



March 12, 2013

U.S. Army Corps of Engineers
Philadelphia District
Wanamaker Building
Philadelphia, PA 19107

Re: Tennessee Gas Pipeline Northeast Upgrade Project – Clean Water Act Section 404 Permit Application.

The Delaware Riverkeeper Network (“DRN”) has serious concerns about Tennessee Gas Pipeline’s (“TGP”) application for a Clean Water Act Section 404 permit for the Northeast Upgrade Project (“NEUP”). DRN has sent the Corps a number of letters providing relevant information to the Corps that TGP may not have submitted in its 404 permit application.

On August 3, 2012 we sent a letter to the Corps that articulated some general concerns about the NEUP, and as part of that letter included a number of additional documents:

- Comment letter from Delaware Riverkeeper Network to the DRBC dated July 11, 2012 regarding the proposed water withdrawal for the project;
- Request for Rehearing submitted June 28, 2012 from the Delaware Riverkeeper Network, the NJ Sierra Club, and the NJ Highlands Coalition, including appendices;
- Letter from a coalition of organizations to the DRBC dated June 27, 2012;
- Letter from the Pike County Commissioners to the DRBC dated June 19, 2012;
- Letter from Paul Rubin, Hydroquest, regarding pipelines, dated June 8, 2012 – while not specifically about the NEUP this report contains relevant information for the NEUP stream crossings proposed;
- Comments submitted by the Delaware Riverkeeper Network to the NJ State House Commission dated June 5, 2012;
- Comments on the draft Environmental Assessment submitted by the Columbia Environmental Law Clinic on behalf of the Delaware Riverkeeper Network, the NJ Sierra Club, and the NJ Highlands Coalition dated December 21, 2011; and,
- Response to Notice of Intent to Prepare an Environmental Assessment and Request for Comments on Environmental Issues submitted by the Columbia Environmental Law Clinic on behalf of the Delaware Riverkeeper Network, the

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NJ Sierra Club, and the NJ Highlands Coalition dated November 12, 2011.

In addition to the issues raised in those documents – many of which still remain outstanding as they are subject to pending litigation – DRN has a number of other concerns that have arisen since our August 2012 letter.

The first concern relates to the Pennsylvania Department of Environmental Protection’s (“PADEP”) evaluation and permitting of the NEUP, including PADEP’s failure to properly enforce the terms and conditions of its permits, the inadequate post construction evaluation of satisfactory wetland restoration, and the inconsistent and contradictory findings on adverse impacts to wetlands.

It is important that the Corps carefully consider the role PADEP has played thus far in permitting these types of projects. For example, the Corps should not assume that PADEP will prevent wetlands degradation through its permitting regime, as it is well documented that PADEP failed to adequately protect wetlands during TGP’s previous project, the 300 Line Upgrade Project. Correspondingly, PADEP has provided no indication that a different result is likely to occur with respect to the NEUP. PADEP has admitted that TGP has accumulated roughly 380 violations as a result of the inadequate implementation and maintenance of environmentally protective measures during the construction and installation of the pipeline.¹ The 300 Line Upgrade Project went into service in November of 2011, and despite the fact that PADEP has yet to make a final determination on the consequences of any of those 380 violations, PADEP issued its Chapter 105 and 102 permits for the NEUP in November 2012.

PADEP has no way to ensure that similar systemic problems won’t arise during the NEUP without making a final determination on what problems occurred on the 300 Line Upgrade Project. To act otherwise invites, if not assures, future problems. Furthermore, standard condition 18 of the Chapter 102 permit for the 300 Line Upgrade Project states that “[a]ny permit-non-compliance that constitutes a violation . . . is grounds for enforcement action or permit suspension; revocation; modification and reissuance, or denial of a permit.” However, PADEP simply cannot revoke, suspend, or modify a permit as a result of violations if PADEP does not make a final determination on the violations until *after construction activities are completed*. Such a backwards enforcement procedure provides no incentive for the project sponsor to act in accordance with the terms and conditions of its permit.

In addition to a lack of adequate enforcement, PADEP’s evaluation of what constitutes an adverse impact to a wetland is demonstrably inadequate. For example, one wetland adversely affected during the construction of the 300 Line Upgrade Project, W038 (milepost 13.75 of the 300 Line Upgrade Project), is a state designated Exceptional Value wetland, and therefore has certain protections that other wetlands do not enjoy. One such protection, pursuant to Chapter 105.18a(a), is that the project encroachment will not have an “adverse impact on the wetland.” In order to determine if an adverse impact has occurred, the function and values of the wetlands are evaluated.²

When evaluating the pre-construction and post-construction pictures of W038 it is evident that a significant portion of tree canopy was lost due to construction activity, thus impacting

¹ DRN v. PADEP, EHB Docket No. 2012-196, hearing transcript (Jan. 14, 2013).

