#### PennEast Pipeline Company, LLC 835 Knitting Mills Way Wyomissing, PA 19610



October 11, 2019

#### VIA OVERNIGHT FEDERAL EXPRESS

Diane Dow, Director New Jersey Department of Environmental Protection Division of Land Use Regulation Mail Code 501-02A PO Box 420 Trenton, New Jersey 08625-0420

RE: PennEast Response to the October 8, 2019 Closure Letter

File and Activity No.: 0000-17-0007.5 LUP190001, FWW190001

Applicant: PennEast Pipeline Company, LLC Project Name: PennEast Pipeline Project Location: Hunterdon and Mercer Counties

Dear Ms. Dow:

PennEast Pipeline Company, LLC (PennEast) is in receipt of the New Jersey Department of Environmental Protection's (the Department's) October 8, 2019 letter deeming previously-identified deficiencies in PennEast's Multi-Permit Application sufficiently addressed, yet closing the application as administratively incomplete based on the recent ruling by the Third Circuit Court of Appeals (the Closure Letter). A copy of the Closure Letter is attached hereto as **Attachment A**. On September 11, 2019, PennEast submitted a response (the Response Letter) to the Department's letter dated September 4, 2019 identifying certain deficiencies in the above-referenced Multi-Permit Application (the Deficiency Letter). A copy of the Deficiency Letter is attached hereto as **Attachment B**. A copy of the Response Letter is attached hereto as **Attachment C**.

Although the Closure Letter characterizes PennEast's Multi-Permit Application as administratively incomplete, as further explained below, PennEast's Multi-Permit Application has already been deemed administratively and technically complete based on the Department's failure to respond within the time period allowed by the Department's own regulations. Specifically, the Deficiency Letter did not conform to the Department's regulations in N.J.A.C. 7:7A-19.2. In addition, the September 10, 2019 Third Circuit decision has no bearing on application completeness.

As the Department is aware, on January 19, 2018, PennEast was issued a Certificate of Public Convenience (Certificate) by the Federal Energy Regulatory Commission (FERC) pursuant to Section 7 of the Natural Gas Act (NGA). PennEast's "legal authority" over the proposed pipeline route arises from the FERC Certificate, which remains in effect, and, as the Department recognized, it allows both PennEast and the Department to proceed with processing the Multi-Permit Application. Further, the Department's conditioning of application completeness upon

<sup>&</sup>lt;sup>1</sup> For the regulatory counterpart for Flood Hazard Area Individual Permits see N.J.A.C. 7:13-21.2.

100% access along the entire project right of way exceeds the requirements of the federal wetlands permitting program, is beyond the scope of the Department's federally delegated authority, and is therefore preempted. Accordingly, PennEast requests that the Department proceed with processing the Multi-Permit Application by the posting of notice in the Department's Bulletin pursuant to its own procedures. See N.J.A.C. 7:7A-19.1(e).

### A. The Multi-Permit Application is Now Administratively and Technically Complete.

The Multi-Permit Application was deemed administratively and technically complete on either August 8, 2019 or September 11, 2019 based on the Department's failure to follow the timelines set forth in its rules.

Within the Deficiency Letter, the Department stated that it could not make an administrative completeness determination and requested that PennEast provide information and materials within 30 days or else the application would be deemed closed. This type of response is not set forth in the New Jersey Administrative Code. Instead, the Department's Deficiency Letter falls most closely within the procedures set forth in N.J.A.C. 7:7A-19.2(b)2. This provision required the Department to provide PennEast with a response within fifteen (15) calendar days, or by September 26, 2019. N.J.A.C. 7:7A-19.2(c). Because the Department failed to issue a response within the 15 calendar days provided by regulation, the Multi-Application was automatically deemed administratively and technically complete on either September 11, 2019, or the earlier date of its submission, August 8, 2019, pursuant to the mandatory, self-executing provisions of N.J.A.C. 7:7A-19.2(g) & (f), respectively.

The Department's regulations provide for three types of specific responses to an application, which must be provided within twenty (20) working days after receiving an application (including the application submission date as the first day). N.J.A.C. 7:7A-19.2(b). The response must be one of the following:

- 1. Determine the application is **both administratively and technically complete**, issue notification to the applicant in writing that the application is complete for review, effective as of the date the Department received the application, and transmit a copy of the application to other agencies if required under this chapter. For example, an application for an individual permit for a major discharge must be transmitted to the USEPA for comment under N.J.A.C. 7:7A-19.5;
- 2. Determine the application is administratively complete but technically incomplete and issue notification to the applicant in writing that the application is technically incomplete. This notification shall specify the additional information required and the deadline by which the information must be submitted; or
- 3. Determine the application is administratively incomplete and <u>return</u> the application.

