



August 13, 2019

Commissioners &  
Executive Director Steven Tambini  
Delaware River Basin Commission  
25 Cosey Road  
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Dear Mr. Tambini and Commissioners,

It is troubling that the Delaware River Basin Commission continues to waffle on its interpretation of the extent of its jurisdiction over the PennEast pipeline project and to what extent it plans to implement that jurisdictional authority. It is important for the public, the applicant, the DRBC Commissioners and the DRBC staff to have a full and clear understanding of how the DRBC intends to interpret and apply its jurisdictional authority over the PennEast pipeline. Given the precedent setting nature of the PennEast pipeline with regards to DRBC authority it is important that DRBC finally do as we have been asking for years: that DRBC provide a formal statement on the record laying out how DRBC interprets and intends to implement its regulatory authority over the PennEast pipeline.

An official statement at this time regarding DRBC's jurisdictional authority over PennEast, including how it intends to implement that authority, will allow all parties the opportunity to bring any necessary and appropriate legal challenges before the DRBC review process is fully underway and will allow us to avoid a situation where a docket is issued (or denied) and then requires challenge on these jurisdictional grounds after-the-fact. It is much more efficient, and will avoid irreparable harm to water resources of the basin that could take place if a docket is issued and construction is allowed to begin while legal challenges are underway. Being clear upfront, and allowing any legal questions regarding DRBC jurisdiction to be handled prior to implementation of docket review will help avoid the situation where we (we being the Delaware Riverkeeper Network and the public) are victorious in confirming that DRBC authority extends to the entire footprint of the project but that victory comes after a docket is issued, forests are cut, streams are trenched, wetlands and waterways are contaminated, and peoples' property rights have been further trampled upon.

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DRBC already failed to fulfill its legal obligations to protect our water resources from irreparable pipeline harm in the past when it failed to properly interpret and apply its jurisdictional authority until it was too late (see below for additional details). It is imperative you learn from your mistakes.

**DRBC communications on the issue of jurisdiction over PennEast and pipelines have been clouded by contradictions, unclear language, and differing characterizations depending on the DRBC person speaking at the time and the intended audience.** A recent press statement adds to the confusion. In an August 9, 2019 news article published in The Intelligencer titled *PennEast pipeline proposal returns, seeks permits from New Jersey*, it was reported that:

Peter Eschbach, spokesperson for the DRBC, wrote in an email Friday the commission had received an application from PennEast “that is still lacking project details” that had not yet been submitted. The commission would need to give approval for water “withdrawals, discharges of hydrostatic testing water, flood hazard area encroachments, and crossing recreation areas and reservoirs included in DRBC’s comprehensive plan,” Eschbach added.

First, this statement to the press mischaracterizes DRBC’s jurisdiction and regulatory authority over the PennEast pipeline project. DRBC clearly has the ability and legal obligation to exercise its jurisdiction over the entire pipeline length, breadth, and footprint (*see below for additional details*).

Second, to have DRBC issue such a statement regarding its jurisdiction in an apparently casual statement to a reporter also flies in the face of the multiple requests made by the Delaware Riverkeeper Network and thousands of signers urging DRBC to issue a clear public statement describing how DRBC itself interprets its jurisdictional authority with regards to PennEast and to what extent it intends to exercise that authority. If the DRBC can so easily suggest the extent of its jurisdiction over the PennEast pipeline project in statements to the press, there is no reason that it cannot formally release and explain this information on the record for the public.

**DRBC’s statement to the press is a clear misrepresentation of the breadth and scope of DRBC authority over PennEast. DRBC regulatory authority clearly extends the entire length and breadth of the PennEast pipeline project and is not limited to hydrostatic testing, water withdrawals, flood hazard areas or simply those portions of the project located within specifically designated Comprehensive Plan areas** (e.g. Beltzville State Park, Beltzville Reservoir, Delaware and Raritan Canal State Park, Delaware Canal Trail, F.E. Walter Reservoir, Hickory Run State Park, Lower Delaware River National Wild & Scenic River, Washington Crossing State Park, and Weiser State Forest). If you intend to limit your jurisdiction in this way it would be a violation of the Compact and DRBC’s Rules of Practice and Procedure.

