



April 15, 2019

John Hohenstein, PE
Acting Program Manager
Waterways and Wetlands Program Manager
2 East Main Street
Norristown, PA 19401
Sent via U.S. Postal Service and Email.

Re: Proposed State Water Quality Certification Required by Section 401 of the Federal Clean Water Act for Adelpia Gateway LLC, Adelpia Gateway Project, EA00012-001

Dear Mr. Hohenstein,

The Delaware Riverkeeper Network (“DRN”) submits the following comment to the Pennsylvania Department of Environmental Protection (“DEP” or “Department”) with regard to the Clean Water Act Section 401 water quality certification (“401 certification”) for the Adelpia Gateway LLC (“Adelpia”), Adelpia Gateway Project (“Project”). The attached comments, as well as the comments and reports provided on the accompanying CD, support and expand on the comment below as well as identify additional concerns. Please ensure all relevant Department personnel and files receive a copy of this comment in order to ensure a full and fair review in all applicable legal contexts, and please be sure this comment is made part of the official file and record.

The Delaware Riverkeeper Network champions the rights of our communities to a Delaware River and tributary streams that are free-flowing, clean, healthy, and abundant with a diversity of life. The Adelpia Gateway Project will inflict substantial and long-lasting harm on the waterways of the Delaware River Basin, yet the DEP seems inclined to rubberstamp it regardless. The Delaware Riverkeeper Network demands the DEP deny 401 water quality certification to the Adelpia Gateway Project as the impacts of the Project have not been properly analyzed, the Department has not shown signs of any intent to do the analysis required of them by law, and there is ample evidence, from past and current projects, that even with a 401 certification, pipeline projects, similar to Adelpia, always result in lasting damage and degradation to the waters of the Commonwealth. In consideration thereof, DEP cannot even

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make a reasonable assessment as to what conditions are necessary to ensure the Project will not violate Pennsylvania's water quality standards, let alone assess those potential impacts.

Project Information

Pennsylvania Department of Environmental Protection's March 16, 2019 PA Bulletin noticed that the Department intends to issue a Clean Water Act § 401 water quality certification for the Adelpia Gateway LL, Adelpia Gateway Pipeline Project.¹ The Adelpia Gateway Project, as proposed, will impact:

- 47 acres of earth disturbance
- 37 linear feet of Marcus Hook Creek (WWF, MF)
- 12 linear feet of Stoney Creek (WWF, MC)
- 0.155 acres of floodway
- .820 acre of temporary PEM and PSS wetland impacts; and
- 0.010 acre of PEM and PSS wetland permanent impacts.

And traverse through:

- East Goshen Township, Whiteland Township, Charlestown Township, and East Pikeland Township in Chester County;
- Chester Township, Concord Township, Lower Chichester Township, Thornberry Township and, Trainer Borough in Delaware County;
- Skippack Township and Perkiomen Township in Montgomery County;
- Richlandtown Borough and West Rockhill Township in Bucks County; and
- Lower Mount Bethel Township in Northampton County.

DRN's own review of Adelpia's application materials has found that at the least, the following waterways will be threatened by the project:

- Chester Creek
- Ridley Creek
- Schuylkill River
- Perkiomen Creek
- East Perkiomen Creek
- One EV Wetland
- Marcus Hook Creek
- Stoney Creek

The breadth of harm that will be inflicted by the proposed Project on waterways, wetlands, groundwater, habitats, species, people, and communities is significant and longterm. Yet, rather than doing its own analysis, as required by law, the Department has simply provided a link to the

¹ Pennsylvania Bulletin, Volume 49, Number 11, Saturday March 16, 2019, page 1219.

FERC EA. DEP cannot issue 401 certification on this basis, as prior to making this decision, DEP must ensure that it has all the proper information and analysis from Adelpia to secure facts necessary to inform the public, and itself, on the Adelpia's compliance with the requirements of a 401 certification. As discussed below the facts and analysis required for DEP to make such an informed decision is absent. Accurate information will not only aid in the Department's decision, but the public's as well, and ensure an opportunity for informed and meaningful participation in the 401 commenting process.

DEP Is Failing To Comply With State And Federal Legal Requirements Mandating That It Fully Review And Analyze The Projects Impacts So To Ensure Compliance With Relevant And Applicable Pennsylvania Regulations Prior To Issuing 401 Certification.

Clean Water Act 401 Water Quality Certification ensures “that the construction operation, and maintenance of the Project will protect water quality in this Commonwealth consistent with the requirements of State law and the Clean Water Act.”² Therefore, 401 certification must ensure that Adelpia comply with DEP water quality permitting programs, criteria, and conditions established pursuant to PA law, including but not limited to: Discharge Permits (National Pollutant Discharge Elimination System (NPDES)); Erosions and Sediment Control Permits; and Water Obstruction and Encroachment Permits. Yet, DEP is proposing to issue a section 401 water quality certification for the Adelpia pipeline prior to evaluating the information, standards, and requirements identified in Chapter 105.13 and Chapter 105.14 of the Pennsylvania Code, as well as other requirements that exist under PA law and regulations, therefore the DEP's issuance of 401 certification will be unlawful.

