

John T. Gross

198 Meadow Lane

Conestoga, PA 17516

Pennsylvania Department of Environmental Resources

Ladies and Gentlemen,

I'm writing today in response to the Department's (PADEP) request for public comment concerning the Atlantic Sunrise project.

I'm submitting proof that the FEIS and related environmental information submitted by Transcontinental Gas Pipeline to the FERC and used by the FERC to gauge environmental impact on streams and wetlands within Pennsylvania is inaccurate and therefore unreliable as a measure of environmental impact.

Additionally, the best possible method of river crossing has not been required to be used by the applicant even though the technology has been suggested on the record and the FERC is aware of the benefits of this technology and the danger of "frack out" as recently occurred in Ohio on the Rover pipeline using the now antiquated HDD method of river crossings. I've linked to a power point presentation provided

by IPC, a company skilled in the use of DirectPipe who's willing to give a personal presentation to the PADEP as to the environmental benefits of using DirectPipe.

WHAT WE DO – DIRECT PIPE



DIRECT PIPE - BENEFITS



Power point presentation attached.

<..\Downloads\IPC Presentation DPI TIM Rev.1.ppsm>

Press control click to follow link to PowerPoint

<https://wettransfer.com/downloads/d862acff014e095d6a4b342f23c9eb8720170625155132/2d977064b80472045401549b71782c7920170625155132/b030ca>

This is the future of river crossings but it's available today. The PADEP must require it is the method used before another spill happens.

In the certificate statement the FERC indicated that, as the agency used inaccurate remote sensed data for the comparison of *both* routes, (current vs. CAR) one was as inaccurate as the other. FERC certificate at 159-161:

a. Conestoga Petitioners

159. On January 4, 2017, the Conestoga Petitioners (Petitioners) filed a comment on the final EIS regarding the alternatives evaluation completed for the Conestoga Alternative Route. The Petitioners argue that information used in the alternatives analysis was inaccurate because it was not based on field data depicted on alignment sheets filed by Transco. As explained in section 3.0 of the final EIS, in analyzing the proposal and alternatives, **Commission staff relied on information provided by Transco, aerial photographs**, U.S. Geological Survey topographic maps and other publicly available information, input from cooperating and other agencies, public input from scoping, and site visits. To ensure that the comparisons are based on consistent data, ***Commission staff used these same desktop sources of information to compare the impacts of the proposed route and alternative routes.***

161. The Petitioners also argue that because the Conestoga Alternative Route is one mile shorter than the proposed route, adopting the Conestoga Alternative Route would reduce construction emissions. While a shorter pipeline length may result in lower emissions during certain construction phases, the Conestoga Alternative Route would require an increased amount of forest clearing compared to the proposed route. Clearing forested vegetation requires more time and construction equipment compared to clearing vegetation on agricultural land, which is the dominant land use along the proposed route. Forest clearing will result in higher construction emissions during the clearing and grubbing phase of construction. Therefore, the Conestoga Alternative Route will

unlikely result in lower construction emissions and *could* (italics added) result in higher construction emissions compared to the proposed route.

Could? The PA DEP cannot rely on such questionable data. Clearly the FERC did not do a thorough assessment of the two routes for eleven (11) months after the CAR was submitted for review, allowing the applicant to instead continue their pursuit of the current route, now leaving that task to the PA DEP.

As the protector of PA's environmental resources, the PA DEP must require the use of DirectPipe for all river and possibly even wetland crossings. To not do so puts all of those resources as well as the "human environment" of nearby landowners and homeowners in far greater jeopardy of having to endure a spill.

"[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Sierra Club*, 459 F. Supp. 2d. at 90 (quotation marks and citation omitted). "Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the [Administrative Procedure Act] standard of review." *Loma Linda Univ. Med. Ctr. v. Sebelius*, 684 F. Supp. 2d 42, 52 (D.D.C. 2010) (citation omitted), *aff'd*, 408 Fed. App'x 383 (D.C. Cir. 2010)."

Pg.19 "The Administrative Procedure Act "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." FCC v. Fox Television Stations, Case 1:16-cv-01534-JEB Document 239 Filed 06/14/17 Page 19 of 91 20 Inc., 556 U.S. 502, 513 (2009).

It requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if, for example, the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision **that runs counter to the evidence before the agency**, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

This is a "narrow" standard of review, under which "a court is not to substitute its judgment for that of the agency." Id. Rather, the Court "will defer to the [agency's] interpretation of what [a statute] requires so long as it is 'rational and supported by the record.'" Oceana, Inc. v. Locke, 670 F.3d 1238, 1240 (D.C. Cir. 2011) (quoting C & W Fishing Co. v. Fox, 931 F.2d 1556, 1562 (D.C. Cir. 1991)). In other words, an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found

and the choice made.” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Courts, accordingly, “do not defer to the agency’s conclusory or unsupported suppositions,” *United Techs. Corp. v. Dep’t of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quoting *McDonnell Douglas Corp. v. Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004)), and “agency ‘litigating positions’ are not entitled to deference when they are merely [agency] counsel’s ‘post hoc rationalizations’ for agency action, advanced for the first time in the reviewing court.” *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 156 (1991). Although a reviewing court “may not supply a reasoned basis for the agency’s action that the agency itself has not given,” a decision Case 1:16-cv-01534-JEB Document 239 Filed 06/14/17 Page 20 of 91 21 that is not fully explained may, nevertheless, be upheld “if the agency’s path may reasonably be discerned.” *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974) (citation omitted).

Even under this “narrow standard” of review, the FEIS fails in respect to the evaluation of and benefits of the CAR.

"Agency action is arbitrary and capricious if, for example, the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its

decision that runs **counter to the evidence before the agency**, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).”

The administrative record contains the comment of State Representative Brett Miller (attached) on behalf of his constituents which pointed out the inaccuracies of the FERC's evaluation of the CAR and the **26 additional streams and 12 wetlands** that would be crossed using the current route as opposed to the CAR In a mere 12 miles of the entire 180 mile project and the court need not inject its own opinion as the record is sufficient to demonstrate the facts. (FERC comment 20170201-5044 attached)

If the same margin of error is present along the entire 180 mile project route, then there are 390 streams and 180 wetlands missing from the evaluation.

The FERC seemed to use the knowingly inaccurate "remote sensed" data in its evaluation of the current route vs. the CAR even though the agency had in its possession the accurate alignment sheets which were used by the Conestoga

residents to point out the obvious inaccuracies in the FERC's comparison of the two routes. (attached)

The FEIS statement claimed there are 0 wetlands on the current route while an examination of the attached alignment sheets proves there are 12 wetlands on the current route, at least one of which was found to be active home to bog turtles. (m-0147 MP.050)

The river crossing method recommended by the Conestoga petitioners (DirectPipe) would eliminate the possibility of a “frack out” during the installation such as recently happened during the Rover Pipeline Horizontal Directional Drill (HDD) in Ohio which spilled two million (2,000,000) gallons of “frack fluid” into an adjoining wetland. (current estimates indicate double that amount may have been released)

Using HDD to cross the Conestoga River will also result in 275,000 gallons of water trucked in tankers to the HDD entry and exit point whereas the DirectPipe method the petitioners recommended could be supplied with water pumped directly from the river to the drill rig, rather than trucked, eliminating hundreds of tanker truck trips from our roads. The DirectPipe method of river crossing recycles

the slurry onsite even further reducing the environmental impact, constantly supports the borehole, and sends the frack fluid inside of the pipe being installed, eliminating the risk of a “frackout.” See attached comment of Gary Erb.

From the May 5, 2016 DEIS:

“Water for Horizontal Directional Drill Operations

Transco would use the HDD method at the CPL North Susquehanna River crossing, the CPL South Susquehanna River crossing, and at the Conestoga River. Throughout the process of drilling and enlarging the hole, a slurry made of non-toxic/non-hazardous bentonite clay and water, referred to as drilling mud, would be circulated through the drilling tools to lubricate the drill bit, remove drill cuttings, and hold the hole open. Transco would use water from the waterbody being crossed to create the drilling mud; and estimates that 81,586 gallons would be required at the CPL North Susquehanna River crossing, 286,065 gallons at the CPL South Susquehanna River crossing, and 275,565 gallons at the Conestoga River crossing.

During the HDD operations, the drilling mud returns would be circulated through mud pits to remove the drill cuttings, and the bentonite would be recycled for use as the drilling operation continues. After completion of the HDD, the recovered drilling mud would be recycled or disposed of at an approved upland location or disposal facility.”

The Conestoga petitioners submitted much more evidence than is listed here as to the environmental benefits and benefits to the “human environment” than are listed here but will be provided for the convenience of the court upon the granting of review.

“It is a widely accepted principle of administrative law that the courts base their review of an agency’s actions on the materials that were before the agency at the

time its decision was made.” *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) (listing cases)."

As explained above, CEQ regulations provide that one factor that “should be considered” in evaluating the significance of a proposed action’s impact is “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4).

The ASP has been "highly controversial" from the outset.

