



1/23/14

Pennsylvania Department of Environmental Protection

Southeast Region

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Phone: 484 250-5900

Re: Comment: Columbia Gas Transmission's Eastside Expansion Project Chapter 105 Water Obstruction and Encroachment Permit Application (E15-846)

The Delaware Riverkeeper Network ("DRN") submits the following comment on the Chapter 105 Water Obstruction and Encroachment Permit application with respect to the Eastside Expansion Project (the "Project") proposed by Columbia Gas Transmission ("Columbia"). Where a water obstruction or encroachment affects an exceptional value ("EV") wetland, the Pennsylvania Department of Environmental Protection ("DEP") may not grant a permit under Chapter 25 unless (1) the applicant affirmatively demonstrates in writing that the seven requirements of 105.18a(a) are met, and (2) DEP issues a written finding that those seven requirements have been met. 25 Pa. Code § 105.18a(a); see *Davailus v. DER*, 1991 EHB 1191 (indicating that where the regulations under chapter 105 state that the department "will" consider factors or take specified actions, the department fails to follow its own procedures, and therefore acts arbitrarily, where it neglects to consider those factors or take those actions, because "will" is mandatory, not precatory language).

The first requirement pursuant to 105.18a(a) requires that applicants demonstrate that the permitted activities will have **no adverse impact** on the exceptional value wetland, or that the

project is necessary to abate a substantial threat to the public health or safety. 25 Pa. Code § 105.18a(a)(1) and (c).

Columbia's Project will likely have an adverse impact on several EV wetlands in Pennsylvania resulting from their permanent conversion from Palustrine Forested Wetlands or Scrub-Shrub Wetlands to Emergent Wetlands, thus resulting in a significant loss to the values and functionality of those EV wetlands. As such, the proposed project cannot meet the standards of 105.18a(a), and DEP is prohibited from providing a Chapter 105 Water Obstruction and Encroachment permit for the project. Furthermore, the application is missing critical data pursuant to Chapter 105.17 that must be included in the application.

I. Pennsylvania's Chapter 105 Water Obstruction and Encroachment Permit Forbids Adverse Impacts to Exceptional Value Wetlands

Chapter 105 of the Pennsylvania code establishes a clear regulatory regime with respect to the protections afforded to wetlands within the state. *See generally* 25 Pa. Code 105.17-105.18a, et seq. Permit applicants for a Chapter 105 Water Obstruction and Encroachment Permit must demonstrate that the permitted activities will have no adverse impact on an exceptional value wetland, or that the project is necessary to abate a substantial threat to the public health or safety.

Wetlands in Pennsylvania are classified as either "exceptional value wetlands" or "other wetlands." 25 Pa. Code § 105.17(1)-(2). "Exceptional value wetlands" are wetlands that exhibit one or more of the following characteristics:

- (i) Wetlands which serve as habitat for fauna or flora listed as "threatened" or "endangered" under the Endangered Species Act of 1973 (7 U.S.C.A. § 136; 16 U.S.C.A. §§ 4601-9, 460k-1, 668dd, 715i, 715a, 1362, 1371, 1372, 1402 and 1531—1543), the Wild Resource Conservation Act (32 P. S. §§ 5301—5314), 30 Pa.C.S. (relating to the Fish and Boat Code) or 34 Pa.C.S. (relating to the Game and Wildlife Code).

(ii) Wetlands that are hydrologically connected to or located within 1/2-mile of wetlands identified under subparagraph (i) and that maintain the habitat of the threatened or endangered species within the wetland identified under subparagraph (i).

(iii) Wetlands that are located in or along the floodplain of the reach of a wild trout stream or waters listed as exceptional value under Chapter 93 (relating to water quality standards) and the floodplain of streams tributary thereto, or wetlands within the corridor of a watercourse or body of water that has been designated as a National wild or scenic river in accordance with the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. § § 1271—1287) or designated as wild or scenic under the Pennsylvania Scenic Rivers Act (32 P. S. § § 820.21—820.29).

