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Alliance for a Living Ocean
American Littoral Society
Asbury Park Fishing Club
Atlantic Highlands Arts Council
Bayside Regional Watershed Council
Bayside Salwater Flyrodders
Belford Seafood Co-op
Belmar Fishing Club
Beneath The Sea
Bergen Save the Watershed Action Network
Berkeley Shores Homeowners Civic Association
Cape May Environmental Commission
Central Jersey Anglers
Citizens Conservation Council of Ocean County
Clean Air Campaign, NY
Clean Water Action
Coalition Against Toxics
Coalition for Peace & Justice/Unplug Salem
Coastal Jersey Parrot Head Club
Communication Workers of America, Local 1075
Concerned Businesses of COA
Concerned Citizens of Bensonhurst
Concerned Citizens of COA
Concerned Citizens of Montauk
Eastern Monmouth Chamber of Commerce
Environment NJ
Fishermen's Conservation Association, NJ Chapter
Fishermen's Conservation Association, NY Chapter
Fishermen's Dock Cooperative, Pt. Pleasant
Food and Water Watch, NJ
Friends of Island Beach State Park
Friends of Liberty State Park, NJ
Friends of the Boardwalk, NY
Garden Club of Allenhurst
Garden Club of Bay Head and Mantoloking/Seaweeders
Garden Club of Brielle/Bayberry
Garden Club of Englewood
Garden Club of Fair Haven
Garden Club of Long Beach Island
Garden Club of RFD Middletown
Garden Club of Morristown
Garden Club of Navasink
Garden Club of New Jersey
Garden Club of New Vernon
Garden Club of Oceanport
Garden Club of Princeton
Garden Club of Ridgewood
Garden Club of Rumson
Garden Club of Sea Girt/Holly
Garden Club of Short Hills
Garden Club of Shrewsbury
Garden Club of Spring Lake
Garden Club of Terra Nova
Garden Club of Washington Valley
Great Egg Harbor Watershed Association
Green Party of Monmouth County
Green Party of New Jersey
Highlands Business Partnership
Hudson River Fishermen's Association
Jersey Shore Captains Association
Jersey Shore Parrot Head Club
Jersey Shore Partnership
Junior League of Monmouth County
Keyport Environmental Commission
Kiwanis Club of Shadow Lake Village
Leonardo Party & Pleasure Boat Association
Mantoloking Environmental Commission
Marine Trades Association of NJ
Monmouth Conservation Foundation
Monmouth County Association of Realtors
Monmouth County Audubon Society
National Coalition for Marine Conservation
Natural Resources Protective Association, NY
NJ Beach Buggy Association
NJ Environmental Lobby
NJ Friends of Clearwater
NJ Marine Education Association
Nottingham Hunting & Fishing Club, NJ
NYC Sea Gypsies
NY Marine Education Association
NY/NJ Baykeeper
Ocean Wreck Divers, NJ
PaddleOut.org
Piscataway Saltwater Sportsmen Club
Raritan Riverkeeper
Religious on Water
Rotary Club of Point Pleasant
Rotary District #7540—Interact
Saltwater Anglers of Bergen County
Sandy Hook Bay Anglers
Save Barnegat Bay
Save the Bay, NJ
SEAS Monmouth
Shark Research Institute
Shark River Cleanup Coalition
Shark River Surf Anglers
Sierra Club, NJ Shore Chapter
Sisters of Charity, Maris Stella
South Monmouth Board of Realtors
Staten Island Tuna Club
Strathmere Fishing & Environmental Club
Sunrise Rod & Gun Club
Surfers' Environmental Alliance
Surfrider Foundation, Jersey Shore Chapter
Surfrider Foundation, South Jersey Chapter
Unitarian Universalist Congregation/Moam. Cong.
United Boatmen of NY/NJ
Viking Village
WATERSPIRIT
Women's Club of Brick Township
Women's Club of Keyport
Women's Club of Long Branch
Women's Club of Merchantville
Women's Club of Spring Lake
Zen Society, NJ



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Since 1984*

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RE: USACE Permit App# NAN-2016-00908-A-EHA

Dear Ms. Handell,

Thank you for the opportunity to comment on Transcontinental Gas Pipe Line Company's ("Transco") ocean disposal request under Section 103 of the Marine Protection, Research, and Sanctuaries Act. Through the application Transco seeks to place 735,000 cubic yards of contaminated dredged material generated from the construction of the proposed Northeast Supply Enhancement Project (the "NESE Project" or "NESE Pipeline") at the Historic Area Remediation Site (the "HARS").

These comments are submitted on behalf of Clean Ocean Action ("COA"), a broad based environmental coalition of over 125 unique and diverse stakeholders joined together to protect and enhance the marine environment of New York and New Jersey.

COA's comments are divided into three sections. Part I provides necessary background information central to the USACE evaluation of the pending permit application. Part II outlines why the Corps must rescind the Supplemental Public Notice as it is untimely, outdated, and incorrect. Part III details why, if the USACE fails to rescind the Supplemental Public Notice, it must deny Transco's application – namely that the project is against the public interest, and that the ocean placement of the contaminated sediment in the HARS would result in significant undesirable effects.

I. Background

A. Transco's Proposed Northeast Supply Enhancement Project.

The NESE Project is a proposed fossil fuel expansion project, building upon the existing Transco Pipeline system. The alleged purpose of the project is to bring 400,000 dekatherms per day of fracked natural gas from Pennsylvania to New York.¹ The project has three central components. First, the Lancaster Loop, which consists of 10.2 miles of 42-inch pipeline in Lancaster County, Pennsylvania. Second, the Madison Loop, which includes the development of 3.4 miles of 26 inch pipeline in Middlesex County, New Jersey as well as the development of a compressor station in Somerset County, New Jersey. Third, the Raritan Bay Loop, which is a 23.4 mile segment of pipeline crossing offshore through 6 miles of New Jersey state waters, and 17.4 miles of New York State waters. In New Jersey, the offshore portion of the Raritan Loop would be sited off the shores of Middlesex and Monmouth Counties, through Raritan Bay. In New York, the pipeline would be sited offshore in Queens and Richmond Counties, just south of Staten Island, Coney Island, and the Rockaways, through three connected waterbodies—Raritan Bay, Lower New York Bay, and the New York Bight section of the Atlantic Ocean.² The NESE pipeline would then connect to an existing offshore pipeline, the Rockaway Delivery Lateral, at a location known as the Rockaway Transfer Point in Queens, New York.

B. New York and New Jersey's Review of the Northeast Supply Enhancement Project.

The NESE Project requires several permits from the New Jersey Department of Environmental Protection ("NJDEP"), and the New York Department of Environmental Conservation ("NYSDEC") in order for construction to begin.

