



June 11, 2018

Alan S. Armstrong, CEO and President  
Williams Companies, Inc.,  
One Williams Center  
Tulsa, OK 74172

**Re: Notice of Violation and Intent to File Suit under the Clean Water Act**

Dear Sir,

This letter provides notification on behalf of the Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum, (collectively “DRN”) of the intent to file suit against the Transcontinental Gas Pipe Line Company, LLC (“Transco” or “you”) for significant and ongoing violations of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and the Pennsylvania Clean Streams Law (“CSL”), 35 P.S. § 691.1 *et seq.*<sup>1</sup> DRN intends to file suit, as an organization and on behalf of its adversely affected members, in United States District Court seeking appropriate equitable relief, civil penalties, and other relief. We provide this 60-day notice pursuant to section 505(b) of the CWA, 33 U.S.C. § 1365(b)(1)(A), and the CSL, 35 P.S. § 691.601.

DRN intends to take legal action to enforce the Clean Water Act and Clean Streams Law because you are unlawfully discharging pollutants related to construction and operational activities of the Atlantic Sunrise Project (“Project”) without the necessary National Discharge Pollutant Elimination System permit (“NPDES”). *See* 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B); 35 P.S. § 691.1 *et seq.* Sediment-laden water and other pollutants have been discharged into streams and other waters of the United States in a number of counties across the state of

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<sup>1</sup> This letter focuses on violations of the CWA, but the analysis applies with equal force to violations of the CSL.

Pennsylvania, including but not limited to: Lancaster, Lebanon, Schuylkill, Northumberland, and Columbia Counties.

You must apply for and obtain the appropriate NPDES permit from the Pennsylvania Department of Environmental Protection (“Department”), and comply with the requirements contained therein.

## **I. FACTUAL BACKGROUND**

Transco is in the process of digging, install, and operating a pipeline as part of a project it calls the Atlantic Sunrise. The Project’s pipelines would cross the state of Pennsylvania and carry natural gas at very high pressures across Pennsylvania. Transco’s project would involve the construction and operation of approximately 199.4 miles of pipeline facilities, including: 185.9 miles of new, greenfield natural gas pipeline in Columbia, Lancaster, Lebanon, Luzerne, Northumberland, Schuylkill, Susquehanna, and Wyoming Counties, Pennsylvania (58.7 miles of 30-inch-diameter and 127.3 miles of 42-inch-diameter pipeline); and 11.0 miles of new pipeline looping in Clinton and Lycoming Counties, Pennsylvania (2.5 miles of 36-inch-diameter and 8.5 miles of 42-inch-diameter pipeline). In addition to the pipeline facilities, Transco proposes to construct and operate the following aboveground facilities: two new compressor stations in Columbia and Wyoming Counties, Pennsylvania; additional compression and related modifications to two existing compressor stations in Columbia and Lycoming Counties, Pennsylvania; two new meter stations and three new regulator stations in Columbia, Lancaster, Luzerne, Susquehanna, and Wyoming Counties, Pennsylvania.

Transco does not have a NPDES permit for the construction or operation of the Project as issued by either the Environmental Protection Agency (“EPA”) or a state equivalent from the Department. Construction and operation of the Project has resulted in numerous unlawful discharges of sediment-laden water and other pollutants into waters of the United States in violation of the CWA and CSL.

## **II. CITIZEN SUIT AUTHORITY UNDER THE CLEAN WATER ACT**

The CWA’s Citizen Suit provision provides a cause of action for DRN to file suit against a pipeline company for discharging pollutants without a NPDES permit where the CWA and Environmental Protection Agency (“EPA”) regulations thereunder provide a basis for a claim that a NPDES permit is required for the discharge. Section 505 of the Clean Water Act states that “any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation [.]” 33 U.S.C. §

1365(a)(1). The definition of an “effluent standard or limitation” for the purposes of section 505 includes, *inter alia*, an unlawful act under section 301(a) [33 U.S.C § 1311(a)]. 33 U.S.C. § 1365(f). Section 301(a) states:

