

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

Islander East Pipeline Company, L.L.C.)	
)	
Appellant,)	
)	
-vs-)	
)	
State of Connecticut Department of)	
Environmental Protection,)	November 19, 2003
)	
Appellee)	

**COMMENTS OF THE ATTORNEY GENERAL OF CONNECTICUT TO
THE APPEAL OF ISLANDER EAST PIPELINE COMPANY, L.L.C
FROM AN OBJECTION BY THE STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION, TO A CONSISTENCY
CERTIFICATION FOR THE ISLANDER EAST PIPELINE PROJECT**

The Attorney General of Connecticut (“Attorney General”) hereby files these comments in opposition to the request of Islander East Pipeline Company, LLC (“Islander East”) for the Secretary of the Department of Commerce (“Secretary”) to override the July 29, 2003 decision of the Connecticut Department of Environmental Protection (“DEP”) to issue a formal objection (“Objection”) to the request of Islander East for a certification of consistency for its proposed pipeline under Section 387(c)(3)(A) of the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.* (“CZMA” or the “Act”).

SUMMARY

The Islander East pipeline project is unacceptable. The project as proposed is not needed. The siting is literally “worst case in the worst place.” In fact, a location less acceptable for a

pipeline route across the Sound would be impossible to find. Overall, the project poses a direct and substantial threat to critical ecosystem resources in the Long Island Sound that are of significant national interest. The project will permanently destroy significant areas of seafloor currently used for a water-dependent activity (shellfishing) for the benefit of a non-water dependent activity (natural gas transmission). Its permanent harms clearly outweigh any speculative benefit from having a duplicative pipeline to Long Island. Even if there is a valid need sometime for a new pipeline, the planned route is unnecessarily and unacceptably harmful. Every relevant regulatory agency – the Connecticut Department of Environmental Protection, the Connecticut Department of Agriculture, the United States Environmental Protection Agency (“EPA”), the Army Corps of Engineers (“ACOE”) and the National Marine Fisheries Services (“NMFS”), and even the staff of the Federal Energy Regulatory Commission (“FERC”) – has agreed that the environmental impacts of this proposal are severe and that a preferable alternative exists. Most recently DEP, after two complete technical reviews of the project, twice concluded that “the activities as proposed by Islander East in the proposed location would cause significant adverse impacts to coastal resources and water-dependent uses and would, therefore, be inconsistent with the enforceable policies of [state coastal management law.]” (DEP decision of July 29, 2003 denying a certificate of consistency with the Coastal Zone Management Act.) This ruling reinforces the conclusion that not only are the environmental impacts of this project particularly severe, but that a pipeline can never appropriately be installed in this uniquely sensitive location. The CZMA program is predicated on the demonstration by Congress that the coastal states are in the best position to balance the needs of coastal development against the harms to the coastal environment. These states, including Connecticut, have mobilized their limited resources at great expense to their taxpayers and have enacted appropriate legislation and

staffed important technical programs to accomplish the goals of Congress. This project has been thoroughly and carefully reviewed, not once, but twice, by the designated regulatory authorities in Connecticut, and twice denied on technical grounds. Consequently, denial of certification of consistency with the CZMA is not only appropriate, it is mandatory under federal law.

I. Background

1. The Project.

Islander East proposes to build an approximately 50-mile long interstate natural gas pipeline creating an additional link between the Connecticut and Long Island markets. As described in the company's literature, the intent of the project is to provide 285,000 dekatherms per day (Dth/d) of natural gas to Long Island, enough to heat about 600,000 homes.

As is required of a project of this magnitude, the FERC staff prepared an Environmental Impact Statement, released in August, 2002, ("EIS"), as mandated by the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"). The resulting document has been challenged as incomplete and inadequate by numerous regulators and citizen organizations, primarily because certain important sedimentation and other studies had not been conducted, a fact that was fully acknowledged in the EIS itself. However, even with only admittedly partial data and analysis, the EIS came to a critical conclusion: "We conclude that there is an environmentally preferable alternative to the Islander East Pipeline Project." (EIS, page ES-5.)

Surprisingly, despite its staff's determination that a better route exists, on September 19, 2002, FERC issued an Order ("Order") approving the project with the more destructive route. As FERC put it, the agency decided not to select any particular route or project but to step back and let the market decide. (See, Order, ¶ 50.) The Attorney General sought rehearing of the

Order. FERC granted rehearing and a final administrative Order on Rehearing and Issuing Certificates was issued on January 17, 2002 (“Order”).

On October 15, 2002, the Connecticut Department of Environmental Protection (“DEP”), the state agency charged with implementing the terms of the CZMA, issued its determination that the Islander East project is not consistent with the goals and purposes of the Act and formally denied a certificate of consistency (“Denial”). Islander East appealed.

During the course of the initial phase of the appeal, however, it became clear that Islander East had made a number of changes to the project. Consequently, on June 2, 2003 the parties agreed to have the Department of Commerce remand the matter to the DEP for reevaluation. This review was completed on July 29, 2003 and, once again, DEP determined that the project was inconsistent with the CZMA. Islander East notified Commerce, which re-initiated the appeal.

2. Interests of the State.

As early as 1786, the legislature of Connecticut recognized the importance of protecting the resources of the Long Island Sound and enacted legislation to regulate shellfishing in order to preserve oyster and clam beds from damage to the ecosystem that even then was beginning. (Connecticut Statutes, rev. 1786, p. 78.)

More recently, the Connecticut legislature has been very clear -- the health of the ecosystem of the Long Island Sound is critical to the State and unchecked development and poorly-sited infrastructure is unacceptable.

The General Assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining environment. The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious. . . . Therefore the General Assembly hereby declares that the policy of the state of

Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state.

Conn. Gen. Stat. § 22a-1.

The legislature has done more, expressly defining the policy of the state and making numerous legislative findings, including the following:

- (1) The waters of Long Island Sound and its coastal resources . . . form an integrated natural estuarine ecosystem which is both unique and fragile;
- (2) Development of Connecticut's coastal area has been extensive and has had a significant impact of the Long Island Sound and its coastal resources; . . .
- (5) The coastal area is rich in a variety of natural, economic, recreational, cultural and aesthetic resources, but the full realization of their value can be achieved only by encouraging further development only in suitable areas and by protection of those areas unsuited to development;

- (7) Unplanned population growth and economic development in the coastal area have caused the loss of living marine resources, wildlife and nutrient-rich areas, and have endangered other vital ecological systems and scarce resources.

Conn. Gen. Stat. § 22a-91. The state has supported its policies with action. Vast sums of public money have been spent to improve municipal waste treatment facilities and reduce pollution and runoff. Millions more have been invested in the state's shellfish industry and, as the DEP has noted, "Connecticut's shellfish industry produces the highest quality oysters in the United States. Despite a devastating blow to oyster production from [a parasitic disease] in 1997, Connecticut was still ranked #2 on the East Coast for oyster market harvest in 2001. Also, in 2001, Connecticut was ranked #1 for hard clam production on the East Coast." (Decision, p. 7.) The State of Connecticut therefore has a direct and immediate interest in the marine environment that is threatened by this project.