1. NYSDEC Review of the NESE Project.

In New York, Transco must receive a Water Quality Certification pursuant to Section 401 of the Clean Water Act, before construction may begin.³ ***On May 15, 2019, the NYSDEC announced the denial of Transco's May 16, 2018 application for Water Quality Certification.*** In the denial, the NYSDEC explained that the basis for the denial was that the construction of the project, namely the necessary dredging, would result in significant impacts to water quality thereby violating New York State water quality standards.⁴ Following the denial, Transco submitted a new application for a Water Quality Certification on May 17, 2019. The NYSDEC is currently evaluating that application.⁵

¹ Federal Energy Regulatory Commission, Northeast Supply Enhancement Project - Final Environmental Impact Statement, Docket No. CP17-101-000, at 1-3 (2019) [hereinafter "EIS"].

² EIS at 4-50.

³ Section 401 of the Clean Water Act (33 U.S.C. § 1441),

⁴ See, Letter from Daniel Whitehead, Director, Division of Environmental Permits, New York State Department of Conservation, to Joseph Dean, Manager, Environmental Health and Safety, Transcontinental Gas Pipe Line Company, LLC (May 15, 2019) [hereinafter New York Denial Letter]

⁵ See, New York State Department of Environmental Conservation, Application No. 2-9902-00109/00006.

2. NJDEP Review of the NESE Project.

In New Jersey, Transco must receive several permits from the NJDEP before construction of the NESE Project may commence. These permits include five state land use permits (Freshwater Wetlands Individual Permit, Flood Hazard Area Individual Permit, Waterfront Development In-Water Individual Permit, Waterfront Development Upland Individual Permit, and Coastal Wetlands Individual Permit), as well as Water Quality Certification, and Coastal Zone Management Consistency Determination under the Coastal Zone Management Act.

On June 5, 2019, the NJDEP issued a denial of all seven of Transco's pending permit applications, citing several significant concerns over the environmental impacts associated with the dredging necessary for the construction of the Raritan Bay Loop portion of the proposed project.⁶ Following the denial, Transco resubmitted its application to the NJDEP on June 12, 2019.⁷ ***On November 26, 2019, Transco withdrew all pending permit applications before the NJDEP related to the construction of the NESE Project.***⁸ On November 27, 2019, the NJDEP submitted a letter acknowledging Transco's withdrawal in which the agency outlined several statutory and regulatory deficiencies associated with the withdrawn applications which must, at a minimum, be resolved to the Department's satisfaction should the applicant seek to reapply. These included issues associated with proving the project is within the public interest, as well as serious concerns over water quality and marine impacts from the proposed dredging.⁹ ***At this time, there are no pending applications for the proposed project, including the necessary Water Quality Certification or Coastal Zone Management Consistency Determination before the NJDEP.***

3. Transco's Request for Ocean Disposal in the HARS.

According to the Supplemental Public Notice, the dredging proposed for the construction of the Raritan Bay Loop portion of the NESE Project is expected to generate roughly 822,000 cubic yards of dredged material. All of which was tested.¹⁰ However, according to the Final Environmental Impact Statement, the project is expected to generate at least 1,091,734 cubic yards of sediment.¹¹ This discrepancy has not been explained.

In accordance with Section 103 of the Marine Protection, Research, & Sanctuaries Act of 1972, Transco requests a permit from the Corps to dump 735,000 cubic yards of dredged

⁶ Letter from Diane Dow, Division of Land Use Regulation, New Jersey Department of Environmental Protection, to Tim Powell, Director, Land Permits Mapping and Survey, Transcontinental Gas Pipe Line Company, LLC (June 5, 2019). [hereinafter June NJDEP Denial].

⁷ Letter from Joseph E. Dean, Manager of Permitting, Transcontinental Gas Pipe Line Company, LLC., to Joslin C. Tamagno, Division of Land Use Regulation, Bureau of Urban Growth and Redevelopment, New Jersey Department of Environmental Protection, (November 26, 2019). [hereinafter November Transco Letter].

⁸ Letter from Christopher Jones, Division of Land Use Regulation, Bureau of Urban Growth and Redevelopment, New Jersey Department of Environmental Protection, to Tim Powell, Director, Land Permits Mapping and Survey, Transcontinental Gas Pipe Line Company, LLC (November 27, 2019). [hereinafter November NJDEP Letter].

⁹ *Id.*

¹⁰ U.S. Army Corps of Engineers New York District, Supplemental Public Notice No. NAN-2016-00908-A-EHA, at 5 (Oct. 17, 2019). [hereinafter "Supplemental Public Notice"].

¹¹ EIS at 4-182.

material produced from the Raritan Bay Loop portion of the NESE Project at the HARS.¹² 87,000 cubic yards was found to be inappropriate for ocean disposal.

As you know, the HARS is a 15.7 square nautical mile area located approximately 3.5 nautical miles east of Highlands, New Jersey and 7.7 nautical miles south of Rockaway, Long Island.¹³ From the 19th century and into the early 20th century, the area surrounding what is now the HARS was used as a dumping ground for numerous hazardous and chemical waste, such as garbage, city refuse, cellar dirt (natural rock and soil excavated during building construction), floatable materials, and sediments derived from dredging during the maintenance, deepening, and construction of new navigation channels in New York Harbor.¹⁴ In 1984, the U.S. Environmental Protection Agency officially designated the area as a dredged material ocean disposal site, known as the “Mud Dump Site” (“MDS”).¹⁵ Due to public unrest over the continued disposal of toxic dredged material in the MDS, in September 1997, the EPA de-designated and terminated the use of the MDS and simultaneously re-designated the site and surrounding areas that had been historically used for dredged material disposal as the HARS. The HARS is managed to reduce impacts of historical disposal activities at the site to acceptable levels in accordance with 40 CFR Section 228.11(c).¹⁶ Specifically, the HARs must be managed to reduce the impacts within the Priority Remediation Areas (“PRA”) to acceptable levels. Therefore, the placement of dredged materials in the HARS is strictly limited to Category I materials and this material shall be selected so as to ensure it will not cause significant undesirable effects including through bioaccumulation or unacceptable toxicity.¹⁷

4. Statutory Framework

The Marine Protection, Research, and Sanctuaries Act strictly prohibit the dumping of materials into the ocean except as authorized by the U.S. Environmental Protection Agency (“EPA”) or, in the case of dredged materials, by the USACE. Neither EPA nor the USACE may issue an ocean dumping permit unless they first determine that “such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.”¹⁸ The main two criteria used to determine whether or not to grant a request for ocean dumping include: (1) the environmental impact criteria and implementing regulations (as outlined by the EPA); and (2) if the dumping will occur at a designated site, the specific requirements for the designated disposal site.¹⁹

The EPA has adopted criteria for reviewing and evaluating permit applications. 40 CFR Section 227.6(a) lists “constituents” that are prohibited from being placed in the ocean except in

¹² U.S. Army Corps of Engineers New York District, Supplemental Public Notice No. NAN-2016-00908-A-EHA, at 5 (Oct. 17, 2019). [hereinafter “Supplemental Public Notice”].

¹³ 40 C.F.R. § 228.15.

¹⁴ U.S. Army Corps of Engineers, New York District, Historic Area Remediation Site (HARS) (last visited Jan. 10, 2029), <https://www.nan.usace.army.mil/Missions/Navigation/Historic-Area-Remediation-Site-HARS/> [hereinafter U.S. Army Corps of Engineers, HARS].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 40 C.F.R. § 228.15.

