



February 4, 2013

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Dear Ms. Collier,

In your letter of February 1, 2013, you asserted that the DRBC is no longer obliged to review the Tennessee Gas Pipeline Company's Northeast Upgrade Project (TGP NEUP) because DRBC has already approved docket D-2011-022-1. The Commission's vote to approve this docket for the water withdrawal allocation for hydrostatic testing does not relieve the Commission of its legal obligations established by Article 3.8 of the Compact and elaborated in the DRBC Rules of Practice and Procedure. This includes the obligation to review projects -- not just particular aspects of a project, but all elements of a project -- that pass through an area incorporated into the DRBC's Comprehensive Plan, to ensure that such projects do not substantially impair or conflict with the Plan. Your letter also gratuitously states that the time for appeal of this permit has passed, which of course has no bearing on the determination of whether DRBC can and should take action on the TGP NEUP as required by the Compact and the RPP.

**I. DRBC Is Obligated to Review and Docket the TGP NEUP Pursuant to the Mandatory Language of Compact Art. 3.8 and RPP Section 2.3.4.**

DRBC's failure to exercise the full scope of its authority to review the TGP NEUP pursuant to the RPP does not translate into an exemption from its obligation under the Compact to perform such review.

Section 3.8 of the Compact provides that:

No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation, or

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governmental authority unless it shall have been first submitted to and approved by the commission, subject to the provisions of Sections 3.3 and 3.5. The commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the comprehensive plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such plan. The commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section.

The Comprehensive Plan is established by Article 13.1 of the Compact:

The commission shall develop and adopt, and may from time to time review and revise, a comprehensive plan for the immediate and long range development and use of the water resources of the basin. The plan shall include all public and private projects and facilities which are required, in the judgment of the commission, for the optimum planning, development, conservation, utilization, management and control of the water resources of the basin to meet present and future needs.

RPP Section 2.3.4 states:

Any project which may have a substantial effect on the water resources of the Basin, except as provided in paragraph D. of this section, *shall* be submitted to the Commission for a determination as to whether the project impairs or conflicts with the Comprehensive Plan... (emphasis added)

While RPP Section 2.3.5 categorizes natural gas pipelines as projects that presumptively do not have a substantial effect on the water resources of the Basin and that therefore do not automatically require Commission review, it removes from this exemption those pipelines that:

- “pass in, on, under or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan;”

and those that

- “involve significant disturbance of ground cover affecting water resources....”

RPP Article 3, Section 2.3.5.A(12).

The review obligation stated in Compact Art. 3.8 and RPP Section 2.3.4 is mandatory – it “shall” be undertaken. The Commission’s approval of docket D-2011-022-1 did not fulfill the review obligation triggered by RPP Sections 2.3.4 & 2.3.5(A)(12). The approval of docket D-2011-022-1, which approved a water withdrawal for the project for hydrostatic testing, has no bearing on or relevance to the DRBC’s obligation to review the NEUP pursuant to Compact Art. 3.8 and RPP Section 2.3.5(A)(12). In fact, that obligation still exists, and the DRBC is obliged therefore to meet this mandatory review obligation.

## **II. DRBC Is Obligated to Exercise the Reopener Clause Included in Docket D-2011-011-1 To Ensure Consistency with the Comprehensive Plan and Proper Use and Management of the Water Resources of the Delaware River Basin.**

Even if the approved docket had been relevant to the NEUP’s review pursuant to RPP Section 2.3.5.(A)(12), which it was not, as per its usual practice, DRBC docket D-2011-011-1 contains two sections that provide clear authority for a re-opening of the docket:

Section C part (t) states:

The issuance of this docket approval shall not create any private or proprietary rights in the water of the Basin, and the Commission reserves the right to amend, alter or rescind any actions taken hereunder in order to insure proper control, use and management of the water resources of the Basin.

Section C part (v) further states: “The Executive Director may modify or suspend this approval or any condition thereof, or require mitigating measures pending additional review, if in the Executive Director’s judgment such modification or suspension is required to protect the water resources of the Basin.”