Notwithstanding these facts, Islander East claims “that Connecticut’s actions here are motivated by politics and parochialism.” (Supplemental Memorandum of Islander East pipeline Company, L.L.C. in Further Support of Appeal From a Coastal Management Plan Objection Of From [sic] An Objection Of the State of Connecticut Department of Environmental Protection, To A Consistency Certification for the Islander East pipeline Project, dated August 20, 2003, hereinafter, “Supplemental Memorandum,” page 23.)

If, by “politics,” Islander East means “policies,” then it is true that the State of Connecticut has long-established and carefully thought-out policies regarding its stewardship of the Long Island Sound. The State is indeed acting according to these policies as codified in its statutes. The State is proud of its efforts to protect its natural resources and has spent significant amounts of time, effort, and taxpayer money to effectuate those policies and will continue to do so in the future.

As to “parochialism,” it is not clear what Islander East means. Presumably, the public officials and the legislature of any state will carefully consider the needs of its citizens and act accordingly. To do otherwise would be a violation of their respective oaths of office and a disservice to the public. From Islander East’s Supplemental Memorandum, however, it appears that the company is suggesting that Connecticut’s public officials are somehow attempting to block any natural gas utility projects of any type whatsoever. This claim is not correct. The Attorney General, for example, has, since the very beginning of this project, repeatedly and expressly stated that it is the siting of this pipeline, rather than the existence of the pipeline that is the issue. In fact, as every single brief or other pleading from this Office to FERC, the Army Corps of Engineers, the Department of Commerce, etc., shows, the Attorney General has emphasized that this very project, *if moved to an appropriate location*, may very well pass

regulatory muster. Properly planned and sited utility projects are in the public interest and many other projects have been favorably reviewed by Connecticut regulators.

II. Project Impacts.

A. Long Island Sound.

The importance of Long Island Sound -- environmentally, esthetically, and economically -- cannot be overstated. Over centuries, for different peoples and cultures, it has been a constant, precious source of nurture and nature. The Sound is one of the largest estuaries in the United States,

where the tidal, sheltered waters support unique communities of plants and animals. Birds, mammals, fish, shellfish, and other wildlife depend on estuarine habitats as places to live, feed and reproduce. Numerous marine organisms, including many of the commercially valuable fish and shellfish species, depend on the Long Island Sound estuary at some point in their development. Long Island Sound is also economically important to the Connecticut-New York region for a variety of commercial and recreational purposes.

Comprehensive Assessment and Report Part II, Task Force on Long Island Sound, June 3, 2003, (hereinafter "Task Force Report").

An analysis prepared for the United States Environmental Protection Agency concluded that annual Long Island Sound shellfishing and finfishing resources could be valued at approximately \$148,000,000. Recreational use was valued in excess of \$300,000,000 annually and the total of all direct and indirect economic use of the Sound produced a "total use value" of more than \$5,200,000,000 per year. See Task Force Report, Section 2.1. Coastal wetlands associated with the Sound added another \$90-100,000,000 annually. And all of this was calculated in 1990 dollars. Staggering as these numbers are, they fail to tell the full story.

Prior to European colonization, the Sound supported a vast and interconnected ecosystem of immense productivity and was used by Native Americans as an important food resource. See, *New Haven Oyster Industry (1635 – 1987)* by Virginia Galpin, New Haven County Historical

Society, p. 13. This resource, however, has been devastated by overdevelopment and poor planning and repeatedly impacted by utility projects. In fact, “Long Island Sound presently provides a route between Connecticut and Long Island for two electric transmission cables, one natural gas pipeline, and two telecommunications lines, which have been installed on or beneath the seafloor during the last 35 years. In addition, there are various cables and infrastructure that connect offshore islands with the mainland.” Task Force Report, Executive Summary.

Associated with overdevelopment along the shoreline has been a steady increase in pollution which has damaged the Sound. As the Task Force Report notes:

[A]verage concentrations of silver and copper in Long Island Sound were four to five times greater than naturally-occurring background values. Zinc, lead, and manganese concentrations were enriched 1.5 to 2 times greater than natural background levels. Consistent with the sedimentary environments, the greatest enrichment of metals is found in the depositional environments and muddy sediments of the central and western basins, due to both proximity to pollutant sources and the natural movement of sediments and contaminants within Long Island Sound. Total Organic Carbon concentrations, at least partially indicative of pollutant additions, also vary across Long Island Sound, with higher concentrations towards the western end of the basin (Appendix C, Figure C-23).

Task Force Report, Section 2.1.2.

While severely damaged by centuries of human impact, industrial pollution and overfishing, the Sound remains “an ‘essential fish habitat’ (EFH), defined as being necessary for fish spawning, breeding, feeding, or growth to maturity, for a variety of fish species.”

Connecticut Siting Council Findings of Fact, Dckt. No. 197, TransEnergie Application for Certificate of Environmental Compatibility and Public Need, March 28, 2001, ¶ 86. In fact, “Long Island Sound is an environment used by Kemps ridley, Loggerhead, Green, and Leatherback marine turtles [which species] are listed as State or Federal Endangered or Threatened Species, according to Connecticut DEP and NOAA National Marine Fisheries

Service.” *Id.*, ¶ 83. The health of the Long Island Sound ecosystem is important because “The tidal, sheltered waters of estuaries support unique communities of plants and animals. Estuarine environments are among the most diverse and productive on earth, creating more organic matter each year than comparably-sized areas of forest, grassland, or agricultural land. Birds, mammals, fish, and other wildlife depend on estuarine habitats as places to live, feed, and reproduce.” Task Force Report, Section 2.1. In fact, because of its unique siting and biological characteristics, the Long Island Sound is of tremendous importance as a natural and economic resource. For example, in terms of physical environment, Dr. Lance Stewart testified, “in essence we have a greater proportion [of productive shellfish habitat] because of the hydrographics of the Sound and the sediment types that allow mollusk and shellfish production to be exceptional compared to any state in New England.” (Testimony before the Connecticut Siting Council, April 12, 2002, p. 180.)

However, this perfectly located, unique resource has been seriously impacted by development and overfishing. Even beyond the confines of the Sound, “[m]ore than 70 percent of [overall marine] commercial fish stocks are now considered fully exploited, overfished or collapsed. Sea birds and mammals are endangered. And a growing number of marine species are reaching the precariously low levels where extinction is considered a real possibility.” Has The Sea Given Up Its Bounty?, *New York Times*, July 29, 2003. Consequently, it is no exaggeration to say that protecting the last vestiges of a heavily impacted but still critically important natural resource is an important national interest.

