July 6, 2017

The Honorable Eric T. Schneiderman
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

Dear Attorney General Schneiderman,

In a letter dated April 25, 2017, the Delaware Riverkeeper Network alerted you to our belief that the Millennium Pipeline Company, LLC's ("Millennium") is misrepresenting the scope of its intended expansion of the Millennium Pipeline project. We shared with you an expert analysis and additional information backing our claim and urging you to investigate. We are now writing to alert you to new information demonstrating that the Federal Energy Regulatory Commission ("FERC") has recently and intentionally withheld facts and other information critical to a state agency's review of a natural gas pipeline project. By withholding this information from the state and public, FERC was apparently seeking to inappropriately influence permitting decisions in order to secure the outcome sought by the Pipeline company. This new information adds to our concerns over similar misrepresentations by Millennium to the New York Department of Environmental Conservation ("NYSDEC"), being parroted by FERC, over the actual size of the Millennium Eastern System Upgrade Project ("ESU").

And so we reiterate and urge the need for investigation by the New York Attorney General's office to determine:

1. whether Millennium is accurately representing the true size and scope of its intended expansion, and add to this investigation
2. whether FERC has withheld similarly substantive conclusions, analysis, and or findings from the NYDEC with regard to the ESU and other related FERC-jurisdictional projects.

In the case of the Tennessee Gas Pipeline Company LLC's ("Tennessee") Orion Project ("Orion"), FERC deliberately concealed information from the Pennsylvania Department of Environmental Protection ("PADEP") on a project alternative that would have greatly reduced the project footprint and its impact on water resources, and therefore could have had a substantial influence on the public and state perspective regarding Clean Water Act ("CWA") Section 401 Certification. *See* Attachment A. The Delaware Riverkeeper Network was involved in two legal challenges to the project, one regarding the state 401 Certification, the second challenging US Army Corps wetlands permitting for the project. As a

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result of our Army Corps challenge we were able to secure documents that were not otherwise revealed by FERC of the Tennessee Gas Pipeline Company to the public or, apparently, to the Commonwealth of Pennsylvania. The failure of the pipeline company or FERC was clearly, in our opinion, part of an intended effort to withhold critical information and facts so as to inappropriately drive the outcome of decisionmaking to the outcome preferred by the Pipeline company.

On or about July 10, 2016 FERC generated an internal Draft Environmental Assessment for Tennessee's Orion Project. *See* Attachment B. As required by the National Environmental Policy Act ("NEPA") and FERC policy, FERC identified and evaluated in the Draft Environmental Assessment alternatives to the specific natural gas transmission facilities comprising the Orion Project proposed by Tennessee in their application and associated supplements.

Specifically, the Draft Environmental Assessment included a detailed analysis regarding a Compression Alternative. *See* Attachment B. The Compression Alternative involved the installation of a new compressor station facility in place of the 12 miles of pipeline looping being proposed for the Orion Project. The Draft Environmental Assessment included a detailed description of the compression alternative and concluded that this alternative "meets the purpose and need" of the Orion Project, and "is technically feasible." Importantly, this document also concluded that the compression alternative "would eliminate the need for 12.9 miles of new pipeline construction, **which would eliminate 30 waterbody crossings, 13 road crossings, and impacts on wetlands and other land use impacts along the pipeline route**." (Emphasis added.)

The internal Draft Environmental Assessment for Orion also included a table showing the different impacts resulting from the compression alternative in comparison to the proposed looping pipeline project. Not only did this comparison show that there would be no aquatic impacts from the Compression Alternative, it also showed that the looping Project would, in addition to the 30 waterbody crossings and significant wetland impacts, would also result in 222.6 more acres of total disturbed land, over 100 more acres of impacts to agricultural lands, would traverse 2,100 feet of steep slopes, and would necessitate the long-term deforestation of between 9 and 19 more acres of upland forests. Therefore, not only did the Draft Environmental Assessment conclude that the Compression Alternative was technically feasible and would meet the purpose and need of the Orion Project, but that its environmental impacts would be significantly smaller thereby obviously making it the environmentally preferred option.

However, without reason or any explanation, FERC excised this entire section from its final Environmental Assessment for the Orion project that was eventually released to the public and other agencies (such as the PADEP) for comment. *See* Attachment C. As such, both the public and other state agencies were obstructed from obtaining critical information regarding the scope and breadth of potential alternatives to the proposed Project, and were specifically prevented from obtaining information regarding the Compression Alternative. Indeed, in our litigation involving PADEP it became readily apparent that FERC had failed to provide PADEP with this critical information. *See* Attachment A, at 7.

FERC's decision to insulate this information from PADEP was particularly egregious because the central issues PADEP was required to review as part of its 401 Certification analysis were:

1) whether the project was "water dependent," and
2) whether there were any practicable alternatives that would not impact aquatic resources.

Had PADEP been provided access to draft Environmental Assessment and/or the analysis and conclusions regarding the Compression Alternative, it is likely PADEP would have been legally bound to choose the Compression Alternative as opposed to the pipeline looping Project.

In the case of Orion, it is clear that FERC:

- excised an analysis of a viable, technically feasible, and environmentally preferable alternative, which involved substantive issues that materially implicated the Pennsylvania's legal permitting obligations for the Orion Project,
- without providing any reason or explanation.

FERC's ability and wiliness to conceal vital and pertinent information from a permitting state agency raises the Delaware Riverkeeper Network's concern that FERC and Millennium are using the same tactics in New York, advancing significant misrepresentations of the ESU project in an effort to secure permits and other authorizations from the NYSDEC.

In light of these facts, in addition to the evidence that the Delaware Riverkeeper Network has previously submitted to your office, the NYAG's office should perform an investigation of the Millennium Eastern System Upgrade Project to determine whether Millennium and/or FERC have withheld similarly substantive conclusions, analysis, and or findings from the NYSDEC with regard to Millennium's Eastern System Upgrade Project and other related FERC-jurisdictional projects.

We do not want to see New York misled into making ill informed decisions on a mere segmented piece of a much larger project to come. We respectfully reiterate our request that the Attorney General's office initiate an investigation into the true scope of Millennium's proposed expansions, including to what degree there is clear internal knowledge of, and planning for, a significantly larger expansion that is not being divulged to New York state or the public in an intentional effort to deceive.

In addition to our Attachments, we re-submit our previous letter and documents for clarity and completeness.

Respectfully,

Maya K. van Rossum

Maya K. van Rossum
the Delaware Riverkeeper

Cc:

Mr. Martin Brand; Mr. Mark Klotz
Regional Director, Region 3; Director, Division of Water
New York State Department of Environmental Conservation

DRBC Commissioners and Executive Director Steve Tambini
Delaware River Basin Commission

Attachments:

Attachment A. Delaware Riverkeeper Network Reply Brief in *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection et al*. June 6, 2017.

Attachment B. Draft Environmental Assessment for Tennessee's Orion Project. June 10, 2016.

Attachment C. Environmental Assessment for Tennessee's Orion Project. August 2016.

Attachment A. Delaware Riverkeeper Network Reply Brief in *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection et al*. June 6, 2017.

No. 17-1533
ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,
v.

SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and,

TENNESSEE GAS PIPE LINE COMPANY LLC,

Intervenor.

REPLY BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW

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Dated: June 6, 2017

Counsel for: *Delaware Riverkeeper Network and the Delaware Riverkeeper*

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GLOSSARY

Department/PADEP	Pennsylvania Department of Environmental Protection
FERC	Federal Energy Regulatory Commission
Petitioners	Delaware Riverkeeper Network, and the Delaware Riverkeeper
Project	Orion Project
Section 404 Permit	Clean Water Act Section 404 Permit for the Orion Project
Tennessee	Tennessee Gas Pipeline Company, LLC

SUMMARY OF THE ARGUMENT

The Department's entire argument is premised on an elementary and inexcusable misunderstanding of the basic facts of this case. Specifically, the Department contends that the compression alternative is twice as big as it actually is, insisting – against all evidence to the contrary – that the compression alternative requires the construction of two compressor stations over 80 acres of land. This fundamental failure of the Department to develop a basic grasp of the scope of the compression alternative during the review process alone demands this Court grant the Petitioners' request for a remand or rescission of the Chapter 105 permits and the corresponding Clean Water Act Section 401 water quality certification. This is particularly true considering that the Department repeatedly relies on the argument that the compression alternative was appropriately discarded because it involved more permanent impacts than the proposed Project.

The Department's reliance on this argument illustrates a second fundamental flaw in the Department's defense. The question before this Court is whether the written finding of the Department regarding Section 105.18a(a)(2) sufficiently demonstrates that the Project is water dependent. The question is not which alternative involves more or fewer environmental impacts. The undeniable facts of this case show that the compression alternative meets the purpose and need of the Project, is technically feasible, and would not involve any impacts to a single water

resource. Because the compression alternative is available and would not impact a Departmental-jurisdictional resource, the proposed looping Project cannot be considered water dependent. Additionally, even if the compression alternative did not exist, there is not a single court in any jurisdiction that has ever considered a pipeline to be water dependent. Pipelines simply do not require water or depend on water for performing their basic function of transporting natural gas from one location to another.

Additionally, not only does the Department misapprehend the scope of the compression alternative and fail to address the correct legal standard, the Department also ignores the plain facts of this case which show that the compression alternative is clearly environmentally preferable to the proposed looping Project. The Department's argument that a project that would not even require a Chapter 105 permit is somehow more environmentally harmful than a project that impacts hundreds of acres of land, permanently deforested numerous wetlands, and cuts through over 65 streams is entire without merit. As such, even on its own terms, the Department's arguments fail.

The Department's approval of the Section 105 permits for the Project specifically violates Section 105.18a(a)(2) of the Pennsylvania Code, and requires a remand to the Department for further review consistent with their legal obligations, or an outright rescission of the permits.

ARGUMENT

I. The Department Based Its Review Of The Compression Alternative On A Fundamental Misunderstanding Of The Size And Scope Of The Impacts

The Department bases its entire defense on an unjustifiable misidentification of the true size and scope of the project. *See* PADEP Resp., at 23-27. Leaving aside the point that the Department incorrectly premises much of its argument on the wrong legal standard in this section,[1] the Department also makes the even more fundamental error of getting the basic facts of this case badly incorrect. Specifically, the Department grossly misrepresents the scope of the impacts related to the compression alternative. The Department's failure here undermines its credibility regarding the rest of its review, and provides clear and convincing evidence of the arbitrary and capricious nature of the Department's decision making in this matter.

