

Participating Organizations

- 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 Navesink
- 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
- Keypoint 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 Chanty, Manis 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
- TACK I, MA
- Unitarian Universalist Congregation/Monm. Cnty.
- United Boatmen of NY/NJ
- Viking Village
- WATERSPIRIT
- Women's Club of Brick Township
- Women's Club of Keypoint
- Women's Club of Long Branch
- Women's Club of Merchantville
- Women's Club of Spring Lake
- Zen Society, NJ



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RE: Transcontinental Gas Pipe Line Company LLC Request for Freshwater Wetlands Individual Permit with 401 WQC; Flood Hazard Area Individual Permit; and Waterfront Development Individual Permit with 401 WQC and Coastal Zone Consistency Determination Activity No. 0000-01-1001.3-LUP-200001

Dear Ms. Tamagno and Mr. Jones;

Thank you for the opportunity to submit comments on the pending applications referenced above for the Northeast Supply Enhancement Project (“NESE Project” or “NESE Pipeline”) submitted on January 21, 2020.

These comments are submitted on behalf of Clean Ocean Action (“COA”). COA is a leading regional environmental non-profit organization focused on protecting and enhancing the marine and coastal ecosystems of New York and New Jersey. COA represents a broad coalition of over 115 conservation, environmental, fishing, boating, diving, religious, student, surfing, women’s, business, civic, and community organizations dedicated to the improvement of water quality in New York and New Jersey.

These comments are divided into five sections. Part I focuses on the background related to the NESE Project and the New Jersey Department of Environmental Protection’s (“NJDEP”) authority over it. Part II discusses the application for Freshwater Wetlands Individual Permit with Water Quality Certification. Part III discusses the application for waterfront development individual permits with Water Quality Certification. Part IV focuses on the

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application for Coastal Zone Consistency Determination under the Coastal Zone Management Act. Part V outlines the widespread public opposition to the project.

At the outset it is critical to understand that this project will have absolutely no benefit to the State of New Jersey. The proposed purpose of the project is to provide New York, not New Jersey, with climate-altering fracked methane gas. The project will significantly contribute to climate change and the harmful practice of fracking. No residents of the state will benefit from the proposed use. Furthermore the construction of the project will result in widespread harm to the environment as well as public health. The threshold requirement of providing a justification for the proposed project has never been achieved.

Ultimately, given the significant environmental harm that would result from the construction and operation of the NESE Project, and the applicant's inability to prove that the project complies with New Jersey law and regulation, the project must be denied.

Furthermore, as this represents Williams Companies and Transcontinental Gas Pipe Line Company's ("Williams/Transco" or "the applicant") fourth attempt to seek approval from the New Jersey Department of Environmental Protection ("NJDEP"), the NJDEP should not only deny the applications, but deny them with prejudice. The applicant has continuously and systemically abused the good will of the Department as well as the regulatory process. Every single application has been either rejected or withdrawn the day a decision is pending. Williams/Transco is abusing taxpayer dollars by continuously restarting the clock on these permits.

I. Background Information

A. Overview of the Northeast Supply Enhancement Project

As you know, 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 methane 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 Compressor Station 206 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.

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.

B. Legal Background – The New Jersey Department of Environmental Protection’s
Authority to Regulate the NESE Project.

The Natural Gas Act (“NGA”) confers upon the Federal Energy Regulatory Commission (“FERC”) jurisdiction over the transportation and sale of natural gas in interstate commerce.³ While the NGA gives significant authority to FERC over the permitting of interstate natural gas pipelines, the act specifically reserves authority to the states under regulations passed pursuant to the Coastal Zone Management Act, Clean Air Act, and Clean Water Act.⁴ This system of “cooperative federalism” establishes a mechanism whereby states can opt-in to regulation, even going so far as to assume permitting authority, and allows such states to set more stringent standards. To be clear, it is undisputed that state actions under these cooperative federal programs are outside of the scope of the NGA’s preemptive effect and thus are binding on an applicant.⁵ Therefore, an applicant seeking to obtain a Certificate of Public Convenience and Necessity under Section 7 of the NGA must “comply with all other federal, state, and local regulations not preempted by the NGA.”⁶

As such, Williams/Transco must demonstrate compliance with the requirements of both Section 401 and 404 of the Clean Water Act, as well as the enforceable policies of the State of New Jersey adopted pursuant to the Coastal Zone Management in order for the NJDEP to approve the NESE Project. Section 401 of the Clean Water Act states that applicants for federal “license[s] or permit[s]” for activities that “may result in any discharge into the navigable waters” must receive state certification that such discharges will comply with various provisions of the Clean Water Act, including state water quality standards.⁷ A water quality certificate must include a “statement that there is a reasonable assurance that the activity [for which a water quality certificate application has been submitted] will be conducted in a manner which will not violate applicable water quality standards”⁸ To help ensure compliance with water quality standards, States may also impose conditions on the applicant’s federally permitted activities though section 401 certification, such as discharge limitations and “any other appropriate requirement[s] of State Law.”⁹ FERC is obligated to include such conditions regardless of whether the agency thinks that they are reasonably related to water quality.¹⁰ In fact, a state is not required to adhere to the water quality findings of a federal agency, such as the FERC.¹¹

³ 15 U.S.C. § 717(a)

⁴ 15 U.S.C. § 717(b)(d). While this section specifically refers to LNG Exports, it can be understood to apply to the entirety of the Natural Gas Act. The Energy Policy Act (“EPAAct”) included the clause, and specifically the term “this Act” rather than “this chapter” in the savings clause enacted by Congress and printed in the statutes at large. Energy Policy Act of 2005, PUB. L. NO. 109-58, sec. 311(c)(2), § 3(d). “[T]his Act” could reasonably be interpreted to have referred either to the NGA (the Natural Gas Act) or to EPAAct (the Energy Policy Act). By “Act,” Congress referred to the NGA as a chapter in the U.S. Code, then the codified version, therefore the section 3 savings clause applies throughout the NGA.

⁵ *Id.*

⁶ *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013) (addressing state failure to act under the Clean Air Act).

⁷ 33 U.S.C. § 1341(a). (2012).

⁸ 40 C.F.R. § 121.2(a)(3).

⁹ *Id.* § 1341(a)

¹⁰ *See, American River, Inc. v. Fed. Energy Regulatory Comm’n*, 129 F.3d 99, 106 (2d Cir. 1997).

¹¹ *See Constitution Pipeline Co., LLC v. New York State Dep’t of Env’tl. Conservation*, 868 F.3d 87, 101 (2d Cir.

Furthermore, States may regulate water quality more stringently than as required by the Clean Water Act.¹² Therefore, Section 401 effectively gives the State the final decision-making authority concerning conditions necessary to maintain state water quality standards for federal permits that may result in discharges to navigable waters.¹³

New Jersey assumed the authority to issue Section 401 permits and delegated the administration of the permitting program to the NJDEP, which exercises the authority under the New Jersey Freshwater Wetlands Protection Act Rules and the Coastal Zone Management Rules.¹⁴ On March 2, 1994, the State's application for assumption of the federal program was approved.¹⁵ For a project which may result into a discharge into the waters and wetlands protected under the Freshwater Wetland Protection Act Rules, permits issued under those rules constitutes a water quality certificate required under Section 401 of the Clean Water Act.¹⁶ For projects which may result into a discharge into the coastal zone, the department shall use the standards and regulations outlined in the Coastal Zone Management Rules to determine whether to issue a water quality certificate.¹⁷

II. Application for Freshwater Wetlands Individual Permit with 401 Water Quality Certification.

The NJDEP must deny Williams/Transco's application for Freshwater Wetlands Individual Permit and Water Quality Certification, as the application fails to comply with the requirement for non-water dependent activities within an exceptional resource value wetland, and the applicant has failed to demonstrate that the requirement should not apply to the project.

A. Legal Background

Under the Freshwater Wetlands Protection Act ("FWPA") Rules, an applicant that proposes a non-water dependent activity within an exceptional resource value wetland must establish that there is either (1) a compelling public need for the proposed activity greater than the need to protect the freshwater wetland, AND that the need cannot be met by essentially similar projects in the region which are under consideration, or (2) that the denial of the permit would impose an extraordinary hardship on the applicant brought about by circumstances peculiar to the subject property.¹⁸ In addition to the requirement for a compelling public need, or alternatively, an extraordinary hardship, all applicants for permits under the FWPA must establish that the project is within the public interest as defined by the FWPA Rules.¹⁹

2017), *cert denied*, 138 S. Ct. 1697 (2018).

¹² 33 U.S.C. §1370. EPA regulations note that this non-preemption clause is applicable to water quality standards. 40 C.F.R. §131.4(a) ("As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required [by the EPA water quality standards] regulation.").

¹³ 33 U.S.C. § 1341

¹⁴ N.J.S.A. § 13:9B-1-30; 33 N.J. Reg. 3045(a); N.J. Admin. Code § 7:7A-2.1(c); Memorandum of Agreement between the New Jersey Department of Environmental Protection and Energy and the United States Environmental Protection Agency (1993). *See*, N.J.S.A. 58:10A-5(b)

¹⁵ 40 C.F.R. 233.71.

¹⁶ N.J.A.C. § 7:7A-2.1(d)

¹⁷ N.J.A.C. § 7:7-1.1

¹⁸ N.J.A.C. 7:7A-10.4(a).

¹⁹ *See*, N.J.A.C. 7:7A-10.2 outlining the standard requirements for all individual permits, and N.J.A.C. 7:7A-

B. Failure to Establish a Compelling Public Need for the Project.

The applicant has, yet again, failed to demonstrate either a compelling public need for the proposed as defined under the FWPA Rules, or an extraordinary hardship. Therefore, the NJDEP must deny the Freshwater Wetland Individual Permit and accompanying 401 Water Quality Certificate.

A compelling public need, as defined by the FWPA Rules, means that based on the specific facts, the proposed regulated activity: (1) will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, (2) benefits the public health and safety, (3) is required to serve the existing needs of the residents of the State, and (4) that there is no other means available to meet the established public need.²⁰

Review of the application clearly affirms that none of these elements have been established.

1. Failure to establish that the project will serve an essential health or safety need of the municipality in which the proposed activity is located.