B. Thimble Islands

While the entire Sound is important, some areas, like the Thimble Islands, are particularly precious and fragile. This area has suffered less development and has especially important

resources. As noted in testimony before the Connecticut Siting Council regarding the Islander East project, this specific area will be directly and devastatingly affected by the project, threatening enduring, even permanent, damage to a resource that is both unusually important and vulnerable. “This particular area has been, -- first of all from a historical standpoint, the Thimble Island area has been essential for an oyster fishery for over a hundred years. That’s fairly well documented. There are a great many oyster beds in the immediate area that have been very important to the shellfish industry for quite some time as I said. Some of the ground is both used also for clams and oysters. Sometimes you can get two crops on one piece of ground.”

(Testimony of L. Williams, April 17, 2002, p.85). Dr. Stewart elaborated: “It’s probably one of the most variable and unique I think along the coast of Connecticut . . . [it is] one of the most highly valuable, multiple marine ecological environments there is on the coast of Connecticut.”

(Testimony of L. Stewart, April 12, 2002, p. 236.)

As described in the DEP’s decision of July 29, 2003 (“Decision”) denying a certificate of consistency with the CZMA:

In addition to this significant area of shallow water-land interface where biological diversity is the most rich and productive, this area hosts unique subtidal conditions including submerged rock reefs and a diversity of benthic habitats which range from soft mud to compacted sand and gravel. Each of these habitat types supports a complex community of sessile organisms, epifauna and infauna, each of their own way critical to the overall health and rich diversity of the surrounding marine ecosystems. These benthic features also include varying types of substrates, each of which creates robust shellfishing ground suitable for hard clams, soft clams and oysters. This area is generally recognized as an important colonial waterbird nesting habitat, a water fowl wintering area, and one of the only four primary seal haulout areas in the State.

Decision, p. 4.

The importance of the Thimble Islands habitat has been recognized by federal authorities. “The Thimble Islands region has been recognized by the U.S. Fish and Wildlife Service as a significant habitat complex in need of protection and has been incorporated into a larger New Haven Harbor Complex in the Northeast Coastal Areas Study: Significant Coastal Habitats of Southern New England and Portions of Long Island, New York. This 1991 report . was prepared for the U.S. House of Representatives and U.S. Senate Committees on Appropriations to identify those areas in southern New England and Long Island in need of protection for fish and wildlife habitat and the preservation of natural diversity.” Decision, p. 3.

C. Onshore Impacts

Onshore, the route chosen by the company would require clearing and destroying woodlands owned and managed by the Branford Land Trust, filling and trenching in many acres of wetlands, and extensive excavations in various residential neighborhoods. (See, EIS, pp. 3-98, 3-131.) Approximately 30 acres of wetlands would be disrupted by the initial construction and then by continual periodic maintenance operations along the pipeline. (EIS, p. 3-98.) This construction would cause serious damage to coastal wetlands directly tied into the greater Connecticut coastline ecosystem, and the project’s ongoing maintenance activities would result in *permanent* changes to a number of important and environmentally-sensitive on-shore areas. (See, EIS p. 3-80.)

D. Offshore Impacts.

Indisputably, this project will do widespread, sizeable harm to the marine environment or, as the DEP has concluded, “will degrade water quality through the significant introduction of suspended solids; and degrade, irrevocably alter and permanently destroy essential shellfish habitat through alteration of the benthic environment.” Decision, p. 4. Furthermore, as noted

above, the DEP has reinforced its decision under the CZMA by issuing a tentative denial of a water quality permit under Section 401 of the Clean Water Act on August 4, 2003.

The project proposes use of horizontal directional drilling (“HDD”) to bring the pipe from landfall to a point (the “punchout” point) approximately 3500 feet from shore. (EIS, pp. 3-37, 3-62 to 3-63.) From there, Islander East plans to construct, by clamshell dredge, a transition pit or trench from where the HDD will exit for a distance of about 1 to 2 miles. (*Id.*) From that point to the New York landfall, a plow will be used to bury the pipe. As planned, the project would include in excess of 22 miles of pipeline under the Long Island Sound. As one expert testified, the Islander East project will be “one of the major most impactful environmental effects on Long Island Sound, the New York side as well as Connecticut, that I’ve ever seen.” (Testimony of Dr. L. Stewart before the Connecticut Siting Council, April 12, 2002, p. 194.)

In fact, as noted above, the Thimble Islands area has been spared development over the years and is so pristine that it has been regarded as a perfect location for a marine sanctuary. (Testimony of Dr. L. Stewart before the Connecticut Siting Council, April 12, 2002, p. 254.) Even the company’s own expert said of the Thimble Islands area that “the resources include both the commercial fishery and the recreational aspects of the area, the view vista, and the diversity of the habitat, it’s a very sensitive area. “ (Testimony of Dr. Bohlen before the Connecticut Siting Council, April 16, 2002, p. 34.)

In this “very sensitive area,” Islander East plans to dig the HDD punchout hole and accompanying dredged pit. (EIS, p. 3-62.) As noted in the EIA, the company’s activities in this regard, involving only the HDD drilling phase, will result in releasing “approximately 448,300 barrels” of bentonite drilling fluid into the environment and excavating a bowl-shaped undersea pit approximately 250 by 300 feet in size to a depth of 20 feet. (EIS, p. 3-53.) This phase alone

was expected to impact 23 acres of prime shellfish habitat, all in an area of unsurpassed natural diversity and beauty. (See, EIS, p. 3-45, table 3.3.3-1.

The impacts to coastal resources are not limited to the initial phase of this project. From the HDD outfall point, the pipe is to be laid in a trench for part of the way across the Sound and then buried by plow for the remainder of the distance to Long Island. While Islander East has made some changes to selected parts of its overall plan, the DEP, after reviewing these changes, noted:

there will still be significant adverse impacts on water quality through sediment suspension and on benthic organisms and their habitat as a result of plowing for approximately 8.9 miles with the subsequent mounding of backfill material and the dredging of approximately 24,000 to 30,000 cubic yards of sediment and placement of backfill.

Decision, p. 4.

The DEP further found that:

pipeline installation, in both the trench and plow sections, would result in the direct disturbance of approximately 161,172,000 square feet (approximately 3,700 acres) of bottom habitat in Connecticut waters. This number includes the pipeline installation area as well as the corridor of anchor strike and cable sweep disturbance. This area of direct impact ranges from 2,400' to 4,000' wide from approximately Milepost 12 to the New York state border. The most recently proposed installation modifications for the one-mile section do not require the wide anchor corridor. However, in its currently proposed location, the pipeline installation would temporarily and in some locations, permanently and irreparably disturb reefs, rocky subtidal habitat of bedrock or glacial till composed of coarse sands, gravel and/or cobbles and a variety of substrate including soft mud of silt/clay and sandy/silt, hard sand, and deposits of shell hash. A June 4, 2003 memo from William Hogarth to Brandon Blum cites a recently conducted benthic profiling study for 1974 water line installation in the Hudson River which has yet to recover its preconstruction condition. With such an anticipated long-term disturbance, shellfish resources which rely on the existing substrate would be severely degraded for an unknown period of time or completely destroyed.

deemed by the state to be inconsistent with 14 enforceable policies of the Connecticut CZMP (Connecticut DEP letter to Islander East Co., 2002).

