

Wade Chandler  
Chief, Pennsylvania Section,  
Baltimore District, USACE

Beth Bachur  
Acting Chief, Regulatory Branch  
Baltimore District, USACE

June 30, 2016

*Via email and electronic filing in FERC docket CP15-138*

**Re: Defective Public Notice for Williams-Transco's Atlantic Sunrise Project, PN16-30**

Dear Chiefs Chandler and Bachur:

The nine undersigned public interest groups respectfully urge you to cure the defects in the Baltimore District's Public Notice on the application from Williams-Transco ("Transco") for a permit pursuant to Section 10 of the Rivers and Harbors Act of 1899 and/or Section 404 of the Clean Water Act for the Atlantic Sunrise Project ("Atlantic Sunrise" or "the Project").<sup>1</sup> Specifically, we urge you to cure the following defects:

- ◊ incomplete/inaccessible permit application;
- ◊ incomplete/inaccessible statement on water impact avoidance and minimization;
- ◊ incomplete/inaccessible mitigation plan; and
- ◊ incomplete/inaccessible information on associated Pennsylvania water permitting.<sup>2</sup>

As we explain below, such defects deny us—and other stakeholders—our procedural right to participate in the Army Corps' public interest review under the Clean Water Act and the National Environmental Policy Act. The defective notice also violates the Army Corps' own regulations, 33 C.F.R. § 230.94(b), 33 C.F.R. Parts 320-325, 332, as well as the public participation requirements in 40 C.F.R. § 230.94.

As a practical matter, the Public Notice set a public comment deadline (June 30, 2016) that precludes meaningful participation because it falls just three days after the comment deadline for

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<sup>1</sup> PN16-30, *available at* <http://goo.gl/19LwzZ>.

<sup>2</sup> This is not necessarily an exhaustive list. Here we focus on the key defects that we discovered to date with respect to Section 404 permitting requirements. We reserve our rights to file additional comments on both the Section 404 and Section 10 permitting processes for the Project.

the Federal Energy Regulatory Commission's (FERC) Atlantic Sunrise Draft Environmental Impact Statement (DEIS). This exacerbates the vast impacts and the vast, yet incomplete/inaccessible record that the public is being asked to review. Indeed, numerous stakeholders—including the undersigned groups<sup>3</sup> and elected officials<sup>4</sup>—requested more time to review the DEIS, underscoring the hardship posed by the short public comment period provided by FERC. The comment period provided by the Baltimore District is even shorter (45 days), adding to this hardship. As a result, the public is yet to have a meaningful participation opportunity on a mega-project that would forever alter people's lives, beloved recreational areas, and public natural resources—especially in Pennsylvania.

The Baltimore District's reliance on Transco's assertions is particularly troubling. Nothing in the Public Notice reassures us that, before issuing it, the Baltimore District independently verified the completeness and accuracy of the company's submittals, including the application and the vitally important plan to avoid, minimize, and mitigate the Project's water impacts. This increases the burden on us—and other stakeholders—to discover the information gaps, which in turn requires more time for public review.

For all these reasons, set out in detail below, we respectfully request that you:

1. Issue a revised public notice that cures the defects in the original;
2. Open a new public comment period of at least 90 days; and
3. Schedule at least one new public hearing pursuant to 33 C.F.R. § 327.4(b) because curing the public notice defects will require significant new information to be disclosed and reviewed, and there is overwhelming public interest in participating, as shown during the FERC public meetings held earlier this month.

### **FACTUAL BACKGROUND**

On March 31, 2015, Transco filed an application with FERC under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f, for a certificate of public convenience and necessity ("Certificate") for the Atlantic Sunrise Project.<sup>5</sup>

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<sup>3</sup> See, e.g., Sierra Club letter of June 1, 2016, *available at* <http://goo.gl/6iy6B2>.

<sup>4</sup> See, e.g., Pennsylvania Mike Folmer's letter of May 26, 2016, *available at* <http://goo.gl/SFW9qo>.

<sup>5</sup> See FERC Docket No. CP15-138-000.