According to PA law:

For structures or activities where water quality certification is required under section 401 of the Clean Water Act (33 U.S.C.A. § 1341), an applicant requesting water quality certification under section 401 shall prepare and submit to the Department for review, an environmental assessment containing the information required by *subsection (a)* for every dam, water obstruction or encroachment located in, along, across or projecting into the regulated water of this Commonwealth.³

Subsection (a) provides:

For dams, water obstructions or encroachments permitted under this chapter, the Department will base its evaluation on the information required by § 105.13 (*relating to permit applications*—information and fees) and the factors included in § 105.14(b) (*relating to review of applications*) and this section.⁴

² 33 U.S.C.A. §§ 1311-1313, 1316, and 1317.

³ 25 Pa. Code § 105.15(b) (emphasis added).

⁴ 25 Pa. Code § 105.15(a) (emphasis added).

The intent is also clearly explained in DEP's policy manual, which provides: "The decision to issue or deny the Commonwealth's applicable Water Obstruction and Encroachment . . . permits provides the *basis and vehicle for granting or denying 401 Water Quality Certification*."⁵

Despite these mandates, the Department has continued to issue 401 water quality certification without all the information required from the permit applicants; it cannot fulfill its mandate that it review certain factors prior to the granting of 401 certification. Where an agency fails to comply with its own procedures, its action is "arbitrary, capricious, or otherwise not in accordance with the law."⁶ Because DEP has once again determined that a project merely needs to show compliance after the issuance of the section 401 water quality certification, it is clear the DEP does not intend to undertake this review in the appropriate sequences mandated by law.

The current procedures in place, make 401 water quality certifications themselves a mere promise that the project applicant must eventually obtain a number of substantive state permits that demonstrate compliance with state water quality standards. In other words, certification – originally designed as tools for the state to protect, maintain, and better their water resources as – are now empty-vessels that provide no actionable authority to the project applicant. As the review of the Project's substantive compliance with Pennsylvania's water quality standards takes place afterwards, during DEP's review of the underlying state permits. Such a bifurcated review process is clearly contrary to the express language and intent of the Pennsylvania Code.

While DRN has conceded that the process of 401 water quality certification from the DEP is a rubber stamp, we would still like to highlight the requirements the Department has to ensure such permits can be followed by the entity prior to the actually issuing of water quality certification.

The Department Has Denied the Public its Right To Comment In A Meaningful And Informed Way.

The Clean Water Act provides a clear non-discretionary duty that a state agency issuing a Section 401 water quality certification "**shall establish procedures** for public notice in the case of all applications for certification by it."⁷ The DEP has failed to fulfil its duties to the public mandated by CWA section 401 through failing to provide adequate instructions on how to comment and failing to keep its pipeline portal up to date.

⁵ Pennsylvania Department of Environmental Protection, Bureau of Water Quality Protection, Water Quality Permitting Policy and Procedure Manual, Document No. 362-2000-001, February 10, 2003. (emphasis added)

⁶ See, e.g., *INS v. Yang*, 519 U.S. 26, 32 (1996); *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986).

⁷ 33 U.S.C. § 1341(a)(1) (emphasis added)

The Department has failed to create and maintain an Adelphia Pipeline Portal webpage with respect to the Adelphia Gateway Project depriving the public of valuable information. While there is a webpage for Adelphia, it is listed under community issues and only shows an application for air permits with limited information concerning the Project's potential water permits.⁸ The relevant information concerning the 401 water quality certification process and additional Clean Water Act permits is yet to be included. The public must be granted immediate access to all information in DEP's possession regarding the proposed Adelphia Project. This information must be posted on the DEP Pipeline Portal, which DEP still claims functions as a clearinghouse of information for large pipeline projects like Adelphia. This information should be part of the public record in order to ensure the public an opportunity to provide informed and meaningful comments on the project, as there is no legitimate reason for denying the public access to this essential information.

This is not the first time the DEP has neglected to update or maintain pipeline portal websites. This same request has been made by several public trust organizations, including Delaware Riverkeeper Network, for other pipelines and in some instances, DEP has in fact provided this information. Despite the importance of the information for review and analysis of impacts, and despite the fact that DEP has made this same information available on some projects, the same is not true for Adelphia. DEP fails for the Adelphia Project and other pipeline proposals, to provide consistent access to information for each and every proposed pipeline project cutting through the Commonwealth.⁹ What information is available is limited and inhibits the public's ability to provide meaningful and thorough review of the impacts of the Adelphia Gateway Pipeline project.

DEP Needs to Conduct its Own Environmental Assessment In Order to Issue 401 Water Quality Certification.

From the lack of materials provided to the public, and the reference to the Federal Energy Regulatory Commission's ("FERC") Environmental Assessment ("EA") in the PA Bulletin Notice, the DEP does not appear to be conducting its own environmental assessment. Instead, it seems to plan to merely rely on FERC's. This is a problem (1) because regulations require DEP to do an environmental review that fits within the scope and requirements of the Commonwealth's unique and state specific water protection laws and (2) there are numerous gaps in information throughout the FERC EA.

⁸ See <https://www.dep.pa.gov/About/Regional/SoutheastRegion/Community%20Information/Pages/Adelphia-Gateway-.aspx>.

⁹ Atlantic Sunrise record is an example where county reports are missing while DTE/Birdsboro pipeline is not included at all, for example.

- a. Under State Regulations, the DEP is required to do an environmental review that fits within the scope and requirements of the Commonwealth's water quality regulatory scheme.

