



August 9, 2012

VIA ELECTRONIC MAIL AND U.S. MAIL

Pamela Bush, Commission Secretary
Delaware River Basin Commission
P.O. Box 7360
West Trenton, New Jersey

Re: Request for a Hearing – Executive Director Determination Regarding DRBC Jurisdiction Over Tennessee Gas Pipeline 300 Line and Northeast Upgrade Projects, Columbia 1278 Replacement Projects, and Other Linear Natural Gas Transmission Infrastructure

Dear Ms. Bush,

Pursuant to Section 2.6.1.C of Article 6 of the Rules of Practice and Procedure (RPP), the Delaware Riverkeeper Network and the Delaware Riverkeeper (collectively DRN) request a hearing to review the Executive Director's and/or Commission's decision not to exercise jurisdiction over certain named natural gas transmission infrastructure projects, and over powerlines and natural gas pipelines traversing the Delaware River Basin in general, as set forth in Ms. Collier's July 10, 2012 letter, titled "Tennessee Gas Pipeline 300 line Extension Project, Columbia 1278 Replacement Project and Other Linear Infrastructure." This hearing request is timely submitted within 30 days of the July 10, 2012 letter.

In letters to the DRBC dated February 1, March 30, and May 7, 2012, DRN formally requested that the DRBC take jurisdiction under Section 2.3.5.A of Article 3 of the RPP and exercise its regulatory authority to require docket applications from linear pipeline project proponents (including, but not limited to, the Tennessee Gas and Pipeline's 300 Line and Northeast Upgrade Projects and Columbia's 1278 Replacement Project). Ms. Collier's July 10 2012 letter memorializes that she and/or the DRBC has denied this request.

According to Article 6, Section 2.6.1.C of the RPP, administrative hearings of contested cases are allowed arising under Article 3, whether a project substantially affects water resources, or Article 5, decisions of the executive director concerning water quality cases. A contested case is defined as "a proceeding in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are involved." RPP Article 6, Section 2.6.1.B. The pipeline projects that are the subject of DRN's letters have substantially affected or will substantially affect water resources of the Basin. The July 10, 2012 letter memorializes the Executive Director's and/or the Commission's

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denial of DRN's formal request for Commission review of the multiple pipeline projects listed in DRN's letters, establishing that these pipeline projects will not be reviewed by the Commission on the basis of the significant disturbance these projects will cause to ground cover, thereby affecting water resources. Accordingly, this is a contested case.

Specific Action or Decision for Which a Hearing is Requested

The specific action or decision for which a hearing is requested is the decision articulated in the July 10, 2012, letter titled "Tennessee Gas Pipeline 300 line Extension Project, Columbia 1278 Replacement Project and Other Linear Infrastructure." This letter specifically states that the Commission "declin[es] to review both the Tennessee Gas Pipeline 300 Line Extension project and the Columbia 1278 Replacement Project." The letter further states that "[a]lthough both were 'natural . . . gas transmission line[]' projects, neither, in the view of the DRBC staff 'involved a significant disturbance of ground cover affecting water resources.'" While the DRBC has accepted responsibility to require dockets from pipeline operators for the sole purpose of hydrostatic pipe testing, the letter states the Commission's position that it has otherwise categorically declined to exercise its jurisdiction with respect to the Tennessee Gas Pipeline 300 Line and Northeast Upgrade projects and the Columbia 1278 Replacement Project, their significant disturbance of ground cover affecting water resources notwithstanding.

The letter does not state an explicit Commission or Executive Director finding with respect to the other specific pipeline projects DRN requested that the Commission assert jurisdiction over or with respect to DRN's request as stated in these letters that the Commission assert jurisdiction over these and all other powerline and pipeline projects crossing the Delaware River Basin because of their significant disturbance of ground cover affecting water resources. To the extent that the July 10, 2012 letter constitutes a denial of these requests, DRN requests a hearing with respect to these actions or decisions of the Executive Director and/or Commission as well.

Date of the Action or Decision

The letter memorializing the action or decision of the Executive Director and/or Commission is dated July 10, 2012. This hearing request is timely, because it is made within 30 days of the letter, as required by RPP Article 6, Section 2.6.1.C.