Interestingly, the NMFS continued:

NOAA Fisheries' communications to FERC and the Army Corps of Engineers (ACOE) present similar arguments regarding the proposed pipeline. Discussions among the appellant and the regulatory agencies indicated significant, unacceptable, and avoidable individual and cumulative adverse impacts associated with the project. NOAA Fisheries has expressed these conclusions and their justification to both FERC on May 20, 2002, during their National Environmental Policy Act review process (FERC/EIS – 0143F), and to the ACOE, New England District, on July 3, 2002 in response to their public notice for this project. Those impacts were characterized as two principal types-removal or burial of both resource and habitat within the actual construction corridor, and intensified suspended sediment-induced impacts in the far field. Both impact types have been shown to be associated with the pipe installation methodologies proposed by Islander East and are destructive to habitats and resources of concern to NOAA Fisheries.

These impacts cannot be minimized and, in fact, will be long-lasting.

Evidence of this from the Hudson River collected from benthic profiling performed by LaMont-Doherty Geological Observatory for the State of New York (New York State Department of Environmental Conservation 2003) indicates that other utility crossings, undertaken in the Hudson even decades ago, continue to have discernible adverse impacts on the aquatic resources in the project alignments. As a specific example, benthic profiling of a water line installation between Newburgh and Wappinger in 1974 indicates that the site has not fully recovered to preconstruction conditions.

NMFS Memo, June 4, 2003.

The DEP has also considered this evidence and concluded:

Pipeline installation would permanently alter the substrate. Once the habitat has been replaced, the naturally-occurring shellfish communities will be eliminated and will not likely reestablish in these areas.

Decision, p. 5. So extensive and enduring are the potential impacts of this project that Mr. John Volk, the former Director of the Connecticut Bureau of Aquaculture, submitted a letter to the ACOE more than a year ago in which he stated:

We have determined that the siting and the construction methods for the marine phase of the project will likely cause significant damage and harm to shellfish resources and shellfish habitat. Shellfish aquaculture, commercial and recreational shellfish harvest operations, are likely to be impacted as well. This determination is based on the review of the information provided in the above referenced documents, consultations, as well as staff field experience with a similar project. We therefore recommend that the marine portion of the current application be denied.

III. Denial of Certificate of Consistency.

In view of these facts, it is not surprising that the DEP, after a careful review, “determined that the activities as proposed by Islander East in the proposed location would cause significant adverse impacts to coastal resources and water-dependent uses and would, therefore, be inconsistent with the enforceable policies of the Connecticut CZMP.” (Denial, p. 2.)

Specifically, the DEP concluded that “[T]he Department has determined that the proposed work would cause significant adverse environmental impacts on coastal resources and would be inconsistent with the enforceable policies of the Connecticut CZMP.” Decision, p.3.

The DEP elaborated on this saying:

The proposed project will degrade water quality through the significant introduction of suspended solids; and degrade, irrevocably alter and permanently destroy essential fish habitat through alteration of the benthic environment. The siting of the non-water dependent pipeline through prime shellfish habitat would cause a permanent adverse impact to a water-dependent use by displacing a water-dependent use, shellfishing, with a non-water dependent use, natural gas transmission. Also, the proposed project will adversely impact tidal wetlands. (Denial p. 4.)

These conclusions were not arrived at lightly. Even after a comprehensive review of the initial application, DEP evaluated material submitted by Islander East in letters dated March 13,

2003, and March 27, 2003 as well as in “additional correspondence from Islander East in support of its application.” (Decision, p. 2.)

In addition to the detailed consideration of environmental impacts, the DEP carefully considered project alternatives and siting criteria that could avoid or minimize adverse project impacts. The Decision clearly identified at least one potential superior alternative route that has been identified by various regulators and further noted that if that route “does not meet the project purpose for an additional separate gas line to Long Island, there are a host of viable alternative locations, that, if fully explored, would likely reveal a site that both meets the project purpose and is acceptable with respect to Connecticut CZMP consistency.” (Decision, p. 9.)

Finally, in addition to detailing the serious environmental impacts of the project, and the “host” of potentially acceptable alternatives, the Decision describes numerous, specific failures of the applicant to provide adequate and timely responses to requests for information and concludes: “The missing information together with the insufficient alternative analysis necessarily render the various pending applications including this request for Federal Consistency Certification incomplete.” (Decision, p. 10.)

IV. Standard of Review

The relevant legal standard is clear. Fifteen C.F.R. § 930.120 permits the Secretary of Commerce to override a state denial of consistency if “the activity is [determined to be] consistent with the objectives or purposes of the [Coastal Zone Management] Act, or is necessary in the interest of national security.” Of course, both the burden of proof and the burden of persuasion are on the appellant, Islander East. 15 C.F.R. § 930.130. See Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc., June 20, 1995, p. 7. (“[T]he Appellant bears the burden of proof and the burden of persuasion.”)

A. National Security

Islander East's primary argument, underpinning its assessments of both national security and national interest, is the claim that energy supply is important, reliability is important, more pipelines provide greater reliability and supply, and therefore its proposed pipeline is important. This is a facile and extremely misleading 'argument.' More to the point, it has nothing to do with this case.

National security is defined in § 930.122 as requiring a finding that "national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." Islander East has not claimed, nor could it, that the military defense of the nation would be compromised if its commercial project were halted or delayed. Thus, the only issue is whether there is some "other national security interest [that] would be significantly impaired."

In this regard, Islander East's Memorandum of Law proceeds at some length to develop its argument that its project will, quoting FERC, "... benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas . . ." (Memorandum, p. 2.) Islander East goes so far as to quote the Secretary of Commerce to the effect that:

Greater use of natural gas can help lessen the Nation's reliance on foreign oil, reduce the nation's trade deficit, boost the U.S. gross national product, and as a result of these, strengthen our national interests.

(Memorandum, p. 6, citation omitted.) Finally, in its Supplemental Memorandum, Islander East, with complete disregard for the facts, invokes the electric energy blackout of August 14, 2003 as justification for its natural gas project.

