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VIA EMAIL AND U.S. MAIL
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Re: Reply to Transco's Responses to Comments on the Proposed Northeast Supply Enhancement Project Regarding "Compelling Public Need" and "Extraordinary Hardship" (Program Interest #: 0000-01-1001.3)

- Freshwater Wetlands Individual Permit (Activity #: LUP 190001)

We are aware that Transco has submitted to the New Jersey Department of Environmental Protection ("DEP") its Responses to Public Comments (dated September 4, 2019 and September 9, 2019) regarding its permit applications under the Program Interest number listed above. In particular, the September 4, 2019 submission contained an Attachment B, which provided Transco's responses to comments regarding the Freshwater Wetlands Protection Act ("FWPA") Rules on "compelling public need" and "extraordinary hardship." On behalf of our clients (NY/NJ Baykeeper, Food & Water Watch – New Jersey, Central Jersey Safe Energy Coalition, and the Princeton Manor Homeowners Association), we provide below a reply specifically to Transco's responses on "compelling public need" and "extraordinary hardship." We are also aware that Transco submitted to DEP revised permit plans (dated October 11, 2019) related to the Compressor Station 206 site. We ask that DEP consider our reply as it reviews Transco's Responses to Public Comments as well as Transco's October 11, 2019 submission.

As detailed below, Transco still has not demonstrated any "compelling public need" or that it will face an "extraordinary hardship" if DEP denies its Freshwater Wetlands Individual Permit application. In light of our reply – as well as our prior comments and expert reports to DEP on Transco's new and prior Land Use permit applications for the NESE Project – DEP must deny Transco's Freshwater Wetlands Individual Permit application (listed above).

I. "Compelling Public Need"

A. Much of Transco's Response Merely Rehashes Its Previous Arguments that EELC has Already Refuted

1. Transco's Argument that DEP has "Historically Relied" on the Issuance of a FERC Certificate to Satisfy "Compelling Public Need"

Transco raises this argument on pages 1 to 2 of Attachment B. But it has not put forth any new points to rebut EELC's arguments in our August 2, 2016 Comments that demonstrating "need" for the purposes of a FERC Certificate does not axiomatically demonstrate "compelling public need" under the FWPA Regulations (see pp. 6-7).

In our August 2, 2016 Comments, we explained that "need" for the purposes of granting a FERC Certificate is separate and distinct from "public and private need" and "compelling public need" under the FWPA Regulations (see pp. 4-6). Therefore, amongst other things, DEP must "make an independent review" of the need for the NESE Project and should not defer to FERC's decision on this issue (see EELC's April 25, 2019 Comments, pg. 6). We've previously noted that two independent reports – by Mike Aucott (dated May 2018) and 350.org (dated March 2019) – indicate that the additional natural gas supplied by NESE is, in fact, not needed (see EELC's April 25, 2019 Comments, pg. 3). We now take the opportunity here to highlight recent, ongoing developments in New York State that create further doubts about whether the additional natural gas supplied by NESE is actually needed.

As you may be aware, after the New York Department of Environmental Conservation ("DEC") denied "without prejudice" Transco's request for a Water Quality Certification in May 2019, National Grid "stopped processing all applications for new or expanded gas service in Brooklyn, Queens and on Long Island."[1] In its announcement of this moratorium, National Grid stated that none of these applications would "be processed until the permits [for the NESE Project] are received" and that the NESE Project "would help to relieve gas supply constraints in the area."[2] In other words, "National Grid...said it will not approve requests for new or upgraded gas service in its territory in New York City and Long Island until the state approves [the NESE Project], arguing there will be a lack of adequate gas supply until it's built."[3] But it was reported in September 2019 that the New York Attorney General has "launch[ed] an inquiry into National Grid's decision to refuse gas service to prospective and existing customers."[4] In particular, the records that the New York Attorney General is seeking "include documents prepared for or submitted to government agencies that relate to the utility's ability to provide gas."[5]

In addition, on October 11, 2019, the New York Public Service Commission ("PSC") partially reversed the moratorium by issuing an Order directing National Grid to connect more than 1,100 existing residential customers with natural gas.[6] Governor Cuomo's press release

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[1] National Grid, "A Message from John Bruckner, National Grid NY President," (May 17, 2019), available at http://www.nycmpc.org/Files/5ac406f4-e473-44ef-801e-bb0bdb689986/National%20Grid%20Stops%20Processing%20New%20Gas%20Service%20Requests..pdf.