"D. Remedy

So where does that leave us? The Court turns now to the question of remedy. The cure for the Corps’ NEPA violation is governed by the APA, which provides that the reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . .arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In this Circuit, vacatur is the “standard remedy” for a NEPA violation. *Pub. Employees for Env’tl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) (quoting *Humane Soc’y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007)); see also *Realty Income Tr. v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977)

("[W]hen an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance."). In other words, the Court would vacate permits and easement, thus forcing until the Corps and PADEP (edited) fully complied with the aforementioned NEPA requirements."

Despite the fact the CAR was submitted to the record 12/22/2015, giving the FERC, PADEP and the Corps plenty of time to take the "hard look" required during an EIS at any and all alternatives, the FERC gave short shrift to the CAR in the DEIS May 5, 2016, never giving thorough examination to the facts available to FERC staff via the alignment sheets, and the Corps was thus restricted to continue their evaluation of the current route as opposed to the more acceptable CAR.

Indeed, it wasn't until our congressional representative congressman Joe Pitts asked for a more thorough evaluation (accession # 20161104-0033) that the FERC seemed the least bit interested in an accurate comparison and had instead deferred to the applicant's preferred route, as by that time, another 10 months had elapsed since the submission and dismissal of the CAR. All the while the applicant was pursuing the current route contrary to the "best management practices" (BMP) of following an existing Right of Way as recommended by the FERC.

Even after the intervention of Congressman Joe Pitts, in the final environmental Impact statement (FEIS) the FERC's evaluation of the CAR vs. the current route was rife with flaws. Though the FERC claims they use aerial photographs, as well as USGS maps, the alignment sheets used by the Conestoga petitioners *are* the aerial photographs of the properties in the proposed ROW and clearly the FERC did not use that available information when doing the comparison of number of streams and wetlands as if they had, they would have come to the same conclusion as the Conestoga petitioners and their count of streams and wetlands would not have been so inaccurate. (see comment of State Representative Brett Miller and corrections submitted by Conestoga petitioners in accession # 20170104-5174)

This is the erroneous analysis of the CAR verses the current route contained in the FEIS:

Conestoga Alternative Route

The Conestoga Alternative Route was identified by Conestoga Township residents to maximize collocation with existing PPL transmission line rights-of-way adjacent to the Susquehanna River. The Conestoga Alternative Route deviates from the proposed route at MP 2.1 and proceeds 3.0 miles northwest across forestland and agricultural land. From this point, the alternative joins an existing transmission line right-of-way and proceeds north across primarily agricultural land and forestland. Along this segment, the Conestoga Alternative Route crosses the Tucquan Glen Nature Preserve, Pequea Creek Recreational Center and Pequea Creek Woods Natural Heritage Area, Shenk's Ferry Wildflower Preserve Natural Heritage Area, PPL Environmental Preserve, Safe Harbor Recreation Area, and Safe Harbor Woods Natural Heritage Area. After crossing Safe Harbor Woods Natural Heritage Area, the Conestoga Alternative proceeds northwest where it rejoins the proposed route at MP 14.1 (see figure 3.3.2-20). An environmental comparison of the Conestoga Alternative Route to the corresponding segment of the proposed route is provided in table 3.3.2-13.

TABLE 3.3.2-13

The Conestoga Alternative Route and the proposed route would cross a comparable number of waterbodies (10 versus 9).???????

However, the Conestoga Alternative Route would cross two Pennsylvania

scenic rivers (Tucquan Creek and Clark Run). While the proposed route would also cross Tucquan Creek, the crossing location is in an area surrounded by agricultural land and would not require significant tree clearing adjacent to the waterbody. Another disadvantage of the Conestoga Alternative Route is the limited amount of workspace available adjacent to the Conestoga River to complete an HDD crossing. River Road, Safe Harbor Park, and residential development are located immediately east of the Conestoga River, which would limit the amount of space available to stage HDD equipment. In addition, the pullback section would need to be assembled on the west side of the crossing within Conestoga River Park. There is about 200 feet of elevation change between these two locations, which would increase the potential for HDD complications including the risks of hole collapse and a significant return of drilling fluid to the low side of the crossing. In contrast, sufficient workspace is available along the proposed route and the entry and exit sides of the HDD are comparable in elevation. We received comments from John Gross indicating that the direct pipe installation method or the dam and pump method could be used at the Conestoga River crossing along the Conestoga Alternative Route. The direct pipe method is a trenchless installation method that combines microtunneling and HDD technology and has the benefit of requiring a smaller footprint to complete pipeline installation compared to the HDD method. **The direct pipe or dam-and-pump methods may be feasible at this crossing location;** however, that does not change our conclusion that the Conestoga Alternative Route is not preferable to the proposed route; as such, we do not recommend it.

HDD technology is less safe than DirectPipe and led to the spill in Ohio.