**DRBC’s failure to properly interpret and apply its own jurisdiction has already resulted in irreparable harm to the basin as the result of pipeline construction and operation – Don’t Allow It To Happen Again.** Let me remind you of DRBC’s history when it comes to pipeline review. DRBC refused, despite repeated timely requests and legal analyses provided by the Delaware Riverkeeper Network, to exercise jurisdiction over the Tennessee Gas 300 Pipeline and the Columbia 1278 Pipeline. It was only after construction of the projects was well on its way, that the DRBC wrote the Delaware Riverkeeper Network and admitted it had made a mistake when it failed to properly

exercise its authority over these projects. By the time DRBC admitted its error and determined that it would apply DRBC's Rules of Practice and Procedure to the two projects, it was too late to protect our natural and water resources because construction was already so far along. DRBC is on the path of making the same mistake when it comes to the PennEast pipeline.

**DRBC jurisdiction and regulatory authority clearly applies to the entire footprint of the PennEast Pipeline.** Section 3.8 of the DRBC Compact provides in relevant part:

No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation, or governmental authority unless it shall have been first submitted to and approved by the commission, subject to the provisions of Sections 3.3 and 3.5. The commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the comprehensive plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such plan. The commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section.

The DRBC Rules of Practice and Procedure ("RPP") classifies projects for review under Section 3.8 of the Compact into two categories, those deemed not to have a substantial effect on the water resources of the Basin and therefore not required to be submitted for DRBC review, and those deemed to have substantial effects on water resources of the Basin and therefore required to be submitted for Commission review. See RPP Article 3, Section 2.3.5.

With respect to natural gas pipeline projects, the RPP categorizes them as projects that *presumptively* do not have a substantial effect on the water resources of the Watershed and that therefore *do not automatically* require DRBC review. But then Section 2.3.5 A. says that:

Except as the Executive Director may specifically direct by notice to the project owner or sponsor, or as a state or federal agency may refer under paragraph C ... a project in any of the following classifications will be deemed not to have a substantial effect on the water resources of the Basin and is not required to be submitted under Section 3.8 of the Compact:

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12. Electric transmission or bulk power system lines and appurtenances; major trunk communication lines and appurtenances; **natural and manufactured gas transmission lines and appurtenances**; major water transmission lines and appurtenances; unless they would pass in, on, under or across an existing or proposed reservoir or recreation project area as designated in the Comprehensive Plan; **unless such lines would involve significant disturbance of ground cover affecting water resources**; ...

RPP Article 3, Section 2.3.5.A(12) (emphasis added).

A clear and straightforward reading of the DRBC Compact and Rules of Practice and Procedure clearly contain four exceptions to the exemption that, if the stated conditions are met, trigger DRBC review for natural gas transmission lines and appurtenances:

- 1) if the Executive Director of the Commission specifically directs;
- 2) if any state or federal agency refers a project under paragraph C;
- 3) if the project in question crosses an existing or proposed reservoir or recreation area that has been incorporated into the Comprehensive Plan; and
- 4) if the project involves a significant disturbance of ground cover affecting water resources.

This DRBC review is not limited to portions of the pipeline project, it clearly applies to the entire project footprint.

Furthermore, the DRBC issued a letter to the Delaware Riverkeeper Network on January 30, 2013 which provided a description detailing how the Commission considered the portion of 2.3.5.A(12) for projects that “involve a significant disturbance of ground cover affecting water resources.” The DRBC stated in the letter that it was guided by other land disturbance thresholds established in section 2.3.5 (A). One standard described that a significant disturbance threshold was triggered by projects that involved “[d]raining, filling, or otherwise altering marshes or wetlands” in excess of “25 acres.” The DRBC stated that meeting this threshold indicates that the magnitude of disturbance “**warrants basin-wide review**” – although we note that the Commission did not limit itself to this criteria or that discussed in 2.3.5.A(6), therefore appropriately leaving open other considerations.<sup>1</sup>

The PennEast Project will involve significant disturbance of ground cover affecting water resources of the basin and therefore, pursuant to the legal authorities discussed above, requires basin-wide

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<sup>1</sup> **For the record, DRN does not agree with DRBC’s limited approach for determining when the significant disturbance of groundcover exception is to be applied:** DRBC, in a January 30, 2012 memo titled “Reviewability of Columbia 1278 Replacement Project and TGP 300 Line,” in which it admits its failure to review two major pipeline projects prior to their construction, and provides arbitrary guidelines that inappropriately characterize when the exception of a “significant disturbance of ground cover affecting water resources” applies. According to the January 30 memo, the language found in RPP Article 3, Section 2.3.5.A found in subsections (6) and (15) should be used to define when there has been “a significant disturbance of ground cover affecting water resources” such that a pipeline would be subject to Section 3.8 review. These unsupported standards dramatically limit the determination of when there has been “a significant disturbance of ground cover affecting water resources.” This is an inappropriate interpretation and application of these provisions