[2] *Id.*

[3] Politico, "Gas moratorium puts city officials in a bind," (August 23, 2019), *available at* https://www.politico.com/states/new-york/city-hall/story/2019/08/22/gas-moratorium-puts-city-officials-in-a-bind-1152020.

[4] New York Daily News, "NY Attorney General launching inquiry into National Grid gas service moratorium," (September 11, 2019), available at https://www.nydailynews.com/new-york/ny-metro-national-grid-inquiry-attorney-general-letitia-james-20190911-yvo5bxxxv5f6dakc63zhjmamuu-story.html.

[5] *Id.*

[6] New York Public Service Commission, "Order Instituting Proceeding and to Show Cause," (October 11, 2019).

announcing the PSC's Order included numerous statements that raise doubts about (1) National Grid's general claims about the degree to which it lacks adequate gas supply as well as (2) the utility's specific claim that this issue can only be resolved by the NESE Project. The Chair of the Public Service Commission noted that "[t]he law requires utilities to provide gas service without unreasonable qualifications or lengthy delay when sufficient gas supply exists, which the order alleges is the case for these previously existing customers of National Grid who found themselves suddenly cut off from gas without adequate warning and preparation."[7] (emphasis added). And the press release noted that "the Department of Public Service is expanding its ongoing investigation to examine whether the company properly planned for reliably meeting the needs of its customers given that the utility faces supply constraints this winter. National Grid's proposed pipeline, if permitted, would not be in service until December 2020 at the earliest. There are alternative forms of gas delivery beyond pipelines; their failure to adequately anticipate this issue and provide for it will immediately be under review."[8] (emphasis added).

2. Transco's Justifications of "Compelling Public Need" Independent of a FERC Certificate

Transco raises these justifications on pages 2 to 4 of Attachment B. But it has not put forth any new points to rebut EELC's arguments in our August 2, 2016 and August 23, 2019 Comments. Regarding the access road for Compressor Station 206, we addressed this in our August 2, 2016 Comments (see pp. 7-8). And Transco's justification regarding the location of tie-in and suction and discharge piping is similarly flawed. Regarding economic benefits, Transco provides no rebuttal, so it essentially concedes this point. Regarding benefits of the NESE Project to natural gas shippers and consumers in New Jersey, Transco claims that EELC "ignores" these alleged benefits. But we both acknowledged and refuted them in our August 23, 2019 Comments (see pp. 2-4). Transco also restates its claims of air quality benefits associated with the Project. But we refuted those in our August 23, 2019 Comments (see pg. 2).

B. Transco's Arguments that DEP's FWPA Rules are Unlawful

1. The Relevant FWPA Regulations Are Not Preempted

On page 4 to 5 of Attachment B, in its discussion of the Natural Gas Act's ("NGA's") "savings clause" [15 U.S.C. § 717b(d)] and the federal regulation 40 C.F.R. § 233.1(c), Transco rests its argument on the concept that this federal regulation "makes clear that while a State may adopt requirements that are more stringent than federal program [sic], these requirements are not *part of* the State's delegated federal authority." (pg. 4) (emphasis added). But this is a misreading (whether intentional or not) of the NGA's "savings clause." As a recent Congressional Research Service Report, entitled "Federal Preemption: A Legal Primer," pointed out, "[t]he law regarding savings clauses 'is not especially well developed,' and cases involving

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[7] "Governor Cuomo Announces PSC Action Ordering National Grid to Immediately Connect Over 1,100 Residential & Small Business Gas Customers Previously Denied Service by Moratorium," (October 11, 2019), *available at* https://www.governor.ny.gov/news/governor-cuomo-announces-psc-action-ordering-national-grid-immediately-connect-over-1100.

[8] *Id.*

such clauses 'turn very much on the precise wording of the statutes at issue.'"[9] Here, the NGA's "savings clause" states that "Except as specifically provided in [the NGA], nothing in [the NGA] affects the rights of states under [the CZMA, CAA, or CWA]."[10] The focus is on "the rights of states" – nowhere in the NGA's "savings clause" is State's delegated federal authority limited to what is included in the relevant "federal program." Thus, a state requirement is saved from the NGA's preemptive effect unless it falls under one of two prongs: (1) it directly conflicts with an explicit portion of the NGA or (2) it is preempted by the CZMA, CAA, or CWA itself (e.g. through conflict preemption). Transco has put forth an additional condition that the state requirement be part of the relevant "federal program."