The project will not serve an “essential health or safety need” in Franklin Township. To be clear, there is no essential health or safety need served by this project in the State of New Jersey, let alone to Franklin Township and the surrounding communities representing “the municipality in which the proposed regulated activity is located.” The alleged purpose of the project is to provide National Grid with an “incremental amount of natural gas” to serve its downstate markets which include Brooklyn, Queens, Staten Island, and Long Island, New York.²¹ Williams/Transco has contractual obligations with National Grid for the entire capacity of the project.²² Therefore, none of the gas generated from the project will benefit any resident in New Jersey, and more specifically as required by the FWPA Rules, the municipality in which the project is located. Instead, the project will cause significant harm to both public health and the environment. Moreover, the project poses safety concerns.

The air quality in the communities surrounding the proposed Compressor Station 206 will be significantly impaired and degraded by the project as a direct result of the emissions from the gas-powered compressor station. From the compressor station alone, the NESE project would be adding the following emissions:

(1) Carbon Dioxide (CO ₂):	132,720 tons per year
(2) Carbon Monoxide (CO):	57 tons per year
(3) Particulate Matter 2.5 (PM _{2.5}):	18.9 tons per year

10.2(b)(12) defining public interest.

²⁰ N.J.A.C. 7:7A-1.3

²¹ EIS at 1-3. Stating that Williams/Transco “proposes to provide 400,000 dekatherms per day (Dth/d) of incremental firm 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.”

²² *Transco Response to Department’s November 27, 2019 Letter, Pg. 8 (Jan. 21, 2020)*. Stating that Williams/Transco has entered into 15-year contracts with National Grid for 100% of the capacity that will be created by the Project. National grid does not operate within the State of New Jersey.

(4) Particulate Matter 10 (PM10):	18.9 tons per year
(5) Nitrogen Oxides (NOx):	22.7 tons per year
(6) Sulfur Dioxide (SO2):	3.07 tons per year
(7) Volatile Organic Compounds (VOCs):	9.5 tons per year
(8) Formaldehyde:	0.35 tons per year

Many of these pollutants have significant impacts on human health. Exposure to these pollutants can increase the risk of respiratory, cardiovascular, neurological and developmental diseases. Examples of public health impacts include eye, nose, and throat irritation, difficulty breathing, worsening of asthma, high blood pressure, heart attacks, and headaches.²³ The potential health impacts are not limited to those who live in the direct area surrounding the compressor station. There are also significant regional health threats.²⁴ When nitrogen oxides and volatile organic compounds combine in the presence of sunlight, they form ground-level ozone, a regional pollutant.²⁵ Ozone can cause respiratory problems, including worsening of asthma and other respiratory diseases, and cardiovascular effects, including cardiac arrhythmia, heart attacks, and stroke.²⁶ People most at risk from breathing polluted air include people with asthma (or other respiratory diseases), children, older adults, and people who are active or work outdoors. Over 165,000 people live in the immediate vicinity of the compressor station, and the weather conditions can facilitate the spread of these harmful chemicals to other vulnerable areas. The impacts from the air emissions is particularly worrisome given that many of the communities directly surrounding the proposed Compressor Station 206 are primarily retirement and 55+ communities, such as Princeton Manor. Moreover, the emissions will add to New Jersey's already failing air quality. The American Lung Association gave both Middlesex and Monmouth Counties an "F" for ozone pollution.²⁷ New Jersey has never achieved the federal air quality standard for ground-level ozone.²⁸ The suffering air quality of the state is not unknown to the NJDEP who recently joined the Office of Attorney General in suing the EPA to enforce ozone and other forms of air pollution from upwind sources.²⁹ The lawsuit notes that four areas in five downwind states are classified as serious in terms of persistent ozone pollution, including the New York-New Jersey-Long Island region.³⁰

Furthermore, the project will create a serious threat to public health and safety due to the nature of the infrastructure to be installed in an area unfit for its use. The Compressor Station 206 will be directly adjacent to numerous residential communities. Moreover, the Compressor

²³ P.N. Russo & D.O. Carpenter, *Health Effects Associates with Stack Chemical Emissions from New York state Natural Gas Compressor Stations: 2008-2014*, Institute for Health and Environment, (Oct. 12, 2017.)

²⁴ *Id.*

²⁵ U.S. Environmental Protection Agency, *Health Effects of Ozone Pollution*. Available at <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>.

²⁶ *Id.*

²⁷ American Lung Association, *State of the Air Report 2019: New Jersey*. Available at <http://www.stateoftheair.org/city-rankings/states/new-jersey/>

²⁸ Tom Johnson, *Federal Suit Pushes EPA to Address Out-of-State Pollution Impacting NJ, Other States*, NJ Spotlight, (Feb. 10, 2020). Available at <https://www.njspotlight.com/2020/02/federal-suit-pushes-epa-to-address-out-of-state-pollution-impacting-nj-other-states/>

²⁹ State of New Jersey, et al. v. Wheeler, *Complaint for Declaratory and Injunctive Relief*, [Civil Action No. 20-cv-1425]

³⁰ *Id.*

Station will be in the vicinity of an active blasting operation, Trap Rock Quarry.³¹ To date, there was no modeling of the impact of the immediate or cumulative blasting at Trap Rock Quarry on the proposed Compressor Station 206, along with all associated buildings and pipelines at the site.³² Trap Rock Quarry anticipates continuing its mining operations on the property until the year 2045. There are also significant concerns related to the water supply and pressure in Franklin Township. Should an accident occur, and a fire result, there is risk that the existing infrastructure would be unable to deal with an emergency.³³ Additionally, since the prevailing winds are toward Princeton Manor, in the case of a fire at Compressor Station 206's site that spreads, Princeton Manor residents would only be able to evacuate toward the fire (toward Route 27) as there is only one exit road which abridges the project area.

This is particularly alarming given Williams/Transco's safety record. Over the past decade, Williams/Transco's pipelines and pumping stations have suffered at least ten explosions or fires.³⁴ Many of these incidents resulted in loss of life, release of methane gas, and contamination of groundwater resources. Additionally, Williams/Transco have faced at least five safety and risk violations from federal agencies over the past five years. This includes a 2015 civil penalty from the Pipeline and Hazardous Materials Safety Administration for failing to adequately inspect transmission pipeline valves in New Jersey and New York City.³⁵ The applicant has also received numerous fines from the Environmental Protection Agency for the unsafe discharges of pollutants.³⁶

2. Public health and safety do not benefit from the proposed project.

As stated above, New Jersey will not benefit from the proposed project or its intended use. Again, the project is only designed to deliver methane gas to New York which will result in no benefit to the public health or safety of the residents of New Jersey. Instead, the project will only result in negative impacts to the State of New Jersey and its residents, as it will only worsen the impacts of catastrophic climate change which will result in dramatic and widespread physical and economic damage throughout the state, region, and world.

The NESE Project is designed to transport 400,000 dekatherms per day of fracked methane gas from Pennsylvania to New York.³⁷ This will significantly contribute to the climate crisis by locking in new hardened fossil fuel infrastructure. To be clear, there is nothing clean about methane gas. Over the lifecycle of methane gas (mining, transport, and use for electric power/heating) it produces a great deal of harmful pollutants that "result in at least 60-80 times more carbon-equivalent emissions and air pollution mortality per unit of electric power generated

³¹ EIS at 4-337 – 378.

³² EIS at 4-337 – 339.

³³ EIS at 4-326 – 439.

³⁴ National Transportation Safety Board, Pipeline Accident Reports (2019). Available at, <https://www.nts.gov/investigations/AccidentReports/Pages/pipelines.aspx>;

³⁵ Pipeline and Hazardous Materials Safety Administration, Letter to Mr. Alan S. Armstrong (2015). Available at, https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120141009/12011009_Final%20Order_12292015_text.pdf;

³⁶ U.S. Environmental Protection Agency, Civil Enforcement Case Report (2017). Available at <https://echo.epa.gov/enforcement-case-report?id=WV000A05100127-14888>;

³⁷ Federal Energy Regulatory Commission, Northeast Supply Enhancement Project - Final Environmental Impact Statement, Docket No. CP17-101-000, at 1-3 (2019) [hereinafter "EIS"].

than does wind energy over a 100-year time frame.”³⁸ Specifically, the approval of this pipeline would be equivalent to adding at least, 7,724,869 metric tons of greenhouse gas emissions into the atmosphere every year.³⁹ Importantly, this number does not reflect the true greenhouse gas emissions from the project as it does not account for methane leakage throughout the fracking and transportation processes. Reports have found that U.S. oil and gas operations are leaking 60 percent more methane than the U.S. Environmental Protection Agency had previously calculated: about 13 million tons more each year.⁴⁰ Newer studies indicate even more leakage.

The threats of climate change are real and already being felt throughout the state and will only continue to exacerbate if we do not rapidly transition to a clean energy economy. Hurricanes Irene and Sandy illustrated the severity that stronger storms can have on the State. Flash flooding washed out roads and bridges, undermined railroads, brought down trees and power lines, flooded homes and businesses, and damaged floodplain forests. Hurricane Sandy was responsible for about 150 deaths, approximately half of which occurred in the Northeast.⁴¹ Damages, concentrated in New Jersey, New York, and Connecticut, were estimated at \$60 to \$80 billion, making Sandy the second most costly Atlantic Hurricane in history behind Katrina.⁴² It is also estimated that 650,000 homes were damaged or destroyed, and that 8.5 million people were without power.⁴³

Sea level rise is a particular concern throughout the state. Over the last forty-years, sea-level rose 8.2 inches along the Jersey shore, which is significantly higher than the global average.⁴⁴ Analysis shows that the Jersey Shore is expected to experience additional sea level rise in varying degrees which is directly dependent on how aggressively we transition away from fossil fuel resources. Under the high-emissions scenario, which is evaluated assuming the continued growth of fossil fuel consumption and fossil fuel infrastructure development, sea level rise could be expected to reach as high as 3.5 feet by 2070 and 5.2 feet by 2100.⁴⁵ Furthermore, the impact, harm and economic losses associated with significant sea level rise will only be compounded by increased frequency and severity of coastal storms.

Moreover, climate change will also increase tidal and non-tidal flooding. High-tide flooding can have detrimental impacts on infrastructure and community function, even in the

³⁸ Jacobson, Mark Z., *et al.*, 2013. Examining the feasibility of converting New York State’s all-purpose energy infrastructure to one using wind, water, and sunlight, *Energy Policy*, 57: 585-601.

