

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

I. TRANSCO HAS DEMONSTRATED THAT THE PROJECT, INCLUDING COMPRESSOR STATION 206 AND ITS COMPONENTS, SERVE A COMPELLING PUBLIC NEED.

Both the Eastern Environmental Law Center (EELC) and the Clean Ocean Action, (COA) assert in their comments that Transco has failed to demonstrate a “compelling public need” as required by N.J.A.C. 7:7A-10.4(a)1. In support of their position, they argue that the FERC Certificate, in and of itself, does not satisfy this requirement since FERC’s basis for granting the Certificate is an economic one, namely the contract between National Grid and Transco. See EELC at pp. 5-7 and COA at pp. 7. These commenters also claim that the Project would not “serve an essential health or safety need of the municipality in which the proposed regulated activity is located.” See EELC at pp. 7-8 and COA at pp. 8-15.

As fully set forth in its June 12, 2019 application for a Freshwater Wetlands Individual Permit and in the June 28, 2019 supplement in Section 5, pages 5-4 to 5-6, Transco has demonstrated that there is a compelling public need for its Northeast Supply Enhancement Project.

Under the Freshwater Wetlands Protection Act (FWPA) regulations, “compelling public need” means:

that based on specific facts, the proposed regulated activity will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing needs of the residents of the State, and that there is no other means available to meet the established public need.
[N.J.A.C. 7:7A-1.3]

The Department has historically relied on the Federal Energy Regulatory Commission’s (FERC) issuance of a Certificate of Public Convenience and Necessity (Certificate) to satisfy the requirement set forth in N.J.A.C. 7:7A-10.4, that there be a compelling public need for the regulated activity. For instance, on Transco’s Leidy Southeast Expansion Project, the Department specifically relied on the FERC Certificate, stating:

FERC has issued an Order dated December 18, 2014 which determined that ‘the project is required by the public convenience and necessity,’ therefore, there is need for the project. The Department concurs that there is a compelling public need for the project that cannot be met with similar projects in the region. [April 6, 2015 Staff Summary Report, DLUR File No. 0000-13-0012.1, attached hereto as Exhibit H.]

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

This determination was challenged at the U.S. Court of Appeals for the Third Circuit and was ultimately upheld. See Del. Riverkeeper Network v. Sec’y Pa. Dept. of Env’tl. Prot., 833 F.3d 360, 380 (3d Cir 2016)(holding that NJDEP appropriately determined that the compelling public need for the project outweighed the impact on exceptional resource value wetlands).

On May 3, 2019, FERC issued a Certificate to Transco finding that “the public convenience and necessity requires approval of the project.” See FERC Certificate, ¶18, attached hereto as Exhibit I. Furthermore, FERC analyzed in the FEIS whether other natural gas transmission systems in the area could meet the purpose and need of the Project and concluded that the expansion of other interstate natural gas transmission systems in the region would not be a viable alternative. See FEIS at 3-5. Accordingly, Transco’s Project would satisfy a compelling public need under the Department’s interpretation of its regulations.

Moreover, Transco has, independent of the FERC Certificate, established that its Project satisfies a “compelling public need” as that term is defined under the FWPA regulations.

As fully explained in Transco’s application, without the access road, Transco cannot access the property on which Compressor Station 206 would be built. The road is necessary for Transco to safely operate and maintain its pipeline and facilities in accordance with US Department of Transportation safety regulations. The access road will serve an essential safety need of the municipality in which the proposed regulated activity is located, and the public health and safety would benefit from Transco’s ability to access its facilities to safely construct, operate and maintain them in accordance with federal law.

Similarly, for Compressor Station 206 to function, it must tie into Transco’s existing pipelines. As detailed in Transco’s FWW Application, the tie-in assembly can only be installed into straight segments of pipe; therefore, siting the tie-in assembly upstream (northeast) of where currently proposed is not possible due to the presence of bends in Mainlines A and C. Siting the tie-in assembly downstream (southwest) would increase the length of suction and discharge piping and associated wetland impacts. There is no practicable alternative to the location of the tie-in and suction and discharge piping that would have less impacts on regulated features. These components are essential to the Project, its safe operation, and the health and safety of the neighboring community.