Decision, p. 5. So extensive and enduring are the potential impacts of this project that Mr. John Volk, the former Director of the Connecticut Bureau of Aquaculture, submitted a letter to the ACOE more than a year ago in which he stated:

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A. National Security

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National security is defined in § 930.122 as requiring a finding that "national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." Islander East has not claimed, nor could it, that the military defense of the nation would be compromised if its commercial project were halted or delayed. Thus, the only issue is whether there is some "other national security interest [that] would be significantly impaired."

In this regard, Islander East's Memorandum of Law proceeds at some length to develop its argument that its project will, quoting FERC, "... benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas . . ." (Memorandum, p. 2.) Islander East goes so far as to quote the Secretary of Commerce to the effect that:

Greater use of natural gas can help lessen the Nation's reliance on foreign oil, reduce the nation's trade deficit, boost the U.S. gross national product, and as a result of these, strengthen our national interests.

(Memorandum, p. 6, citation omitted.) Finally, in its Supplemental Memorandum, Islander East, with complete disregard for the facts, invokes the electric energy blackout of August 14, 2003 as justification for its natural gas project.

It is self-evident that reducing reliance on foreign oil and the trade deficit can strengthen national interests. It is also true that natural gas can reduce both harmful air emissions and the use of foreign oil. Finally, it may be accurate to say that an additional pipeline serving the eastern end of Long Island would marginally increase system reliability; if one is prepared to make certain assumptions about the reliability of the remainder of the antiquated, land-based, local part of Islander East's existing interstate gas transmission system which will be supporting the project. What is categorically not true is that it is necessary or even desirable to have such a pipeline *on this particular route*. Ultimately, it is futile for Islander East to claim that its designated route through the Thimble Islands region is the only available means to accomplish its goal of moving natural gas to Long Island. Therefore, the company is compelled to restate the issue before the Secretary in other terms. By casting the debate as whether more pipelines increase reliability in order to increase national security, the Appellant is failing to address the actual issue -- whether it is necessary to destroy the economic and ecological importance of the Thimble Islands in order to best serve national security. The answer, of course, is "no."

There are two primary flaws in Islander East's argument. The first relates to its claim that its project will improve the reliability of the interstate gas transmission system. All other things being equal, additional pipelines (or electric transmission lines, or anything else) may very well reduce the probability that there will be a complete failure of the entire transmission system. In order to accomplish this goal, however, it is obviously not necessary to place the new pipeline in one of the most vulnerable and delicate environments in the entire Long Island Sound. In fact, each and every point made by Islander East regarding system reliability applies with equal force to a new pipeline placed in the near vicinity of the existing Iroquois pipeline or anywhere else along Connecticut's 120 miles of coastline. Islander East's claim of potentially increased

reliability may be true, but it is also irrelevant, because the issue is not whether a new pipeline is a good idea, but whether the pipeline must be sited to minimize the adverse environmental consequences.

The second flaw is that its pipeline does not, in fact, add any new natural gas into the regional system; it merely re-distributes existing supplies. In its brief, Islander East repeatedly states that its project is in the national interest because it will provide another source of natural gas supply. In fact, all the gas in question comes from putatively one source -- Sable Island, Canada. Gas from Canada reaches southern New England through the existing regional pipelines, a system that is antiquated and already overtaxed. The Islander East proposal is merely a short, local tap-line between Connecticut and Long Island. Both Connecticut and Long Island only consume, rather than produce, natural gas. Thus, the proposal changes nothing in the regional picture except to shift a portion of the natural gas supplies within the regional market. All the contracts upon which Islander East bases its conclusions regarding the dire need for this pipeline involve solely the movement of natural gas *from* Connecticut *to* Long Island. Thus, the proposed line will have potentially adverse consequences to Connecticut ratepayers by sharply reducing a supply of natural gas in the State. This is not an idle concern. Independent regulators have already described the supply situation in New England as “tight-as-drum” and noted that inducing “additional demand stress . . . competing for the *existing* delivery capacity of New England’s pipelines has potentially ominous strategic implications for the security of New England’s power supply.” (Connecticut Attorney General’s Request for Rehearing of the Commission’s Approval of Preliminary Determination, dated January 18, 2002, citing Steady-State Analysis of New England’s Interstate Pipeline Delivery Capacity 2001-2005, produced for ISO-New England, Inc.) (Emphasis in original.) The Commission appears to recognize the

burden, and lack of benefit, to Connecticut's citizens in paragraph 74 of its Order of September 19, 2002, stating: "The fact that Algonquin's existing customers and Connecticut residents may not appear to benefit from the proposed projects [sic] does not mean that the proposed project's benefits do not outweigh any potential adverse impacts.

The market need identified by Islander East is suspect at best. The market analysis data underlying Islander East's statement of natural gas demand on Long Island predate the events of September 11, 2001 and the ongoing economic slowdown. An independent expert has prepared a recent report, attached hereto as Exhibit A, showing that the "need" for this project was based on "precedent agreements" entered into with the developers of proposed electric power generation stations on Long Island. However, these developers have either ceased project development or have made alternative arrangements for fuel supply. (Ex. A, p. 2.) Ultimately, Islander East has "substantially overstate[d]" the anticipated growth of the natural gas market on Long Island and has failed to properly consider the additional pipeline infrastructure programs currently proposed or under construction. *Id.* Hence, while Islander East continues to announce its project purpose as providing 285,000 Dth/day to Long Island, the supposed project need may be nonexistent – or, at most, dubious.

More importantly, even if one assumes the need for natural gas advanced by Islander East both exists and is a legitimate national (as opposed to parochial) interest, there is nothing in the existence of a market that presupposes that only one particular pipeline route can satisfy that need. Specifically, if there is a need for 285,000 Dth/d of natural gas on Long Island, then it obviously does not matter how that amount of natural gas gets there. Any pipeline route that reaches Long Island will do. Thus, the claim by Islander East that a certain amount of gas needs

to be made available cannot be used to support dredging a trench through a critical marine resource.

Islander East also attempts to promote its plans with a reference to the blackout of August 14th. All evidence indicates, however, that it was the operational failings of electric utility company operators that caused the blackout, rather than any deficiencies in natural gas supplies. Claiming that an *electric* blackout means new *gas* pipelines must be built is an insult to the intelligence of any decision maker. Also, that claim, too, is irrelevant. Even if more utility infrastructure is needed, this begs the question of where this infrastructure is to be placed. It is not enough to baldly assert that more cables and pipelines are urgently needed because this would support even the most ludicrous of siting alignments. Accepting the non-logic of Islander East, pipelines and power cables must immediately be installed through Yosemite National Park, the Grand Canyon, the Washington Monument, and Gettysburg National Park Battlefield because the country needs more infrastructure.