² See, 25 Pa. Code § 105.14.b(13).

habitat diversity and the thermal character of the wetland. Furthermore, it is clear from those images that not only has there been a significant loss in tree cover, but also that the wetland now essentially resembles an open water system and has been reduced in overall length. However, PADEP contends that “a Department representative inspected wetland W038 and observed that it had been properly restored to the Department's approved specifications. The temporary impacts to the wetland will not inhibit the wetlands future function and value.”³ If W038 is the standard to which PADEP holds for wetlands to be restored, it is inadequately protecting these wetlands.

Furthermore, the Chapter 105 permit issued by PADEP, which also constitutes the project's CWA Section 401 Water Quality Certification, includes a finding that no adverse impacts will result from construction activities. However, the Van Auken Creek Wetlands Mitigation Plan for the project submitted by TGP to the Corps indicates that roughly 1.86 acres of wetlands will be *permanently* changed from Palustrine Forested Wetlands to Palustrine Emergent Wetlands within the Philadelphia District. Additionally, the Wetlands Mitigation Plan provides further detail, stating “[t]he main impact of the Project on wetland *function* will be associated with habitat modification due to the conversion from forested wetland and scrub-shrub wetland to emergent wetland.”⁴ (emphasis added). Such permanent changes to wetlands within the project area are not reflected in the Chapter 105 permit application or approval, and were not evaluated in the context of the Exceptional Value status of many of the associated wetlands. In order to produce an adequate review of the NEUP, the Corps must evaluate not only the application material provided by TGP, but also consider the actual conditions on the ground that have resulted from the action/inaction of PADEP in holding TGP responsible for fulfilling the terms and conditions of its permits.

In addition to these concerns with PADEP's evaluation, permitting, and enforcement of the project, DRN has also identified several other issues that the Corps must consider in the context of its CWA 404 permit evaluation. These issues relate to the cumulative impacts of the project, as well as the potential project alternatives.

The Corps' regulations specify that “a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines” or if the discharge “would be contrary to the public interest.” 33 C.F.R. §§ 323.6(a), 320.4(a)(1). To provide guidance to the Corps district offices that make permitting decisions, the Corps developed Standard Operating Procedures that describe in detail how districts should make permitting decisions.

Analyzing alternatives to a proposed project is a mandatory component of the Corps' Section 404 decision-making process. 40 C.F.R. §§ 230.5(c), 230.10(a); 33 C.F.R. § 320.4(a)(2)(ii). The Corps may not issue a Section 404 permit if it finds that there is “a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem,” unless that alternative also has “other significant adverse environmental consequences.” 40 C.F.R. § 230.10(a).

³ Commonwealth of Pennsylvania DEP's Response to Appellant's Petition for Supersedeas, Environmental Hearing Board, EHB Docket No. 2012-196 (Jan. 7, 2013), p. 36.

⁴ Van Auken Creek Wetlands Mitigation Plan, 12.

One alternative that has not been adequately scrutinized is the crossing method TGP has selected for crossing West Falls Creek and the associated Exceptional Value wetland. TGP has indicated that it will perform a “wet” crossing utilizing the push/pull method. However, TGP initially indicated that it was going to perform the crossing using the direct pipe method, which would be the environmentally less destructive alternative. TGP commissioned a third party, GeoEngineers, to evaluate the geotechnical feasibility of the direct pipe crossing method for this specific location. The result of the initial analysis showed that the direct pipe method looked promising, and as of August 1, 2012, TGP had communicated to PADEP that it planned on using the direct pipe method for the crossing. Only after the Pike County Conservation District requested to review the plan sets for the crossing did TGP abruptly, and without explanation, change its crossing method from the trenchless direct pipe method to the wet crossing push/pull method.

The Corps must independently verify that the environmentally preferred alternative, the direct pipe method, is not technically feasible and that the only option is to perform the wet crossing. Furthermore, the Corps must verify that the flow conditions in the West Falls Creek area are such that a “dry” crossing is not possible, as this technique would also be environmentally preferable to the push/pull method. It should be noted that the push/pull method is not even a technique that TGP lists in its construction plans as a way in which to cross a waterbody, rather it is listed as a way to only cross wetlands.

Additionally, while the majority of the project will be collocated along an existing Right-of-Way (“ROW”), a significant portion of the NEUP has been proposed to be constructed in previously undisturbed forest. The greenfield route that TGP has selected includes the crossing of a number of wetlands, including: W091, W092, W093, and W095 (three of which are designated under Pennsylvania Law as Exceptional Value wetlands). A review of wetland delineation maps for the project indicates that TGP can avoid crossing these previously undisturbed wetlands along the greenfield portion of the NEUP by re-routing the proposed ROW. The Corps must evaluate this routing alternative to determine if it avoids unnecessary impacts to wetlands.

The Corps must deny a Section 404 permit not only when there is a less environmentally damaging practicable alternative, 33 C.F.R. § 230.10(a), but also when issuing the permit would be “contrary to the public interest,” 33 C.F.R. § 320.4(a)(1). During its public interest review, the Corps must consider “all the facts” and must deny the permit if “the costs of the project outweigh[] its potential benefits and . . . the public interest would best be served by denying the permit.” *Buttrey v. United States*, 690 F.2d 1170, 1185 (5th Cir. 1982).