The Interests of the Delaware Riverkeeper and the Delaware Riverkeeper Network

The Delaware Riverkeeper is a full-time privately-funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats. The Delaware Riverkeeper regularly visits the Delaware River for personal and professional reasons and her use and enjoyment of the River will be adversely affected by any change in water quality due to natural gas infrastructure projects within the drainage area of SPW. She will also be adversely affected by any associated public perception of a water quality impact due to natural gas infrastructure projects.

The Delaware Riverkeeper Network is a non-profit organization established in 1988 to protect and restore the Delaware River, its tributaries and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs,

environmental advocacy initiatives, recreational activities, and litigation throughout the entire Delaware River watershed. DRN is a membership organization with over 10,000 members throughout the watershed and beyond. Thus, the protection and improvement of water quality in the watershed is germane to DRN's mission and purpose.

As you know, DRN petitioned the Commission to grant the Upper and Middle Delaware Wild and Scenic River segments Special Protection Waters (SPW) status. DRBC took this action in 1992. In 2001, DRN again petitioned DRBC to classify the Lower Delaware as SPW.

As a result of DRN's efforts, the DRBC permanently designated the Lower Delaware as Significant Resource Waters, a type of SPW, in July 2008. DRN also requested in its 2001 petition that DRBC fulfill the requirements for prioritization of the Upper and Middle Delaware Wild and Scenic River segments. The entire non-tidal Delaware River is now protected by SPW anti-degradation regulations. Not only was DRN directly involved in obtaining SPW status for the non-tidal Delaware, but the Delaware Riverkeeper, DRN, and DRN's members all enjoy the water quality values of the Delaware River and its watershed, particularly within the drainage area of SPW.

DRN has a demonstrated interest in natural gas and power transmission infrastructure, including linear pipeline and powerline projects, throughout the Basin, as evidenced by the three letters submitted to the Commission as well as DRN's ongoing legal activities regarding these projects at the local, state, and federal levels. DRN and its members will be adversely affected by the Executive Director's and/or Commission's refusal to exercise Commission jurisdiction over these infrastructure projects because such projects threaten the quality of Special Protection Waters. DRN has an interest in generally supporting the Commission's regulatory authority over these projects on behalf of our members, many of whom live within the drainage area of SPW, or use the area for recreational, professional, or aesthetic use. DRN members canoe, birdwatch, hike, and participate in other recreational activities throughout the watershed, particularly within the drainage area of SPW. Our members will be adversely affected by any change in water quality due to pipeline and powerline construction projects and their associated induced development within the drainage area of SPW, as well as from the associated public perception of a water quality impact due to these projects.

The July 10, 2012 letter articulating the action or decision on which DRN requests a hearing is of interest to the Riverkeeper, DRN, and its members because of the potential environmental impacts these projects have had and could have on the Delaware River and its watershed.

Summary Statement of Basis for the Hearing

DRN requests the hearing for two reasons. First, pipeline construction projects result in significant disturbance of ground cover affecting water resources. Individually and cumulatively, these projects are likely to result in detrimental impacts to Special Protection Waters. Second, the Commission has already received a referral of pipeline projects from the National Park Service pursuant to RPP Article 3, Section 2.3.5C. Accordingly, DRN asserts that the action and/or decision memorialized in the July 10, 2012 letter was in error as a matter of fact and as a matter of law, and should be reconsidered through the hearing process.

Pipeline Construction Projects in the Basin Result in Significant Disturbance of Ground Cover Affecting Water Resources, Necessitating Commission Review

DRN asserts that, because the linear pipeline construction projects named in its three letters have involved and will continue to “involve significant disturbance of ground cover affecting water resources,” RPP 2.3.5.A.12, the Commission must require project proponents to submit these projects for review pursuant to Section 3.8 of the Compact.

A brief survey of published environmental studies suggests that pipeline construction activities result in four primary impacts to groundcover affecting water resources, including: erosion and sedimentation, loss of riparian vegetation, forest and habitat loss and fragmentation, and cumulative impacts.