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a). Thus, a party alleging that the discharge of a pollutant is unlawful because the discharger has failed to obtain a permit required under Section 402 of the CWA may bring suit because the failure to obtain a permit for the discharge constitutes a violation of 33 U.S.C. § 1311(a). *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1012-1013, 1012 n.4 (9th Cir. 2002) (stating “nothing in the Act limits citizen suits to only those claims where the alleged polluter has obtained an NPDES permit and violated its terms. Suit may also be brought where a party proceeds to discharge pollutants from a point source without a required permit” in finding jurisdiction under 505 for citizen suit claiming that discharge required NPDES permit even where state agency asserted that no NPDES permit was required for the discharge); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 559 (5th Cir.1996) (“it is clear that a citizen may bring an action under the CWA against any person who is allegedly discharging a pollutant without a NPDES permit”); *West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F.Supp.2d 512, 518, 528-530 (S.D.W.Va. 2009) (recognizing cause of action under section 505 for citizens to stop the discharge of pollutants without a NPDES permit and concluding the federal district court has jurisdiction to hear the challenge even where the state holds delegated authority to issue or deny the permits in question); *Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F.Supp.2d 325, 329 (D. Vt. 2004) (finding jurisdiction under section 505 where plaintiff alleged that defendant violated 1311(a) by failing to get a NPDES permit for the discharge in question); *see also Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1334 (2013) (affirming that district court had jurisdiction to hear citizen suit alleging that defendants had discharged without a NPDES permit where reading of ambiguous EPA regulation could support claim that NPDES permit was required for the discharge in question); *U.S. Pub. Interest Research Group v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 29, 31, 35 (1st Cir.2003) (upholding district court’s grant of injunction in citizen suit to address discharges made without NPDES permit against jurisdictional challenge even where state granted general permit authorization for the discharge after the injunction issued, and terms of state permit where more lenient than requirements of district court’s injunction); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1014 n.11 (3d Cir. 1988) (noting that the court made no decision on whether citizen suits could be brought only to enforce terms

of an existing NPDES permit because neither party raised the question, and discussing in dictum that other courts recognized federal district court's jurisdiction to hear citizen suits challenging discharges made without permits).

Pursuant to section 505(b) of the CWA, DRN intends to file suit in the applicable federal district court any time after the sixty (60) day notice period has concluded to enjoin the violations described herein, ensure future compliance, seek penalties, recover attorney fees and cost of litigation, and obtain other appropriate relief.

### **III. SEDIMENT-LADEN WATER IS A POLLUTANT PURSUANT TO THE CWA AND CSL**

According to the Department's Erosion and Sediment Pollution Control Program Manual:

sediment is the greatest pollutant to the surface waters of Pennsylvania. Excess sediments are associated with increased turbidity and reduced light penetration in the water column, as well as more long-term effects associated with habitat destruction and increased difficulty in filtering drinking water. In addition to reducing light penetration, fine sediment (fine sand and smaller) impedes sight-feeding, smothers benthic organisms, abrades gills and other sensitive structures, reduces habitat by clogging interstitial spaces within a stream bed, and reduces the intergravel dissolved oxygen by reducing the permeability of the bed material. The overall effect of fine sediment is to drastically reduce both the kinds and numbers of organisms present. Coarser-grained materials blanket bottom areas and suppress aquatic life found in these areas. Where currents are strong enough to move bedload, the abrasive action of suspended sediment accelerates channel scour... According to the U.S. Environmental Protection Agency (EPA), sediment is the primary stressor for 31% of all declared impaired stream miles in the United States.

*See Erosion and Sediment Pollution Control Program Manual, 363-2134-008 (March 2012), xviii-xix; see also Leeward Const., Inc. v. Com., Dept. of Environmental Protection, 821 A.2d 145, 154 (Pa. Cmwlth., 2003) (identifying "sediment as the greatest source of pollution to Commonwealth waters, leading to tremendous ecological and physical damage to streams, rivers, and other water bodies") (other citations omitted); see also National Pollutant Discharge Elimination System Regulations (NPDES) for Revision of the Water Pollution*

*Control Program Addressing Storm Water Discharges*, 64 Fed. Reg. 68,722, 68,729 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 122-124 (Westlaw 2009)) (“A highway construction project in West Virginia disturbed only 4.2 percent of a 4.72-square-mile basin, but resulted in a three-fold increase in suspended sediment yields.... During the largest storm event, it was estimated that 80 percent of the sediment in the stream originated from the construction site.... A 1970 study determined that sediment yields from construction areas can be as much as 500 times the levels detected in rural areas”).