³⁹ See, U.S. Environmental Protection Agency, *Greenhouse gas Equivalencies Calculator*.

⁴⁰ See, *Assessment of methane emissions from the U.S. oil and gas supply chain*. (July 13, 2018). Available at <https://science.sciencemag.org/content/361/6398/186>

⁴¹ Blake, E. S., T. B. Kimberlain, R. J. Berg, J. P. Cangialosi, and J. L. Beven, II, 2013: Tropical Cyclone Report: Hurricane Sandy. (AL182012) 22 – 29 October 2012. 157 pp., National Oceanic and Atmospheric Administration, National Hurricane Center.

⁴² NOAA, 2013: Billion Dollar Weather/Climate Disasters, List of Events. National Oceanic and Atmospheric Administration.

⁴³ *Supra* 25.

⁴⁴ Kopp, R.E., C. Andrews, A. Broccoli, A. Garner, D. Kreeger, R. Leichenko, N. Lin, C. Little, J.A. Miller, J.K. Miller, K.G. Miller, R. Moss, P. Orton, A. Parris, D. Robinson, W. Sweet, J. Walker, C.P. Weaver, K. White, M. Campo, M. Kaplan, J. Herb, and L. Auermuller. *New Jersey’s Rising Seas and Changing Coastal Storms: Report of the 2019 Science and Technical Advisory Panel*. Rutgers, The State University of New Jersey. Prepared for the New Jersey Department of Environmental Protection. Trenton, New Jersey.

⁴⁵ *Id.*

absence of a major storm. Over 2007-2016, there was an average of 8 high-tide flood events in Atlantic City, NJ, with annual event totals ranging between 4 events in 2007 and 18 events in 2009.⁴⁶ This frequency has grown from an average of less than one high-tide flood event per year in the 1950s.⁴⁷

Climate impacts will also significantly harm human health. Temperature related climate impacts include premature death and hospitalization due to increased temperatures. One recent study projected that temperature changes alone would lead to a 50% to 91% increase in heat-related deaths in Manhattan by the 2080s (relative to a 1980s baseline).⁴⁸ Increased ground-level ozone due to warming is projected to increase emergency department visits for ozone-related asthma in children (0 to 17 years of age) by 7.3% by the 2020s relative to a 1990 baseline of approximately 650 visits in the New York metropolitan area.⁴⁹ According to the DEC, the annual average temperature statewide has risen about 2.4°F since 1970, with winter warming exceeding 4.4°F.⁵⁰

Rising temperatures and sea levels in New Jersey has significantly increased the economic risk to New Jersey residents. Reports show that an estimated \$60 billion worth of homes and buildings facing increased risk of flooding from hurricanes, and the estimated annual potential loss to New Jersey from hurricane-related wind and flooding has increased between \$670 million and \$1.3 billion.⁵¹

Finally, there is concern that not only would the NESE Project result in harm by contributing to climate change, but locking in the fossil fuel infrastructure may impede investments into greenhouse gas reduction strategies, such as energy efficiency and demand response measures, as well as renewable energy development.

3. *The proposed project will not serve an existing need of the residents of the New Jersey.*

Not only has Williams/Transco failed to establish that the project will benefit the State of New Jersey in any way, but also that the project will serve an existing need. First, there is no need, and the project is not designed to provide any benefits to the gas transmission system in New Jersey. Second, the need for the project in New York has never been independently verified and numerous independent reports establish that there is no need for the project.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Li, T., R. M. Horton, and P. L. Kinney, 2013: Projections of seasonal patterns in temperature-related deaths for Manhattan, New York. *Nature Climate Change*, **3**, 717-721.

⁴⁹ Sheffield, P. E., J. L. Carr, P. L. Kinney, and K. Knowlton, 2011: Modeling of regional climate change effects on ground-level ozone and childhood asthma. *American Journal of Preventive Medicine*, **41**, 251-257, doi:10.1016/j.amepre.2011.04.017.

⁵⁰ *Supra* note 44.

⁵¹ Rhodium Group, *New Jersey Rising Coastal Risk*, (Oct. 29, 2019). Available at <https://rhg.com/research/new-jersey-flooding-hurricanes-costs-climatechange/>

First, there is no indication that the project will have any ancillary benefits on New Jersey's methane gas transmission system as claimed by Williams/Transco. New Jersey is aggressively seeking to reduce its greenhouse gas emissions and transition away from fossil fuel consumption. The state is committed to an 80% reduction in greenhouse gas emissions below 2006 level by 2050, as well as the achievement of 100% clean energy by 2050.⁵² To accommodate this, New Jersey is actively working to significantly increase its renewable energy resources. Importantly, the Clean Energy Act specifically requires reductions in methane gas consumption.⁵³ The Clean Energy Act mandates that gas utilities achieve a reduction in demand by 0.75%.⁵⁴ Thus, it is clear that over the next decade there will not only be less need for methane-gas in New Jersey, but there will be less stress on the existing system as demand decreases. Most recently, Executive Order No. 100, and NJDEP Administrative Order 2020-01, requires the NJDEP to integrate climate change considerations, such as sea level rise, into its regulatory and permitting programs.⁵⁵

Second, the need for this additional capacity has not been independently proven, and several studies debunk the alleged need for increased methane gas capacity in New York. Both Williams/Transco and National Grid have claimed that there is a projected increase in demand for methane gas within National Grid's service area based primarily on conversions from home heating oil to gas. The companies have never justified this claim. A report commissioned by 350 Brooklyn and drafted by Lookout Hill entitled False Demand: The Case Against the Williams Fracked Gas Pipeline, established that the conversions and subsequent increase in demand were fictitious.⁵⁶ The report concludes that virtually all of the conversions, occurred already.⁵⁷ The conversions began after the City of New York banned the use of home heating oil No. 4 and No. 6 in 2015.⁵⁸ The law indicates that beginning in 2030, no fuel oil other than No. 2 will be allowed for power generation, heating, or other uses within the City.⁵⁹

Importantly, in 2010, only one percent of buildings were using No. 4. and No. 6 heating oil.⁶⁰ However, these boiler emissions were causing significant soot pollution throughout the city, which prompted the passage of the law phasing out their use.⁶¹ Of that one percent, a significant number within National Grid's service territory have already transitioned away from

⁵² N.J.S.A. 26:2C-40

⁵³ N.J.S.A. 48:3-87.9

⁵⁴ *Id.*

⁵⁵ N.J.A.C. Executive Order No. 100 (2020), and New Jersey Department of Environmental Protection Admin. Order NO. 2020-01.

⁵⁶ See, False Demand: The case against the Williams fracked gas pipeline.

⁵⁷ *Id.*

⁵⁸ City of New York, Local Law 43 of 2010 and Rules of the City of New York, Title 15, §§ 2-15(b)(2), (c)(1) and (d) (available at http://www.nyc.gov/html/dep/pdf/air/heating_oil_rule.pdf).

⁵⁹ New York City adopted more comprehensive legislation in 2015, Local Law 38, that effectively bans the burning of No. 6 fuel oil for any purpose by January 1, 2020, and the burning of No. 4 fuel oil by January 1, 2030 (except that any boiler replaced before the deadline must use a cleaner fuel). City of New York. "Local Laws of The City of New York For the Year 2015, No. 38" (Apr. 16, 2015 (available at https://www1.nyc.gov/assets/buildings/local_laws/ll38of2015.pdf)).

⁶⁰ D. Seamonds, D. Lowell, T. Balon, The Bottom of the Barrel: How the Dirtiest Heating Oil Pollutes Our Air and Harms Our Health (Environmental Defense Fund, 2016) (available at https://www.edf.org/sites/default/files/10085_EDF_Heating_Oil_Report.pdf).

⁶¹ *Id.*

the use of these heavy fuels. The New York City Housing Authority (NYCHA), a major client for Natural Grid converted from heavy fuel oils decades ago.⁶² Currently, 98% of NYCHA buildings rely on methane gas, with only 0.4% relying on No. 2 oil.⁶³ Private housing has also already transitioned away from heavy fuel oil to methane gas and No. 2 oil. According to the City’s database, as of November 12, 2015, only one boiler within National Grid’s New York City service area was still using No. 6 fuel oil.⁶⁴ On Long Island, very little No. 6 or No. 4 oil is used in home heating. Local home energy businesses and the Oil Heat Institute of Long Island observe that nearly all remaining fuel oil boilers on Long Island use No. 2 oil.⁶⁵ In fact, fewer than 446 boilers in National Grid’s service area still rely on No. 4 or No. 6 heating oil.⁶⁶ Even if all of these were to convert to methane gas, the capacity generated by the NESE project would be a gross overbuild.

Moreover, the New York Public Service Commission has questioned the justification for the project. Following the New York State Department of Environmental Conservation’s (“NYSDEC”) denial of the NESE Project’s water quality certificate on May 15, 2019, and the NJDEP’s denial of several permits on June 5, 2019, National Grid issued a moratorium on all new methane gas connections within its service territory citing the lack of capacity.⁶⁷ National Grid later escalated the moratorium by refusing to connect existing customers who simply turned off service to perform routine maintenance. Throughout the nearly six-month moratorium, the company was actively pressuring its customers, likely in violation of New York State law, to lobby elected officials to approve the NESE Project. On November 25, 2019, National Grid agreed to lift the moratorium after the New York Public Service Commission and Governor Cuomo threatened to revoke the company’s license to operate unless they could justify the lack of capacity and need for the moratorium. The company lifted the moratorium and agreed to pay \$36 million in fines and penalties. As part of the settlement agreement, National Grid was required to outline the case for an increase in demand and provide various options for meeting the projected demand.

⁶² See, The Bottom of the Barrel, p. 9; NYC Cleanheat, “Case Studies and Testimonials” (available at <https://www.nyccleanheat.org/content/case-studies-and-testimonials>). See also statement of NYCHA spokesperson Zodet Negron in J. Callahan, “A New Year Means Cleaner Air for New Yorkers (Jan. 15, 2015) (<https://nextcity.org/daily/entry/air-clean-new-yorker-heat-conversion-oilnatural-gas>).