Pennsylvania regulations clearly state that in order to secure Chapter 105 approval and/or Section 401 Water Quality Certification, § 105.14(b) requires consideration of:

- (1) Potential threats to life or property created by the dam, water obstruction or encroachment.
- (2) Potential threats to safe navigation created by the dam, water obstruction or encroachment.
- (3) The effect of the dam, water obstruction or encroachment on the property or riparian rights of owners upstream, downstream or adjacent to the project.
- (4) The effect of the dam, water obstruction or encroachment on regimen and ecology of the watercourse or other body of water, water quality, stream flow, fish and wildlife, aquatic habitat, instream and downstream uses and other significant environmental factors.
- (5) The impacts of the dam, water obstruction or encroachment on nearby natural areas, wildlife sanctuaries, public water supplies, other geographical or physical features including cultural, archaeological and historical landmarks, National wildlife refuges, National natural landmarks, National, State or local parks or recreation areas or National, State or local historical sites.
- (6) Compliance by the dam, water obstruction or encroachment with applicable laws administered by the Department, the Fish and Boat Commission and river basin commissions created by interstate compact.
- (7) The extent to which a project is water dependent and thereby requires access or proximity to or siting within water to fulfill the basic purposes of the project.
- (8) Present conditions and the effects of reasonably foreseeable future development within the affected watershed upstream and downstream of the dam, water obstruction or encroachment
- (9) Consistency with State and local floodplain and stormwater management programs, the State Water Plan and the Coastal Zone Management Plan.
- (10) Consistency with the designations of wild, scenic and recreational streams under the Wild and Scenic Rivers Act of 1968 (16 U.S.C.A. § § 1271—1287) or the Pennsylvania Scenic Rivers Act (32 P. S. § § 820.21—820.29), including identified 1-A candidates.
- (11) Consistency with State antidegradation requirements contained in Chapters 93, 95 and 102 (relating to water quality standards; wastewater treatment requirements; and erosion and sediment control) and the Clean Water Act (33 U.S.C.A. § § 1251—1376).
- (12) Secondary impacts associated with but not the direct result of the construction or substantial modification of the dam or reservoir, water obstruction or encroachment in the area of the project and in areas adjacent thereto and future impacts associated with dams,

water obstructions or encroachments, the construction of which would result in the need for additional dams, water obstructions or encroachments to fulfill the project purpose.

(13) For dams, water obstructions or encroachments in, along, across or projecting into a wetland, as defined in § 105.1 (relating to definitions), the Department will also consider the impact on the wetlands values and functions in making a determination of adverse impact.

(14) The cumulative impact of this project and other potential or existing projects. In evaluating the cumulative impact, the Department will consider whether numerous piecemeal changes may result in a major impairment of the wetland resources. The Department will evaluate a particular wetland site for which an application.

In addition, the DEP is also required to:

- Identify whether the wetlands being crossed are in fact EV under Pennsylvania's water quality regulatory regime with respect to the protections afforded to wetlands within the state. *See generally* 25 Pa. Code § 96.3(b).¹⁰
- Verify that the project does not impact an Exceptional value wetland, unless “[t]he project is water dependent. 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.”¹¹
- Verify that the Project will not have an adverse impact on “Exceptional Value” wetlands, as described by 25 Pa. Code § 105.18a.

None of these specific regulations have been analyzed by the provided FERC EA, and, if the DEP insists on not conducting its own proper review prior to certifying the Project, there is no way for the public to be sure that degradation and other environmental harms will not result from the Project. Pipelines using the construction techniques proposed by Adelphia, inflict stream, wetland, water quality and groundwater degradation contrary to the above criteria that guide Chapter 105 and 401 Certification decisionmaking. These impacts to the environment are not limited to the time period in which the right-of-way is disturbed, but can result in long lasting consequences. From the lack of materials provided, DEP's 401 water quality certification analysis will not consider or address these many pathways of degradation nor determine that this degradation will not result in violation of Pennsylvania's water quality standards and applicable review criteria. Given the current state of the application, 401 Certification cannot be justified when reviewed against § 105.14(b) and the various standards it incorporates.

- b. Even if the DEP, were to ignore this mandate numerous gaps still exist in the FERC EA, therefore it cannot be used as a basis for the issuance of 401 water quality certification.

¹⁰ The Department may not grant a permit or authorization for a proposed project “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.

¹¹ 25 Pa. Code § 105.18a (a)(2).

The Delaware Riverkeeper Network in the attached comments has identified numerous areas where gaps in FERC's EA exist. For a complete list see Section XIV in Delaware Riverkeeper Network's Comment on Adelpia Gateway Project, Environmental Assessment, February 28, 2019, attached as exhibit C. FERC's EA has indicated numerous areas where Adelpia's analysis is wholly incomplete, and if allowed to proceed on this basis will result in a misidentification of the appropriate conditions to protect the waters of the Commonwealth.

In order to prevent this DEP must require Adelpia to remedy these gaps in information including, but not limited to providing information concerning:

- Assess the functions and values of wetlands that will be encroached and ensure that they will be restored with none or minimal degradation. Including, ensuring protections for EV wetlands are in place and any impacts identified and mitigated for the harms such practice can cause.
- Establish construction practices that reduce removal or pre-existing vegetation, limit the building envelope, and prevent complications during construction are in place.
- Identify how the pipeline will mitigate any methane releases as Adelpia's EA simply states that because methane is lighter than air there is no cause for concern of contamination. See DRN's EA Comment to FERC, attached as exhibit C.
- Ensure that Adelpia has thoroughly assessed, using proper tools and data the potential for the Project to impact and degrade wetlands and streams in the commonwealth.
- Analyze potential impacts that the Project could have during construction in contaminated areas and sites and develop a plan to properly identify the threats of exposure and mitigate them. Reference to section in Adelpia comment that establishes they are yet to actually plan out and establish threats for the HDD in contaminated sites. See DRN's EA Comment to FERC, attached as exhibit C.

