



United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Energy and Power
2125 Rayburn House Office Building
Washington, D.C. 20515

**Written Testimony Regarding
H.R. 1900, Natural Gas Pipeline Permitting Reform Act
Submitted by Maya K. van Rossum, the Delaware Riverkeeper
to the House of Representatives Committee on Energy and Commerce,
Subcommittee on Energy and Power
July 9, 2013**

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Introduction

Good morning, my name is Maya van Rossum. I am the Delaware Riverkeeper; my organization is the Delaware Riverkeeper Network, an environmental advocacy organization which champions the rights of communities for a Delaware River that is free-flowing, clean and healthy. Since 1988, the Delaware Riverkeeper Network has been working to protect and restore the Delaware River, its tributaries and watershed, which now supplies the drinking water for over 17 million people -- one-fifth of this country's population. Our work ensures the protection of that water supply as well as hundreds of thousands of jobs and local economies that rely upon healthy waterways. We help safeguard some of the most popular recreational destinations in the nation and we are working to preserve keystone species such as Atlantic sturgeon and horseshoe crab, which play critical roles in our communities, both human and wild. For example, the Delaware River's genetic line of Atlantic sturgeon exist nowhere else on earth, and the Delaware Bay's population of horseshoe crabs — whose annual spawning on bay beaches supports migrating birds as well as local economies through ecotourism — provide an irreplaceable substance necessary for testing vaccines for their safe use by humans.

I thank you for the opportunity to speak to you this morning. I have provided for the record a copy of my verbal statement as well as an expanded version that includes more detailed information to inform your deliberations. I am here to ask you to rethink HR 1900 and not send it to the floor. HR 1900 will diminish critical protections for our communities and environment, and will have unintended consequences, including for pipeline companies.

As natural gas drilling proliferates, so too does the infrastructure used to support and encourage it. Pipelines and associated compressor stations are being rapidly proposed and pursued. The rapid expansion of natural gas infrastructure requires ever-increasing time and attention from agencies and the public; yet, HR 1900 proposes just the opposite. HR 1900's implementation would result in serious negative consequences for the proper implementation of a number of environmentally protective federal laws, including: Clean Water Act Section 401, Water Quality Certifications; Clean Water Act Section

404 Army Corps permitting; National Environmental Policy Act compliance; and the application of the Clean Air Act and the Coastal Zone Management Act.

At a very fundamental level, HR 1900 undermines the power preserved and granted to the states to ensure protection of the health, safety, and economies of their people. Laws designed to protect the environment – particularly those for protecting clean water, clean air, and healthy habitats – were crafted with a specific respect and regard for the balance of power between state and federal governments. In the arena of energy production and use, that balance of power has already been undermined by seemingly unwarranted exemptions. HR 1900 further erodes that balance and takes from states and other federal agencies their ability to earnestly and effectively protect the natural resources that are fundamental to healthy families, lives, and jobs.

Not only does HR 1900 exacerbate problems in the current legal regime as it applies to natural gas pipeline projects, it also fails to address the most significant deficiencies that currently exist.

HR 1900 Will Adversely Affect the Ability of States to Provide Water Quality Protection Pursuant to Section 401 of the Clean Water Act.

HR 1900 introduces a number of problems that would not only reduce the scope and breadth of environmental protection that can be obtained pursuant to Section 401 of the Clean Water Act, but also creates inefficiencies within the permitting regime. Given that implementation of 401 Water Quality Certification may be the *only* way that a state can protect water quality through enforceable constraints on natural gas pipeline projects (as the result of 2005 Energy Policy Act related exemptions and preemption of state environmental law by the Natural Gas Act), HR 1900's significant interference with the exercise of this authority is also an interference with the rights of states to protect their communities, and can result in a significant regulatory gap.