⁶³ NYCHA, Next Generation NYCHA Sustainability Agenda (April 22, 2016) (available at <https://www1.nyc.gov/assets/nycha/downloads/pdf/NGN-Sustainability.pdf>); See also New York City Open Data, NYCHA Buildings – Heating Oil Consumption and Costs 2010-2016 (available at <https://data.cityofnewyork.us/Housing-Development/Heating-Oil-Consumption-And-Cost-2010-2016-/bhwuwuzu>) and NYCHA Buildings – Heating Gas Consumption and Costs 2010-2018 (available at <https://data.cityofnewyork.us/HousingDevelopment/Heating-Gas-Consumption-And-Cost-2010-June-2018-/it56-eyq4>) (hereafter, NYC Open Data re NYCHA buildings)

⁶⁴ See, City of New York, “Clean Heat Data: Remaining No. 6 Buildings, last updated Nov. 12, 2015” (available at <https://www.nyccleanheat.org/content/press-and-downloads>). Among Con Edison customers, 27 boilers (21 buildings) had not yet converted by Nov. 12, 2015.

⁶⁵ *Id.*

⁶⁶ NYC Current Boiler Database. A review of current No. 4 boiler permits and registrations in Brooklyn, Queens and Staten Island indicates that roughly 38% do not require a certificate to operate, which is required for boilers with a capacity of 4.2MMBtu/hr and above. See <http://www.nyc.gov/html/dep/pdf/air/boiler-filing-applicability.pdf>

⁶⁷ Shashwat Awasthi, *National Grid to Pay \$36 Million and Lift Natural Gas Moratorium After New York Settlement*, Reuters, (Nov. 25, 2019).

National Grid released their report on February 27, 2020.⁶⁸ The central conclusion of the report is that the utility projects that peak demand is expected to increase by 0.8–1.1% per year at the bare minimum, which equals 8–11% growth in 10 years⁶⁹ However, there are serious and fatal flaws with National Grid’s assumption.

First, the U.S. Energy Information Administration predicts an increase in Methane gas Demand for the region of only 1.6% over the entire next decade.⁷⁰

Second, Energy Future Group’s recent report, *A Framework for Critical Analysis of National Grid’s Long-Term Natural Gas Needs Assessment*, outlines numerous flaws which the utilities need assessment hinges upon.⁷¹ For instance, the data sets, assumptions and modeling method used by National Grid to reach its conclusions were not provided to the public.⁷² The lack of transparency with the underlining data clearly questions the validity of the study. Moreover, even looking at National Grid’s historic data, the new projections are clearly inconsistent, which shows that demand has slowed significantly in the last six years.⁷³

Third, the projected increase in demand is based on a “design day” which does not accurately reflect methane gas needs or constraints. The “design day” chosen is “based on a 24-hour period that averages 0 degrees Fahrenheit in Central Park.”⁷⁴ However, the last day that averaged 0 degrees or lower for 24 hours in Central Park was February 9, 1934, or eighty-six years ago.⁷⁵ The chosen “design day” also fails to account for climate science projections indicating warmer winters. The annual mean temperature in NJ has already increased by about 3.6° F (2° C) since 1895 – faster than the rise in global mean temperature.⁷⁶ In the next 50-60 years, when global warming crosses the 2 degrees Celsius threshold, NJ average summer and winter temperatures will increase by over 3.3 degrees Celsius.⁷⁷ Moreover, according to data from the United States Geological Service, the coldest winters in the future will be significantly above average.⁷⁸ Therefore, the design-day chosen by National Grid fails to capture both current weather conditions or future conditions based on climate projections and cannot represent an accurate basis for determining gas demand for the future.

Finally, the projection is also based on “current policies.” Given the climate crisis we all collectively are facing, it is virtually certain that additional policies and practices focused on

⁶⁸ National Grid, *Natural Gas Long-Term Capacity Report for Brooklyn, Queens, Staten Island, and Long Island*, (Feb. 2020).

⁶⁹ *Id.* at 8.

⁷⁰ U.S. Energy Information Administration, *Annual Energy Outlook 2019: With Projections to 2050*, (Jan. 24, 2019). Available at www.eia.gov/aeo

⁷¹ Energy Future Group, *Critical Elements in Short Supply: Assessing the Shortcomings of National Grid’s Long-Term Capacity Report*, (Mar. 9, 2020). [Hereinafter Energy Future Group Report]

⁷² *Id.* at 9

⁷³ *Id.*

⁷⁴ *Id.* at 19.

⁷⁵ *Id.*

⁷⁶ Climate Research Center, *How Will Global Warming of 2 Degrees Celsius Affect New Jersey*, University of Massachusetts – Amherst. Available at https://www.geo.umass.edu/climate/stateClimateReports/NJ_ClimateReport_CSRC.pdf

⁷⁷ *Id.*

⁷⁸ *Id.*

drastically reducing greenhouse gasses will be adopted either through the Regional Greenhouse Gas Initiative, the New York State Legislature, or the New York City Council. In fact, in his 2020 State of the City Address, New York City Mayor Bill de Blasio unveiled plans to end the use of fossil fuels, including methane gas by 2040, and to stop all new fossil fuel infrastructure within the City.⁷⁹ Moreover, even under existing policies the project will likely be rendered a stranded asset in the manner of two to five years. New York State recently adopted the Climate Leadership and Community Protection Act which established a goal of net zero greenhouse gas emissions by 2050, with an 85% reduction from the energy and industrial emissions when compared to 1990 levels.⁸⁰ More importantly, New York City adopted the Climate Mobilization Act which mandates that buildings larger than 25,000 square feet must reduce greenhouse gas emissions by 40% over the next decade.⁸¹ The law will apply to approximately 50,000 buildings and nearly 60 percent of the square footage in New York City.⁸²

Therefore Williams/Transco has failed to demonstrate that the project will meet the needs and requirements of the residents of the State of New Jersey as required under the FWPA Rules. Moreover, the applicant has also failed to demonstrate any need for the project, even in New York.

4. *There are other means available to meet the alleged public need.*

As explained above, the demand and extent of demand for new methane gas capacity within National Grid's service area is questionable and the construction of the NESE Project would likely not comply with New York's climate regulations. However, to the extent that there is a need for increased energy in New York, this need can be met by other projects which would not result in destruction of exceptional value wetlands. Specifically, demand reduction mechanisms such as energy efficiency and demand response programs, as well as increased electrification are viable and would meet even National Grid's forecasted demand for the coming years. While National Grid does evaluate these options, it downplays the reliability of these programs and does not fully evaluate the effectiveness of the synergetic effects of utilizing all three mechanisms.

Time and time again, energy efficiency programs have proven to be the most cost-effective means of both lowering rates and reducing carbon emissions.⁸³ According to the American Council for an Energy Efficient Economy ("ACEEE"), there are considerable opportunities for cost-effective energy efficiency savings which would achieve an average savings of 1% of gas sales per year over the next decade.⁸⁴ However, aggressive implementation

⁷⁹ New York City – Office of the Mayor, *State of the City 2020: Mayor de Blasio Unveils Blueprint to Save Our City*, (Feb. 6, 2020). Available at <https://www1.nyc.gov/office-of-the-mayor/news/064-20/state-the-city-2020-mayor-de-blasio-blueprint-save-our-city#/0>

⁸⁰ N.Y. Env. Con. Law. Art. 75 (2019),

⁸¹ 2019 N.Y.C. Local Law No. 97

⁸² Urban Green Council, *NYC Building Emission Law Summary*. Available at https://www.urbangreencouncil.org/sites/default/files/urban_green_emissions_law_summary_v3_0.pdf

⁸³ See, *The Cost of Saving Electricity Through Energy Efficiency Programs Funded by Utility Customers: 2009 – 2015*. Energy Analysis and Environmental Impact Division of Lawrence Berkeley National Laboratory. (June 2018). Available at http://eta-publications.lbl.gov/sites/default/files/cose_final_report_20180619_1.pdf

⁸⁴ Steven Nadel, *Natural Gas Energy Efficiency: Progress and Opportunities*, American Council for an Energy Efficient Economy, (July 2017). Available at

and overly successful efficiency programs were able to achieve savings as high as 2.4% per year.⁸⁵ Moreover ACEEE found that these savings are among the most cost-friendly options even in low cost methane gas markets.⁸⁶ National Grid has significant experience as the company's service territory in Massachusetts is one of the leaders in energy savings as a percent of sales.⁸⁷ It is not unreasonable to assume that National Grid would be able to replicate that success in its downstate New York service territories.

Demand response is another effective means to combat increased demand and to specifically target peak demand needs which is one of the constraints National Grid is citing for need for additional capacity. Demand response has proven to be significantly effective in the electric sector but has not been fully utilized in the gas heating sector. However, the program would work in an identical way whereby during period of high demand the utility would provide an incentive for customers to lower usage. Southern California Gas Company has illustrated the savings which can be achieved through gas demand response programs. During the 2017-2018 winter season, SoCalGas enrolled 9,267 customers and 10,798 smart thermostats. On average, each participant reduced their usage between 16-25%, which translated to 0.03-0.05 therms during the morning event period and between 10.7-15.6% or 0.012-0.019 therms during the evening event period.⁸⁸

Finally, there is significant room for electrification, something which will likely increase throughout National Grid's downstate service territory as buildings seek to comply with New York and New York Cities Climate goals. To achieve climate goals this electricity must be from primarily renewable energy sources. As such, New York is seeking to aggressively moving to increase its renewable energy portfolio. The state is developing significant offshore wind capacity with a goal of 9,000 megawatts by 2035. Moreover, the New York also has a goal of doubling its solar energy capacity by 2040. New York's offshore wind resources will primarily be cited off the coast of New York City and Long Island which will directly power National Grid's downstate service territory. This area is the largest consumer of power in New York State and with line loss calculations it can be assumed that most of the capacity generated by offshore wind will be utilized in New York City and Long Island. In fact, Long Island Power Authority's most recent Integrated Resource Plan has led to decisions to not build new gas fired capacity and to not repower existing gas generation stations given the shift to renewables.⁸⁹ The state recently announced it will be investing \$2 billion into clean heat, electric efficiency and electrification measures.

Importantly, energy efficiency and conservation would have no negative impacts on the environment, a fact even National Grid acknowledges in the Long Term Capacity Report.⁹⁰

<https://www.aceee.org/sites/default/files/publications/researchreports/u1708.pdf>

⁸⁵ *Id.* at 14

⁸⁶ *Id.*

⁸⁷ Energy Future Group Report, at 15.