Given all of these missing pieces, coupled with the missing, inaccurate, and deficient information documented in this and other comments, it is impossible for the Department to assert that the Project will not violate any state water quality standards.

DRN Field Monitoring and Documentation of the Reality of Pipeline Construction, Operation & Maintenance – Both In Compliance with the Law and In Violation of the Law – Shows These Projects Irreparably Harm Rivers, Wetlands and Streams.

Adelpia contends that the Project will be constructed in full compliance with all applicable state laws, and that in temporary workspaces and restored areas the natural landscape will return to its former, or somewhat altered but healthy ecological status. In fact, experience shows that neither is true. The Delaware Riverkeeper Network has found that the construction methods proposed necessarily result in environmental harms and failures of mitigation/restored areas to return to ecological health.

As the result of document reviews and field investigations during construction of three sections of pipeline -- the TGP 300 line upgrade, TGP Northeast Upgrade Project (NEUP), and Columbia 1278 pipeline -- in the Upper Delaware River Basin the Delaware Riverkeeper Network documented:

- over 60 instances where best management practices (BMPs) were not present, inadequate or not functioning or in need of repair, maintenance or reinforcement,
- 4 instances of fueling being conducted in wetlands or near waterbodies,
- dozens of instances of poor signage and staking and mapping errors which sometimes led to impacts off of the permitted Right of Way (ROW), loss of trees outside the ROW, and inaccurate mitigation calculations,
- thermal impacts, extreme (and unreversed) soil compaction, nutrient impacts, benthic invertebrate changes from pipeline cuts, including for streams with exceptional value, high quality and or C-1 anti-degradation classifications,
- discrepancies between pipeline company monthly compliance reports and what work and activities to meet compliance and avoid pollution were actually occurring or not occurring on the ground. We also noted excessive lag time in the filing and/or public release of construction reports making for difficult follow up in the field. DRN documented too few pipeline inspectors and a lack of oversight person-power for these extensive linear projects that spanned many miles and where work was going on simultaneously along the routes with little independent oversight.

Based on first hand observations and monitoring, the Delaware Riverkeeper Network has concluded:

- Interstate natural gas pipeline projects result in a multitude of environmental impacts that inflict high levels of unnecessary ecological damage – this damage is not avoided, nor properly mitigated, despite the resource reports that are drafted or the guidance provided by FERC or other federal or state agencies;
- Violations of environmental laws are common place and an accepted part of pipeline construction – and compliance outweighs penalties and violations to the detriment of the environment and the public;
- Construction problems and potential violations are not properly responded to by the company, by FERC or by other state or federal agencies and mitigation does not undo the harms inflicted -- as a result of both, pipelines inflict enduring and/or repetitive harms on natural resources; and
- Current or proposed guidance from FERC or other regulatory agencies do not prevent, avoid, or otherwise mitigate these ecological and public harms or the multitude of bad practices used by the pipeline companies.

Attached please find: *Field Monitoring Report, Pipeline Construction & Maintenance Irreparably Harms Rivers, Wetlands and Stream., Addendum to Comment for the PennEast Pipeline*, a compilation of Delaware Riverkeeper Network generated technical documents, reports and observations compiled as the result of field monitoring which support, inform and expand upon these conclusions. Our observations in the field demonstrate and document that construction, operation and maintenance practices like those being proposed by the PennEast pipeline company, even when followed in full compliance with regulatory standards, results in unavoidable, unmitigated and irreparable harm and violations of state water quality standards and wetlands protections. In addition, DRN monitoring has documented that over and above these impacts, violations of law are commonplace during pipeline construction, operation and maintenance and as a result the violations of law, including water quality standards and wetland protections, are further exacerbated. The DEP's analysis needs to build in a consideration of the inevitable impacts and implications of construction activity for the project that will necessarily involve violations of the laws governing the construction activity.

THE DEP Should Wait until After the Stakeholder Process for Chapter 105 Program is Completed in Order to Issue 401 Water Quality Certification or any other permits to Adelphia.

DEP is currently undergoing an 8 month stakeholder process of its Chapter 105 program that convened its first meeting of stakeholders in January, 2019, largely due to gross water pollution impacts from Sunoco pipeline/Mariner East pipeline construction in the Commonwealth that were permitted under current Department guidance and regulations.¹² There is an Alternatives Analysis (AA) Stakeholder Workgroup and an HDD Stakeholder Work Group meeting to determine and draft up needed changes in the guidance documents to work to ensure extreme harms to the environment do not continue to be repeated time and time again as has been the case on so many pipelines cutting across the Commonwealth to date.

In the case of the AA stakeholder group, they are reviewing current practices by the DEP to ensure that if an applicant for Chapter 105 is proposing impacts to a waterbody, the applicant is actually required to conduct a thorough and complete Alternatives Analysis that demonstrates that there is no practicable alternative to the proposed activity that will not involve an aquatic resource or have less adverse impact on the resource, and would not have other significant adverse impacts on the environment. Once the groups have agreed on changes, DEP will be drafting new guidance and putting the guidance out for at least a 60-day public comment period, likely in the summer or fall of 2019. For DEP to begin review and possibly permit the Adelphia pipeline before this extensive review of the Chapter 105 process is established and finalized after public input, would be premature and reckless to protection of our freshwater.