Because the DRBC has identified a significant deficiency in its review process for the TGP NEUP docket (i.e., its failure to recognize and review a project that includes passage through areas incorporated into the DRBC Comprehensive Plan), the Commission has an obligation to exercise its authority pursuant to either of the aforementioned re-opener clauses and apply RPP Section 2.3.5.A.12.

RPP Section 2.3.5(A)(12), when read in conjunction with RPP Section 2.3.4, mandates that natural gas pipelines be subject to DRBC review and docket requirements if they: “pass in, on, under or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan.”

The DRBC failed to fulfill its legal review obligation for the TGP NEUP when it failed to consider the watershed ramifications of the project, beyond simply the water

withdrawal required for hydrostatic testing, because the project passes through multiple areas specifically incorporated into the Comprehensive Plan. As noted in our letter of January 31, 2013, the project may pass through or does pass through the following Comprehensive Plan areas:

- Delaware State Forest;
- High Point State Park; and
- Stokes State Forest.

The DRBC's failure to undertake this mandated review does not exempt it from the obligation to perform such review under the Compact and the RPP.

Your letter and memorandum of January 30, 2013 are very clear: the DRBC failed to require a review and docket of the TGP 300 Line Upgrade Project and the Columbia 1278 Pipeline project because of the staff's failure to recognize "The status of Delaware State Forest as a recreation area included in the Comprehensive Plan..." This oversight was only identified when the staff was directed to reconsider DRBC jurisdiction over these two projects at the December 5, 2012, Commission meeting in response to DRN's rehearing request.

Therefore, it would be equally true that the "...status of Delaware State Forest as a recreation area included in the Comprehensive Plan..." had also not been recognized when DRBC staff was considering its review obligations for the TGP NEUP project. If the DRBC refuses to remedy this oversight by reviewing the TGP NEUP project under RPP Section 2.3.5(A)(12), it will violate its legal obligations under the Compact and RPP. This will also create an absurd result, whereby DRBC is, through an arbitrary and inconsistent application of its own criteria, determining which projects it will subject to review under the Compact and RPP Procedure and which it will not.

In addition, while the memo included with the January 30, 2013, letter specifically discusses the Delaware State Forest, there is every reason to believe that High Point State Park and Stokes State Forest were also overlooked.

Nothing within the Docket text as submitted to and approved by the Commissioners on December 5, 2012, indicates that the Commission's review considered or addressed the NEUP's passage through recreation areas identified in the Comprehensive Plan. If DRBC did, in fact, at the time it prepared, reviewed, and approved Docket D-2011-011-1, consider the passage of the NEUP project through recreation areas incorporated into the Comprehensive Plan that we have identified, as well as those we may not have identified, please provide documentation of that fact.

### **III. DRN's Decision Not to Appeal the Docket that Was Limited to the Water Allocation Provisions of the RPP Does Not Negate DRBC's Legal Obligation to Enforce Its Requirements.**

The description for Docket D-2011-011-1 states that the docket has been established for TGP's application "for approval of a withdrawal and allocation of surface water and land discharge" for the NEUP. The docket is limited to the narrow purpose of considering water withdrawal for horizontal drilling and hydrostatic testing and subsequent discharge of that water. The narrow scope of the docket does not encompass *all* issues related to the installation of the NEUP pipeline, and certainly does not encompass issues related to the environmental impact of installing the pipeline sections. Because the docket was not established for the purpose of considering the impacts of NEUP pipeline installation, the mere fact that this limited docket was established does not bar claims that DRBC's total failure to consider the environmental impacts of the pipeline installation itself on reservoirs and recreation areas constitutes a breach of DRBC's statutory and regulatory obligations.

The RPP provides procedures for parties to challenge an "action" or "decision" of the DRBC. *See* RPP Section 2.6.1(C). A challenge to the DRBC's decision on Docket D-2011-011-1 is a challenge *only* to the decision to approve the specified withdrawal and discharge because no other matters were considered in that docket. It is not a challenge to DRBC's failure to determine whether *additional authorizations* were required pursuant to RPP Section 2.3.5(A)(12). DRBC's failure even to consider the need for authorization pursuant to RPP Section 2.3.5(A)(12) is an entirely separate action, and is therefore subject to challenge independent of the approval of specific withdrawals and discharges.