⁸⁸ 7 Case U 904 G. Direct testimony of Darren Hanway. Public Utilities Commission of the State of California. November 6, 2018. Retrieved from https://www.socalgas.com/regulatory/documents/a-18-11-005/Demand_Response_Testimony_Chapter%201_Final.pdf

⁸⁹ Long Island Power Authority, DPS Public Statement Hearings.

<https://www.lipower.org/wpcontent/uploads/2016/10/Irp20Presentation20BEST1.pdf>

⁹⁰ *Supra*, Note 64.

While it is possible that there may be slight environmental impacts from the development of offshore wind resources or solar energy, the impacts are likely to be significantly less than that of the NESE Project. Therefore, Williams/Transco has failed to demonstrate a clear and compelling need for the project, and to the extent there may be a need for additional energy capacity in New York, the need can clearly be met through less environmentally harmful alternatives.

C. Failure to Demonstrate an “Extraordinary Hardship”

Under New Jersey Law, an applicant may still receive a permit if the applicant can demonstrate that the “denial of the permit would impose an extraordinary hardship” which is brought about “by circumstances peculiar to the subject property.”⁹¹ Williams/Transco has utterly failed to prove such a hardship.

Although the term “extraordinary hardship” is not defined within the FWPA or the FWPA Rules, the definition is to be understood in the context of the protections that the State of New Jersey and the NJDEP sought to provide to exceptional resource value wetlands, which is to provide the utmost protection to these vital and critical resources.⁹²

Williams/Transco has repeatedly argued that the reclassification of certain wetlands in the proposed project area as “exceptional resource value” was unforeseen and sudden, thus constituting an “extraordinary hardship.” The reclassification was the result of the presence of the barred owl in the project area. The spotting of the owl was neither sudden nor unforeseen. A private citizen was responsible for sighting the barred owl and submitting the “Rare Wildlife Sighting Report Form” that ultimately led to this reclassification. The citizen has stated that she has heard the calls of the barred owl from the forest on or near her property over the last 40 years. Yet in the last three years in which the applicant has been evaluating the project site none of the environmental specialists hired by the applicant, could locate the endangered animal. The failure of Williams/Transco’s hired consultants to document the barred owl in no way undermines the destination as a protected area for decades. Indeed, it is not surprising since a sighting by the applicants’ experts would not be in Williams Transco’s interest.

The applicant is also arguing that the location of the access road and tie-in assembly components within the location of exceptional resource value wetlands has now imposed an undue burden/hardship on the applicant since the project cannot be constructed without the components. The specific features of the project which impact the exceptional resource value wetlands is irrelevant, the project is evaluated as a whole, not piecemeal.

Furthermore, the showing of the extraordinary hardship is explicitly tied to the requirement that the hardship be “brought about by circumstances peculiar to the subject property.”⁹³ Williams/Transco cannot use its own failure to conduct the proper due diligence at the outset of this project as a basis for satisfying the “extraordinary hardship” requirement. As stated above, the presence of the barred owl has been known for the last 40 years. Nothing

⁹¹ N.J.A.C. 7:7A-10.4(a)(2).

⁹² See, Matter of Freshwater Wetlands Prot. Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super. 516, 519, 570 A.2d 435, 437 (App. Div. 1989)

⁹³ N.J.A.C. 7:7A-10.4(a)(2).

related to the circumstances peculiar to the project indicate any extraordinary hardship. It was clear at the outset that the project was within a wetland area and therefore subject to the requirements of the FWPA and FWPA Rules. Due diligence indicates that the wetlands are “exceptional value resource” thereby increasing the stringency of the development requirements. This clearly reflects the intent of the legislature in passing heightened requirements for these specific wetland areas and shows nothing inherently peculiar about the property that would result in an extraordinary hardship.

Additionally, the NJDEP must hold the applicant to a high standard when determining what constitutes an “extraordinary hardship.” Williams/Transco is a Fortune 500 company which operates more than 33,000 miles of pipeline within the U.S, including the largest continuous pipeline system in the nation.⁹⁴ The company therefore has significant expertise and experience in the development and siting of projects such as NESE.

Therefore, the applicant has failed to demonstrate an “extraordinary hardship brought about “by circumstances peculiar to the subject property.”⁹⁵ The applicant’s clear and obvious oversight in studying and observing the project area cannot constitute an extraordinary hardship. Thus, the NJDEP must deny the permit application.

D. The FERC Certificate of Public Convenience and Necessity Fails to Establish a Compelling Public Need for the Project as Defined by the Freshwater Wetlands Protection Act

In the most recent application for the NESE Project, Williams/Transco argue that the Certificate of Public Convenience and Necessity (“Certificate”) issued by FERC on May 3, 2019, is conclusive in establishing a compelling public need for the project as defined by the FWPA Rules. While, it is true that the NJDEP has previously relied on FERC orders and Certificates to demonstrate a showing of need – as explained above – the NJDEP has full authority over this project to ensure it meets the federally approved water quality standards outlined in the FWPA and its implementing regulations. Again, an applicant seeking to obtain a Certificate of Public Convenience and Necessity under Section 7 of the NGA must “comply with all other federal, *state, and local regulations not preempted by the NGA.*”⁹⁶ This includes regulations passed under Sections 401 and 404 of the Clean Water Act, such as the FWPA and FWPA Rules.⁹⁷

A careful evaluation of the standards utilized by the NJDEP, and those utilized by FERC when determining whether to issue a certificate clearly demonstrates that the standards are vastly different, and therefore the process by which FERC determines need is insufficient to demonstrate that a project meets New Jersey’s high standards for establishing a compelling public need.

⁹⁴ See, Forbes 500 List (2018). Available at <https://fortune.com/fortune500/2019/williams>; and *Williams’ Transco Pipeline Delivers Record Volumes* (Feb. 7, 2019). Available at <https://investor.williams.com/press-release/williams/williams-transco-pipeline-delivers-record-volumes>

⁹⁵ N.J.A.C. 7:7A-10.4(a)(2).

⁹⁶ *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013) (addressing state failure to act under the Clean Air Act).

⁹⁷ 15 U.S.C. § 717(b)(d).

As stated above, to build the NESE Project, Williams/Transco must establish that the project meets the requirements demonstrating a compelling public need given the project's relation to exceptional value resource wetlands.⁹⁸ On top of this requirement, Williams/Transco must also establish that the project is within the public interest as defined in the Freshwater Wetlands Protection Act.⁹⁹ In determining whether a proposed regulated activity in any freshwater wetland is in the public interest, the NJDEP shall consider: (1) the public interest in the preservation of natural resources and the interest of the property owners in reasonable economic development, (2) the relative extent of the public and private need for the proposed regulated activity, (3) the practicability of using reasonable alternative locations and methods to accomplish the purpose of the proposed regulated activity, (4) the extent and permanence of the beneficial or detrimental effects which the proposed regulation activity may have on the public and private interests, (5) the quality of the wetland which may be affected and the amount of wetlands to be disturbed, (6) the economic value, both public and private, of the proposed regulated activity to the general area, and (7) the ecological value of the freshwater wetlands and the probable impact on public health, fish, and wildlife.¹⁰⁰

Conversely, Certificates issued by the Federal Energy Regulatory Commission are primarily based on the financial backing of the project and not the overall need for new methane gas transmission. As the Certificate FERC awarded to the applicant states, "the threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from existing customers."¹⁰¹ The Certificate in no way speaks to any of the relevant factors necessary to determine whether the project meets New Jersey standards, such as whether the project will serve the essential health or safety need of residents of the State, let alone the municipalities. As the Commissioners state, the evaluation is "essentially an economic test."¹⁰² In fact, FERC's virtually singular focus on the financial viability of the project has been the subject of intense criticism.¹⁰³

In fact, over the last twenty years, FERC has only denied two applications for certification, while approving more than four-hundred, representing an additional 180 billion cubic feet per day (Bcf/d) of pipeline capacity.¹⁰⁴ The amount of capacity permitted is appalling given that the average consumption of methane gas in the U.S. during January 2017 was 93.1 Bcf/d, and the all-time peak-day consumption was 137 Bcf/d during the 2014 Polar Vortex.¹⁰⁵

⁹⁸ N.J.A.C. 7:7A-10.4(a).

⁹⁹ N.J.S.A. 13:9B-11.

¹⁰⁰ N.J.A.C. 7:7A-10.2(b)(12)

¹⁰¹ 167 FERC ¶ 61,110

¹⁰² 167 FERC ¶ 61,110

¹⁰³ See, Susan Tierney, Natural Gas Pipeline Certification – Policy Considerations for a Changing Industry, Analysis Group (Nov. 2017).

¹⁰⁴ *Id.* at 11.

¹⁰⁵ 2 Energy Information Administration (EIA), "Natural Gas Monthly," March 2017, https://www.eia.gov/naturalgas/monthly/archive/2017/2017_03/ngm_2017_03.php; EIA, "Record winter withdrawals create summer storage challenges," June 12, 2014, https://www.eia.gov/naturalgas/review/winterlookback/2013/#tabs_Consumption-4.

Additionally under FERC regulations, interstate gas pipeline manufacturers are guaranteed a 14% return on investment for projects¹⁰⁶. This guaranteed high return provides an incentive for utility holding companies and gas producers to enter into the pipeline business, especially as utilities face stagnant or declining revenues from electricity and gas sales.¹⁰⁷ The policy also incentivizes the building of new infrastructure over the efficient use of existing pipelines. The return on pipeline investments is about 40% higher than for other utility-type spending.¹⁰⁸

In short, FERC is able to approve such a drastic overbuild of supply because the economic test which FERC relies on to determine whether a project should receive certification only looks to see whether the developer has an agreement with someone who wishes the purchase the capacity of the pipeline. This is the determinative factor in the decision-making process.

Thus, the FERC process for issuing a Certificate is nearly singularly focused, whereas New Jersey's laws and regulatory standards are far more inclusive and holistic. Therefore, the FERC certificate in and of itself does not demonstrate compliance with the public interest standard, compelling public need, or extraordinary hardship requirements outlined in the FWPA and FWPA Rules.¹⁰⁹

E. The FWPA Rules Are Not Preempted

Williams/Transco has continued to argue that the FWPA Rules are either wholly preempted, or at least partially preempted to the extent they exceed New Jersey's authority under the Clean Water Act. This argument is false; New Jersey is the legal authority for permitting decisions related to Section 401 and 404 of the Clean Water Act and the state implements these federally approved programs through its rules and regulations, including the FWPA Rules.