Transco likens the NESE Project to AES Sparrows Point LNG, LLC. v. Smith, in which the petitioners brought suit against Baltimore County, Maryland, seeking "a declaration that County Bill 9-07, which prohibits the siting of any liquefied natural gas ("LNG") terminal in the County's Chesapeake Bay Critical Area, is preempted by the [NGA]." 527 F.3d 120, 122 (4th Cir. 2008). In that case, the Fourth Circuit Court of Appeals held that the Bill was "not a part of Maryland's federally approved Coastal Zone Management Plan ("CMP")" and was therefore preempted by the NGA. Id. In evaluating the issue of preemption, the court began with "the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act *unless that [is] the clear and manifest purposes of Congress*." Id. at 125 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, (1992)) (emphasis added). The court reasoned that "when that intent is *explicitly stated* in the statute's language, conflicting state law is expressly preempted." Id. (citing Cipollone, 505 U.S. at 516 (internal quotations omitted)) (emphasis added).

The Fourth Circuit Court found that the NGA provides that FERC "shall have the *exclusive authority* to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." Id. (citing 15 U.S.C. § 717b(e)(1)) (emphasis added). The Court rejected the petitioners' argument that the Savings Clause operates to save the Bill from federal preemption, because the Savings Clause only operates under specific circumstances that were not met in the case. Id. at 126. Transco mentions the concurrence of Chief Judge Williams and his "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." This "doubt" comes directly from the language of 15 U.S.C. § 717b(e)(1), which expressly gave FERC the *exclusive authority* to approve or deny an application for the siting of an LNG terminal. County Bill 9-07 was at direct odds with this provision of the NGA. Thus, County Bill 9-07 fell under the first prong outlined above: it directly conflicted with an explicit portion of the NGA.

In contrast, with the NESE Project, the FWPA regulation regarding "compelling public need" does not directly conflict with an explicit portion of the NGA. Regarding the second prong, there is no evidence that the CWA itself preempts the FWPA regulation regarding "compelling public need." This FWPA Regulation does not fall under any of the categories of preemption that we outlined in our August 2, 2019 Comments, such as express preemption,

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[9] CRS Report, "Federal Preemption: A Legal Primer," (July 23, 2019), p. 13 [quoting ALAN UNTEREINER, THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE (2008) at 204-205]
[10] 15 U.S.C. § 717b(d) (emphasis added).

conflict preemption, or field preemption (see pg. 8). In fact, federal CWA provisions provide 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." 40 C.F.R. § 233.1(c). While it is true that "the additional coverage is not part of the Federally approved program and is not subject to Federal oversight or enforcement," this provision does not in any way prohibit DEP from enacting more stringent regulations than are required under the federal program or cause the more stringent regulation to no longer be considered a "right of the state" under the CWA.

The Third Circuit case of Delaware Riverkeeper Network v. Sec'y Pa. Dept. of Envtl. Prot., 833 F.3d 360 (3d. Cir. 2016) provides more support for the points above regarding the NGA's "savings clause" and its effect on New Jersey's FWPA Rules. The court noted that "The Natural Gas Act preempts state environmental regulation of interstate natural gas facilities, except for state action taken under those statutes specifically mentioned in the Act: the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act... In other words, the only state action over interstate natural gas pipeline facilities that could be taken pursuant to federal law is state action taken under those statutes."[11] The court repeatedly uses the phrase "state action" and there is no mention of that state action needing to be part of the relevant "federal program." In fact, the Petitioners in this case twice mentioned in their Brief in Support of Petition for Review (dated August 10, 2015) that certain FWPA Rules were "at least as" or "more" stringent than the Clean Water Act[12], yet nowhere in the Third Circuit's decision does it state that that these FWPA Rules were, therefore, not part of the New Jersey's delegated federal authority. Moreover, in response to arguments that the court "could not reach issues regarding aspects of the Freshwater Wetlands Individual Permits that concern transition areas and threatened and endangered species, the Letters of Interpretation, or the Flood Hazard Area Individual Permits," the court "conclude[d] that each is rooted in NJDEP's exercise of authority that it assumed pursuant to Sections 401 and 404 of the Clean Water Act."[13]

Finally, the scope of a state's CWA Section 401 Water Quality Certification can extend beyond issues directly related to water quality. CWA Section 401 plainly states that "[a]ny certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant...will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title...and with any other *appropriate requirement* of State law set forth in such certification."[14] The Supreme Court of the United States acknowledged this in ruling that "pursuant to § 401, States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other '*appropriate requirement* of State law.'"[15] The Supreme

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[11] Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot., 833 F.3d 360, 372 (3d Cir. 2016) (emphasis added).

