



Citizens for Pennsylvania's Future
8 West Market Street, Suite 901
Wilkes-Barre, PA 18701
info@pennfuture.org
www.pennfuture.org

June 13, 2016

Via electronic mail (jbuczynski@pa.gov) and hand delivery

Mr. Joseph Buczynski
Northeast Region Waterways and Wetlands Program Manager
2 Public Square
Wilkes-Barre, PA 18711

**Re: PennEast Pipeline Company, LLC, PennEast Pipeline Project
Water Quality Certification Application No. WQ02-005
Luzerne, Carbon, Northampton, and Bucks Counties
46 Pa. Bull. 2450-51 (May 14, 2016)**

Mr. Buczynski:

On February 9, 2016, PennEast Pipeline Company, LLC (PennEast) submitted a “Clean Water Act Section 401 Water Quality Certification Request” (the Application) to the Department of Environmental Protection (the Department or DEP) for its proposal to construct the PennEast pipeline and related facilities in several Pennsylvania counties (the Project). 46 Pa. Bull. 2450 (May 14, 2016). The Department published notice in the Pennsylvania Bulletin on May 14, 2016 that it “anticipates issuing a state water quality certification to Applicant for the Project.” *Id.* at 2451. In that notice, the Department also invited public comment about the Application. Citizens for Pennsylvania’s Future (PennFuture) conducted an informal file review of the Application at DEP’s Northeast Regional Office on June 1, 2016 and submits these comments based on materials made available during that review.

PennFuture is a membership-based public interest, environmental organization whose activities include advocating and advancing legislative action on a state and federal level; providing education for the public; and assisting citizens in public advocacy. PennFuture is concerned with the protection of Pennsylvania’s waters and the conservation of its resources for future generations.

Based on PennFuture’s review of the Application, we believe that it would be inappropriate for the Department to provide a state water quality certification for the Project. As more fully described below, because of inadequate opportunity for public review of the Application, an inadequate Department review process, insufficient data in the Application, and the pendency of related legal challenges, it would be premature for the Department to issue a state water quality certification for the Project at this time.

1. DEP should publish notice in the Pennsylvania Bulletin when the Application is deemed complete.

For water quality certifications issued under Section 401 of the Clean Water Act, the Department is required to “establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.” 33 U.S.C. § 1341(a)(1). In Pennsylvania, the Department typically attempts to satisfy that requirement, as it did here, by publishing notice of the application in the Pennsylvania Bulletin and inviting public comment. *See, e.g.*, 46 Pa. Bull 2450-51 (May 14, 2016).

After learning about the Application in the May 14, 2016 edition of the Pennsylvania Bulletin, I conducted a review of the Application file in DEP’s Northeast Regional office on June 1, 2016. During that review, I found in the file an April 29, 2016 “Incompleteness Review Letter” to PennEast from Kevin S. White, the Environmental Group Manager in DEP’s Waterways and Wetlands Section. (A copy of Mr. White’s letter is enclosed.) In that letter, Mr. White stated that DEP had deemed PennEast’s Application incomplete because it was missing two required components: 1) the Environmental Assessment Form and enclosures; and 2) the delineated wetlands tables in Appendix G of the Application. Mr. White informed PennEast that it must submit the required items by June 27, 2016.

At the time of my file review, there was no indication that PennEast had responded to DEP’s April 29, 2016 letter. Although I was able to find (on a compact disk in the file) what appears to be the Appendix G wetland delineation tables, the Application I reviewed was administratively incomplete because it lacked an essential component, the Environmental Assessment Form and enclosures, which would include information on “all aspects of water quality to include, but not [be] limited to discharges, erosion and sediment control, water obstructions and encroachments, water quality monitoring during construction and operation of the pipeline, etc.” (DEP April 29, 2016 letter.) As of this morning, the Department’s eFACTS database continues to indicate that the Department still has not found the Application to be administratively complete. See attached eFACTS “Authorization Search Details,” Authorization No. 1111888 (June 13, 2016).