Currently, the time period allocated for a state to issue a Section 401 Water Quality Certification is flexible and depends upon the discretion of an Army Corps District Engineer. This time period may

be as long as one year from the time the state receives a complete application. By contrast, HR 1900 imposes an inflexible 90-day deadline that can be expanded to only 120 days, under seemingly exceptional circumstances, and gives FERC – an agency that has no expertise in the Clean Water Act – the sole discretion to determine whether those exceptional circumstances have occurred. Furthermore, the 90-day time line begins to toll when FERC issues its final environmental document, not when the state has received a completed application.

The Delaware Riverkeeper Network's experience has been that states currently work with pipeline applicants seeking 401 Certification to remedy application deficiencies, rather than issue outright denials. The time limitations included in HR 1900 would inhibit such cooperative efforts. States may respond to the reduced time for reviewing 401 applications by quickly denying deficient applications rather than working with the applicants to remedy deficiencies. Or, a state may ignore the deficiencies in order to keep within the HR 1900 time limits, and end up approving deficient applications and projects.

Even if timely and complete applications are submitted, the truncated timeline afforded by HR 1900 may put states in a position to deny rather than condition their 401 Water Quality Certifications, as the development of project-specific conditions would require more time than the proposed law allows. Whereas the current statutory regime gives the Army Corps discretion to afford states the additional time needed to develop these conditions, HR 1900 would prevent that accommodation from taking place, leaving the states no choice but to deny the application -- or issue it without developing the necessary conditions to protect its waters. If a state makes a timely denial of a 401 Water Quality Certification, then the Army Corps *cannot* issue its 404 permit. 33 USC § 1341(a)(1).

In order to avoid the additional administrative or legal burdens imposed by HR 1900, some states may opt to waive their 401 authority entirely with respect to pipelines. These states would lose a critical opportunity to prevent degradation of their waters caused by pipeline construction.

The creation by Congress of an inflexible reduction in the time allocated to states to develop conditions to protect water quality will create the unintended consequences of more denials, more litigation, further delay of pipeline projects, and less effective environmental oversight.

HR 1900 Will Negatively Affect the Ability of the Corps to Properly Administer Clean Water Act Section 404 Permits and May Force Denial of those Permits.

CWA 404 permits are required to authorize the discharge of dredged or fill material into a navigable water of the United States. Section 404 permits are generally issued by the US Army Corps of Engineers.

Ensuring adequate review for the 404 permitting process is vitally important. Over the course of a single pipeline project, there are dozens, sometimes hundreds, of wetlands and waterways that are impacted and require individual consideration and review. For example, just one portion of one recent pipeline as it passes through the Delaware River watershed will impact an estimated 450 acres of land, and cross 90 waterbodies and 136 wetlands, a large portion of which are the region's highest quality streams and wetlands and are entitled the greatest level of protection under federal and state laws.

Currently, the timing of the 404 permit process is governed by Army Corps regulations, which provide defined time limits that can be extended only for good and specific cause. Pursuant to these regulations, after receiving a permit application, the District Engineer has 15 days to determine whether that application is administratively complete and has the components necessary for evaluation; within this timeframe the District Engineer must either publically notice that it has received a complete application, or inform the applicant that additional information is needed to complete its application. 33 CFR § 325.2(a)(2).

District Engineers are to decide upon all applications not later than 60 days after receipt of a complete application. 33 CFR § 325.2(d)(3). The "clock" on the running of the 60 days can only be stopped and restarted for good cause, e.g., if the Army Corps extends the public comment period, or if

the Army Corps is waiting for other state or federal agencies to provide certifications, impact statements, or other documents required by federal law. *See* 33 CFR § 325.2(d)(3)(iii),(vi).

HR 1900 would give the Army Corps 90 days from the issuance of FERC's "final environmental document" to either issue or deny the 404 permit. It would allow FERC to extend that time to 120 days only for "circumstances beyond" Army Corps control. This is problematic because the time limit starts to run from when FERC issues its final "environmental document" (presumably a FONSI or EIS), rather than from the time when the Army Corps receives a complete application. Similar to the result in state review of Section 401 permits, this could pressure the Army Corps to deny more applications based on incompleteness rather than working with the applicant to remedy information or project deficiencies.