In no way does the RPP establish that the challenge to DRBC's failure to consider the need for additional authorizations under RPP Section 2.3.5(A)(12) is waived by a prior challenge to an independent decision on the same project. Furthermore, even if the RPP did provide for such waiver of objections, there would be good cause here for the DRBC to waive the application of any such rule as per RPP Section 2.9.3. The very narrow description of the purpose for Docket D-2011-011-1 did not provide adequate notice to the public of the full implications of the NEUP, nor did it provide notice of the relationship of the NEUP to parks and reservoirs included in the Comprehensive Plan. This lack of notice, coupled with the seriousness of the potential environmental impacts of the NEUP installation on the water resources in the Basin, constitutes good cause for DRBC to waive any procedural limitation that it might otherwise invoke to avoid considering this important issue.

#### **IV. DRBC Is Obligated to Review the NEUP Project as Part of Its Upcoming TGP 300 Line Review and Docket.**

Furthermore, even if the DRBC's approval of the docket was intended to include review of all aspects of the NEUP, which it was not, and the DRBC does not exercise its authority pursuant to the re-opener clauses contained in Section C part (t) and (v), which it must, the DRBC is *still* obligated to review the TGP NEUP project as part of its review of the TGP 300 Line Upgrade. While DRBC was not informed that TGP's 300 Line Upgrade would be larger than what was proposed to it in 2010 and would include the section now called the NEUP, it is now well known with the highest degree of certainty that TGP only provided DRBC a glimpse at TGP's 300 Line pipeline expansion plan, and failed to alert DRBC to the full breadth of the interrelated projects that it intended to pursue.

We all now know that the TGP NEUP is not a project unto itself, but is in fact part of the larger interstate transmission line upgrade project by TGP to add capacity to the Eastern Leg of its existing 300 Line pipeline by building a second pipeline and new compressor facilities. TGP segmented the addition of this second line along the Eastern Leg into multiple projects which, when completed, will result in the addition of a continuous set of new 30 inch diameter pipeline loops being installed next to the old 24 inch pipeline that delivers gas to the Mahwah Meter Station. The NEUP is one of at least four projects TGP has launched in the last two years to add new 30 inch pipeline along the Eastern Leg to complete what it itself calls "Line 2" of the 300 Line.

As shown in the attached map, the 300 Line Upgrade added 127.4 miles of new pipe in eight *non-contiguous* sections along the Eastern Leg, and new compressors; the Northeast Supply Diversification (NSD) project then added 6.8 miles in a gap left by the 300 Line Upgrade; the MPP Project will add 7.9 miles of pipeline in a gap between a segment added by the 300 Line Upgrade and a compressor station upgraded by the 300 Line Upgrade, and the NEUP will add 40.3 miles in five sections *that bridge the remaining gaps* and complete the second line of the Eastern Leg.

