

PENNSYLVANIA CAMPAIGN FOR CLEAN WATER

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Sent via email to RA-EPREGIONALPERMIT@pa.gov

Domenic Rocco, P.E. Program Manager
Pennsylvania Department of Environmental Protection
Regional Permit Coordination Office
400 Market Street
Harrisburg, PA 17101
drocco@pa.gov

Re: Proposed State Water Quality Certification Required by the Commonwealth of Pennsylvania, Department of Environmental Protection Pursuant to Section 401 of the Clean Water Act for the Leidy South Project, 49 Pa. Bull. 5638 (Sept. 28, 2019).

Dear Mr. Rocco,

On behalf of the Pennsylvania Campaign for Clean Water's Exceptional Value Workgroup (CCWEV), we write regarding the Department of Environmental Protection's (DEP) proposed Clean Water Act (CWA) Section 401 water quality certification (WQC or 401 Certification) for the Leidy South pipeline project, noticed in the September 28, 2019 Pennsylvania Bulletin (49 Pa. Bull. 5638) for public comment. For the reasons set forth herein, the DEP's conditional WQC approval procedure undermines the purpose of Section 401 of the CWA, Pennsylvania Clean Streams Law (CSL), and fails to comply with Article I, Section 27 of the Pennsylvania Constitution. Given the lack of information known to DEP at this time, it seems impossible that DEP can certify, even with the "conditions" it is imposing on the WQC, that the Leidy South pipeline project will comply with water quality standards. DEP therefore must deny the issuance of a WQC to Transcontinental Gas Pipe Line Company, LLC (Transco), pending further thorough project information and agency review that supports a conclusion that the project will comply with Pennsylvania water quality standards.

The Pennsylvania Campaign for Clean Water (CCWEV) is a coalition of over 180 environmental, conservation, sporting, and religious groups from all corners of the state that speaks in one voice in support of federal and state policies to protect and restore Pennsylvania's water resources. The Exceptional Value workgroup focuses on protection of the Commonwealth's highest quality streams.

The Leidy South pipeline project proposes the installation of 12.2 miles of pipeline (in three discontinuous loops) and both compression station upgrades and two new compressor

stations, ranging across six Pennsylvania counties.¹ The project area encompasses the Susquehanna River basin, and would impact several special protection waters.² Transco applied for a WQC from DEP August 23, 2019.³ DEP posted notice in the Pennsylvania Bulletin September 28, 2019, proposing the approval of a “conditional” WQC.⁴ DEP’s pipeline portal for the project states that it received Chapter 102 and Chapter 105 applications from Leidy South on Sept 27, 2019.⁵

DEP proposes to issue a WQC that certifies that the operation and maintenance of the Leidy South Project complies with Pennsylvania water quality standards based on several conditions. These conditions include, but are not limited to, the following:

- 1) The applicant must obtain an NPDES permit for the discharge of water from the hydrostatic testing of the pipeline;
- 2) The project shall implement BMPs to protect and maintain water quality;
- 3) The applicant shall obtain and comply with a Water Obstruction and Encroachment Permit;
- 4) DEP may require additional water quality studies or monitoring; and
- 5) The applicant shall properly operate and maintain all project facilities and systems of treatment and control installed to achieve compliance with the terms of this WQC and all required permits.⁶

Basically, DEP is certifying that the project will have to get all applicable permits, and therefore, because of those permits, water quality will be assured. This puts the cart before the horse because DEP currently lacks the sufficient information and review to assure the project will abide by Pennsylvania’s water quality standards, even with these “conditions” placed on the WQC. Therefore, DEP cannot issue a WQC for the project at this time. The commenters request that the DEP deny the water quality certification at this time to better retain its duty and

¹ <https://www.dep.pa.gov/Business/ProgramIntegration/Pennsylvania-Pipeline-Portal/Pages/Leidy-South.aspx>. The project proposes construction or upgrades in Clinton, Lycoming, Wyoming, Luzerne, Columbia, and Schuylkill counties.

² 49 Pa. Bull. 5545, 5638-39 (September 28, 2019) (“The Project, as proposed, will require approximately 412.2 acres of earth disturbance, and impacts to 1,391 linear feet of UNT to Little Muncy Creek (EV, MF), Buck Run (EV, MF), West Branch Little Muncy Creek (EV, MF), UNT to West Branch Little Muncy Creek (EV, MF), Post Hollow Run (EV, MF), UNT to Young Womans Creek (HQ-CWF, MF), Young Womans Creek (HQ-CWF, MF), UNT to Dark Hollow (EV, MF), UNT to Paddy Run (EV, MF), Paddy Run (EV, MF), UNT to Hensel Fork (EV, MF), Hensel Fork (EV, MF), UNT to Drury Run (EV, MF), and Drury Run (EV, MF), 5.01 acres of floodway, 2.89 acres of temporary PEM, PSS, and PFO wetland impacts, and 3.44 acres of PEM, PSS, and PFO permanent impacts.”).

