

No. 17-1456

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

DELAWARE RIVERKEEPER NETWORK,

and

MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

PATRICK MCDONNELL, Acting Secretary of the Pennsylvania Department of
Environmental Protection, and COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

REPLY BRIEF OF PETITIONERS

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This matter concerns Petitioners Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper's ("DRN") challenge to the Pennsylvania Department of Environmental Protection ("PADEP") issuance of a Conditional Water Quality Certification ("Water Quality Certification") to PennEast Pipeline Company, LLC ("PennEast") for the PennEast Pipeline Project ("Project").

I. The Water Quality Certification Is Not Ripe for Review By This Court

As set forth in DRN's merits brief, the Water Quality Certification in the above-captioned matter is not ripe for review by this Court. It is not a "final" order of PADEP. Rather, the matter must first be heard by the Pennsylvania Environmental Hearing Board ("EHB"). Failing to require that this matter first proceed before the EHB would require that this Court consider the matter on an incomplete record and would deprive DRN of significant due process rights.

In an effort to undermine this conclusion, PADEP and PennEast set forth a number of arguments. Each of these arguments fail.

This Court has Not Previously Addressed When a Water Quality Certification is Ripe for Federal Judicial Review

Relying on *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016), PADEP and PennEast argue that this Court has already held that it has "exclusive original jurisdiction over an appeal of the PADEP water quality certification." *See* Brief of Intervenor, p. 5. It has not. In *Delaware Riverkeeper*, this Court only addressed

the question of whether PADEP's action was an "order or action of a State administrative agency acting pursuant to Federal law." 833 F.3d at 370-372. The Court did not address whether the order or action was ripe for federal review. As the EHB found, for this reason "[w]e do not believe the Third Circuit's Opinion in the *Delaware Riverkeeper* case is particularly helpful" in resolving this issue.

Lancaster Against Pipelines v. Commonwealth of Pennsylvania, Department of Environmental Protection, EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L) (May 10, 2017), Slip Op. at 4. (AD 8).

Pennsylvania and Massachusetts Administrative Processes are Nearly Identical

PennEast attempts to undermine the applicability of the First Circuit's persuasive decision in *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017) by claiming that the "PADEP's procedures are fundamentally different from [those of the Massachusetts Department of Environmental Protection]." Brief of Intervenor, p. 8. However, this argument too has been squarely addressed and rejected by the EHB. The EHB is an independent tribunal with the sole job of reviewing PADEP actions. 35 P.S. § 7514(c). No tribunal better understands PADEP's processes than the EHB. Yet, contrary to PennEast, the EHB found that "Pennsylvania's procedures are *nearly identical* in substance to the Massachusetts procedures that the First Circuit found not to be final until the adversely affected party had an opportunity to take

advantage of that state's hearing process.” *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, slip op. at 5 (AD 9) (emphasis added).

By way of example, in Massachusetts, administrative agency action is subject to an appeal which includes the “the taking of evidence and *de novo* consideration.” *Berkshire Environmental*, 851 F.3d at 112. The agency action does not become “final” until after an aggrieved party has had the opportunity to pursue the administrative appeal process. *Id.* Such a process “may culminate in an adjudicatory hearing” where “parties may present evidence on issues of fact, and argument on issues of law and fact prior to the Commissioner's issuance of a final decision.” *Id.* Such “full blown adjudicatory proceedings” may involve “time and expense.” *Id.* “[T]he manner in which Massachusetts has chosen to structure its internal agency decision-making strikes us as hardly unusual” *Id.*

Like Massachusetts, Pennsylvania has an administrative appeal process for challenging an agency action, which involves the taking of evidence and *de novo* consideration. *See Leatherwood, Inc. v. Com., Dept. of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003). And, like Massachusetts, the agency action does not become “final” until after an aggrieved party has person has had the opportunity to appeal the action to the EHB. 35 P.S. § 7514(c).

Requiring Final Agency Action Is Not “Practically Infeasible”

PennEast attempts to present this Court with the “sheer practical infeasibility” and “absurd result” of requiring a PADEP order to become final before it is reviewed by the Court. Brief of Intervenor, pp. 12, 13. PennEast argues (without any citation) that because the EHB process may take more than a year, it would run afoul of the deadlines set forth in 33 U.S.C. § 1341(a)(1). Even if the time frame proposed by PennEast is correct, this argument misapprehends the Pennsylvania administrative review process. Under the Environmental Hearing Board Act, “[n]o appeal shall act as an automatic supersedeas.” 35 P. S. § 7514(d)(1). Unless the EHB were to take the affirmative step of conducting an evidentiary hearing and issuing a supersedeas, the Water Quality Certification would remain in full force and effect during the pendency of the appeal process. There would be no “practical infeasibility” or “absurd result” as postulated by PennEast.

Having Expressly Directed DRN To This Court, PADEP and PennEast Cannot Claim that DRN has Waived Review Before the EHB

Finally, PADEP and PennEast argue that because DRN sought review before this Court rather than the EHB, the Water Quality Certification is a final action and therefore reviewable by this Court. However, in its correspondence and published notices, PADEP repeatedly directed DRN to challenge the Water Quality Certification “with the Office of the Clerk, United States Court of Appeals for the

Third Circuit, 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106-1790.” (App. 106a) (AD 4). *See also* Water Quality Certification (App. 98a).¹

Having directed DRN to assert its challenge in this Court, and not the EHB, PADEP and PennEast cannot now claim that DRN has waived substantive rights by following these explicit instructions. *See Commonwealth, Department of Environmental Resources v. Dixon Contracting Company, Inc.*, 471 A.2d 934, 936-37 (Pa. Cmwlth. 1984) (equitable estoppel can be applied to governmental agency when such agency knew or should have known that such person would rely on the representation of the agency). *See also MacDonald v. Unisys Corp.*, 951 F.Supp.2d 729, 736 (E.D. Pa. 2013) (state law governs the equitable estoppel determinations).

PADEP and PennEast’s argument also ignores the plain language of the Environmental Hearing Board Act. Section 4(c) of the Environmental Hearing Board Act provides that “no action of the department adversely affecting a person shall be final as to that person until the person *has had the opportunity to appeal* the action to the board” 35 P.S. 7514(c) (emphasis added). A litigant must be provided a “full and fair opportunity” to litigate. *See National Collegiate Athletic*

¹This is in contrast to other matters, in which the PADEP directed aggrieved persons to file their challenges before the EHB. *See* Water Quality Certification for the Atlantic Sunrise Pipeline Project April 23, 2016 Pennsylvania Bulletin, 46 Pa.B. 2132 – 2133 (<http://www.pabulletin.com/secure/data/vol46/46-17/701d.html>). Challenges in these matters are pending before this Court at Nos. Nos. 16-2211, 2212, 16-2218, 16-2400.

Ass'n v. Corbett, 79 F.Supp.3d 536, 546 (M.D. Pa. 2015). As set forth above, PADEP repeatedly directed DRN to file its challenge to the Water Quality Certification with this Court. In addition, at the time that the Petition for Review in this matter was filed, the Middle District of Pennsylvania had already issued its order in *Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network*, 921 F.Supp. 2d 381, 392 (M.D. Pa. 2013), enjoining the EHB from hearing an appeal in such a proceeding. The EHB needs a definitive statement from this Court that it can consider this matter. These factors clearly demonstrate that DRN has been deprived of a full and fair opportunity to appeal its action to the EHB.

In addition, PADEP and PennEast ignore the provisions of the EHB's rules which provide that, "the Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*." 25 Pa. Code § 1021.53a. Good cause includes fraud or some breakdown in the court's operation, or unique and compelling circumstances establishing a non-negligent failure to appeal. *George Maczarczyj v. DEP*, EHB Docket No. 2016-125-M, 2017 WL 439669 (January 18, 2017). DRN did precisely as directed by PADEP and the District Court – it filed a Petition for Review before this Court within 30-days. DRN has not failed to perfect its appeal in accordance with the EHB's rules, as the EHB can certainly find that an appeal *nunc pro tunc* is appropriate.

Transferring Matter to the EHB

Were the Court to agree, as it should, that the rationale of the First Circuit in *Berkshire Environmental* applies to this case, this matter can and should proceed before the EHB. The EHB has already determined that it has jurisdiction over matters such as this. *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L (AD 5-11). Pennsylvania has established a mechanism to address the very circumstance presented here – the transfer of a matter from this Court to the EHB – which has been recognized by this Court. See 42 Pa.C.S.A. § 5103; *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426, 430 (3d Cir. 1983). As this Court lacks jurisdiction, it should transfer this matter to the EHB, where it can be heard with other similar matters.

II. DRN Has Standing to Maintain This Matter

PennEast challenges DRN’s standing in this matter, claiming that DRN is merely seeking to vindicate the “property rights” of its members who will be subject to eminent domain proceedings. Brief of Intervenor, p. 13. In support of its claim, PennEast relies on a decision from the District of Columbia Circuit, *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015). PennEast’s attack on DRN’s standing fails for both factual and legal reasons.

First, contrary to PennEast’s allegations, DRN’s standing is based not merely on “property” interests, but on a myriad of environmental, recreational and aesthetic interests. As set forth in DRN’s merits brief:

DRN has standing as a not-for-profit environmental protection organization whose members, including its executive director, use and enjoy the specific geographic areas affected by construction and operation of the Project, and whose recreational and aesthetic interests will be harmed by the faulty and unlawful Water Quality Certification that PADEP has issued. See Maya van Rossum Declaration at ¶¶ 7-17 (AD 14-22); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342-43 (1977) . . . The Delaware Riverkeeper Network’s stated purpose is to preserve and protect the Delaware River Basin Watershed; this purpose is directly germane to the appeal of the unlawful certification of the pipeline project. Maya van Rossum Declaration at ¶¶ 3-5 (AD 13-14).

Construction and operation of the Project has harmed and will continue to harm DRN’s protected recreational and aesthetic interests in the environment, in particular the degradation and loss of valuable wetlands and habitat, thus constituting injury in fact within the zone of interests of the Clean Water Act. See Maya van Rossum Declaration at ¶¶ 7-17 (AD 14-22); *Laidlaw*, 528 U.S. at 180 81; *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1236 (D.C. Cir. 1996); *Bentsen*, 94 F.3d at 667.

Merits Brief of Petitioner, pp. 18-19.

Secondly, even absent the clear allegations regarding environmental harm, *Gunpowder Riverkeeper* establishes an artificial distinction between “property interests” and “environmental interests” and should be rejected by this Court. *Gunpowder Riverkeeper* was a decision of a three judge panel, in which one judge

dissented and concurred in result. In *Gunpowder Riverkeeper*, petitioner Gunpowder Riverkeeper (“Gunpowder”) challenged the issuance of a Certificate of Public Convenience for a natural gas pipeline issued by the Federal Regulatory Energy Commission (“FERC”).

Initially, the majority found that Gunpowder established jurisdictional Article III standing. 807 F.3d at 271-273. The majority then turned to the “zone-of-interests” test. “The zone-of-interests tests is not jurisdictional, but rather a rule of statutory interpretation under which the court must ‘presume that a statutory cause of action extends only to [petitioners]’ whose interests fall within the zone of interests protected by the law invoked.” 807 F.3d at 275 (Rogers, J., dissenting in part and concurring in judgment) (*quoting Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 (2014)). The zone-of-interests test “is not meant to be especially demanding.” *Id.* (*quoting Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)). The Supreme Court has “always conspicuously included the word ‘arguably’ in the test to indicate that any doubt goes to the plaintiff.” *Id.* (*citing Match–E–Be–Nash–She–Wish Band of Pottawatomí Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012)). As a result, “the test forecloses suit only when a [petitioner]’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that [petitioner] to sue.” *Id.* (*quoting Lexmark*, 134 S.Ct. at 1389).