The public notice of the Application states that “consideration will be given to any comments, suggestions or objections which are submitted in writing within 30 days of this notice.” 46 Pa. Bull 2451 (May 14, 2016). Because of the missing Environmental Assessment Form referenced in Mr. White’s letter, however, it is impossible for a meaningful public review to occur by the June 13, 2016 deadline for public comment. The period for public review and comment should not begin until the Application is found to be complete, and the Environmental Assessment Form and any related information are available for public review.

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Munzo*, 380 U.S. 545, 552 (1965)); *see also Pa. Bankers Ass’n v. Pa. Dep’t of Banking*, 956 A.2d 956, 965 (Pa. 2008). PennFuture, and the public generally,

cannot provide meaningful input if the public comment period closes before the Application is complete. In light of the fact that the Application was incomplete at the time the original Pennsylvania Bulletin notice was published on May 14, 2016, remained incomplete as of June 1, 2016, and (according to eFACTS) remains incomplete today, we request that DEP: (1) publish another notice in the Pennsylvania Bulletin when it deems the Application complete; and (2) extend the public comment deadline until members of the public have an opportunity to review the complete Application.

2. The Department’s proposed water quality certification is premature and does not fulfill the intent of Section 401 of the Clean Water Act.

Section 401 of the Clean Water Act requires an applicant for a federal permit or license to conduct an activity (such as the construction and operation of an interstate natural gas pipeline) that may result in a discharge to navigable waters to obtain a state certification “that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307” of the Clean Water Act. 33 U.S.C. § 1341(a)(1). Receipt of this certification is a precondition of federal issuance of the permit or license – in this instance, a Certificate of Convenience and Necessity under the federal Natural Gas Act from the Federal Energy Regulatory Commission (FERC). *Id.* (“No license or permit shall be granted until the certification required by this section has been obtained or has been waived...”).

The language cited above makes clear that Section 401 contemplates a *project-specific review* of water quality impacts *prior to* issuance of a water quality certification. The Department’s certification provides the opposite – a certification that a project-specific review will occur at some point in the future, likely *after* FERC makes a decision about whether to issue a Certificate of Convenience and Necessity for the Project.

Further, it is clear that the Section 401 quality certification is intended to be an overall, comprehensive review of the water quality impacts of the Project. It is not supposed to be simply an aggregation of different permit requirements. The Department needs to review the Project as a whole to ensure that water quality standards will not be violated.

An appropriate, project-specific evaluation of the water quality impacts expected from the Project, and an assessment of any modifications or mitigation measures necessary to ensure compliance with Pennsylvania’s water quality standards, would include but not necessarily be limited to conducting reviews for the state permits that will be required for the Project. In this case, those permits include, among others, erosion and sedimentation permits under 25 Pa. Code Chapter 102 and water obstruction and encroachment permits under 25 Pa. Code Chapter 105. Indeed, the Department’s internal guidance for issuing Section 401 water quality certifications anticipates that the water quality certification analysis will be conducted in conjunction with reviews for other relevant state permits. *See* DEP, Permitting Policy and Procedure Manual, Section 402.1 “Procedure for 401 Water Quality Certification” (October 1997) (“In the Commonwealth of Pennsylvania, Water Quality Certifications have been integrated with other required approvals or permits.”), *available at* <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-48789/Section%20400.2.pdf> (last accessed June 13, 2016).

Nothing in the Pennsylvania Bulletin notice or the Department's file suggests that the Department has done – or even has the materials necessary to do – the type of evaluation essential to ensure that PennEast will be able to obtain the necessary water quality permits or that Pennsylvania's water quality standards will be maintained. The Department's anticipated water quality certification would rely on reviews of permit applications that have yet to occur and on conditions in permits that have yet to be granted. This approach is neither adequate nor efficient. *See New Hanover Township and Paradise Watch Dogs v DEP and New Hanover Corp.*, 1996 E.H.B. 668, 687 (voiding a Solid Waste Management Act permit and a Section 401 Certification on the grounds that "DEP acted unlawfully and abused its discretion in issuing the Permits and Certifications without adequate information as to the final design of the proposed landfill or knowledge of the potential resultant environmental effects therefrom."), *aff'd*, 2081 CD 1996 (Pa. Commw. 1997).

