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VIA EMAIL AND U.S. MAIL

John Gray, Esq.
Deputy Chief of Staff
State of New Jersey
Department of Environmental Protection
Office of Permit Coordination and Environmental Review
P.O. Box 420 Mail Code 401-07J
Trenton, NJ 08625-0420

Re: PennEast's Unlawful and Deficient Application for New Jersey Freshwater
Wetlands Individual Permit and 401 Water Quality Certificate

Dear Mr. Gray:

We write on behalf of the New Jersey Conservation Foundation ("NJCF") and the Stony Brook-Millstone Watershed Association ("SBMWA") to address the unauthorized and deficient permit application submitted on April 6, 2017 by the PennEast Pipeline Company ("PennEast") to the New Jersey Department of Environmental Protection ("NJDEP"), Division of Land Use Regulation, seeking a Freshwater Wetlands Individual Permit ("FWIP") and a Water Quality Certificate ("WQC") for the proposed PennEast Pipeline Project. We have reviewed PennEast's cover letter and are in receipt of the permit and certificate application. NJCF and SBMWA intend to comment fully on the PennEast application in due course, if necessary, but NJDEP must immediately reject PennEast's application on the following grounds: (1) PennEast has no legal authority to apply for either a FWIP or a WQC on land that it does not own and is unauthorized to conduct the activities contemplated therein; and (2) PennEast's permit application is, on its face, deficient under controlling NJDEP regulations, and cannot support review—let alone issuance—within the law. Moreover, PennEast's cover letter misleads as to the deadlines and options facing NJDEP on this unlawful and deficient application.

N.J.A.C. 7:7A-10.1(d) and 7:7A-10.2(b)(2) require NJDEP to reject PennEast's unauthorized application for a FWIP and WQC. PennEast lacks both landowner consent to apply for these permits and therefore the legal authority to do so. There are a multitude of properties included therein that it does not own, and it lacks the legal authority to do the work

that is described in its application on all of the properties. In knowing violation of these laws, PennEast still chose to submit its unauthorized application, stating, “PennEast realizes that it does not yet have full legal authority to perform the proposed activities on all of the parcels, as may be required by the FWIP application requirements.” Letter dated April 6, 2017, from PennEast to NJDEP. NJDEP is required by law to immediately reject this premature application, without even reviewing it for administrative completeness.¹

Were NJDEP to review this unlawful application for administrative completeness, N.J.A.C. 7:7A-12.1 also requires NJDEP to return a permit application that is glaringly administratively incomplete. In fact, NJDEP provided PennEast clear written instructions not to submit an incomplete application. Under NJDEP’s own prior directive, NJDEP must therefore return PennEast’s application as submitted. In a letter to the Federal Energy Regulatory Commission (“FERC” or the “Commission”) dated December 20, 2016, NJDEP wrote in no uncertain terms that

Penn East has completed less than thirty-five (35%) percent of the required, full environmental assessment for the entire proposed pipeline route due to lack of complete route access. Completed surveys and analysis for all regulated impacts is required for DEP to accept many of the permit applications as complete and prior to DEP initiating a review of those permit applications.²

This deficiency remains the case: PennEast still has not completed a majority of the New Jersey environmental assessment required for NJDEP to consider the Freshwater Wetlands Individual Permit and Water Quality Certificate application complete, such to allow NJDEP to begin its review.

PennEast must be aware that its application is both unauthorized and incomplete, because the company attempts to obfuscate these issues with the disingenuous claim that it had an “obligation” to submit the present application in order to abide by a schedule set by FERC. PennEast uses that schedule to imply that PennEast must necessarily receive all approvals for its proposed project by July 6, 2017, within ninety days from FERC’s April 7, 2017 issuance of the Final Environmental Impact Statement (“FEIS”). But FERC’s schedule does not excuse PennEast—nor NJDEP—from the legal requirements for submission and review of an application for a Freshwater Wetlands Individual Permit and a Water Quality Certificate. Indeed, because PennEast has submitted an unauthorized and deficient application, NJDEP must reject it.