[12] Petitioners' Brief in Support of Petition for Review (dated August 10, 2015), pg. 42 ("NJDEP's rules prohibiting open water and wetland impacts are at least as stringent as the federal rules) and pg. 40 ("under the FWPA, state wetlands protections are even more stringent than federal law because, among other requirements, New Jersey also protects against impacts to freshwater wetlands 'transition areas' or buffers).

[13] Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot., 833 F.3d 360, 372 (3d Cir. 2016) (emphasis added).

[14] 33 U.S.C. 1341(d) (emphasis added).

[15] Pud No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 713-14 (1994) (emphasis added).

Court further held that "EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference."[16] As was highlighted in a May 24, 2019 letter to EPA from various state attorneys general (including Gurbir S. Grewal of New Jersey) and environmental agencies, "EPA's current guidance appropriately recognizes the wide range of state statutes and regulations that states have deemed 'appropriate' under this provision [of CWA Section 401], including laws protecting threatened or endangered species or cultural or religious values of waters."[17] Therefore, the FWPA Rule on "compelling public need" is an "appropriate requirement" within the scope of New Jersey's authority under CWA Section 401.

2. The Relevant FWPA Rules Do Not Impose an Undue Burden on Interstate Commerce

While N.J.A.C. 7:7A-10.4(a)l is indeed meant to "ensure that exceptional resource value wetlands are not impacted by development without good reason," Transco Sept. 4, 2019 comment at pg. 6, these regulations also seek to protect the health and safety of the state and serve the needs of state residents. This is made clear in the "Legislative findings and declarations" section of the FWPA, which states that "[t]he Legislature finds and declares that freshwater wetlands protect and preserve drinking water supplies ...and prevent the loss of life and property" and that "public benefits aris[e] from the natural functions of freshwater wetlands."[18] Contrary to Transco's claims, N.J.A.C. 7:7A-10.4(a)l does not categorically exclude all interstate pipeline projects that transport gas to states other than New Jersey.

In Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n, the Third Circuit ruled that the district court's decision to enjoin the Hackensack Meadowlands Development Commission ("Commission") from interfering with construction of Transco's proposed Liquified Natural Gas ("LNG") facilities was correct. 464 F.2d 1358, 1363 (3d Cir. 1972). The Third Circuit agreed with the district court's characterization of the Commission's actions as "arbitrary" and an "unwarranted imposition on interstate commerce" because "[t]he record reveal[ed] that the Commission had not promulgated any set of regulations, standards or criteria applicable to the construction of this type of industrial facility. It nevertheless concluded that the denial of the variance was 'based mainly on the lack of conformity with applicable planning regulations and safety considerations.'" Id. In contrast, the state in this case has specifically promulgated N.J.A.C. 7:7A-10.4(a)1 to establish criteria for regulating activity. Therefore, the state's denial of a permit is not arbitrary; instead, it is based on a promulgated standard.

Even if the FWPA regulations are discriminatory, they need not be invalidated if the state can show that the rules "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Among other purposes, one of the legitimate local purposes that the FWPA regulations seek to advance is public health and safety. In

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[16] *Id.* at 712.
[17] State Attorneys General and Environmental Agencies, Response to EPA's Request For Pre-Proposal Recommendations Regarding CWA Section 401 Water Quality Certifications (May 24, 2019), pg. 6 (citing 2010 Interim Guidance, at 21) (emphasis added).
[18] N.J.S.A. § 13:9B-2.

Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n, the court ruled that the "needs of the New York-New Jersey metropolitan area for the adequate and efficient supply and delivery of natural gas" outweighed the state's plans for community development. 464 F.2d 1358, 1363. In this case, the state rules do not simply seek to regulate regional planning or community development; rather, the rules seek to protect the "essential health or safety need[s] of the municipality in which the proposed regulated activity is located." N.J.A.C. 7:7A-1.3. Given that the Third Circuit recognized the "tremendous importance of sound community and regional planning," 464 F.2d 1358, 1363, and the fact that considerations of public health and safety are arguably even more essential consideration for the state, the local benefits to be gained from the FWPA regulations are stronger than those that were to be gained in that case. Given the proven health and safety risks of pipeline activity, there are no "reasonable nondiscriminatory alternatives" to the state's legitimate local purpose of protecting public health and safety in the state. Transco suggests that "state and local regulations that prohibit facilities authorized under the Natural Gas Act constitute an undue burden on interstate commerce," Transco Sept. 4, 2019 comment at pg. 7, based on the Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n case, but the Third Circuit decided the way it did because of the specific facts of the case. There is no such blanket rule about state regulations.

II. "Extraordinary Hardship"

A. Whether Transco's Alleged "Hardship" Is of Its Own Making is Relevant to DEP's Analysis

On page 9 of Attachment B, Transco claims that the FHACA Rules – which include a specific requirement that the hardship not be created through the action or inaction of the applicant (see EELC's August 2, 2019 Comments, pp. 10-11) – "are simply not relevant" to DEP's analysis of Transco's FWW permit application under the FWPA Rules. Transco refers to this specific requirement as "additional requirements from a completely different regulatory framework." As we explained in our August 2, 2019 Comments, however, the purposes and goals of the FHACA and FWPA are very similar and thus the FWPA Rules can hardly be considered "a completely different regulatory framework" from the FHACA Rules.

Even if we assume, for the sake of argument, that DEP should not look to the FHACA Rules here, the FWPA Rules themselves (i.e. the same exact regulatory framework) include multiple rules with a similar specific requirement regarding a self-created hardship. As discussed in Princeton Hydro's October 24, 2019 Report (see pp. 3-4), the FWPA Rule for a hardship transition area waiver (N.J.A.C. 7:7A–8.4) states that it may only be granted if the "limitation results from unique circumstances peculiar to the site which…[a]re not the result of any action or inaction by the applicant, the site owner or the owner's predecessors in title."[19] And -- as also discussed in Princeton Hydro's October 24, 2019 Report (see pg. 4) -- the FWPA Rule regarding "[a]dditional requirements for a non-water dependent activity in a wetland or special aquatic site" (N.J.A.C. 7:7A–10.3) states "[t]hat in cases where the applicant has rejected alternatives to

[19] N.J.A.C. 7:7A–8.4(a)(3) (emphasis added).

the project as proposed due to constraints such as inadequate zoning, infrastructure, or parcel size, the applicant has made reasonable attempts to remove or accommodate such constraints."[20]

B. Transco's Alleged "Hardship" Is of Its Own Making

As we've repeatedly stated, Transco would not find itself in this situation had it done adequate due diligence by performing its own site-specific surveys at the outset to verify DEP's findings (see EELC Comments dated May 15, 2018 and August 2, 2019). In Transco's Attachment A (dated September 9, 2019) under Response # 6 ("Barred Owl"), however, Transco appears to be trying to rebut EELC's argument on this point by claiming that it "does not have access to the private properties surrounding the compressor station site and, therefore, was unable conduct [sic] surveys for the purpose of identifying the full extent of potentially suitable habitat for the barred owl."

In fact, EELC's experts Wade and Sharon Wander have informed us that, because Barred Owls produce loud vocalizations that are audible to humans for at least one-half mile under favorable conditions, Transco could have surveyed for the presence of this species on adjacent land from the borders of its own property. This is by no means unusual, as many property owners do not grant permission to conduct such surveys. So, biologists like the Wanders frequently must survey from adjacent public land or privately-owned land where permission has been obtained. Moreover, EELC's expert at Princeton Hydro informed us that Transco itself did something similar to this during the permit review process of the Leidy Pipeline project, where Transco identified Barred Owl and Red Shouldered Hawk on Princeton Ridge. Transco had an auditory survey performed that "does not require trespassing and can be done from publicly accessible areas." (see Princeton Hydro's October 24, 2019 Report, pg. 3). Thus, there is no reason that Transco could not have conducted a similar survey for the NESE Project and it is even more unacceptable that a seasoned pipeline company like Transco – already informed by its experience with the Leidy pipeline -- failed to do so here.

Respectfully submitted,

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[20] N.J.A.C. 7:7A–10.3(c)(4) (emphasis added).