To evaluate the project's effects on the public interest, the Corps must balance the “benefits which reasonably may be expected to accrue from the proposal” against the “reasonably foreseeable detriments.” 33 C.F.R. § 320.4(a)(1). This “careful weighing” considers “[a]ll factors which may be relevant to the proposal . . . including the cumulative effects thereof.” *Id.*

One series of cumulative impacts that have not been adequately identified or evaluated by the Federal Energy Regulatory Commission or PADEP, includes a review of cumulative impacts on wetlands and water resources at places where the NEUP interconnects with previous pipeline projects (including TGP’s 300 Line Upgrade Project, the NSD Project, and the MPP Project). A review of the plan sets for the NEUP illustrate the segmented nature of the

NEUP project and the way in which the NEUP leap-frogs other pipeline looping and upgrade projects on the Eastern Leg of TGP's 300 Line. For example, during construction of Loop 323 for the 300 Line Upgrade Project there were associated impacts to the Savatine Wetland complex, Savatine Creek, and Craft Brook, all of which flow into the Sawkill Creek. These impacts were documented by the Pike County Conservation District in numerous notices of violation submitted to PADEP. The NEUP project will result in the crossing of a number of waterbodies and wetlands that also flow into the Sawkill Creek, including Pinchot Brook and Dimmock Brook. Therefore, where these two projects interconnect, there is a significant risk that the wetlands and streams impacts will overlap.

A second example of project overlap is illustrated by the potential impacts to the Monksville Reservoir. Loop 325 of the 300 Line Upgrade Project resulted in the crossing of Hewitt Brook and several tributaries to Hewitt Brook, which are all connected to the Monksville Reservoir. The NEUP will in fact not only cross the Monksville Reservoir itself, but will also result in the crossing a tributary to the Wanaque River which flows into the Reservoir. There are no fewer than eight other instances where the wetlands and streams impacts from previous TGP projects potentially overlap with impacts from the NEUP. To complete an adequate cumulative impacts analysis the Corps must conduct a searching review of these overlapping impacts.

DRN has also been providing updates to the Corps on the potentially inadequate signage through the project area within the Philadelphia District's jurisdiction. We appreciate the Corps' open reception of our recent letters, and request that the Corps continue to evaluate and verify that TGP has sufficiently marked these wetlands and water resources prior to undertaking any further tree felling, tree clearing, or construction activities.

Lastly, DRN urges the Corps, as a voting member on the Delaware River Basin Commission ("Commission"), to advocate for subjecting all pipeline installation and expansion projects to Commission review. Currently, no federal or state agency is examining the cumulative impacts of pipeline proliferation within the Delaware River Basin, and, no agency is analyzing the cumulative impact of these projects on wetlands and water resources. The Commission possesses the clear legal and regulatory authority to do so, as pipeline projects meet the thresholds established by the Commission to trigger review. As demonstrated by the environmental harms resulting from TGP's 300 Line Upgrade Project on wetlands and water bodies, there is a need for a meaningful review by the Commission to ensure the preservation and protection of the water resources of the basin.

More specifically, we ask that the Corps request that the Commission reopen the NEUP to the regulatory review process. On January 30, 2013, the Commission provided to DRN an Amended Letter of Determination for the Tennessee Gas Pipeline 300 Line Upgrade Project and the Columbia 1278 Replacement Project. This letter indicated that the DRBC would exercise jurisdiction pursuant to RPP 2.3.5 A.12, and require each project sponsor to submit a docket application because each of the projects involved construction within a recreation area incorporated into the Comprehensive Plan. However, despite the fact that the NEUP qualifies for review *in exactly the same manner* as the 300 Line Upgrade Project and the Columbia 1278 Project, the Commission has refused to review the NEUP pursuant to RPP 2.3.5 A.12.

The Commission's vote to approve the water withdrawal docket for the NEUP did not relieve the Commission of its legal obligations established by Article 3.8 of the Compact and elaborated in

the DRBC Rules of Practice and Procedure. This includes the obligation to review projects - not just aspects of a project, but all elements of a project - that pass through an area incorporated into the DRBC's Comprehensive Plan, to ensure that such projects do not substantially impair or conflict with the Plan.

The concerns raised above are not meant to represent an exhaustive list of issues; rather, this letter is designed to highlight some of the most troubling aspects of the proposed project, and the role that the Corps must play in protecting the water resources of the region. To adequately evaluate the NEUP in the context of a CWA 404 permit, the Corps must take into account not only PADEP's failure to properly enforce its permits and the resulting conditions on the ground, but also, the Corps must properly evaluate those viable alternatives and public interest considerations that were not provided in TGP's application.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Maya van Rossum", with a long horizontal flourish extending to the right.

Maya van Rossum,
the Delaware Riverkeeper