HR 1900 is also problematic because it would take away the Army Corps' discretion to wait for a pending state 401 Water Quality Certification before rendering its 404 decision. Under the current law, the Army Corps can put the 60-day clock on hold for up to a year from the time that the state received a complete application for 401 Certification. Under HR 1900, the Army Corps would not have that level of discretion. Because 404 permitting depends on the state's 401 decision or waiver, the impact of HR 1900 on 404 permitting depends on how HR 1900 affects state implementation of Section 401 of the Clean Water Act.

- If states react to HR 1900 by denying more 401 applications, the Army Corps would be obliged, pursuant to law, to deny the 404 permit.
- If states react to HR1900 by waiving their authority, then Army Corps decision-making would be deprived of the important information that states provide about impacts of projects on the protection of state water quality standards.
- Under HR 1900, both the state 401 certification and the Army Corps 404 would simultaneously be due within 90 days of FERC's issuance of its "final environmental document." And so, if states exercise their 401 authority, but consume the entire 90 day period in developing conditions, then the Army Corps could potentially be deprived of

the opportunity to carefully consider those state-imposed conditions prior to issuing or denying the 404 application; and may be more inclined to deny the 404 permit if they are concerned about the conditions (or lack thereof) that may or may not be imposed by a state. Whether the Army Corps would receive additional time (no more than 30 days as per HR 1900) to consider the conditions imposed by the state (or the lack thereof) would depend upon FERC's discretion to decide whether a delay is warranted by circumstances beyond Army Corps' control.

As Proposed, HR 1900 Limits FERC's Ability to Properly Comply with the National Environmental Policy Act.

FERC compliance with NEPA is a legal prerequisite for issuance of a Certificate of Public Convenience and Necessity. As such, if FERC is unable to complete its NEPA obligations within the HR 1900 one-year timeframe, then it would be unable to Certify a proposed project.

FERC's capacity to properly engage the NEPA process could be adversely impacted by the terms included in HR 1900. If FERC finds a pipeline application deficient, there would be less time to revise the proposal and cure the deficiencies within the context of a NEPA review. Additionally, NEPA analysis by FERC often requires detailed surveys, expert reports, and data analysis; HR 1900 would reduce the time within which FERC could secure this information.

Ultimately, requiring FERC to comply with an arbitrary truncated timing restriction will further stress the limited resources of FERC, and (1) could increase the likelihood of an improperly or inadequately informed decision by FERC that results in the approval of a sub-par application and project, or (2) FERC may find itself unable to fulfill its NEPA obligation within the one-year timeframe and be forced to deny Certification for a project.

Furthermore, FERC's mission is not directed towards environmental protection, it is to "[a]ssist consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost through

appropriate regulatory and market means.” As a result, FERC often looks to other regulatory agencies for their expertise on issues of environmental protection; tying the hands of these other agencies, particularly the state agencies, with an artificially short timeline for review also diminishes the level of knowledge they can share with FERC.

HR 1900 Incentivizes the Illegal and Ongoing Practice of Segmentation.

By truncating the time allowed for environmental reviews, HR 1900 incentivizes the illegal practice of project segmentation. Projects that are segmented make it difficult, if not impossible, for agencies and the public to have a full understanding of the impacts of a pipeline installation or upgrade, and allow project sponsors to avoid fully complying with regulatory review requirements under federal law. Smaller project segments are easier for an agency to review within the HR 1900 time limitations, which creates an incentive for both the pipeline companies and the agencies to segment infrastructure projects. When segmentation does happen, HR 1900 diminishes the ability of agencies to identify and stop the practice.