As justification for rejecting the compression alternative the Department repeatedly states that the compression alternative requires the construction of two separate compressor stations each requiring 40 acre sites, for a total disturbance of 80 acres. *See, e.g.*, PADEP Resp., at 23, 24, 25. For example, the Department states that the compression "alternative . . . involves the use of two compressor stations." *Id*. at 23. The Department later contends that the compression alternative

[1] *See infra*, at Section III.

requires the "acquisition of two 40-acre sites (a total of 80 acres) to construct two compressor stations." *Id*. at 24. And the Department also provides that the compression alternative would require "the clearing of two green ways to accommodate two new compressor stations." *Id*., at 25. The Department then characterizes Petitioners' argument as contesting that "the alternative which involves the use of two compressor stations is the least environmentally detrimental alternative." *Id*. These statements are all incorrect.

First, the Department misrepresents what Petitioners' argue in their brief. Petitioners clearly state that:

> Tennessee found that there are "two compressor options," **either one of which** could move the necessary capacity of gas to the destination points along Tennessee's mainline . . . In other words, Tennessee found that a **single compressor station** could meet the needs of the Project, and identified **two potential general sites** that would be hydraulically optimal for its location.

Pet. Br., at 30 (emphasis added). As such, it is Petitioners' position that the compression alternative only requires the use of a single site and forty acres of land, not two sites and 80 acres as stated by the Department.

In addition to misrepresenting what Petitioners' argue, the Department also gets the basic facts of the compression alternative wrong. Indeed, there is no doubt that the compression alternative **does not, and has never**, required construction on eighty acres over two sites as repeatedly stated and relied upon by the Department; rather, the facts clearly show that the compression alternative only requires the

construction of a single compressor station at one site involving 40 acres of land. *See* JA317-318.

The Department's mischaracterization is evident based on the documents the Department itself cites. *See* PADEP Resp., at 24 (citing DEP007014). The project application states that "[c]ompression options for projects involve either the addition of more compressor horsepower at an existing compressor station or the construction of **a** new compressor station." JA318. The application further states that "[u]sing an iterative process of locating **the new station** at various points downstream, Tennessee then selects **the location** which results in the least amount of horsepower." *Id*. (emphasis added). These representations clearly contemplate a single compressor station being built at a single site. Perhaps the Department was confused by the fact that two **potential sites** for the single compressor station were discussed in the application; however, this does not excuse the Department from conducting a careful reading of the application, after which it should have been crystal clear that only one compressor station was necessary. Indeed, if anything, this mistake demonstrates the sloppy review conducted here by the Department.

Additionally, from a logistical perspective, the construction of two separate 10,000 horsepower compressor stations (totaling 20,000 horsepower) would far exceed what is necessary to move 135,000 dekatherms of natural gas. For example, a comparable project recently added compression to a similarly sized interstate

natural gas pipeline that only used slightly more horsepower to transport nearly 100,000 more dekatherms of natural gas. *See Minisink Residents for Environmental Preservation v. Federal Energy Regulatory Commission*, 762 F.3d 97, 102 (D.C. Cir. 2014) (natural gas project adding 12,260 horsepower of compression used to transport 225,000 dekatherms of natural gas). As such, it does not take a pipeline engineering expert to understand that using two compressor stations and 20,000 horsepower to move only 135,000 dekatherms of gas would be a massive and unnecessary overbuild of the project.

Furthermore, in separate litigation the Army Corps of Engineers has agreed with Petitioners that the "compression alternative would involve the development of **a new compressor station requiring approximately 40 acres of new greenfield construction**." *See* AD009 (United States Army Corps of Engineers Resp., at 29). In that matter, the Army Corps of Engineers reviewed the Orion Project application materials for the purpose of issuing a Section 404 Clean Water Act permit for the Project, and specifically conceded during the pendency of the litigation that the Orion Project only requires the construction of a single compressor station. *Id*.

Additionally, a Draft Environmental Assessment that was generated by the Federal Energy Regulatory Commission for the Orion Project clearly states:

> To achieve the Project objectives, we identified a possible compression alternative, which would involve development of **a new**

> **compressor station** requiring approximately **40 acres of new greenfield construction**. Two potential sites were identified.

AD005 (Draft Environmental Assessment Orion Project). The document further clarifies that "[c]onstruction would require permanent land use conversion of the 40-acre area." AD007. Also, a table is provided in the document which shows the individual impacts from all of the potential alternatives, and lists the two sites as two potential separate individual alternatives, not a single combined alternative. The statements in the Draft Environmental Assessment, and the table irrefutably corroborates what Petitioners state in their principle brief.

Counsel for Petitioners contacted counsel for the Department on May 4, 2017, to voluntarily alert counsel of the existence of the Draft Environmental Assessment and its contents, and to assure that Department's counsel was specifically aware of the Draft Environmental Assessment's details regarding the compression alternative. *See* AD015. Counsel for Petitioners even cited the relevant pages in the document showing that the compression alternative only required a single compressor station and an impact to only 40 acres. *Id.*[2] Despite

[2] Counsel for Department likely has an ethical responsibility to correct the record and representations made to the Court regarding the facts of the case. *See* Model Rules of Prof'l Conduct 3.3 (a) (1) (2006) ("A lawyer shall not knowingly . . . make a false statement of fact . . . to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

having this clear notice, the Department still represented to this Court an inaccurate and false accounting of the scope of the compression alternative.[3]

The clear facts contained in the Draft Environmental Assessment and the statements provided by the Army Corps of Engineers regarding the compression alternative may be considered by the Court because they correct factual mistakes asserted by the Department and Tennessee, and provide important background factual context regarding the Commission's review of the compression alternative. *See Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 791 n.3 (10th Cir. 2010) (although judicial review of agency action is generally limited to the administrative record, a court may take judicial notice of background information that informs the court's understanding of the factual context of the case); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (supplemental evidence properly admitted where it provides background information that aids Court in determining whether the agency considered all relevant factors); *Theodore*

[3] Perhaps even more disconcerting than the Department's misunderstanding of the compression alternative is Tennessee's statements regarding the scope of the impacts involved in an alternative that it was responsible for developing. *See, e.g.*, Tennessee Resp., at 52 ("the compression alternative involves constructing ***two*** compressor stations, each of which would require Tennessee to obtain 40 acres of land, for a total of ***80 acres*** of land"). Prior to drafting its brief in this matter, counsel for Tennessee was well aware that the Draft Environmental Assessment existed, and that the Army Corps of Engineers agreed that the compression alternative only required a single additional compressor station over 40 acres. Tennessee's failure to even acknowledge that it was aware of these clearly contradictory facts is particularly troubling.

Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514-515 (D.C. Cir. 2010) (acknowledging supplemental evidence may be properly admitted where needed to evaluate deficiency of record).

Indeed, the fact that the Department cannot accurately describe the compression alternative begs the question, how could the Department possibly conduct a competent and reasonable review of the compression alternative if the Department does not even understand the most basic details involved in its construction and operation? The startling and troubling misapprehension of the scope of the impacts related to the compression alternative alone requires a remand to the Department for further review.

II. It Is Uncontested That No Court In Any Jurisdiction Has Ever Found Linear Infrastructure or Pipelines To Be Water Dependent, And Even If Such A Determination Could Be Made, This Specific Project Is Not Water Dependent

As conceded by the Department, the Department must make a written finding regarding the water dependency of the Project. *See* PADEP Resp., at 12. It is this specific written statement that this Court must examine to determine whether the Department complied with Section 105.18a(a)(2). *See* 25 Pa. Code § 105.18a. The Department's regulations also state that "[a] project is water-dependent when the project requires access or proximity to or siting within the wetland to fulfill the basic purposes of the project." 25 Pa. Code § 105.18a(a)(2). A separate regulation provides that "[t]he [water] dependency must be based on the

demonstrated unavailability of any alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and protect the public natural resources of this Commonwealth." 25 Pa. Code§ 105.14(b)(7).

Based on these standards, the proposed Project cannot be considered water dependent for two separate reasons. First, linear infrastructure projects, including pipelines, have never been considered to be water dependent by any court in any jurisdiction. Second, even if pipeline projects could be considered water dependent, this specific Project is not because the Department failed to show the "demonstrated unavailability" of the compression alternative.

a. The Court Should Interpret The Water Dependency Language Of Section 105.18a Similarly To How Federal Courts Interpret Parallel Provisions of the Clean Water Act Section 404 Guidelines

The Department concedes Petitioners' argument that there is no existing Pennsylvania case law interpreting Section 105.18a with regard to pipelines specifically, or with regard to linear infrastructure generally. *See* PADEP Resp., at 18. As noted by Petitioners, Pennsylvania courts have looked to the Clean Water Act for guidance in interpreting parallel provisions of Section 105.18a where there is no existing case law. *See* Pet. Br., at 18-19 (citing *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93,109 (Pa. Commw. 2004)). In *Pennsylvania Trout*, the court specifically looked to the Clean Water Act to

interpret the term "basic project purpose" pursuant to Chapter 105.18a. *Id*. The court did so because both Chapter 105.18a and the Clean Water Act Section 404 Guidelines contain parallel provisions referencing that term. *Id*.

Here, the term "water dependent" also appears in both Chapter 105.18a and the Clean Water Act, and considering there is a similar dearth of Pennsylvania case law interpreting the term "water dependent," it is appropriate for this Court to look to the federal courts for guidance. The Department contends that because *Pennsylvania Trout* was considering a "different" subchapter of Chapter 105.18a, that *Pennsylvania Trout* is not relevant. *See* PADEP Resp., at 22 (comparing Section 105.18a(a) and Section 105.18a(b)). The Department offers only conclusory support for this argument by merely stating that such a comparison is inappropriate "because of the material differences between Federal and State law requirements." *Id*. However, the Department never identifies what specific "material differences" are so significant as to have this Court ignore the well-developed line of federal case law finding that linear infrastructure of any type is not "water dependent," or why courts should look to the Section 404 Guidelines to interpret provisions of Section 105.18a(b), but not provisions in Section 105.18a(a).

Additionally, the Department actually makes Petitioners' case for us. The Department erroneously states that Petitioners "fail[] to recognize the differences

between Pennsylvania's regulations" and the Clean Water Act. *See* PADEP Resp., at 22. The Department's only evidence supporting this contention is that "**[u]nlike Pennsylvania law**, practicable alternatives are presumed to exist under the Federal regulations when a project is not water-dependent." *Id*. However, the Department inexplicably overlooks the fact that Section 105.18a itself contains a provision providing **exactly this presumption**. Specifically, the Pennsylvania Code states that "[i]t shall be a rebuttable presumption that there is a practicable alternative, not involving a wetland, to a nonwater-dependent project, and that the alternative would have less adverse impact on the wetland." *See* 25 Pa. Code 105.18a(b)(3)(i), *compare with* 40 C.F.R. § 230.10(a) ("practicable alternatives . . . are presumed to be available" and "are presumed to have less adverse impact on the aquatic ecosystem"). Therefore, in this singular subchapter of Section 105.18a there exist two regulatory presumptions that arise for non-water dependent projects that have exact parallels in the Clean Water Act Section 404 Guidelines. Considering that Chapter 105.18a has such a close analogue in Section 230.10(a) of the Section 404 Clean Water Act Guidelines, it is more than appropriate for this Court to interpret parallel provisions and terms similarly. *See* Pet. Br., at 20-22.