The majority found that Gunpowder was attempting to vindicate its members' "property rights" and that these interests fell outside of the "environmental interests" protected by the Clean Water Act. 807 F.3d at 274. Judge Rogers disagreed and found the majority's conclusion inconsistent with precedent from the D.C. Circuit and other Circuits. Rather, Judge Rogers, stated that the D.C. Circuit had previously concluded that the relevant zone-of-interests for environmental statutes "encompasses environmental values, read, of course, very broadly." 807 F.3d at 276 (*quoting Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 n. 11 (D.C.Cir.1977)). Any petitioner who "arguably" asserts an environmental interest, read "very broadly," satisfies the test. *Id.* Only "strictly financial" interests of a petitioner fall outside of the zone of interests encompassed by the environmental statutes. *Id.*

Judge Rogers found that nothing about Gunpowder suggested it was seeking to protect interests that were strictly financial. *Id.* It is a non-profit organization whose "general purpose is the protection [of] the Gunpowder River watershed," where its "members live, work, and recreate". *Id.* (citations omitted). The organization is "engaged in natural resource protection and conservation" on behalf of its members, aiming to "maintain and enhance the water quality and aquatic and natural resources of the watershed." *Id.* (citations omitted). The organization's sole purpose is to protect the Gunpowder River and surrounding

environment. *Id.* at 277 (citation omitted). Its members stand to lose the property on which they “live, work, and recreate.” *Id.* (citation omitted). Their loss of such opportunities is different from the purely monetary interests of a business seeking to impose regulatory costs on a competitor, *id.* (citing *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1258 (D.C.Cir.2014), or a company trying to steer business its way through the regulation of distant land use. *Id.* (citing *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir.2005))). Gunpowder’s members are not absentee landowners, but actually live on the property affected by the challenged action. *Id.* As a result of eminent domain, some of Gunpowder’s members face the loss of that enjoyment. *Id.* Judge Rogers concluded that this was enough for Gunpowder to come within the zones of interests of NEPA and the Clean Water Act. *Id.*

Judge Rogers took specific issue with the majority’s finding that Gunpowder’s use of the word “property” and not “environment” as a reason for concluding that Gunpowder’s interests fell on the “purely financial” side of the line and failed the zone of interest test, finding that “[t]he court misapplied the test.” *Id.* Rather, she found that although Gunpowder has referred to its members’ “property interests,” an interest in “property” does not necessarily refer to commercial or financial interests alone, as the standing affidavits and agency record make plain. *Id.* at 278 (citations omitted). The asserted interest pertains to

using that property—which encompasses trees, water, wildlife, etc.—to “live, work, and recreate.” (citations omitted). “The use of the word ‘property’ did not magically transform Gunpowder’s members’ stated interests in their natural environment into an interest in money alone. The court’s conclusion that their only interest is monetary is too obtuse for a test that ‘is not meant to be especially demanding.’” *Id.* (quoting *Clarke*, 479 U.S. at 399).

In the case at bar, DRN is a non-profit organization whose general purpose is the protection of the Delaware River watershed, where its members live, work, and recreate. The organization is engaged in natural resource protection and conservation on behalf of its members, aiming to maintain and enhance the water quality and aquatic and natural resources of the watershed. The organization’s sole purpose is to protect the Delaware River and surrounding environment. Its members stand to lose the property on which they live, work, and recreate. Their loss of such opportunities is different from the purely monetary interests of a business seeking to impose regulatory costs on a competitor, or a company trying to steer business its way through the regulation of distant land use. DRN’s members are not absentee landowners, but actually live on the property affected by the challenged action. As a result, even if DRN’s interests were limited only to the “property” interests of its members, some of DRN’s members face the loss of the use and enjoyment of that property, and the environmental, recreational and

aesthetic interests associated therewith. This is enough for DRN to come within the zone of interests of the Clean Water Act.

Moreover, as initially stated, DRN's interests go well beyond the so called "property interests", but include such interests as "protected recreational and aesthetic interests in the environment, in particular the degradation and loss of valuable wetlands and habitat, thus constituting injury in fact within the zone of interests of the Clean Water Act." *See* Maya van Rossum Declaration at ¶¶ 7-17 (AD 14-22). Finally, neither PADEP nor PennEast contest DRN's standing to vindicate its environmental rights under Article I, Section 27 of the Pennsylvania Constitution (i.e. the "Environmental Rights Amendment").

III. PADEP'S ISSUANCE OF THE CONDITIONAL WATER QUALITY CERTIFICATION RESULTS IN DIRECT AND IRREPARABLE HARM TO DRN'S ENVIRONMENTAL INTERESTS

In an effort to bolster their argument, PADEP and PennEast set up a straw-person to knock down. They erroneously claim that "the heart" of DRN's argument is that PADEP lacks authority to condition a Water Quality Certification² and that DRN fails to "recognize or honor" this Court's decision in *Delaware*

² Throughout its brief, PADEP refers to the Water Quality Certification as a "stand-alone water quality certification", which it describes as a request that is not accompanied by applications for the relevant state water quality permits. *See* Brief of Respondent, pp. 17, 26, 28. This is an odd characterization of the Water Quality Certification, given that, in 2016, prior to the issuance of the Water Quality Certification, PennEast applied for relevant state water quality permits, *see* Brief of Intervenor, pp. 18-19, and the Water Quality Certification is expressly conditioned on these state water quality permits.

Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection, 833 F.3d 360 (3d Cir. 2016). *See* Brief of Respondent, pp. 19, 26; Brief of Intervenor, p. 23. PADEP and PennEast misconstrue and mischaracterize DRN’s argument. Contrary to their claim, “the heart” of DRN’s argument is that PADEP’s issuance of the Conditional Water Quality Certification results in direct and irreparable harm to DRN’s environmental interests.³

In *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016), the Court found that DRN “failed to demonstrate that it suffered harm from the sequence of PADEP’s permitting actions” because the pipeline company “could not begin construction until it obtained all applicable authorizations required under federal law.” 833 F.3d at 385. “Because environmental review was required before construction could begin, the Riverkeeper was not harmed by the timing of the required review, and PADEP did not act arbitrarily or capriciously.” *Id.*

In the case at bar, however, DRN asks this Court to look beyond the harms merely resulting from “construction” to the myriad of irreparable harms that result from PADEP’s issuance of the Conditional Water Quality Certification that may

³In addition, DRN acknowledges that a Water Quality Certification may be conditioned on “any other appropriate requirement of State law set forth in such certification” 33 U.S.C. § 1341(d). However, there is a big difference between a condition based on an “appropriate requirement” of state law generally, and conditions that go to the very core and purpose of the Water Quality Certification. As written, the Water Quality Certification is an empty vessel that fails to assure the protection of water quality in Pennsylvania through compliance with state water quality standards.

occur long *before* any of the conditions in the Water Quality Certification are met. As DRN clearly states in its merits brief, “[i]n the case at bar, however, DRN does not argue that the sequencing has merely resulted in environmental harm that will not occur until after the environmental permits are issued. Rather, it contends, *inter alia*, that the sequencing results in a real and present deprivation of rights under the Fifth and Fourteenth Amendments of the United States Constitution, by taking private property without an established ‘public use’ and without ‘due process of law.’” Merits Brief of Petitioner, p. 37-38. DRN’s members stand to lose the property on which they live, work, and recreate, and the related environmental, recreational and aesthetic interests.

PADEP and PennEast argue that the harm to DRN and its members should be ignored because an applicant requires “field verified” surveys in order to obtain State water quality permits. The only authority cited for this proposition is 25 Pa. Code § 105.13(e)(3). *See* Brief of Intervenor, p. 29. This argument is troubling for two reasons. First, there is nothing in 25 Pa. Code § 105.13 that demands “field verified” surveys. Secondly, the requirements of 25 Pa. Code § 105.13 expressly apply to PennEast’s Water Quality Certification application. *See* 25 Pa. Code § 105.15(a). If, as PADEP and PennEast contend, Section 105.13 requires “field verified” surveys that they are yet to obtain, PADEP and PennEast must also

concede that the Water Quality Certification application was insufficient and improperly approved.

PADEP and PennEast also argue that DRN should seek redress for these harms in “other proceedings”, such as challenges to the Certificate of Public Convenience, eminent domain actions, or environmental permits issued by PADEP. *See* Brief of Respondents, p. 30; Brief of Petitioners, p. 29. This argument – that Petitioners’ relief can be found in some other future (or past) proceeding – has become standard fare. What this argument highlights, however, is the shell game perpetrated by PADEP, the harm directly created by PADEP’s issuance of a flawed Water Quality Certification, and the limited issues that can be pursued in these “other proceedings”. PADEP and PennEast seek to perpetuate a “Catch-22” that insulates from judicial review government action that substantially impacts people’s lives.

PADEP, along with FERC, have established a complex system of interrelated and “conditional” approvals, with each government approval relying on yet another approval for its substance. The FERC Certification for Public Convenience relies on the state Water Quality Certification for assurance that the Project will protect water quality in Pennsylvania through compliance with state water quality standards and associated state law requirements. The Water Quality

Certification, in turn, relies on yet to be issued state environmental permits to assure such compliance.⁴

DRN does not challenge FERC's Certificate of Public Convenience in this matter. Were DRN to challenge the issuance of the FERC Certificate based on PADEP's Water Quality Certification in a later proceeding, DRN would expect FERC and PennEast to argue that FERC had no choice but to rely on the "certification" issued by the State, as flawed as it may be, for assurance that the Project will protect water quality in Pennsylvania.

⁴ Despite the fact that PADEP itself created this situation by issuing the conditional approvals, PADEP recently complained to FERC about the confusion that its conditional approval created in another ongoing natural gas pipeline project sponsored by Transcontinental Gas Pipe Line Company LLC, ("Transco"). In a June 27, 2016 letter to FERC, PADEP complained that FERC placed too much emphasis on PADEP's issuance of the Water Quality Certification and failed to "fully acknowledge the State law requirements that Transco must fulfill to meet its obligations under Section 401 of the Clean Water Act" as required by the conditional Water Quality Certification. See June 27, 2016 Letter from PADEP to FERC (AD 37-39). Specifically, PADEP stated that:

the Section 401 of the Clean Water Act imposes an obligation on Transco to obtain a certification from Pennsylvania that the discharges from the project will protect the quality of Pennsylvania's water resources. In Pennsylvania, that protection is assured through State law permits that PADEP has identified as conditions of the State Water Quality Certification. FERC's short-hand method of describing Pennsylvania's State Water Quality Certification and its State law permits required thereunder as permits issued under Section 401 of the Clean Water Act is misleading and should be corrected to accurately describe these requirements as applicable State law authorizations.

Id. Of course, FERC's reliance on the Water Quality Certification to assure that the project would protect water quality in Pennsylvania was entirely justified, as this is the very reason why the Clean Water Act requires the issuance of a Water Quality Certification.

Additionally, it is unlikely that DRN could successfully challenge PADEP's issuance of the flawed Water Quality Certification in an eminent domain proceeding. Rather, this Court has found that once a holder of a Certificate of Public Convenience has established its right to condemn, it has "the ability to obtain automatically the necessary right of way through eminent domain, with the only open issue being the compensation the landowner defendant will receive in return for the easement." *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Tp., York County, Pa., Located on Tax ID #£440002800150000000 Owned by Brown*, 768 F.3d 300, 304 (3d Cir. 2014).

Nor would a DRN challenge of environmental permits that may be issued at some future time likely remedy the harm caused by PADEP's flawed Water Quality Certification. The aggrieved parties may, at some future date, have an opportunity to challenge the underlying permits when, and if, PADEP issues such permits. However, in the interim, PADEP has given FERC the greenlight to proceed with granting PennEast authority to take private property. The resulting harm suffered by DRN and its members is directly related to PADEP's issuance of the flawed Water Quality Certification.

According to the pipeline interests, regardless of the claim, a petitioner is always either too early, too late or in the wrong jurisdiction. If they had their way, there would never be a right time or right place for judicial review.

IV. PADEP Failed to Follow Its Own Rules and Policies In Issuing the Conditional Water Quality Certification

PADEP and PennEast suggest that nothing in PADEP's regulations require it to coordinate the issuance of a Water Quality Certification with the environmental permits on which it relies. *See* Brief of Intervenor, p. 27. They are wrong. PADEP's Chapter 105 Water Obstruction and Encroachment regulations clearly contemplate that the decision to issue or deny a Water Quality Certification be based upon a determination to issue or deny a Chapter 105 Water Obstruction and Encroachment permit. Specifically, the regulations provide that:

For structures or activities where water quality certification is required under section 401 of the Clean Water Act (33 U.S.C.A. § 1341), an applicant requesting water quality certification under section 401 shall prepare and submit to the Department for review, an environmental assessment containing the information required by *subsection (a)* for every dam, water obstruction or encroachment located in, along, across or projecting into the regulated water of this Commonwealth.

25 Pa. Code § 105.15(b) (emphasis added).⁵ Subsection (a) provides that:

For dams, water obstructions or encroachments permitted under this chapter, the Department will base its evaluation on the information required by § 105.13 (*relating to permit applications*—information and fees) and the factors included in § 105.14(b) (*relating to review of applications*) and this section.

⁵In its merits brief, DRN mistakenly quoted language from PADEP's policy manual rather than 25 Pa. Code § 105.15(b).

25 Pa. Code § 105.15(b) (emphasis added). It would be absurd for regulations to require that PADEP base a Water Quality Certification on all “the information required by” the “permit applications” and the factors “relating to review of applications”, but that it issue such a Certification without regard to those very permit applications.

However, it is not necessary to guess what is intended by PADEP’s regulations. Rather, the meaning is clearly explained in PADEP’s policy manual.

As the manual provides:

The decision to issue or deny the Commonwealth’s applicable Water Obstruction and Encroachment . . . permits provides the ***basis and vehicle for granting or denying 401 Water Quality Certification.***

Water Quality Permitting Policy and Procedure Manual (362-2000-001) (emphasis added) (emphasis added) (AD 46).