The Department seems to assume that by conditioning its water quality certification on future permit issuances, the Department will be able to ensure compliance with state water quality standards at the time it reviews and issues those permits. In doing so, it further assumes, without sufficient evidence (as discussed below), that the applicant will ultimately be able to qualify for all of the relevant state permits. The Department does not seem to consider what would happen in the event that the applicant proves unwilling or unable to satisfy the requirements necessary to obtain the requisite permits. In that case, the Department may have to deny permit coverage and place on hold a project that had already received a Certificate of Convenience and Necessity from FERC. The up-front water quality certification is supposed to avoid such an inefficient result by determining, *in advance of any federal authorization or on-the-ground activity*, that the *specific measures* proposed by the applicant will result in attainment of water quality standards.

The Department's anticipated certification, as published in the Pennsylvania Bulletin, is essentially meaningless, because it no more than provides a list of permits PennEast is required to obtain under state law. It does not provide any meaningful project-specific conditions that would help to protect water quality in Pennsylvania. The lack of project-specificity is made clear by the fact that the water quality certification that the Department intends to issue for this Project is nearly identical to water quality certifications issued for other projects, including Transcontinental Pipe Line Company's Leidy Southeast Expansion Project and Transcontinental Pipe Line Company's Atlantic Sunrise Pipeline Project. *See* Section 4 of this letter, below.

To fulfill the intent of Section 401 of the Clean Water Act, the Department should ensure that it has sufficient information to assess PennEast's ability to comply with Pennsylvania's water quality standards at the time it issues the water quality certification. At this time, it does not appear that the Department has that information. The Department should withdraw its proposal to issue a water quality certification for the Project until after it has fully reviewed all water quality permit applications necessary for the Project.

3. The Application does not provide enough information to ensure that the Project will comply with Pennsylvania’s water quality standards.

Based on a review of the Department’s file for the Application, it appears that the Department lacks certain information essential to performing an adequate evaluation of a water quality certification application. Among other things, the Department should obtain more information about the following topics before it issues a water quality certification to PennEast:

a. Cumulative Impacts

Among the water quality standards with which PennEast must comply are the Chapter 105 regulations governing water obstructions and encroachments. *See generally* 25 Pa. Code Chapter 105. When evaluating a proposed project’s impact on health, safety, and the environment under 25 Pa. Code § 105.14, the Department must consider “the cumulative impact of this project and other potential or existing projects.” *Id.* § 105.14(b)(14). Nothing in the regulation limits the “other potential or existing projects” to those related to the project proposed in the application under review. A gas pipeline, a power line, a housing development, an industrial park, and a marina might have cumulative impacts on water resources even though all of them are proposed by unrelated entities and none of them is engendered by any of the other projects or depends on any other project to go forward. As part of its analysis of cumulative impacts, the Department must consider the potential impacts of “numerous piecemeal changes” on wetland resources and recognize that each wetland site “is part of a complete and interrelated wetland area.” *Id.*

For water obstructions and encroachments that will affect non-exceptional value (non-EV) wetlands, the Department generally may issue a permit only if “[t]he cumulative effect of this project and other projects will not result in a *major impairment* of this Commonwealth’s wetland resources.” 25 Pa. Code § 105.18a(b)(6). (Emphasis added). The term “major impairment” is not defined in Chapter 105; however, since wetlands are subject to the Department’s antidegradation requirements set forth at 25 Pa. Code Chapter 93, the Department may not allow any impairment so “major” that it prevents wetlands from attaining their existing uses, and the Department must protect the level of water quality necessary to protect those uses. 25 Pa. Code § 93.4a(b).¹ Moreover, any wetlands that are impaired must be replaced in accordance with 25 Pa. Code § 105.20a. *See* 25 Pa. Code § 105.18a(b)(7).