Studies documenting the effects of stream crossing construction on aquatic ecosystems identify sediment as the primary stressor for construction on river and stream ecosystems.¹ During the pipeline stream crossings construction, discrete peaks of high suspended sediment concentration occur during activities such as blasting, trench excavation, and backfilling.² The excavation of streambeds can generate persistent plumes of sediment concentration and turbidity.³ This sedimentation has serious consequences for the benthic invertebrates and fish species whose vitality is crucial for healthy aquatic ecosystems. There have been documented reductions in benthic invertebrate densities, changes to the structure of aquatic communities, changes in fish foraging behavior, reductions in the availability of food, and increases in fish egg mortality rates.⁴ In addition to the stream crossing construction activity itself, the associated new road construction increases the risk of erosion and sedimentation.⁵ Heavy rains during two tropical storms in August and September 2011 caused extensive failures to erosion and sediment controls on pipelines under construction in north central Pennsylvania resulting in sedimentation plumes in nearby waterbodies.⁶

Pipeline construction also results in the loss of riparian vegetation.⁷ For each pipeline construction technique, there is a resulting loss of foliage associated with clearing the stream banks. This reduction in foliage increases stream temperature and reduces its suitability for fish incubation, rearing, foraging and escape habitat.⁸ The loss of vegetation also makes the stream more susceptible

¹ Scott Read, *Effects of Sediment Released During Open-cut Pipeline Water Crossings*, Canadian Water Resources Journal, 1999, 24: (3) 235-251.

² *Id.*

³ *Id.*

⁴ James Norman, et al., *Utility Stream Crossing Policy*, ETOWAH Aquatic Habitat Conservation Plan, July 13, 2008, 9-10.

⁵ *En Banc* Hearing of the Pennsylvania Public Utility Commission on Jurisdictional Issues Related to Marcellus Shale Gas Development, Docket No. I-2010-2163461.

⁶ Craig R. McCoy and Joseph Tanfani, *Similar Pipes, Different Rules*, PHILADELPHIA INQUIRER, available at, http://articles.philly.com/2011-12-12/news/30507185_1_hazardous-materials-safety-administration-pipeline-safety-rules

⁷ Norman at 8.

⁸ Canadian Association of Petroleum Producers, Canadian Energy Pipeline Association, and Canadian Gas Association, *Pipeline Associated Water Crossings*, Prepared by TERA Environmental Consultants and Salmo Consulting, Inc. (2005), 1-4.

to erosion events, as the natural barrier along the stream bank has been removed. Deposited sediment from construction activities can also fill in the interstitial spaces of the streambed, changing its porosity and composition, and thereby increasing embeddedness and reducing riffle area and quality.⁹ Furthermore, deposited sediment has the potential to fill in pool areas and reduce stream depth downstream of the construction area.¹⁰

Forest fragmentation and habitat loss is a serious and inevitable consequence of increased pipeline construction activity. While the right of way for a pipeline construction zone ranges from 25-200 feet, on average, the right of way extends about 100 feet.¹¹ The Nature Conservancy has determined that “[t]he expanding pipeline network could eliminate habitat conditions needed by “interior” forest species on between 360,000 and 900,000 acres as new forest edges are created by pipeline right-of-ways.” In addition, the right of way will need to be maintained and kept clear throughout the lifetime of the pipeline, which can be up to 80 years.

The clearing of forest for pipelines can result in the introduction of invasive species (such as Japanese knotweed and hay scented fern), native wildlife species decline, and the creation of microclimates that degrade forest health through sunscald and wind-throw. Habitat fragmentation also deprives interior forest species of the shade, humidity, and tree canopy protection that well developed deep forest environments provide.¹² Furthermore, oftentimes the land being cleared has been identified as soils that have poor re-vegetation growth, thus resulting in land being “temporarily cleared” for construction activity that is then unable to be restored to its previous condition.

The cumulative impact of multiple construction sites for water crossings on a stream or river has the potential to significantly degrade the quality and flow rate of the water body. The capacity of a water system to recover from a multitude of impacts may be exceeded with the detrimental effects of crossing construction becoming permanent.¹³ Recurrent stresses on fish, such as those originating from elevated suspended sediment concentrations, will have negative effects on fish health, survival and reproduction.¹⁴ For a more expansive overview of potential cumulative environmental impacts please see, *Utility Stream Crossing Policy*, by James Norman, et al.¹⁵

With respect to two of the three specific projects that the Commission has refused to take jurisdiction over, Tennessee Gas Pipeline’s 300 Line and Northeast Upgrade Projects, the DRBC staff determination that these projects did not or will not involve a significant disturbance of ground cover affecting water resources was in error. As the chart below, compiled from TGP’s applications to FERC, demonstrates, these projects have already or will soon significantly disturb ground cover, thereby affecting water resources, a significant proportion of which fall within the Delaware River Basin.

⁹ Read at 235-251.

¹⁰ Norman at 9-10.