Where an agency fails to comply with its own procedures, its action is arbitrary, capricious, or otherwise not in accordance with the law. *See, e.g., INS v. Yang*, 519 U.S. 26, 32 (1996); *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986). PADEP departed from its historical practice without reason or explanation, and ignored the plain language of its own regulations and guidance document. Such action is clear evidence of arbitrary conduct.

V. PADEP Failed to Establish Procedures Sufficient to Satisfy the Notice Requirements of Section 401(a)(1) of the CWA.

The Clean Water Act provides a clear non-discretionary duty that a state agency issuing Section 401 water quality certifications “*shall establish procedures* for public notice in the case of all applications for certification by it.” *See* Merits Brief of Petitioner, pp. 38-41. Importantly, neither the PADEP nor PennEast contest that the Chapter 102 permits are subject to the notice requirements of Section 401(a)(1). As such, PADEP’s failure to “establish” the Section 401 “procedures” for the substantive Chapter 102 permits harms Petitioners’ interests and renders the issuance of the Section 401 water quality certification arbitrary, capricious, or otherwise not in accordance with law.

PennEast mistakenly argues that “Riverkeeper provides no support for its allegation and that is not surprising because the allegation is incorrect.” Brief of Intervenor, p. 30. To support this argument, PennEast cites to 25 Pa. Code § 102.5(m)(3), and specifically highlights a requirement in that section that requires PADEP to “publish notice in the *Pennsylvania Bulletin* of intent to issue a general permit, including the text of the proposed general permit.” *Id.* Conspicuously, PADEP does not join this argument, nor point to any other regulations providing public notice requirements. This is likely because PADEP well-understands the argument is not applicable to the PennEast Chapter 102 permits.

Section 102.5(m)(3) only requires PADEP to publish notice in the context of Chapter 102 for “general permit[s],” however, for permits that involve significant earth disturbance activities – such as large scale pipelines – the permits that are issued are not “general permits,” but rather “individual permits.” *See* 25 Pa. Code § 102.5(a). For example, on February 13, 2017, PADEP issued an ESCGP-2 permit as an “individual permit” for the Sunoco’s Mariner East 2 pipeline project. *See* Erosion and Sediment Control (“E&S”) Permit (February 13, 2017); AD 48-64. Specifically, PADEP “made a determination that the earth disturbances proposed in your Notice of Intent (“NOI”) for coverage under the ESCGP-2 general permit are most appropriately addressed through an *individual permit* and has therefore treated your NOI as an application for an *individual permit*.” *Id.* (emphasis added).

Therefore, Section 102.5(m)(3)’s consideration of “general permits” is completely irrelevant to DRN’s argument that no procedures have been established with regard to the Chapter 102 permits to be issued for this Project. This is the case because this Project, like the Sunoco Mariner East 2 project, requires an individual permit pursuant to Chapter 102. There are no requirements in the Pennsylvania Code or PADEP guidance documents that establish any notice procedures for *individual* Chapter 102 permits. Had any procedures been established for the issuance of individual permits pursuant to Chapter 102, surely PennEast or PADEP would have provided the appropriate citations.

PennEast further cites a PADEP policy statement which states that “upon acceptance of an application, the program(s) will complete any necessary public notices.” Brief of Intervenor, p. 31. However, as shown above, to date PADEP has not recognized that there are “necessary public notices” for individual Chapter 102 permits, only general permits. Therefore, the statement cited above is meaningless in the context of this particular Project.

Additionally, both PennEast and PADEP contend that DRN’s notice argument is “speculative” and “premature” because while the Chapter 102 Erosion and Sediment Control permit applications have been submitted to PADEP, they are not considered “complete.” Brief of Intervenor, p. 31; Brief of Respondent, pp. 31-32. PADEP further contends that it plans on issuing public notice for the Chapter 102 permits. Brief of Respondent, p. 32. However such arguments entirely miss the mark. Section 401(a)(1) expressly requires the state to “establish procedures” for public notice (and presumably public comment), and as described above, PADEP has clearly not “established” such procedures for conditional Section 401 water quality certifications. As such, PADEP is in clear violation of the Clean Water Act. Indeed, this issue has already been considered and settled by Third Circuit, where this Court unequivocally found that “PADEP has not published any procedures for issuing Water Quality Certifications.” *See Delaware Riverkeeper Network v. Sec’y Pennsylvania Dep’t of Env’tl. Prot.*, 833 F.3d 360, 385 (3d Cir. 2016).

This issue also speaks to DRN's argument that the Pennsylvania Code contemplates that Section 401 Water Quality Certifications and the underlying substantive permits must be noticed, reviewed, and issued simultaneously. Pennsylvania's Conditional Water Quality Certifications themselves merely memorialize a promise that the project applicant must eventually obtain a number of substantive state permits that demonstrate compliance Pennsylvania with state water quality standards. In other words, Pennsylvania's Conditional Water Quality Certifications themselves are nothing more than empty-vessels that provide no actionable authority to the project applicant. PADEP argues that it has complied with Section 401(a)(1) by virtue of the fact that "PADEP published notice of receipt of PennEast's request for water quality certification as well as the proposed draft WQC for public comment." Brief of Respondent, p. 31. However, notice of a complete application for Pennsylvania's Conditional Water Quality Certificate is functionally worthless, because the review of the Project's substantive compliance with Pennsylvania's water quality standards takes place pursuant to PADEP's review of the underlying state permits. *Id.* This bifurcated review process is clearly contrary to the express language and intent of the Pennsylvania Code.

VI. PADEP'S Issuance of the Conditional Water Quality Certification Violates Article I, Section 27 of the Pennsylvania Constitution

PADEP argues that, so long as it complies with a statute "whose stated purposes and objectives include protection of the Commonwealth's natural

resources and compliance with the goals of Article 1, Section 27”, its actions “enjoy of presumption of constitutionality.” Brief of Respondent, pp. 34–35. This is wrong and expressly contradicts the Pennsylvania Supreme Court’s recent rulings in *Robinson Township v. Commonwealth*, 83 A.3d 901, 951 (Pa. 2013) and *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania* (“*PEDF II*”), 161 A.3d 911 (Pa. 2017).

PADEP’s argument is a vestige of the *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) regime that the Pennsylvania Supreme Court overturned in *PEDF*, replacing it with a true constitutional analysis that places the Constitution at the center, not a statute. *PEDF II*, 161 A.3d at 930. In striking down the *Payne* framework, the Court noted:

In *Robinson Township*, the plurality explained the significant drawbacks of the Commonwealth Court’s *Payne* test:

[T]he test poses difficulties both obvious and critical. First, the *Payne* test describes the Commonwealth’s obligations—both as trustee and under the first clause of Section 27—in much narrower terms than the constitutional provision. Second, the test assumes that the availability of judicial relief premised upon Section 27 *is contingent upon and constrained by legislative action*. And, finally, the Commonwealth Court’s *Payne* decision and its progeny *have the effect of minimizing the constitutional duties of executive agencies* and the judicial branch, *and circumscribing the abilities of these entities to*

carry out their constitutional duties independent of legislative control.

Robinson Twp., 83 A.3d at 967.

Id. at 930 n. 20 (emph. added). In sum, the *Payne* regime placed the General Assembly at the center, not the Pennsylvania Constitution. Here, PADEP tries to do the same thing. It attempts to hang on to the old regime, but that old regime is dead. PADEP *must* exercise *whatever* statutory authority it has consistent with Section 27 and other constitutional limitations.

Under Section 27, PADEP cannot act without being informed of how a potential action it seeks to take may lead to likely or actual degradation of the local environment, including degradation of public natural resources such as water. *PEDF II*, 161 A.3d at 932 (citing *Robinson*, 83 A.3d at 951); *Robinson*, 83 A.3d at 952 (“Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.”). Informing itself before it acts is required both to protect the people’s right to clean water (set forth in Section 27 clause 1) and to fulfill the PADEP’s fiduciary duty of prudence (among others) as a trustee of public natural resources (including water). *PEDF II*, 161 A.3d at 932 (quoting *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979); *Robinson*, 83 A.3d at 955).

PADEP’s argument is further undermined by the fact that neither the Clean Water Act, under which the Water Quality Certification is issued, nor the state

Clean Streams Law, are statutes “whose stated purposes and objectives include protection of the Commonwealth’s natural resources and compliance with the goals of Article 1, Section 27.” Thus, even under the old regime, had PADEP strictly complied with the requirements of these statutes in issuing the Water Quality Certification, which they did not, PADEP would still have had the independent duty to assure compliance with its Constitutional duties under Section 27.

PADEP readily admits that it did no analysis to determine the likely impact of its Water Quality Certification. Rather, it has postponed such an analysis until sometime in the future, which may be well after PennEast has been granted authority to impinge up the environmental, recreational and aesthetic interests of DRN and its members. *See* Brief of Respondent, p. 35. This is a classic example of closing the barn door after the horse is out. The Water Quality Certification is a means by which PADEP is supposed protect Pennsylvanians’ environmental rights; instead PADEP treats it like an afterthought.

CONCLUSION

DRN respectfully requests that this Honorable Court transfer this matter to the Pennsylvania Environmental Hearing Board pursuant to 42 Pa.C.S.A. § 5103. In the alternative, DRN respectfully requests that this Court rescind the Water

Quality Certification. DRN also asks that the Court grant such other relief as it finds to be just and appropriate.

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*Attorneys for Petitioners Delaware Riverkeeper Network and Maya van Rossum,
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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

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L.A.R. 31.1 CERTIFICATION

I, Mark L. Freed, pursuant to L.A.R. 31.1. (c), certify that the text of the electronic brief is identical to text in the paper copies. I also certify that a virus detection program has been run on the files and no virus was detected. The virus detection program used was Webroot SecureAnywhere.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the forgoing was served, via the Court's Electronic Filing System, on the following on the date listed below:

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No. 17-1456

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

DELAWARE RIVERKEEPER NETWORK,

and

MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

PATRICK MCDONNELL, Acting Secretary of the Pennsylvania Department of
Environmental Protection, and COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

REPLY ADDENDUM



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

June 27, 2016

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

RE: Transcontinental Gas Pipeline Company
Atlantic Sunrise Project
Comments on May 5, 2016 Draft Environmental Impact Statement
Docket No. CP-15-138-000
OEP/DG2E/Gas2

Dear Secretary Bose:

The Pennsylvania Department of Environmental Protection (PADEP) has reviewed and is providing comments on the Federal Energy Regulatory Commission's (FERC) draft Environmental Impact Statement (EIS) for the Transcontinental Gas Pipeline Company (Transco) Atlantic Sunrise Project issued on May 5, 2016. PADEP's primary concern with the draft EIS is that it does not fully acknowledge the State law requirements that Transco must fulfill to meet its obligations under Section 401 of the Clean Water Act (33 U.S.C. § 1341).

As you know, Transco is required under the Section 401 of the Clean Water Act to obtain a certification from Pennsylvania that discharges from its proposed project within the State will comply with State law requirements necessary to ensure compliance with applicable provisions of the Clean Water Act.¹ Pennsylvania is rich in water resources, which PADEP protects pursuant to State law authority to fulfill both State and Federal law. Specifically, Pennsylvania has a long history of regulating discharges to its waters through the Pennsylvania Clean Streams Law enacted in 1937, and of regulating stream and wetland crossings and encroachments through the Pennsylvania Dam Safety and Encroachments Act, enacted in 1978. PADEP is the agency responsible for ensuring the quality of Pennsylvania's water resources through regulatory permitting programs that implement these statutes.

PADEP issued its State Water Quality Certification for the Atlantic Sunrise Project on April 5, 2016, and published notice of this certification in the *Pennsylvania Bulletin* on April 23, 2016 (46 Pa. B. 2132; copy enclosed). PADEP's State Water Quality Certification for this project is

¹ Specifically, the discharge must achieve applicable State law requirements related to the following sections of the Clean Water Act: the effluent limitations in Section 301 (33 U.S.C. § 1311), the water quality related effluent limitations in Section 302 (33 U.S.C. § 1312), the water quality standards and implementation plans in Section 303 (33 U.S.C. § 1313); the national standards of performance in Section 306 (33 U.S.C. § 1316); and the toxic and pretreatment effluent standards in Section 307 (U.S.C. § 1317).

Ms. Kimberly D. Bose, Secretary

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conditioned upon Transco obtaining and complying with State permits necessary to ensure that Pennsylvania's water quality standards are achieved. Specifically, Transco is required to obtain:

- State permits for erosion and sediment control required by State regulations at 25 Pa. Code Chapter 102;
- State permits for water obstruction and encroachments required by State regulations at 25 Pa. Code Chapter 105; and
- State permits for the discharge of hydrostatic test water under State regulations at 25 Pa. Code Chapter 92a.