When a project will affect exceptional value (EV) wetlands, as PennEast’s Project will in several instances (see Environmental Assessment Appendix G), the Department generally may not issue a water obstruction and encroachment permit unless “[t]he cumulative effect of this project and other projects *will not result in the impairment* of the Commonwealth’s exceptional value wetland resources.” 25 Pa. Code § 105.18a(a)(6) (emphasis added). Thus, before granting a Chapter 105 permit, the Department must find in

¹ The Department’s antidegradation program applies to all “surface waters,” *see* 25 Pa. Code § 93.4a(a), and the term “surface waters” is defined in Chapter 93 to include wetlands. *See id.* § 93.1.

writing that PennEast affirmatively demonstrated that EV resources would not be impaired by the cumulative impact of the Project and all other projects. This is a significant burden – and one that PennEast has not even attempted to make in this case.

A proper cumulative impacts analysis for wetlands will consider the impacts of all existing and reasonably foreseeable future projects that could impact wetland resources. The February 2016 Environmental Assessment submitted with PennEast’s Application does not even mention the word “cumulative.” Although the Environmental Assessment does discuss wetland impacts of the project itself (PennEast Environmental Assessment at 3-77 through 3-79), the Application does not discuss how those wetlands impacts would interact with wetlands impacts of other existing and reasonably foreseeable development in the area.

The Department should ensure that it receives and fully reviews all relevant information about cumulative impacts so that it is able to make the findings about wetlands impacts required by 25 Pa. Code § 105.18a before it issues a water quality certification for the Project.

b. Permanent Impacts to Wetlands

The Department generally may not issue a Chapter 105 permit for a water obstruction or encroachment in a non-EV wetland unless the applicant affirmatively demonstrates (among other things) that “[a]dverse environmental impacts on the wetland will be avoided or reduced to the maximum extent possible.” 25 Pa. Code § 105.18a(b). For projects in EV wetlands, the Department generally may not issue a permit unless the project “will *not* have an adverse impact on the wetland, as determined in accordance with §§ 105.14(b) and 105.15 (relating to review of applications; and environmental assessment).” 25 Pa. Code § 105.18a(a)(1) (emphasis added). In determining whether a project will have an adverse impact on a wetland, the Department must specifically consider the impact on the wetland functions and values. 25 Pa. Code § 105.14(b)(13).

The functions and values of a palustrine forested (PFO) and palustrine scrub-shrub (PSS) wetlands are different than (and generally superior to) the functions and values of palustrine emergent wetlands (PEM). Schmid & Company, Inc., *The Effects of Converting Forest or Scrub Wetlands to Herbaceous Wetlands, Prepared for the Delaware Riverkeeper Network* (2014) at 16-22.² PennEast implicitly recognizes this distinction in its descriptions of the different types of wetlands. See Environmental Assessment at 2-42 through 2-44 (describing the characteristics of different categories of wetlands).

PennEast explicitly acknowledges that “permanent modification of vegetative cover type of PFO to palustrine PSS or PEM is anticipated in establishing a new ROW.” Environmental Assessment at 3-78. PennEast reports that 5.85 acres of PFO wetlands and 2.09 acres of PSS wetlands are located within the 30-foot permanent right-of-way for the pipeline and will be permanently converted to PEM wetlands. *Id.* at 3-78 through 3-79. It

² Schmid & Company’s report is available at http://www.schmidco.com/Leidy_Conversion_Final_Report.pdf (last accessed June 7, 2016).

appears that a significant portion of these converted wetlands are classified as EV wetlands. *See generally* Environmental Assessment Appendix G.