On April 9, 2015, Transco filed an application with the Army Corps for a permit pursuant to Section 10 of the Rivers and Harbors Act of 1899 and/or Section 404 of the Clean Water Act for the Atlantic Sunrise Project.<sup>6</sup>

As part of the Atlantic Sunrise Project, Transco proposes to:

- ◊ construct 183.7 miles of 30- and 42-inch-diameter greenfield pipeline known as the Central Penn Line ("CPL") North and CPL South in Pennsylvania;
- ◊ construct 11.5 miles of new 36- and 42-inch diameter loops known as Chapman and Unity Loops in Pennsylvania;
- ◊ replace 2.5 miles of 30-inch pipeline in Virginia;
- ◊ construct two new compressor stations in Pennsylvania;
- ◊ increase compression at three existing compressor stations in Pennsylvania and Maryland;
- ◊ construct two new meter stations and three new regulator stations in Pennsylvania; and
- ◊ modify existing aboveground facilities in Pennsylvania, Virginia, North Carolina, and South Carolina to allow for bi-directional flow and the installation of supplemental odorization, odor detection, and/or odor masking/deodorization equipment.<sup>7</sup>

By any measure, the Project will have significant impacts, especially on water resources. According to FERC, the water impacts are concentrated in four major watershed basins (i.e., 6-digit hydrologic unit codes): the Upper Susquehanna, the Lower Susquehanna, and the West Branch Susquehanna in Pennsylvania, and the Potomac in Virginia. More specifically, in eight watershed subbasins: the Upper Susquehanna-Lackawanna, the Upper Susquehanna-Tunkhannock, the Lower Susquehanna, the Lower Susquehanna-Swatara, the Lower Susquehanna-Penns, the Middle West Branch Susquehanna, and the Lower West Branch Susquehanna in Pennsylvania, and the Middle Potomac-Anacostia-Occoquan in Virginia.

In these watersheds, the Project will have pervasive impacts:

- ◊ 333 waterbody crossings, including 207 perennial streams, 79 intermittent streams, 41 ephemeral streams, and 6 other open water areas; and
- ◊ 255 wetlands crossings, including at least 48.4 wetland acres of wetland of which at least 10.9 acres are forested wetlands.<sup>8</sup>

The problem is, the scale and scope of the impacts is not properly disclosed in the DEIS or elsewhere in the FERC e-library. Nor did Baltimore District provide any information beyond the limited content in the Public Notice, which we describe further below, much less identify

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<sup>6</sup> See DEIS 1-11.

<sup>7</sup> See FERC Draft Environmental Impact Statement, ES-1 - ES 2 [hereinafter "DEIS"].

<sup>8</sup> DEIS at 4-274.

where the public can find the information that is relevant to the District's public interest review of water impacts.

The undersigned groups have already submitted extensive comments on the outstanding information gaps on the Project's water impacts. We have persistently voiced our concerns that these gaps preclude meaning public participation. Nonetheless, we have tried as best as we can under the circumstances to identify and comment on the problems with how Transco proposes to handle the Project's water impacts.

Here, we incorporate by reference all of these earlier comments, including:

- ◊ Allegheny Defense Project et al comments on DEIS (June 27, 2016);<sup>9</sup>
- ◊ Clean Air Council comments on DEIS (June 27, 2016);<sup>10</sup>
- ◊ Sierra Club et al comments on DEIS (June 27, 2016);<sup>11</sup>
- ◊ Lancaster Against Pipelines comments on DEIS (June 27, 2016);<sup>12</sup>
- ◊ Lancaster Against Pipelines comments on Chapter 105 permit (May 31, 2016);<sup>13</sup>
- ◊ Allegheny Defense Project et comments on Chapter 105 permit (May 31, 2016);<sup>14</sup> and
- ◊ Lebanon Pipeline Awareness comments (June 28, 2016)<sup>15</sup>

Also, we incorporate by reference the recent statements by PADEP and the U.S. Environmental Protection Agency recognizing the need to improve public participation opportunities because of the Project's vastness, and because of the outstanding information gaps:

First, on June 1, 2016, "in the interest of transparency and public participation," PADEP extended the comment period on the applicable state permitting processes.<sup>16</sup> PADEP rightly recognized that a "project of this size requires thoughtful public input," and thus extended by

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<sup>9</sup> Available at <http://goo.gl/crvUYq>.

<sup>10</sup> Available at <http://goo.gl/DwJFdR>.

<sup>11</sup> Available at <http://goo.gl/cgQYN9>.

<sup>12</sup> Available at <http://goo.gl/FrBQpx>.

<sup>13</sup> Available at <http://goo.gl/IRGOZH>.

<sup>14</sup> These comments will be posted in the FERC docket CP15-138 under Submission ID 684473.

<sup>15</sup> Available at <http://goo.gl/eWzIeM>.