Sediment discharges also have significant economic impacts. The billions of tons of sediment that reaches ponds, rivers, tributaries, and lakes in the United States need to be dredged to create navigable waterways to the cost of over 500 million dollars. *Erosion and Sediment Pollution Control Program Manual*, at xix. The Department’s Erosion Manual further states that:

In 1985, a study by Clark, et. al., estimated that the annual cost of sediment damage in the United States ranged from \$1 billion to \$13 billion (\$2.1 billion and \$27.3 billion in 2011 dollars\*). Another study by Osterkamp, et. al. found that the annual costs of water pollution due to sediment in North America approached \$16 billion in 1988 (\$31 billion in 2011 dollars\*). It is clear from these studies that the economic damage due to sediment pollution is significant. It is also clear that the benefits of sound erosion control practices during earthmoving operations not only make good sense from an environmental viewpoint, but from an economic one as well.

*Id.*

As such, the proper regulation of sediment discharges is critical component of the Clean Water Act and the Pennsylvania Clean Streams Law. *See National Pollutant Discharge Elimination System Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*, 64 Fed. Reg. 68,722, 68,728-29 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 122-124 (Westlaw 2009)) (referencing several reports and studies supporting the EPA’s statements that streams were affected by construction activity that led to stream impairment); *Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category*, 73 Fed. Reg. 72,562, 72,564 (proposed Nov. 28, 2008) (to be codified at 40 C.F.R. pt. 450) (“Construction activity typically involves site selection and planning, and land-disturbing tasks such as clearing, excavating and grading. Disturbed soil, if not managed properly, can be easily washed off-site during storm events. Although streams and rivers naturally carry sediment loads, discharges from construction activity can elevate these loads

to levels above those in undisturbed watersheds”). Section 301 of the Clean Water Act, prohibits the discharge of any pollutant from a point sources into waters of the United States unless such discharge is authorized pursuant to a National Pollutant Discharge Elimination System (“NPDES”) permit. The Department has federally delegated authority to issue permits that meet the requirements of the Clean Water Act’s NPDES program. Transco never obtained a NPDES permit from the Department for discharges to waters of the United States relating to its construction and operation of the Project. The types of discharges that have occurred, are occurring, and that are likely to continue to occur are not permitted under federal or state law.

#### **IV. TRANSCO IS DISCHARGING POLLUTANTS TO WATERS OF THE UNITED STATES WITHOUT A NPDES PERMIT**

Section 402 of the CWA establishes the NPDES program, which allows EPA and states acting under delegated authority to issue NPDES permits for the discharge of pollutants from a point source. 33 U.S.C. § 1342. Any person who discharges a pollutant must apply for a NPDES permit unless they are exempt under the statute or the EPA regulations implementing it. 40 C.F.R. § 122.21(a). Discharges of sediment pollution in stormwater runoff from the pipeline construction absent a NPDES permit violates the CWA where there has been a reportable release of oil/hazardous material, or a contribution to a violation of water quality standards resulting in whole or in part from the runoff. *See* 40 C.F.R. § 122.26(c)(1)(iii).

The Third Circuit has held that “a discharge that is not in compliance with a permit is the archetypal Clean Water Act violation, and subjects the discharger to strict liability.” *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir.1993); *see also United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 175 (3d Cir. 2004); *Natural Resources Defense Council, Inc. v. Loewengart & Co.*, 776 F.Supp. 996, 998 (M.D.Pa.1991); *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d at 68, 73 n. 10 (3d Cir. 1990) (“the Clean Water Act imposes strict liability. All the plaintiff need do is establish that the defendant violated the terms of its NPDES permit”); *Am. Canoe Assoc., Inc. v. Murphy Farms Inc.*, 412 F.3d 536, 539-40 (4th Cir. 2005) (declining to “graft an exemption onto the jurisdictional requirements of section 505(a) to shield from suit those past violators who have undertaken good-faith remedial efforts at the time of the complaint” and noting that “it is plainly possible for those undertaking good-faith remediation ... nevertheless ‘to be in violation’ of the Act within the meaning of section 505(a), because the CWA creates a regime of strict liability for violations of its standards”)

(citation omitted) 33 U.S.C. § 1319(d) (“Any person who violates ... any permit condition ... shall be subject to a civil penalty”).