Table 1.5-1 of the draft EIS acknowledges that Transco has obtained a State Water Quality Certification from PADEP and identifies State law permits that must be obtained from PADEP for this project. FERC includes the State law authorizations as part of its draft EIS to support its conclusion that the Atlantic Sunrise Project will not result in any significant adverse environmental impacts.

While these State law authorizations are identified in the draft EIS, FERC does not expressly require Transco to obtain these State law authorizations prior to construction. For example, Section 5.2 of the draft EIS identifies the "FERC Staff Recommended Mitigation" for inclusion in the FERC Order granting the Certificate of Public Convenience and Necessity for the project. None of FERC's conditions expressly require Transco to obtain the State law authorizations identified by and required under Pennsylvania's State Water Quality Certification prior to the commencement of construction in Pennsylvania. PADEP requests that FERC include in Section 5.2 of the final EIS a condition requiring Transco to obtain these State law authorizations pursuant to Pennsylvania's State Water Quality Certification.

PADEP also requests that FERC clarify the role of Pennsylvania's State law permitting programs in other relevant discussion when it finalizes the EIS. For example, the water obstruction and encroachments permits issued pursuant to 25 Pa. Code Chapter 105 will include wetland mitigation requirements. The draft EIS incorrectly identifies these and other State law permits required under Pennsylvania's State Water Quality Certification as permits issued under Section 401 of the Clean Water Act (e.g., page ES-6 describing mitigation of construction and operation-related impacts on wetlands). That characterization is incorrect.

As noted above, the Section 401 of the Clean Water Act imposes an obligation on Transco to obtain a certification from Pennsylvania that the discharges from the project will protect the quality of Pennsylvania's water resources. In Pennsylvania, that protection is assured through State law permits that PADEP has identified as conditions of the State Water Quality Certification. FERC's short-hand method of describing Pennsylvania's State Water Quality Certification and its State law permits required thereunder as permits issued under Section 401 of the Clean Water Act is misleading and should be corrected to accurately describe these requirements as applicable State law authorizations.

Ms. Kimberly D. Bose, Secretary

- 3 -

Finally, Section 5.2 of the draft EIS identifies numerous instances in which Transco needs to provide additional information to FERC prior to the end of the draft EIS comment period or prior to construction. PADEP requests that FERC direct Transco to ensure that all pending applications for State permits and authorizations be updated with the current project data and information to ensure actions taken by PADEP are consistent with the project as authorized by FERC, including the State Water Quality Certification. PADEP also requests that FERC require Transco to provide copies of its weekly status reports required under condition 8 concurrently to PADEP.

PADEP appreciates the opportunity to comment on the draft EIS. Should you have any questions or need additional information regarding the comments and recommendations on the draft EIS, please contact Alexandra Chiaruttini, PADEP Chief Counsel by e-mail at achiarutti@pa.gov or by telephone at 717.787.4449.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dana K. Aunkst', written over a horizontal line.

Dana K. Aunkst
Deputy Secretary

Enclosure

cc: Alexandra Chiaruttini

**PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF WATER QUALITY PROTECTION**

DOCUMENT NUMBER: 362-2000-001

TITLE: PERMITTING POLICY AND PROCEDURE MANUAL

AUTHORITY: The PA Clean Streams Law, The Federal Clean Water Act, PA Code Title 25, and other State/Federal permitting regulations.

POLICY: To implement the permitting aspects of the Water Quality Protection Program in a fair, equitable, consistent, and environmentally sound manner.

PURPOSE: This Manual describes the policies and procedures for (1) applying for NPDES and WQM permits, and (2) reviewing and processing the permit applications. The policy was revised to incorporate policies and procedures that were issued by memo since the last revision of the policy and procedure. The Process Improvement Team Recommendations on the review procedure for NPDES applications was also incorporated.

APPLICABILITY: All NPDES (Part I) and Water Quality Management (Part II) permits for point sources.

DISCLAIMER: The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies and procedures shall affect regulatory requirements. The policy and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give this document that weight or deference. This document establishes the framework within which DEP will exercise administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

PERMITTING POLICY AND PROCEDURES MANUAL

Section 400 - Certification Procedures

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400.2 401 Water Quality Certifications	6

**400.1 CERTIFICATION OF INDUSTRIAL
ANTI-POLLUTION FACILITIES FOR TAX BENEFITS**

POLICY

- A. Regulations of the Environmental Protection Agency Provide for fast tax write-off of certain pollution control facilities of businesses which qualify for rapid amortization under Section 169 of the Internal Revenue Code. To obtain favorable amortization treatment, a taxpayer must obtain certification of his pollution control facility from the "State certifying authority."
- B. Pennsylvania Law, Section 602.1 of Act 93, approved August 31, 1971, provides for tax benefits for corporations, providing "equipment, machinery, facilities and other assets employed or utilized within the Commonwealth of Pennsylvania for water and air pollution control or abatement devices which are being employed or utilized for the benefit of the general public."
- C. It is the duty of the Department to certify eligible projects to the appropriate agency.

PROCEDURE

- D. To qualify for certification under the Federal Regulations:
 - 1. The facilities must have been built under a Water Quality Management Permit if any was required at the time of construction, and
 - 2. The facilities must be operated in compliance with DEP requirements.
- E. In order to qualify for certification under Pennsylvania Act 93, approved August 31, 1971:
 - 1. The facilities must have been built under a Water Quality Management permit, if required.
 - 2. The facilities must be operated in compliance with DEP requirements.
 - 3. The facilities must be used for pollution control only.
- F. Where the establishment provides water pollution control facilities not requiring a Water Quality Management Permit, such as a connection to a sanitary sewer, the discharge from which is adequately treated by others, the cost of the connection may qualify. Pre-treatment facilities under like circumstances may qualify. In such cases it can be certified that the facilities, while not under a Water Quality Management permit, were in conformity with Pennsylvania's program for pollution abatement at the time they were constructed.
- G. Facilities for the treatment of sanitary sewage from a industrial establishment are eligible as well as facilities for the treatment of industrial waste. The facilities must, however, prevent pollution and comply with Department requirements.
- H. Buildings are not eligible unless the building is part of a treatment facility and serves no other purpose.

- I. The regional offices are in no way obligated to determine other factors which may affect eligibility.
- J. The regional offices shall issue notice of certification when appropriate:
 - 1. Certification under the Federal Internal Revenue Code shall be by completing EPA Form 3300.
 - 2. Certification under Pennsylvania Act 93, approved August 31, 1971, shall be by completing Form 3600-FM-WQ0021.
- K. Responsibility for certification in the Regional Office shall rest with the Permits Section.

APPLICATION AND NOTICE OF STATE CERTIFICATION FOR CORPORATION TAX BENEFITS FOR AIR AND WATER POLLUTION CONTROL DEVICES

For Tax Year Ending _____

1. Corporation Name _____
2. Person Representing Corporation _____
 Title _____ Telephone () _____
 Mailing Address _____

3. Location of Pollution Control Device(s)
 Plant Name _____ County _____
 Mailing Address _____ Municipality _____
 _____ (Twp, Boro, City)

4. Briefly list and describe the nature and function of each pollution control device(s) for which the tax certification is requested. (If more space is needed, please attach additional sheets.)
 1. _____ : _____
 2. _____ : _____
 3. _____ : _____
 4. _____ : _____
 5. _____ : _____
5. Attach a detailed description of the device(s), along with diagrams or sketches showing the device(s) in question and their relationship to the overall air or water pollution control system at the plant.
6. DEP Permits Pertaining to the Pollution Control Device(s):⁽¹⁾

Permit No.	Air	Water	Date Issued	Date Expiring
7. Complete the following information for the device(s) in question:

Device	Date Installed	Date Began Operation	Original Installation Cost

⁽¹⁾ Some pollution control devices (i.e. pretreatment units) may not be permitted by the Department, but may still be eligible for the corporate tax benefit.

APPLICATION AND NOTICE OF STATE CERTIFICATION FOR CORPORATION TAX BENEFITS FOR AIR AND WATER POLLUTION CONTROL DEVICES (contd.)

Subject to the penalties of Title 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities, I certify that I am an authorized representative of the corporation, and that the devices for which tax benefits are herein requested are in place and operating, and that all the information submitted on this application is accurate and valid to the best of my knowledge.

 Signature of Authorized Representative

 Date Signed

FOR DEPARTMENT OF ENVIRONMENTAL PROTECTION USE ONLY

CERTIFICATION BY THE DEPARTMENT

Except as otherwise noted below, the Department of Environmental Protection hereby certifies:

1. That the above component(s) is/are component(s) to a water or air pollution control device;
2. That the above device(s) is/are installed and completed in place;
3. That the above component(s) or device(s) is/are employed or utilized to remove pollutants commencing in, or during, the tax year in question;
4. That, where a plan approval or permits is required by the Department of Environmental Protection, plan approval or permit has been obtained.

By _____

Title _____

 (signature of authorized DEP Water Management representative)

Date _____

By _____

Title _____

 (signature of authorized DEP Air Quality Control representative)

Date _____

Comments:

400.2 PROCEDURE FOR 401 WATER QUALITY CERTIFICATION

A. REQUIREMENT

1. Water Quality Certifications are required by Section 401 of the Federal Clean Water Act (CWA) as a prerequisite to receiving a federal license or permit for any activity which may result in a discharge into navigable waters. Applicants must provide a certification from the state that the discharge complies with the provisions of sections 301, 302, 303, 306 and 307 of the CWA.
2. In the Commonwealth of Pennsylvania, Water Quality Certifications have been integrated with other required approvals or permits. Individual separate Water Quality Certifications are issued for activities that do not need approvals or permits under these programs.

B. PROCEDURE

1. When the Department of Environmental Protection (DEP) receives a request for Water Quality Certification, a notice is published in the **Pennsylvania Bulletin** for a 30-day comment period. The **Pennsylvania Bulletin** is the official gazette of the Commonwealth of Pennsylvania.
2. Applications for water obstructions and encroachments, including dredge and fill activities, are reviewed by the Regional Soils and Waterways permitting staff. Water obstructions and encroachments must comply with Pennsylvania's Clean Streams Law which requires that all earth moving activities must have an erosion and sedimentation control plan. By administrative decisions, DEP has concluded that the only pollution threat from water obstructions and encroachments is from sediment pollution during construction. Therefore, in most cases, the 401 Water Quality Certification is issued based on the applicants documentation that an adequate or approved erosion and sedimentation control plan has been developed and will be implemented during construction.
3. Although dredging is regulated as a physical encroachment, dredged material is defined as solid waste. Dredged material is frequently used or disposed of as a clean fill. Dredging of contaminated sediments, however, requires a coordinated review by DEP's Water Quality and Waste Management programs to address concerns related to resuspension of pollutants, impacts on water quality parameters, and proper disposal of waste material. Water Quality evaluates potential for discharge of pollutants and considers the impacts of the activity based on the classification of the body of water, water quality standards and the Commonwealth's antidegradation program. Waste Management reviews the types and concentrations of pollutants to assure disposal in a properly designed and approved site. These coordinated reviews rely on the expertise and professional judgment of technical program staff. The decision to issue or deny the Commonwealth's applicable Water Obstruction and Encroachment, Water Quality or Waste Management permits provides the basis and vehicle for granting or denying 401 Water Quality Certification.
4. The issuance or denial of Water Quality Certifications is an integral part of the respective approval or permit and is published in the **Pennsylvania Bulletin** as a final action of the Department. Actions of the Department may be appealed to the Environmental Hearing Board within thirty days by an aggrieved person.

C. WAIVERS

1. Following the publishing of a notice that an application for Water Quality Certification has been received, DEP may simply waive the Commonwealth's decision. Waivers are confirmed by letter to the applicant and the federal permitting agency. Waiving the Water Quality Certification is done to save time and resources of both DEP and the applicant in special cases where there is little potential impact or the project is otherwise adequately regulated.

D. MISCELLANEOUS ADDITIONAL GUIDANCE

1. The CWA Section 401 provides that WQ Certification is waived if a state fails to respond within a reasonable time. In a settlement of federal litigation, DEP has a maximum of 180 days to respond. To waive, write a letter to the applicant and the federal permitting agency that we do not intend to make a decision and are therefore waiving our right to make a 401 determination. We must however, publish notice an application was receive, but no notice of waiver is received, but we do not have to publish notice that we waived.
2. All State 105 GPs and 105 waivers under Chapter 105(a)(1)-(10) and (12)-(15) have the integrated 401 reviews/approvals (refer to **Pennsylvania Bulletin** publications dated 8/6/94 and 2/112/94). In addition, use of any of the state approved nationwide general permits (NWP) of the U.S. Corps of Engineers also have the state 401 review/approval and are listed in the 105 Program Guidelines available in each Soils and Waterways Section. The NWP 29 was issued in **Pennsylvania Bulletin** 10/14/195.
3. As to technical review procedure or review criteria, there is no detailed available guidance from EPA or other sources. This is where you need to use the best professional judgment. However, the Section 401 of CWA and regulations thereunder provide some specific information and procedural requirements. It is sketchy on technical evaluations guidance. If you assume the premise that instream encroachments/disturbances are temporally in nature and only cause temporarily/transient water quality impact (suspended solids and turbidity are the expected major problems with temporary impacts), there shouldn't be much other technical review involved. The only thing needed is to assure that the applicant has or will use BMPs, pollution prevention and erosion and sedimentation plans during and a short period after the completion of the activity.