<sup>16</sup> DEP Newsroom, "DEP Extends Comment Period for Permits Related to Atlantic Sunrise Pipeline," June 1, 2016, available at <http://goo.gl/i01xHs>.

60 days the comment periods on the state water obstruction and encroachments, erosion and sedimentation control, and air quality permits.”<sup>17</sup>

Earlier this week, PADEP urged FERC to recognize that certain state water permitting processes are ongoing, and to fully factor the outcome of the same into FERC's public interest review.<sup>18</sup> In other words, neither FERC, nor anyone else has a complete picture of the water impacts, because the state of Pennsylvania is still reviewing and developing the record on the impacts.

Earlier this week, EPA also wrote FERC that the Project raises “environmental concerns,” and that the DEIS presents “insufficient information.”<sup>19</sup> EPA noted that key aspects of the Project—including the need, the water impacts, and the alternatives—have yet to be properly studied and disclosed. EPA “recommend[ed] that the information not currently included in the DEIS be disseminated and appropriately evaluated with the resource agencies and public stakeholder participation prior to the issuance of any certificates by FERC.”<sup>20</sup>

On May 15, 2016, the Baltimore District issued the Public Notice setting June 30, 2016, as the deadline for public comments.<sup>21</sup> At the same time, the Public Notice states: “Any comments received by our office [i.e., the Baltimore District] or FERC will be considered by the Corps of Engineers to determine whether to issue, modify, condition or deny a permit for the proposed work”<sup>22</sup>—hence our cross-reference, above, to our comments filed with FERC.

The Public Notice provides only limited information on the Atlantic Sunrise Project and the Baltimore District's responsibilities under NEPA and the Clean Water Act. It says nothing about where the public can access Transco's Section 404 permit application, mitigation plan, or, as we noted above, any other information that the Baltimore District considers pertinent to its public interest review. In fact, the Public Notice states that Transco is still “designing a wetland mitigation plan,” without any indication of when the plan will be completed. Moreover, the information on mitigation in the Public Notice appears to be mere excerpts from Transco's incomplete mitigation plan.<sup>23</sup> The section titled “Avoidance, Minimization, and Compensation”

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<sup>17</sup> *Id.*

<sup>18</sup> PADEP letter of June 27, 2016, *available at* <http://goo.gl/4I8kdk>.

<sup>19</sup> EPA letter of June 27, 2016, enclosed as Attachment 1.

<sup>20</sup> *Id.* [emphasis added].

<sup>21</sup> PN16-30.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 11-16 (showing tables “provided by Williams on 5/4/2016”).

is no better. It consists of four short paragraphs, none of them even mention the requisite water dependency test, much less discuss the availability of alternatives that do not involve aquatic sites. There is, however, one bald assertion that Transco somehow already “implemented measures to avoid and minimize impacts on surface waters and wetlands.”<sup>24</sup> This leaves the public in the dark on how to verify that Transco did so.

After many attempts to locate Transco's submittals to the Baltimore District,<sup>25</sup> and other material relevant to the Corps' public interest review, we tried the contact listed in the Public Notice, Mike Dombroskie, to confirm how to access these materials. Mr. Dombroskie acknowledged that “since the original application has been submitted there has been a number of major amendments, updates, to the original application.”<sup>26</sup> Therefore, Mr. Dombroskie said the “best bet maybe to go on the FERC web site, as the information, with all of the amendments, would be posted on the docket.”<sup>27</sup> When we asked him to specify where the information is posted on FERC's website, Mr. Dombroskie directed us to Joanne Wachholder, the Baltimore District's lead environmental reviewer for the Atlantic Sunrise Project. When we tried contacting Ms. Wachholder, however, we received an automated response that she was out of the office until July 7, 2016, a week after the deadline for these comments.<sup>28</sup>

The Public Notice also lacks the requisite statement of the public's right to request a hearing on this matter.

## LEGAL BACKGROUND

Clean Water Act Section 404<sup>29</sup>—and the associated public participation requirements—aim to avoid the unnecessary destruction or alteration of Waters of the United States, including wetlands, and to compensate for the unavoidable loss of such waters. Specifically, Section 404

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<sup>24</sup> *Id.* at 8.

<sup>25</sup> Given no guidance in the Public Notice, or on the Baltimore District's website, we focused our search on the FERC e-library, which collects over two years of filings on Atlantic Sunrise (Transco started the pre-filing process for the Project in the spring of 2014). Confounding this unwieldy task, the FERC e-library was down several times during the 45-day comment period.