Pursuant to this strict liability regime, neither the CWA nor its implementing regulations contain an exception for “de minimis” violations. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) (noting EPA’s authority to grant exemptions for de minimis circumstances where doing so would be a reasonable interpretation of the CWA); *Hawaii’s Thousand Friends v. City & City of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993) (noting that the CWA does not excuse de minimis violations).

To establish liability for a discharge made without a NPDES permit, plaintiffs must show that the defendant (1) discharged or added (2) a pollutant (3) to waters of the United States (4) from a point source (5) without a required NPDES permit. *West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F.Supp.2d 512, 518 (S.D.W.Va. 2009); *see also* 33 U.S.C. §§ 1311(a), 1342, 1362(12); *Committee to Save the Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 308 (9th Cir. 1993); *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

The CWA prohibits the “discharge of any pollutant” except in compliance with the CWA’s provisions. 33 U.S.C. § 1311(a). The “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). An “addition” of a pollutant includes human activities that cause sediments from a streambed to be re-suspended in the water column. *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990).

The statute defines the term “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6); 40 C.F.R. 122.2. It is well-established that Courts and the EPA have both determined that sediment discharged in stormwater run-off is a pollutant. *See, e.g., City of Harrisburg v. Commonwealth of Pennsylvania*, 1996 EHB 709, 751 (1996) (“we conclude that sediment does, indeed, constitute a “pollutant” within the scope of the Clean Water Act”); *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (sediment composed primarily of sand and silt constitutes a “pollutant.”); *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1525 n. 1. (11th Cir.1996) (rainwater flowing over land disturbed by grading and clearing falls within the Act’s definition of “pollutant”); *see also NRDC v. EPA*, 526 F.3d 591, 597 (9th Cir. 2008) (discussing EPA determination that sediment discharges in runoff from construction sites cause serious water

quality impacts, justifying regulation of stormwater from such sites). Congress knew, when it passed the Energy Policy Act of 2005, that sediment-laden discharge qualified as contaminated discharge under Section 402(1)(2) if it contributed to a violation of a water quality standard. 40 C.F.R. § 122.26(c)(1)(iii)(C) (1990).

It is irrefutable that under Pennsylvania state law sediment-laden runoff constitutes “pollution.” *See, e.g., Community College of Delaware County v. Fox*, 342 A.2d 468, 479 (Pa. Cmwlth. 1975) (pollution includes siltation during the construction process); *Leeward Construction Inc., v. Commonwealth of Pennsylvania*, 821 A.2d 145, 147-149 (Pa. Cmwlth. 2003) (discharge of sediment laden water violated NPDES permit); *Power Operating Company, Inc. v. DEP*, 1997 EHB 1186, 1193 (1997) (sediment laden water constitutes pollution); *DEP v. Carbro Construction Corp.*, 1997 EHB 1204, 1229 (1997) (same); *DEP v. Silberstein*, 1996 EHB 619, 635-36 (1996) (same); *Furnley H. Frish v. DER*, 1994 EHB 1226, 1238 (1994) (same).

The term “navigable waters” means “waters of the United States.” 33 U.S.C. § 1362(7). Waters of the United States has been defined by EPA and United States Army Corps of Engineers (“USACE”) to include wetlands adjacent to waters of the United States, other than waters that are themselves wetlands. 33 C.F.R. § 328.3(a). Wetlands are also “waters of the United States” if there is a significant nexus with a navigable water, meaning the wetlands has a significant effect on the chemical, physical, or biological integrity of a navigable water, or if the wetlands is connected to the navigable water by a relatively permanent or at least seasonally flowing waterbody. *See Rapanos v. U.S.*, 547 U.S. 715, 732, 739, 759, 780 (2006).<sup>2</sup>

A “point source” is “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The term includes surface runoff collected and channeled by human effort. 40 C.F.R. § 122.2. Bulldozers, backhoes, and earthmoving equipment constitute point sources. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004); *U.S. v. Weisman*, 489 F.Supp. 1331 (M.D. Fla. 1980).

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<sup>2</sup> *See* EPA & U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carbell v. United States* (2008), [http://www.asce.army.mil/CECW/Documents/cecqo/reg/cwa\\_guide/cwa\\_juris\\_2dec08.pdf](http://www.asce.army.mil/CECW/Documents/cecqo/reg/cwa_guide/cwa_juris_2dec08.pdf) (stating that it is EPA and USACE position that satisfying either tests demonstrates jurisdiction).