A final point in this regard is that the Appellant's discussion of national interest/security curiously omits the importance to the nation of securing its food supplies and natural resources. The cost to the nation of the loss of vital ecosystems is incalculable. Further, as noted before, the Connecticut shellfish industry is both an important water dependent commercial industry and a leading food production resource. As the DEP has noted, "Connecticut was still ranked #2 on the East Coast for oyster market harvest in 2001. Also, in 2001, Connecticut was ranked #1 for hard clam production on the East Coast." (Decision, p. 7.) If the Department of Commerce wishes to provide for adequate energy supplies and guard national food production, it is incumbent on the Department to ensure that this and other non-water dependent utility infrastructure in the Sound is sited in a manner that does not threaten shellfish or fin fish

resources. In fact, if the Appellant is to prevail, and considering the undisputed importance of Connecticut's shellfish industry, Islander East must prove that damaging the shellfish resources of the Thimble Islands area will enhance national security, in a way that no alternative can accomplish.

B. Consistency with the CZMA.

The second basis upon which an override is permitted is that the project is found by the Secretary to be consistent with the CZMA. Section 930.121 states that a designated activity is "consistent with the objectives or purposes of the Act" if it satisfies each of the following three requirements: specifically, 1) "The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner," 2) the national interest "outweighs the activity's [cumulative] adverse coastal effects, and 3) "[t]here is no reasonable alternative available." In determining if an alternative exists, "the Secretary may consider, but its not limited to considering, previous appeal decisions, alternatives described in objection letters, and alternatives and other new information described during the appeal." *Id.*

1. National Interest.

As noted above, federal regulations state that "national interest" for purposes of this appeal is defined in Sections 302 and 303 of the Act. Both of these sections emphasize that our natural resources are fragile and threatened and that the national interest is served by protecting our coastal resources from ill-advised development. They also establish that it is the states, and not federal agencies, that have the lead role in determinations about the protection of these resources.

Specifically, Section 302 states that: “There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.” This section refines this statement by adding:

The coastal zone is rich in a variety of natural, . . . recreational, ecological . . . and esthetic resources of immediate and potential value to the present and future well-being of the Nation.

. . .

The habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and the wildlife therein, are ecologically fragile, and consequently extremely vulnerable to destruction by man’s alterations. Important ecological, . . . and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.

The key to more effective protection and use of the land and water resources in the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone”

Similarly, Section 303 states that:

The Congress finds and declares that it is the national policy –

- (1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations; [and]
- (2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone

Sections 302 and 303 are of direct relevance to this appeal because Connecticut regulators, operating under a federally approved plan, have made a considered decision as to how to protect and preserve coastal resources that each and every party acknowledges are especially unique and precious. Upholding the agency’s decision will therefore both save coastal resources and encourage the state to exercise its responsibilities effectively. These points will be elaborated upon further below.

2. Coastal Resources

A central and undisputed fact in this case is that the area in which Islander East is planning its pipeline is one of unique and irreplaceable natural beauty and biological importance. Independent experts repeatedly refer to the Thimble Islands-Branford Harbor area as diverse and ecologically important. Even the company's expert acknowledged that it is a "very sensitive area" needing special protection. Army Corps and Department of Agriculture personnel uniformly agree that the area is environmentally critical.

It is also beyond dispute that Islander East's project will damage this environment and that, in many ways, this damage will be permanent. The Department of Agriculture has noted that past experience in the Sound clearly shows that utility construction work creates permanently altered ecosystems that, once disturbed, are no longer useful for commercial shellfishing. (EIS, p. 3-70.) As the EIS itself states, the project will result in long-term "conversion" of the shellfish habitat.²

Thus, the project, which is not a water-dependent use, will result in utterly eliminating the important water-dependent shellfishing activity from as many as 3000 acres of seafloor. Connecticut has spent millions of taxpayer dollars to develop a commercial shellfishing industry that produces the highest quality oysters and clams anywhere. There are only about 85,000 acres under cultivation in the Sound. This project, by itself, will remove an area equal to almost 4% of this total and this removal will be, for all practical purposes, permanent. Unfortunately, this is not the only such project under consideration for the Sound. For example, Northeast Utilities, a

² For unexplained reasons, Islander East baldly asserts at one point that areas destroyed by pipeline construction will recover. Supplemental Memorandum, p. 32. In the next sentence, however, the company admits that "oysters do not appear to have returned to areas disturbed by construction of the Iroquois pipeline. . . ." Id. In any event, each and every expert has agreed

Connecticut electric company, plans to install *four* new electric cables between Connecticut and Long Island. Cross-Sound Cable Company has already installed an electric transmission cable which cuts through other, extremely valuable oyster beds and has negotiated contracts that compel the leaseholding shellfishermen to agree not to cultivate along the power line. Other projects are also under consideration. The Sound has been, is being, and will continue to be, impacted by numerous utility projects that cumulatively pose a direct threat to the state's coastal resources.

The action of the DEP is, therefore, not only defensible, but is ultimately the only rational decision. The project will, undeniably, result in material adverse impacts to coastal resources. These impacts cannot be mitigated by any known technology or technique. Precious, and finite, water-dependent resources, built up at taxpayer expense over many years, will be destroyed in favor of a non-water dependent use. This result would flatly contradict the legislative policies underlying the CZMA as established in Conn. Gen. Stat. § 22a-92, and thus the DEP's denial should be upheld.

Islander East claims that the DEP's decision "is riddled with serious distortions of fact, unfounded assumptions and misstatements and mischaracterizations of environmental impacts." Supplemental Memorandum, p.6. Islander East then refers to the "perceived adverse impacts on water quality, shellfish habitat, water dependent uses and tidal wetlands." *Id.* Denouncing DEP's technical determinations as "simply factually incorrect," the company announces that the Thimble Islands ecosystems are "not unusually ecologically sensitive areas of importance but rather are features common throughout much of Long Island Sound." *Id.*

that pipeline construction results in permanent destruction of the seabed and commercial shellfishing is no longer possible in affected areas.

Contrary to Islander East's remarkable assertion, each and every state and federal environmental regulatory agency, and even the staff of FERC, has come to the same conclusion – this project will have severe, permanent, adverse environmental impacts on the unique and pristine natural resources of the Thimble Islands. As Dr. Stewart, probably the foremost academic expert on the ecosystems of the Long Island Sound, stated: “[The Thimble Islands area is] probably one of the most variable and unique I think along the coast of Connecticut . . . if you're looking at diversity as one of the biological axioms of healthy environment, the Thimble Islands has soft mud bottoms, oyster reefs, it has rocky outcrops, it has numerous shelters from any wind, a tremendous fish habitat. So this is smack dab in the middle of one of the most highly valuable, multiple marine ecological environments there is on the coast of Connecticut.” (Testimony of L. Stewart, April 12, 2002, p. 236.) Dr. Stewart's opinion does not stand alone. “The Thimble Islands region has been recognized by the U.S. Fish and Wildlife Service as a significant habitat complex in need of protection and has been incorporated into a larger New Haven Harbor Complex in the Northeast Coastal Areas Study: Significant Coastal Habitats of Southern New England and Portions of Long Island, New York. This 1991 report . . . was prepared for the U.S. House of Representatives and U.S. Senate Committees on Appropriations to identify those areas in southern New England and Long Island in need of protection for fish and wildlife habitat and the preservation of natural diversity.” Decision, p. 3.