February 13, 2017

CERTIFIED MAIL NO. 7015 1520 0002 1486 2620

Mr. Matthew L. Gordon
Sunoco Pipeline, L.P.
535 Fritztown Road
Sinking Spring, PA 19608

Re: Erosion and Sediment Control (E&S) Permit
PA Pipeline Project/Mariner East 2
E&S Permit No. ESG 01 000 15 001
Chester and Delaware Counties

Dear Mr. Gordon:

In compliance with the provisions of the Pennsylvania Clean Streams Law, as amended, 35 P.S. Sections 691.1 et seq., the Department of Environmental Protection (DEP) hereby approves your application for an Erosion and Sediment Control Permit (E&S Permit) for the PA Pipeline Project/Mariner East 2 project. Your permit is enclosed. DEP has made a determination that the earth disturbances proposed in your Notice of Intent (NOI) for coverage under the ESCGP-2 general permit are most appropriately addressed through an individual permit and has therefore treated your NOI submission as an application for an individual permit.

The permit is effective on February 13, 2017, and will expire on February 12, 2022. You must comply with all conditions of the permit in accordance with Sections 402 and 611 of The Clean Streams Law (35 P.S. Sections 691.402 and 691.611).

Please be advised that you are not authorized to commence construction that will result in earth disturbances until a pre-construction meeting is held in accordance with Part C VI of the permit and 25 Pa. Code Section 102.5(e). The purpose of this meeting is to review all aspects of the E&S Permit with the permittee, co-permittees, operators, consultants, DEP inspectors, and licensed professionals or their designees who will be responsible for the implementation of the critical stages of the approved post-construction stormwater management (PCSM)/restoration plan.

In addition to the E&S Permit authorization, the permittee and any subsequent co-permittees have additional responsibilities related to this authorization. E&S Permit requirements and state regulations require that operators who are not the permittee shall be a co-permittee. Please be advised that once an operator/contractor has been selected for the project, the E&S

Mr. Matthew L. Gordon

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February 13, 2017

Permit must either be transferred to the operator/contractor or the operator/contractor must be made a co-permittee and enter into an agreement with the permittee. Please use the enclosed Transferee/Co-Permittee Application form to transfer the permit or to add a co-permittee. This form must be received by DEP at least 30 days prior to the co-permittee/transferee action taking place.

As part of the operation and maintenance of best management practices (BMPs), the permittee or co-permittee(s) must conduct inspections of the BMPs on a weekly basis, at a minimum, and after each measurable storm event to include the repair or replacement of BMPs to ensure effective and efficient operation (see Part A III.C of the permit). The Visual Site Inspection Report Form is enclosed and must be used to document these required site inspections.

For any property containing a PCSM BMP, the permittee or co-permittee shall record an instrument with the recorder of deeds which will assure disclosure of the PCSM BMP and the related obligations in the ordinary course of a title search of the subject property. The recorded instrument must identify the PCSM BMP, provide for necessary access related to long-term operation and maintenance for PCSM BMPs and provide notice that the responsibility for long-term operations and maintenance of the PCSM BMP is a covenant that runs with the land that is binding upon and enforceable by subsequent grantees. Unless a later date is approved by DEP in writing, the permittee shall record an instrument as required under 25 Pa. Code Section 102.8(m)(2) and Part C XII of the permit within 45 days from the date of issuance of this permit. The permittee shall provide DEP and the conservation district with the date and place of recording along with a reference to the docket, deed book or other record, within 90 days from the date of issuance of this permit or authorization.

The Notice of Termination (NOT) form is also enclosed and must be completed and filed when construction activities have ceased and final stabilization has been achieved as a condition of this E&S Permit as specified in Part B I.B of the permit. The NOT is an E&S Permit requirement, as well as a regulatory requirement under 25 Pa. Code Chapter 102 Section 102.7. The NOT must identify the responsible person(s) for the long-term operation and maintenance of the PCSM BMPs. Please be advised that the permittee and any co-permittees remain responsible for all operational maintenance for this project site until the NOT has been filed and acknowledged by DEP or the conservation district.

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa.C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105-8457, 717.787.3483. TDD users may contact the Board through the Pennsylvania Relay Service, 800.654.5984. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. The appeal form and the Board's rules of practice and procedure are also

Mr. Matthew L. Gordon

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February 13, 2017

available in braille or on audiotape from the Secretary to the Board at 717.787.3483. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

IF YOU WANT TO CHALLENGE THIS ACTION, YOUR APPEAL MUST REACH THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD.

IMPORTANT LEGAL RIGHTS ARE AT STAKE, HOWEVER, SO YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. IF YOU CANNOT AFFORD A LAWYER, YOU MAY QUALIFY FOR FREE PRO BONO REPRESENTATION. CALL THE SECRETARY TO THE BOARD (717.787.3483) FOR MORE INFORMATION.

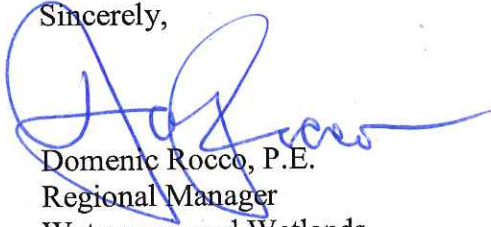
Mr. Matthew L. Gordon

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February 13, 2017

If you have any questions, please contact Mr. Christopher Smith at 484.250.5152.

Sincerely,



Domenic Rocco, P.E.
Regional Manager
Waterways and Wetlands

Enclosures: E&S Control Permit
Visual Site Inspection Report Form
Transferee/Co-permittee Application Form
Notice of Termination Form
Riparian Forest Buffer Reporting Form (when applicable)
PCSM Instrument Filing Notice

cc: Mr. Simcik, P.E. – Tetra Tech
Ms. Ferri – Delaware County Conservation District
Mr. Sofranko – Chester County Conservation District
East Goshen Township
East Nantmeal Township
East Whiteland Township
Elverson Borough
Upper Uwchlan Township
Uwchlan Township
Wallace Township
West Goshen Township
West Nantmeal Township
Westtown Township
West Whiteland Township
Aston Township
Brookhaven Borough
Chester Township
Edgmont Township
Middletown Township
Thornbury Township
Upper Chichester Township
Re 30 (GJS17WAW)41



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF CLEAN WATER

**EROSION AND SEDIMENT CONTROL (E&S) PERMIT
FOR EARTH DISTURBANCE ASSOCIATED WITH OIL AND GAS EXPLORATION,
PRODUCTION, PROCESSING, OR TREATMENT OPERATIONS
OR TRANSMISSION FACILITIES**

E&S PERMIT NO.: ESG 01 000 15 001

In compliance with the provisions of Pennsylvania's Clean Streams Law, as amended, 35 P.S. §§ 691.1 *et seq.*, 58 Pa.C.S. §§ 3201-3274 (2012 Oil and Gas Act) and regulations promulgated thereto, including 25 Pa Code Chapters 78.93 and 102, and sections 1905-A, 1917-A and 1920-A of the Administrative Code of 1929, 71 P. S. §§ 510-5, 510-17 and 510-20, earth disturbances associated with oil and gas activities are authorized for the project identified below, in accordance with the application submitted to the Department of Environmental Protection (DEP) and accompanying plans and additional information, as revised, subject to the requirements specified herein.

Project Name and Location(s)

**PA Pipeline Project / Mariner East 2
Counties: Mariner East 2**

Permittee Name and Address

**Sunoco Pipeline, L.P.
535 Fritztown Road
Sinking Spring, PA 19608**

**THIS PERMIT SHALL BECOME EFFECTIVE ON FEBRUARY 13, 2017
AND SHALL EXPIRE ON FEBRUARY 12, 2022.**

The authority granted by this permit is subject to the following further qualifications:

1. This permit is issued for earth disturbances associated with oil and gas activities subject to the use of erosion and sediment control (E&S) and post-construction stormwater management (PCSM) best management practices (BMPs) to control discharges composed entirely of stormwater to surface waters identified in the application. Authorization to discharge is subject to implementation of the plans and additional information submitted as part of the application. This permit incorporates by reference the application and any other attachments, reports, plans, plan drawings, supplements, and other materials submitted by the applicant, as revised.
2. Any construction or earth disturbance activities that are not presented on the plans submitted in support of the application are not authorized by the permit. A request to modify this permit must be submitted by the permittee and approved by DEP before the permittee may commence any construction or earth disturbance activities that are not included in the information submitted in support of the application.
3. Earth disturbance activities conducted in accordance with the terms and conditions herein may commence on the effective date of this permit or the date other necessary permits and authorizations are obtained, whichever occurs later.
4. Coverage under this permit may be extended by DEP or an authorized conservation district if a timely and administratively complete application for renewal is submitted at least 180 days prior to the permit expiration date.
5. DEP may terminate this permit prior to the expiration date upon notice. The permittee may request termination of the permit prior to the expiration date through the submission of an acceptable Notice of Termination (NOT).
6. No condition of this permit shall release the permittee(s) from any responsibility or requirement under Pennsylvania's statutes or regulations or local ordinances.

DATE PERMIT ISSUED: FEBRUARY 13, 2017

ISSUED BY: 

**Domenic Rocco, P.E.
Environmental Program Manager
Waterways and Wetlands Program
DEP Southeast Regional Office**

PART A

EFFLUENT LIMITATIONS, MONITORING, AND REPORTING REQUIREMENTS

I. DEFINITIONS

Accelerated erosion – The removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone.

BMPs – Best Management Practices – Activities, facilities, measures, planning, or procedures used to minimize accelerated erosion and sedimentation and manage stormwater to protect, maintain, reclaim and restore the quality of waters, and existing and designated uses of waters of the Commonwealth before, during, and after earth disturbance activities.

Conservation District – A Conservation District, as defined in Section 3(c) of the Conservation District Law (3 P.S. § 851(c), as amended) that has the authority under a delegation agreement executed with DEP to administer and enforce all or a portion of the erosion, sediment, and stormwater management program in the Commonwealth of Pennsylvania (also referred to as “authorized conservation district”).

Co-Permittee/Permittee – Person(s) identified in this permit as responsible for the discharges of stormwater associated with construction activity who is jointly and individually responsible together with the permittee for compliance with all conditions of this permit and applicable laws.

Critical stages – The installation of underground treatment BMPs, structurally engineered BMPs, or other BMPs as deemed appropriate by the Department or the conservation district.

Earth disturbance activity – A construction or other human activity which disturbs the surface of the land, including land clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, operation of animal heavy use areas, timber harvesting activities, road maintenance activities, oil and gas activities, well drilling, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock, or earth materials.

Erosion – The natural process by which the surface of the land is worn away by water, wind, or chemical action.

E&S Plan – Erosion and Sediment Control Plan– A site-specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during, and after earth disturbance activities.

Forested riparian areas – Areas that consist of permanent vegetation that is predominantly native trees, shrubs, and forbs along surface waters.

Licensed professional – Professional engineers, landscape architects, geologists and land surveyors licensed to practice in the Commonwealth.

Long-term operation and maintenance – The routine inspection, maintenance, repairs, or replacements, of a BMP to ensure proper function for the duration of time that the BMP is needed.

Municipality – A county, city, borough, town, township, school district, institution or authority or another public body created by or pursuant to State Law. For the purposes of this definition, town includes an incorporated town.

NOT – Notice of Termination – A request, on a form provided by the Department, to terminate coverage under an erosion and sedimentation control general permit for earth disturbances associated with oil and gas exploration, production, processing or treatment operations or transmission facilities.

Oil and gas activities - Earth disturbance associated with oil and gas exploration, production, processing or treatment operations or transmission facilities.

Operator – A person who has one or more of the following:

- Oversight responsibility of earth disturbance activity on a project site or a portion thereof, who has the ability to make modifications to the E&S Plan, PCSM Plan, or site specifications.
- Day-to-day operational control over earth disturbance activity on a project site or a portion thereof to ensure compliance with the E&S Plan or PCSM plan.

Owner – A person or persons who hold legal title to the land subject to construction activity. This term also includes the person(s) who held legal title to the land subject to construction activity at the time such activity was commenced on a site.

PCSM / SR Plan – Post-Construction Stormwater Management Plan / Site Restoration – A site-specific plan consisting of both drawings and a narrative that identifies BMPs to manage changes in stormwater runoff volume, rate, and water quality after earth disturbance activities have ended and the project site is permanently stabilized.