³ *Id.*

⁴ *Id.*

⁵ PA DEP Pipeline portal website. <https://www.dep.pa.gov/Business/ProgramIntegration/Pennsylvania-Pipeline-Portal/Pages/Leidy-South.aspx> Accessed Oct 26, 2019.

⁶ *Id.* (“PADEP is proposing to certify that the construction, operation and maintenance of the Leidy South Project complies with the applicable provisions of sections 301—303, 306 and 307 of the Federal Clean Water Act (33 U.S.C.A. §§ 1311—1313, 1316 and 1317). The PADEP is proposing to further certify that [the project] complies with Pennsylvania water quality standards and that . . . the project will maintain and protect applicable Commonwealth water quality standards *provided that* the construction, operation and maintenance of the project complies with . . . PADEP water quality permitting programs . . .”) (emphasis added).

obligation to protect Pennsylvania’s public trust and water resources. Denying the request would also protect the state under the current requirements that Transco asserts in its August 23, 2019 letter to DEP. Transco states:

“Based on the federal and state requirements, waiver of the Section 401 WQC will be deemed to occur if PADEP fails or refuses to act on a request for certification within sixty days after receipt of such request, unless the district engineer for the U.S. Army Corps of Engineers determines that a shorter or longer period of time, not to exceed one year, is reasonable for the agency to act. 33 C.F.R. § 325.2(b)(1)(ii).⁷”

Yet Transco only provided materials to DEP regarding its 102 and 105 applications on Sept 27, 2019.⁸ Transco is once again attempting a rush and running rough shod at the Department so the company can meet an arbitrary internal start date to “commence construction in winter 2020/2021 to meet a target in-service date of December 1, 2021”. Pipeline companies too often attempt to dictate the regulatory process when in fact they don’t have and have not supplied all the materials and complete data required in the first place; nor has there been adequate time for the DEP to thoroughly review submitted materials. A denial of the WQC would give Transco an action they are demanding at this time - albeit not the one they expect while also protecting the Commonwealth and the rights Pennsylvania residents deserve.

I. Legal Standard for Water Quality Certification of FERC-Regulated Pipelines.

A. Clean Water Act Requirements

Under Section 401 of the CWA, any applicant for a federal authorization to construct or operate a facility that may result in discharge into navigable waters must provide the licensing or permitting agency with a certification from the state in which the discharge originates or will originate.⁹ To grant a 401 Certification, the state must be able to certify that any potential discharge from the proposed project will comply with the water quality standards set forth in sections 301, 302, 303, 306, and 307 of the CWA.¹⁰ The state places limitations (effluent or other) and monitoring requirements necessary to assure that any applicant for a federal license or permit will comply with the CWA and any other appropriate requirement of state law set forth in such certification.¹¹ EPA regulations require a certifying state to find that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable federal or EPA-approved state water quality standards.¹²

⁷ Transco Letter to DEP dated August 23, 2019

<http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/LeidySouth/State%20Water%20Quality%20Certification/0%20-%20Leidy%20South%20Project%20-%20State%20Water%20Quality%20Certification%20-%20208-23-19.pdf>

⁸ PA DEP Pipeline portal website. <https://www.dep.pa.gov/Business/ProgramIntegration/Pennsylvania-Pipeline-Portal/Pages/Leidy-South.aspx> Accessed Oct 26, 2019.

⁹ 33 U.S.C. § 1341(a)(1).

¹⁰ *Id.*

¹¹ 33 U.S.C. § 1341(d).

¹² 40 C.F.R. § 121.2(a)(3).

Additionally, Section 401 allows a state, in limited circumstances, to issue a conditional 401 Certification, imposing such conditions that may be necessary to assure compliance with applicable water quality requirements.¹³ However, the state must deny a Section 401 Certification if it is unable to assure that the action will comply with the applicable Clean Water Act standards. No federal license or permit shall be granted unless the state grants the 401 Certification or waives its rights under Section 401. Thus, DEP has the critical role of granting certification *only* if it can reasonably assure that the project will comply with water quality standards *or* with the necessary conditions to protect Pennsylvania’s water quality. In Pennsylvania, the state, conservation districts, and NGOs have documented numerous pollution events on pipeline projects certified by the state in the past that are on record (Mariner East 2, Atlantic Sunrise Pipeline, Tennessee Gas Pipeline, Leidy Eastside Expansion - to name a few); based on the evidence, we believe this certification should be denied and certainly not granted prematurely. The DEP should not give away the power and duty it has to wait to thoroughly review the completed applications. Leidy South pipeline project, as other pipelines, will likely employ similar pipeline construction techniques that have failed on multiple fronts in the past causing discharge of pollution to Pennsylvania waterbodies and irreparable harm. DEP must deny this certification.