Further, it is likely that these values underestimate the actual impacts that will result from the project. As discussed below, PennEast has yet to conduct a field survey of more than twenty percent of its proposed route, and the Environmental Assessment includes only those wetlands and waterbodies that have been field assessed. Environmental Assessment at 1-23 and 2-37 (“PennEast is continuing to identify water features, and field surveys are ongoing. Only wetlands and waterbodies that have been field-verified are addressed in this WQC EA.”).

As discussed above, under the Chapter 105 regulations, the Department must affirm in writing that the Project “will not have an adverse impact on the wetland.” 25 Pa. Code § 105.18a(a)(1). It is hard to conceive of how degrading the functions and values of EV wetlands could be considered anything other than an “adverse impact” on a wetland, but if such an explanation exists, it does not appear to be present in PennEast’s Application. Before issuing a water quality certification for the Project, the Department must ensure that it will be able to make the requisite finding that the Project “will not have an adverse impact on” any EV wetland. It does not appear that the Department could do so based on the record currently before it.

c. Incomplete information in application

The difficulty of making the types of assessments described above is exacerbated by the fact that the Application does not contain all relevant information about the Project.

For example, PennEast has conducted surveying (including wetlands and waterbodies delineations) for only 78.6% of the proposed route. Environmental Assessment at 1-23. Without knowing the full extent of the wetlands and waterbodies that the Project will impact, the Department cannot adequately evaluate the Project’s impacts or the proposed mitigation measures proposed by PennEast.

PennEast is also unable to provide information to the Department about all construction techniques that it will use – even for crossing of a large, special protection waterbody, the Lehigh River. *See, e.g.*, Environmental Assessment at 1-33 (“PennEast is evaluating either a dam-and-pump or flumed dry crossing method for this section of the Lehigh River.”)

Without these important pieces of information, the Department cannot make a fully informed evaluation about the potential water quality impacts of the proposed Project, and therefore cannot certify that all discharges associated with the project will comply with Pennsylvania’s water quality standards.

4. There remain unresolved legal challenges concerning the Department's practice of issuing water quality certifications like the one proposed in this case.

The Department anticipates issuing PennEast a water quality certification that essentially purports to require compliance with the Commonwealth's water quality standards by requiring PennEast to comply with existing water quality permitting programs, criteria, and conditions. *See* 46 Pa. Bull. 2451 (May 14, 2016). This anticipated certification is nearly identical to previous water quality certifications that are the subject of legal challenges that are now pending before a federal court and a state administrative tribunal. The Department should not issue another water quality certification that would contain the same deficiencies until the pending legal challenges have been resolved.

On April 6, 2015, you issued a water quality certification for Transcontinental Pipe Line Company's Leidy Southeast Expansion Project. The Leidy Southeast certification contains terms that are nearly identical to those you propose for the PennEast certification. The Leidy Southeast certification was appealed to both the Pennsylvania Environmental Hearing Board (EHB Docket No. 2015-060-M) and the United States Court of Appeals for the Third Circuit (Docket No. 15-2122). Similarly, on April 5, 2016, you issued a water quality certification for Transcontinental Pipe Line Company's Atlantic Sunrise Pipeline Project. That certification contains terms that are nearly identical to both the Leidy Southeast water quality certification as well as the anticipated PennEast water quality certification. The Atlantic Sunrise certification has also been appealed to both the EHB (Docket Nos. 2016-075-L, 2016-076-L, and 2016-078-L) and the Third Circuit (*see* <http://cqrcengage.com/delawareriverkeeper/Litigation>).