When applied, DRBC’s misapplication of 2.3.5.A.6 and 2.3.5.A.15 to 2.3.5.A.12 limits DRBC review to natural gas pipelines that pass through comprehensive plan areas, that involve the draining, filling or altering of marshes or wetlands in excess of 25 acres, that result in a change in land cover on over three square miles of a major ground water infiltration area, that are specifically noticed by the DRBC Executive Director or referred for review by a state or federal agency under paragraph C of the section. This interpretation is an artificial legal manipulation of the RPP that cannot hold up in the courts of legal or public opinion.

If in fact 2.3.5.A.6 and 2.3.5.A.15 were to be used as the determining factor for the significant disturbance of ground cover pipeline review exception then the RPP provisions would have been explicitly written as such, or incorporated by reference. However, A.6 and A.15 were clearly written as discrete, separate and co-equal exceptions to the exclusion from review, not as further limitations on the exceptions crafted for pipelines found in 2.3.5.A.12.

The DRBC cannot point to a single project where its jurisdiction has been exercised pursuant to the “significant disturbance” language in RPP Section 2.3.5 A.12, and consequently cannot point to a single project where a determination was made that implicated RPP Sections 2.3.5 A.6 or A.15 in that context. Finally, if DRBC indeed interprets that the elements of 2.3.5.A.6 and 2.3.5.A.15 are relevant to the application of RPP Section 2.3.5 A.12, there are a multitude of other pipeline, communications line, water line, and power line projects it would have, under these terms, been required to take jurisdiction over. For example, the recently constructed NorthEast Upgrade Project should have triggered review pursuant to this flawed interpretation of the RPP but failed to do so. These recently conjured standards are post-hoc interpretations that fail to cite any rational basis in fact or law for their application.

review, jurisdiction, and docketing before the project may proceed within the boundaries of the basin.

On its face, the PennEast pipeline project will involve significant disturbance of ground cover affecting water resources of the basin thereby triggering basin-wide review across the entire footprint of the project and its right of way. Construction of the PennEast Pipeline project will impact 1,613.5 acres of land (1,065.2 acres for pipeline facilities, 110.1 acres for access roads; 372.3 acres for pipe and contractor ware yards, 31.1 acres for above ground facilities), the vast majority of which is located within the boundaries of the Delaware River basin. The project will cut through at least 255 waterbodies (including 159 perennial, 45 intermittent, 40 ephemeral, 11 open water), 633 acres of forest, 91 acres of wetlands, and impact “several” vernal pools – again, the vast majority of which lie within the boundaries of the Delaware River basin.

In addition, the PennEast Pipeline will result in the alteration or destruction of well over 25 acres of wetlands. According to the 25-acre standard articulated in the DRBC’s January 30, 2013 letter which provided a description detailing how the Commission considered the portion of 2.3.5.A(12) for projects that “involve a significant disturbance of ground cover affecting water resources,” the Project thereby involves the magnitude of disturbance that triggers basin-wide review even when using DRBC’s flawed interpretation of its own regulations.

**As early as October 5, 2017 the Delaware Riverkeeper Network wrote the DRBC asking for a clear and upfront interpretation of the DRBC’s jurisdiction and authority when it comes to the PennEast pipeline.** In a letter on that date we wrote:

“A review of documents on file with DRBC, including documentation of the areas visited during site visits with PennEast representatives, suggests that the DRBC is intending to limit the exercise of its jurisdiction to only Comprehensive Plan Areas and issues surrounding hydrostatic testing, water withdrawals and water discharges. For the record, we want DRBC to inform the public now, to what extent it intends to exercise its jurisdictional authority over the PennEast pipeline. DRBC officials have obviously communicated this information to the PennEast Pipeline Company and its representatives.”

Since that time, we have submitted additional requests for an official statement from the DRBC regarding its interpretation and intentions with regards to jurisdiction over the PennEast pipeline and have yet to receive an official and clear response.

**It is time to stop playing games with the health and safety of our water resources, our communities, and the rights of present and future generations to clean and healthy waterways and aquatic resources. It is time for the DRBC to go on record and be honest with the people and the applicant about how it intends to interpret and apply its own regulations and jurisdictional authority when it comes to the PennEast pipeline.**

Respectfully and Urgently,



Maya K. van Rossum  
the Delaware Riverkeeper