B. Pennsylvania Clean Streams Law

Generally, the CSL should provide heightened protection for waters designated as High Quality (HQ) or Exceptional Value (EV).¹⁴ However, where lowering the water quality is necessary to accommodate what is deemed as important economic or social development, DEP may allow for exceptions concerning the antidegradation of HQ waters.¹⁵ DEP takes a case-by-case approach, in which it balances the weight of the expected social or economic benefits against the expected harm of the projects water quality degradation.¹⁶

C. Article I, Section 27 of the Pennsylvania Constitution

Article I, Section 27 of the Pennsylvania Constitution—the Environmental Rights Amendment provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The text establishes a duty for the Commonwealth government to prohibit the degradation, diminution, and depletion of Pennsylvania’s public natural resources, whether the

¹³ 33 U.S.C. § 1341(a)(2).

¹⁴ 25 Pa. Code § 93.4c(b).

¹⁵ *Id.*

¹⁶ See *Water Quality Antidegradation Implementation Guidance*, PADEP, TGD 391-0300-002 (Nov. 29, 2003).

harms result from direct state action or the actions of private parties.¹⁷ As trustee of the state's natural resources, the Commonwealth must protect "equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term."¹⁸

II. DEP's Decision to Issue Transco a "Conditional" WQC Does Not Conform to the Applicable Legal Standards.

DEP's issuance of a conditional WQC, without an informational foundation, is contrary to the purpose of Section 401 of the CWA. A WQC is meant to be a legal instrument that *assures* fellow regulators and the public that a project will comply with state water quality standards and will not degrade water quality. However, DEP's policy of conditioning WQC on the project's compliance with state regulations and permits utterly fails to provide the necessary reasonable assurances that those permits, or the water quality protections underlying those permits, will actually be met. These are not the types of conditions (e.g., limitations (effluent or other) and monitoring requirements) that CWA § 401 envisions. Such conditional approvals lack any basis in fact and are based merely on an unsupported premise that the project will comply with the applicable water quality standards. Rather than providing assurance, conditional WQC approvals such as DEP issues, and is proposing for the Leidy South pipeline project, hide potential problems with a project from public view and is contrary to the purpose of Section 401 of the CWA.

It is axiomatic that merely saying that something must comply with a future, yet-to-be-issued permit does not—and cannot—ensure that it will comply with the water quality standards. DEP's conditional approval of Transco's past WQC application for the Atlantic Sunrise Pipeline project proves this point. In 2016, DEP issued a conditional WQC for the Atlantic Sunrise project without reviewing any environmental analysis or permit applications for stream crossings and waterways encroachments.¹⁹ After delivering the conditional WQC to FERC, DEP sent nine notices of technical deficiency to Transco, listing significant deficiencies in the permit applications. The problem was simply that many construction and operation details were not available at the time DEP issued its WQC for the project. Prior to issuance of the Final Environmental Impact Statement, in a submission to FERC, Transco proposed at least 388 waterbody crossings as part of its Atlantic Sunrise project.²⁰ Of these crossings, 66 would impact high-quality, cold water fisheries ("HQ-CWF") waters, which is eight more HQ-CWF crossings than were initially identified by Transco.²¹ Clearly, DEP lacked sufficient information to assure compliance and wrongfully assumed that the project would abide by state water quality

¹⁷ *PEDF*, 161 A.3d at 933 (citing *Robinson Township v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013) (plurality) ("*Robinson Twp.*").

¹⁸ *Robinson Twp.*, 83 A.3d at 959 (Pa. 2013).

¹⁹ See 46 Pa. Bull. 2019, 2132 (April 23, 2016).

²⁰ See Transco Final Environmental Impact Statement (FEIS), FERC Docket No. CP15-138-000. The Atlantic Sunrise project's waterbody crossings include 208 crossings would impact perennial waterbodies, 84 would impact intermittent waterbodies, and 41 would impact ephemeral waterbodies. In addition, another 21 perennial waterbodies, 20 intermittent waterbodies, 10 ephemeral waterbodies, and 1 pond would be within construction workspaces or crossed by access roads.

²¹ *Id.*

standards. They simply needed *more information* before they could issue any WQC, conditional or not.