<u>Id.</u> (emphases added). The Department did not respond by deeming the Multi-Permit Application administratively and technically complete (N.J.A.C. 7:7A-19.2(b)1); nor did it deem the Multi-Permit Application administratively complete but technically incomplete (N.J.A.C. 7:7A-19.2(b)2); nor did it deem the Multi-Permit Application administratively incomplete and indicate a return of the application in its entirety (N.J.A.C. 7:7A-19.2(b)3). Rather, the Department requested specific information and responses as follows:

Please address the missing or incomplete materials and/or address any deficiencies [listed above] and submit the requested information within 30 days from the date of this letter so that the Department may **commence processing this application**. Failure to provide the information within the 30-day time period may result in the administrative closing of this application.

Att. B at p. 4 (emphasis added). In reliance on this request for more information, on September 11th, PennEast submitted its Response Letter.

Much of the Response Letter simply clarified questions regarding the final parcels along the pipeline route and clarified that the list provided to the Department on August 8th was correct (along with the notice procedures) with the exception of one parcel that was incorrectly included in the first instance (Parcel 1007-53-2). In addition, PennEast provided copies of the certified lists of all owners of real property in Delaware Township and Holland Township. As indicated in the Response Letter, these lists were not provided to the Department with the August 8th submittal because they were not provided by these municipalities in a timely manner, as required by the Municipal Land Use Law (N.J.S.A. 40:55D), despite numerous follow-up requests for the information and despite the requirement to furnish such lists within seven days of written request by the applicant. This is not an administrative or technical deficiency at all and, to the extent the Department disagrees, it was cured on August 11th. The Department also requested payment for additional fees. However, the Department mistakenly concluded that PennEast's temporary bridges required individual permitting, which is both incorrect and inconsistent with its regulations and prior policy. The Response Letter clarified this error. The Department also requested additional supporting information to verify that a regulated activity would not adversely affect a property that is listed or is eligible for listing on the New Jersey or National Register of Historic Places in accordance with N.J.A.C. 7:7A010.2(b). PennEast provided this additional information in its Response Letter and believes the Department erroneously classified this request as an administrative, as opposed to technical, deficiency. See Att. C at p. 3. Finally, the Department asked PennEast to respond to a letter received from the Mayor of Kingwood Township. This was clearly not a deficiency, but a courtesy extended to PennEast allowing it to directly respond to arguments made in opposition to the project.

Looking to the language of the Deficiency Letter and the Response Letter and the quality of the noted "deficiencies," it is clear the Department invoked the procedure of N.J.A.C. 7:7A-19.2(b)2 because the missing information was largely technical in nature. The fact that the Deficiency Letter refers to administrative completeness is not determinative in light of the responses received by PennEast and the procedures the Department voluntarily invoked—procedures which allow an applicant with a technically deficient application to submit responses to cure the deficiency within a stated time period. Accordingly, pursuant to N.J.A.C. 7:7A-19.2(c), the Department had 15 days

to respond to PennEast's Response Letter, which it did not do. The Department's regulation is clear in stating:

If the Department does not take one of the actions in (c) above within 15 calendar days after receiving additional information submitted for a technically incomplete application, the application shall be declared complete for review, <u>effective as of the date the additional information was received by the Department</u>.

N.J.A.C. 7:7A-19.2(g) (emphasis added). Having failed to respond within 15 days, the Multi-Permit Application was deemed complete on the date the supplemental information was received, on September 11th.

If the Department's September 4th Deficiency Letter does not fall within the realm of procedures set forth in N.J.A.C. 7:7A-19.2(b)2 by requiring PennEast to submit additional technical materials within a certain timeframe, then it is clear the Deficiency Letter does not fall within the types of responses contemplated by N.J.A.C. 7:7A-19.2(b) at all. Pursuant to the Department's own regulations, "If the Department does not take one of the actions in [N.J.AC. 7:7A-19.2(b)] above within 20 working days after receiving an application, the application shall be declared complete for review, effective as of the date the application was received by the Department." N.J.A.C. 7:7A-19.2(f). PennEast submitted its Multi-Permit Application on August 8, 2019. To the extent the Department cannot interpret its Deficiency Letter as falling within the procedures outlined by N.J.A.C. 7:7A-19.2(b)2, it did not provide a proper response and the Multi-Permit Application has been deemed complete as of August 8, 2019 pursuant to N.J.A.C. 7:7A-19.2(f).