¹² Group was a result of *Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc v. Commonwealth Department of Environmental Protection and Sunoco Pipeline L.P* litigation.

In Addition to the Permits Sought, Adelphia Should be Required to Obtain a NPDES Permit For Construction of the Project

There are numerous instances of unlawful sediment discharges from pipeline construction projects across the state, and neither the Chapter 102 permit, nor the Chapter 105 are designed to regulate such discharges pursuant to the Clean Water Act. Rather, these discharges trigger then need for pipeline applicants, such as Adelphia, to obtain a National Pollutant Discharge Elimination System (“NPDES”) permit for construction of the project. Based on Adelphia’s proposed construction activities, sediment discharges into waters of the United States is inevitable. As such, Adelphia must apply for a NPDES permit prior to these construction activities or it is highly likely that it will violate the Clean Water Act, and be exposed to significant civil penalties.

A NPDES permit would provide greater protections for the waters of the Commonwealth as opposed to the state permits Adelphia is required to obtain for construction purposes. The ESCGP-3 Chapter 102 permit, which Adelphia is required to get to monitor such discharges, is a state permit issued pursuant to the Pennsylvania Clean Streams Law that has limited purpose and scope and falls short of the protective measures found in NPDES permits. NPDES permits require additional environmental protections, more exact stormwater volume calculations, additional riparian buffer protections, more public participation opportunities, and higher enforcement penalties. NPDES permits also subject permittees to stricter and more publicly accessible record keeping requirements, allowing for the public to inspect and monitor a project’s compliance with the Clean Water Act.

Given the plethora of unlawful discharges that plagued the Mariner East 2 pipeline project, and the failure of the Clean Streams Law penalty provisions to deter such discharges, the Commonwealth must mandate that every pipeline project, including Adelphia’s, apply for a NPDES permit for construction activities. Absent this requirement DEP cannot certify that the project will not violate Pennsylvania’s water quality standards.

Construction of the Adelphia Pipeline Will Inflict Significant, Unnecessary and, Avoidable Harm on Water Resources, Pennsylvania Communities, and the Environment as Trustee as the State’s Natural Resources, it is imperative that the Department Deny these Applications.

Construction, operation and maintenance of the Adelphia Pipeline will inflict significant and long-term effects on waterways, wetlands, groundwater, floodplains, soils, plants, animals, habitats, and people. These impacts are discussed in detail in the attached comments.¹³ In

¹³ For impacts specific to the Adelphia project see DRN’s EA Comment to FERC, attached as exhibit C

addition to the direct environmental impacts of construction of the Project, the operation of the Adelpia Project will induce more hydraulic fracturing in the state of Pennsylvania and commit more consumers to the use of fossil fuels, thereby contributing to climate change and its disastrous environmental impacts across the globe. These indirect impacts Adelpia will induce and support will bring an additional set of harms to our air, water, forests, natural resources, and environments that must be, and have not been, considered by the DEP. Individually and collectively each of these – the pipeline, the gas drilling, and end uses – will inflict harm that rises to the level of constitutional concern and violation.

Section 27 states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹⁴

At its very core, both the individual environmental rights clause and the public trust clauses of Article I, Section 27 of the Pennsylvania Constitution embody a non-degradation concept placing it on the trustees, in this case the DEP, to ensure that the resources of this state are protected from projects that seek to infringe on an individual's right to a clean and healthful environment. Section 27 is among the rights set forth in Article I of the Pennsylvania Constitution, more commonly called the Declaration of Rights. The Declaration of Rights contains those rights that "guard against the transgressions of the high powers which we have delegated" in the other Articles of the Pennsylvania Constitution.¹⁵ Everything in Article I, including Section 27, "is excepted out of the general powers of government and shall forever remain inviolate."¹⁶ In other words, the people did not delegate to government the authority to trample on their inherent rights protected by Article I.¹⁷

The Pennsylvania Supreme Court has made clear that by virtue of Article I, Section 27, there is a duty on all government officials to engage in informed decisionmaking with regards, to the environment. To ensure that they "refrain from unduly infringing upon or violating the right" to a healthy environment, and fulfill the government's duty as outlined in the Pennsylvania Constitution, "to prevent and remedy the degradation, diminution, or depletion of our public natural resources." DEP is a trustee of the State's natural resources for the benefit of present and

¹⁴ Pa. Const. Art. I, § 27.

¹⁵ Pa. Const. Art. I, § 25; *Robinson Tp., Washington County v. Com.*, 83 A.3d 901, 948-49 (Pa. 2013) (hereinafter referred to as "*Robinson II*"); *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 916 (Pa. 2017) (hereinafter referred to as "*PEDF*").

¹⁶ Pa. Const. Art. I, § 25.

¹⁷ *Robinson II*, 83 A.3d at 947-48 (plurality); see also *PEDF*, 161 A.3d at 916.

future generations. As trustee of our natural resources, DEP must fulfill the duties put upon it, those of prudence, loyalty and impartiality. Therefore, DEP must consider the science, facts, and law when evaluating permits and render a decision that will avoid degradation of our environment.

