



January 4, 2013

**VIA ELECTRONIC MAIL AND U.S. MAIL**

Pamela Bush, Commission Secretary  
Delaware River Basin Commission  
P.O. Box 7360  
West Trenton, NJ 08628-0360

**Re: Request for a Hearing – Commission Determination Regarding DRBC  
Jurisdiction over Susquehanna-Roseland Transmission Line Project**

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 Commission's decision not to exercise jurisdiction over the entire length of the Susquehanna-Roseland transmission line project ("S-R Line") within the Delaware River Basin. This hearing request is timely submitted within 30 days of the Commission's decision on December 5, 2012, to approve a docket for the S-R Line that covers only that portion of the project that lies within the Delaware Water Gap National Recreation Area (DEWA).

In written and oral testimony to the DRBC submitted at the December 5, 2012 meeting, the contents of which are incorporated herein by reference, DRN and other commenters formally requested that the DRBC take jurisdiction under the Compact and the Rules of Practice and Procedure and exercise its regulatory authority to require a complete docket application based on the substantial effects on the water resources of the basin that the S-R Line will have along more than 70 linear miles through the drainage area of Special Protection Waters. By approving the limited docket for the S-R Line that pertains only to the roughly four linear miles cutting through the DEWA, the Commission has failed to fulfill its obligations under the Compact to ensure that the S-R Line will not substantially impair or conflict with the Comprehensive Plan.

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 S-R Line project will substantially affect water resources of the Basin. The Commission's denial of DRN's formal request for

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Commission review of the S-R Line project's full range of impacts to water resources throughout the basin renders this a contested case within the meaning of the RPP.

### ***Specific Action or Decision for Which a Hearing is Requested***

The specific action or decision for which a hearing is requested is the decision by the Commission to approve the limited docket for the S-R Line pertaining only to that portion of the project crossing the DEWA without requiring a full docket application and Commission review of the entire length of the S-R Line project within the Delaware River Basin.

### ***Date of the Action or Decision***

The Commission voted to approve the limited S-R Line project docket on December 5, 2012. This hearing request is timely, because it is made within 30 days of the Commission's vote, 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 electric power 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 electric power 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.

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 electric power transmission infrastructure, including the S-R Line project, as evidenced by DRN's written and oral testimony submitted to the Commission as

well as DRN's ongoing advocacy and legal activities regarding this project. DRN and its members will be adversely affected by the Commission's refusal to exercise Commission jurisdiction over the entire S-R Line project that lies within the Basin because this project threatens the quality of Special Protection Waters. DRN has an interest in generally supporting the Commission's regulatory authority over the S-R Line project and similar power infrastructure 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 the construction of the S-R Line project in particular and powerline construction projects in general, as well as from the associated public perception of a water quality impact due to these projects.

The December 5, 2012 Commission decision on which DRN requests a hearing is of interest to the Delaware Riverkeeper, DRN, and DRN's members because of the substantial and detrimental environmental impacts the S-R Line project will have on the Delaware River Basin's water resources, including wetlands and floodplains.

### ***Summary Statement of Basis for the Hearing***

Currently, no federal, state, or local regulatory agency other than the Commission is tasked with evaluating the cumulative impacts to water resources of the S-R Line project, which extends across more than 70 miles of the Delaware River Basin, from Pennsylvania across the mainstem of the Delaware River itself and into New Jersey. Additionally, no other agency is tasked with ensuring that the strict anti-degradation standards applicable to the Special Protection Waters of the Delaware River Basin are met and that each project proposed within the Delaware River Basin is consistent with the Comprehensive Plan.

DRN requests the hearing because the Commission failed to fulfill its mandate under Article 3.8 of the Compact to ensure that the S-R Line project, which will have a substantial effect on the water resources of the basin, will not substantially impair or conflict with the Comprehensive Plan. The Compact, the Water Code, and the Rules of Practice and Procedure provide ample authority for the Commission to exercise its jurisdiction over the entire length of the S-R Line project that lies within the Delaware River Basin. The Commission's failure to exercise this jurisdiction in fulfillment of Compact Article 3.8 constituted error.

### **Applicable Compact, Water Code, and RPP Provisions**

Section 3.8 of the Compact provides in relevant part:

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

In 1992, in response to a petition filed by DRN, the Commission launched the Special Protection Waters (“SPW”) program, which established regulations to “keep the clean water clean” in the upper and middle sections of the non-tidal Delaware, portions of which had been designated by the federal government as part of the National Wild and Scenic Rivers System in 1978. Following the federal designation of an additional 38.9 miles of the Delaware in the National Wild and Scenic Rivers System in 2000, and again in response to a petition filed by DRN, in 2008 the Commission expanded SPW coverage to include the river from the Delaware Water Gap National Recreation Area downstream to the head of tide at Trenton, New Jersey. The entire 197-mile non-tidal river is now included under the SPW regulations, which is believed to be the longest stretch of anti-degradation policy established on any river in the nation.