Section 404 of the Clean Water Act regulates the discharge of dredged or fill materials into the waters of the United States, including wetlands.¹¹⁰ Generally, the U.S. Army Corps of Engineers administer the federal wetlands protection program under Section 404.¹¹¹ However, Section 404 allows for a state or tribe to administer its own individual permitting program in place of the federal program.¹¹² States can assume permitting authority within their jurisdiction so long as the state program is at least as stringent as the federal requirements.¹¹³ There is no

¹⁰⁶ Kelly Trout, *Art of the Self-Deal, How Regulatory Failure Lets Gas Pipeline Companies Fabricate Need and Fleece Ratepayers*, Oil Change International (September 2017). Available at <http://priceofoil.org/2017/09/19/how-gas-pipelines-fleece-ratepayers/>

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ N.J.A.C. 7:7A-10.2(b)(12).

¹¹⁰ *See*, 33 U.S.C. § 1344

¹¹¹ *Id.*

¹¹² *Id.* at § 1344(g)

¹¹³ *See Id.* and *Marquette Cty. Rd. Comm'n v. United States Env'tl. Prot. Agency*, 188 F. Supp. 3d 641, 652 (W.D. Mich. 2016), *aff'd*, 726 F. App'x 461 (6th Cir. 2018), expressing that "a]ny approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose."

limitation barring states from adopting regulations beyond the federal requirement.¹¹⁴ New Jersey is one of two states that has assumed authority under Section 404.¹¹⁵ In 1987, the New Jersey Legislature enacted the FWPA, to satisfy federal assumption requirements, although it was not until March 2, 1994, that the State's application was approved.¹¹⁶ In fact, One of the principal purposes of the FWPA was to “provide the State with the statutory authority necessary to assume implementation” of the Federal 404 program.¹¹⁷

Moreover, Case Law further affirms New Jersey’s strong legal jurisdiction over the application as well as the validity of the FWPA. The Supreme Court of New Jersey has held that the “DEP has the authority under the FWPA to issue both general and individual permits allowing the discharge of dredged or fill material into wetlands.”¹¹⁸ Further, in *MCG Associates v. Department of Environmental Protection* the court ruled that “the state program could be more stringent than the federal laws, but not less stringent, and it was required to cover all activities that would otherwise be covered by the federal scheme.”¹¹⁹

Moreover, the FWPA and FWPA Rules are also applicable to the project through the NJDEP’s Water Quality Certificate permitting authority under Section 401 of the Clean Water Act. As stated previously, pursuant to Section 401 of the Clean Water Act, a federal agency may not issue a permit or license to conduct any activity that may result into any discharge into the waters of the United States unless the state where the discharge originates issues a Water Quality Certification. Water Quality Certification is required for discharges of dredged material under Section 404 of the CWA. For a project which may result in a discharge into the waters and wetlands protected under the Freshwater Wetland Protection Act Rules, permits issued under those rules constitutes a water quality certificate required under Section 401 of the Clean Water Act.¹²⁰

In Islander East Pipeline v. Connecticut Department of Environmental Protection, the second circuit held that while Congress did preempt the area of methane gas regulation through the enactment of the NGA, Congress specifically did not supersede or preempt federal statutory requirements implemented by the states such as Water Quality Certification. In fact, Congress intended to still provide states with the option of being deputized regulators under the authority of Section 401.

Thus, the requirements under the FWPA and FWPA Rules are not preempted by the NGA. The NJDEP retains authority under these regulations pursuant to both Sections 401 and 404 of the Clean Water Act. It is clear that Williams/Transco is legally obligated to comply with all applicable standards in these laws and regulations, and failure to meet these standards must result in a denial of the pending applications, but has failed. Therefore, the permits must be denied.

¹¹⁴ 40 C.F.R. § 233.1(c) stating that “Nothing in this part precludes a State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope, than required under this part.”

¹¹⁵ 40 C.F.R. 233.71

¹¹⁶ *See, Id.* and N.J.S.A. 13:9B-2

¹¹⁷ *Matter of Freshwater Wetlands Rules*, 238 N.J. Super. 516, 519, 570 A.2d 435 (App.Div.1989).

¹¹⁸ *In re Freshwater Wetlands Prot. Act Rules*, 180 N.J. 415, 429, 852 A.2d 167, 176 (2004)

¹¹⁹ *MCG Assocs. v. Department of Env'tl. Protection*, 278 N.J. Super. 108, 111-14 (App. Div. 1994).

¹²⁰ N.J.A.C. § 7:7A-2.1(d)

F. The Compelling Public Need Requirement Under the FWPA rules Does Not Constitute an Undue Burden on Interstate Commerce.

Finally, in yet another attempt to circumvent the NJDEP's standards created to protect the state's wetlands, Williams/Transco argues that the requirement mandating the demonstration of a compelling public need for projects which impact exceptional value resource wetlands constitutes an undue burden on interstate commerce and therefore cannot be applied. Again, this argument is legally unfounded.

Article I of the U.S. Constitution states that Congress shall have the power to regulate commerce among the several states.¹²¹ The negative implication of this enumerated power is the Dormant Commerce Clause, which impliedly restricts states' abilities to regulate interstate commerce.¹²² The U.S. Supreme Court has interpreted the Dormant Commerce Clause requirement of the Constitution holding that "state statutes that burden interstate transactions only incidentally" will only be found to violate the Commerce Clause "if the burdens they impose on interstate trade are clearly excessive in relation to the putative local benefits."¹²³ In *Pike v. Bruce Church Inc.*, the U.S. Supreme Court outlined a flexible balancing test used to determine whether a state regulation violates the Commerce Clause.¹²⁴ There, the Court ruled that when a state law or rule regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed is clearly excessive in relation to the incidental local benefits.¹²⁵

The added scrutiny applied under the additional requirements for projects which impact exceptional value resource wetlands are not facially discriminatory. The regulations apply equally to all non-water dependent projects in exceptional resource value wetlands or trout production waters seeking approval from the NJDEP.

The regulation also serves the legitimate public interest of "preserv[ing] the purity and integrity of freshwater wetlands from random, unnecessary, or undesirable alteration[s] or disturbance[s]."¹²⁶ In fact, the legislature found that freshwater wetlands protect and preserve drinking water supplies, provide a natural means of flood and storm drainage protection, serve as a transition zone between dry land and water courses slowing soil erosion, provide essential breeding, spawning, nesting and wintering habitats for a major portion of the State's fish and wildlife, maintain a critical base flow to surface waters through the gradual release of stored flood waters and ground water, and **therefore that these inland waterways and freshwater wetlands need vigorous protection given the ecological significance.**¹²⁷ The Supreme Court of New Jersey has explicitly held that "one would be hard pressed to discover a more legitimate

¹²¹ U.S. Const. art. I, §8, cl. 3.

¹²² See, Rachel J. Schaefer, *Must the House Always Win?: A Critique of Rousso v. State*, 35 Seattle U. L. Rev. 1549, 1559-62 (2012)

¹²³ *Maine v. Taylor*, 447 U.S. 131, 138.

¹²⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹²⁵ *Id.*

¹²⁶ N.J.S.A. 13:9B-1

¹²⁷ See, *Matter of Freshwater Wetlands Prot. Act Rules*, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super. 516, 519, 570 A.2d 435, 437 (App. Div. 1989)

state interest than that of protecting the health of the citizenry, an interest that can manifest itself in the conservation of natural resources such as water.”¹²⁸ Thus, when passing the FWPA and promulgating the FWPA Rules, the Legislature and NJDEP were acting within the public interest to establish a program for systematic review of activities in and around freshwater wetland areas “designed to provide predictability in the protection of freshwater wetlands.”¹²⁹ Therefore, it is clear that the regulation “effectuates a legitimate local public interest.”

Furthermore, the regulation is not “clearly excessive in relation to the incidental local benefits” as it only has “incidental” impacts on interstate commerce. The FWPA specifically chose to divide freshwater wetlands into three categories, choosing the first, and most highly protected category, as exceptional resource values. These wetlands are defined by whether they are present habitats for threatened or endangered species or whether they have been established as suitable for breeding, resting, or feeding by threatened or endangered species.¹³⁰ The regulation which Williams/Transco seeks to avoid compliance with was promulgated to reflect the importance of protecting these important wetlands and simply adds additional requirements for non-water dependent activities impacting exceptional resource value wetlands.¹³¹ The additional requirement simply requires the applicant to justify the harm it is causing in the state. Moreover, in the event that the applicant is unable to justify the compelling public need, the regulation explicitly authorizes the applicant to alternatively demonstrate that the “denial of the permit would impose an extraordinary hardship on the applicant.”¹³² Thus, the regulation is clearly not excessive in relation to the important, and incidental benefits it provides. Williams/Transco’s repeated inability to meet the requirements of the law does not reflect on the burden imposed by the standard, but on the applicant’s failure to illustrate the benefit or purpose of the project or a showing of extraordinary hardship thereby warranting the impacts to the wetlands.

G. Conclusion: The NJDEP Must Deny Williams/Transco’s Application for Freshwater Wetlands Individual Permit with Water Quality Certification.

The applicant has failed to demonstrate either that the NESE Project serves a compelling public need as defined by the FWPA Rules, or alternatively, that the denial of the application would constitute an extraordinary hardship brought about by the circumstances peculiar to the subject property. Additionally, as presented above, the applicant’s repeated attempts to deny, undercut, and/or circumvent the authority of the NJDEP are either specious, invalid, or both. Therefore, the NJDEP must deny the application, and do so with the strongest authority and prejudice.

5. Application for Waterfront Development Individual Permit with 401 Water Quality Certification.

The NJDEP must deny Williams/Transco’s application for both a Waterfront Development Individual Permit and Water Quality Certification under Section 401 of the Clean

¹²⁸ *Borough of Glassboro v. Gloucester Cty. Bd. of Chosen Freeholders*, 100 N.J. 134, 147, 495 A.2d 49, 56 (1985)

¹²⁹ N.J.S.A. 13:9B-2.

¹³⁰ N.J.S.A. 13:9B-7a(2)

¹³¹ N.J.A.C. 7:7A-10.4(a)

¹³² N.J.A.C. 7:7A-10.4(a)(2)

Water Act, as the project fails to comply with the requirements outlined in the New Jersey Coastal Zone Management (“CZM”) Rules, and the New Jersey Surface Water Quality Standards (“SWQS”).