The EELC argues that any economic benefits relied upon by Transco do not serve an “essential health or safety need” and rejects Transco’s assertion that the access road will provide health and safety benefits to the community. However, the EELC ignores the important benefits of the Project to natural gas shippers and consumers in New Jersey that are set forth in the supplemental materials submitted by Transco on June 28, 2019. Those benefits include:

- The New Jersey facilities will provide redundancy during planned and unplanned maintenance activities on Transco’s natural gas infrastructure within the State.

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

- The Project is designed to provide 400,000 Dth/d under peak conditions. However, under non-peak conditions, the facilities constructed as part of the Project will enable Transco to meet its service obligations, and manage outages for maintenance and repairs; thus, minimizing impacts or interruption to all shippers and customers on the system, especially those in New Jersey.
- In the event that the permits for the Project are denied and the Project is not constructed, the anticipated increase in the average deliveries from the Transco system will likely result in material degradation of delivery pressures at existing delivery points in New Jersey, resulting in additional constraints associated with delivering existing firm shipper entitlements in the State of New Jersey. Specifically:
 - Utility providers will continue accepting customers to their service territory because they are obligated to do so by the New York State Public Service Commission.
 - In the absence of the Project, however, utility providers may only be able to provide interruptible service to new customers because they will not have the capacity on an upstream interstate pipeline to guarantee deliveries.
 - As a result, there will be an increase in the normal load from the interstate pipeline transmission grid, resulting in an overall increase in average deliveries from the Transco pipeline system in New Jersey.
 - An increase in the average load would lead to operational challenges related to the scheduling of maintenance activities and a greater chance of impacts to all shippers in the northeast region, including those in New Jersey. Such impacts could directly affect the well-being of New Jersey residents were they to occur during an extreme weather event.

Similarly, COA claims that any alleged air quality benefits would not satisfy the requirement since: (1) the air quality benefits would only be realized by New York, not New Jersey; (2) any air quality benefits would be “negated by the pollution of Compressor Station 206”; and (3) air quality benefits to New York are overstated. However, COA provides no evidence in support of these conclusory claims. To the contrary, the Project would have significant health and safety benefits to the surrounding area, as discussed by FERC in the FEIS. Specifically, the project will displace the use of No. 2 fuel oil in New York City and Long Island, significantly reducing ozone precursors of nitrogen oxides (NO_x), sulfur dioxide (SO₂), and particulate matter (PM). Reducing emissions of these compounds will improve air quality within the Northern New Jersey-New York-Connecticut air quality control region. These emissions reductions and associated public health benefits will be shared across this airshed. In addition, emissions reduction projects are planned to be implemented in Northern New Jersey to reduce public transit and drayage truck emissions. These permanent emissions reduction projects will reduce diesel-related emissions in the

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

immediate region of the project, providing a local air quality and public health benefit. Currently no other Project is proposed that could meet the purpose and need of the Project and enable to conversion of National Grid customers from heavy heating oil to natural gas.

A. The FWPA Rules are Preempted to the Extent they Exceed New Jersey's Authority Under the Clean Water Act.

The EELC claims that the FWPA regulations are not preempted since the NJDEP has the discretion to impose more stringent requirements than federal law, citing 40 C.F.R. § 233.1(c). Specifically, the EELC relies upon language in the regulation which provides that “[n]othing 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.” The EELC cherry-picked this language but ignored the order in which this language appears in the regulation. In other words, the EELC failed to read 40 C.F.R. § 233.1(c) in its entirety and in the correct order.

Specifically, 40 C.F.R. § 233.1(c) provides in its entirety that “[n]othing 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. Where an approved State program has a greater scope than required by Federal law, the additional coverage is not part of the Federally approved program and is not subject to Federal oversight or enforcement.” Thus, the federal regulation makes clear that while a State may adopt requirements that are more stringent than federal program, these requirements are not part of the State’s delegated federal authority.