A stormwater discharge from an oil and gas operation is **not** exempt from obtaining a NPDES permit once there has been a reportable release of oil or a hazardous substance in the runoff, or if the runoff contributes to the violation (exceedance) of a water quality standard. *See NRDC v. EPA*, 526 F.3d 591 (9<sup>th</sup> Cir. 2008) (vacating EPA rule that attempted to cut back on 122(c)(1)(iii)(C) by allowing sediment-only discharges from oil and gas operations to remain exempt even where the discharge contributed to the violation of a water quality standard); 40 C.F.R. § 122.26(c)(1)(iii).

Section 93.6 of the Pennsylvania Code is the primary water quality standard that applies to sediment pollution. This provision provides that “[w]ater may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be **inimical or harmful** to the water uses to be protected or to human, animal, plant or aquatic life.” 25 Pa.Code 93.6(a) (General Water Quality Criteria) (emphasis added). “[S]pecific substances to be controlled include, but are not limited to, floating materials, oil, grease, scum and substances that produce color, tastes, odors, **turbidity** or settle to form deposits.” *Id.* at 96.3(b) (emphasis added). Pennsylvania law does not impose any quantitative water quality standard for turbidity or total suspended solids. *See* 25 PaCode § 93.7 (Specific Water Quality Criteria). Because the list of specific water quality criteria in 93.7 “does not include all possible substances that could cause pollution . . . [f]or substances not listed, the general criterion that these substances may not be inimical or injurious to the existing or designated water uses applies.” *Id.* at 93.7(c).

Pennsylvania defines “pollution” as:

contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to **render such waters harmful, detrimental or injurious** to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. The department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.

Because Pennsylvania Courts have determined that sediment-laden water constitutes pollution, *see supra* at 6-7, such discharges therefore violate Section 93.6(a) because the discharges are, by definition, inimical or injurious to the existing or designated use of the water receiving the discharge. *See also O'Reilly v. DEP*, 2001 EHB 19, 33 (2001) (“When disturbed earthen materials are exposed to the elements without the protection normally afforded by vegetative cover or pavement, they are prone to wash away, or erode, at a much greater rate than they would when protected. Unless precautions are taken, these eroded earthen materials can then end up as sediment in the waters of the Commonwealth. This excess sedimentation has a **deleterious effect on Pennsylvania’s streams**”) (emphasis added). Additionally, for water designated as Exceptional Value (“EV”) or High Quality (“HQ”), which are subject to strict anti-degradation requirements, this means that the discharge cannot cause any alteration in the turbidity of the water body. *See* 25 Pa.Code 93.4a(c-d) (“the existing quality. . . shall be maintained and protected”).

Here, Transco’s construction and operation activities have resulted in numerous discharges of sediment-laden water and other pollutants into waters of the United States that have contributed to a violation of Pennsylvania’s water quality standards as identified above. Transco has done so without a NPDES permit. As such, Transco is liable under the CWA and the CSL.

“[A] citizen plaintiff may prove ongoing violations ‘either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.’” *Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 671 (9th Cir. 1988) (*quoting Chesapeake Bay Foundation v. Gwaltney*, 844 F.2d 170, 171–72 (4th Cir. 1998)). “Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.” *Id.* (*quoting Gwaltney*, 844 F.2d at 172 (also phrasing the question as “whether the risk of defendant’s continued violation had been completely eradicated when citizen-plaintiffs filed suit”). Additionally, “[w]here, as here, a discharger has failed to obtain a NPDES permit in the first instance (as opposed to having violated the terms of an existing permit), that discharger ‘remains in a state of violation’ as a matter of law.” *See Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1062 (5th Cir.1991). “Operating without a permit is a present, not a past violation.” *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F.Supp. 1389, 1400 (D.Hawaii, 1995); *see also San Francisco Baykeeper, Inc. v. Moore*, 180 F.Supp.2d 1116, 1122 (E.D.Cal., 2001). Because

Transco unlawfully discharged sediment-laden water without a permit, it remains in continuous violation even if the initial discharge was addressed.