To avoid a similar disaster with the Leidy South project, DEP should have all relevant information available upon which to make its determination and have had the time to thoroughly review the applications for deficiencies. CCWEV believes that the most effective way to do this would be to require Transco to complete all the relevant state permit proceedings before applying for a certification. Pipeline companies have a good deal of information available at the time they file applications for Pennsylvania environmental and water quality permits. They have the proposed route. They know what streams and wetlands will be crossed by that route. They know the topography and the proposed method of construction and drilling. They know what alternatives they have considered and whether they are feasible. They have consultants who are to verify the water resources affected and how. Currently, DEP has only just received application materials for the 102 and 105 applications on September 27, 2019 and has not begun an administrative or technical review. Therefore, the agency cannot reasonably assure the Leidy South pipeline project would comply with the water quality standards, and consequently, DEP's *only* option is to deny the WQC at this time.

Clearly, DEP's practice of issuing conditional WQC without having all relevant information, including environmental analyses, undermines the very purpose of Section 401, which is to assure the protection of water quality in Pennsylvania through compliance with state water quality standards and associated state law requirements. Furthermore, with the nature of linear pipeline construction and dozens or sometimes hundreds of stream, wetland and waterbody crossings, the potential for harm is immense and intensified. The past record shows pipeline operators contending that the Project will be constructed in full compliance with all applicable state laws, and that in temporary work spaces and restored areas the natural landscape will return to its former, or some altered but healthy ecological status. In fact, experience shows that neither is true. The Delaware Riverkeeper Network, state agencies and conservation districts have documented that the construction methods proposed result in environmental harms. In Pennsylvania and New Jersey, the Tennessee Gas Pipeline 300 Line and Northeast Upgrade Projects featured frequent noncompliance, with the 300 Line Project alone resulting in approximately **500 to 600** violations in Pennsylvania alone.²² Delaware Riverkeeper Network (DRN) documented environmental damage along these pipelines, including, *inter alia*, sedimentation into wetlands and streams; failures to protect sensitive waterbodies, including Exceptional Value streams and wetlands; potential harm to private water supplies; thermal impacts to wetlands; failures to stabilize slopes; and failures of erosion and sedimentation controls.

Field observations and violations on record demonstrate and document that construction, operation and maintenance practices like those being proposed by the Leidy South pipeline company, even when followed in full compliance with regulatory standards, results in unavoidable, unmitigated and irreparable harm and violations of state water quality standards and wetlands protections. In addition, DRN monitoring has documented that over and above these impacts, violations of law are commonplace during pipeline construction, operation and

²² <https://www.poonorecord.com/apps/pbcs.dll/article?AID=/20121127/NEWS/211270320/-1/rss01>. Accessed October 27, 2019.

maintenance and as a result the violations of law, including water quality standards and wetland protections, are further undermined. The Department's analysis needs to build in a consideration of the inevitable impacts and implications of construction activity for the project that will necessarily involve violations of the laws governing the construction activity.²³

Considering that the Leidy South project proposes impacts to HQ and EV waters, DEP should further inquire into the project's impacts to these waters before issuing the WQC. Special protection designated uses are to protect the state's cleanest and most biologically diverse waters. HQ and EV streams provide great recreational and economic value to the community. Consequently, these streams must receive the utmost protections to ensure that outstanding water quality is not degraded. As such, the CSL establishes antidegradation regulations which strive to protect the quality of these waters.²⁴

Similarly, DEP lacks sufficient information to conduct meaningful review as required by the Pennsylvania Constitution. As trustee of the state's natural resources, DEP cannot issue a certificate unless it has considered all potential water quality impacts associated with the project. This includes direct and indirect impacts over the life of the project on existing and designated uses. At the same time requesting that the public comment on this incomplete information undermines public process. Without having secured and made publicly available the full information necessary to support a 401 Certification determination, the public is unable to comment to the PADEP in an informed, meaningful and timely way. Therefore, the public is being denied its ability and right to comment and to impact or inform the determination to be made at this very critical step that was established under the Clean Water Act.

For all the reasons set forth herein, DEP's proposed conditional WQC for the Leidy South project does not meet the standards that the CWA, CSL, and Pennsylvania Constitution require for water quality certification. It is contrary to the purpose of Section 401 of the CWA. DEP must withdraw its proposed conditional WQC unless and until it has the information necessary to actually assure that the project will comply with state water quality standards. If DEP does not have that information upon which to make those reasonable assurances, then DEP must deny the WQC for the Leidy South pipeline project.

Respectfully submitted,

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PennFuture
CCWEV Committee

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²³ Delaware Riverkeeper Network *Field Monitoring Report, Pipeline Construction & Maintenance Irreparably Harms to Rivers, Wetlands and Streams.*

²⁴ 25 Pa. Code §§ 93.4a-93.4d.