¹⁸ 33 U.S.C. § 1412(a), § 1413(b).

¹⁹ 40 C.F.R. § 227.1(a).

“trace” amounts in material otherwise suitable for dumping. In accordance with section 227.6(b) of the regulations, these listed constituents are considered to be present at “trace” levels only when they are present in such forms and amounts that the “dumping of the materials would not result in significant undesirable effects, including the possibility of danger associated with their bioaccumulation in marine organisms. These listed contaminants include, among other things, mercury, cadmium, and known and suspected carcinogens.”²⁰ In deciding whether or not to grant a request for ocean placement, the Army Corps can deny an application if it can be shown that (1) there is no demonstrated need for the dumping and alternative means of disposal are available, or (2) there are unacceptable adverse effects on aesthetic, recreational or economic values, or (3) there are unacceptable adverse effects on other uses of the ocean.²¹ In making its determination, the Corps must consider the probable impacts, including cumulative impacts, on the public interest, which include, without limitation, effects on wetlands, fish and wildlife, water quality, coastal zone management programs and federal, state or local requirements, environmental benefits, and economics.²²

II. The USACE Must Rescind the Supplemental Public Notice.

For the following reasons, Clean Ocean Action argues that the USACE must rescind the Supplemental Public Notice. First, the Supplemental Public Notice is untimely and review of the application at this time is unwarranted. Second, the Supplemental Public Notice is insufficient, outdated, and incorrect thereby failing to give the public and affected legal entities the required information necessary to furnish meaningful comment.

A. The Supplemental Public Notice is Untimely and the USACE Should Not Review Transco’s Application at This Time.

As stated in our letter dated December 19, 2019 to the USACE, the Supplemental Public Notice is untimely, and therefore, review of the application should not proceed. To date, the USACE has not formally responded to our letter.

First and foremost, there is no urgency for the review of the application. The Supplemental Public Notice explicitly states no permit decision can be made on the ocean disposal application until the applicant received both Water Quality Certification and Coastal Zone Management Consistency from the NJDEP and NYSDEC.²³ In fact, it is the general policy of the USACE to ensure that “state and federal regulatory programs... complement rather than duplicate one another.”²⁴ In fact, district engineers should “cooperate to the maximum extent practicable with state agencies to prevent violation of federally approved state water quality standards and to achieve consistency to the maximum degree practicable with an approved coastal zone management program.”²⁵ As stated above, there are currently no applications for Water Quality Certification or Coastal Zone Management Consistency before the NDEP. Thus,

²⁰ 40 C.F.R. § 227.6(a).

²¹ See 40 C.F.R. §§ 227.15 – 22.

²² 33 C.F.R. § 320.4.

²³ Supplemental Public Notice, at 3.

²⁴ 33 C.F.R. § 320.1.

²⁵ 33 C.F.R. § 337.2.

the USACE, at a minimum, should wait until the applicant resubmits applications before the NJDEP to ensure a straightforward and complementary state and federal process.

Moreover, the USACE is required to publish a new Site Management and Monitoring Plan (“SMMP”) for the HARS, which will provide necessary information pertaining to the status of the HARS which is necessary for a full and fair review of Transco’s application. Section 506 of the Water Resources and Development Act (“WRDA”) of 1992, which amended the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), required the EPA and the U.S. Army Corps of Engineers (USACE) to prepare a SMMP for the HARS, once designated.²⁶ The MPRSA further requires that the SMMP include a schedule for review and revision of the plan to occur not less than 10 years after adoption, and every 10 years thereafter.²⁷ Importantly, the SMMP must include information surrounding (1) “the baseline assessment of conditions at the site,” (2) “the quantity of the material to be disposed of at the site, and the presence, nature, and bioavailability of the contaminants in the material,” and finally, “consideration of the anticipated use of the site over the long term, including the anticipated closure date for the site.”²⁸ The most recent SMMP was published April 29, 2010. At the time of the submission of these comments it is January 16, 2020. Clearly, the USACE and EPA are required to publish an updated SMMP for the HARS within the coming months. The information which must be contained in this updated SMMP is crucial not only to understanding the current status of the HARS, but also in determining whether the proposed placement of 735,000 cubic yards of dredged material produced from the NESE Pipeline is warranted. This includes information which will drastically change the evaluation such as the current quality of material contained in the HARS, and the anticipated date of closure of the site. The USACE must not review the current application until the revised SMMP is published.

B. The Supplemental Public Notice is Insufficient, Outdated, and Incorrect.

The Supplemental Public Notice is insufficient, outdated, and incorrect thereby failing to give the public and affected legal entities the required information necessary to furnish meaningful comment as required by law.

To be clear, the Supplemental Public Notice serves as “the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest.”²⁹ Therefore, the notice must include “sufficient information to provide a clear understanding of the nature of the activity and related activities of local interests in order to generate meaningful comments.”³⁰

1. Insufficiency of the Public Notice

²⁶ U.S.C.A. § 1271.

²⁷ 33 U.S.C.A. § 1412

²⁸ *Id.*

²⁹ 33 C.F.R. § 325.3.

³⁰ 33 C.F.R. § 337.1.

The Supplemental Public Notice fails to give the clarity and specificity required to “advise all interested parties of the proposed activity for which the permit is sought” and therefore, the public cannot provide detailed comments necessary to “evaluate the probable impact on the public interest.”³¹

First, the public notice was required to provide a description of the timing of both the proposed dredging, as well as the placement of the dredging.³² This information was not provided. Neither the public notice, nor the supplemental public notice outlines the specific season, month, or number of days during which the proposed activities would take place. Any meaningful environmental review and assessment of the proposal and its impacts requires a clear understanding of the schedule when the work will occur so that the full extent and magnitude of the biological and ecological impacts can be evaluated. The timing is essential to understanding impacts to specific wildlife populations given differing migration periods. Moreover, the Public Notice also does not include information on the specific location where the dredged material is proposed to be placed, which prohibits an evaluation of how material from this project will contribute to the cumulative contaminant loads at the HARS. Therefore, COA requests that the timing and the specific location of disposal be provided and that a decision not be rendered on the application until further analysis has been done in light of the specific location and timing of the proposed activity. Additionally, COA urges the Army Corps to include specific information on the timing of dredged activity and the placement of dredged material in all future HARS-related Public Notices.

Second, the Supplemental Public Notice failed to sufficiently evaluate the alternatives to HARS Placement. When determining whether to grant a permit for ocean disposal, the Army Corps must determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site.³³ If it is found that there are other feasible alternative methods or sites available, these sites must be evaluated.³⁴ USACE indicate that “alternative methods of disposal are practicable when they are available at reasonable incremental cost and energy expenditures, which need not be competitive with the cost of ocean dumping, taking into account the environmental benefits derived from such activity, including the relative adverse environmental impacts associated with the use of alternatives to ocean dumping.”³⁵ Here, the Supplemental Public Notice does not provide any economic evaluation or documentation regarding the process by which alternatives were evaluated. In fact, the project offers no alternative locations, and simply states that the cost of upland placement is “excessive”, but no costs are provided.³⁶ Without a detailed rationale and documentation regarding how the USACE arrived at their determination that upland placement is too costly and, therefore, that no other alternatives exist for this project, the process appears arbitrary and biased toward ocean placement. Given that the regulations do not require that the cost of alternatives be “competitive with the cost of ocean dumping,” the USACE should provide an analysis of the cost, and how it reached its determination that upland placement is “excessive.” This is especially true given that

³¹ 33 C.F.R. § 320.4

³² 40 C.F.R. § 221.1.