The experience of the Delaware Riverkeeper Network is that pipeline companies routinely segment their projects. A look at the Delaware Riverkeeper Network pipeline map demonstrates the problem: the yellow line represents a project that was proposed and authorized in May 2010, and the red line represents a project that was authorized in May 2012. While these two projects were presented to FERC as separate and distinct projects to receive their own independent review and permitting, it is clear just by observation and the timing of the reviews that the Tennessee Gas Pipeline Companies 300 Line Upgrade Project (yellow line) and Northeast Upgrade Project (red line) are a single project submitted as two separate proposals in order to impact the path of review.

FERC has previously relied upon the assertion that since pipeline projects are designed to serve different customers, at different points in time, they have independent utility, and thus warrant individual review. Such an argument improperly rests entirely on the *economic* independent utility of

each project. Taken to its logical conclusion, this argument suggests that if a project sponsor could find individual shippers interested in extremely small volumes of gas that would each only require a half-mile stretch of looped pipeline along an existing pipeline, FERC could certificate each one of those small individual half-mile loops independently. Such a result undermines the design, purpose, and intent of NEPA.

HR 1900 Could Create Another Regulatory Gap by Inhibiting Implementation of the Clean Air Act and Coastal Zone Management Act.

Aside from section 401 of the Clean Water Act, state regulation of pipelines pursuant to federally-delegated authority under other statutes might also be affected by HR 1900. HR 1900 should not be passed until a careful analysis has been undertaken to determine how the timing restrictions that it imposes might affect state action pursuant to the federal Clean Air Act and the Coastal Zone Management Act. Because state environmental regulations are likely preempted by the Natural Gas Act, state action taken pursuant to these federally-delegated programs may constitute the only substantive environmental protections for air quality and coastal zone integrity imposed on interstate pipeline projects.

HR 1900 Undermines Fair and Informed Public Participation in the 401 Water Quality Certification, 404 Dredge and Fill Permitting Process, and NEPA Review.

The truncated reviews ensured by HR 1900 deny the public a full and fair opportunity to participate in the public process and to provide informed input into the decisions made by regulatory agencies regarding pipelines. Ninety to 120 days is not enough time for a community to become properly notified, secure access to public files and documents, procure expert analysis, and craft and submit informed comment. Ninety to 120 days is not enough time for agencies to schedule, announce, hold, and consider comments from a public hearing. Nor is it enough time for agencies to notice, secure,

consider and appropriately benefit from and utilize the information and considerations posed in written comments from the public. The needlessly restrictive timelines imposed by HR 1900 diminish the ability of the public to provide informed input into the process.

The public often provides helpful facts, science, documentation, information and considerations that inform and enhance an agency's decisionmaking process. Inhibiting meaningful public participation denies us all the benefit of public input and is a denial of this country's commitment to honoring the public voice in decisionmaking.

The one year time period provided by HR 1900 for NEPA review does not remedy this disadvantage; rather, it exacerbates the problem. Clean Water Act Section 401 and 404 decisionmaking are based upon different documentation, require different expert reviews, and require a different quality of comment than NEPA documents. Consequently, commenting pursuant to NEPA does not prepare a person for submitting informed and convincing comment pursuant to other laws.

Additionally, the public is already at a disadvantage with FERC's present process for implementing NEPA. In the experience of the Delaware Riverkeeper Network, FERC routinely allows an application to move ahead through the scoping process without critical analysis and information, such as Resource Reports that provide the details about the expected environmental impacts of a process. As a result, the public is denied critical information necessary to assess a proposal. For example, FERC closed the public comment period on the Transcontinental Gas Pipeline Company's Leidy Southeast Expansion Project with only two of ten Resource Reports available, and without making public any environmental reports describing the local impacts to those in the path of construction. Truncating the time for FERC's decision process will inevitably further reduce the public's involvement, jeopardizing the NEPA requirements for an open and accessible public participation process and disenfranchising stakeholders.

HR 1900 Compounds the Inability of Citizens to Secure Timely and Cost Efficient Consideration of Challenges. Limitations of FERC’s Ability to Avoid Timely Response to Rehearing Requests In Order to Avoid Timely Legal Challenge Needs to Be Addressed.