Permanent stabilization – Long-term protection of soil and water resources from accelerated erosion.

Person – Any operator, individual, public or private corporation, partnership, association, municipality or political subdivision of this Commonwealth, institution, authority, firm, trust, estate, receiver, guardian, personal representative, successor, joint venture, joint stock company, fiduciary; Department agency or instrumentality of State, Federal or local government, or an agent or employee thereof; or any other legal entity. Whenever used in any clause prescribing and imposing a penalty, or imposing a fine or imprisonment or both, the term "person" shall not exclude the members of an association and the directors, officers, or agents of a corporation.

Point Source – Any discernable, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, Concentrated Animal Feeding Operation, landfill leachate collection system, or vessel or other floating craft, from which pollutants are or may be discharged.

Post-construction stormwater – Stormwater associated with a project site after the earth disturbance activity has been completed and the project site is permanently stabilized.

PPC Plan – A written plan that identifies an emergency response program, material and waste inventory, spill and leak prevention and response, inspection program, housekeeping program, security and external factors, and that is developed and implemented at the construction site to control potential discharges of pollutants other than sediment into waters of the Commonwealth.

Project site – The entire area of activity, development, lease or sale including:

- The area of the earth disturbance activity.
- The area planned for the earth disturbance activity.
- Other areas which are not subject to earth disturbance activity.

Stabilization – The proper placing, grading, constructing, reinforcing, lining, and covering of soil, rock, or earth to ensure their resistance to erosion, sliding, or other movement.

Stormwater – Runoff from precipitation, snow melt runoff, surface runoff and drainage.

Surface Waters – Perennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps and estuaries, excluding water at facilities approved for wastewater treatment such as wastewater treatment impoundments, cooling water ponds and constructed wetlands used as part of a wastewater treatment process.

Total Maximum Daily Load (TMDL) – The sum of individual waste load allocations for point sources, load allocations for nonpoint sources and natural quality and a margin of safety expressed in terms of mass per time, toxicity or other appropriate measures.

Transferee – Person(s) identified through the co-permittee/transferee form as having new responsibility for the discharges of stormwater during construction activities and responsibility for compliance with all conditions of this permit and all applicable laws for discharges of stormwater during the earth disturbance activity.

Wasteload Allocation (WLA) – The portion of a surface water's loading capacity that is allocated to existing and future point source discharges.

Waters of the Commonwealth – Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.

Wetlands – Areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas.

II. EFFLUENT LIMITATIONS

- A. BMPs – Except as required by 25 Pa. Code §102.11(c), this permit establishes narrative performance-based effluent limitations in the form of BMPs identified in E&S Plans, PCSM Plans, and PPC Plans, which control the volume, rate, and quality of stormwater runoff and associated pollutants from being discharged into surface waters, and which replicate pre-construction infiltration and runoff conditions to the maximum extent practicable.
1. Operators of all earth disturbance activities shall implement and maintain E&S and PCSM BMPs and other pollution prevention measures required by this permit to minimize accelerated erosion and sedimentation before, during, and after construction activities.
 2. E&S BMPs shall be implemented to meet the standards and specifications identified in DEP's regulations, including 25 Pa. Code § 102.4 (relating to Erosion and Sediment Control requirements) and 102.11(a)(1) (relating to general requirements), and identified in DEP's *Erosion and Sediment Pollution Control Program Manual* (363-2134-008) as amended and updated, or an approved alternative that is at least as effective.
 3. PCSM BMPs shall be implemented to meet the standards and specifications identified in DEP's regulations, including 25 Pa. Code § 102.8 (relating to PCSM requirements) and 102.11(a)(2), and identified in DEP's *Pennsylvania Stormwater Best Management Practices Manual* (363-0300-002), as amended and updated, or an approved alternative that is as at least as effective.
 4. The E&S Plan, PCSM Plan, and PPC Plan shall identify appropriate BMPs that will be implemented to ensure that existing and designated uses of surface waters are protected and maintained.
 5. The permittee or co-permittee shall maintain the E&S Plan, PCSM Plan, PPC Plan, and other documents required by this permit at the project site and shall make these documents available for review by DEP, an authorized conservation district, or other authorized local, state, or federal agent or representative.
 6. Discharges to surface waters identified as impaired waters must be managed with non-discharge and/or ABACT BMPs.
- B. Applicable Effluent Limitations – Activities covered under this permit must comply with applicable effluent limitations established in 25 Pa. Code Chapters 91, 93, 96, 102, and 105 and any applicable federal law or regulation.
- C. Water Quality Based Effluent Limitations – Water quality based effluent limitations are applicable to activities conducted under this permit when required under applicable state and federal law or regulation to ensure that the water quality standards of the receiving water are attained. Activities conducted under this permit shall not result in a violation of such water quality standards.

III. MONITORING, INSPECTION, AND REPORTING REQUIREMENTS

A. Monitoring.

DEP or the authorized conservation district may require monitoring of stormwater discharges and/or disturbed soils where an increased risk of potential pollution is present, or pollution is suspected to be occurring from an earth disturbance activity subject to this permit. The permittee or co-permittee shall commence such monitoring upon receipt of written notification from DEP or an authorized conservation district in accordance with the instructions set forth in the notification.

B. Test Procedures.

Unless otherwise specified in this permit, the test procedures for the analysis of pollutants shall be those contained in 40 CFR Part 136, alternate test procedures approved pursuant to that part, or other alternate procedures approved by DEP.

C. Visual Inspections.

1. The permittee and co-permittee(s) shall visually inspect the project site weekly, at a minimum, and within 24 hours of the conclusion of each measurable (> 0.1 inch) storm event throughout the duration of earth disturbance and until the permittee and co-permittee(s) receive acknowledgement of the NOT from DEP or an authorized conservation district. The visual site inspections shall be conducted by qualified personnel, trained and experienced in erosion and sediment control.
2. Each inspection must include an evaluation of E&S, PCSM and PPC BMPs, as applicable, to determine whether the BMPs are adequate and properly implemented in accordance with the terms of this permit or whether additional control measures are needed. If needed, such measures shall be implemented and immediately and DEP and the authorized conservation district shall be notified.
3. Each inspection must include an evaluation of equipment needed to implement E&S, PCSM, and PPC Plans, such as spill response equipment, as applicable.
4. The permittee shall document all visual inspections on an inspection report form that is provided by DEP. In addition to the information required above, the permittee shall document the date, time, name and signature of the person(s) conducting the inspection. All inspection reports shall be made available on the project site for review by DEP and an authorized conservation district.
5. If the permittee discovers conditions in the field that pose a threat of pollution to waters of the Commonwealth, the permittee shall temporarily stabilize the site and cease earth disturbance activities. Thereafter the permittee shall submit a plan and schedule to DEP for review and approval to resume earth disturbance activities while protecting waters of the Commonwealth. The permittee shall implement the plan upon DEP's approval.

D. Licensed Professional Oversight of Critical Stages.

A licensed professional or a designee shall be present on-site and responsible during critical stages of implementation of the approved PCSM Plan. The critical stages may include the installation of underground treatment or storage BMPs, structurally engineered BMPs, or other BMPs as deemed appropriate by DEP or the authorized conservation district.

E. Noncompliance Reporting.

Where E&S, PCSM or PPC BMPs are found to be inoperative or ineffective during an inspection or any other time the permittee becomes aware of any incident causing or threatening pollution as described in 25 Pa. Code § 91.33 (relating to incidents causing or threatening pollution), the permittee and co-permittee(s) shall, within 24 hours, contact the Department or authorized conservation district, by phone or personal contact, followed by the submission of a written report within five (5) days of the initial contact. Noncompliance reports shall include the following information:

1. Any condition on the project site which may endanger public health, safety, or the environment, or involve incidents which cause or threaten pollution.
2. The period of noncompliance, including exact dates and times and/or anticipated time when the activity will return to compliance.
3. Steps being taken to reduce, eliminate, and prevent recurrence of the noncompliance.
4. The date or schedule of dates, and identifying remedies for correcting noncompliance conditions.

Additionally, when BMPs are found to be inoperative or ineffective, a licensed professional shall be consulted to ensure BMP adequacy, as designed.

F. Availability of Reports.

Except for data determined to be confidential under Section 607 of the Clean Streams Law, all reports and other information prepared in accordance with the terms of this permit shall be available for public inspection at the appropriate DEP Regional Office or authorized conservation district office.

IV. RECORD KEEPING

A. Recording of Results.

For each measurement or sample taken pursuant to the requirements of this permit, the permittee or co-permittee shall record the following information:

- The exact place, date and time of sampling or measurements.
- The person(s) who performed the sampling or measurements.
- The dates the analyses were performed.
- The person(s) who performed the analyses.
- The analytical techniques or methods used.
- The results of such analyses.

B. Retention of Records.

The permittee and co-permittee(s) shall retain records of all monitoring information including copies of all monitoring and inspection reports required by this permit, all monitoring information (including site log book, calibration and maintenance records) and records of data used to complete the application for this permit, for a period of three years from the date of the termination of coverage under this permit. This period of retention must be extended during the course of any unresolved compliance, enforcement, or litigation or when requested by DEP or an authorized conservation district.

C. Reporting of Monitoring Results.

Visual inspection monitoring results shall be submitted to DEP or an authorized conservation district upon request.

PART B

STANDARD CONDITIONS

I. MANAGEMENT REQUIREMENTS

A. Permit Modification, Termination, or Revocation and Reissuance.

1. If changes to site conditions or the design have the potential to increase runoff, the permittee shall contact DEP to evaluate whether a permit modification is required. The permittee shall manage any increase in stormwater rate, volume or quality by adding appropriate BMPs.
2. This permit may be modified, suspended, revoked, reissued, or terminated during its term for any of the causes specified in 25 Pa. Code Chapter 102 (relating to erosion and sediment control), or to require compliance with updated effluent limitation guidelines, water quality standards, impaired water listings, or new TMDLs, including but not limited to, the following.
 - Violation of any terms or conditions of the permit.
 - Obtaining a permit by misrepresentation or failure to discuss fully all relevant facts.
 - A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.
3. The filing of a request by the permittee or co-permittee for a permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated non-compliance, does not stay any permit condition.
4. Permit modification or revocation will be conducted according to 25 Pa. Code Chapter 102.

B. Notice of Termination.

1. Termination of Coverage.

- a. Upon permanent stabilization of earth disturbance activity under 25 Pa. Code § 102.22(a)(2) (relating to permanent stabilization) and installation of BMPs in accordance with the approved plan prepared and implemented in accordance with 25 Pa. Code §§ 102.4 and 102.8, the permittee and/or co-permittee shall submit a NOT to DEP or an authorized conservation district. The NOT must include:
 - The facility name, address, and location;
 - The operator name and address;
 - The permit number;
 - The reason for the permit termination; and
 - Identification of the persons who have agreed to and will be responsible for the long-term operation and maintenance of PCSM BMPs.
- b. Until the permittee or co-permittee has received written approval of the NOT, the permittee or co-permittee will remain responsible for compliance with the permit terms and conditions, including long-term operation and maintenance of all PCSM BMPs on the project site in accordance with 25 Pa. Code § 102.8(m). DEP or an authorized conservation district may conduct a follow up inspection and approve or deny the NOT within 30 days of receipt in accordance with 25 Pa. Code § 102.7(c) (relating to permit termination).

2. Final Certification.

- a. The permittee shall enclose with the NOT "Record Drawings" along with a final, signed certification statement from a licensed professional, which shall read as follows:

"I (name) do hereby certify pursuant to the penalties of 18 Pa. C.S.A. § 4904 to the best of my knowledge, information, and belief, that the accompanying record drawings accurately reflect the as built

conditions, are true and correct, and are in conformance with Chapter 102 of the rules and regulations of the Department of Environmental Protection and that the project site was constructed in accordance with the approved PCSM Plan, all approved plan changes, and accepted construction practices."

- b. The permittee shall retain a copy of the record drawings as part of the approved PCSM Plan. The permittee shall also provide a copy of the record drawings as part of the approved PCSM Plan to the persons identified as responsible for the long term operation and maintenance of PCSM BMPs. Permittees shall also provide copies of both the record drawings and the long-term operation and maintenance plan to the Department, authorized conservation district, and municipality.

C. Duty to Provide Information.

1. The permittee or co-permittee(s) shall furnish to DEP or an authorized conservation district within thirty (30) days of the date of request, any information that DEP or an authorized conservation district may request to determine whether cause exists for modifying, revoking, reissuing, or terminating this permit or coverage approved under this permit or to determine compliance with this permit.
2. The permittee or co-permittee shall furnish, upon request, to DEP or an authorized conservation district, copies of records required to be kept by this permit.
3. When the permittee or co-permittee becomes aware that they failed to submit any relevant facts or submitted incorrect information in the application, E&S Plan, PCSM Plan, or PPC Plan or in any other report to DEP or an authorized conservation district, the permittee or co-permittee shall within 24 hours of becoming aware of the deficiency submit or correct such facts or information.
5. The permittee or co-permittee shall give seven (7) calendar days' advance notice to DEP or an authorized conservation district of any planned physical alterations or additions to the permitted facility which could, in any way, substantially affect the quality and/or quantity of stormwater discharged from the activity.