³³ 33 C.F.R. § 324.4.

³⁴ 33 C.F.R. § 324.4.

³⁵ 40 C.F.R. § 227.16(b)

³⁶ Supplemental Public Notice, at 11

the applicant is ranked 353 on Fortune's list of largest United States corporations by total revenue.³⁷ The company is estimated to have roughly \$42.3 billion in assets, with \$7.36 billion in revenue.³⁸ Furthermore, in the Final Environmental Impact Statement, Transco includes an alternative to sediment disposal at the HARS. The Final Environmental Impact Statement states that if "disposal of excess dredge material in the HARS is not approved, Transco has secured preliminary agreements to dispose of all excess dredge material at licensed onshore facilities in Kearney and Jersey City, New Jersey."³⁹

Third, the Supplemental Public Notice failed to consider significant safety concerns with the proposed project. The public interest review required when evaluating all permit applications, mandates that the Army Corps consider safety implications of the proposed project.⁴⁰ No evaluation of the safety concerns were evaluated, despite the applicant's history of safety violations and the proximity of the proposed pipeline route to major sources of navigation and commerce. Over the past decade, Williams' pipelines and pumping stations have experienced over ten explosions or fires.⁴¹ Many of these incidents resulted in human fatality and injury, release of methane into our atmosphere, or contamination of groundwater resources. Moreover, the applicant has faced five safety and risk violations from various federal agencies over the past five years, including a civil penalty for an incident in New York and New Jersey. In 2015, the Pipeline and Hazardous Materials Safety Administration fined the company for failing to properly inspect transmission pipeline valves in New York and New Jersey.⁴² Finally, the applicant has also received numerous fines from the EPA for the unsafe discharge of pollutants.⁴³ Not only should the applicant's history raise concerns, but the proposed project calls for the development of submerged natural gas line which will cross several navigational channels including the Ambrose Channel, the Chapel Hill Navigation Channel, and the Raritan Bay Channel. At this time, it appears the courts have failed to analyze the impacts on future deepening projects, vessel anchorage strikes with the pipeline, and vessel collision during construction. The USACE must thoroughly evaluate the potential safety impacts from the proposed actions.

Fourth, the public interest review required when evaluating a proposal for ocean placement of dredged material requires an evaluation of all probable impacts, including cumulative impacts.⁴⁴ The cumulative effects to water quality, marine life, and marine ecosystems must be assessed at the point of dredging using best available practices to minimize degradation of water quality and negative effects on marine life. The Army Corps must also

³⁷ Fortune, *2019 Fortune 500*, available at <https://fortune.com/fortune500/2019/williams/> (2019)

³⁸ *Id.*

³⁹ EIS, at 3-1.

⁴⁰ 33 C.F.R. § 320.4

⁴¹ National Transportation Safety Board, Pipeline Accident Reports (2019), available at <https://www.nts.gov/investigations/accidentReports/Pages/pipeline.aspx>;

⁴² Pipeline and Hazardous Materials Safety Administration, Letter to Mr. Alan S. Armstrong (2015), available at https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120141009/120141009_Final%20Order_12292015_text.pdf;

⁴³ Environmental Protection Agency, Civil enforcement Case Report (2017), available at <https://echo.epa.gov/enforcement-case-report?id=WV000A05100127-14888>;

⁴⁴ 33 C.F.R. § 320.4

perform a full analysis of cumulative effect of placement of the dredged material and the contribution to contaminant concentrations at the HARS. Cumulative placement effects include the water quality impacts of successive placement events within the same area in a relatively short period of time, as well as the cumulative effects of placing these sediments with elevated toxin levels over degraded sediments at the HARS

For these reasons, the USACE must, at a minimum, rescind the Supplemental Public Notice given the untimely nature of the application, as well as the numerous omissions contained within the notice.

2. The Public Notice is Outdated and Incorrect.

Transco's November 26, 2019, withdrawal of all NJDEP permit applications has rendered the Supplemental Public Notice outdated, and even incorrect, in several respects. Therefore, the Supplemental Public Notice severely hinders both the public's ability to comment on the proposed application, as well as the NJDEP's ability to evaluate the proposed activity for consistency under New Jersey's federally approved Coastal Zone Management Program, as required under the Coastal Zone Management Act.⁴⁵

For instance, the Supplemental Public Notice solicits a review of the proposed application by the NJDEP for consistency under the Coastal Zone Management Program. However, there is no current application for consistency determination pending before the NJDEP. No application for review exists. Furthermore, the Supplemental Public Notice even goes so far as to advise the public that the applicant's Coastal Zone Management consistency certification and accompanying information is available from the NJDEP.⁴⁶ This information is now incorrect. As explained above, the application for a Consistency Determination has been withdrawn by the applicant. There is no current application available for public review. Thus, the public's ability to fully and fairly evaluate the proposed activity and to supply meaningful and comprehensive comments to the USACE, including those related to the "probable impact on the public interest" in response to the Supplement Public Notice, is significantly and negatively impacted.⁴⁷

Moreover, the subject of the public notice, namely the proposed dredging and subsequent placement, is likely to undergo significant material changes. As explained above, the NJDEP expressed that the previous applications submitted by Transco contained "several statutory and regulatory deficiencies" related to water quality impacts from the dredging of the proposed project.⁴⁸ Moreover, the NJDEP specifically stated that these deficiencies must be addressed should Transco chose to reapply.⁴⁹ These changes will likely include alterations to critical aspects of the proposal such as the proposed pipeline route, as well as the timing, location, and methods of the dredging. Given the virtual certainty that these components of the proposed

⁴⁵ 16 U.S.C. 1456(c).

⁴⁶ Supplemental Public Notice, at 3

⁴⁷ 33 C.F.R. § 325.3.

⁴⁸ NJDEP November Letter.

⁴⁹ *Id.*

dredging will change, the USACE should not review the application for ocean disposal at this time.

C. Therefore, the USACE Must Rescind the Public Notice.

For the reasons outlined above, USACE must rescind the Supplemental Public Notice. Review at this time is unwarranted and unnecessary given the need for both Consistency and Water Quality Certification from both the NYSDEC and the NJDEP. Moreover, the Supplemental Public Notice is insufficient, outdated, and incorrect, thereby failing to give the public and affected legal entities the required information necessary to furnish meaningful comments.

III. In the Alternative, if the USACE Fails to Rescind the Supplemental Public Notice, Transco's Application Must be Denied.