Those challenges allege that the Department's issuance of water quality certifications for those projects was improper because, among other things, the Department did not adequately evaluate information to determine the projects' compliance with the Commonwealth's Chapter 102 and Chapter 105 regulations. Because of the similarity between the challenged water quality certifications and the proposed water quality certification for the PennEast project, a court decision to invalidate the previously issued water quality certifications would likely adversely impact the PennEast water quality certification. To ensure that the Department's actions comply with the law, the Department should wait for the pending lawsuits to be resolved before issuing the water quality certification as proposed.³

³ PennFuture recognizes that the Department is obligated to respond to the application for a water quality certification within one year. 33 U.S.C. § 1341(a)(1). If the legal challenges to previously issued water quality certifications are still not resolved at the time the Department is obligated to respond, the Department should render its decision on the Application at that time. If the Department is not satisfied that PennEast has provided sufficient information to ensure compliance with water quality standards, the Department should deny the Application on those grounds. If, however, the Department intends to issue the water quality certification as anticipated in the May 14, 2016 Pennsylvania Bulletin notice, the Department should include in its certification an indication that the validity of the water quality certification may depend on the result of unresolved legal challenges.

Thank you for your time and consideration of PennFuture's comments.

Sincerely,



Michael D. Helbing

Staff Attorney

helbing@pennfuture.org

(570) 208-4007

Enclosures: April 29, 2016 "Incompleteness Review Letter" to PennEast from Kevin S. White, Environmental Group Manager in DEP's Waterways and Wetlands Section.

eFACTS "Authorization Search Details," Authorization No. 1111888 (June 13, 2016)

cc: Joseph S. Cigan, Assistant Counsel, Pennsylvania DEP
FERC Docket No. CP15-558-000



April 29, 2016

PennEast Pipeline Company, L.L.C.
Attention: Mr. Anthony C. Cox, Project Manager
1 Meridian Boulevard, Suite 2C01
Wyomissing, PA 19610

Re: Incompleteness Review Letter
WQ02-005, PennEast Pipeline Project
401 Water Quality Certification Request
Luzerne, Carbon, Northampton and Bucks Counties

Dear Mr. Cox:

The Department of Environmental Protection (DEP) has reviewed the above referenced Request and has identified that it is incomplete. The following list specifies the items missing from the submission which must be included in your response.

Items Missing from Submission

1. The application does not include the Environmental Assessment Form. Please complete the Department's Environmental Assessment Form and Enclosures. Please include discussion on the project's effects on all aspects of water quality to include, but not limited to discharges, erosion and sediment control, water obstructions and encroachments, water quality monitoring during construction and operation of the pipeline, etc.
2. The delineated wetlands tables in Appendix G are not included, please submit the missing tables.

Please note that this information must be received within sixty (60) calendar days from the date of this letter, on or before **June 27, 2016**.

Should you have any questions regarding the identified deficiencies, please contact Eugene Trowbridge for inquiries at 570-820-4919, to discuss your concerns or to schedule a meeting. The meeting must be scheduled within the 60 calendar days allotted for your reply, unless otherwise extended by DEP.

Sincerely,

Kevin S. White, P.E.
Environmental Group Manager
Waterways and Wetlands Program

cc: Ms. Sarah Binckley, PWS/AECOM Corporation

bcc: J. Buczynski
K. White
File (WQ02-005)
File (30-day)

KSW:ET:mjc
WP: D7- 656
H(Email):&T(F): 4/28/16
R(F): 4/29/2016sp

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Item #10000000000000000000

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| Authorization ID: | 1111888 |
| Permit number: | WQ02-005 |
| Site: | PENNEAST PIPELINE PROJECT |
| Client: | PENNEAST PIPELINE CO |
| Authorization type: | Env Assessment for Waived Activities for Water Obstruction & Encroachment |
| Application type: | New |
| Authorization is for: | FACILITY |
| Date received: | 02/09/2016 |
| Status: | Pending |

Is this authorization type included in Permit Decision Guarantee? : Yes
Permit Decision Guarantee status: ACTIVE
Authorization status: Pending

Permit Review Standard Task Information:

| Task | Start Date | Target Date | Completion Date |
|-----------------------------------------------------|------------|-------------|-----------------|
| <input type="checkbox"/> Completeness Review | 2/9/2016 | n/a | |
| <input type="checkbox"/> Technical Review | | | |

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