In a second attempt to differentiate Section 105.18a from the Section 404 Guidelines, both the Department and Tennessee contend that a water-dependency determination under Section 105.18a(a)(2) is different because it is evaluated on a

"case-by-case basis." *See* PADEP Resp., at 15; *see also* Tennessee Resp., at 42 (water dependency is a "project-specific analysis that focuses on whether the basic purposes of a particular project can only be achieved"). However, this project specific analysis is no different than what is demanded, and what takes place, pursuant to the Section 404 Guidelines. For example, the Section 404 Guidelines require a "particularized" review that "reflects the various objectives the applicant is trying to achieve," which includes a consideration of the applicant's needs of a "desired geographic area of development" and the "type of project being proposed." *Florida Clean Water Network, Inc. v. Grosskruger*, 587 F.Supp.2d 1236, 1243 (M.D. Fla. 2008) (citations omitted). Yet, despite these project specific considerations, no federal court has ever found a pipeline, or any type of linear infrastructure, to be water dependent pursuant to the Section 404 Guidelines. *See* Pet. Br., at 14. Just because the Department performs a case-by-case analysis does not dictate that certain classes of activities are simply prohibited by the Chapter 105 regulations.

The inter-related nature of the Section 404 Guidelines and Chapter 105.18a is further illustrated by the fact that pipeline companies submit a joint application for a Chapter 105 permit from the Department and a Section 404 permit from the Army Corps of Engineers. Indeed, on January Tennessee submitted its *Joint Application for Pennsylvania Water Obstruction and Encroachment Permit and*

U.S. Army Corps of Engineers Section 404 Permit for the Orion Project. *See* Tennessee Resp., at 21.

Considering the close parallels between Section 105.18a and the Section 404 Guidelines, and that no court has ever found that the construction of a pipeline – which by definition does not need to be placed in an aquatic zone to fulfill its basic purpose – to be water dependent, this Court should similarly find that the looping pipeline Project is not water dependent pursuant to Section 105.18a(a)(2).

b. The Department's Written Finding Does Not Support A Finding Of Water Dependency

The Department's written finding pursuant to Section 105.18a(a)(2) does not address the standard for water dependency found in 105.14(b)(7). Pursuant to 105.14(b)(7), water dependency must be "based on the demonstrated unavailability of any alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment." 25 Pa. Code§ 105.14(b)(7). The Department contends that its written finding regarding Section 105.18a(a)(2) is sufficient, PADEP Resp., at 14, which states that "[t]he project is water dependent in that the pipeline needs to cross the wetland areas to access land on either side of the wetland system as there are no other practicable crossing alternatives to avoid the crossing." *Id*. This statement focuses only on "other practicable crossing alternatives," such as re-routing or hydraulic directional drilling crossing methods,

and therefore fails to address alternatives that eliminate the need for any crossings, such as the compression alternative.

Additionally, the Department's written finding does not establish or even address the standard requiring a "demonstrated unavailability" of the compression alternative. *See* 25 Pa. Code§ 105.14(b)(7). Indeed, no such specific showing or written finding is provided. Importantly, neither the Department nor Tennessee contest, and they thereby concede, that the term "unavailability" must mean something broader than impracticability. *See* Pet. Br., at 37-38. Therefore, a "water dependent" project need only be generally "available" outside a consideration of the factors considered in a practicability analysis under Section 105.18a(a)(3), which includes costs, existing technology, and logistics.[4] There can be no doubt that the compression alternative is "available," as it meets the purpose and need for the Project, is technically feasible, and involves far fewer total environmental impacts than the proposed looping Project. *See* Pet. Br., at 25, 30, 33, 34-35. The Department and Tennessee do not contest the technical feasibility of the compression alternative or that the compression alternative can meet the purpose and need of the Project. Nor could either party contest these issues, as these conclusions are clear from the record, *see* JA318, and have been further

[4] It should be noted that neither the Department nor Tennessee assert that the compression alternative is not practicable based on costs, existing technology, or logistics.

corroborated by the Draft Environmental Assessment. AD001-007. Specifically, the Draft Environmental Assessment states that the compression alternative would meet the "purpose and need" of the project, was "technically feasible." *Id*. This document also concludes that the compression alternative would eliminate the need for the new pipeline looping and "all waterbody crossings" (including the approximately 10,000 feet of wetland crossings). *Id.* Considering these realities, the Department has not established what exactly renders the compression alternative "unavailable." Indeed, while this standard is cited by the Department, the Department conspicuously fails to specifically apply it to the facts.

The Department does explicitly attempt to argue that the pipeline looping Project would be environmentally preferable to the proposed Project. *See* PADEP Resp., at 27-29. Specifically, the Department states that "Petitioners fail to establish that PADEP's determination that the compression alternative is a less environmentally harmful alternative than the chosen co-location alternative is arbitrary or capricious." *Id.*, at 27. However, this argument is entirely meritless for several reasons: 1) a determination regarding the least environmentally harmful alternative is not part of the standard under Section 105.18a(a)(2), 2) even if such a determination were relevant, the Department does not even accurately represent to the Court the true size and scope of the compression alternative in order to make a

reasonable comparison of impacts, and 3) the clear and uncontested facts relating to environmental impacts directly contradict the Department's statement.

Leaving aside that the Department's argument is factually inaccurate, it is also meaningless in the context of Petitioners' challenge, as Petitioners do not have to prove that the chosen alternative is more or less environmentally harmful than the compression alternative. That simply is not the standard. *See* Pet. Br., 26-29. The only questions this Court must answer is whether or not pipelines can be considered water dependent pursuant to Section 105.18a(a)(2), or in the alternative, whether the Department demonstrated that the compression alternative is "unavailable." *See* 25 Pa. Code § 105.14 (b)(7).

However, even if such an environmental comparison were germane to a determination under Section 105.18a(a)(2), the Department does not even accurately represent the impacts of the compression alternative to provide a reasonable comparison. *See supra*, at Section I. Indeed, the Department has been operating under the mistaken assumption that the compression alternative is twice as big as it actually is. *Id*. Such a significant mistake renders any conclusions drawn by the Department regarding the compression alternative arbitrary.

To support its claim that the looping Project is environmentally preferable the Department cites to vaguely described "permanent impacts," including vegetation clearing for various facilities related to the compression alternative, as

compared to the "temporary" impacts of the proposed looping Project. *See* PADEP Resp., at 24-25. However, this argument is unpersuasive. The Department fails to address Petitioners' statement that such "impacts are generalized common impacts" that are unquantified and "would be true for any number of different construction activities," including the pipeline looping Project. *See* Pet. Br., at 37. To the extent permanent or long-term vegetation clearing is considered relevant, the proposed Project will result in the deforestation of at least 47 acres of upland forests,[5] and the deforestation of roughly six acres of wetlands. JA318; AD009-10. Therefore, even controlling for the singular issue of long term upland deforestation, the compression alternative involves fewer impacts even assuming all 40 acres for the compressor station site will need to be cleared.[6] Furthermore, the Department and Tennessee necessarily find themselves in the untenable position of arguing that the looping pipeline Project, which impacts 31 streams, 65 wetlands (13 of which are "exceptional value"), 15 acres of water resources, permanently deforests roughly 6 acres of forested wetlands, and disturbs over 200 more acres of land is somehow environmentally preferable to an alternative that would not even require a single Chapter 105 permit **because no water resources**

[5] It is unclear how or why the Department classifies the deforestation of mature trees as "temporary" considering that it will take 30-50 years for those trees to regrow.

[6] The Draft Environmental Assessment makes clear that only 28-38 acres need to be cleared for the compression alternative. *See* AD006.

would be impacted by the compression alternative. AD003. Such an unreasonable position is clearly arbitrary. *See* PADEP Resp. Br., at 13.

Because the Department cannot reasonably rely on the contention that the compression alternative results in greater environmental impacts to wetlands, streams, and forests, the Department and Tennessee must instead rely on the singular fact that the compression alternative may result in some undefined higher degree of light, air, or noise pollution. *See* PADEP Resp., at 25; Tennessee Resp., at 53. However, the record shows that the level of light, air, or noise pollution was never quantified, or even qualitatively described, in any way such that a reasonable conclusion could be drawn regarding the significance of those impacts. Furthermore, both parties fail to cite to any case law, regulations, or guidance documents suggesting that such a vaguely described and speculative increase in these potential impacts could be interpreted to result in the compression alternative being "unavailable." Additionally, light, noise, and air impacts are considerations that are wholly unrelated to Pennsylvania's water quality standards that are the resources under consideration pursuant to Chapter 105, and therefore have little to no relevance to this inquiry. *See* Pet. Br., at 36-37.

III. The Department's Primary Arguments Fail To Address The Appropriate Legal Standard, But Nevertheless Fail On Their Own Terms

Petitioners devote an entire section of its principle brief to an explanation of how and why a consideration of practicable alternatives is irrelevant to this Court's inquiry with regard to the Department's compliance with Section 105.18a(a)(2). *See* Pet. Br., 26-29. The Department and Tennessee fail to address any of these arguments, or explain how Tennessee's statements regarding practicability are relevant or even related to a determination pursuant to Section 105.18a(a)(2), or Section 105.14(b)(7).

The Department expressly relies on a statement to prove water dependency pursuant to Section 105.18a(a)(2) that only speaks to Tennessee's compliance with Section 105.18a(a)(3). Specifically, the Department states "[t]he Project is considered to be water-dependent **because there is no other practicable alternative to the proposed pipeline** that does not involve crossing streams and wetlands." JA321 (emphasis added).[7] However, a determination that no practicable alternative exists merely addresses the conditions of Section 105.18(a)(3), and has no bearing on Tennessee's compliance with Section 105.18a(a)(2). *See* Pet. Br., 27-28. The Department has no answer as to why it relied on information that speaks only to Section 105.18a(a)(3) to also satisfy the requirements of Section 105.18a(a)(2). *Id*., at 28-29. To conflate these two provisions would be to read out

[7] Similarly Tennessee contends that the compression alternative was rightly discarded because "PADEP concluded that the 'compression alternative' was not a practicable alternative." *See* Tennessee Resp., at 42-43.

the purpose of the higher degree of protection afforded to "exceptional value" wetlands as contemplated by Section 105.18a(a)(2).

