

**PROPOSED CONDITIONAL STATE WATER QUALITY CERTIFICATION UNDER
SECTION 401 OF THE CLEAN WATER ACT FOR THE UNITED STATES ARMY
CORPS OF ENGINEERS NATIONWIDE PERMITS**

COMMENT AND RESPONSE DOCUMENT

January 9, 2021



**Pennsylvania Department of Environmental Protection
Bureau of Waterways Engineering and Wetlands**

INTRODUCTION

The Pennsylvania Department of Environmental Protection (DEP or the Department) published notice of the availability of the Department’s “Proposed Conditional State Water Quality Certification under Section 401 of the Clean Water Act for the United States Army Corps of Engineers Nationwide Permits” in the *Pennsylvania Bulletin* on October 31, 2020 (50 Pa.B. 6062). A 30-day comment period was provided, and interested parties were directed to submit comments to DEP’s eComment system. The comment period ended on November 30, 2020. DEP received a single letter with multiple comments from one commenter during the comment period. The purpose of this document is to present DEP’s responses to these comments and answer all questions posed. The Department published the final “Conditional State Water Quality Certification under Section 401 of the Clean Water Act for the United States Army Corps of Engineers Nationwide Permits” in the *Pennsylvania Bulletin* on January 9, 2021 (51 Pa.B. 238).

LIST OF COMMENTERS

ID #	Organization	Submitted by
1	Citizens for Pennsylvania’s Future	Jessica O’Neill

COMMENTS AND RESPONSES

Note: The following comments were provided to DEP in a November 30, 2020 email from Citizens for Pennsylvania’s Future (Penn Future).

1. [W]e write to object to the Department’s continued practice of issuing “conditional” water quality certification approvals without requiring the applicant to have the necessary informational foundation first. That conditional approval, combined with the proposed expansion of activities covered by NWP’s that do not require preconstruction notification to the Corps, means that the Department will not be notified or able to review additional categories of activities resulting in discharges of dredged and fill material into Pennsylvania’s waters. This will likely lead to less scrutiny over actions that may have negative impacts to waters of the Commonwealth.

Response: The Department disagrees that a conditional state water quality certification (SWQC) leads to less scrutiny by the Department as suggested by the commenter.

The applicant is not able to proceed to construction until they have applied for and obtained all necessary state permits, authorizations or approvals. Through the permit application review process associated with these state authorizations, the conditions imposed in the SWQC allow the Department to conduct a full and robust environmental review to ensure an applicant’s compliance with state water quality standards based on site-specific and field-verified information. See *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl Protection* (“*Del. Riverkeeper Network*”), 903 F.3d 65, 78 (3d. Cir. 2018). These permit

programs provide a comprehensive evaluation of a proposed project. By conditioning this SWQC on compliance with the environmental regulatory programs that are designed to achieve Pennsylvania's water quality standards, the Department is protecting and maintaining Pennsylvania's water resources through those programs and the environmental authorizations.

DEP's practice of granting a SWQC conditioned on the applicants obtaining state permits is consistent with a state's authority under section 401 of the Clean Water Act to grant, deny, grant with conditions or waive certification. In *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl Protection*, 903 F.3d 65, 76-77 (3d Cir. 2018), the U.S. Court of Appeals for the Third Circuit held that DEP's sequencing approach of issuing SWQC conditioned on obtaining state permits at later time is lawful. See also, *Del. Riverkeeper v. Sec'y Pa. Dep't of Env'tl Prot.*, 833 F.3d 360, 386-87 (3d Cir. 2016).

2. Under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, any applicant for a federal authorization to construct or operate a facility that may result in discharge into navigable waters must "provide the licensing or permitting agency" with "a certification from the State in which the discharge originates or will originate" (SWQC) 33 U.S.C. § 1341(a)(1). The state, in turn, must evaluate the proposed project's compliance with certain provisions of the Clean Water Act, including water quality standards and permitting, and set forth limitations and monitoring requirements "necessary to assure that any applicant for a Federal license or permit will comply" with the Act "and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. §1341(d). Should a state be unable to assure that the action will comply with the applicable Clean Water Act standards, the state must deny a SQWC.

Response: The Department disagrees that in this case it must deny the United States Army Corps of Engineers (Corps) request to provide State Water Quality Certification (SWQC) for the proposed Nationwide Permits (NWP) as suggested by the commenter. DEP's practice of granting a SWQC conditioned on the applicants obtaining state permits is consistent with a state's authority under section 401 of the Clean Water Act to grant, deny, grant with conditions or waive certification. This conditional SWQC is based on the scope of the request, and the Department is also adding a condition to reopen the SWQC if warranted based on any changes to the scope of the request. Since the SWQC requires that an applicant apply for and obtain all necessary state permits, authorizations or approvals necessary to assure compliance with the Pennsylvania's water quality standards prior to beginning any activity authorized by a Corps NWP, the Department can provide the Clean Water Act certification that the action will comply with the applicable Pennsylvania water quality standards.