The Natural Gas Act, 15 U.S.C. § 717r(a), permits “any person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for rehearing within thirty days after the issuance of such order. . . . Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.” The NGA makes a rehearing request a condition precedent for filing suit in federal court for review of a Commission order. Moreover, the aggrieved party may not file suit in federal court until the Commission renders its final decision on the merits of the rehearing request.

FERC’s common practice is to comply with the NGA 30-day mandate by issuing a tolling order within 30 days of a rehearing request. The tolling order grants the request for rehearing only inasmuch as taking the matter into consideration, and allows FERC extra time to make a decision.

FERC compounds this inequity by then waiting to issue final decisions on rehearing requests until just prior to, or sometimes weeks after, the agency authorizes a project to proceed with construction. In some cases, FERC withholds its denial until the party seeking rehearing files a petition with a court of appeals to compel the response.

This FERC practice effectively denies the parties requesting rehearing their due process rights to a timely decision by FERC and judicial review thereof, before construction starts, thus resulting in potentially irreparable injury to communities striving to protect their health, safety, and environmental interests. Additionally, this practice creates unnecessary litigation burdens for the affected parties and FERC itself.

For example, this tolling procedure was abused by FERC in the context of the Tennessee Gas Pipeline Company’s Northeast Upgrade Project. The Northeast Upgrade Project was approved in May of 2012. The Delaware Riverkeeper then timely submitted a Rehearing Request the following month.

FERC, required to respond in 30 days, instead issued a tolling order that indefinitely extended the time they had to review the Rehearing Request. During this tolling time period, the project sponsor began initiating requests to proceed with certain aspects of its construction activity. Despite numerous requests from the Delaware Riverkeeper Network and the Army Corps of Engineers as to the status of the Rehearing Request, FERC remained silent for nearly 6 months. This left the Delaware Riverkeeper without a legal remedy since a final decision from the agency had not yet been issued. Delaware Riverkeeper Network had to file an All Writs Act suit against the FERC in order to have their concerns properly reviewed. One day after the filing of the All Writs Act suit, FERC issued its final order denying the Rehearing Request, such that judicial review of FERC's decision could proceed.

The truncated timeline for review included in HR 1900 not only diminishes the time and opportunity for citizens and residents to gather factual and scientific information needed to support or challenge a project, but it further inhibits the people's ability to submit and secure timely response from agencies to their legal challenges. Agencies already pressed with truncated timelines for permit and certificate reviews will conceivably be less willing and able to give timely consideration and response to community legal filings, and further diminishes their ability to bring timely challenge in the courts, before a project begins.

Diminished Reviews From HR1900 Should be Offset with Better Quality Construction, Planning, and Project Proposal Requirements.

Pipeline projects that have already gone through the Delaware River watershed have been found by experts to have resulted in "significant and permanent increases in stormwater runoff volumes, rates, pollutant discharges, and frequencies of discharge, and a corresponding decrease in infiltration volumes.

As a result, existing streams and wetlands, including exceptional value streams, have been adversely impacted by stormwater discharges and the discharge of sediment.”¹

HR 1900 diminishes environmental protection by reducing the time period for creating appropriate conditions during environmental reviews. Therefore, if this piece of legislation is to move forward it must be balanced by Congressional legislation that ensures the use of best construction practices and planning so as to avoid environmental harm to the greatest extent possible.