A. The Project is Against the Public Interest

In reviewing the application for ocean disposal in the HARS, the USACE must make an independent determination as to the need for the dumping based on “an evaluation of the potential effect of a permit denial on navigation, economic and industrial development, and foreign and domestic commerce of the United States.”⁵⁰ The extent of the public and private need for the proposed work must be considered in the evaluation of every application.⁵¹ The benefits which may reasonably be expected to arise from the proposed project must be balanced against the reasonable foreseeable detriments.⁵² In determining whether the proposed activity is within the public interest all relevant factors must be weighed.⁵³ Furthermore, while the Army Corps can generally assume that a proposal is economically viable and needed in the market place, the district engineer, where appropriate, may make an independent review of the need for the project from the perspective of the overall public interest.⁵⁴

The proposed NESE Project, and the ocean disposal of the 735,000 cubic yards of dredged material produced from the construction of the Raritan Bay Loop portion, is clearly against the public interest for two reasons. First, there is a well-documented lack of need for the NESE pipeline. Second, this private pipeline project will fill a significant portion of the remaining capacity in the HARS, which should be utilized for navigation maintenance dredging projects. Therefore, the USACE should deny Transco's request.

1. There is a well-documented lack of need for the NESE Project.

As explained above, the USACE must evaluate the extent of the public and private need for the proposed project with every application.⁵⁵

⁵⁰ 33 U.S.C. § 1413(b).

⁵¹ 33 C.F.R. § 320.4(a)

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 33 C.F.R. § 320.4(q)

⁵⁵ 33 C.F.R. § 320.4(a)

As stated in the Final Environmental Impact Statement, the alleged purpose of the proposed NESE Project is to provide 400,000 dekatherms per day (Dth/d) of natural gas transportation service to Brooklyn Union Gas Company and KeySpan Gas East Corporation (collectively referred to as “National Grid”) in order to serve National Grid’s residential and commercial customers in the New York City area.⁵⁶ According to Transco and in comments filed by National Grid, National Grid forecasts a need for additional natural gas supply in its downstate New York market beginning in the 2019/2020 heating season.⁵⁷ Obviously, this date has passed. Since this project was initially proposed there have been several critiques of the alleged need for this pipeline.

First, the alleged forecasted need for additional natural gas supply has been disproven. Independent reports from 350 Brooklyn and the Long Island Power Authority indicate that the justification provided for the need for the project is unfounded and that the project is entirely not needed to meet projected natural gas demands.⁵⁸ In fact, natural gas demand in the service area is actually decreasing.⁵⁹ Additionally, according to the U.S. Energy Information Administration, from 2000 to 2050 natural gas consumption in the residential and commercial sectors will remain flat due to efficiency gains and population shifts which counterbalance demand growth.⁶⁰ In fact, this trend can be expected to continue as New York State and New York City move to reach ambitious clean energy goals. New York State is committed to reaching 100% renewable energy by 2050 under the New York Climate Leadership and Community Protection Act.⁶¹ Furthermore the state has also committed to the development of 9,000 MW of offshore wind energy by 2035, which will primarily be used for electric and heating in the New York City area.⁶² New York City recently passed the Climate Mobilization Act, which required buildings over 25,000 square feet to cut climate emissions 40% by 2030 and 80% by 2050.⁶³

Second, the lack of need has been further exemplified by the recent actions taken against National Grid, the company contracted to purchase the natural gas from the proposed pipeline. Following the NYSDEC May 15, 2019 denial of Water Quality Certification, National Grid implemented a moratorium on all new natural gas connections in its downstate service territory, claiming a lack of capacity. However, an investigation by the New York State Department of Public Service (“NYSDPS”) on the justification for the moratorium found that there are numerous options available to National Grid [other than the NESE Pipeline], including the implementation of aggressive demand response and energy efficiency programs, and alternative

⁵⁶ EIS at 1-3.

⁵⁷ *Id.*

⁵⁸ False Demand: *The Case Against the Williams Fracked Gas Pipeline* (350 Brooklyn, 2018). (available at http://350.org/wp-content/uploads/2019/03/Stop_Williams_False_Demand.pdf).

⁵⁹ *Id.*

⁶⁰ U.S. Energy Information Administration, Annual Energy Outlook 2019 (Jan. 24, 2019) (available at <https://www.eia.gov/outlooks/aeo/pdf/aeo2019.pdf>) (hereafter, USEIA Annual Energy Outlook 2019), p. 82

⁶¹ N.Y. Envtl. Conserv. §75-0101(5)amending ECL§75-0101(13)

⁶² *Id.*

⁶³ New York City, Admin. Code § 28-320

supply options, that could accommodate the load and capacity needs.⁶⁴ The results of this report created a standoff whereby New York Governor Andrew Cuomo and the NYSDPS threatened to withdraw National Grid's license to operate based on the lack of justification for the moratorium. Subsequently, the NYSDPS and the company reached an agreement whereby National Grid will (1) lift the moratorium, (2) pay \$36 million in penalties for its failure to provide service, and (3) will undergo aggressive energy efficiency and demand response programs to significantly reduce demand further.⁶⁵

2. The Public Interest is Not Served by Allowing a Private, Non-Navigational Project to Utilize the Limited Space Left in the HARS.

In determining whether the proposed activity is within the public interest all relevant factors must be weighed.⁶⁶ COA argues that it is against the public interest to allow for the dredged material from this private pipeline project to be placed in the HARS. The rationale behind the designation of the HARS, the limited remaining capacity within the site, and the need for future navigational dredging all support the argument that this application should be denied as it is against the public interest.

The HARS was designed and designated to ensure that “needed port maintenance and deepening projects” move forward expeditiously, thereby securing jobs that depend on the Port of New York and New Jersey and ensuring “that the port remains an engine of the regional and national economy in the new century.”⁶⁷ The Port of New York and New Jersey is the third largest port in the nation, and the largest port on the East Coast.⁶⁸ There are over 250 miles of engineered waterways in the Port District, allowing deepwater navigation in a harbor that is naturally only 19 feet deep.⁶⁹ Maintenance and improvement of these waterways, is crucial to safe navigation, and requires dredging 4-6 million cubic yards of sediment, or “dredged material”, annually.⁷⁰ The Site Management and Monitoring Plan (“SMMP”) for the HARS specifically defines a “HARs Remediation project” as “(1) an annual maintenance dredging cycle in a private 3-year permitted project, (2) a single Federal maintenance dredging project, or (3) a single private or federal deepening project.”⁷¹ Clearly, the NESE Project does not meet this

⁶⁴ State of New York Public Service Commission, *Proceeding on Motion of the Commission to Investigate Denials of Service Requests by National Grid USA, The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid*, Case. No. 19-G-0678, at 5. (Oct. 11, 2019).

⁶⁵ Office of the Governor of New York, *Governor Cuomo and National Grid Announce Agreement to Lift Moratorium Immediately*. (Nov. 25, 2019).

⁶⁶ *Id.*

⁶⁷ Memorandum of Agreement, *Among the Department of the Army, the Environmental Protection Agency, and the U.S. Army Corps of Engineers, To Strengthen Environmental Protection of the Ocean Environment and to Promote Economic Progress in the Port of New York and New Jersey*. (1999).