## B. The Third Circuit's Decision Does Not Provide a Valid Basis for the Department to Decline to Review a FERC Approved Pipeline Project.

Though untimely, the Closure Letter specifically notes that the deficient items in the application were "sufficiently addressed" by virtue of the September 11th Response Letter, but goes on to reject the Multi-Permit Application in its entirety as administratively incomplete (per N.J.A.C. 7:7A-19.2(b)3). Att. A at p. 1. In its determination, the Department relies on a recent Third Circuit decision relating to activities on forty-nine (49) properties in which the state claims an interest along the route, each with condemnation orders issued by the New Jersey District Court. The Department cites to N.J.A.C. 7:7A-16.2(c) (and N.J.A.C. 7:13-18.2(c)) in rejecting the application, which require that an applicant have "legal authority to perform the activities proposed." N.J.A.C. 7:7A-16.2(c)4. However, condemnation orders over the entirety of the pipeline route are not required for the Department to conduct its review. PennEast holds a properly issued FERC Certificate, providing it with all the legal authority it would need for purposes of the Department's delegated Section 404 review. Any greater requirement is preempted.

### 1. The FERC Certificate Provides More than Enough Legal Authority for the Department's Review of the Project.

In the Certificate issued to PennEast, FERC determined that the Project satisfies a public need for new natural gas infrastructure to "ensure future domestic energy supplies and enhance the pipeline grid by providing additional transportation capacity connecting sources of natural gas to markets in Pennsylvania and New Jersey." FERC Order, Para. 28. As discussed in PennEast's Alternatives Analysis as it relates to purpose and need, the Certificate and NGA have conclusive and preemptive effect. The Certificate provides more than enough "legal authority" for the Department to continue processing PennEast's application, which is notably more than what would be required by the U.S. Army Corps of Engineers (USACE), as discussed below.

Indeed, in the Deficiency Letter, the Department stated that the Certificate "allows the applicant ...to apply for any permits required for the project however, the applicant must secure either [a] right of way agreement or order of condemnation for each of the properties along the proposed route." Att. B at p. 1 (emphasis added). This statement, on the one hand, recognizes that the Certificate "allows" (i.e., is the legal authority) for the project, while also recognizing the challenges that may arise after the Certificate is issued with respect to gaining access to property. As recognized by the Department on September 4th, the Certificate "allows" PennEast to apply for a Freshwater Wetlands Individual Permit as part of the Department's delegated 404 responsibilities (along with other permits required for the project). The Closure Letter now concludes, in effect, that the FERC Certificate is not legal authority and does not allow PennEast to apply for the permits needed to build the project. The Department is estopped from taking an entirely contrary position now, particularly one that is clearly in error and preempted by federal law.

# 2. The "legal authority" Requirement in N.J.A.C. 7:7A-16.2(c), as Interpreted by the Department, is Preempted by Federal Law.

To the extent the Department has interpreted N.J.A.C. 7:7A-16.2(c) to require agreements or condemnation orders associated with each parcel of land along the pipeline route in order to proceed with processing PennEast's application, the requirement falls wholly outside of the Department's delegated authority under Section 404 of the Clean Water Act (CWA) and is preempted by the NGA and the FERC Certificate.

The requirement that an applicant either own the property or possess sufficient legal authority to undertake the activity is inconsistent with federal law and is not saved by the NGA's savings clause at 15 U.S.C. § 717b(d). When the US Environmental Protection Agency (USEPA) approved New Jersey's 404 program, the delegation directed that "where an approved State program has a greater scope than required by Federal law, the additional coverage is not part of the Federally-approved program and is not subject to Federal oversight or enforcement." 40 C.F.R. § 233.1(c). If the requirement is not incorporated as part of the federal program, it is not saved under 15 U.S.C. § 717r(d)(3). See Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 243–44 (D.C. Cir. 2013). The requirement at issue is clearly not part of New Jersey's delegated 404 program.