<sup>26</sup> M. Dombroskie email of June 28, 2016.

<sup>27</sup> *Id.*

<sup>28</sup> J. Wachholder email of June 29, 2016.

<sup>29</sup> As noted above, our focus here on Section 404 permitting requirements should not be read as an endorsement of the Corps' approach to Section 10 permitting. We reserve our rights to provide further comments on both Section 404 and Section 10 permitting processes.

prohibits the discharge of dredged or fill material if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. Every proposed discharge within the ambit of Section 404, therefore, requires an evaluation of the potential to use non-aquatic areas and other aquatic sites that would result in less adverse impact to the aquatic ecosystem. The Army Corps cannot issue a permit in circumstances where an environmentally preferable practicable alternative for the proposed discharge exists.

Section 404 permitting starts with the Army Corps verifying that the application is complete. The Army Corps regulations define completeness as “when sufficient information is received to issue a public notice,”<sup>30</sup> with cross-references to two sets of requirements<sup>31</sup>—one on the content of applications, the other on the content of public notices. Intuitively, before issuing a public notice, the Army Corps thus has a duty to verify that the underlying application is complete and contains all the requisite information.<sup>32</sup>

The Army Corps also has an overarching duty to ensure that all public notices contain “sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.”<sup>33</sup> Army Corps regulations specify 17 “items of information” to be included in the notices. This includes, for instance, a statement that any person may request a hearing,<sup>34</sup> and “in case of doubt, a public hearing shall be held.”<sup>35</sup> Public notices also are to include “[a]ny other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest.”<sup>36</sup> It is beyond dispute that such requirements aim to facilitate meaningful participation, not preclude it.

Additionally, public notices for Section 404 permit applications “must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and

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<sup>30</sup> 33 C.F.R. § 325.1(d)(10).

<sup>31</sup> *Id. citing* 33 C.F.R. § 325.1(d) and § 325.3(a).

<sup>32</sup> 33 C.F.R. § 325.1(d)(10).

<sup>33</sup> *Id.* at § 325.3(a).

<sup>34</sup> *Id.* at § 325.3(a)(15).

<sup>35</sup> 33 C.F.R. § 327.4(b).

<sup>36</sup> *Id.* at § 325.3(a)(13).

compensated for.”<sup>37</sup> Importantly, the “level of detail” in the statement “must be commensurate with the scope and scale of the impacts.”<sup>38</sup> Courts recognize that compensatory mitigation may be the “single most important material issue related to the justification” of Section 404 permits.<sup>39</sup> As such, it is particularly important for the Army Corps to provide the public access to and an opportunity to comment on the complete mitigation plan for projects seeking Section 404 permits.

## DISCUSSION

- I. The Public Notice's failure to include or otherwise ensure public access to the complete permit application violates public participation requirements, and draws into question whether the Baltimore District made a proper completeness determination.

One of the fundamental defects in the Public Notice is that it fails to tell the public where to find the complete permit application, in violation of public participation requirements. To be sure, the complete application should always be “available” because it is a prerequisite to issuing the public notice. Here, the Baltimore District should have provided the complete application with the Public Notice for any number of reasons, including, first, doing so would “assist interested parties”<sup>40</sup> given the multiple “major amendments” and “updates” to the application that cannot be readily located in the FERC docket, as evidenced by our fruitless searches.

Second, the contact listed in the Public Notice could not even describe how to locate the complete application. This is an alarming state of affairs. Not only does it preclude meaningful public participation, but it also draws into question whether the District made a proper completeness determination. If staff whom the District holds out as knowledgeable about the Project cannot readily locate the complete application, was a completeness determination even made?

Third, Transco's most recent filing proposing changes to the Project is dated May 18, 2016,<sup>41</sup> three days after the Baltimore District issued the Public Notice. Without knowing what the District considered the “complete application,” it is impossible to tell which changes the District

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<sup>37</sup> 40 C.F.R. § 230.94.

<sup>38</sup> *Id.*

<sup>39</sup> *Ohio Valley Emvtl. Coal. v. U.S. Army Corps of Engineers*, 674 F. Supp. 2d 783 (S.D.W. Va. 2009).

<sup>40</sup> 33 C.F.R. § 325.3(a)(13).

<sup>41</sup> *Available at* <http://goo.gl/oxtqXc>.



is considering in its public interest review. This leaves us with an ill-defined, moving target, rather than the “clear understanding of the nature and magnitude of the activity” on which we are supposed to comment, in violation of public participation requirements.<sup>42</sup>

II. The Public Notice's statement on water impact avoidance and minimization is so devoid of detail as to violate public participation requirements.