In passing the Energy Policy Act of 2005 (EPAAct), Pub. L. No. 109-58, 119 Stat. 594 (2005), Congress amended the Natural Gas Act to, among other things, grant federal Courts of Appeals jurisdiction to review permitting decisions over actions taken by State administrative agencies acting pursuant to federal law to issue, condition or deny a permit or other approval required under federal law for interstate natural gas pipeline projects. Furthermore, as amended by the EPAAct, the Natural Gas Act designates FERC as “the lead agency for purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969.” 15 U.S.C. § 717n(b)(1). However, Congress made clear that, except as specifically provided for in the Natural Gas Act, the law would not affect “the rights of States” under the Coastal Zone Management Act, Clean Air Act or the Clean Water Act. 15 U.S.C. § 717b(d). This “savings clause” effectively exempts States from the preemptive effect of the Natural Gas Act if they are acting pursuant to their authority under these federal laws. See Del. Riverkeeper Network v. Sec’y Pa. Dept. of Env’tl. Prot., 833 F.3d 360, 368 (3d. Cir. 2016) citing 15 U.S.C. § 717b(d); See also AES Sparrows Point LNG, LLC v. Smith, 527 F.3d 120, 127 (4th Cir. 2008) (Williams, concurring)(expressing doubt about whether a local law that bans liquified natural gas terminal siting “can ever be a ‘right of States under’ the Coastal Zone Management Act”, even if incorporated into the State’s federal program).

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

Transco's position is correct under federal law. Since the federal 404 program does not have a similar requirement that a project or regulated activity serve a compelling public need, that requirement would exceed its authority under the Clean Water Act and is preempted. While the Army Corps of Engineers must perform a public interest review that is similar to the one performed by the Department, compare 33 C.F.R. § 320.4(a) with N.J.A.C. 7:7A-10.2(b)12, nowhere is the Corps required to find a benefit to the municipality in which a project is located in order to approve a permit. Similarly, regulations pertaining to transition areas are not part of the federal program.

Furthermore, whether a project or regulated activity benefits the municipality is irrelevant to whether the project or activity complies with New Jersey's water quality standards. The Department's review of whether the Project serves the municipality in which it is located therefore exceeds the scope of its authority under Section 401 of the Clean Water Act. Accordingly, the Department's regulations are preempted to the extent they exceed its authority under the Clean Water Act.

B. The Compelling Public Need Requirement, as Defined Under the FWPA, Constitutes an Undue Burden on Interstate Commerce.

The EELC claims that the FWPA regulations do not impose an undue burden on interstate commerce See EELC Comment, pp. 9-10.

The Commerce Clause provides that Congress has the power "to regulate Commerce...among the several States..." U.S. Const. art. I, §8, cl. 3. The Commerce Clause not only authorizes Congress to enact laws for the protection and encouragement of commerce among the states, but also prevents interference by states on matters pertaining to interstate commerce. Under the negative or dormant implications of the Commerce Clause, "a state is...precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the states." Western Oil & Gas Assoc. v. Cory, 726 F.2d 1340, 1342 (9th Cir. 1984) quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)(internal quotations omitted).

The analysis of whether a state regulation violates the dormant Commerce Clause has been set out by the Supreme Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Under the "two-tiered approach," a state regulation that directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state economic interests over out-of-state economic interests, will be struck down. If, however, a state statute has only indirect effects on interstate commerce and regulates evenhandedly, the court looks to whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. Id. Determining whether a State law "discriminates" for purposes of the negative Commerce Clause analysis turns on whether the law gives "differential treatment of in-state and out-of- state economic interests that benefits the former and burdens the latter." Oregon Waste Sys. v. Dep't. of Env'tl. Prot., 511 U.S. 93, 99 (1994). "If a restriction on commerce is discriminatory, it is virtually *per se* invalid"

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

unless the state can show that the law “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* at 99, 100. Furthermore, even if there is no overt discriminatory purpose, a law that has a discriminatory effect must also meet this higher level of scrutiny. Maine v. Taylor, 477 U.S. 131, 138 (1986).

Transco disagrees with the EELC’s contention that the burden on interstate transportation of natural gas from N.J.A.C. 7:7A-10.4(a)1 is incidental, and not affirmative. At first glance, the additional burden placed on permittees proposing non-water dependent activity within an exceptional resource value wetland is evenhanded and requires, among other things, a showing that the compelling public need for the regulated activity outweighs impacts to the wetlands. However, the FWPA Rules define “compelling public need” to mean that “the proposed regulated activity will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing needs of the residents of the State.” N.J.A.C. 7:7A-1.3. The EELC itself notes that “‘compelling public need’ is only satisfied if the proposed project will serve the health or safety need of the particular municipality in which the regulated activity is located.” See EELC August 2, 2019 comment at p. 6.