Therefore, DEP's decision denying a certificate of consistency with the Coastal Zone Management Act is fully supported by independent federal and academic experts when it concludes:

In addition to this significant area of shallow water-land interface where biological diversity is the most rich and productive, this area hosts unique subtidal conditions including submerged rock reefs and a diversity of benthic habitats which range from soft mud to

compacted sand and gravel. . . . This area is generally recognized as an important colonial waterbird nesting habitat, a water fowl wintering area, and one of the only four primary seal haulout areas in the State.

Decision, p. 4. In fact, as the Decision notes, the unique “topography formed of bedrock is *found nowhere else in Long Island.*” Decision, p. 3. Emphasis added. Even Dr. Bohlen, an expert hired by Islander East, looked at the company’s data and concluded that “the resources [in the Thimble Islands area] include both the commercial fishery and the recreational aspects of the area, the view vista, and the diversity of the habitat, it’s a very sensitive area. . . .” (Testimony of Dr. Bohlen before the Connecticut Siting Council, April 16, 2002, p. 34.)

Ultimately, whatever Islander East claims in its brief, its expert, and all of the state’s experts, agree that the Thimble Islands area is truly unique and a vital natural resource. Furthermore, all of the reviewing federal agencies agree that the project will have a significant, adverse environmental impact. Even NOAA, the technical arm of the Department of Commerce, has made its views clear in its June 4, 2003 Memo: “NOAA Fisheries has expressed these conclusions and their justification to both FERC on May 20, 2002, during their National Environmental Policy Act review process (FERC/EIS – 0143F), and to the ACOE, New England District, on July 3, 2002 in response to their public notice for this project. Those impacts were characterized as two principal types-removal or burial of both resource and habitat within the actual construction corridor, and intensified suspended sediment-induced impacts in the far field. Both impact types have been shown to be associated with the pipe installation methodologies proposed by Islander East and are destructive to habitats and resources of concern to NOAA Fisheries.”

There is no doubt, therefore, that the impacts of this project are severe and will be felt in the last, pristine area of the Sound that has not suffered from poorly thought-out development.

What makes the impacts from this project the more galling is that at least one practicable alternative with materially less adverse consequences has already been identified.

3. Alternatives

There is another compelling reason to deny an override in this case. Pursuant to 15 C.F.R. § 930.121(c), a party seeking an override must show that “[t]here is no reasonable alternative available. . . .” In the present case, every federal agency that has commented on this matter has agreed that almost any other route would be less damaging and, in fact, the FERC-prepared EIS has identified a demonstrably less damaging alternate route. Therefore, an override must be denied.

As an initial matter, “[t]he purpose of the Islander East Pipeline Project is to provide transportation service for 285,000 dekatherms of natural gas from supply areas, including eastern Canada, to energy markets in Connecticut and New York (specifically Long Island and New York City).” (EIS, p.2) By its terms, therefore, the point of the project is to get natural gas to Long Island and New York City. Absolutely nothing in the defined project purpose necessitates use of any particular pipeline route.

In the present case, however, the issue of practicable alternatives has been examined and the conclusion is inescapable: feasible alternatives exist with far less adverse environmental consequences. To begin, even FERC in its EIS included a limited discussion of alternatives and concluded:

We evaluated six system alternatives, one of which, the ELI System Alternative, is based on Iroquois’ ELI Extension Project. The second is based on Tennessee’s planned Connecticut-Long Island Lateral Project. The third is based on other existing or planned systems in New York or New Jersey and the fourth is based on the local distribution company’s (KeySpan) existing facilities. We also considered two other system alternatives (the One-Pipe System Alternative and the Long Island System

Alternative) both of which would carry the total volumes of the ELI Extension Project and the Islander East Project.

We have determined that one of these system alternatives, the ELI System Alternative, is environmentally preferable because it has a shorter Long Island Sound crossing, avoids more shellfish leases, and would only have air quality and noise impacts onshore in Connecticut.

....

Based on our environmental analysis, the ELI System Alternative is environmentally preferable to the proposed route because it reduces onshore and offshore impacts, except for emissions.

EIS. (Emphasis added.)

The EPA also has stated that “We agree that the ELI alternative appears to be less damaging than the Islander East alternative” Letter from EPA to ACOE, dated Sept. 30, 2002. The Army Corps of Engineers similarly noted that

The analysis, although incomplete, appears to suggest that the [ELI] alternative would be practicable, shorter in length (both onshore and offshore), cross fewer streams, avoid designated shellfish beds, affect fewer residences, and minimize trenching in the nearshore environment. Consequently, the ELI alternative . . . appears to meet the stated project purpose and need while discernibly reducing potential adverse impact to the aquatic environment.

Letter of Christine Godfrey, Chief, Regulatory Division of the ACOE, dated June 17, 2002 to the FERC.

In sum, no one seriously disputes that better alternatives exist for this project. The EIS itself acknowledges this fact and thus, pursuant to 15 C.F.R. § 930.121 (C), an override of the DEP’s denial of a certificate of consistency is not available.

V. Adequacy of the Record.

As previously noted, both the burdens of persuasion and of proof are on Islander East. *See Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc.*, June 20, 1995, p. 7. (“[T]he Appellant bears the burden of proof and the burden of

Decision, p. 5. So extensive and enduring are the potential impacts of this project that Mr. John Volk, the former Director of the Connecticut Bureau of Aquaculture, submitted a letter to the ACOE more than a year ago in which he stated:

We have determined that the siting and the construction methods for the marine phase of the project will likely cause significant damage and harm to shellfish resources and shellfish habitat. Shellfish aquaculture, commercial and recreational shellfish harvest operations, are likely to be impacted as well. This determination is based on the review of the information provided in the above referenced documents, consultations, as well as staff field experience with a similar project. We therefore recommend that the marine portion of the current application be denied.

III. Denial of Certificate of Consistency.

In view of these facts, it is not surprising that the DEP, after a careful review, “determined that the activities as proposed by Islander East in the proposed location would cause significant adverse impacts to coastal resources and water-dependent uses and would, therefore, be inconsistent with the enforceable policies of the Connecticut CZMP.” (Denial, p. 2.)

Specifically, the DEP concluded that “[T]he Department has determined that the proposed work would cause significant adverse environmental impacts on coastal resources and would be inconsistent with the enforceable policies of the Connecticut CZMP.” Decision, p.3.