Because the Department failed to "demonstrate[]" the "unavailability" of the compression alternative pursuant to Section 105.14(b)(7) – in fact the record shows that it was undeniably available – the Project is water dependent; and therefore, the Department was prohibited from issuing the permit. In other words, to the extent the compression alternative is available, any inquiry into the requirements of Section 105.18a(a)(3) is unnecessary. Indeed, there is no mention of practicability in Section 105.18a(a)(2), or Section 105.14(b)(7). Instead, the practicability analysis is strictly limited to Section 105.18a(a)(3). *See* Pet. Br., at 37-38. Petitioners' argument here is unrebutted by both the Department and Tennessee. However, even if practicability was a necessary element of the Section 105.18a(a)(2) or Section 105.14(b)(7) analysis, the compression alternative is practicable. *See* Pet. Br., at 29-35. This is particularly true considering that the Department was required to review the compression alternative under the presumption that it was practicable, and to "demonstrate with reliable and convincing evidence and documentation" that the presumption is rebutted. *See* Pet. Br., at 33-34 (citing 25 Pa. Code § 105.18a(b)(3)(ii)). The Department and Tennessee do not contest that this presumption arose, nor does either party cite to any evidence showing that this it was overcome.

IV. The Pennsylvania Environmental Hearing Board's Statement Is Of No Moment

The Pennsylvania Environmental Hearing Board's ("PAEHB") non-binding ruling from the bench is of little import. First, the project at issue in that matter is easily distinguishable from the proposed Project, as the project before the PAEHB does not have a recognized alternative that meets the purpose and need of the project, is technically feasible, and would not impact a single water resource such as the compression alternative. Additionally, the statement is only preliminary as petitioners in that matter have yet to have the opportunity to fully brief the issue of water dependency on a motion for summary judgment.

Furthermore, in line with federal courts the PAEHB recognized that linear infrastructure such as pipelines do "not use water" and do "not depend on water." *See* PADEP Resp., at Addendum (AD000066). However, the PAEHB then articulated a position that has been roundly rejected by all courts that have considered it with regard to water dependency, which is that "the project could not have possibly been built within reason without encroaching upon exceptional value wetlands." *Id*. Both the Department and Tennessee glom on to the concept that because the desired location for the pipeline looping Project crosses wetlands and waterways that the project is therefore water dependent pursuant to Section 105.18a(a)(2). *See* PADEP Resp., at 14-15, 19; Tennessee Resp., at 41-42. However, as described in Petitioners' principle brief, this logic has been

resoundingly rejected by every federal court that has considered it. *See* Pet. Br., at 21-22.

For example, *Coastal Conservation League v. U.S. Army Corps of Eng'rs* is particularly instructive on this issue. *See Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 2016 WL 6823375, at *13-14 (S.D. Fl., November 18, 2016). In that matter, the Corps found that expanding and improving a road could not occur without impacting wetlands or waterways; yet, the Corps found that the desire to locate such infrastructure across water resources does not render the road construction project "water dependent." *Id*. The Court agreed that the infrastructure was not water dependent despite its crossing of water resources, as the basic purpose of a road does not use or depend on water. *Id*.[8] The same principle applies in the instant matter. Section 105.18a(a)(2) was specifically designed to protect and preserve Pennsylvania's most sensitive and ecologically important wetlands – exceptional value wetlands – and prevent projects from being located in these irreplaceable resources when location therein is not necessary to fulfil their basic

[8] The Department cites to a 1991 comment response document to suggest that roads may or may not be considered water dependent. *See* PADEP Resp., at 15-16. However, the Department fails to cite a single court that has adopted the Department's rationale that a road could theoretically be water dependent. Furthermore, even if a road could be found to be water dependent, roads are fundamentally different from pipelines. Whereas pipelines can be constructed via hydraulic direction drilling under water resources, thus not impacting the resource, roads cannot and instead require fill in the wetlands. As such, the Department's reliance on the 1991 comment response document is wholly unpersuasive.

function. *See* Pet. Br., at 21. Here, there is no doubt that pipeline projects simply do not require access or proximity to water resources to perform their basic function, which is to transport natural gas from one location to another.

V. Petitioners Did Not Forfeit Their Claim That The Department Failed To Comply With Section 105.18a(a)(2)

As stated by Tennessee, there is a long standing doctrine that a flaw in an agency's analysis "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Department of Transportation, et al. v. Public Citizen, et al.*, 541 U.S. 752, 765 (2009) (internal citation omitted). The "so obvious" standard is interpreted by whether the agency had "independent knowledge" of the issue that concerned the plaintiffs. *See Friends of Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000). Here, the Department had independent knowledge that the compression alternative existed, was technically feasible, met the purpose and need of the Project, and would not result in **<u>any impacts to Department-jurisdictional resources</u>**. *See* JA318. As such, the Department had clear independent knowledge that the Project was not water dependent pursuant to Section 105.18a(a)(2) and Section 105.18 (b)(7). Considering the clear environmental advantages of the compression alternative combined with its admitted technical feasibility and ability to meet the purpose and need of the Project, the issue of whether the Department was

prohibited from issuing the Section 105 permit for the looping pipeline project could not have been any more obvious.

Additionally, Petitioners clearly stated in a comment letter to the Department that the project was not water dependent, and that the proposed Project specifically did not comply with Section 105.18a(a)(2). JA018-19. Where an agency is apprised of the issues and has a fair opportunity to address them, they are not waived. *See Portland General Electric Co. v. Bonneville Power Administration*, 501 F.3d 1009, 1025 (9th Cir. 2007). Where a party raises policy and legal issues before an agency, it is entitled to further argue the facts concerning those issues in court. *See generally id.* at 1024-25, 1035 (describing legal and policy objections raised in the administrative proceeding, then analyzing and deciding based on detailed factual arguments); *Nat'l. Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1139-1140 (D.C. Cir. 2002) (noting that although comments did not specifically mention the cold-start portion of the Federal Test Procedure, they did "raise the underlying issue of poor performance at certain temperatures," and consequently the comments were "close enough to have put the EPA on notice that it had to defend the performance of the NOx absorbers at all relevant temperatures and conditions…"). Here, Petitioners' comment letter fairly raised the issue of water dependency and specifically put the Department on notice that it would have to defend its determination that the Project complied with Section 105.18a(a)(2).

As such, Petitioners did not forfeit any of its claims related to Section 105.18a(a)(2).

VI. FERC's Environmental Assessment and Certificate Is Irrelevant To The A Determination As To Whether The Project Complies With Pennsylvania's Water Quality Standards

To the extent the proposed Project violates one of Pennsylvania's water quality standards, such as Section 105.18a(a)(2), it is fully within Pennsylvania's authority to deny the Project application pursuant to its rights under the Clean Water Act. As such, the Federal Energy Regulatory Commission's approvals and orders under the Natural Gas Act are irrelevant. See Tennessee Resp., at 49-54.

Section 401(d) of the Clean Water Act states that any Section 401 certification may include "any other appropriate requirement of State law set forth in such certification and shall become a condition on any Federal license or permit, subject to the provisions of this section." 33 U.S.C. § 1341(d); *see also PUD No. 1 of Jefferson County*, 511 U.S. 700, 707-708, 711 (1994) (explaining that Section 401(d) "expands the state's authority to impose conditions on the certification of a project," including "appropriate state law requirements"). Section 401 water quality certifications therefore ensure that federal permits meet state water quality standards after a site specific environmental review. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997); *see also S.D. Warren Co. v. Maine Bd. of Env'tl. Protection*, 547 U.S. 370, 386 (2006). The Department exercises delegated

authority to issue federal Section 401 water quality certifications, and conditions their approval on an applicant receiving the appropriate substantive state water quality permits such as the Chapter 105 permits. *See* 25 Pa. Code 105.15(b); *see also Tennessee Gas Pipeline L.L.C. v. Delaware Riverkeeper Network*, 921 F.Supp.2d 381, 390 (M.D. Pa. 2013). Therefore, the Department is the state administrative agency that is charged by the Clean Water Act to issue, condition, or deny water quality certifications and their underlying permits. Pennsylvania's water quality standards and implementing regulations are located in 25 Pa. Code § 93; 25 Pa. Code § 96; and 25 Pa. Code § 105.

Any Section 401 water quality certification Pennsylvania issues must comply with the substantive requirements of Pennsylvania's water quality standards. The Section 105 permits at issue here specifically codify these water quality standards with respect to wetlands, and are required to be complied with for an approval of the Section 401 certification. To the extent that any of the substantive portions of Chapter 105's water quality standards – such as Section 105.18a(a)(2) – are not met, the Department is prohibited from issuing Section 105 permits, and the Section 401 certification is correspondingly not valid. Therefore, because the proposed Project violates one of Pennsylvania's water quality standards, the Department was prohibited from issuing the Section 105 permits. FERC's determinations and approvals under the Natural Gas Act are separate and

apart from the approvals required by the Clean Water Act, such as the delegated Section 401 certifications and underlying state permits as contested in this case.

CONCLUSION

The Department unlawfully issued Chapter 105 permits for a Project that is expressly prohibited by Section 105.18a(a)(2) of the Pennsylvania Code. Petitioners respectfully request that the Chapter 105 permits be rescinded or remanded, and any other relief the Court deems just and equitable.

Respectfully submitted this 6th day of June, 2017.

s/ Aaron Stemplewicz

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,404 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(ii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

Dated: June 6, 2017

s/ Aaron Stemplewicz

Aaron Stemplewicz
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CERTIFICATE OF BAR ADMISSION

Pursuant to Third Circuit Local Appellate Rule 28.3(d) Petitioners hereby certify that Aaron J. Stemplewicz of the Delaware Riverkeeper Network is a member of the bar of this Court.

Dated: June 6, 2017

s/ Aaron Stemplewicz

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Counsel for: *Petitioners Delaware Riverkeeper Network and the Delaware Riverkeeper*

L.A.R. 31.1 CERTIFICATION

I, Aaron Stemplewicz, pursuant to L.A.R. 31.1. (c), certify that the text of the electronic brief is identical to text in the paper copies. I also certify that a virus detection program has been run on the files and no virus was detected. The virus detection program used was Microsoft Security Essentials, Version 1.203.1304.0.

Dated: June 6, 2017

s/ Aaron Stemplewicz

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2017, the foregoing has been filed and served electronically through the Court's CM/ECF system on all registered counsel.

Dated: June 6, 2017

s/ Aaron Stemplewicz

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No. 17-1533
ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and,

TENNESSEE GAS PIPE LINE COMPANY LLC,

Intervenor.