An after-the-fact review by DEP or one that fails to thoroughly evaluate the impacts of a project on an individual and cumulative level cannot be justified by state law or constitution. The government cannot properly respect the limits placed on it by the people unless it actually analyzes what the impact of its actions will be. To know what the impacts would be, the government must first identify the resources to be impacted and what uses, functions, values, or ecological services they provide. If insufficient information exists to determine if an intrusion into protected rights will occur (i.e. degradation may occur), or if the available information is insufficient to inform about the degree of intrusion, the government must at a minimum require the information to be obtained (or obtain it itself).¹⁸ Using data that is capable of identifying both the type of resources to be impacted, and also the degree of environmental impact on the potentially-affected resources. This duty exists, even in addition to whatever statutory or regulatory authority the DEP has.

Ideally, if the government has done a pre-action analysis sufficient to inform about the intrusion, and it acts, there will be a basis from which to judge the government's decision. Challengers, of course, may muster their own data to rebut the government's view. But, as explained, the lack of data to support a governmental action—such as a permit approval—is itself a violation because the Department must have informed itself about whether its action may cause degradation and if so, what could be done to avoid the harm.¹⁹

As this comment and supporting documentation make clear, DEP cannot constitutionally justify 401 water quality certification for the Adelpia Gateway Project because the DEP cannot meet its constitutional obligations based on the science, facts, and data that have been provided by Adelpia. Further, it is clear there is no compelling state interest that supports a decision to approve Adelpia. Adelpia is a private company seeking to secure private profits, the Project is not needed by the public but wanted by private interests. All the way around, it is clear that Adelpia is yet to prove that it can meet the proper state, federal, and Constitutional requirements and must be denied all the approvals it currently seeks.

DRN asks the DEP Fulfill its Constitution and Legal Duties to the People Of Pennsylvania and Deny Adelpia its 401 Water Quality Certification.

¹⁸ *Robinson II*, 83 A.3d at 952 (plurality); see also *id.* at 983 n.60 (describing trust beneficiary's rights to information necessary to enforce rights or trust limitations).

¹⁹ *Robinson II*, 83 A.3d at 952 (plurality).

One of the benefits of living next to a stream or other natural body of water is the increased property value those riparian rights bring as well as the recreational and quality of life benefits that can be enjoyed. But the cut of a pipeline diminishes all of these rights and benefits of living near a waterway. Property values are demonstrably harmed by the presence of a pipeline.²⁰ Aesthetic qualities, ecological health of a stream and instream populations such as fish are diminished due to a pipeline's stream cuts and permanent loss of riparian vegetation essential for healthy riparian and instream habitat. Ecological and aesthetic harm translates into diminished recreational enjoyment and opportunities as well as a diminished ability to enjoy the environment and one's property.

The Department is charged with the duty of protecting the waterways of Pennsylvania and empowered to do so through the Clean Water Act § 401 certification. As the EPA themselves has stated, "Clean Water Act §401 water quality certification provides states and authorized tribes with an effective tool to help protect water quality, by providing them an opportunity to address the aquatic resource impacts of federally issued permits."²¹ In fact, it was a FERC regulated project where the Supreme Court of the United States reiterated the rights and power vested in a state with through § 401 certification in the following way:

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 polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter 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." 116 Cong. Rec. 8984 (1970).

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,"²²

This power is under attack, not just by the abdication of responsibility by the DEP, but the president himself, who signed an executive order with the intent to undo the rights and protections CWA § 401 guarantees to the states.²³ The Pennsylvania DEP has a chance to show

²⁰ See, e.g., Review of INGAA Foundation Report, "Pipeline Impact to Property Value and Property Insurability", Key Log Economics 3/11/2015.

²¹ Environmental Protection Agency, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes.*, pg. 1.

²² *S. D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370 (2006) (Quote from the unanimous U.S. Supreme Court decision affirming the State of Maine's certification authority over a Federal Energy Regulatory Commission dam relicensing.).

²³ Executive Order, "Promoting Energy infrastructure and Economic Growth", Signed April 10, 2019

that it takes protections of the waters of the commonwealth seriously and act in a meaningful by acting on its regulatory and Constitutional duty and protecting the waters of the Commonwealth.

The facts, law, data, and science make clear that DEP cannot legally, constitutionally and/or defensibly support issuing Water Quality Certification for the Adelpia Gateway pipeline. For all of these reasons, the DEP must deny Water Quality Certification for the Adelpia Gateway pipeline.

Respectfully submitted,

A handwritten signature in blue ink that reads "Maya K. van Rossum" followed by a horizontal line.

Maya K. van Rossum
the Delaware Riverkeeper
Delaware Riverkeeper Network
925 Canal St., Ste, 3701
Bristol, PA 19007

Exhibits attached to Comment:

- A. *Docket No. CP18-46: Comments Regarding Adelpia Gateway Pipeline Project, Scoping Period*, Delaware Riverkeeper Network, June 1, 2018.
- B. *Docket No. CP18-46-001: Comment Regarding Adelpia Gateway Pipeline Amended Application*, Delaware Riverkeeper Network September 28, 2018.
- C. *Comments Regarding Adelpia Gateway, LLC, Adelpia Gateway Project Environmental Assessment, Docket Nos. CP18-46-000 and CP18-46-001*, Delaware Riverkeeper Network February 28, 2019.