D. Signatory Requirements.

Documents required, submitted, or maintained under this permit shall be signed in accordance with the following:

1. Notices of Intent, Transferee/Co-permittee Form, and Notices of Termination.
 - a. Corporations: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or (2) the manager of one or more manufacturing, production, or operating facilities, if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.
 - b. Partnerships or sole proprietorships: a general partner or the proprietor, respectively.
 - c. Municipalities, state, federal, or other public agencies: either a principal executive officer or ranking elected official such as: (1) the chief executive officer or secretary of the agency, or (2) a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., PennDOT District Executive).
2. All reports, plans, documents, and other information required by the permit or requested by DEP or an authorized conservation district shall be signed by a duly authorized representative of the permittee.
3. If there is a change in the duly authorized representative of the permittee or co-permittee, the permittee or co-permittee shall notify DEP or an authorized conservation district within thirty (30) days of the change.

E. Transfer of Ownership or Control.

1. This permit is not transferable to any person except after notice and acknowledgment by DEP or an authorized conservation district.

- a. In the event of any pending change in control or ownership of facilities, the permittee or co-permittee shall notify DEP or an authorized conservation district using the form entitled "Transferee/Co-permittee Application" of such pending change prior to the change in ownership or control.
 - b. The Transferee/Co-permittee Application form shall be accompanied by a written agreement between the existing permittee and the new owner or operator stating that the existing permittee shall be liable for violations of the permit up to and until the date of coverage transfer and that the new owner or operator shall be jointly and individually liable for permit violations under the permit from that date on.
 - c. After receipt of an administratively complete and acceptable Transferee/Co-permittee Application form, DEP or an authorized conservation district shall notify the existing permittee and the new owner or operator of its decision concerning approval of the transfer of ownership or control. Such requests shall be deemed approved unless DEP or an authorized conservation district notifies the applicant otherwise within thirty (30) days. For the purposes of this permit, this modification is considered to be a minor permit modification.
2. For purposes of this permit, operators shall include general contractors. If prior to construction activities, the owner is the permittee and an operator/general contractor is later identified to become a co-permittee, the owner shall:
 - a. Notify DEP or an authorized conservation district by submitting an administratively complete and acceptable Transferee/Co-permittee Application form; and
 - b. Ensure that monitoring reports and any other information requested under this permit shall reflect all changes to the permittee and the co-permittee name.
 3. Upon authorization of a change in ownership or control, the existing permittee shall provide a copy of the permit and approved plans to the new owner and/or co-permittee.

F. Removed Substances.

Solids, sediments, and other pollutants removed in the course of treatment or control of stormwater shall be disposed in accordance with federal and state law and regulations, in order to prevent any pollutant in such materials from adversely affecting the environment.

G. BMP Construction, Operation and Maintenance.

The permittee and co-permittee(s) are responsible for the design, installation, operation, and maintenance of the BMPs identified in the E&S Plan, PCSM Plan, and PPC Plan.

H. Adverse Impact.

The permittee and co-permittee(s) shall take all reasonable steps to prevent, minimize, or cease any discharge in violation of this permit.

I. Reduction, Loss, or Failure of BMP.

Upon reduction, loss, or failure of any BMP, the permittee and co-permittee shall take immediate action to restore, repair, or replace the BMP or provide an alternative method of treatment. Such restored BMP or alternative treatment shall be at least as effective as the original BMP when properly installed. These actions should be undertaken to ensure that there are no pollutional discharges to the waters of the Commonwealth. This requirement is applicable in situations where the BMP is rendered ineffective, whether the cause or source of the reduction, loss or failure is within or beyond the control of the permittee or co-permittee.

II. COMPLIANCE RESPONSIBILITIES

A. Duty to Comply.

The permittee and co-permittee must comply with all terms and conditions of this permit. Any permit noncompliance constitutes a violation of the Pennsylvania Clean Streams Law and is grounds for enforcement action; for permit termination, revocation, reissuance, or modification; or for denial of a permit or permit renewal.

B. Penalties for Violations of Permit Conditions.

Any person who violates a permit condition, fails to take corrective action to abate violations or falsifies report or other documents may be subject to criminal and/or civil penalties or other appropriate action for violations of the terms and conditions of this permit under Sections 602 and 605 of the Clean Streams Law (35 P.S. §§ 691.602 and 691.605), which are incorporated by reference.

C. Need to Halt or Reduce Activity Not a Defense.

The permittee and/or co-permittee may not use as a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity to maintain compliance with the conditions of this permit.

D. Penalties and Liability.

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee or co-permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject.

E. Property Rights.

This permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of federal, state, or local laws or regulations.

F. Severability.

The provisions of this permit are severable; and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances and the remainder of this permit shall not be affected thereby.

G. Other Laws.

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee or co-permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation.

H. Right of Entry

Pursuant to Sections 5(b) and 305 of the Pennsylvania Clean Streams Law (35 P.S. §§ 691.5(b) and 691.305), and Section 1917-A of the Administrative Code of 1929, the permittee and co-permittee shall allow the Director of DEP, and/or an authorized representative of DEP, conservation district or, in the case of a facility which discharges to a municipal separate storm sewer, an authorized representative of the municipal operator of the separate storm sewer receiving the discharge, upon the presentation of credentials and other documents, as may be required by law, to:

1. Enter upon the permittee's or co-permittee's premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this permit.
2. Have access to and copy, at reasonable times, any records that must be kept under the terms and conditions of this permit.
3. Inspect any facilities or equipment (including monitoring and control equipment).
4. Observe or sample any discharge of stormwater.

I. Availability of Reports.

Except for data determined to be confidential under Section 607 of the Clean Streams Law (35 P.S. § 691.607), all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of DEP or authorized conservation district. As required by the Clean Streams Law, permit applications, permits, and other documents related to this permit shall not be considered confidential.

J. Penalties for Falsification of Reports.

Any person who knowingly makes any false material statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including reports of compliance or noncompliance is subject to criminal sanctions as set forth for false swearing and unsworn falsification at 18 Pa. C.S. §§ 4903-4904 and Section 611 of the Clean Streams Law (35 P.S. § 691.611).

K. The permittee or co-permittee shall contact DEP or an authorized conservation district for clarification of any requirements contained in the E&S Plan, PCSM Plan, PPC Plan, or other documents related to this permit.

PART C

OTHER REQUIREMENTS

I. PROHIBITED DISCHARGES

- A. All discharges covered by this permit shall be composed entirely of stormwater. Discharges of substances other than stormwater must be in compliance, when required, with an NPDES permit (other than this permit) issued for the discharge. Discharges of sewage or industrial waste to waters of the Commonwealth or a BMP is not permitted.
- B. The permittee or co-permittee(s) may not discharge floating materials, oil, grease, scum, foam, sheen, and substances which: produce odor, taste, or turbidity or settle to form deposits in concentrations or amounts sufficient to be, or create a danger of being, inimical to the water uses to be protected or human, animal, plant, or aquatic life.

II. EROSION AND SEDIMENT CONTROL (E&S) PLANS

- A. The permittee shall implement its approved E&S Plan, including all BMPs contained therein. The E&S Plan is incorporated into this permit.
- B. E&S Plans required under this permit are considered reports that shall be available to the public under Section 607 of the Clean Streams Law (35 P.S. § 691.607). The owner or operator of a facility with stormwater discharges covered by this permit shall make E&S Plans available to the public upon request. E&S Plans must be made available at the site of the construction activity at all times.
- C. The staging of earth disturbance activities and maintenance requirements contained in the approved E&S Plan must be followed.
- D. Upon the installation or stabilization of all perimeter sediment control BMPs and at least three (3) days prior to proceeding with the bulk earth disturbance activities, the permittee or co-permittee shall provide notification to DEP or an authorized conservation district.
- E. All manufactured BMPs, including erosion control matting and water quality devices, shall be installed and maintained in accordance with manufacturer's recommendations.
- F. General site clearing, grubbing and topsoil stripping shall not commence in any stage or phase of the project until the E&S BMPs specified by the E&S Plan for that stage or phase have been installed and are functioning as described in the E&S Plan.
- G. Regardless of slope, erosion control blankets shall be used for all seeded areas within 100 feet of a High Quality or Exceptional Value surface water. For all slopes that are 3H:1V or steeper or where potential exists for sediment pollution to receiving waters, erosion control blankets shall be used for all seeded areas within 50 feet of a surface water.
- H. In accordance with the E&S and Site Restoration Plans, measures shall be taken to ensure that proper soil de-compaction occurs for all areas of site restoration for the project. The permittee shall implement such measures in accordance with the guidance on soil restoration in the PA Stormwater BMP Manual (BMP 6.7.3, Chapter 6, page 221).
- I. Where compost filter sock is necessary to elevate the pumped water filter bag to an ABACT E&S BMP, the compost filter sock shall be placed to sufficient length to manage all flow from the pumped water filter bag.
- J. For all discharges from the project site associated with earth disturbance activities, the permittee shall implement, maintain, repair and if necessary replace BMPs to minimize the potential for accelerated erosion and sedimentation and to protect, maintain, reclaim and restore water quality and existing and designated uses.

III. POST-CONSTRUCTION STORMWATER MANAGEMENT (PCSM) PLANS

- A. The permittee shall implement its approved PCSM Plan, including all BMPs contained therein. The PCSM Plan is incorporated into this permit.
- B. PCSM Plans required under this permit are considered reports that shall be available to the public under Section 607 of the Clean Streams Law (35 P.S. § 691.607). The owner or operator of a facility with stormwater discharges covered by this permit shall make PCSM Plans available to the public upon request. The PCSM Plans must be made available at the site of the construction activity at all times.
- C. A licensed professional or their designee shall be present on-site and be responsible for oversight of critical stages of implementation of the approved PCSM Plan. The licensed professional will be responsible to provide a final certification, pursuant to 25 Pa. Code § 102.8(l) along with the required NOT and record drawings, indicating that the project site was constructed in accordance with the approved or modified PCSM Plan.
- D. The PCSM Plan must be consistent with the assumptions and requirements of any available WLAs for the discharges as set forth in any applicable TMDLs established for the receiving waters.
- E. The portion of a site reclamation or restoration plan that identifies PCSM BMPs to manage stormwater from pipelines or other similar utility infrastructure may be used to satisfy the PCSM requirements if the PCSM reclamation, or restoration plan meets the requirements of 25 Pa. Code § 102.8(b), (c), (e), (f), (h), (i) and (l), and when applicable, (m).
- F. All manufactured BMPs, including erosion control matting and water quality devices, shall be installed and maintained in accordance with manufacturer's recommendations.
- G. In accordance with the E&S and Site Restoration Plans, measures shall be taken to ensure that proper soil de-compaction occurs for all areas of site restoration for the project. The permittee shall implement such measures in accordance with the guidance on soil restoration in the PA Stormwater BMP Manual (BMP 6.7.3, Chapter 6, page 221).
- H. Upon reduction, loss, or failure of any PCSM BMP, the permittee shall immediately take measures to prevent pollution to waters of the Commonwealth and adverse impacts to the environment. The permittee shall immediately submit to DEP for review and approval a Corrective Action Plan (CAP) and, if necessary, a permit modification, which shall include a schedule for the repair and/or replacement of the PCSM BMP. Upon DEP's approval of the CAP, the permittee shall implement the CAP.
- I. The permittee shall implement PCSM BMPs as detailed in the approved PCSM Plan. Any changes to the PCSM Plan, including the introduction of alternate PCSM BMPs or the elimination of any approved PCSM BMPs, must be approved by DEP prior to the implementation of these changes.
- J. The PCSM Plan, inspection reports, and monitoring records shall be made available at the project site for review and inspection by DEP and the authorized conservation district.

IV. PREPAREDNESS, PREVENTION, AND CONTINGENCY (PPC) PLANS

- A. If toxic, hazardous, or other polluting materials will be on site, the permittee or co-permittee(s) must implement a PPC Plan for use while those materials are on-site in accordance with 25 Pa. Code § 91.34 (relating to activities utilizing pollutants). The PPC Plan shall identify areas which may include, but are not limited to, waste management areas, raw material storage areas, fuel storage areas, temporary and permanent spoils storage areas, maintenance areas, and any other areas that may have the potential to cause noncompliance with the terms and conditions of this permit due to the storage, handling, or disposal of any toxic or hazardous substances such as oil, gasoline, pesticides, herbicides, solvents, concrete washwaters, etc. BMPs shall be developed and implemented for each identified area.
- B. The PPC Plan shall be maintained on-site at all times and shall be made available for review at the request of DEP or an authorized conservation district.