ADDENDUM TO REPLY BRIEF

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Office of
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Orion Project

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Cooperating Agency:
US Army Corps of Engineers

Washington, DC 20426

4.1 Other Pipeline Company Alternatives

There is significant fuel conversion-driven demand in the United States for additional supplies of natural gas to supply utility companies and other users. Because TGP currently operates a transmission system in the northeast, TGP can supply the increased demand for natural gas in this area using efficiencies afforded by its existing system. The Project has a firm purchaser commitment and can meet the demand sooner than a hypothetical project not yet planned or committed. Therefore, we did not consider any system alternatives involving the use of other (non-TGP) natural gas pipeline systems.

4.2 System Alternatives to TGP's Project

We evaluated technically feasible system alternatives in terms of their ability to meet the Project objectives, namely to provide firm transportation capacity for 135,000 dekatherms per day to supply three Project Shippers. Four options are feasible: two new pipeline looping options, and two new compression options.

4.2.1 Pipeline Looping Alternatives

Looping Alternative 322

We evaluated a looping alternative, referred to as Looping Alternative 322, which would require construction of approximately 9.4 miles of 36-inch-diameter pipeline looping beginning approximately 3 miles east of the existing Compressor Station 321 in Susquehanna County and continuing east into Wayne County. This looping alternative would replace the proposed 322 Loop. While this alternative would affect less wetland habitat than the proposed 322 Loop, it would require 1.1 miles of additional pipeline construction and would cross an additional 2.9 miles of forested land and 1.8 miles of agricultural land. While this alternative would meet the purpose and need and is technically and economically feasible and practical, it presents no environmental advantage over the Project. Table C.4-1 provides a comparison of Looping Alternative 322 to the portion of the Project that this alternative would replace.

Looping Alternative 323

We also evaluated a looping alternative, referred to as Looping Alternative 323, which would require construction of approximately 5.4 miles of 36-inch-diameter loop beginning approximately 10 miles southeast of Compressor Station 323 in Pike County. This looping alternative would replace the proposed 323 Loop. This looping would require approximately 0.7 mile of additional pipeline construction and would cross an additional 4.9 miles of forested land; however, it would cross 3 fewer waterbodies and would affect less wetland habitat. While this alternative would meet the purpose and need, is technically and economically feasible and practical, and presents some environmental advantages over the Project, it would also require additional land disturbance and land use modifications due to the additional length. Table C.4-1 provides a comparison of Looping Alternative 323 to the portion of the Project that this alternative would replace.

4.2.2 Compression Alternatives

Compression options involve either the addition of more compressor horsepower at existing facilities or the installation of a new compressor station facility. To achieve the Project objectives, we identified a possible compression alternative, which would involve development of a new compressor station requiring approximately 40 acres of new greenfield construction. Two potential sites were identified. The compressor station would add approximately 10,000 horsepower of capacity either upstream or downstream of the existing Compressor Station 323 to overcome the loss of capacity from loop elimination. Other upgrades to existing compressor stations, without looping, did not offer the same reliability and flexibility on the system.

TABLE C.4-1

Comparison of System Alternatives

Aspect	Unit	Project Total	Project (Loop 322)	Looping Alternative 322	Project (Loop 323)	Looping Alternative 323	Compression Alternative (Site 1)	Compression Alternative (Site 2)
Length of new pipeline	Miles	12.9	8.2	9.4	4.7	5.4	0	0
Construction right-of-way	Acres	260.3	133.0	153.8	76.2	88.4	40	40
Permanent right-of-way	Acres	78.8	50.1	57.0	28.7	32.4	40	40
New aboveground facility land impacts (temporary / permanent)	Acres	0.4 / 0.1	N/A	N/A	N/A	N/A	40 / 40	40 / 40
Road crossings	Number	13	8	14	5	5	0	0
Public land crossings	Miles	0	0	0	0	0	0	0
Structures within 200 feet	Number	14	12	12	2	9	0	0
Wetlands crossed	Feet	9,552	8,132	950	1,420	1,056	0	0
Waterbodies crossed	Number	30	15	8	10	7	0	0
Steep terrain crossed	Feet	2,112	686	528	1,426	106	0	0
Forested areas crossed	Miles or Acres	2.0 miles	2.0 miles	4.9 miles	<0.1 mile	4.9 miles	28 acres	38 acres
Agricultural land affected	Miles or Acres	0.4 mile	0.4 mile	2.2 miles	0	0	12 acres	2 acres
Additional compression	Horsepower	0	0	0	0	0	10,000	10,000
New noise source	Number	0	0	0	0	0	1	1
Fuel efficiency	Comparative	Base case	Base case	Comparable	Base case	Comparable	Higher	Higher
Meets purpose and need	Comparative	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Technical feasibility	Comparative	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Environmental impacts	Comparative	Base case	Base case	Comparable	Base case	Higher	Different but comparable	Different but comparable
Economic efficiency	Comparative	Base case	Base case	Lower	Base Case	Lower	Lower	Lower

The new station would require permanent clearing of trees and other vegetation and installation of permanent access roads, fencing, buildings, and other appurtenance equipment. Construction would require permanent land use conversion of the 40-acre area and would present a new source of light, air emissions, and noise. Based on an assessment of land use in the general study area, the general location of a new compressor station would affect approximately 28 acres of forested land and 12 acres of agricultural land at Site 1, and approximately 38 acres of forested land and 2 acres of agricultural land at Site 2. The new station would, however, eliminate the need for 12.9 miles of new pipeline construction, which would eliminate 30 waterbody crossings, 13 road crossings, and impacts on wetlands and other land use impacts along the pipeline route. A more detailed comparison of these alternative compressor station sites to the Project is presented in table C.4-1.

This alternative meets the purpose and need, is technically feasible, and has some environmental advantages as well as disadvantages over the Project. This alternative would have different environmental impacts from the Project; however, the impacts associated with this alternative would be comparable or possibly lower. The impacts of the compressor station as an air emission and noise source and aboveground facility are permanent, while the bulk of the Project impacts are temporary (such as waterbody crossings) or adjacent to the existing right-of-way.

4.2.3 Comparison of System Alternatives to the Project

Table C.4-1 summarizes the comparison of the system alternatives to the Project. We conclude that the system alternatives identified would not provide a significant environmental advantage over the Project.

5. Alternative Pipeline Routes

Route alternatives are alternatives that differ from the proposed route and may be major and deviate from the proposed route for an extended distance, or be minor and deviate from the proposed route for a short distance. The proposed routes for the pipeline loops are primarily co-located within and adjacent to TGP's existing 300 Line right-of-way. Any newly identified alternative pipeline route would involve development of new right-of-way, resulting in greater environmental impacts than the proposed pipeline route. Since the Project is co-located within existing rights-of-way, we did not identify any routing alternatives that could result in a reduced environmental impact. In addition, we did not receive any comments requesting that we consider any pipeline route alternatives.

6. Aboveground Facility Site Alternatives

There are no modifications to or construction of new major aboveground facilities associated with the Project. The only aboveground alternative evaluated was the compression alternative in section B.4.2.2. We also did not receive any requests to examine additional aboveground alternatives and find that siting the proposed modification within the existing aboveground facilities would adequately minimize impacts.

7. Lackawaxen River Crossing Alternatives

TGP is proposing to cross the Lackawaxen River at approximately MP 10.4 along Loop 323. As detailed in sections A.6.1.7 and B.2.1, TGP is proposing to cross the Lackawaxen River using the cofferdam crossing method as the primary crossing method. In the event that the cofferdam crossing method is unable to be implemented, TGP would propose to cross the Lackawaxen River using the open cut method. Our environmental analysis in section B analyzed the impacts associated with TGP's primary crossing method. In this section we provide an analysis of other alternative crossing methods.

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No. 17-1506

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; et al.

Respondents.

FEDERAL RESPONDENTS' PROOF BRIEF IN RESPONSE TO THE PETITION FOR REVIEW

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vegetation clearing from the area in order to install permanent access roads, fencing, buildings and other appurtenance equipment associated with constructing such a facility, resulting in increased impacts to the environment," as well as "light pollution and noise impacts and [a potential] source of [greenhouse gas] emissions." [JA _ (AR 540).] The Report noted that although the Project would likewise require disturbance of vegetation, "the new [right-of-way] will be allowed to re-vegetate to minimize and mitigate possible environmental impacts." [JA _ (AR 540).] The Report also explained that the "compression alternative would result in higher Project operating and fuel costs." *Id.* For all of those reasons, TGP opted for the Project rather than the compression alternative. *Id.*

Second, both FERC and the Corps considered TGP's assessments and the various project alternatives during the joint interagency environmental review. During that process, FERC sent an internal draft EA[10] to the Corps for its review. [JA _ (AR 2694; AR 2885).] That draft EA evaluated the compression alternative, among various other Project alternatives. [JA _ (AR 2789-91).] The draft noted that a possible compression alternative would involve the development of a new compressor station requiring approximately 40 acres of new greenfield construction. [JA _ (AR 2789).] This draft also contained a detailed chart comparing various aspects of the

[10] This draft EA document was an internal working draft EA that FERC sent to the Corps (as a word-processing document for redlining and commenting) for inter-agency review and comment; it was not a formal draft EA for public comment. [JA _ (AR 2885).]

compression and looping alternatives with the Project. [JA _ (AR 2790).] In support of the compression alternative, the draft EA noted that this alternative would meet the purpose and need of the project, was "technically feasible," and would eliminate the need for the new pipeline looping and all waterbody crossings (including the approximately 10,000 feet of wetland crossings). [JA _ (AR 2790-91).] Weighing against the compression alternative, the draft EA noted that the "economic efficiency" of the compression alternative was "lower" than that of the Project, [JA _ (AR 2790)]; that construction of the compression alternative would "require permanent land use conversion" of the 40-acre area (affecting between 28-38 acres of forested land and the remainder agricultural lands); and that the compressor station would present a new source of light, air emissions, and noise. [JA _ (AR 2791).] The draft characterized the environmental impacts of the compression alternative as "different," "comparable," and "possibly lower." But the draft also stated that the impacts from the compressor station in terms of air emissions, noise source, and the aboveground footprint are "permanent," "while the bulk of the Project impacts are temporary (such as waterbody crossings) or adjacent to the existing right-of-way." [JA _ (AR 2791).][11]

The final EA did not contain a discussion of the compression alternative. Instead, it explained that the agencies considered various alternatives, and that each

[11] TGP's submission to the Corps and FERC stated that the compression alternative would require it to obtain a "total of 80 acres." [JA _ (AR 540).] The internal draft

alternative "was considered to the point where it was clear the alternative was not reasonable, would result in greater environmental impacts than those of the Project, or it could not meet the Project objective." [JA _ (AR 3176).] The final EA then provided analysis for the no-action alternative, looping alternatives, other company system alternatives, and Lackawaxen River crossing alternatives. [JA _ (AR 3177).][12]

The final EA also estimated that the footprint of all project-related disturbances (including temporary construction activities) was 262.6 acres, with the

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EA described the compression option as requiring a single (40-acre) station. [JA _ (AR 2789-91).] While there may be ambiguity on this issue, even assuming that only one compressor station would be needed, the construction of that new station on 40 acres would require "permanent land use conversion of the 40-acre area," which includes 28 to 38 acres of forested lands, [JA _ (AR 2790)], and it would have other environmental consequences, which support the Corps' ultimate conclusion regarding the comparative impacts of the preferred alternative.