Special Protection Waters are waters designated by the Commission, pursuant to the Water Quality Regulations, that have exceptionally high scenic, recreational, ecological, and/or water supply values and are subject to stricter control of non-point pollution control, wastewater discharges, and reporting requirements to prevent degradation.

Article 3 of the Water Code, Section 3.10.3.A.2, establishes the strict anti-degradation standard that the Commission applies to Special Protection Waters of the Basin: “It is the policy of the Commission that there be no measurable change in existing water quality except towards natural conditions . . .” Water Code Article 3, Section 3.10.3.A.2.e requires that “Projects subject to review under Section 3.8 of the Compact that are located in the drainage area of Special Protection Waters must submit for approval a Non-Point Source Pollution Control Plan that controls the new or increased non-point source loads generated within the portion of the project’s service area which is also located within the drainage area of Special Protection Waters.”

The RPP classifies projects for review under Section 3.8 of the Compact into two categories, those deemed not to have a substantial effect on the water resources of the Basin and therefore not required to be submitted for Commission review, and those deemed to have substantial effects on water resources of the Basin and therefore required to be submitted for Commission review. See RPP Article 3, Section 2.3.5. The Commission has ample authority under Article 3, Section 2.3.5 of the RPP as well as under the Water Code for requiring a docket application that covers the entire length of the S-R Line project within the Delaware River Basin.

1. **The S-R Line Will Result in Significant Disturbance of Ground Cover Affecting Water Resources, Necessitating Commission Review**

With respect to electric transmission line projects such as the S-R Line, the RPP categorizes them 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:

**Electric transmission or bulk power system lines and appurtenances;** major trunk communication lines and appurtenances; natural and manufactured gas transmission lines and appurtenances; major water transmission lines and appurtenances; unless they would pass in, on, under or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan; unless such lines would involve significant disturbance of ground cover affecting water resources;

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

This section contains two independent exceptions to the exemption that, if the stated conditions are met, trigger Commission review: first, if the project in question crosses an existing or proposed reservoir or recreation area that has been incorporated into the Comprehensive Plan, and second, if the project involves a significant disturbance of ground cover affecting water resources.

The Commission properly took jurisdiction over the S-R Line project insofar as it will cut through (and significantly adversely affect) the Delaware Water Gap National Recreation Area (“the Park”). However, the Commission’s limited exercise of jurisdiction under the first exception to the exemption failed to take into account the appropriateness of exercising jurisdiction under the second exception to the exemption. DRN asserts that, because the S-R Line project will “involve significant disturbance of ground cover affecting water resources,” RPP Article 3, Section 2.3.5.A.12, the Commission must require the project proponents to submit a docket application for the entire length of the project that lies within the Delaware River Basin for review pursuant to Section 3.8 of the Compact.

The 72 mile S-R Line Right-of-Way (ROW) within the Delaware River Basin must be widened the entire length between 50 and 100 feet to accommodate the new towers. The National Park Service (NPS), in its Environmental Impact Statement (EIS), which only assessed the roughly 4.3 miles of the S-R Line that traverses the Park, determined that the S-R Line will have a “significant impact” on vegetation within the Park. The NPS EIS found that approximately 240 acres of vegetation would be cleared in the ROW, 129 acres of this which is mature forest; impacts would also result from vegetation maintenance activities and vegetation clearing from other construction activities outside the ROW (25.4 acres). If the vegetation clearing in the Park is considered to be “significant” and that only incorporates 6% of the linear miles that the S-R Line traverses in the basin, it is the Commission’s mandated responsibility to fully assess and consider the specific impacts on the Basin from ground cover clearing along the entire 72 miles of ROW within the Basin, particularly as the entire 72 mile length is within the drainage area of Special Protection Waters.

**2. The S-R Line Project Requires Commission Review under Article 3, Section 2.3.5.B(5)**

Article 3, Section 2.3.5.B(5) provides for Commission review where projects involve: “Deepening or widening of existing stream beds . . . or the dredging of the bed of any stream or lake and the disposal of the dredged spoil, where the nature or location of the project would affect the quantity or quality of ground or surface waters, or fish and wildlife habitat” (emphasis added).

Again, the NPS EIS, in its limited geographic scope, determined that impacts to water quality would primarily occur from increased sediment loads being introduced into the stream from construction activities (short term) and from increased erosion due to vegetation loss and new access roads (long term). Sediment loading is a pollutant. Even if a particular stream crossing or wetland crossing is deemed to present a temporary and minimal impact, the Commission must look at all the stream crossings and all the wetland crossings that will occur along the 72 mile ROW within the Basin and determine how all that sediment loading will impact the water quality of the Basin. Due to the total number of stream, wetland, riparian zone and floodplain crossings, the Commission must take jurisdiction over the S-R Line for the entire 72 miles the project traverses in the Basin.