⁶⁸ The Port Authority of New York and New Jersey, Port Master Plan 2050

⁶⁹ W. Scott Douglas, et al., *A Comprehensive Strategy For Managing Contaminated Dredged Materials In The Port Of New York And New Jersey* (2004),

<https://www.state.nj.us/transportation/freight/maritime/pdf/compstrategy.pdf>.

⁷⁰ *Id.*

⁷¹ U.S. Army Corps of Engineers, New York District, Site Management and Monitoring Plan for the Historic Area Remediation Site 21 (2010), https://www.epa.gov/sites/production/files/2015-10/documents/r2_hars_smmp_3-10_final.pdf.

definition. In fact, COA's review of all previous, publically available applications for HARS placement indicates that the USACE has never approved, or even considered, a project that is not central to navigation before.

The USEPA and USACE previously estimated that 40 million tons of uncontaminated sediment would be required to fully remediate the MDS. As of the end of September 2019, dredged material from one hundred and twenty-seven different dredging projects in the Port of New York and New Jersey have been dredged and placed as Remediation Material within the HARS.⁷² This represents approximately 76.51 million cubic yards of remediation materials.⁷³ It is important to contrast this against the mere sixty-one projects which had been approved as of July, 2008.⁷⁴ In eleven years the number of projects which utilized the HARS more than doubled.⁷⁵ The significant increase clearly demonstrates the importance of the HARS for maintaining the navigational channels and ports within the Port of New York and New Jersey area. Furthermore, it has been established that due to both the number of individual projects, as well as the volume of total dredged material placed in the HARS thus far, limited capacity remains.⁷⁶ The HARS will reach its capacity when all nine Primary Remediation Areas (PRA) have been sufficiently capped with at least one meter of Material for Remediation.⁷⁷ Currently, almost all of HARS PRAs #1, #2 and #3 have been capped with at least one meter of Remediation Material.⁷⁸ While, large portions of PRA's #5, #6, #7, and #9 have not yet met the one-meter cap requirement, it is clear the HARS is reaching the end of its useful life.⁷⁹ Moreover, a large section of PRA #9 is closed for new placement due to the sunken vessel exclusion zones, further limiting the capacity for future projects.⁸⁰ While it is well known the capacity of the HARS is diminishing, it is unclear exactly how much time remains before the closure of this crucial site for navigational projects as the USACE has failed to publish the revised SMMP.

Therefore, the USACE must deny the pending project as it is clearly against the public interest to allow for the disposal of such a large volume of dredged material in the HARS given its diminishing capacity, the importance of the HARS to necessary navigational dredging projects, and the established precedent of not allowing for non-navigational projects to utilize the HARS.

B. The Proposed Dumping Would Result in Unacceptable Negative Impacts on the Marine Environment of the New York / New Jersey Bight.

⁷² Supplemental Public Notice, at 6.

⁷³ Supplemental Public Notice, at 7.

⁷⁴ *Supra*, note 61 at 5.

⁷⁵ *Id.*

⁷⁶ *Supra*, note 14.

⁷⁷ 40 C.F.R. § 228.15(6)(iv).

⁷⁸ *Supra*, note 14.

⁷⁹ *Id.*

⁸⁰ *Id.* at 11.

The HARS must be managed to reduce the impact of historical disposal activities at the former MDS to acceptable levels.⁸¹ To accomplish this, only material which will not cause significant undesirable effects, including through bioaccumulation, may be placed within the HARS.⁸²

If approved, Transco's application for the ocean disposal of 735,000 cubic yards of contaminated dredged material would result in significant environmental harm which would undermine not only the purpose of the HARS, but would result in unlawful adverse impacts to the surrounding wildlife and ocean ecosystem in violation of the applicable legal standards for four main reasons. First, Clean Ocean Action questions the cleanliness of the dredged material based on the USACE and USEPA's continued reliance on an outdated framework in testing the toxicity of the sediment. Second, there is well documented evidence that the project area is known to contain significant levels of toxicants within the sediment as a result of historic dumping. Third, the Final Environmental Impact Statement ("FEIS") further supports the consensus that there is known contamination in this area and that the proposed project would involve dredging and resuspension of this contaminated sediment. Fourth, both the NYSDEC and the NJDEP both have denied Water Quality Certification to Transco for the proposed NESE Pipeline based on the significant environmental harm that will result from the dredging of the pipeline route given the sediments' exceedance of state water quality standards. Finally, the evaluation by Transco shows elevated concentrations of toxicants which would produce undesirable effects on the marine environment.

1. The USEPA and USACE Continue to rely on an Outdated Framework to Determine Whether Material is Suitable for Remediation.

For at least the previous 20 years, Clean Ocean Action has consistently specified technical reasons why the evaluation framework currently used for assessing bioaccumulation and chronic toxicity cannot be used for determining Material for Remediation and why it cannot protect against adverse effects.

The Failure of the USACOE and the USEPA to update the evaluation framework developed in 1996 (using data from 1980) in a timely manner has undermined remediation efforts at the HARS by continuously allowing the disposal of sediments containing elevated levels of dioxins, PAHs and PCBs. The fact that the current framework did not identify these sediments as inappropriate serves to illustrate the fact that the current framework cannot select for sediments that will reduce levels of contamination at the HARS and cannot select against sediments that have the potential to cause adverse ecological effects to the New York Bight. For instance, the USACE continued to rely on a framework which includes effects levels that do not incorporate new information regarding effects of toxins on benthic communities and associated food chains.

2. The Project Area is known to Have Significant Toxic Chemicals Contained within Its Sediment Which Would be Re-Suspended During the Proposed Project.

⁸¹ 40 C.F.R. § 228.15(6)

⁸² *Id.*

It is no secret that the New York/ New Jersey Harbor (“NY-NJ Harbor”) area, including the Raritan Bay and Lower New York Bay, has had a long history as a repository for various industrial, chemical, and other wastes of human society.⁸³ Since at least the beginning of the nineteenth century the Raritan and Lower New York Bays have been used to dispose harmful pollutants, solid waste, sewage sludge, and chemicals.⁸⁴ In 1906, the Metropolitan Sewerage Commission conducted a comprehensive survey of the condition of the NY-NJ Harbor, finding that around 600 million pounds of untreated raw sewage was being dumped into the harbor each day.⁸⁵

As recently as the early 1990’s, toxic contamination was still a serious concern for the bight, and specifically the portion closest to the mouth of the NY-NJ Harbor.⁸⁶ Numerous studies have indicated that three toxicants were identified to have exceeded enforceable limits for fish tissue concentrations: mercury; PCBs; and Dioxin.⁸⁷ Moreover, a complementary characterization report for the NY-NJ Harbor identified up to 12 metals and 42 organic compounds as toxicants of concern.⁸⁸ Most recently, copper has been noted as an additional toxicant of particular concern.⁸⁹ From 1990 to 1997, dredged material from the NY-NJ Harbor represented “a significant source of toxicant inputs to the NY Bight.”⁹⁰ In spite of the contamination issues, New York Harbor’s estuarine system is still home to a surprisingly diverse assemblage of fish species, although the overall abundance of fish has declined in the past 400 years.⁹¹