[12] In support of their assertion that the compression alternative was not considered, Petitioners rely on a sentence in the final EA which states that because no new major aboveground facilities were associated with the Project, "we did not evaluate any aboveground facility site alternatives." Pet'rs Br. at 22 (citing JA _ (AR 3176)). In the context of the full Administrative Record, the logical reading of this sentence is that the EA did not consider alternatives to the portion of the proposed Project which would have involved modifications of its existing aboveground compressor facility, *see* [JA _ (AR 555)], not that the EA did not consider aboveground alternatives to the pipeline loops themselves. The notion that the compression alternative was at no point considered by the agencies is simply at odds with the internal draft EA, which discussed the compression alternative, as well as the final decisions of FERC and the Corps, which both explicitly reference and reject the compression alternative. [JA _ (AR 4735); (FERC Order at 23).]

new permanent right-of-way associated with the project estimated at 43.9 acres.[13] Of the permanent right-of-way, there would be impacts on 12.5 acres of forest lands. [JA _ (AR 3123).] Because the pipeline looping would be installed underground, with the ground restored to conform to pre-existing contours and topsoil replaced and seeded as appropriate, [JA _ (AR 3098)], the EA found that impacts throughout the right-of-way would be minimized, and that the Project would not have a significant impact on vegetation. [JA _ (AR 3123).] And as noted above, for the approximately 10,000 feet of wetland crossings, the EA determined that there would be no net loss of wetlands and that the permanent impacts to wetlands would be only in the form of conversion of forested and scrub/shrub wetland into emergent wetlands. [JA _ (AR 3119).]

c. The Corps' assessment of the compression alternative was commensurate with the level of aquatic impacts and sufficient to permit the Project.

When the Corps made its permitting decision, it had information that the "compression" alternative would result in "higher Project operating and fuel costs," [JA _ (AR 540)], and had a lower "economic efficiency" than the Project, [JA _ (AR 2790)]. This information alone would support a finding that the compression alternative was not "practicable" under the Guidelines, particularly under the rule of commensurate review.[14] But even if the information relating to costs was not

[13] *See* [JA _ (AR 3095) ("The Project would require approximately 79.3 acres of permanent right-of-way for operation, of which 43.9 acres would be new permanent right-of-way.").]

[14] *See* 40 C.F.R. §§ 230.6(b), 230.10(a); *see also Hillsdale Envtl. Loss Prevention, Inc. v. Corps*, 702 F.3d 1156, 1163 (10th Cir. 2012) (*quoting Greater Yellowstone Coalition*, 359

sufficient to show impracticability, the Corps also had before it the EA's determination that there were no reasonable alternatives that would "result in significantly less environmental impacts." Under the plain terms of subsection (a) of the Guidelines, the Corps is prohibited from issuing a permit only if there exists a "practicable alternative" that itself "does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). Thus, even if the compression alternative was practicable and would have had less adverse impacts on aquatic ecosystems – or as the internal draft EA indicated, no adverse impact on aquatic ecosystems – that would not have barred issuance of the permit, if the compression alternative involved other significant adverse environmental consequences. Here, the record indicated that the compression alternative's permanent footprint – in terms of light, air, and noise emissions, as well as the comparative acreage impact on *forested* lands – would be larger than the Project's permanent footprint, particularly when considering restoration post-construction.

At bottom, Petitioners' objection is with the Corps' assessment that the permanent clearing of a new greenway for the construction of a compressor station would be a significant adverse environmental consequence that warrants proceeding with the preferred alternative. Although the latter alternative concededly has a larger *temporary* footprint, it undoubtedly has less *permanent* impact on forested and other

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F.3d at 1271); *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1150 (D.C. Cir. 2011) (affirming the rejection of an alternative as not "practicable" based on cost).

resources. While Petitioners are free to disagree with the Corps' assessment, the law gives the decision not to Petitioners but the Corps, so long as its assessment is not irrational or a clear error of judgment. For the above-stated reasons, it was not.

The lead agency in the environmental review process also concluded that "no reasonable alternative would result in significantly less environmental impacts and accomplish the project's objective." [JA _ (FERC Order at 23 & n. 91) (citing TGP's Resource Report as "evidence that the Orion Project could not be satisfied by relying on other transportation systems or . . . compression," contrary to Petitioners' suggestions that alternatives would potentially result in less impact). It was therefore entirely consistent with the statutory and regulatory framework of the Natural Gas Act and reasonable for the Corps to rely on and defer to FERC's expertise regarding pipeline alternatives. *See Town of Norfolk v. Corps*, 968 F.2d 1438, 1447-48 (1st Cir. 1992); *California Trout v. Schaefer*, 58 F.3d 469, 474 (9th Cir. 1995); *River Road Alliance, Inc. v. Corps.*, 764 F.2d 445, 452-53 (7th Cir. 1985) (noting that the "Corps is not a business consulting firm" and therefore is entitled to rely on studies provided by the applicant); *Alliance for Legal Action*, 314 F. Supp. 2d at 548; *see also* [JA _ (AR 30) (FERC-Corps MOU).]

And while Petitioners complain about the brevity of the Corps' analysis, the Corps is not required to provide an extensive analysis of all alternatives. The Court can clearly determine from the Corps' Statement of Findings the reason for permitting the preferred alternative – it avoided "clearing of a new greenway," and had only

relatively minor and temporary impacts. That rationale finds support in the record, as shown above. Moreover, the Section 404 Guidelines themselves make clear that more extensive analysis is not required here. Under the Guidelines' rule of "commensurate review," it is "not intended or expected that extensive testing, evaluation or analysis will be needed to make findings of compliance" for permit applications with little potential for significant aquatic degradation, 40 C.F.R. § 230.6(a), and it is therefore contemplated that the level of analysis and documentation that is required by the Corps will "var[y] in magnitude depending on the impact of the proposed discharge." *Town of Norfolk*, 968 F.2d at 1447; *see also* 40 C.F.R. § 230.6(b); 40 C.F.R. § 230.10 note. The Corps recognized that this was one of those cases where the aquatic impacts were minimal, and it appropriately determined that the documentation relating to project alternatives was sufficient and that its analysis was commensurate with the impacts. [JA _ (AR 4735)]. The Corps' assessment that there was no practicable alternative that was without significant adverse environmental consequences was commensurate with the minimal impacts associated with the Project. *See Greater Yellowstone Coalition*, 359 F.3d at 1270-71 (finding that the Corps' failure to require the applicant to prove the impracticability of committing more of an adjacent ranch property to the project's proposed golf course did not render the permit decision arbitrary and capricious, given that the Corps' "level of effort and documentation" was commensurate with

project's minimal impact on wetlands when considering other effects of the project as well as restoration and mitigation).

CONCLUSION

The Petition for Review challenging the Corps' issuance of a Section 404 Permit for the Orion Project should be denied.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

DAVID C. SHILTON
MICHAEL T. GRAY

/s/ Varu Chilakamarri
VARU CHILAKAMARRI
U.S. Department of Justice
Environment & Natural Res. Div.
Washington, DC 20026
(202) 353-3527

Dated: May 12, 2017
DJ # 90-13-9-14934

CERTIFICATE OF SERVICE

I certify that on May 12, I filed the foregoing brief using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this Opposition upon its filing.

/s/ Michael T. Gray
Michael T. Gray
Counsel for Federal Respondents

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this response contains fewer than 13,000 words.

This response to a motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

/s/ Varu Chilakamarri
Varu Chilakamarri
Counsel for Federal Respondents

Aaron Stemplewicz

From: Aaron Stemplewicz [redacted]
Sent: Thursday, May 04, 2017 2:39 PM
To: Cigan, Joseph S [redacted]
Subject: 17-1533
Attachments: 2016-07-10 Draft EA.pdf

Joe,

See pages 88-90. To the extent the comments here are true - and I don't see any evidence of them not being true or any evidence in the record you provided contradicting the statements made therein - I don't know how this alternative could be possibly interpreted as not being available pursuant to 105.14(b)(7). If that is the case, we should talk.

I have a FOIA out to FERC to disclose all parties who were copied or had access to this document, and expect a response in the next couple weeks.

Let me know what you think.

-Aaron

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Remember the River
www.delawareriverkeeper.org/remember

Attachment B. Draft Environmental Assessment for Tennessee's Orion Project. June 10, 2016.

Federal Energy Regulatory Commission

Office of
Energy Projects

July 2016

Tennessee Gas Pipeline Company, L.L.C **Docket No. CP16-4-000**

Orion Project

Environmental Assessment

Cooperating Agency:
US Army Corps of Engineers

Washington, DC 20426

4.1 Other Pipeline Company Alternatives

There is significant fuel conversion-driven demand in the United States for additional supplies of natural gas to supply utility companies and other users. Because TGP currently operates a transmission system in the northeast, TGP can supply the increased demand for natural gas in this area using efficiencies afforded by its existing system. The Project has a firm purchaser commitment and can meet the demand sooner than a hypothetical project not yet planned or committed. Therefore, we did not consider any system alternatives involving the use of other (non-TGP) natural gas pipeline systems.

4.2 System Alternatives to TGP's Project

We evaluated technically feasible system alternatives in terms of their ability to meet the Project objectives, namely to provide firm transportation capacity for 135,000 dekatherms per day to supply three Project Shippers. Four options are feasible: two new pipeline looping options, and two new compression options.

4.2.1 Pipeline Looping Alternatives

Looping Alternative 322

We evaluated a looping alternative, referred to as Looping Alternative 322, which would require construction of approximately 9.4 miles of 36-inch-diameter pipeline looping beginning approximately 3 miles east of the existing Compressor Station 321 in Susquehanna County and continuing east into Wayne County. This looping alternative would replace the proposed 322 Loop. While this alternative would affect less wetland habitat than the proposed 322 Loop, it would require 1.1 miles of additional pipeline construction and would cross an additional 2.9 miles of forested land and 1.8 miles of agricultural land. While this alternative would meet the purpose and need and is technically and economically feasible and practical, it presents no environmental advantage over the Project. Table C.4-1 provides a comparison of Looping Alternative 322 to the portion of the Project that this alternative would replace.