Examples of enhanced practices include, but are certainly not limited to, the following:

- ✓ Reduced Right of Way widths to more historic proportions in order to reduce the level of land clearing, stormwater runoff, and loss of forest and backyard habitat.
- ✓ Requirement of the use of construction strategies that avoid soil compaction in order to allow for effective rainfall infiltration and avoid stormwater runoff that would otherwise cause pollution and flood damages for communities downstream. Delaware Riverkeeper Network experience has shown that the level of compaction at a pipeline construction site can be as high as 98%; by way of comparison, earthen dams are generally only compacted to 95%. Such high compaction levels ensure that all the rainfall that hits the ground runs off to wreak havoc on the communities below. But there are means to avoid this level of compaction, for example, by using the excavated soils and woodchips from felled trees to create the construction bed upon which heavy equipment such as the side boom travel and operate; once construction is complete this bed of soil and woodchips can be removed and the level of soil compaction beneath avoided or reduced. (In a video I am making available today, expert Leslie Sauer talks about the strategies used at one project that resulted in dramatic benefits for protecting the environment, communities and public lands.)

¹ Affidavit, Michele C. Adams, P.E., Meliora Engineering, in the case of *Delaware Riverkeeper Network, Maya van Rossum the Delaware Riverkeeper and Responsible Drilling Alliance v. Commonwealth of Pennsylvania Department of Environmental Protection and Tennessee Gas Pipeline Company*, before the Commonwealth of Pennsylvania Environmental Hearing Board. *See also* affidavits submitted in the same case from Kevin Heatley, Senior Scientist with Biohabitats, and Peter M. Demicco, Groundwater Geologist.

- ✓ A mandate that public lands protected with community resources, whether local, state or federal, be avoided to the greatest degree possible.
- ✓ Use of least harmful stream and wetland crossing strategies, such as horizontal directional drilling.
- ✓ Improved erosion and sediment control practices to best available technology.
- ✓ Avoidance, if not prohibition, of crossing our highest quality wetlands and streams in the siting of projects.
- ✓ Fully effective restoration and maintenance of sites to naturally healthy conditions after construction. The goal should be to restore the natural functions and values of a site after a project is complete.
- ✓ Avoidance of the conversion of forested wetlands to emergent wetlands.
- ✓ Mandatory protections against the invasion and spread of invasive plant species needs to be included in ongoing maintenance by the pipeline company.

FERC should have a duty to ensure coordinated location of pipeline projects as part of its review – similar to the obligation it has with respect to hydro-electric dams under the Federal Power Act.

Coordinated planning for pipeline projects would better serve public interest and help avoid redundant and unnecessary projects.

The coordinated planning obligation should include a mandate to consider cumulative impacts of pipeline construction: the cumulative impacts of individual pipelines as they pass from jurisdiction to jurisdiction, the cumulative impacts of multiple pipeline projects for a watershed or region, and the impacts of induced development that result from pipeline siting, location, and construction.