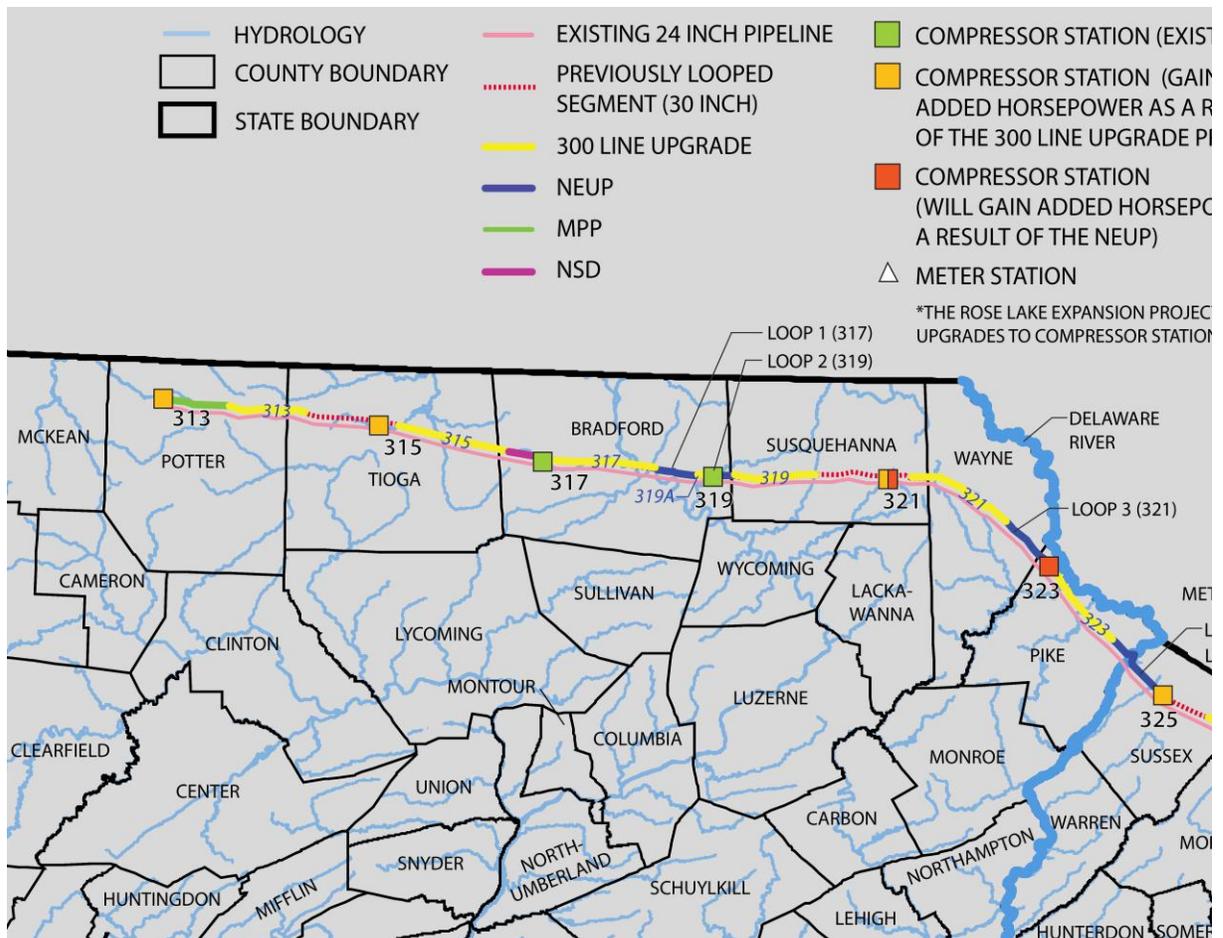
The additions of new pipeline segments and compressor horsepower involved in these projects, including the NEUP, are inextricably interdependent. By artificially dividing the addition of the second Eastern Leg line into subprojects in its various project applications, including in its representations to the DRBC, TGP sought to evade the review of the aggregate and synergistic environmental consequences of the Eastern Leg expansion as a whole, including that portion it dubs the NEUP. As the evidence now on the record makes clear, the TGP 300 Line Upgrade is functionally and operationally dependent on the portion called the NEUP. Therefore, review and docketing of the 300 Line Upgrade necessarily requires review and docketing of the whole project, including that segment that TGP refers to as the NEUP.

While DRBC may have been deceived by TGP when it first made representations concerning the 300 Line Upgrade, and, as a result, the DRBC failed to require a docket for any portion of the project, DRBC now has the information necessary to recognize that the TGP 300 Line 2 Project includes that portion dubbed the NEUP. As a result, the TGP 300 Line review the DRBC will be undertaking necessarily must include the NEUP. Should the DRBC fail to review the entire project as one integrated whole, it will allow and support the improper practice of segmentation, undermining the design and purpose of the Comprehensive Plan.

Respectfully,

*Maya K. van Rossum*

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the Delaware Riverkeeper



SCALE: 1 INCH = 30 MILES

*Pipeline and station data recreated from Meliora Design is not responsible for acc*

*\*Hydrology data varies by state.*