



Pinelands Preservation Alliance

Bishop Farmstead ♦ 17 Pemberton Road ♦ Southampton NJ ♦ 08088
Phone: 609-859-8860 ♦ ppa@pinelandsalliance.org ♦ www.pinelandsalliance.org

Protecting the Pinelands
since 1989

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August 20, 2015

Mark Lohbauer, Chair
Nancy Wittenberg, Executive Director
Pinelands Commission
PO Box 359
15 Springfield Road
New Lisbon, New Jersey 08064

Re: South Jersey Gas – Pipeline Project

Dear Mr. Lohbauer and Ms. Wittenberg,

We are writing to again stress our view that the Pinelands Commission staff is mistaken in its position that the Executive Director can unilaterally approve the “amended” application of South Jersey Gas (“SJG”) without a public hearing simply because it is now being treated as an application for private development. Ms. Wittenberg has reiterated this position as recently as last Friday’s Commission meeting. As described below, this position is contrary to the Pinelands Protection Act (“Act”) and the Comprehensive Management Plan (“CMP”). Moreover, by acting in this manner, the Executive Director would undermine the credibility of the Commission and its procedures.

First, though, assuming the Commission proceeds on its current course, we continue to seek a clear explanation of:

- a. Whether the public submit comments and information that will be part of the official record of this matter at the Commission, and
- b. If so, what is the deadline for submitting such comments and information.

The Pinelands Preservation Alliance has substantial legal, factual and expert information which we wish the Commission to consider, as I am sure do other members of the public, yet the Commission has persistently failed to explain whether such information can be formally submitted (Ms. Wittenberg has only said we can submit “informal” comments) and, if so, when it must be submitted to be taken into account and made part of the record of decision.

Second, even if the Commission had jurisdiction to reconsider the merits of the proposed pipeline, the Commission's stated process for considering the application violates the Act and CMP. The Commission has not held hearings on whether SJG's proposed pipeline violates the CMP (the Commission had already determined it did violate the CMP when it held hearings before the vote in 2014) and has not established a formal mechanism for public comment. Ms. Wittenberg has stated repeatedly that the Commissioners have no role to play in reviewing or approving/disapproving the project. The Act and CMP not only provide for such processes, but require them. *See generally* N.J.S.A. 13:18A-15.

In *In the Matter of the Application of John Madin v. New Jersey Pinelands Commission*, the Appellate Division of the New Jersey Superior Court held that public hearings are required when the Commission considers and makes decisions on development applications, such as the one by SJG. Specifically, the Appellate Division held that:

[T]he Pinelands Protection Act itself clearly evinces a legislative intent that hearings be conducted when the Commission reviews a development application. Moreover, even if we were not to so construe the Act, the quasi-judicial functions of the Commission with respect to land use regulation in the Pinelands area within the specific statutory framework . . . mandates that hearings be conducted.

492 A.2d 1034, 1050 (N.J. Super. 1985), *cert. vacated*, 103 N.J. 689 (N.J. 1986). In assessing SJG's amended application to construct the proposed natural gas pipeline, the Commission is acting in a quasi-judicial capacity. As the Appellate Division explained:

[W]hen the Commission reviews or is required to review a development application, or even when its staff does a preliminary investigation, it is ultimately the Commission which must determine whether the proposed development complies with the minimum standards of the CMP. In making this determination it must, upon finding the application complete, make findings of fact and conclusions of law. . . . The Commission's functions in considering development applications are thus generally akin to land use regulation and, specifically, to the exercise of the variance power. Such functions are quasi-judicial in nature.

Id. at 1044. Since the Commission is reviewing a development application and in so doing is acting in a quasi-judicial capacity, the public is entitled to the opportunity to publicly comment on and a public hearing relating to application.