The discharge of wastewater from any waters of the United States is unlawful unless authorized by a NPDES permit, as defined by Section 402 of the Clean Water Act, or authorized by a “state pollutant discharge elimination system” permit issued as the equivalent of a NPDES permit. Currently Transco has three Erosion and Sediment Control permits. Erosion and Sediment Control permits are not NPDES permits, nor do they purport to be. They do not meet and were not designed to meet the requirements of Section 402 of the CWA; they are not federal NPDES permits, or state issued NPDES permits issued as the equivalent of federal NPDES permits. Your permits do not contain conditions adequate to authorize discharge to state waters that are “waters of the United States” within the meaning of the CWA. These Erosion and Sediment Control permits are not designed to authorize discharge to waters of the United States in compliance with the Clean Water Act’s section 402 obligations, and do not impose conditions on your discharge that are necessary to protect waters of the United States and conform to federal law. Since the Erosion and Sediment Control permits were not designed as federally-delegated permits to meet federal standards, they cannot authorize you to discharge pollutants to waters of the United States.

## **V. EXAMPLES OF DISCHARGES PROHIBITED BY THE CWA AND CSL**

Below is a description of twenty-eight examples of unlawful discharges of sediment-laden water and other pollutants into waters of the United States by Transco that contributed to a violation of Pennsylvania’s water quality standards during the construction and/or operation of the Project. Any one of these examples would be sufficient to provide grounds for liability under the CWA and CSL.

As a result of Transco’s demonstrated inability or unwillingness to prevent intermittent and ongoing unlawful discharges from its construction and operational activities, it is likely that the discharges of pollutants into the commonwealth are likely to continue.<sup>3</sup> You do not have a NPDES permit that covers any of these discharges.

### **Sediment Laden Stormwater Discharges**

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<sup>3</sup> It is likely that more unlawful discharges than enumerated herein have occurred and will continue to occur during construction and operation of the Project.

On or before December 6, 2017 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions into streams and wetlands at the Bethel Staging area in Columbia County PA.

On or before January 29, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering a stormwater drain entering into a water of the United States, in Columbia County PA at Spread 4 / Mile Posts (“MPs”) 123.1–123.5.

On or before January 30, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering the Quittaphilla Creek, in North Annville Township, Lebanon County PA.

On or before January 31, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering stream WW-T17-14003 (York Hollow), in Columbia County PA at Spread 4 / MPs 123.1–123.3.

On or before February 5, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering stream Quittaphilla Creek, in Lebanon County PA at Spread 6 / MPs 45.3.

On or before February 6, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering stream WW-T81-13001 (Little Fishing Creek), in Columbia County PA at Spread 4 / MPs 107.0.

On or before February 22, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering wetland W-T43-5004, in North Annville Township, Lebanon County PA.

On or before February 26, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into water resources, in Columbia County PA at Spread 4 / MPs M-0423 1.6.

On or before February 26, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into water resources, in Columbia County PA at Spread 4 / MPs 99.3.

On or before February 27, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into stream WW-T15-14008, in Columbia County PA at Spread 4 / MPs 121.3.

On or before February 28, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering wetland W-T43-5004, in North Annville Township, Lebanon County PA.

On or before March 1, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering wetland W-T04-11004 and stream WW-T04-11001, in Columbia County PA at Spread 5 / MPs 94.1–94.5.

On or before March 6, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering stream WW-T90-16001 (UNT to Mitchler Run), in Luzerne County PA at Spread 2 / MPs 13.0-13.2.

On or before March 6, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering stream WW-T90-14005, in Columbia County PA at Spread 2 / MPs 121.3.

On or before March 8, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering stream WW-T47-11001 (UNT to South Branch Roaring Creek), in Columbia County PA at Spread 5 / MPs 91.7.

On or before March 8, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into wetland WT49-11002, in Columbia County PA at Spread 5 / MPs 91.0.

On or before March 10, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into stream WW-T03-16002 (UNT to Huntington Creek), in Luzerne County PA at Spread 2 / MPs 14.8–15.5.

On or before March 9, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into wetland W-T10-14001A and stream WW-T16-14002 (UNT to Green Creek), in Columbia County PA at Spread 4 / MPs 118.0.

On or before March 9, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into stream WW-T15-14007 (Green Creek), in Columbia County PA at Spread 4 / MPs 120.0–120.1.

On or before March 10, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into Quittapahilla Creek, in Lebanon County PA at Spread 6 / MPs 45.3.