A. Legal Background

Under the Coastal Area Facility Review Act (, N.J.S.A. 13:19-1 et seq.), Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.), and the Waterfront Development Act (N.J.S.A. 12:5-3), Williams/Transco must receive an individual permit for the construction of the pipeline.¹³³ As stated above, the NJDEP also has the authority to issue Water Quality Certification, which the Department does utilizing the CZM Rules. Additionally, Water Quality Certificate approval in New Jersey is predicated on the demonstration of compliance with applicable New Jersey water quality regulations, including New Jersey Coastal Zone Management Rules, New Jersey Freshwater Wetlands Protection Act Rules,⁵⁶ and New Jersey Surface Water Quality Standards.¹³⁴

B. Williams/Transco’s Continued Failure to Demonstrate Compliance with Various Protections Outlined in the CZM Rules.

As outlined in a June 5, 2019 letter notifying Williams/Transco of the denial of various permit applications for the NESE Project, the construction of the Raritan Loop will have significant adverse environmental impacts to offshore resources. Williams/Transco’s most recent application for Waterfront Development Individual Permit and Water Quality Certification, submitted on January 21, 2020, fails to make any substantive and provable – either on paper or in terms of real-world impacts – alterations to ensure compliance with the standards and regulations outlined by the NJDEP in the CZM Rules. Therefore, the permit applications must be denied.

As stated in COA’s previous comments (Attachment 1, Attachment 2, Attachment 3), there are numerous standards by which the Department could and should have utilized to deny the previous applications, with prejudice. These standards remain relevant to the current application. The Department’s review must take a comprehensive and cumulative evaluation of these stringent requirements under New Jersey law. This includes the stringent requirements which the applicant must demonstrate compliance with, in order for the approval of both the Waterfront Development Individual Permit and the Water Quality Certification. These standards include, but are not limited to, the protection of:

¹³³ N.J.A.C. 7:7-1.1(a)

¹³⁴ N.J.A.C § 7:7, N.J.A.C § 7:7A, N.J.A.C § 7:9B

- Shellfish habitat
- Prime fishing area
- Finfish migratory pathways
- Coastal wetlands
- Endangered and threatened wildlife habitat
- Surf clam areas
- Designated water quality uses
- Public health, safety and welfare
- Public property
- Special hazard areas

As the new application has failed to make any substantive and demonstrable alterations to the project which would ensure that the construction and operation of the NESE project will meet these standards, the NJDEP must deny the application.

C. Williams/Transco’s Proposed NESE Project has Failed to Ensure New Jersey’s Surface Water Quality Standards will be Met.

As mentioned in COA’s comments submitted to the NJDEP on August 2, 2019, (Attachment 3), proposed construction of the Raritan Loop has failed to prove New Jersey Water Quality Standards will be met. Moreover, the applicant is using flawed or inappropriate modeling to suggest or feign compliance. The *only* modification which Williams/Transco has made to the Raritan Loop portion of the application which the NJDEP previously denied based on the significant likelihood that the project would violate New Jersey SWQS, is the inclusion of a Draft Water Quality Management Plan. This plan failed to provide any scientifically provable assurances that the construction of the offshore pipeline will comply with New Jersey laws and regulations and therefore the project must be denied, with prejudice.

1. Legal Background

Under the New Jersey Surface Water Quality Standards, all waterbodies in the state are assigned a classification that are associated with established “designated uses” – the ways in which the public is expected to use that waterbody. Designated uses include drinking water, “primary contact recreation,” like swimming, and fish propagation, among other uses.¹³⁵ The Department designates all waterbodies that will be crossed by the offshore segment of the NESE project (including those in Raritan Bay, Sandy Hook Bay, Lower New York Bay, and the Atlantic Ocean) as SE-1 (saline estuarine) and SC (coastal saline waters).¹³⁶ In all SE-1 and SC waters, the designated uses are: shellfish harvesting; maintenance, migration and propagation of the natural and established biota; primary contact recreation; and “any other reasonable uses.”¹³⁷ Each waterbody classification has corresponding New Jersey surface water criteria that vary based on the classification of the waterbody. These criteria contain both numeric and narrative standards. The numeric standards for targeted pollutants in Raritan Bay, Sandy Hook Bay, Lower New York Bay, and the Atlantic Ocean are identified in Table 1.

¹³⁵ See, N.J.A.C 7:9B

¹³⁶

¹³⁷ N.J.A.C § 7:9B-1.12(d), (g).

Table 1: Numeric Criteria for Targeted Pollutants - 7:9B-1.14(f)(7)

Chemical	CAS Number	Saline Water (SE & SC) Criteria		
		Aquatic		Human Health
		Acute (µg/L)	Chronic (µg/L)	
Bis(2-Ethylhexyl)phthalate		None	None	2.2(hc)
Phenanthrene				
Arsenic	7440-38-2	69(d)(s)	36(d)(s)	0.061(hc)(T)
Mercury	7439-97-6	1.8(d)(s)	0.94(d)(s)	0.94(d)(s) 0.051(h)(T)
PCBs	1336-36-3	None	0.030	0.000064(hc)
4,4' DDE	72-54-8	None	None	0.00031(hc)
Manganese	7439-96-5	None	None	0.051(h)(T)
Copper (Site specific for Raritan Bay)	7440508	7.9	5.6	None

For toxic substances, there are also descriptive solids which are applicable to all waterbody classifications. For instance, the SWQS prohibit concentrations, either alone or in combination with other substances as to affect humans or to be detrimental to the natural aquatic biota, produce undesirable effects on aquatic life, or which would render the waters unsuitable for the designated use.¹³⁸ Furthermore, toxic substances may not be present in concentrations that cause acute or chronic toxicity to aquatic biota, or bioaccumulation within an organism to concentrations that exert a toxic effect on the organism or render it unfit for consumption.¹³⁹

The SWQS also differentiate between non-persistent and persistent toxic substances. For non-persistent toxic substances, concentrations may not exceed one-twentieth (0.05) of the acute definitive LC50 or EC50 value, as determined by appropriate bioassays.¹⁴⁰ For persistent toxic substances, concentrations shall not exceed one-hundredth (0.01) of the acute definitive LC50 or EC50 value, as determined by appropriate bioassays.¹⁴¹

Additionally, each waterbody classification is also assigned an anti-degradation category. Each category provides different protections regarding changes to existing water quality outside

¹³⁸ N.J.A.C § 7:9B-1.14

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

of the water quality criteria. SE-1 and SC waters are categorized as Category 2 waters, meaning that even where water quality is equal to or better than necessary to sustain the waterbodies' designated uses, the water quality must still be maintained to support the existing and designated uses of that waterbody.¹⁴² New Jersey water quality standards also note that “[t]he maintenance, migration, and propagation of threatened or endangered species is considered an existing use that must be maintained.”¹⁴³

2. The Applicant has Failed to Demonstrate that Construction of the NESE Project will Meet New Jersey SWQS

It is well known and documented that construction of the NESE Project would result in significant resuspension of about 1,091,734 cubic yards of toxin-laced sediments at levels which exceed New Jersey SWQS. The environmental impact statement reveals that resuspension of contaminants in the water column will exceed New Jersey standards for at least two contaminants—mercury and copper.¹⁴⁴ The NJDEP has explicitly acknowledged this in both the June 2019 denial, and the November 2019 notice of withdrawn applications. Furthermore, it is likely that the project will result in resuspension of other toxins which would exceed SWQS.

It is important to note here, that the resuspension of the sediment will adversely affect New Jersey waters even if the construction is geographically occurring in New York waters. The closed proximity to the states' borders combined with the counter-clockwise movement of the estuary will result in the dominant flow of water along with the re-suspended sediments and flow will move toward New Jersey's Bayshore area where it will also likely accumulate as the tide fluctuates. Therefore, it is essential that the NJDEP evaluate the modeling presented for the construction impacts for the entire length within the estuary. Even construction impacts including resuspension outside the estuary may impact New Jersey waters as the sediments will be flushed into the estuary with twice daily strong tidal currents.

This 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. 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

¹⁴² Matter of Issuance of a Permit by Dep't of Env'tl. Prot. to Ciba-Geigy Corp., 576 A.2d 784, 791 (1990); see also N.J.A.C. § 7:9B-1.12(d).

¹⁴³ N.J.A.C. § 7:9B-1.5(d)(1)(i).

¹⁴⁴ Compare EIS, supra note 11, at 4-122 with N.J. Admin. Code § 7:9B-1.14(f)(7).

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.

The test results provide ample evidence for these concerns. However, at the outset COA continues to object to the insufficient sampling along the proposed 23.4-mile offshore pipeline route. 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 vibrocore 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 PAHs, 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.

In addition, and with grave concern for public health, Williams/Transco’s contaminant modeling still does not account for bioaccumulation or synergistic effects to organisms, which is a blatant disregard for ensuring public health. Furthermore, Williams/Transco has again failed to account for cumulative rather than average sediment dispersal. Combined, the applicant has failed to prove that the project is compliant with Surface Water Quality Standards (SWQS) under N.J.A.C. 7:9B-1.5 and 1.14.

3. The Draft Water Quality Management Plan Fails to Ensure Compliance with New Jersey’s Surface Water Quality Standards.

The Draft Water Quality Management Plan (“WQMP”) is, at best, a very basic proposal to monitor the waters and suspended sediments using turbidity as the sole criteria for evaluation. This is highly inadequate, and fails to address the main concerns outlined by the NJDEP in the

June denial of the previous Williams/Transco application. It also fails to indicate how the applicant proposes to account for the significant exceedances of threshold toxins in the sediment.

Furthermore, what would result in a significant dilution of the true impact to water quality during construction, the plan proposes to measure water quality nearly a half mile away. Compliance stations are proposed 2,500 feet down-current, shockingly beyond the legal 500 feet mixing zone. Monitoring should be measured within 5-10 feet from mixing zone to determine true impacts. The legal solution to pollution is not dilution. It appears Williams/Transco seeks to avoid detected water quality impacts and violate SWQS.

Moreover, the WQMP does not offer any proactive monitoring to investigate sediment movement or resuspension to ensure compliance with SQWS or provide acceptable mitigation actions should exceedances be measured. Instead, the plan simply offers a step-by-step outline of retroactive measures that will only be triggered should turbidity exceed acceptable levels. The step-by-step plan fails to account for specific actions that would be taken in the likely event that the construction produced sedimentation and turbidity are out of compliance with the SWQS.