The Act and CMP, moreover, require that once the agency decides to "commence a review" of a proposed development, the Commission itself must make the final decision on whether to approve or disapprove the development. *See* N.J.S.A. 13:18A-15; N.J.A.C. 4.3. The CMP accords the Executive Director only the gatekeeper role of determining whether the application is complete and whether it "raises substantial issues" with respect to its compliance with the CMP. *See, e.g.*, N.J.A.C. 7:50-4.37(a) and -4.40(a). Ms. Wittenberg seems to be confusing the right to determine whether an application "raises substantial issues" with the right to decide whether the application complies with the CMP and to give the agency's approval – a

fundamental expansion of the Executive Director's powers that neither the Act nor the CMP, nor the case law, permit.

No one could seriously argue that the Commission has not "commenced a review" of SJG's application, or that the application does not "raise substantial issues" with respect to compliance with the CMP, especially given that Ms. Wittenberg has already concluded in 2014 that the project *violates* the CMP's standards for the Forest Area. Even if she now wishes to reverse that position, she can hardly claim the project does not raise "substantial issues" in order to avoid a public hearing process and take from the Commission its statutory role in the final decision.

In Ms. Wittenberg's July 24th letter to me, she states that, in the context of non-public filings, the opportunity for public comment and participation is provided through local and state approval processes. The Act and CMP make clear that the Commission itself must hold a hearing under its own rules, but in any case there has been no opportunity presented here by the New Jersey Board of Public Utilities (the "BPU") or local boards. The remaining issue before the BPU is whether to preempt local authorities, and we do not believe the BPU will address compliance with Pinelands CMP regulations. The opportunity for public comment on compliance with the CMP, therefore, will be denied unless afforded to members of the public by the Commission.

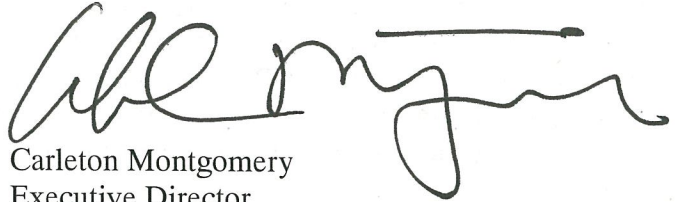
On July 23, 2015, the BPU issued an order ostensibly authorizing the proposed project before the Commission had issued its COF. See Order, *In the Matter of Petition of South Jersey Gas Company for Authorization to Construct a 24" Pipeline Through the Maurice River Township in Cumberland County, City of Estell Manor in Atlantic County and Upper Township in Cape May County, New Jersey* (Docket No. GO13030202) (Jul. 23, 2015). Importantly, the BPU did not consider the critical issue of whether SJG proposed project complies with the minimum standards of the CMP. As such, unless the Commission affords members of the public the right to publicly comment and to be heard on this critical issue, members of the public will be deprived of their procedural rights. There has not been, and likely will never be, local land use board hearings addressing the compliance of SJG's application with Pinelands land use standards.

It would undermine the credibility of the Commission and its procedures if, after a public comment period on the MOA generating over a thousand comments, even more petition signatures, and public hearings attended by hundreds of concerned citizens, culminating in the Commission's rejection of the MOA – all premised on the conclusion that SJG's pipeline project violates the CMP Forest Area standards – the Executive Director of the Commission now unilaterally approves SJG's proposed project, and does so without any of the process to which members of the public are entitled.

Finally, we would like to point out that the CMP does not authorize the Executive Director to issue a Certificate of Filing that states the application conforms with the CMP. All the CMP permits is that the Executive Director, in issuing a Certificate of Filing, "may identify any inconsistencies of the proposed development" with the CMP in order to provide "guidance"

to the applicant and local permitting authorities. N.J.A.C. 7:50-4.34. The power to determine compliance here lies only with the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Carleton Montgomery". The signature is fluid and cursive, with a long horizontal stroke at the end.

Carleton Montgomery
Executive Director

cc: Jennifer Coffey, Executive Director, ANJEC
Tim Dillingham, Executive Director, American Littoral Society
Tom Gilbert, Campaign Director, Climate, Energy and Natural Resources, NJ
Conservation Foundation
Doug O'Malley, Executive Director, Environment New Jersey
David Pringle, Campaign Director, NJ Clean Water Action
Jeff Tittel, Executive Director, Sierra Club, NJ Chapter
Jim Walsh, New Jersey Director, Food and Water Watch