(iv) Wetlands located along an existing public or private drinking water supply, including both surface water and groundwater sources, that maintain the quality or quantity of the drinking water supply.

(v) Wetlands located in areas designated by the Department as “natural” or “wild” areas within State forest or park lands, wetlands located in areas designated as Federal wilderness areas under the Wilderness Act (16 U.S.C.A. § § 1131—1136) or the Federal Eastern Wilderness Act of 1975 (16 U.S.C.A. § 1132) or wetlands located in areas designated as National natural landmarks by the Secretary of the Interior under the Historic Sites Act of 1935 (16 U.S.C.A. § § 461—467).

25 Pa. Code § 105.17(1)(i)-(v). Any wetlands that do not meet one or more of the abovementioned characteristics are defined as “other wetlands.” 25 Pa. Code § 105.17(2).

DEP “will not grant a permit under this chapter for a dam, water obstruction or encroachment located in, along, across or projecting into an exceptional value wetland, or otherwise affecting an exceptional value wetland” if the dam, water obstruction or encroachment will have an “**adverse impact on the wetland** as determined in accordance with §§ 105.14(b) and 105.15.” 25 Pa. Code § 105.18a(a)(1) (emphasis added). The **only** reference in 25 Pa. Code 105.14(b) that specifically provides guidance to DEP for making a determination of an “adverse impact” on wetlands is § 105.14(b)(13). This section clarifies that DEP must

“consider the impact on the wetlands values and functions.” 25 Pa. Code § 105.14(b)(13).

Wetland functions are defined in the code to include, but are not limited to, the following:

- (i) Serving natural biological functions, including food chain production; general habitat; and nesting, spawning, rearing and resting sites for aquatic or land species.
- (ii) Providing areas for study of the environment or as sanctuaries or refuges.
- (iii) Maintaining natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, natural water filtration processes, current patterns or other environmental characteristics.
- (iv) Shielding other areas from wave action, erosion or storm damage.
- (v) Serving as a storage area for storm and flood waters.
- (vi) Providing a groundwater discharge area that maintains minimum baseflows.
- (vii) Serving as a prime natural recharge area where surface water and groundwater are directly interconnected.
- (viii) Preventing pollution.
- (ix) Providing recreation.

25 Pa. Code § 105.1. Therefore, to the extent that any project applicant seeking a Chapter 105 Water Obstruction and Encroachment permit proposes a project that results in the loss of functionality as defined in § 105.1 of an EV wetland, the impact is adverse and the proposed permit application must be denied.

II. Columbia’s Proposed Permanent Conversion of Palustrine Forested Wetlands and Palustrine Scrub-Shrub Wetlands to Emergent Wetlands Degrades Wetland Functions and Values, and Therefore is an Adverse Impact Under Chapter 105

On December 11, 2013 Columbia submitted an authorization application to receive a Chapter 105 permit from DEP. The project description of the application states that “impacts to 19 wetlands are ... proposed: 14 palustrine emergent (PEM), 1 palustrine emergent/scrub-shrub (PEM/PSS), and 4 palustrine forested (PFO) wetlands.” Section J, 2. The project description

further provides that a total of 5.05 acres of wetlands will be impacted, and that .09 acres of wetlands is proposed to be permanently impacted due to conversion from forested to emergent wetland. *Id.* at 3.

Columbia specifically identified the PFO wetland that will be permanently converted from PFO to PEM as W400PA.¹ Section J, Enclosure D, 6. This section also indicates that “compensatory mitigation for permanent impact to wetlands will consist of forested wetlands creation with native trees and shrubs within the watershed.” *Id.* The permanent conversions of cover type, flora diversity, and species habitat from PFO to PEM qualifies as an adverse impact to wetland functions and values pursuant to §§ 105.14(b); 105.15; 105.18a(a)(1); and 105.1. If Columbia did not expect any adverse impacts from construction within these wetlands it would not be necessary to functionally improve an existing wetland with trees and shrubs in proportion to what was lost as a result of the project as described in Section T (Mitigation Plan).