While significant improvements have been achieved, there are still serious concerns with the quality of the sediment in the NY-NJ Harbor area. The action of our past mismanagement of waste, chemical disposals, and industrialization has resulted in a legacy of contaminated sediments in the Harbor area and beyond.⁹² One critical characteristic of heavy metals is their conservative nature, once they are introduced into the biosphere, they are transferred from one medium to another and may change chemical form, but they never degrade into different constituents.⁹³ Consequently, heavy metals accumulate in the environment, posing long-term impacts to exposed organisms. As such, for all pollutants, but specifically for heavy-metals,

⁸³ New York Bight Restoration Plan Report to Congress 4 (1993), available at <https://www.nj.gov/dep/passaicdocs/docs/NJDOTSupportingCosts/NY%20BightRestorPlan-ReporttoCongress.pdf> [hereinafter “New York Bight Restoration Plan”].

⁸⁴ Judith M. O’Neil et al., New York Harbor: Resilience in the face of four centuries of development, *Regional Studies in Marine Science*, passim (June 16, 2016), <https://par.nsf.gov/servlets/purl/10021363>.

⁸⁵ *Id.*

⁸⁶ *Id.*, at S-3.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*, at. S-4.

⁹¹ Judith M. O’Neil et al., New York Harbor: Resilience in the face of four centuries of development, *Regional Studies in Marine Science*, passim (June 16, 2016), <https://par.nsf.gov/servlets/purl/10021363>.

⁹² W. Scott Douglas, et al., *A Comprehensive Strategy For Managing Contaminated Dredged Materials In The Port Of New York And New Jersey* (2004), <https://www.state.nj.us/transportation/freight/maritime/pdf/compstrategy.pdf>.

⁹³ Sarah L. Clark, *Lurking on the Bottom: Heavy Metals in the Hudson-Raritan Estuary*, Environmental Defense Fund, (May 1990).

sediments should be viewed not only as a sink for pollutants, such as metals, but as a reservoir.⁹⁴ Therefore, it is not surprise that as much as 85% of all maintenance material (newly deposited) is too contaminated for management via ocean disposal.⁹⁵ As the oldest industrial watershed in the country, the sediments in the Harbor are “moderately to severely contaminated with a variety of industrial pollutants and the majority are no longer considered suitable for ocean disposal.”⁹⁶ On top of the historic contamination there are still significant active, including concerns regarding combined sewer overflows (CSOs) which are a significant source of remaining untreated pathogenic contamination to the Harbor.⁹⁷

Thus, it is clear that there is a well-documented history of contamination in the project area, and that based on this history, there is a legacy of contaminated sediment. Approval of this project would not only re-suspend this toxic sediment, but would allow the applicant to dispose of the contaminated sediment in the HARS, which must be managed to remediate the former MDS.

3. The Final Environmental Impact Statement

The Final Environmental Impact Statement (“FEIS”) issued by the Federal Energy Regulatory Commission (“FERC”) supports the consensus that the sediment in the Raritan Bay and Lower New York Bay are known to contain sediment containing known toxicants.

According to the FEIS, sediments within Raritan and Lower New York Bays contain contaminants from historical and ongoing anthropogenic sources.⁹⁸ As such, there are many points along the proposed route that exceed contamination levels.⁹⁹ FERC’s FEIS maintains that “concentrations of organic contaminants were greater than upper level effects’ thresholds at approximately 33 percent of the sample sites.¹⁰⁰ Approximately 83 percent of the sample sites had at least one exceedance of an inorganic (metal) threshold.¹⁰¹ Moreover, exceedances of upper-level effects’ thresholds for heavy metals (e.g., copper, lead, zinc, mercury) were detected at multiple locations. These included exceedances for mercury at one site; lead and mercury at one site; lead, zinc, and mercury at two sites; and copper, lead, and mercury at one.¹⁰² Testing and modeling results also indicated exceedances along the proposed route for dioxins, polychlorinated biphenyls (PCBs), and certain polycyclic aromatic hydrocarbons.¹⁰³

Moreover, there is evidence indicating that the levels of contamination outlined in the FEIS, are understated, and that the true level of contamination within the sediment could be

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ W. Scott Douglas, et al., A Comprehensive Strategy For Managing Contaminated Dredged Materials In The Port Of New York And New Jersey (2004), <https://www.state.nj.us/transportation/freight/maritime/pdf/compstrategy.pdf>.

⁹⁷ New York Bright Restoration Plan.

⁹⁸ EIS at ES-11

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 4-182.

¹⁰² *Id.*

¹⁰³ *Id.* at 4-121.

higher. Transco has stated that “sediment with higher contaminant levels will be mixed with adjacent, less contaminated material.”¹⁰⁴ However, Transco does not explain how it can know for certain that the sediment adjacent to the contaminated sediment is in fact less contaminated. Transco has only taken samples from sediment along the proposed pipeline route.¹⁰⁵ There have been no samples which indicate that the sediment adjacent to the pipeline is in fact cleaner.¹⁰⁶ Furthermore, if the samples taken from the proposed pipeline route, are considered “reasonably representative” of the sediment characteristics in the area along the route, as claimed by Transco, then it would be expected that the sediment surrounding the proposed route would be equally contaminated.¹⁰⁷ Therefore, if the sediment proposed to be mixed with is in fact equally as contaminated, the diluting effect, Transco sites, will not be achieved.

Furthermore, the proposed construction of the NESE Pipeline and the subsequent disposal of 735,000 cubic yards of contaminated sediment will have significant undesirable effects on the marine ecosystem and the wildlife of the surrounding area. The offshore construction is estimated to re-suspend 1,091,734 cubic yards of contaminated sediments.¹⁰⁸ However, the number will likely be larger due to vessel traffic, anchoring, hydrostatic testing, and other aspects of pipeline construction. The resuspension will result in significantly decreased water quality which will negatively impact fishing and shell fishing in the area. Dredging up buried industrial toxins (like arsenic, lead, zinc and mercury) and organic compounds (PCBs, DDT, and dioxins) from the seabed will poison fish, shellfish and marine life in the Raritan and Sandy Hook Bays. Dredged-up toxins will affect aquatic migration, clog fish gills, interfere with breeding, and contribute to harmful algae blooms. Furthermore, the redistribution of sediments that fall from suspension, will bury benthic and demersal species, resulting in mortality of eggs and other life stages, including winter flounder that spawn in shallow, inshore waters in the project area. The FEIS specifically notes that eggs and larva of this species could be directly affected by excavation or by smothering in toxic-laden sediments during construction.¹⁰⁹ Additionally, the excavation of an 8- to 15-foot deep trench for 23.5 miles will disturb hundreds of acres of sand and gravel, creating increased sediment in the water. The resulting increase in the turbidity of the water threatens marine life since the clarity of water is critical to the ability of many species to navigate, find food, and avoid predators. Moreover, impacts also include temporary loss of habitat and foraging areas.¹¹⁰

4. *Both New York and New Jersey Denied Water Quality Certification for the Proposed NESE Pipeline Based On Severe Environmental Impacts Associated with The Contaminated Sediment.*

¹⁰⁴ Jack Szczepanski, *Analysis of Transco’s Response to Public Comments on its Waterfront Development Individual Permits and Coastal Wetlands Individual Permit applications for the Proposed Northeast Supply Enhancement Project*, (Oct. 20, 2019).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 4-106.