Looping Alternative 323

We also evaluated a looping alternative, referred to as Looping Alternative 323, which would require construction of approximately 5.4 miles of 36-inch-diameter loop beginning approximately 10 miles southeast of Compressor Station 323 in Pike County. This looping alternative would replace the proposed 323 Loop. This looping would require approximately 0.7 mile of additional pipeline construction and would cross an additional 4.9 miles of forested land; however, it would cross 3 fewer waterbodies and would affect less wetland habitat. While this alternative would meet the purpose and need, is technically and economically feasible and practical, and presents some environmental advantages over the Project, it would also require additional land disturbance and land use modifications due to the additional length. Table C.4-1 provides a comparison of Looping Alternative 323 to the portion of the Project that this alternative would replace.

4.2.2 Compression Alternatives

Compression options involve either the addition of more compressor horsepower at existing facilities or the installation of a new compressor station facility. To achieve the Project objectives, we identified a possible compression alternative, which would involve development of a new compressor station requiring approximately 40 acres of new greenfield construction. Two potential sites were identified. The compressor station would add approximately 10,000 horsepower of capacity either upstream or downstream of the existing Compressor Station 323 to overcome the loss of capacity from loop elimination. Other upgrades to existing compressor stations, without looping, did not offer the same reliability and flexibility on the system.

TABLE C.4-1

Comparison of System Alternatives

Aspect	Unit	Project Total	Project (Loop 322)	Looping Alternative 322	Project (Loop 323)	Looping Alternative 323	Compression Alternative (Site 1)	Compression Alternative (Site 2)
Length of new pipeline	Miles	12.9	8.2	9.4	4.7	5.4	0	0
Construction right-of-way	Acres	260.3	133.0	153.8	76.2	88.4	40	40
Permanent right-of-way	Acres	78.8	50.1	57.0	28.7	32.4	40	40
New aboveground facility land impacts (temporary / permanent)	Acres	0.4 / 0.1	N/A	N/A	N/A	N/A	40 / 40	40 / 40
Road crossings	Number	13	8	14	5	5	0	0
Public land crossings	Miles	0	0	0	0	0	0	0
Structures within 200 feet	Number	14	12	12	2	9	0	0
Wetlands crossed	Feet	9,552	8,132	950	1,420	1,056	0	0
Waterbodies crossed	Number	30	15	8	10	7	0	0
Steep terrain crossed	Feet	2,112	686	528	1,426	106	0	0
Forested areas crossed	Miles or Acres	2.0 miles	2.0 miles	4.9 miles	<0.1 mile	4.9 miles	28 acres	38 acres
Agricultural land affected	Miles or Acres	0.4 mile	0.4 mile	2.2 miles	0	0	12 acres	2 acres
Additional compression	Horsepower	0	0	0	0	0	10,000	10,000
New noise source	Number	0	0	0	0	0	1	1
Fuel efficiency	Comparative	Base case	Base case	Comparable	Base case	Comparable	Higher	Higher
Meets purpose and need	Comparative	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Technical feasibility	Comparative	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Environmental impacts	Comparative	Base case	Base case	Comparable	Base case	Higher	Different but comparable	Different but comparable
Economic efficiency	Comparative	Base case	Base case	Lower	Base Case	Lower	Lower	Lower

The new station would require permanent clearing of trees and other vegetation and installation of permanent access roads, fencing, buildings, and other appurtenance equipment. Construction would require permanent land use conversion of the 40-acre area and would present a new source of light, air emissions, and noise. Based on an assessment of land use in the general study area, the general location of a new compressor station would affect approximately 28 acres of forested land and 12 acres of agricultural land at Site 1, and approximately 38 acres of forested land and 2 acres of agricultural land at Site 2. The new station would, however, eliminate the need for 12.9 miles of new pipeline construction, which would eliminate 30 waterbody crossings, 13 road crossings, and impacts on wetlands and other land use impacts along the pipeline route. A more detailed comparison of these alternative compressor station sites to the Project is presented in table C.4-1.

This alternative meets the purpose and need, is technically feasible, and has some environmental advantages as well as disadvantages over the Project. This alternative would have different environmental impacts from the Project; however, the impacts associated with this alternative would be comparable or possibly lower. The impacts of the compressor station as an air emission and noise source and aboveground facility are permanent, while the bulk of the Project impacts are temporary (such as waterbody crossings) or adjacent to the existing right-of-way.

4.2.3 Comparison of System Alternatives to the Project

Table C.4-1 summarizes the comparison of the system alternatives to the Project. We conclude that the system alternatives identified would not provide a significant environmental advantage over the Project.

5. Alternative Pipeline Routes

Route alternatives are alternatives that differ from the proposed route and may be major and deviate from the proposed route for an extended distance, or be minor and deviate from the proposed route for a short distance. The proposed routes for the pipeline loops are primarily co-located within and adjacent to TGP's existing 300 Line right-of-way. Any newly identified alternative pipeline route would involve development of new right-of-way, resulting in greater environmental impacts than the proposed pipeline route. Since the Project is co-located within existing rights-of-way, we did not identify any routing alternatives that could result in a reduced environmental impact. In addition, we did not receive any comments requesting that we consider any pipeline route alternatives.

6. Aboveground Facility Site Alternatives

There are no modifications to or construction of new major aboveground facilities associated with the Project. The only aboveground alternative evaluated was the compression alternative in section B.4.2.2. We also did not receive any requests to examine additional aboveground alternatives and find that siting the proposed modification within the existing aboveground facilities would adequately minimize impacts.

7. Lackawaxen River Crossing Alternatives

TGP is proposing to cross the Lackawaxen River at approximately MP 10.4 along Loop 323. As detailed in sections A.6.1.7 and B.2.1, TGP is proposing to cross the Lackawaxen River using the cofferdam crossing method as the primary crossing method. In the event that the cofferdam crossing method is unable to be implemented, TGP would propose to cross the Lackawaxen River using the open cut method. Our environmental analysis in section B analyzed the impacts associated with TGP's primary crossing method. In this section we provide an analysis of other alternative crossing methods.

Commented [KR13]: Section doesn't exist, follow up with ERM.

Attachment C. Environmental Assessment for Tennessee's Orion Project. August 2016.

Federal Energy Regulatory Commission

Office of
Energy Projects

August 2016

Tennessee Gas Pipeline Company, L.L.C. Docket No. CP16-4-000

Orion Project

Environmental Assessment

Cooperating Agency:

US Army Corps of Engineers

Washington, DC 20426

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:
OEP/DG2E/Gas 4
Tennessee Gas Pipeline Company, L.L.C.
Orion Project
Docket No. CP16-4-000

TO THE PARTY ADDRESSED:

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared this environmental assessment (EA) for the Orion Project (Project) proposed by Tennessee Gas Pipeline Company, L.L.C. (TGP) in the above-referenced docket. TGP requests authorization to construct pipeline facilities in Pennsylvania to increase natural gas delivery capacity in the region by approximately 135,000 dekatherms per day.

The EA assesses the potential environmental effects of the construction and operation of the Project in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA). The FERC staff concludes that approval of the Project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The U.S. Army Corps of Engineers participated as a cooperating agency in the preparation of the EA. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis.

TGP's Project involves construction of approximately 12.9 miles of 36-inch-diameter looping[1] pipeline in two segments; a new pig[2] launcher and connecting facilities at the beginning of the proposed pipeline loop; and a new pig receiver, a new odorant facility, and additional modifications at TGP's existing Compressor Station 323.

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[1] A loop is a segment of pipe that is usually installed adjacent to an existing pipeline and connected to it at both ends. The loop allows more gas to be moved through the system.

[2] A "pig" is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the Project area. In addition, the EA has been placed in the public files of FERC and is available for viewing on FERC's website at www.ferc.gov using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at:

Federal Energy Regulatory Commission
Public Reference Room
888 First Street NE, Room 2A
Washington, DC 20426
(202) 502-8371

Any person wishing to comment on the EA can do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to lessen or avoid environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this Project, it is important that we receive your comments in Washington, DC on or before **September 22, 2016**.

For your convenience, there are three methods you can use to file your comments with the Commission. In all instances, please reference the Project docket number (CP16-4-000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at 202-502-8258 or efiling@ferc.gov.

(1) You can file your comments electronically by using the eComment feature, which is on the Commission's website (www.ferc.gov) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature on the Commission's website (www.ferc.gov) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing"; or

(3) You can file a paper copy of your comments at the following address:

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, DC 20426

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 Code of Federal Regulations 385.214).[3] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other parties can adequately represent. **Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.**

Additional information about the Project is available from the Commission's Office of External Affairs at **(866) 208-FERC** or on the FERC website (www.ferc.gov) using the eLibrary link. Click on the eLibrary link, click on "General Search," and enter the docket number excluding the last three digits in the Docket Number field (i.e., CP16-4). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notifications of these filings, document summaries, and direct links to the documents. Go to (www.ferc.gov/docs-filing/esubscription.asp).

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[3] See the previous discussion on the methods for filing comments.

C. ALTERNATIVES

In accordance with NEPA and FERC policy, we evaluated alternatives to the Project to determine whether they would be reasonable and environmentally preferable to the proposed action. These alternatives included the no-action alternative, system alternatives, and waterbody crossing alternatives. The evaluation criteria used for developing and reviewing alternatives were:

- technical and economic feasibility and practicality;
- significant environmental advantage over the proposed action; and
- ability to meet the Project's stated objective which is to provide the contracted new capacity of approximately 135,000 PAGC of natural gas capacity to the Project shippers.

Our evaluation of the identified alternatives is based on Project-specific information provided by TGP, affected landowners, and other concerned parties; publicly available information; our consultations with federal and state resource agencies; and our expertise and experience regarding the siting, construction, and operation of natural gas transmission facilities and their potential impact on the environment. None of the environmental comments received on the Orion Project identified specific alternatives to the proposed looping segments. Further, there are no new major aboveground facilities associated with the Project; all of the proposed modifications would take place at the existing Compressor Station 323. Therefore, we did not evaluate any aboveground facility site alternatives. However, as previously noted, we received comments regarding the proposed Lackawaxen River crossing; therefore, we evaluated alternative crossing methods for the Lackawaxen River.

Each alternative was considered to the point where it was clear the alternative was not reasonable, would result in greater environmental impacts than those of the Project, or it could not meet the Project objective.