V. RECYCLING AND DISPOSAL OF BUILDING MATERIALS AND WASTES

All building materials and wastes must be removed from the site and recycled or disposed in accordance with DEP's Solid Waste Management Regulations at 25 Pa. Code Chapter 260a (relating to hazardous waste management system: general), Chapter 271 (related to municipal waste management system – general provisions), and Chapter 287 (relating to residual waste management system – general provisions). No building material or wastes or unused building materials shall be burned, buried, dumped, or discharged at or from the site.

VI. PRE-CONSTRUCTION MEETINGS

For earth disturbance activities authorized by this permit, at least one pre-construction meeting is required. The permittee shall contact DEP to schedule the pre-construction meeting and provide at least seven (7) days' notice of the pre-construction meeting to all invited attendees, unless otherwise approved by DEP in writing. Permittees, co-permittees, operators, and licensed professionals, or designees responsible for earth disturbance activity, including implementation of E&S, PCSM and PPC Plans and critical stages of implementation of the approved PCSM Plan, shall attend the pre-construction meeting(s). Permittees, co-permittees, operators and licensed professionals are responsible for ensuring that all activities on the site comply with the requirements of the permit.

VII. SPOIL OR BORROW AREAS

- A. An E&S Plan or other authorization meeting the regulatory requirements detailed in 25 Pa. Code § 102.4(b) shall be received and approved by DEP or an authorized conservation district and implemented for all spoil and borrow areas, regardless of their locations.
- B. Clean Fill Requirements – Any person placing clean fill that has been affected by a spill or release of a regulated substance must use DEP Form FP-001 (Certification of Clean Fill) to certify the origin of the fill material and the results of the analytical testing to qualify the materials as clean fill. The form must be retained by the owner of the property receiving the fill. Fill material not qualifying as clean fill is regulated fill and must be managed in accordance with DEP's municipal or residual waste regulations based on 25 Pa. Code Chapters 271 or 287, whichever is applicable.

VIII. PHASED PROJECTS

Prior to the commencement of earth disturbance activities for subsequent phases of the project, the permittee or co-permittee shall submit an E&S Plan and PCSM Plan and supporting information for each additional phase or portion of the project to DEP or an authorized conservation district for approval. Coverage under this permit is only granted for those phases or portions of a project for which an E&S Plan and PCSM Plan has been submitted and approved by DEP or an authorized conservation district.

IX. WETLAND PROTECTION

If hydric soils or other wetland features are present, a wetland determination must be conducted in accordance with DEP procedures. A copy of the wetland determination shall be provided to DEP or an authorized conservation district as part of the application. All wetlands identified must be included on the E&S Plan and PCSM Plan. Special precautions must be taken to protect wetlands and other water resources identified in the application, plans, and other supporting documents.

X. INFILTRATION BMPs

- A. Where infiltration and/or restoration BMPs are being utilized, the permittee and co-permittee must ensure that soil compaction is avoided or minimized in those areas. If the areas planned for infiltration and/or restoration BMPs are compromised through compaction or other means, measures shall be taken to ensure that proper soil de-compaction occurs. The permittee shall implement such measures in accordance with the guidance on soil restoration in the PA Stormwater BMP Manual (BMP 6.7.3, Chapter 6, page 221). Additional soil testing must be performed to verify that the BMPs will perform as planned.

- B. To protect the effective infiltration area(s) at PCSM BMPs during construction activities (including earth disturbance and conversion or installation), the infiltration area(s) for a PCSM BMP shall be protected by entirely surrounding the infiltration area with an 18-inch compost filter sock. This is only necessary in those areas where specific infiltration BMPs are being utilized. The compost filter sock shall remain in place and be properly maintained until the contributing drainage area has reached permanent stabilization (a minimum uniform 70% perennial vegetative cover or other permanent non-vegetative cover with a density sufficient to resist accelerated erosion) and DEP or an authorized conservation district approves the removal of the compost filter sock.

XI. STABILIZATION

The time period between the trench excavation to the beginning of disturbed area stabilization for the main line pipeline installation shall not exceed thirty (30) calendar days, unless sufficient justification for an extension of time is provided to and approved by DEP in writing. Upon temporary cessation of any earth disturbance activity, including topsoil and soil stockpiles, for which the cessation of the earth disturbance activities will exceed four (4) calendar days, the disturbed area shall be temporarily stabilized in accordance with the E&S Plan and with 25 Pa. Code § 102.22(b). Proper E&S BMPs shall be implemented and maintained throughout the entire project until permanent stabilization and Notice of Termination approval.

XII. LONG-TERM OPERATION AND MAINTENANCE

- A. The permittee or co-permittee shall be responsible for long-term operation and maintenance of PCSM BMPs unless a different person is identified in the NOT and that person has agreed to long-term operation and maintenance of PCSM BMPs.
- B. For any property containing a PCSM BMP, the permittee or co-permittee shall record an instrument with the Recorder of Deeds which will assure disclosure of the PCSM BMP and the related obligations in the ordinary course of a title search of the subject property. The recorded instrument must identify the PCSM BMP, provide for necessary access related to long-term operation and maintenance for PCSM BMPs, and provide notice that the responsibility for long-term operation and maintenance of the PCSM BMPs is a covenant that runs with the land that is binding upon and enforceable by subsequent grantees, and provide proof of filing with the NOT under 25 Pa. Code § 102.8(m)(2).
- C. For Commonwealth owned property, a covenant that runs with the land is not required until the transfer of the land containing a PCSM BMP occurs. Upon transfer of the Commonwealth-owned property containing the PCSM BMP, the deed must comply with 25 Pa. Code § 102.8(m)(3). An agency of the federal government shall not be required to make or record a declaration of covenants on its property until transfer of the property to a non-federal or non-commonwealth entity or individual. Upon transfer of the Commonwealth owned or federally owned property containing the PCSM BMP, the deed must comply with 25 Pa. Code § 102.8(m)(3).
- D. The person responsible for performing long-term operation and maintenance may enter into an agreement with another person, including a conservation district, nonprofit organization, municipality, authority, private corporation, or other person, to transfer the responsibility for PCSM BMPs or to perform long-term operation and maintenance and provide notice thereof to DEP.
- E. A permittee or co-permittee that fails to transfer long-term operation and maintenance of the PCSM BMPs or otherwise fails to comply with this requirement, shall remain jointly and severally responsible with the landowner for long-term operation and maintenance of the PCSM BMPs located on the property.
- F. Unless a later date is approved by DEP in writing, the permittee shall record an instrument as required under 25 Pa. Code Subsection 102.8(m)(2) and paragraph XII.B within 45 days from the date of issuance of this permit or authorization. Unless DEP authorizes a different procedure, the long-term operation and maintenance plan shall be recorded along with the instrument. Unless a later date is approved by DEP in writing, the permittee shall provide the conservation district and DEP with the date and place of recording along with a reference to the docket, deed book or other record, within 90 days from the date of issuance of this permit or authorization.
- G. Unless an alternative process is approved by DEP in writing, upon the sale or other transfer of any parcel, lot, road or other real property included within the permit boundary, the permittee shall notify the purchaser, grantee, or transferee of the long-term PCSM BMP operation and maintenance requirements. The permittee

shall expressly identify the PCSM BMPs on each property, the schedule for inspection and reporting, the person or entity responsible for long-term operation and maintenance of the PCSM BMPs and how access to the BMPs will be achieved and shall obtain approval from the purchaser, grantee or transferee. Unless a later date is approved by DEP in writing, the permittee shall provide the conservation district and DEP with notice of compliance with this section within 45 days from the date of transfer of the property and at the time the permittee files a Notice of Termination.

XIII. PRIOR CONTAMINATION

The permittee shall implement the following procedures at any location of the project site where it knows or has reason to believe that soils are or may be contaminated due to past land uses or upon receipt of written notification from DEP:

- A. Minimize Disturbance – Limit the extent and duration of earth disturbance activities, including the use of less intrusive earth disturbance techniques/equipment, and avoiding and minimizing the impact of ancillary areas that are not necessary for the project.
- B. Incorporate a contingency plan and additional safety protocols in the event unexpected contamination is uncovered. These protocols shall be established in the permittee's PPC Plan. Incorporate appropriate dust control and suppression practices and procedures during dry and windy periods.
- C. Implement immediate stabilization on all contaminated areas of the project site involving earth disturbance. This may be achieved using mats/blankets/linings/mulching (including compost); temporary and/or permanent seeding/vegetation; tarping or other impermeable/impervious cover; or temporary daily cover.
- D. Implement and maintain perimeter E&S BMPs including but not limited to compost filter berms, compost filter socks or weighted sediment filter tubes, and/or non-acrylamide flocculants.

XIV. WATER SUPPLY NOTIFICATION

Prior to beginning any construction or earth disturbance activities, all public water supplies or other users of surface waters within one (1) mile downstream that may be affected by turbidity increases or other water quality changes caused by construction or earth disturbance activities shall be notified at least 72 hours prior to commencing the activities.

XV. ARCHAEOLOGICAL SPECIMENS

The permittee shall not begin work in areas subject to Phase I or Phase II archeological investigations recommended by the Pennsylvania Historical and Museum Commission (PHMC) until the permittee secures the necessary clearances for these areas from PHMC. In addition, the permittee and its agents shall visually inspect for archaeological specimens, as the term is defined in the Pennsylvania State History Code (37 Pa. C.S.A., Section 101 *et seq.*), during earth disturbance activities, and shall immediately cease earth disturbance activities upon discovery of archaeological specimens. Upon discovery the permittee shall immediately notify DEP and PHMC (Phone: (717) 783-8947).

XVI. DISCHARGES TO NON-SURFACE WATERS

This permit authorizes proposed discharges of stormwater to non-surface waters. Discharges to areas that are not surface waters shall not cause accelerated erosion or stormwater damage to down slope or adjacent properties. These areas that are not surface waters shall be maintained to prevent erosion from stormwater flows.

XVII. RIPARIAN AREA REPLANTING

Prior to submission of the Notice of Termination, the permittee shall replant forested riparian areas in temporary right of ways along surface waters. Replanting shall be conducted for a minimum distance of fifty (50) feet landward from the top of both banks of warm water fisheries and trout stocked fisheries; 100 feet from cold water fisheries; and 150 feet from HQ/EV streams. The density of replanted trees shall be similar to the density that existed prior to the permittee conducting construction activities but shall provide no less than 60% uniform canopy

cover upon maturation and shall be appropriate to the geographic location. Maintenance and inspections shall ensure survival and growth of plantings and protection from competing plants and animals including noxious weeds and invasive species over a 5-year establishment period to ensure and proper functioning of riparian forest buffers, and shall include measures to repair damage to the buffer from storm events greater than the 2-year/24-hour storm.

XVIII. HABITAT CONSERVATION PLANS AND THREATENED AND ENDANGERED SPECIES PROTECTION

- A. The permittee shall comply with all applicable provisions of the Habitat Conservation Plan submitted and approved by the U.S. Fish and Wildlife Service (USFWS), PA Game Commission (PGC), PA Fish and Boat Commission (PFBC) and PA Department of Conservation and Natural Resources (DCNR) to protect federal and state listed species. The permittee shall provide a copy of the plan to DEP prior to initiation of any work under this permit.
- B. The permittee shall implement the approved Habitat Conservation Plan in accordance with all PGC approvals for the Allegheny Woodrat (*Neotoma magister*). This includes no blasting or the use of herbicides on the project or in the vicinity of the project on DCNR lands as identified in the PGC clearance. The permittee shall provide a copy of the plan to DEP prior to initiation of any work under this permit.
- C. The permittee shall implement the Migratory Bird Conservation Plan approved by the USFWS. The permittee shall provide a copy of the plan to DEP prior to initiation of any work under this permit.
- D. The permittee shall implement all Avoidance Measures identified by the jurisdictional resource agencies for any threatened or endangered species or species of special concern.
- E. Where applicable, the permittee shall implement the Avoidance Measures identified in Appendix A of the Department's permit issued under Chapter 105 for all open trench wetland crossings in bog turtle (*Clemmys muhlenbergii*) counties identified by the USFWS as occupied, potentially occupied or adjacent habitats, unless otherwise specified by the USFWS.
- F. The permittee shall comply with all protocols set forth by the USFWS for protection of the Rusty Patch Bumble Bee.
- G. Prior to conducting any future maintenance activities on the pipeline or right of way which involves disturbance, the permittee shall conduct a then current Pennsylvania Natural Diversity Inventory search, shall obtain clearance(s) for any species or resource where a potential impact is identified, provide the avoidance and mitigation plan to DEP prior to initiating such maintenance work, and shall implement and adhere to all avoidance measures outlined in such clearance(s).

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