On or before March 13, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering a wetland, in Columbia County PA at Spread 5 / MPs 94.3-94.5.

On or before March 18, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into Roaring Creek, in Columbia County PA at Spread 4 / MPs 95.9.

On or before March 19, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into a wetland, in Luzerne County PA at Spread 2 / MPs 18.1.

On or before March 23, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into a wetland and waterbody, in Columbia County PA at Spread 4 / MPs 95.8–95.9.

On or before March 24, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into wetland WT17-20001, in Wyoming County PA at Spread 1 / MPs 0.1–0.3.

On or before April 4, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into a waterbody, in Luzerne County PA at Spread 1 / MPs 14.9.

On or before April 25, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into stream WW-T54-21001 (Tunkhannock Creek) as a result of flooding, in Luzerne County PA at Spread 1 / MPs M-0051 0.1.

On or before April 25, 2018 and continuing until a date to be determined, an inspection report documented sediment-laden water depositions entering into Pikes Creek, in Luzerne County PA at Spread 1 / MPs 16.6.

## **VI. RELIEF REQUESTED**

The relief requested includes but is not limited to you obtaining NPDES permit coverage and correction of all identified violations through direct implementation of control measures and demonstration of full regulatory compliance. Further you are required to take restorative measures and to cleanup any aforesaid and/or other unlawful discharges and releases.

Should legal action be required, DRN will request that the court to order you to comply with the Clean Water Act, to pay penalties, and to pay costs and legal fees. More specifically, DRN will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505 of that act, and such other relief as permitted by law.

Please note the each separate violation of the Clean Water Act subjects you to a penalty not to exceed \$37,000 per day for each violation. The first date upon which DRN is aware of an unlawful discharge is December 6, 2017, as such, Transco has been operating for at least 187 days without the necessary permit.<sup>4</sup> The corresponding potential civil penalty liability for operating without a permit since December 6, 2017 is **\$7,012,500.00**. This number does not reflect additional civil penalties for the individual violations related to each discharge. DRN will seek the full penalties allowed by and appropriate under governing law, as well as injunctive and declaratory relief. Lastly, pursuant to Section 505(d) of the Clean Water Act, DRN will seek recovery of their litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

## **VII. PERSONS GIVING NOTICE**

The full name, address, and telephone number of the persons giving notice are as follows:

Delaware Riverkeeper Network  
925 Canal Street, Suite 3701  
Bristol, PA 19107  
Phone: 215.369.1188  
Fax: 215.369.1181  
Attn: Maya van Rossum

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<sup>4</sup> To the extent additional unlawful discharges occurred prior to this date, the number of days that Transco is subject to liability could substantially increase.

## **VIII. IDENTIFICATION OF COUNSEL**

Aaron Stemplewicz, Esq.  
Senior Attorney  
Delaware Riverkeeper Network  
925 Canal Street, Suite 3701  
Bristol, PA 19107  
Phone: 215.369.1188  
Fax: 215.369.1181  
aaron@delawareriverkeeper.org

## **IX. CONCLUSION**

The foregoing provides more than sufficient information to permit you to identify the specific standard, limitation, or order alleged to have been violated, the activities alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. 40 C.F.R. § 135.3(a).

Every day upon which you have discharged polluted water without a NPDES permit is a separate violation of the Clean Water Act and of EPA's regulations implementing the Clean Water Act. You are liable for the above-described violations occurring prior to the date of this letter, and for every day after the date of this letter that the violations remain ongoing. In addition to the violations set forth above, this Notice covers all violations of the Clean Water Act evidenced by information that becomes available to DRN after the date of this Notice of Intent to File Suit. These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act these violations will continue.

If you wish to pursue discussions DRN, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. Notwithstanding DRN's desire to work with you to help you protect public health, and bring your facilities into compliance with the federal and state environmental laws discussed, the fact remains that you are discharging pollution to waters of the United States without the permit required under the CWA. You must obtain coverage under a NPDES permit. Accordingly, we do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of this period.

/s/ Aaron Stemplewicz

Aaron Stemplewicz  
Delaware Riverkeeper Network  
925 Canal Street, Suite 3701  
Bristol, PA 19107  
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cc:

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U.S. Department of Justice  
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Scott Pruitt, Administrator  
Environmental Protection Agency, Office of the Administrator 1101A  
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