When the USEPA approved New Jersey's 404 program, it incorporated by reference the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1, et. seq., and the state's implementing rules, as they existed in 1994. See 40 C.F.R. § 233.71(a), (b) ("Material is incorporated as it exists at 1 p.m. on March 2, 1994 and notice of any change in the material will be published in the Federal Register."). The requirement that an applicant either own the property or possess legal authority to undertake the activity is not present in the Department's 1994 regulations relating to the FWPA. See N.J.A.C. 7:7A-11.1 & 11.3. The Department modified its

FWPA rules in 2000 by requiring the applicant to be the owner of the site or a person under contract to buy the site. See 32 N.J.R. 2693(a) (adding new N.J.A.C. 7:7A-10.1(d)). However, the change is not part of New Jersey's delegated program, which was expressly limited to the version of the FWPA rules which existed on March 2, 1994, unless notice of the change was published in the Federal Register. See 40 C.F.R. § 233.71(a); 59 Fed. Reg. 9917, 9933 (March 2, 1994). There is no evidence that the state's subsequent changes to the 1994 version of the rules was ever published in the Federal Register. Moreover, the requirement that an applicant either own the property or possess legal authority to undertake the activity is not present in the FWPA (either presently or in 1994). Thus, the requirement clearly is not part of the federally delegated 404 program. As a result, it is also not "federal law" under the CWA.

Instead, both the FWPA and USEPA's delegation regulation instruct the Department to follow the federal forms and procedures of the USACE to the maximum extent practicable and feasible. The FWPA directs that the Department "shall utilize, to the maximum extent practicable and feasible, forms and procedures for permit applications which are <u>identical</u> to those used by the [USACE] in issuing permits under the Federal Act." N.J.S.A. 13:9B-27b (emphasis added). USEPA's delegation regulation authorizing New Jersey to assume the 404 Program also directs states to follow the USACE permit application forms because "<u>under this approach, State assumption of the program should not result in any change in either the kind of information available for review or the burden upon the applicant to supply the information.</u>" 53 Fed. Reg. 20595, 20764 (June 6, 1988) (emphasis added). This is the federal law that USEPA approved and that applies here.

The Department's "legal authority" requirement goes far beyond anything required by the USEPA and USACE and is clearly inconsistent with federal law. The federal forms and procedures for processing 404 permits only require an applicant to affirm that it possesses or will possess the requisite property interest to undertake the activity proposed in the application. 33 C.F.R. § 325.1(d)(8); see Alliance to Protect Nantucket Sound v. USACE, 398 F.3d 105 (1st Cir. 2005) (affirming that an applicant need only affirm in the application that it will possess the requisite property interest at the time of the permitted activity but need not possess this interest at the time of the application itself). In fact, under USACE regulations, "An application will be determined to be complete when sufficient information is received to issue a public notice . . . . [and] [t]he issuance of a public notice will not be delayed to obtain information necessary to evaluate an application." 33 C.F.R. § 325.1(d)(10). A reading of N.J.A.C. 7:7A-16.2(c) that requires any more information than what was already submitted goes well beyond requirements of the USACE 404 program and disregards the FWPA, which requires the Department to adhere to the federal program to the maximum extent possible. This fact clearly is illustrated by the USACE's acceptance and substantive review of PennEast's 404 application for the Pennsylvania segment of the project based upon PennEast's affirmation that it eventually will have the requisite property interest to undertake the Project.

<sup>&</sup>lt;sup>2</sup> The Department's requirements are clearly not "identical to those used by the [USACE]," in clear disregard of the FWPA. N.J.S.A. 13:9B-27.

As recognized by the Department in its Deficiency Letter, the FERC Certificate *is* the legal authority upon which PennEast seeks to build the project and the Certificate, together with the NGA, are the basis upon which it *will possess* the requisite property interest in the properties along the pipeline route. As such, PennEast has satisfied the requirement of N.J.A.C. 7:7A-16.2(c)4. While even this is more than anything that should be required, the Department cannot now assert that it cannot proceed with processing the application. To do so is both manifestly unfair and in clear contravention of the FWPA, the Supremacy Clause, and the Department's delegated authority, which is limited by the FWPA, the terms of the federal delegation of the Section 404 program, and the NGA.

Accordingly, PennEast requests that the Department proceed with processing the Multi-Permit Application by the posting of notice in the Department's Bulletin immediately. <u>See N.J.A.C. 7:7A-19.1(e)</u>.

Should you have any questions about this response, please contact the agent for this application, Peter J. Fontaine, Esq. of Cozen O'Connor at (215) 665-2723.

Very truly yours,

PENNEAST PIPELINE COMPANY, LLC

Ву: 🦲

Name: Anthony C. Cox

Title: Authorized Signer for UGI PennEast, LLC, its Authorized Member

cc: Peter J. Fontaine – Cozen O'Connor