Contrary to the EELC’s characterization of the FWPA Rules, N.J.A.C. 7:7A-10.4(a)1 is not meant to protect the public health and safety of the state, but to ensure that exceptional resource value wetlands are not impacted by development without good reason. The regulations limit the instances that justify impacts to exceptional resource value wetlands to those that have essential local benefits and serve the needs of the State. And therein lies the rub. The EELC claims that the Rule regulates all natural gas pipelines the same way, but this is clearly not correct. Several commenters have argued that the Project does not serve the existing needs of the residents of the State and, therefore, cannot fulfill a compelling public need. If this interpretation were correct, only those pipeline projects that service the state or municipality would be able to satisfy the “compelling public need” requirement of N.J.A.C. 7:7A-10.4(a)1, meaning interstate natural gas pipeline companies that transport gas to states other than New Jersey are treated differently than those regulated by the New Jersey Board of Public Utilities, which only provide natural gas for consumption in New Jersey. The Rule therefore has a discriminatory effect on interstate commerce and must pass “strict scrutiny”, i.e. it must advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Oregon Waste Sys. v. Dep’t. of Env’tl. Prot., 511 U.S. at 100.

While the protection of exceptional resource value wetlands may be a legitimate local purpose, there are other reasonable nondiscriminatory alternatives that could be employed to adequately protect these resources. For one, the definition of “compelling public need” under the FWPA Rules can easily be revised to remove the references to the municipality and state without sacrificing the protections for exceptional resource value wetlands. There is simply no need for such limiting language.

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

Even assuming, as the EELC argues, that N.J.A.C. 7:7A-10.4(a)1 regulates evenhandedly, the Rule's burden on interstate commerce clearly exceeds the local benefits. Courts have held that state and local regulations that prohibit facilities authorized under the Natural Gas Act constitute an undue burden on interstate commerce.

For instance, in Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Commission, 464 F.2d 1358 (3d Cir. 1972), the Third Circuit held that the Hackensack Meadowlands Development Commission's ("Commission") outright prohibition of Transco's proposed Liquefied Natural Gas ("LNG") facilities pursuant to a regional master plan was an "unlawful interference with interstate commerce". Id. at 1363. In that case, Transco sought to construct facilities for the processing and storage of LNG within an area designated as the "Planning Area" on the Commission's Master Plan and, pursuant to the Hackensack Meadowlands Reclamation and Development Act, was required to obtain a building permit from the Commission prior to beginning construction. Id. at 1361. However, the Commission refused to issue the building permits to Transco, as Transco's proposed facilities were not a "permitted use." Transco sought a variance, but the Commission denied the variance, concluding that Transco's construction would "seriously restrict the range of possible uses in the surrounding areas" and that it would "fail to meet applicable planning and safety regulations." Id. at 1362. Transco brought suit in the U.S. District Court for the District of New Jersey to enjoin the Commission from interfering with Transco's project. Id. The District Court issued an order enjoining the Commission from interfering with construction and the Commission appealed.

On appeal, the Third Circuit noted that "[i]t is well established that the interstate transmission and sale of natural gas is within the regulatory ambit of the Commerce Clause of the constitution." Id. The Court reasoned that "[a]lthough the states are not precluded from imposing reasonable restraints and restrictions on interstate commerce, and although the authority to enact zoning ordinances under the state's police power is clear, it is equally settled that a state may not exercise that police power where the necessary effect would be to place a substantial burden on interstate commerce." Id. (internal citations omitted). The Court noted that "[a]lthough we are cognizant of the tremendous importance of sound community and regional planning, we must also consider the needs of the New York-New Jersey metropolitan area for the adequate and efficient supply and delivery of natural gas." Id. at 1363 (internal citation omitted). The Court ultimately affirmed the District Court's findings that Transco's facilities would be built in accordance with all current federal safety standards and the District Court's determination that the Commission's denial was "'arbitrary', and 'an unwarranted imposition upon interstate commerce.'" Id.

That N.J.A.C. 7:7A-10.4(a)1 is not a zoning regulation is irrelevant as it would prohibit a federally authorized interstate natural gas pipeline project simply because the gas being transported would not be consumed in New Jersey. New Jersey cannot prevent impacts to exceptional resource value wetlands on the grounds that the regulated activity does not benefit the State. This is repugnant to the Commerce Clause.