Attachments included on CD:

- 1. *Impacts of the Proposed PennEast Pipeline on Exceptional Value Wetlands in Pennsylvania Supple, Supplemental Report, Prepared for the Delaware Riverkeeper Network*, Schmid and Company, March 2019
- 2. *Review of PennEast Pipeline Application for Chapter 102 and 105 Permits*, Michele Adams & Marc Henderson, Water Resources Engineers, Meliora Design, LLC, March 2019.
- 3. *Docket No. CP15-558: Comments Regarding PennEast Pipeline Project*, Delaware Riverkeeper Network Comment to Federal Energy Regulatory Commission, February 11, 2016
- 4. *Comment on Proposed State Water Quality Certification by Section 401 of the PennEast Pipeline Company, LLC, PennEast Pipeline Project*, Delaware Riverkeeper Network to PA DEP, June 10, 2016
- 5. *Comments Regarding PennEast DEIS FERC Docket no. CP15-558*, Delaware Riverkeeper Network, September 12, 2016
- 6. Letter dated September 9, 2016 written by Schmid & Company, Consulting Ecologists to Maya K. van Rossum, the Delaware Riverkeeper.
- 7. Letter Dated November 9. 2016 written by Schmid & Company, Consulting Ecologists to Maya K. van Rossum, the Delaware Riverkeeper.
- 8. *Comment on Proposed PennEast Pipeline Project Proposed Route Modifications*, FERC Docket No.: CP15-558, Delaware Riverkeeper Network, December 5, 2016
- 9. *Docket No. PF15-1-000: Comments Regarding PennEast Pipeline Project, Scoping Period*, Delaware Riverkeeper Network to Federal Energy Regulatory Commission, February 13, 2014
- 10. *Delaware Riverkeeper Network Comment on PADEP 401 Water Quality Certification and Chapter 105 Permits*, Delaware Riverkeeper Network, September 26, 2016.
- 11. *Comment on PennEast Pipeline Company's PennEast Pipeline Project 404 Permit*, Delaware Riverkeeper Network, October 8, 2017
- 12. *Comment on Pending Pipeline Project Review Process in Pennsylvania to Governor Wolf and Acting Secretary McDonnell*, Delaware Riverkeeper Network, February 13, 2017
- 13. *Comment on PennEast Route Modifications*, FERC Docket No.: CP19-78, Delaware Riverkeeper Network, March 8, 2019.
- 14. *Pipeline Development – Strategies And Tools to Minimize Landscape Impacts*, Pennsylvania Pipeline Task Force, The Nature Conservancy, September 23, 2015

15. *Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction)*, Physicians for Social Responsibility & Concerned Health Professionals of New York, 5th edition, March 2018.
16. *Effects of Converting Forest or Scrub Wetlands to Herbaceous Wetlands in Pennsylvania*, Prepared by Schmid Company, Inc., Consulting Ecologists, 2014
17. *The Short and Long-Term Consequences of the Construction of the PennEast Pipeline– A White Paper*, Princeton Hydro, LLC, July 2015.
18. *Proposed State Water Quality Certification –PennEast Pipeline Project*, Michele Adams & Marc Henderson, Water Resources Engineers, Meliora Design, LLC, June 9, 2016.
19. *Delaware Riverkeeper Network v. PADEP, Tennessee Gas*, Environmental Hearing Board, Michelle Adams affidavit, December 17, 2012.
20. *Technical Memorandum, Review Application Materials, Proposed PennEast Pipeline*, Dr. Tom Myers, June 6, 2016
21. *Technical Memorandum, Review of Surface water Withdrawal and Discharge Permit, Delaware River Basin Commission, Proposed PennEast Pipeline*, Dr. Tom Myers, November 30, 2016.
22. *White Paper: Pipelines A Significant Source of Harm*, Delaware Riverkeeper Network,
23. *Delaware Riverkeeper Network v. PADEP, Tennessee Gas*, Environmental Hearing Board, Peter Demicco affidavit, December 17, 2012.
24. *River Values: The Value of a Clean and Health Delaware River*, Delaware Riverkeeper Network, April 2010.
25. *Drinking Water, Arsenic, and Natural Gas Pipelines*, Julia L. Barringer, PhD.
26. *Effects of Forest Cutting and Herbicide Treatment on Nutrient Budgets in the Hubbard Brook Watershed Ecosystem*, Likens G.L., et al., 40 Ecol. Monogr. 23-47 (1970).
27. *Water Quality Changes on Highland Forest before, during, and after Timber Harvesting*, Marryanna, L. et al., International Conference on Environment, Energy, and Biotechnology IPCBEE vol. 33 (2012).
28. Delaware Riverkeeper Network comment to Federal Energy Regulatory Commission, regarding the Spectra M2M project, 6/3/2016
29. *Karst Mitigation Plan PennEast Pipeline Project*, PennEast Pipeline, Prepared by Hatch Mott MacDonald.
30. *In re: Sunoco Pipeline L.P. a/k/a Energy Transfer Partners*, Emergency Order, Pennsylvania Public Utility Commission Docket No. P-2018-3000281, March 7, 2018
31. Appendix 1: Table A-1. Active, proposed and reported natural gas wells in Pennsylvania, by county.
32. Letter dated September 9, 2016 written by Key-Log Economics to Secretary Kimberly Bose & Deputy Secretary Nathaniel J. Davis.
33. *Review of INGAA Foundation Report, “Pipeline Impact to Property Value and Property Insurability”*, Key Log Economics March 11, 2015
34. *Professional Review & Comment of the Draft Environmental Impact Statement and Supporting Documents Related to Surface Water Impacts of the Proposed PennEast Pipeline Project*, Michelle Adams & Marc Henderson, Water Resources Engineers, Meliora Design, LLC, September 5, 2016.
35. *The Effects of the Proposed PennEast Pipeline on Exceptional Value Wetlands in Pennsylvania*, Prepared for the Delaware Riverkeeper Network, Schmid and Company, July 2016.