3. In addition to giving states a primary role in enforcing water quality standards in their jurisdictional waters, see 33 U.S.C. § 1319(a), the Clean Water Act requires that an applicant for a federal license to conduct any activity that "may result in any discharge into the navigable waters" obtain a SWQC from the state where such a discharge may occur, *id.* § 1341(a). In order to grant a SWQC, the state must be able to certify that any potential discharge from the proposed project "will comply with the applicable provisions of

sections [301], [302], [303], [306], and [307]" of the Clean Water Act. *Id.* Section 401 also allows a state to condition the grant of a SWQC and provides that a certification "shall set forth any effluent limitations and other limitations... necessary to assure that any applicant" will comply with the various provisions of the Clean Water Act "and with any other appropriate requirement of State law." *Id.* § 1341 (d); *see also PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 711 (1994). EPA regulations require a certifying state to find that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards," 40 C.F.R. § 121.2(a)(3), including EPA-approved state standards. Thus, DEP has the critical role of granting certification only when and with the necessary conditions to protect Pennsylvania's water quality. Unless the state waives its rights under Section 401 or grants the SWQC, "no license or permit shall be granted," and "no license or permit shall be granted if certification has been denied by the State." 33 U.S.C. § 1341(a).

Response: The Department has reviewed the Corps' request. Based on a review of this request, Pennsylvania's environmental regulatory programs, and public comments received, the Department believes that this final SWQC includes the necessary conditions that ensures the activities will satisfy Pennsylvania's water quality standards.

Please also see the Department's response to comment 2.

4. The federal license at issue here is a nationwide permit issued by the Corps. Under § 404 of the Clean Water Act, the Corps can issue nationwide permits, which remain in effect for five years, for any prescribed category of activities that involve discharges of dredged or fill material into waters of the United States. In order to qualify, the Corps must determine that "the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." The Corps has proposed modifications and expansions of its existing nationwide permits, including 5 additional new nationwide permits.

Response: The Department is familiar with the scope of the request as received by the Corps. Please also see the Department's response to comments 2 and 3.

5. PennFuture has focused on the Corps' proposed revisions to Nationwide Permit (NWP) 12, which, as revised, would apply to authorize certain oil and natural gas pipeline activities. The proposed changes to NWP 12, especially the removal of types of activities that currently trigger additional review, would likely lead to less federal scrutiny over actions that may have negative impacts to waters of the United States. The Department's proposed conditional SWQC for NWP 12 will similarly likely lead to less Commonwealth scrutiny over actions that may have negative impacts to waters of the Commonwealth.

Response: The Department disagrees with the commenter's assertion that the Department's proposed SWQC for NWP 12 will lead to less Commonwealth scrutiny. The SWQC conditions require compliance with Pennsylvania laws that implement Pennsylvania water quality standards which include requirements to obtain permits and authorizations from the Department. The Department determines the level of information

necessary to comply with state environmental laws. The Department's certification further indicates that activities that require any other Federal authorization or license, including an individual Corps permit or FERC license, must apply for and obtain a project-specific 401 SWQC.

6. The Department proposes issuing a conditional SWQC for all projects covered by the NWP, including NWP 12, with three additional conditions. One, that the applicant obtains, prior to beginning its activity, all necessary environmental permits and approvals as required under state law. Two, that fill material does not contain any waste as defined in the Solid Waste Management Act. Three, that the applicant obtains all state permits or approvals to ensure that the project meets the state's applicable water quality standards, including a project specific SWQC.

Response: The Department acknowledges that its proposed SWQC includes the conditions referenced by the commenter. This three-part comment will be addressed by the Department in responses to comments 7, 8 and 9, respectively.

7. First, recent history and ongoing experience affirms that pipeline builders are not adequately protecting water quality in their construction projects. Water supply contamination across the Commonwealth as a result of HDD operations by Sunoco for Mariner East 2, and Sunoco's discharge of over 100,000 gallons of drilling fluids into exception value wetlands in Cumberland County is just one recent example. As a result, a conditional certification for oil and gas activities conducted under the authorization of NWP 12 - with potentially no other notice provided to and no other permits sought from a regulator - is insufficient to protect Pennsylvania's water from potential harm.

Response: The Department disagrees. Please see the responses to comments 1, 2 and 3.

By way of further response, the Department conducts a state permit review and has the opportunity to include project-specific and site-specific special conditions. The Department has conditioned certification based on the applicant obtaining the necessary permits, authorizations and approvals under Pennsylvania's environmental laws.