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

II. TRANSCO HAS DEMONSTRATED THAT DENIAL OF THE PERMIT WOULD RESULT IN AN EXTRAORDINARY HARDSHIP BROUGHT ABOUT BY CIRCUMSTANCES PECULIAR TO THE COMPRESSOR STATION 206 SITE

Both the EELC and COA claim that Transco has failed to establish that denial of the permit would impose an extraordinary hardship because Transco created the hardship by failing to classify the wetlands along the access road as “exceptional resource value” in the first place. See EELC Comment, pp. 10-11 and COA Comment, p. 14. However, as fully established in Transco’s application for a Freshwater Wetlands Individual Permit, pp. 5-7, the hardship is created by the location of the site and the location of the wetlands on the property. The comments also completely ignore the express language of N.J.A.C. 7:7A-10.4(a)2 which provides that “[t]hat denial of the permit would impose an extraordinary hardship on the applicant brought about by circumstances peculiar to the subject property.” (emphasis added).

As set forth in Transco’s June 28th submission, the denial of the permit imposes an extraordinary hardship on Transco due to the circumstances peculiar to the property.

- In March 2019, after two years working through these permitting issues, a neighboring landowner reporting hearing a Barred Owl last heard in 2018 in the adjacent wooded area, exact location unknown. In May 2019, NJDEP accepted this report prompting reclassification of the wetlands at the Compressor Station 206 site from intermediate to exceptional.
- Transco, as a good corporate citizen, revised its design of Compressor Station 206 and its ancillary facilities to further avoid and minimize impacts to these wetlands and their associated transition area buffers.
- Given the location of the exceptional resource value wetlands on the Compressor Station 206 site, Transco would not be able to construct an access road and tie-in facilities without impacting these wetlands.
 - Transco’s existing pipelines on the Compressor Station 206 site are located within exceptional resource value wetlands.
- These two components are necessary for the construction, operation, and maintenance of Compressor Station 206 and, therefore, the Project as a whole.
 - The road is necessary for Transco to safely operate and maintain its pipeline and facilities in accordance with US Department of Transportation safety regulations.
 - Compressor Station 206 must tie into Transco’s existing pipelines. Given the specific requirements for siting the tie-in assembly, there is no practicable

ATTACHMENT B

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC
Northeast Supply Enhancement Project
DLUR File No.: 0000-01-1001.3: LUP 190001 and LUP 190002
Responses to Substantive Public Comments Submitted to NJDEP

alternative location or design of the tie-in and suction and discharge that would have fewer impacts exceptional resource value wetlands.

- There are no other impacts to wetlands associated with Compressor Station 206

Accordingly, the circumstances peculiar to the Compressor Station 206 site, namely the location of the exceptional resource value wetlands, makes it impossible for Transco to construct the Project without impacting these wetlands. Furthermore, given the location of Transco's existing pipelines on the Compressor Station 206 site and the landlocked nature of the property, coupled with the fact there are no practicable alternatives that would have lesser environmental impacts, necessarily requires the limited impacts to these wetlands and transition areas. Transco has established that it has avoided and minimized impacts to regulated areas, including wetlands and transition areas, to the greatest extent practicable.

Transco is suffering an extraordinary hardship as a result of the Department's denial of the permit as it will be unable to construct and operate Compressor Station 206 and meet the need of its customer for natural gas, which FERC has determined to be in the public convenience and necessity.

In addition, the State of New Jersey will suffer hardship, which could prove to be extraordinary without the Project due to impacts to system reliability and a loss of opportunity to realize the economic and air quality benefits from the construction and operation of the Project. As noted above, these benefits include system reliability and redundancy, additional jobs, additional local and state tax revenue, reduced ozone precursors, reduced carbon emissions from the project itself, and the implementation of emissions reductions projects and the retiring of Emissions Reductions Credits.

Further, the EELC also claims that NJDEP should re-evaluate the extraordinary hardship requirement using the standard under the FHACA rules for hardship exceptions. While the first prong of the FHACA standards may be similar to the extraordinary hardship provision under the FWPA rules, it does not mean that the FHACA standards should be applied to Transco's Project. They are simply not relevant. The NJDEP recently revised the FHACA and FWPA rules. If NJDEP wanted to impose the same hardship exception standards to the FWPA, it would have revised the rules to include those additional requirements. To apply additional requirements from a completely different regulatory framework now would arguably be arbitrary and capricious.