**3. The S-R Line Project Requires Commission Review under Article 3, Section 2.3.5.B(9)**

Article 3, Section 2.3.5.B(9) provides for Commission review where projects involve: “Projects that substantially encroach upon the stream or upon the 100-year flood plain of the Delaware River or its tributaries.”

The S-R Line substantially encroaches upon many streams, 100- year floodplains, and wetlands along the entire 72 miles it traverses within the Basin yet outside the Park. In Wayne County alone, the S-R Line traverses natural features, including three FEMA-delineated 100-year floodplains, 41 Chapter 105 regulated wetlands and waters, woodlands, and slopes exceeding 15%. In Wayne County, the S-R Line traverses 1.04 acres of floodplains, 16.2 acres of riparian areas, and 8.29 acres of wetlands.

In Pike County, the natural features of the ROW and associated proposed construction sites include eight FEMA-delineated 100-year floodplains, 94 Chapter 105 regulated wetlands and waters, woodlands along the fringes of the right-of-way, and slopes exceeding 15%. In Pike County, the S-R Line traverses 12.6 acres of floodplains, 3.32 acres of riparian areas, and 4.87 acres of wetlands.

The S-R Line, according to the NJDEP Fresh Water Wetland permit, will impact a Blair Creek tributary; Paulins Kill Creek tributaries 1, 1A, 1B, 2, 9; an Unnamed Stream identified as #6; and the mainstem Paulins Kill. Also, the line will cross the Musconetcong River above Lake Hopatcong and could impact water resources and ground cover.

With all of these water resources being impacted to a degree, the Commission must take jurisdiction for the S-R Line for the full 72 linear miles under Article 3 to consider fully whether the project is consistent with the Comprehensive Plan.

4. **The S-R Line Project Requires Commission Review under Article 3, Section 2.3.5.B(10)**

Article 3, Section 2.3.5.B(10) provides for Commission review where projects involve: “Change in land cover on major ground water infiltration areas.”

The ROW clearing for the S-R Line is intended to provide a ROW with a typical cleared width of 200 feet, which will be generally centered on the new pole structures. Clearing of vegetation in the areas of access road widening and at construction pad, pull site, and equipment laydown locations may also involve the removal of stumps and grubbing. Some new access roads will be constructed, some in steep slope areas.

The total limit of disturbance within Wayne County is anticipated to be 362 acres and the grading limit is anticipated to be 106.7 acres. The total project limits of disturbance estimated in Pike County is approximately 751.07 acres. Even with the stated plan to minimize the actual amount of earth disturbance to the area, ground disturbance will still be approximately 204.1 acres. The project area within Monroe County is approximately 36.7 acres. The total limit of disturbance within Monroe County is approximately 11.7 acres.

The NPS determined, as referenced above, that the S-R Line Project will have a significant impact on vegetation within the Park. According to the Park Service’s EIS, “generally, access roads would fall within the transmission line ROW, but in some instances, it would be necessary for access roads to extend outside the ROW. A total of 5.3 miles of access roads would be constructed, with 1.9 miles occurring outside the ROW.” How many miles of new access roads will be constructed along the rest of the 72 mile project?

The NPS found that most of the adverse impacts on aquatic resources are due to a measurable change in the water quality due to stream crossings and runoff; the loss of vegetation, the opening of tree canopies, which could also lead to changes in water temperature that could affect stream health and biodiversity; and the potential for drilling in limestone, which could alter flow or water availability. Again, the NPS made those findings in assessing only 4.3 of the total 72 linear miles runs traverses the Basin.

The expected clearing and change in land cover is roughly 879.9 acres and will indisputably affect water resources. The Commission is therefore obligated to take jurisdiction over the entire length of the S-R Line that is planned to cut through the Delaware River Basin.

5. **The S-R Line Project Requires Commission Review under Article 3, Section 2.3.5.A(15) and Article 3, Section 2.3.5.B(13) as well as the Water Code Because the Project Will Drain, Fill, or Otherwise Alter More than Twenty-Five Acres of Marshes or Wetlands**

Water Code Section 2.350.2, **Policy of Protection and Preservation** (Resolution No. 78-10), states: “It shall be the policy of the Commission to support the preservation and protection of wetlands by:

- A. Minimizing adverse alterations in the quantity and quality of the underlying soils and natural flow of waters that nourish wetlands.