1. NO-ACTION ALTERNATIVE

If the Commission were to deny TGP's application, the Project would not be built and the environmental impacts identified in this EA would not occur. Under this alternative, TGP would not be able to increase the transportation capacity of its existing system. As a result, the Project's objective would not be met.

As discussed in section C.2, we did not identify any other existing pipeline systems in the region that could provide the capacity of the Project; therefore, new natural gas facilities in the same region would be required to provide the subscribed Project capacity. TGP's proposal involves pipeline looping (rather than a new greenfield pipeline alignment); whereas the no-action alternative would require new natural gas facilities to meet the subscribed Project capacity, which would likely result in the construction of new facilities to meet the known demand for additional capacity. Such actions could result in impacts similar to or greater than the proposed Project, and would likely not meet the Project's purpose and need within the proposed timeframes. Therefore, we have concluded that the no-action alternative would not satisfy the Project objectives, and we are not recommending it.

2. SYSTEM ALTERNATIVES

System alternatives would make use of existing, modified, or proposed pipeline systems to meet the stated objectives of the Project. Although some modifications or additions to existing or proposed pipeline systems may be required, implementation of a system alternative would deem it unnecessary to construct all or part of the Project. These modifications or additions could result in environmental impacts that are less than, similar to, or greater than those associated with construction and operation of

the Project. The purpose of identifying and evaluating system alternatives is to determine whether the environmental impacts associated with construction and operation of the Project could be avoided or reduced by using another pipeline system, while still meeting the objectives of the Project.

TGP System Alternatives

Potential looping system alternatives on TGP's system would essentially shift the location of looped pipeline from one portion of TGP's 300-Line System to another. Our evaluation of the proposed loops concluded that construction and operation of the Project would not result in significant environmental impacts due in part to the Project being co-located within existing rights-of-way. As such, we did not consider any specific TGP looping system alternatives.

Other Company System Alternatives

There is significant fuel conversion-driven demand in the United States for additional supplies of natural gas to supply utility companies and other users. Because TGP currently operates a transmission system in the northeast, TGP can supply the increased demand for natural gas in this area using efficiencies afforded by its existing system. The Orion Project has a firm purchaser commitment and can meet the demand sooner than a hypothetical project not yet planned or committed. Further, the proposed loops were selected to minimize environmental impacts to the greatest extent possible while using existing rights-of-way to limit the need for construction on undisturbed lands. We did not identify any other existing systems in the area that could deliver the same quantities of gas, at similar locations, without substantial additional pipeline construction, which would likely include greenfield pipeline. Because the existing 300 Line already connects to the Project shippers' specified receipt and delivery points, the modification or expansion of another existing or new pipeline system that does not connect at or near the specified receipt and delivery points would require construction with similar or greater environmental impact than TGP's proposal. Therefore, we did not further evaluate the expansion of another existing pipeline system to meet the Project objectives.

3. LACKAWAXEN RIVER CROSSING ALTERNATIVES

We received comments that alternatives to TGP's proposed crossing of the Lackawaxen River should be considered. TGP proposes to cross the Lackawaxen River at approximately MP 10.4 along Loop 323 using the cofferdam crossing method (detailed in sections A.6.1.6 and B.2.1). In the event that the cofferdam crossing method is unable to be implemented, TGP indicates it would propose to cross the Lackawaxen River using the open cut method. Our environmental analysis in section B analyzed the impacts associated with TGP's proposed cofferdam crossing method. In this section we evaluate alternative crossing methods for the Lackawaxen River.

We considered five different methods for the Lackawaxen River crossing: cofferdam, horizontal directional drill (HDD), conventional bore/micro-tunneling, dam and pump, and open cut (wet) crossing. The conventional bore/micro-tunneling and dam and pump methods are neither technically feasible nor practical to accomplish at the proposed crossing location due to the depth and width of the Lackawaxen River and are not carried through in this analysis. The HDD crossing method is also not technically feasible due to geotechnically unfavorable surface and subsurface conditions, including vertical differences between the surface elevation at the entry and exit points, and gravel deposits with cobbles and boulders underlying the Lackawaxen River at this location. Further details regarding the technical feasibility of HDD crossing are included in section C.3.2. We also examined the HDD crossing method at an alternate location approximately 1.8 miles downstream of the proposed crossing location where surface conditions were more favorable. Table C.7-1 compares engineering and environmental factors associated with each crossing type analyzed.

TABLE C.7-1

Lackawaxen River Crossing Method Comparison

	Crossing Method			
	Cofferdam	HDD (Proposed Crossing Location)	Open cut	HDD (Alternative Crossing Location)
TECHNICALLY FEASIBLE	Yes	No	Yes	Yes
WORKSPACE REQUIREMENTS (acres)				
Forest	3.4	7.6	3.4	37.9
Open	19.4	11.8	18.9	6.3
Developed	0.4	0.1	0.2	3.4
Open Water	0.9	0.0	0.9	0.5
Total	24.1	19.6	23.4	48.1
SCHEDULE (days to complete)				
Total	65-75	180-200	36–48	180–200
Instream Work	40-50	NA	10–12	NA
TURBIDITY AND SEDIMENTATION	Minimal and Local Increase	None	150–290 ppm [a] Increase	None
STRUCTURES WITHIN 200 Feet	0	0	0	20
RECREATIONAL USE IMPACTS	Medium	Low	High	Low

[a] ppm = parts per million

3.1 Open Cut (Wet) Crossing Method

We evaluated the feasibility of crossing the Lackawaxen River using the open cut crossing method. As further described in section A.6.1.6, the open cut or wet crossing method consists of excavating a pipeline trench in a waterbody without diverting or pumping water from the workspace/crossing area. This method is technically feasible and would meet the Project objectives.

This crossing method would not involve the diversion or pumping of water from the workspace; therefore, it offers the minimal duration of instream activities (approximately 10 to 12 days). However, it would require the installation of a temporary equipment bridge, as well as a rock filter downstream of the crossing location, to catch sediment washed away from the workspace. The majority of additional workspace required for this crossing method would be in existing open spaces; similar to the impacts associated with the cofferdam crossing method (see table C.7-1). Peak suspended sediment concentrations would be expected during trench excavation and equipment bridge removal. Recreational use of the Lackawaxen River would be restricted during the construction phase of the river crossing; however, due to the shorter in-water work window, this restriction in use would be much shorter in duration for an open cut crossing than for the cofferdam method.

In the event that the cofferdam crossing method is unable to be implemented, TGP proposes to cross the Lackawaxen River using the open cut crossing method. This method has been identified by TGP as an alternate crossing method in the Section 401/404 permit application submitted to the USACE and PADEP. Because of the possibility of increased sedimentation and turbidity and the increased recreational impact, we did not find an open cut crossing environmentally preferable and thus we do not recommend it as the primary crossing method for the Lackawaxen River. However, if the cofferdam were to fail or otherwise not enable TGP to complete a successful crossing of the Lackawaxen River, we acknowledge that an open cut crossing would be acceptable, contingent upon TGP receiving the necessary permits from the USACE and/or NPS as well as approval from the FERC in accordance with established variance protocols (see recommended condition 5 in section D).

3.2 Horizontal Directional Drill Crossing Method

Proposed Crossing Location HDD

We evaluated the feasibility of crossing the Lackawaxen River using the HDD method. The HDD method allows for trenchless construction across an area by drilling a hole below the depth of a conventional lay, and then pulling a prefabricated section of pipe through the hole. This method is used to avoid direct impacts on sensitive environmental features or areas that otherwise present difficulties for standard pipeline construction. Although only a limited geotechnical study of the proposed crossing was completed, the Lackawaxen River area is underlain by gravel deposits with cobbles and boulders. Therefore, at the proposed crossing, the HDD method would pose a high risk for inadvertent returns (loss of drilling fluid) into the Lackawaxen River or surrounding upland areas, which would cause impacts on water quality and possibly on the recreational use of the river. Depending on the amount of an inadvertent release of drilling mud, there could also be downstream impacts on the Delaware River. In addition, the vertical topographic difference (160 feet) of the entry and exit holes for the HDD create a potential "dry hole" situation, which would increase the risk of lost tooling, stuck carrier pipe, and/or hole collapse.

Although the HDD method would require less overall workspace than the cofferdam and open cut methods (see table C.7-1), it would require additional workspace in forested areas to fabricate the entire length of pipe (approximately 1,500 feet long and 125 feet wide). This workspace would require the clearing of approximately 4.2 acres of trees, which could negatively affect interior-dwelling bird species as well as federally listed bat species if present in the area (see section B.3.4). Further, the HDD method would require 180 to 200 days to complete, which would be more than double the construction time of other crossing methods. Because of the increased impacts on forested areas and the geotechnical/and topographical conditions in the project area which could result in a failed HDD or a greater risk of inadvertent returns, we conclude that the HDD crossing method at the proposed cofferdam site is technically infeasible and not environmentally preferable, and we do not recommend it.

Alternate Crossing Location HDD

We also evaluated the HDD crossing method at an alternative crossing location approximately 1.8 miles downstream of the proposed crossing. The topography of the alternate site demonstrates level terrain on both sides of the river, which would reduce the risk of lost tooling, stuck carrier pipe, and/or hole collapse due to topographic concerns. However, subsurface characteristics are similar at this crossing location as compared to the proposed crossing location; therefore, the risk of inadvertent returns would be similar to the proposed crossing location. The alternative HDD crossing location would also require an additional 3.6 miles of new pipeline right-of-way, which would increase the amount of land that would need to be cleared by almost 5 times and would result in substantially more forest clearing (about 37.9 acres—see table C.7-1). In addition, 20 structures are within 200 feet of the right-of-way to the alternate site, which would result in additional residential impacts. Additional details regarding potential impacts associated with this crossing method are included in table C.7-1. Because of the increased impacts due to the additional 3.6 miles of new right-of-way that would be required and the geotechnical conditions being similar to proposed crossing location, we did not find the alternate crossing location HDD to be environmentally preferable, and we do not recommend it.

3.3 Lackawaxen River Crossing Conclusions

Based on information provided by TGP and our review, we conclude that both the cofferdam and open cut crossing methods are technically feasible, and, with sufficient mitigation, do not present significant environmental impacts. However, we find the proposed cofferdam crossing method to be environmentally preferable assuming that it can be successfully implemented based on in-stream flow conditions at the time of the crossing. In the event that the cofferdam crossing method is not able to be implemented for the Lackawaxen River crossing, TGP would be required to file a request for a revised crossing method with the FERC, including all associated regulatory approvals from the USACE, PADEP, and the NPS for their reviews under the Clean Water Act and the National Wild and Scenic Rivers Act prior to implementing the change. We also conclude that topographic and geologic concerns do not justify the use of the HDD method, either at the proposed crossing location or at the identified alternate crossing location.