¹⁰⁹ *Id.* at 4-118.

¹¹⁰ *Id.*

Furthermore, both New York and New Jersey have denied Transco's application for Water Quality Certification under Section 401 of the Clean Water Act based on the impacts the project poses to water quality through the resuspension of the contaminated sediment.

In the May 15, 2019 letter, the NYSDEC denied Transco's application for Water Quality Certification based on the impermissible exceedance for both mercury and copper.¹¹¹ The exceedance of both mercury and copper were acknowledged by both FERC and Transco.¹¹² The NYSDEC found that the exceedance of these heavy metals would have significant impacts to water quality, shellfish beds, and other benthic resources.¹¹³ Furthermore, in the denial, the NYSDEC called into question the validity of the modeling and methods to ensure compliance with applicable water quality regulations, finding that it was insufficient information to determine that the applicant would comply with state water quality standards based on the contamination levels in the sediment.¹¹⁴ On top of the chemical exceedances, the NYSDEC also found that "the construction and operation of the project would cause numerous other significant adverse environmental impacts."¹¹⁵ The impacts include unlawful harm to shellfish propagation and survival, fish populations, and special harvest areas.¹¹⁶ These impacts were a direct result of the reintroduction of the contamination of the sediment to be dredged.¹¹⁷

Similarly, in both the June 5, 2019, and the November 27, 2019 letters the NJDEP specifically stated that the construction of the proposed NESE Pipeline would likely adversely impact water quality in violation of New Jersey regulation N.J.A.C. 7:7-12.7.¹¹⁸ In the June 5, 2019 letter, the NJDEP found that the dredging would result in exceedances of numerous chemicals in violation of New Jersey water quality standards, such as bisphthalate, phenanthrene, arsenic, manganese, mercury, PCBs, and DDE.¹¹⁹ Similar to the NYSDEC, the NJDEP also questions the validity of Transco's modeling in relation to measuring the levels of contamination.¹²⁰ As such, the NJDEP found that the proposed dredging would have unlawful impacts on the marine environment of New Jersey.¹²¹ Moreover, in the November 26, 2019 letter, the NJDEP made the same points, thereby indicating that the level of contamination in the sediment are at such a level as to violate New Jersey water quality standards despite the attempts of the applicant to alienate harm.¹²²

Given the finding of both the NYSDEC and the NJDEP on the contamination levels of the sediment which Transco proposed for ocean placement, it is clear that the material is unfit for the HARS, and therefore, the USACE must deny the application.

¹¹¹ New York Denial Letter, at 4.

¹¹² See, FERC Order at 19 ¶ 49; EIS at ES-12, and 4-122, and Table 4.5.2-8.

¹¹³ New York Denial Letter, at 4.

¹¹⁴ *Id.* at 8.

¹¹⁵ *Id.* at 9.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See, June NJDEP Denial, and NJDEP November Letter.

¹¹⁹ June NJDEP Denial, at 12.

¹²⁰ *Id.* at 13.

¹²¹ *Id.* at 14.

¹²² November NJDEP Letter, at 3.

5. *The Biological and Chemical Characteristics of the Proposed Dredged Material Indicates it is Unsuitable for Remediation.*

At the outset, COA objects to the insufficient number of samples which were taken throughout the length of the exceedingly long 24 mile route. Indeed, this is likely the longest dredge material project ever within the NY District. Moreover, this is the first project which is not along a predetermined navigational channel. Review of previous applications indicates that this project is the first offshore pipeline project which the USACE has evaluated for ocean disposal purposes. All other projects are for dredging of predetermined navigational channels. This alone illustrates the need for increased sample locations. Any proposed dredging and remediation should have the minimum number of field samples and dredge material management units (DMMU) that are spatially representative. Here, only 87 vibracore samples were taken, which is less than four samples per mile. Furthermore, the sampling was not evenly spaced throughout the proposed route and no justification for this was provided. Thus, given the length of the proposed route and the unusual nature of this project when compared to previous applications, combined with the history of contamination in the area, more samples should have been taken.

Even with such minimal sampling, a review of the testing results indicates that specific “Chemicals of Concern,” in the sediment, which COA has routinely referred to as “bad actors,” exceed the reference materials in numerous instances. Therefore, the presence of these contaminants is clearly a concern, and the higher the levels and the more chemicals found, the greater the concern. In reviewing samples for all Prisms, COA has found the following

- For heavy metals including lead, mercury, and arsenic: the dredged sediment statistically exceeded levels in reference materials 34 times.
- For PCBs, a known carcinogen: the dredged sediment statically exceeded reference sediments 36 times for individual congeners, and 5 times for total PCBs.
- For PAH’s, petroleum-based chemicals: the dredged sediment statistically exceeded reference sediments 10 times.
- For Dioxins/Furans (some of the most toxic industrial chemicals assessed) the dredged sediment exceeded reference sediments 29 times, and in at least one instance exceeded by more than an order of magnitude.

Furthermore, the Supplemental Public Notice indicates that 87,000 cubic yards of dredged material was found to be unacceptable for ocean disposal.¹²³ However, there is no reference to (1) how this conclusion was reached, (2) who concluded the material was unacceptable for ocean disposal, (3) which specific section of the proposed pipeline route the material was generated from, or (4) the levels of contamination in the 87,000 cubic yards of sediment? Clean Ocean Action questions why this information was not made publically available and requests that Transco and the USACE release this highly relevant information.

¹²³ Supplemental Public Notice, at 3.

C. Therefore, Should the USACE Fail to Rescind the Supplemental Public Notice, the USACE Must Deny Transco's Application.

The proposed ocean disposal from the NESE Pipeline is clearly not within the public interest. There is a well-documented lack of need for the project itself and the remaining capacity of the historic area remediation site should be left for navigational needs. Both the purpose of the designation of the HARS, as well as the USACE precedent of never approving a non-navigational project for HARS placement, supports this. Furthermore, it is clear that the 735,000 cubic yards of sediment is contaminated, and would not serve the purpose of remediating the area and would likely result in significant undesirable effects, including through bioaccumulation.

IV. Conclusion

Based on the reasons stated above, Clean Ocean Action is strongly opposed to Transco's request for the ocean placement of 735,000 cubic yards of contaminated sediment produced from the NESE pipeline. COA demands that the USACE rescind the Supplemental Public Notice and cease review of this application based on the significant flaws associated with it. However, should you fail to rescind the public notice, COA urges the USACE to deny the pending application as the proposed action is against the public interest and would result in significant undesirable effects on the marine environment.

Respectfully submitted,



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