Furthermore, the Pennsylvania Department of Conservation of Natural Resources (“PADCNR”) has submitted comments to FERC recognizing that in the context of pipeline construction activity the conversion of forested wetlands to non-forested wetlands “will **adversely impact established flora and fauna** on site which are dependent upon forested wetlands.”² This letter further demonstrates that the PADCNR interprets such wetland conversions as adverse, and therefore prohibited by Chapter 105 for proposed construction activity involving an EV Wetland.

¹ It should be noted that Columbia’s application is inconsistent with regard to expected wetlands impacts. For example, in the Alternatives Analysis Columbia states that 0.68 acres of W400PA will be permanently impacted by construction. Section S. 3.6. The 0.59 acre difference with the wetlands table needs to be resolved. Furthermore, the site specific crossing in Section H indicates that there will be 1.5 acres of permanent impact for WP400PA. Section H, Drawing No. TA-6711-821. This 1.41 acre difference with the wetlands table needs to be resolved.

² PADCNR Comment 300 Line Upgrade Project, Docket No. CP09-444, Submittal No 20100329-5091 (March 19, 2010).

Additionally, upon information and belief, as of January 14, 2014 Columbia has yet to provide to DEP the proper wetlands classifications pursuant to Chapter 105 that details the designations of the delineated wetlands in the project area. The designations that have been included in Table 2 of Enclosure A of Section L (Environmental Assessment) incorrectly include Chapter 93 designations for the wetlands in the project area; Columbia has failed to include the proper wetlands designations pursuant to Chapter 105.17 in this section of the application. As a result of this failure it is impossible for DEP, or the general public, to determine which wetlands are afforded the enhanced protective measures described in Chapter 105. To the extent that any of the PFO or PSS wetlands in the project area that will be permanently converted to PEM are found to be designated as EV wetlands, DEP may not lawfully issue a Chapter 105 permit for the project.

Included as Appendix E of Enclosure A of Section L (Environmental Assessment) are the “Wetlands Determination Forms” which Columbia used to delineate and describe the wetland features in the project area. Columbia has included a form, which is typically three pages long, for each wetland that describes that wetland’s features, such as its hydrology, vegetation, and soils. However, the “Wetlands Determination Forms” provide no specific analysis of the five factors that must be examined pursuant to the wetlands designations of Chapter 105.17. Therefore, not only has Columbia failed to include the general Chapter 105 designations for the wetland features in the project area, but they have also failed to provide the underlying data that supports the findings. Without the underlying data neither DEP nor the general public can verify the accuracy of any forthcoming designations. As such, until such time that that the underlying data supporting the wetlands designations is included in the application it is deficient.

III. Pennsylvania’s Chapter 105 Water and Obstruction Permit is not Preempted by the Natural Gas Act

Pennsylvania's Chapter 105 Water Obstruction and Encroachment permit also constitutes the approval of a Water Quality Certification under Section 401 of the Federal Water Pollution Act (also known as the Clean Water Act); therefore, the issuance of a Chapter 105 permit by the Pennsylvania Department of Environmental Protection ("PADEP") is not preempted by the Natural Gas Act's ("NGA") permitting process. As such, a CWA Section 401 certification is an important tool for the states to ensure that their water quality requirements are met, and is beyond the scope of control of any other federal permitting regime, including that of the Federal Energy Regulatory Commission ("FERC").

In the context of pipeline projects, FERC may not issue a Certificate of Convenience and Public Necessity ("Certificate") to any project in Pennsylvania unless the project applicant first properly secures a Chapter 105 Water Obstruction and Encroachment permit. All of the protective conditions and requirements contained within the Chapter 105 permit therefore must be recognized and respected by FERC, and adhered to by the project applicant.