Astonishingly for the 21st century, Williams/Transco's WQMPs compliance thresholds for in-water excavation activities relies solely on **visual turbidity** observations and real-time measurements, both of which are severely limited. Critically the plan creates compliance thresholds based on approximate calculations such as percentages, which is inconsistent with the standard numerical criteria relied upon for criteria pollutants.

Based on legacy contamination and the propensity of concomitant bioaccumulation of multiple contaminants in these sediments, Transco has done little to nothing to address these concerns in all aspects of risk assessment including the preliminary sediment assessment. It is known that a lot of these contaminants lack a definitive numeric standard presently, and Transco attempts to use this limitation in current knowledge gap and create more harm to the marine environment. The Draft WQMP also is a very basic attempt at monitoring and drawing conclusions based on a highly variable "Standard" such as "turbidity". Turbidity cannot be a reliable indicator of the numerous organic and inorganic pollutants in the Raritan Bay, and the draft proposes to measure turbidity as nephelometric units, and attempts to provide an equivalent comparison to NJDEP's standard of mg/L is poor science and statistically unreliable in disturbed environments. Equally poorer is the reliance of visual monitoring of turbidity to make the assessment if "project-related activities appear to cause a substantial visible contrast to natural conditions". Alternatively, Transco offers a series of time-intensive checklist and retroactive measures that will at best be just analytical tests with no real application, long after the damage is done. In projects like these that will cause harm to the marine environment, management strategies should be proactive and not adaptive, and Transco's plan falls very short.

Today, the world of dredging and dredge operations use far more sophisticated technology and tools to monitor and manage sediment resuspension, continuously, and in real-time. Transco's efforts are woefully inadequate.

6. Application for Coastal Zone Consistency Determination under the Coastal Zone Management Act

Williams/Transco is also seeking a Consistency Determination from the NJDEP pursuant to the Coastal Zone Management Act (“CZMA”) in relation to their pending application before the U.S. Army Corps of Engineers (“USACE”) for the ocean disposal of 735,000 cubic yards of contaminated dredged material generated from the construction of the Raritan Loop portion of the NESE Project at the Historic Area Remediation Site (the “HARS”). The ocean disposal of this contaminated material is against the public interest and would result in significant harm to New Jersey’s Coastal Zone in violation of the state’s federally approved Coastal Management Program and therefore must be denied.

A. Legal Background

The intent of the CZMA was to ensure proper “coordination and cooperation” between the federal government and coastal states.¹⁴⁵ To effectuate this intent, the CZMA requires that activities carried out or approved by the federal government that affect a state’s coastal zone must comply with the state’s coastal laws and policies.¹⁴⁶ Federal consistency is required for federal actions that have reasonably foreseeable effects on any land use, water use, or natural resource of the state’s coastal zone. Consistency determinations are made by ensuring compliance with the state’s federally approved Coastal Management Program (“CMP”). Under the CZMA, enforceable policies are state policies which are legally binding and by which a state exerts control over coastal uses and resources.

The New Jersey Coastal Management Program was approved by NOAA in 1978 and is directly administered by the NJDEP. The following statutes and regulations represent New Jersey’s enforceable policies which must be satisfied in order to receive a consistency determination:

- (1) The Waterfront Development Law (N.J.S.A. 12:5-3)
- (2) The Wetlands Act of 1970 (N.J.A.C. 13:9A)
- (3) The Coastal Area Facility Review Act (N.J.S.A. 13:19)
- (4) Freshwater Wetlands Protection Act (N.J.S.A. 13:9B)
- (5) The Law concerning the transportation of dredged materials containing polychlorinated biphenyls (PCBs) (N.J.S.A. 13:19-33)
- (6) The Coastal Zone Management Rules (N.J.A.C. 7:7)
- (7) The Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A)
- (8) The Stormwater Management Rules (N.J.A.C. 7:8)
- (9) New Jersey Pollutant Discharge Elimination Systems Rules (N.J.A.C. 7:14A)

¹⁴⁵ 16 U.S.C. § 1456(a).

¹⁴⁶ 16 U.S.C. § 1456(c)

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

If approved, Williams/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.

As stated above, the project is estimated to generate roughly 1,091,734 cubic yards of materials laced with varying degrees of toxins and contaminants. However, the number will likely be larger due to vessel traffic, anchoring, hydrostatic testing, and other aspects of pipeline construction. The applicant seeks to dispose of 735,000 tons of this contaminated material into the HARS. Again, the quality of the material to be disposed in the HARS has been repeatedly found to violate SWQS in both New York and New Jersey. In the May 15, 2019 letter, the NYSDEC denied Williams/Transco's application for Water Quality Certification based on the impermissible exceedance for both mercury and copper.¹⁴⁷ The exceedance of both mercury and copper were acknowledged by both FERC and Williams/Transco.¹⁴⁸ The NYSDEC found that the exceedance of these heavy metals would have significant impacts to water quality, shellfish beds, and other benthic resources.¹⁴⁹ 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.¹⁵⁰ 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."¹⁵¹ The impacts include unlawful harm to shellfish propagation and survival, fish populations, and special harvest areas.¹⁵² These impacts were a direct result of the reintroduction of the contamination of the sediment to be dredged.¹⁵³

C. Ocean Disposal Would Utilize Remaining Capacity at the HARS Thereby Harming the State's Navigation and Shipping Industries.

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

¹⁴⁷ 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]

¹⁴⁸ See, FERC Order at 19 ¶ 49; EIS at ES-12, and 4-122, and Table 4.5.2-8..

¹⁴⁹ See, New York Denial Letter.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

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.”¹⁵⁴ The Port of New York and New Jersey is the third largest port in the nation, and the largest port on the East Coast.¹⁵⁵ There are over 250 miles of engineered waterways in the Port District, allowing deep-water navigation in a harbor that is naturally only 19 feet deep.¹⁵⁶ 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.¹⁵⁷ 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.”¹⁵⁸ Clearly, the NESE Project does not meet this definition. In fact, COA’s review of all previous, publicly 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.¹⁵⁹ This represents approximately 76.51 million cubic yards of remediation materials.¹⁶⁰ It is important to contrast this against the mere sixty-one projects which had been approved as of July 2008.¹⁶¹ In eleven years, the number of projects which utilized the HARS more than doubled.¹⁶² 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

¹⁵⁴ 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).

¹⁵⁵ The Port Authority of New York and New Jersey, Port Master Plan 2050

¹⁵⁶ 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>

¹⁵⁷ *Id.*

¹⁵⁸ 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.

¹⁵⁹ U.S. Army Corps of Engineers New York District, Supplemental Public Notice No. NAN-2016-00908-A-EHA, at 8 (Oct. 17, 2019). [hereinafter “Supplemental Public Notice”].

¹⁶⁰ *Id.* at 7.

¹⁶¹ *Id.*

¹⁶² *Id.*

remains.¹⁶³ 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.¹⁶⁴ Currently, HARS PRAs # 1, 2, 3, 4, and 8 have been capped with at least one meter of Remediation Material.¹⁶⁵ Additionally, substantial portions of PRAs # 5, 6, and 7 have been filled with one meter of Remediation Material. The only portion which currently remains completely open for remediation is PRA #9. Importantly, 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.¹⁶⁶ 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.

Therefore, the NJDEP should deny the application for consistency determination as the project will be utilizing the limited remaining capacity at the HARS which is needed to sustain the states navigational and commerce demands.

V. Vast Public Opposition and Outrage in New Jersey

There is significant public opposition and outrage over the proposed NESE Project. To date, fifteen municipalities, and the Monmouth County Board of Chosen Freeholders have passed resolutions formally opposing the NESE Project. Moreover, several towns passed additional resolutions re-affirming their opposition to the project in light of the January 21, 2020 application. Additionally, there is widespread opposition from individual residents throughout New Jersey. Thousands of citizens have signed petitions expressing their opposition to the project. Furthermore, a review of the administrative record surrounding the Williams/Transco's June 12, 2019 application for this project found overwhelming public opposition to the NESE project. Of the 3,901 comments submitted in that docket, 3,897 comments were opposed to the NESE project, with only 4 comments in favor. There is no reason to believe that this has changed. COA will be making a separate submission which includes a copy of all the resolutions passed opposing NESE, as well as our petition signatures.

Finally, given the current circumstances regarding the COVID-19 pandemic, public comment was severely limited and restricted. While social distancing measures are absolutely necessary given the current challenge we collectively face, it minimized the ability for full public engagement on this critical issue. Therefore, COA expects that the overwhelming opposition we have seen thus far would have been even stronger under normal circumstances.

¹⁶³ 4 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].

¹⁶⁴ 40 C.F.R. § 228.15(6)(iv).

¹⁶⁵ U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, *Draft Site Management and Monitoring Plan for the Historic Remediation Site*, (April 1, 2020). Available at <https://www.nan.usace.army.mil/Portals/37/docs/regulatory/publicnotices/Non%20Project%20Specific/2020/PN%20NAN-2019-00803-ERO.pdf?ver=2020-04-03-105115-543>

¹⁶⁶ *Id.*

VI. Conclusion

Based on the reasons outlined in these comments, as well as the comments previously submitted by COA, Williams/Transco failed again to prove compliance with New Jersey laws and regulations necessary for the construction of the NESE Project. It is unequivocal that the NESE project would violate the many laws and regulations described herein. With a project life-span of 50 years or more it would result in incalculable harm to the public health, safety, and economic potentialities of New Jerseyans and the ecosystem now and for future generations. NESE flies in the face of the green energy future that both Governors Murphy and Cuomo aspire to and are going to great effort to achieve. Above this for a project that has with a failed justification or need.

As this marks the fourth time Williams/Transco has sought approval of this project despite continuously failing to demonstrate compliance with the law, COA strongly urges the NJDEP to not only deny this project, but to do so with prejudice. Over the past three years the applicant has repeatedly and systematically abused the good will of the NJDEP, as well as the administrative process. Nothing makes this more evident than the repeated withdrawal and subsequent resubmission of applications to avoid denial. Moreover, it has become clear that the construction of the project cannot be done in a way which would satisfy New Jersey law. Therefore, the permit applications must be denied with prejudice.

Respectfully submitted,

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