline. Even temporary obstructions of streams can have permanent impacts. In responding to the proposal to construct the Constitution Pipeline (which originates in Pennsylvania and crosses Pennsylvania), the NYDEC found the information submitted inadequate, whereas DEP failed to take a close look at water quality impacts before issuing its certificate. In that case, DEP issued a

¹³ In the Atlantic Sunrise Final Environmental Impact Statement, along with other major defects, FERC says the additional information is needed to justify the destruction of Exceptional Value wetlands. Id. See FEIS, App. L at L-16, 19-20.

conditional water quality certification, as it does in almost every situation (and as the draft policy assumes). Yet, the Pennsylvania Environmental Hearing Board has affirmed that PADEP's constitutional duties are not y satisfied by mere compliance with statutory or regulatory standards:

In the abstract, we find that certain impacts that don't impair a stream but do impact it, can, based on their scope or duration, rise to the level of causing unreasonable degradation or deterioration. Finding otherwise would mean that you are treating the Article 1, Sec 27 Constitutional standard as coextensive with compliance with the statutes and the regulations governing clean water. The Supreme Court in *PEDF* clearly rejected such an approach when it rejected the *Payne* test. There is no question that the longwall mining authorized by the Department degrades and causes deterioration of the streams in BMEEA on at least a limited and temporary basis. Ultimately then it becomes an issue of whether the degradation and deterioration is unreasonable.¹⁴

In this policy, DEP should specify the information it needs to issue—or deny—a certification. This certainly includes information regarding the water quality, uses, thermal conditions, and biology of the streams to be crossed. These would also include surveys of historical and cultural resources affected. And these certainly would include methods of construction, drilling, and mitigation. DEP cannot and should not issue a certificate unless it has considered all potential water quality impacts associated with to the project, both direct and indirect, over the life of the project, including impacts on existing and classified uses.

Recent history and ongoing experience affirms that pipeline builders are not adequately protecting water quality in their construction projects. Water supply contamination across the Commonwealth as a result of HDD operations by Sunoco for Mariner East 2, and Sunoco's discharge of over 100,000 gallons of drilling fluids into exception value wetlands in Cumberland County is just one recent example. These issues were not only foreseeable, they were foreseen and warned against. DEP's Policy must treat these problems as preventable, not inevitable.

The draft policy does not credibly meet the standards that the Pennsylvania Constitution, the Clean Water Act, the Clean Streams Law, and DEP's regulations require for water quality certification. DEP should withdraw the draft and cease issuing such certifications until the policy has been revised consistent with these constitutional and statutory standards. We request that a revised policy state clearly the information that an applicant must submit to receive—or for the DEP to deny—a water

¹⁴ *Citizens for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, Adjudication, August 15, 2017 (at 61-62)

quality certification. We also request that DEP not issue any water quality certifications until such a revision has been accomplished.

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