Specifically, Section 3(d) of the NGA, 15 U.S.C. § 717b(d), preserves state rights under the Clean Water Act ("CWA"), including state water quality certification of federal projects under CWA Section 401, and any state water quality permits associated with that certification. The Pennsylvania Department of Environmental Protection's water obstruction and encroachments permitting program under Chapter 105 of its regulations, 25 Pa. Code Chapter 105, authorize it to issue Water Quality Certifications under Section 401 of the CWA.

CWA Section 401 authorizes the states to ensure that federal permits meet state water quality standards after a site specific environmental review. The state's role with respect to CWA Section 401 certifications is expressly preserved by the NGA, which provides: "Except as specifically provided in this chapter, nothing in the chapter affects the rights of states under . . .

the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).” 15 U.S.C. § 717b(d). *See AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009) (upholding the State of Maryland’s denial of CWA Section 401 water quality certification for a FERC approved liquefied natural gas terminal and related interstate pipeline); *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141 (2nd Cir. 2008) (“Islander II”); *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 467 F.3d 295 (2nd Cir. 2006) (“Islander I”).

Clean Water Act Section 401 obligates an applicant for a “federal license or permit” (such as a Certificate of Convenience and Public Necessity by FERC) to construct or operate facilities which “may result in any discharge” into the navigable waters of the United States to seek certification from the “State in which the discharge originates.” 33 U.S.C. § 1341(a)(1). The state must certify that the discharge (or potential discharge) “will comply with the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317” of the CWA. *Id.* These sections provide for effluent limitations and water quality standards. *See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712-13 (1994).

The CWA relies on the States to establish water quality standards that are approved by the United States Environmental Protection Agency. *See* 33 U.S.C. § 1342; *Arkansas, supra*; *PUD No. 1, supra*. The CWA also specifically preserves state law authority in certain respects to condition certification of water quality under state law standards in general and under NEPA. *See* 33 U.S.C. §§ 1341(d), 1370, and 1371(c). Furthermore, CWA Section 401 forbids a federal agency from granting a “license or permit” unless the certification has been obtained or waived. *Id.* CWA Section 401 provides, “No license or permit shall be granted if certification has been denied by the State” *Id.* Further, CWA Section 401(d) states that:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title ... and **with 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) (emphasis added). *See PUD No. 1 of Jefferson County*, 511 U.S. at 707-708, 711 (explaining that Section 401(d) “expands the state’s authority to impose conditions on the certification of a project,” including “appropriate state law requirements.”).

The State’s authority under CWA Section 401(d) to condition a federal permit under state law has been broadly read to include conditions “affecting water quality in one manner or another.” *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2nd Cir. 1997); *see also Roosevelt Campobello Int’l Park Comm’n v. US EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (finding Maine’s CWA Section 401 certification conditions to be appropriate requirements of state law and related to water quality). As noted by the U.S. Supreme Court:

State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed:

No [person] will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No [person] will be able to make major investments in facilities under a federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a *fait accompli* by an industry that has built a plant without consideration of water quality requirements.

S.D. Warren Co. v. Maine Bd. of Env’tl. Protection, 547 U.S. 370, 386 (2006). The Supreme Court noted that these “are the very reasons that Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ 33 U.S.C. § 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge.” *Id.* Therefore, the

Chapter 105 permitting regime in Pennsylvania is immunized from preemption pursuant to the NGA, and is a requisite certification for pipeline construction activity.

IV. Conclusion

The permanent conversion of Exceptional Value Palustrine Forested Wetlands and Scrub Shrub Wetlands to Emergent Wetlands constitutes an adverse impact on wetland values and functions. As such, the proposed Project runs afoul of the requirements of Chapter 105 of the Pennsylvania Code, and PADEP may not lawfully approve a Water Obstruction and Encroachment permit until the aforementioned issues are resolved or the application is withdrawn.

Dated: 1/23/14

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