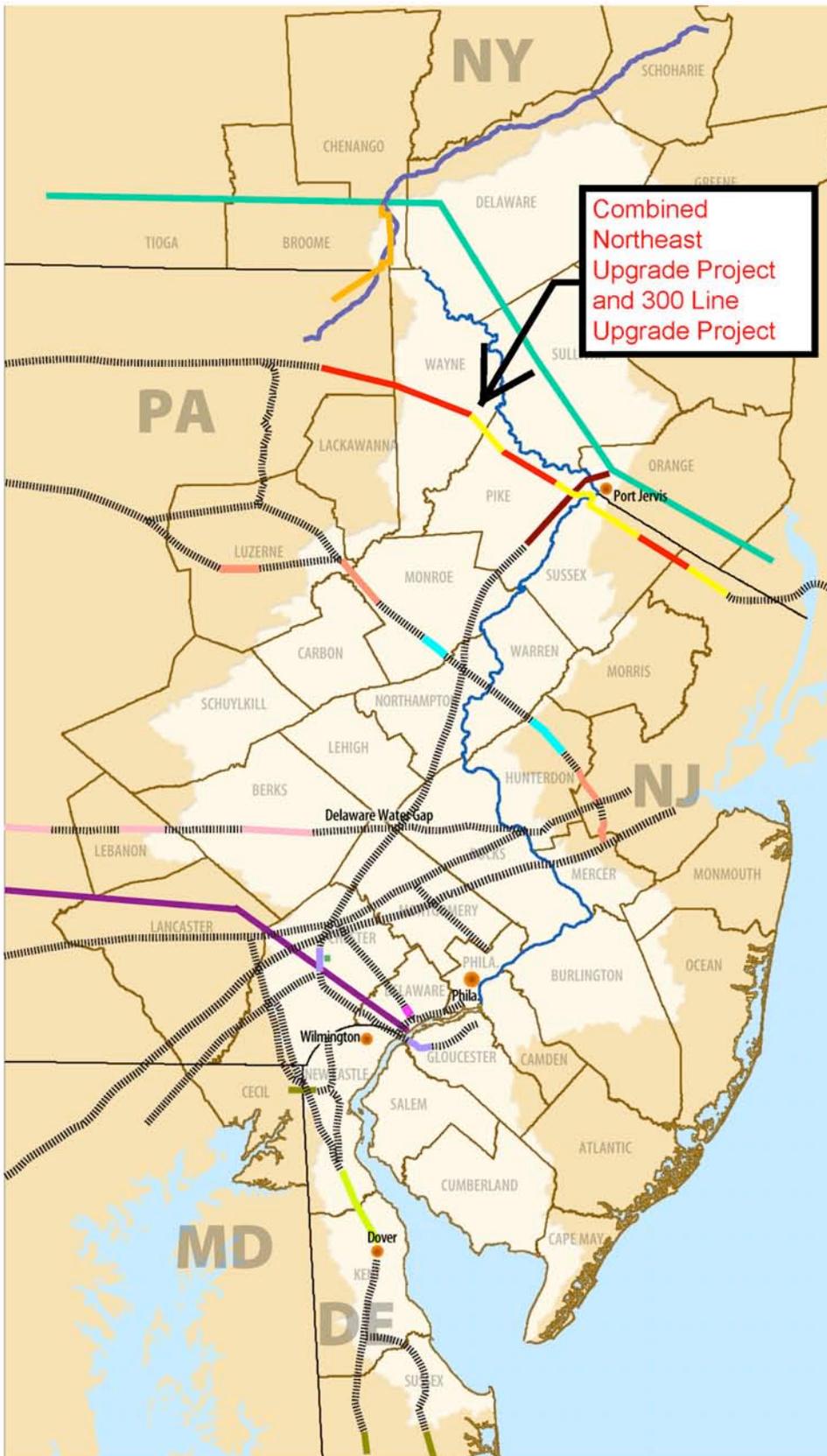
Conclusion

I thank the Committee for inviting the Delaware Riverkeeper Network to offer testimony on HR 1900. I respectfully request that the Committee not move forward with this proposed piece of legislation. However, if the Committee does so, I ask that the Committee balance its effect with necessary legislative reform regarding better pipeline planning, review, and construction.

Respectfully submitted,

A handwritten signature in blue ink that reads "Maya K. van Rossum" followed by a horizontal line.

Maya K. van Rossum, the Delaware Riverkeeper
Delaware Riverkeeper Network



Pipeline Projects Currently Planned To Go Through the Delaware River Basin

- Existing Pipelines
- DTE Bluestone Pipeline
- TGP Northeast Upgrade Project
- ESNG Greenspring Project
- Constitution Pipeline
- Transco Leidy Southeast Expansion
- Transco Northeast Supply Link
- Transco Philadelphia Lateral
- Transco Mainline "A" Replacement
- Texas Eastern TEAM 2014 Project
- Columbia East Side Expansion Project
- Sunoco Mariner East Project

Pipeline Projects That Will Potentially Cross the Delaware River Basin

- Transco Northeast Connector (Not Pictured)

Pipeline Projects Constructed Through the Delaware River Basin Since 2011

- Millennium Pipeline
- TGP 300 Line Upgrade Project
- Columbia 1278 K Replacement
- ESNG System Expansion



www.delawareriverkeeper.org