- B. Safeguarding against adverse draining, dredging or filling practices, liquid or solid waste management practices, and siltation.
- C. Preventing the excessive addition of pesticides, salts or toxic metals arising from non-point source wastes.
- D. Preventing destructive construction activities generally.”

Section 2.350.4 of the Water Code, titled **Commission Jurisdiction** (Resolution No. 78-10), provides in relevant part:

The Commission **shall exercise** its jurisdiction over wetlands in a manner which will assist, supplement and overview actions of agencies signatory to the Delaware River Basin Compact and in a manner that will avoid unnecessary regulatory activity.

To avoid duplication or conflicting regulatory activity, the Commission **will undertake** review and action on projects affecting 25 or more acres of wetlands as provided for in Section 2-3.5 of the Rules of Practice and Procedure. (emphasis added).

Article 3, Section 2.3.5.A(15) of the RPP exempts projects from review only where such projects affect fewer than twenty-five acres of marshes or wetlands and certain other conditions not relevant here apply. Article 3, Section 2.3.5.B(13) provides for Commission review where projects involve: “Draining, filling, or otherwise altering marshes and wetlands.”

The NPS EIS found that the impacts wetlands within the Park from the S-R Line will be “significant.” Impacts from clearing wetlands, resulting in conversion of 20.28 acres of forested wetlands to scrub shrub and/or emergent wetlands; construction of access roads and crane pads in wetlands (1.02 acres), and from drilling activities; 15.22 acres of Exceptional Value Wetlands and/or rare and unique wetlands would be affected. If the roughly 4.3 linear miles within the Park will have this degree of impact, how can the Commission not anticipate similar impacts throughout the rest of the 72 miles of ROW within the drainage area of SPW? The Commission must assess and understand all of these impacts to wetlands and other water resources for the entire 72 linear miles of the ROW within the basin..

According to the Post Construction Stormwater Management Report, monopole structures will need to be placed in four wetlands which also qualify for a permit waiver, and 22 wetland crossings will use swamp mats or existing culverts and do not require permits. Each of these will result in negative impacts on the water resources within the Basin. Considering that the state agencies will be issuing some waivers to these activities and will not be coordinating between states, the Commission must take jurisdiction over this entire 72 linear mile project because of these otherwise-unassessed and unregulated wetlands impacts.

It has been demonstrated that removing trees from a forested wetland does not interrupt the prevailing ground water hydrology of the site but that evaporation and evapotranspiration may be significantly increased (Cutlip 1986). Tree removal along the S-R Line corridor and in forested wetlands would change functions and values by reducing the vegetation canopy over these wetlands, which would reduce the biomass and change the species composition of the wetland (Cutlip 1986).

The reduction in biomass would potentially alter the vegetation and wildlife species that use that wetland.

The New Jersey DEP Fresh Water Wetland permit authorizes 1.067 acres of permanent wetland impacts, 25.082 acres of temporary wetland impacts, 3.283 acres of permanent transition area impacts, 45.666 acres temporary transition area impacts, 16.27 acres of perm riparian zone impacts and 52.60 acres of temporary riparian zone impacts. While this permit is for some geographic areas outside the DR Basin Drainage Area, some of these impacted water resources certainly are in the Basin. NJDEP is not calculating the total and cumulative impacts that these water resource impacts are have along the entire S-R Line. That is why it is critical that the Commission require the applicant to submit a new docket request for the entire 72 linear miles that this project will traverse in the Basin.

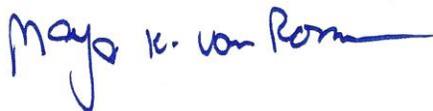
The S-R Line will impact wetlands in all five counties it traverses in the DR Drainage Basin. However, some of those wetlands contain rare and unique communities, such as low heath scrub shrub and mesic scrub oak/heath/pitch pine barrens, that make them of greater value. Some of these wetlands are rated as “imperiled” and “critically imperiled.”

Given the significant impacts to wetlands both inside and outside the recreation areas, the DRBC must take jurisdiction over the entire project to ensure that wetlands impacts are evaluated on a Basin-wide basis and that the Commission fully understands and has planned for any impacts to wetlands to ensure consistency with the Comprehensive Plan.

The S-R Line has required some 25 permits from a dozen or so agencies. But none of those agencies will assess the total and cumulative impacts, none will assess the impacts to Special Protection Waters, and none will ensure consistency with the Comprehensive Plan. At the time of the Commission’s docket approval, several of the permits and approvals of those outside agencies were still pending. The Commission possesses the authority to take jurisdiction over the entire 72 linear mile project and should utilize that authority to safeguard the Special Protection Waters of the Basin and ensure consistency with the Comprehensive Plan in order to fulfill its obligations under the Compact.

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

Respectfully submitted,



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