<https://www.ecowatch.com/rover-pipeline-spills-2399807580.html>

<https://www.theguardian.com/environment/2017/may/25/energy-transfer-partners-dakota-access-oil-leaks-ohio>

The petitioners never accepted the HDD method and as such understood the lack of feasibility due to the “pull back” distance required and elevation differences at the crossing we recommended as they are irrelevant when considering the better crossing method DirectPipe. DirectPipe is the safest and most environmentally friendly method of river and wetland crossing.

It seems in their haste to approve the project before the FERC lost a quorum with the resignation of Chairman Norman Bay, the FERC ignored readily available information and made an “uninformed decision” to approve the current route.

“It is a widely accepted principle of administrative law that the courts base their review of an agency’s actions on the materials that were before the agency at the time its decision was made.” *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) (listing cases).”

Between the submission of the CAR (12/22/2015) and the release of the DEIS many more comments were filed with the FERC pointing out other environmental benefits associated with the CAR. Obviously, the applicant continued to move forward with the planning of the existing route and the FERC seemingly ignored the *on the record facts* it should have considered while taking a "hard look" at the CAR.

Indeed, this is the extent of the evaluation as mentioned in two paragraphs contained in the DEIS 20160505-4005:

"3.3.2 Minor Route Alternatives:

We recently received comments from 89 Conestoga Township residents suggesting

that the initially planned pipeline route across Shenk's Ferry Wildflower Preserve and Tucquan Glen Nature Preserve would be preferable to the proposed route. The residents identified the Conestoga Alternative Route, which would follow an alignment similar to the initially planned CPL South pipeline route by Transco in Conestoga Township. The Conestoga Alternative Route is similar in length to the proposed route, but would cross Tucquan Glen Nature Preserve, Pequea Creek Campground, Shenk's Ferry Wildflower Preserve, and the Conestoga River Park. In addition, the Conestoga Alternative Route would cross two Pennsylvania scenic rivers (Tucquan Creek and Clark Run). While the proposed route would also cross Tucquan Creek, the crossing location is in an area surrounded by agricultural land and would not require significant tree clearing adjacent to the waterbody.

Another disadvantage of the Conestoga Alternative Route is the limited amount of workspace available adjacent to the Conestoga River to complete an HDD crossing. River Road, Safe Harbor Park, and residential development are located immediately east of Conestoga River, which would limit the amount of space available to stage HDD equipment. In addition, the pullback section would need to be assembled on the west side of the crossing within the Conestoga River Park. There is about 200 feet of elevation change between these two locations, which would increase the potential for HDD complications including the risks of hole

collapse and a significant return of drilling fluid to the low side of the crossing. In contrast, sufficient workspace is available along the proposed route and the entry and exit sides of the HDD are comparable in elevation. Because the Conestoga Alternative Route does not have any overwhelming advantages and would increase the complexity of construction and increase impacts on public lands and scenic rivers, we do not find that the Conestoga Alternative Route is environmentally preferable to the proposed route."

Nowhere in the DEIS is the fact that the CAR is 1 mile shorter, impacts 12 fewer acres of land, 26 fewer streams, or 12 less wetlands mentioned. The Conestoga petitioners did clearly recommend the use of DirectPipe as the river crossing method and not HDD as DirectPipe is a far more environmentally friendly method of trenchless technology and is also far friendlier to the "human environment."

This can hardly pass the smell test for a "hard look."

Nor does the statement address the issue which was only addressed in January of 2017 that is the fact that the DirectPipe river crossing method recommended by the Conestoga petitioners was deemed feasible at the river crossing they mentioned.

The Conestoga petitioners also pointed to *City of Euclid v. Ambler Realty* in asking the project ("right thing, wrong place, pig in the parlor instead of the barnyard") be

moved outside of our town and follow an existing ROW which was the proposed original route.

For these reasons, the FEIS should be vacated, The PADEP should deny the water quality and sediment and erosion permits and the certificate revoked until the "agency is in compliance" with NEPA.

"1. Hard Look / Convincing Case

Pursuant to NEPA's "hard look" requirement, the agency must ensure that "the adverse environmental effects of the proposed action are adequately identified and evaluated." Robertson, 490 U.S. at 350.

In evaluating the significance of a proposed action's impact, an Case 1:16-cv-01534-JEB Document 239 Filed 06/14/17 Page 22 of 91

23 agency is to consider, inter alia, the effect on "public health or safety"; "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources"; the extent to which the environmental effects "are likely to be highly controversial" or "are highly uncertain or involve **unique or unknown risks**"; "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts"; and the degree to which the action "may cause loss or destruction of significant . . . cultural[] or historical resources." 40 C.F.R. § 1508.27."

If the FERC refuses to insist on the most environmentally friendly methods and route then it's up to the PA DEP to do so.

Best regards,

John T. Gross