The section in the Public Notice titled “Avoidance, Minimization, and Compensation” is confoundingly slim. Whereas the level of detail here is supposed to be “commensurate with the scope and scale of the impacts,”<sup>43</sup> it is by no means so. Instead, this section appears to rely entirely on assertions by Transco, without any hint as to how the public (or the Baltimore District) can locate and verify Transco's avoidance and minimization analyses. Yet those analyses and the independent verification are supposed to be the focus of Section 404 public interest reviews. Surely, that is why there are express requirements for both the application and the public notice to discuss how impacts to waters of the United States are to be avoided and minimized.<sup>44</sup>

The bald assertion in the Public Notice that Transco somehow already “implemented measures to avoid and minimize impacts on surface waters and wetlands,”<sup>45</sup> shuts down inquiry instead of inviting it. This violates public participation requirements.

III. The Public Notice's references to Transco's incomplete mitigation plan, with no direction for how to access the plan or track its development, violates public participation requirements.

Like avoidance and minimization, mitigation is supposed to be the focus of Section 404 public interest reviews. Yet the Public Notice is similarly defective in its coverage of mitigation. Besides the references and excerpts to Transco's incomplete mitigation plan, the Public Notice includes no direction for locating it or the eventual final version. Additionally, the Public Notice does not specify where trenchless crossings (a relatively more environmentally protective technique) will be used, nor how that determination will be made. This is not the “level of

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<sup>42</sup> 33 C.F.R. § 327.4(b).

<sup>43</sup> *Id.*

<sup>44</sup> 33 C.F.R. § 325.1(d)(7) (applications); 33 C.F.R. § 327.4(b)(1) (public notices).

<sup>45</sup> *Id.* at 8.

detail” that is “commensurate with the scope and scale of the impacts.” It precludes meaningful input in violation of public participation requirements.

IV. The Public Notices’ failure to address the incomplete/unavailable information due to Pennsylvania’s ongoing water permitting also precludes meaningful public participation.

As PADEP reminded FERC earlier this week, its water permitting processes are ongoing, and PADEP is still developing information on the Project’s water impacts. There is no mention of this fact, however, in the Public Notice. Instead, the Public Notice includes an confusing reference to Pennsylvania’s Clean Water Action Section 401 water quality certification: Although PADEP issued that certification in April (at least the certification corresponding to FERC’s certification decision), the Public Notice does not acknowledge this, but states that “the Section 401 certifying agency [PADEP] has a statutory limit of one year from the date of this public notice [May 15, 2016] to make its decision.”<sup>46</sup> This fails to explain to the public the relevance of Pennsylvania’s ongoing water permitting, how the various federal and state permitting decisions on water impacts are interrelated and coordinated, and where the relevant information on water impacts will be disclosed. All of this precludes meaningful public participation.

Finally, the Public Notice’s failure to state that any person may request a hearing in and of itself makes the notice legally insufficient.

For all the foregoing reasons, we urge you to:

1. Issue a revised public notice that cures the defects in the original;
2. Open a new public comment period of at least 90 days; and
3. Schedule at least one new public hearing pursuant to 33 C.F.R. § 327.4(b) because curing the public notice defects will require significant new information to be disclosed and reviewed, and there is overwhelming public interest in participating, as shown during the FERC public meetings held earlier this month.

Respectfully submitted,

/s/

Joanne Kilgour, Thomas Au, Diana Csank  
**Sierra Club**

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<sup>46</sup> PN16-30 at 17.

Re: Defective Public Notice for Williams-Transco's Atlantic Sunrise Project, PN16-30  
June 30, 2016

Ryan Talbott  
**Allegheny Defense Project**

Ben Lockett  
**Appalachian Mountain Advocates**

Ann Pinca  
**Lebanon Pipeline Awareness**

Eva Telesco, Malinda Harnish Clatterbuck, Tim Spiese  
**Lancaster Against Pipelines**

Michael Helfrich  
**Lower Susquehanna Riverkeeper**

Joseph Otis Minott  
**Clean Air Council**

Pam Bishop and Doug Lorenzen  
**Concerned Citizens of Lebanon County**

Betsy Nicholas  
**Waterkeepers Chesapeake**

Cc:

Michael Dombroskie, USACE Baltimore District  
Jeffrey Lapp, EPA Region 3  
Patrick McDonnell, PADEP