¹¹ Nels Johnson, et al., *Natural Gas Pipelines*, THE NATURE CONSERVANCY, 1 (December 2011) at 6.

¹² *Id.* at 7.

¹³ CAPP (2005) at 1-4.

¹⁴ *Id.*

¹⁵ Norman at 11-13.

TGP Project*	Looping Segments Added	Pipeline Mileage	% of Total Pipe Added on “Eastern Leg”	Impacted Acreage from Construction	Poor Re-vegetation Potential Acreage	New Permanent ROW Acreage	Water Crossings	Pipe Size	Added Horsepower (Compressor Stations Modified)	Increase d Capacity Dth/d
NEUP	5	39.5	21.6%	810.3	640.137	120.6	102 (25)	30”	22,310 (321, 323)	636,000
300 Line Upgrade	7	127.4	70.4%	2,628.7	1550.933	439.2	155 (29)	30”	55,058 (313, 315, 321, 325)	350,000

*Data compiled from Project Applications for Certificate of Public Convenience and Necessity for TGP and 300 Line Upgrade.

Whether considered individually or cumulatively, the pipeline projects DRN has identified in its letters will have both short- and long-term impacts to the Basin’s water resources through their significant disturbance of ground cover affecting water resources, and, given the Commission’s mandate to ensure that Special Protection Waters are protected from degradation – a mandate not held by state or federal agencies – the Executive Director and/or Commission erred in determining that these projects should not be subject to Commission review and approval on that basis.

The Commission Has Already Received a Referral of Pipeline Projects from the National Park Service

RPP Article 3, Section 2.3.5.A specifies that state or federal agencies may refer projects otherwise exempted from review to the Commission for action, pursuant to RPP Article 2.3.5.C: “Whenever a state or federal agency determines that a project falling within an excluded classification (as defined in paragraph A. of this section) may have a substantial effect on the water resources of the Basin, such project may be referred by the state or federal agency to the Commission for action under these Rules.

The July 10, 2012 letter erroneously states that:

Possibly in recognition of existing state and federal regulations applicable to regional natural gas transmission line projects, as of today no member state or federal agency has referred to the Commission for review any projects of this kind; nor has such agency referred for Commission review any other linear infrastructure project that is otherwise excluded from section 3.8 review by section 2.3.5A of the RPP.

In point of fact, in his May 26, 2010 letter to Ms. Collier, Superintendent Sean McGuinness of the National Park Service referred to the Commission, under RPP Article 3, Section 2.3.5.C, “all projects that involve drilling of natural gas wells that are not already subject to project review under the Commission’s regulations” and the EDD. “This referral includes both ‘exploratory’ or ‘test’ wells, and wells completed in geologic strata other than shale, and it extends to all aspects of natural gas development that involves land disturbance or water use from the proposed construction of exploratory wells to gas distribution pipelines.” (emphasis added). The project referral letter states: “It is important to understand all the potential and cumulative impacts of large scale changes in land

use associated with natural gas development, from test wells to pipelines, throughout the watershed on the water resources of the Basin.” (emphasis added).

Indeed, while recognizing “that state regulations provide a measure of protection for the region’s water resources,” this project referral letter emphasized: “However, given the national and regional significance of the Wild & Scenic Delaware River, extra protections above and beyond those already afforded by state programs are warranted.”

DRN disagrees with the Commission’s interpretation that RPP Article 3, Section 2.3.5C gives it the discretion to accept or decline the referral ab initio. That interpretation is not supported by the plain language of RPP Article 3, Section 2.3.5C, which clearly states that a project may be referred “to the Commission for action under these Rules.” (emphasis added). This reading is further buttressed by the plain language of RPP Article 3, Section 2.3.5A, which gives the Executive Director and a state or federal agency equal power to determine that a project otherwise exempt from review must be submitted to the Commission under Section 3.8. That the Commission has the final decision-making authority, either following a special direction by the Executive Director, or by a state or federal agency referral, to determine its ultimate disposition of a project submission does not give it the discretion to accept or decline a state or federal agency referral in the first instance.

In light of the explicit referral of pipeline projects to the Commission for review by the National Park Service, DRN asserts that the Commission erred in refusing to require such projects to be submitted for review under Compact Section 3.8.

Thank you for your prompt attention to this hearing request. Do not hesitate to contact us with any questions.

Respectfully submitted,

/s/ Jane P. Davenport

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