¹ PennEast also misrepresents the facts in this submission. First, PennEast states that “PennEast has received legal authority to conduct the regulated activities along a portion of the right of way. . .” -- but it has received no legal authority to conduct any of the regulated activities along any of the right of way. Second, it states that it expects to have legal authority when it expects FERC to issue a Certificate. Yet PennEast will have no legal authority to conduct the activities described in this application unless it is granted such through the completed exercise of a legitimately delegated power of eminent domain. FERC does not currently possess the power to consider whether to issue this hypothetical Certificate, and when and if it does issue such, PennEast still must exercise any limited eminent domain authority granted thereunder in independent court proceedings.

² NJDEP Comments on Route Modifications, FERC Docket CP15-558, Accession No. 20161221-5164, at 2 (Dec. 20, 2016).

Finally, in the cover letter to its permit application, PennEast wrongly suggests that NJDEP faces a “mandatory” deadline to decide on its application for a Freshwater Wetlands Individual Permit and a Water Quality Certificate: ninety days from the FEIS issuance, or July 6, 2017. Sensibly, though, this default timeline does not prevent NJDEP from refusing to consider an unlawful and deficient application.³ The Natural Gas Act (“NGA”) gives FERC authority to coordinate the processing of “Federal authorizations.” These are “authorization[s] required under Federal law” for FERC-licensed gas projects,⁴ including authorizations delegated to states under sections 404 and 401 of the Clean Water Act—in New Jersey, Freshwater Wetlands Individual Permits and Water Quality Certificates, respectively. Accordingly, FERC regulations establish a schedule that a “final decision” on a request for such an authorization “is due no later than 90 days after [FERC] issues its final environmental document, unless a schedule is otherwise established by Federal law.”⁵ In promulgating this default schedule, however, FERC explained that the ninety-day timeline need not apply where an authorization request (i.e., permit application) is incomplete:

In the event of a disagreement regarding the adequacy of the contents of a request for a Federal authorization, the Commission may find reason to revise an agency’s deadline for a final decision. However, although the Commission implores project sponsors and agencies to work cooperatively, **it cannot compel them to do so. An agency retains the discretion to reject a request on the grounds that information necessary to reach a decision is lacking.**⁶

Therefore, FERC’s usual authorization schedule does not preclude a permitting authority from determining that no lawful request for a federal authorization has been made. Moreover the schedule specifically anticipates rejecting a deficient permit application, as NJDEP must do here. Further, FERC itself may revise the ninety-day default deadline where a permit application is inadequate. Thus, in rejecting the present permit application, NJDEP merely retains the rights specifically contemplated and accorded to it under FERC’s regulations, which propose a schedule but do not override environmental agencies’ determinations of when those applications are lawful or sufficient.⁷

With its unauthorized and deficient permit application, PennEast seeks to strong-arm its way through New Jersey’s permitting process without having any rights to even begin such process, and having conducted no environmental assessment adequate to even *submit* a complete application for a Freshwater Wetlands Individual Permit and a Water Quality Certificate.

³ In fact, this schedule is more suited to address certificate applications in which pipeline companies have lawfully applied for ancillary federal authorizations during the FERC NEPA process - not at the very conclusion of it.

⁴ 15 U.S.C. § 717n.

⁵ 18 C.F.R. § 157.22.

⁶ 71 Fed. Reg. 62,912, 62,916 n.26 (Oct. 27, 2006) (emphasis added).


⁷ In the future, should PennEast submit a proper and administratively complete permit application as required under NJDEP regulations, NJDEP would then be required to afford a public comment period on the application as mandated by N.J.A.C. 7:7A-12.3, and an opportunity for hearing in the event of significant public interest under N.J.A.C. 7:7A-12.4. The regulatory timelines for comment and hearing may not be subordinated to PennEast’s purportedly “mandatory” deadline of July 6, 2017, especially where, as here, PennEast has not and cannot meet New Jersey regulatory requirements.

PennEast cannot use the FERC schedule as a shield to submit a permit application and expect it to be considered, when (1) it has no legal authority to begin the application process; and (2) that application is deficient under NJDEP regulations. NJDEP is compelled to reject PennEast's permit application for all the above reasons.

Respectfully submitted,



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