The NWP 12 is not valid unless the applicant applies for and obtains the necessary state permits, authorizations or approvals.

The incident referenced was a *violation* of the 25 Pa. Code Chapter 105 and Chapter 102 permit conditions for which the Department required a corrective action and assessment of civil penalties for violations of Pennsylvania law. Further, the Pennsylvania permits issued for this project were upheld by the Environmental Hearing Board when environmental groups sought to supersede them. *See Clean Air Council et al. v. DEP and Sunoco Pipeline LP*. EHB Docket No. 2017-009-L. These Pennsylvania permits had an unprecedented number of special conditions. Sunoco's failure to comply with those conditions for the incident described was a violation of Pennsylvania Law. Sunoco was fined \$87,600 for that incident and was required to undertake a number of corrective actions. Further, Pennsylvania is in the process of developing HDD-specific technical guidance based upon

our experience with HDD. NWP 12 in no way limits Pennsylvania's ability to scrutinize pipeline projects proposing the use of HDD. With regard to the Mariner East 2 project, for example, the Department provided public notice for the referenced projects when it published the water obstruction and encroachment permits in the *Pennsylvania Bulletin*. The Department held five public hearings on the project and issued 20 Pennsylvania project-specific permits to Sunoco for that project. Pursuant to Pennsylvania's SWQC, future project proponents will similarly be required to obtain appropriate Pennsylvania state permits. That permitting process will involve appropriate public notice and address the potential impacts to water quality posed by the specific project.

8. Second, the three "conditions" included in the Department's "conditional certification" are already those required by law and do not provide meaningful additional requirements for an applicant operating under an NWP. Additionally, the Department's issuance of a conditional SWQC means that an activity operating under an NWP might be able to discharge dredged and fill materials to waters of the Commonwealth without meaningful review of potential impacts to water quality. Merely stating that a project will be required to get all necessary water quality permits does not – and under the Clean Water Act cannot – provide reasonable assurances that state water quality standards will be met and is not a sufficient basis upon which to issue a conditional SWQC.

Response: The Department disagrees that there will not be meaningful review as suggested by the commenter. An NWP is not valid without a Department permit, authorization, or approval required under Pennsylvania environmental laws. The conditions included in the final SWQC do provide reasonable assurance that the applicant's project will not have will comply with Pennsylvania water quality standards. The Department has discretion upon review to add conditions to a certification based on its review of a specific request. While it is accurate that the conditions are already requirements of state law, there is additional benefit in these certification conditions also become conditions that are enforceable via the federal authorization as well as under state law.

Please also see the Department's response to comment 1.

9. Moreover, it is not clear from the Department's proposed third condition where an activity would require a project specific SWQC, particularly given the proposed issuance of this conditional SWQC. All activities occurring under the authorization of an NWP must still be able to meet Pennsylvania's water quality standards and should be required to demonstrate that they can do so before beginning. DEP cannot and should not issue a certificate unless it has considered all potential water quality impacts associated with to the project, both direct and indirect, over the life of the project, including impacts on existing and classified uses.

Response: This SWQC is only available for projects that do not require any Federal authorization other than from the Corps under section 404 of the Act or section 10 of the Rivers and Harbors Act of 1899. Applicants seeking authorization for activities not eligible for coverage under a NWP or for any activity that requires another Federal authorization

either by the Corps (e.g. a Corps individual permit) or another Federal agency (e.g. FERC license), must submit a request to the Department for a project-specific SWQC.

Please also see the Department's responses to comments 1 and 8.

10. This is particularly so where the Corps has proposed to remove five of the seven categories of activities from the requirement that the project's proponent provide the Corps with pre-construction notification (PCN). PCN, which is required for certain projects otherwise covered by the nationwide permit, triggers case-by-case review of activities. Removing some of these categories of PCN for NWP 12 is highly inappropriate because it will likely result in the improper use of general nationwide permit in those situations where more than minimal adverse environmental effects are likely. If an activity is operating under the authorization of a NWP, and is not required to notify the Corps prior to beginning work, the requirement of seeking a project specific SWQC enables the Department to provide the necessary verification that the activity will not result in violations of Pennsylvania's water quality standards.

Response: The comment appears to be directed toward the Corps' NWP program, rather than the Department's decision to provide conditional certification. Please see the Department's responses to comments 1, 8 and 9.

11. In conclusion, for all the reasons set forth herein, we oppose the Department's continued practice of issuing conditional SWQCs without a complete evaluation of a potential activity's impact on the water quality and support the requirement to impose additional project specific SWQCs to enable the Department to fully evaluate potential negative impacts on waters of the Commonwealth.

Response: The Department thanks PennFuture for its thoughtful comments. Please see the Department's responses to comments 1, 5, 8 and 9.