36. *Technical Memorandum Review of Draft Environmental Impact Statement, Proposed PennEast Pipeline, Docket No. CP15-558-000, FERC\EIS: 0271D*, Tom Myers, Ph.D., August 31, 2016.
37. *Opinion on the PennEast Pipeline*, Arthur Berman, Petroleum Geologist, Labyrinth Consulting Services, Inc., September 11, 2016.
38. *Technical Review of Volume I FERC Draft Environmental Impact Statement Submitted for PennEast Pipeline Project*, Princeton Hydro, September 2016.
39. *Field Monitoring Report, Pipeline Construction & Maintenance Irreparably Harms Rivers, Wetlands and Streams. Addendum to Comment for the PennEast Pipeline*, Delaware Riverkeeper Network.
40. *Marcellus/Utica on Pace for Pipeline Overbuild, Says Braziel*, Natural Gas Intelligence, June 8, 2016.
41. *Achieving Higher Quality Restoration Along Pipeline Rights of Way*, Leslie Sauer, May 2014.
42. *Professional Opinion of Proposed PennEast Pipeline Project*, Arthur E. Berman, Petroleum Geologist, Labyrinth Consulting Services, Inc., February 26, 2014.
43. *Analysis of Public Benefit Regarding PennEast*, Skipping Stone, March 9, 2016.
44. *Review of PennEast Pipeline Project Economic Impact Analysis*, Jannette Barth, Pepecton Institute, April 4, 2016.
45. *Expert Report on the PennEast Pipeline Project Economic Impact Analysis for New Jersey and Pennsylvania*, The Goodman Group Report, Nov 4, 2015.
46. *The Potential Environmental Impact from Fracking in the Delaware River Basin*, Steven Habicht, Lars Hanson, and Paul Faeth, August 2015.
47. *Report on Phase 1 Bog Turtle Survey for Wetlands Associated with Hunters Creek, Towamensing Township, Carbon County, Pennsylvania*, Jason Tesauro, September 5, 2015.
48. *Drilling Deeper: A Reality Check on U.S. Government Forecasts for a Lasting Tight Oil and Shale Gas Boom*, J. David Hughes, Post Carbon Institute, October 2014.
49. *A Bridge Too Far: How Appalachian Basin Gas Pipeline Expansion Will Undermine U.S. Climate Goals*, Oil International, July 2016.
50. *Climate Change in Pennsylvania: Impacts and Solutions for the Keystone State*, Union of Concerned Scientists, October 2008.
51. *Climate Change Impacts and Solutions for Pennsylvania*, Union of Concerned Scientists, 2008.
52. *The Changing Northeast Climate*, Union of Concerned Scientists, 2006.
53. *Cumulative Land Cover Impacts of Proposed Transmission Pipelines in the Delaware River Basin*, Lars Hanson and Steven Habicht, May 2016.
54. *Natural Gas Price Increase Inevitable*, Arthur Berman, The Petroleum Truth Report, February 21, 2016.
55. *Climate Change Impacts in the United States*, Radley Horton and Gary Yohe, May 2014.
56. *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, Christina Goldfuss, Council on Environmental Quality, August 1, 2016.
57. *Pennsylvania Energy Impacts Assessment*, Nels Johnson, the Nature Conservancy, November 15, 2010.
58. Key-Log Economics, LLC, *Economic Costs of the PennEast Pipeline*, January 2017.

59. Key-Log Economics, LLC, *Economic Costs of the Mountain Valley Pipeline*, May 2016.
60. Key-Log Economics, LLC, *Economic Costs of the Atlantic Coast Pipeline*, February 2016.
61. Key-Log Economics, LLC, *Economic Costs of the Eastern System Upgrade*, April 2017.
62. Key-Log Economics, LLC, *Atlantic Sunrise Project: FERC's Approval Based on an Incomplete Picture of Economic Impacts*, March 2017.
63. Key-Log Economics, LLC, *The Social Cost of Carbon and the Adelpia Gateway Project*, February 2019.
64. Delaware Riverkeeper Network, *Field-Truthing and Monitoring of the Proposed PennEast Pipeline*, FERC Draft EIS, September 2016.
65. *Clearcutting in Forested Wetlands*, Schmid & Company, Inc., Consulting Ecologists, May 1, 2017.
66. *Expert Report on the Environmental Impacts of the Millennium Eastern System Upgrade*, Princeton Hydro, November 28, 2016.
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68. Letter dated September 23, 2016 written by the US Environmental Protection Agency to Maya K. van Rossum, the Delaware Riverkeeper.
69. *The Economics of Clean Energy Portfolios*, Rocky Mountain Institute, 2018.
70. Comment on FERC Docket No. PL18-1 by Key-Log Economics, LLC, July 23, 2018.
71. *Citizen Input Regarding the Proposed PennEast Pipeline*, Key-Log Economics, LLC, March 2017.
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73. *Comment Regarding Adelpia Gateway Pipeline Project- Scoping Period*, Delaware Riverkeeper Network, June 1, 2018.
74. *Environmental and Geotechnical Considerations Regarding the Proposed Paulsboro Natural Gas Pipeline Crossing Beneath the Delaware River*, HydroQuest, February 16, 2016.
75. *Hydrologic and Environmental Rationale to Bury Gas Pipelines Using Horizontal Directional Drilling Technology at Stream and River Crossings*, HydroQuest, June 12, 2012.
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