The DEP elaborated on this saying:

The proposed project will degrade water quality through the significant introduction of suspended solids; and degrade, irrevocably alter and permanently destroy essential fish habitat through alteration of the benthic environment. The siting of the non-water dependent pipeline through prime shellfish habitat would cause a permanent adverse impact to a water-dependent use by displacing a water-dependent use, shellfishing, with a non-water dependent use, natural gas transmission. Also, the proposed project will adversely impact tidal wetlands. (Denial p. 4.)

These conclusions were not arrived at lightly. Even after a comprehensive review of the initial application, DEP evaluated material submitted by Islander East in letters dated March 13,

2003, and March 27, 2003 as well as in “additional correspondence from Islander East in support of its application.” (Decision, p. 2.)

In addition to the detailed consideration of environmental impacts, the DEP carefully considered project alternatives and siting criteria that could avoid or minimize adverse project impacts. The Decision clearly identified at least one potential superior alternative route that has been identified by various regulators and further noted that if that route “does not meet the project purpose for an additional separate gas line to Long Island, there are a host of viable alternative locations, that, if fully explored, would likely reveal a site that both meets the project purpose and is acceptable with respect to Connecticut CZMP consistency.” (Decision, p. 9.)

Finally, in addition to detailing the serious environmental impacts of the project, and the “host” of potentially acceptable alternatives, the Decision describes numerous, specific failures of the applicant to provide adequate and timely responses to requests for information and concludes: “The missing information together with the insufficient alternative analysis necessarily render the various pending applications including this request for Federal Consistency Certification incomplete.” (Decision, p. 10.)

IV. Standard of Review

The relevant legal standard is clear. Fifteen C.F.R. § 930.120 permits the Secretary of Commerce to override a state denial of consistency if “the activity is [determined to be] consistent with the objectives or purposes of the [Coastal Zone Management] Act, or is necessary in the interest of national security.” Of course, both the burden of proof and the burden of persuasion are on the appellant, Islander East. 15 C.F.R. § 930.130. See Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc., June 20, 1995, p. 7. (“[T]he Appellant bears the burden of proof and the burden of persuasion.”)

A. National Security

Islander East's primary argument, underpinning its assessments of both national security and national interest, is the claim that energy supply is important, reliability is important, more pipelines provide greater reliability and supply, and therefore its proposed pipeline is important. This is a facile and extremely misleading 'argument.' More to the point, it has nothing to do with this case.

National security is defined in § 930.122 as requiring a finding that "national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." Islander East has not claimed, nor could it, that the military defense of the nation would be compromised if its commercial project were halted or delayed. Thus, the only issue is whether there is some "other national security interest [that] would be significantly impaired."

In this regard, Islander East's Memorandum of Law proceeds at some length to develop its argument that its project will, quoting FERC, "... benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas . . ." (Memorandum, p. 2.) Islander East goes so far as to quote the Secretary of Commerce to the effect that:

Greater use of natural gas can help lessen the Nation's reliance on foreign oil, reduce the nation's trade deficit, boost the U.S. gross national product, and as a result of these, strengthen our national interests.

(Memorandum, p. 6, citation omitted.) Finally, in its Supplemental Memorandum, Islander East, with complete disregard for the facts, invokes the electric energy blackout of August 14, 2003 as justification for its natural gas project.

persuasion.”) For Islander East to meet those burdens, the record must include sufficient information for review. For the Secretary to find for the Appellant, the Secretary “must make the findings specified in the regulations at 15 C.F.R. §§ 930.121 or 930.122. An absence of adequate information in the record inures to the State’s benefit because such an absence would prevent [the Secretary] from making the required findings.’ *Id.*

Islander East has never adequately documented the extent of the likely impacts from its project, the natural resources to be affected, or the range of appropriate alternatives. Beginning with the Draft Environmental Impact Statement, the EPA warned: “Unfortunately, the DEIS fails to provide the type of rigorous analysis required under NEPA to fully evaluate and consider the relative impacts of the alternatives or to support informed decision-making regarding the project.” Letter, EPA to ACOE, May 21, 2002.

Similarly EPA noted regarding the Final Environmental Impact Statement that

[T]he FEIS lacks the detailed information necessary to understand the direct, indirect and secondary impacts to wetlands and waters of the United States associated with the proposed project. Assessment of indirect and secondary impacts is essential to understanding the full scale and significance of environmental impacts This lack of detailed information . . . makes it difficult to determine the relative impacts of various alternatives

Letter of the EPA to the FERC, dated Sept. 30, 2002.

This egregious failure to provide basic alternatives data is not limited to the EIS. The

EPA notes:

In the §404 application package, section 2.5, . . . the applicant does not present a complete alternatives analysis. Rather, the application references the alternatives analysis conducted under the FERC application process and presented in the DEIS. EPA reviewed and commented on the alternatives analysis presented in the DEIS in our May 21, 2002 letter, which is enclosed. To summarize, we state that the analysis of system alternatives lacks detail necessary for an objective comparison of the relative environmental impacts of the alternatives. With the exception of

the Tennessee Connecticut-Long Island lateral project system alternative, eliminated from further study because it would require 60 additional miles of pipeline, the DEIS repeatedly cites a lack of sufficient information to fully analyze the various alternatives being considered to meet the project purpose and need, as required by NEPA, or the basic project purpose as required by the CWA. In particular the DEIS cites a lack of sufficient information regarding the one-Pipe alternative (pg 4- 3), the Brookfield to Milford loop (pg 4-13), the ELI Alternative (and thus any combination alternative incorporating the ELI alternative) (pg 4-18), and the Long Island System Alternative (pg 4-19). In other words, effectively all of the system alternatives to the Islander East project presented in the DEIS (and referenced by the §404 application) are described as lacking sufficient information to be analyzed.

Furthermore, our DEIS comment letter notes that an alternatives analysis must be conducted under CWA §404(b)(1), to determine the [least environmentally damaging alternative or LEDPA.] We cautioned that unless a significant amount of additional detailed information were gathered and presented on the project alternatives, this effort would be constrained by the lack of meaningful data on which to base an evaluation of environmental impacts. *Unfortunately, no additional data has been presented regarding project alternatives, and therefore the applicant has failed to demonstrate that the proposed project represents the LEDPA and can qualify for a §404 permit.*

Letter of the EPA to the ACOE, dated July 1, 2002, p 2. (Emphasis added.) As the EPA has said: “We would add that there may indeed be more than one other alternative with less adverse environmental impacts than the proposed project. . . . The lack of detailed information on the environmental resources impacted by the various alternatives, including the proposed alternative, prevents the evaluation of the significance of those impacts on the aquatic ecosystem, and therefore precludes compliance with the guidelines.” Letter, EPA to ACOE, dated July 1, 2002.

Similarly, the United States Army Corps of Engineers (“ACOE”), after its review of the draft EIS stated:

The analysis does not contain sufficient information to make a reasonable determination as to whether the proposed discharge will comply with the [ACOE] Guidelines.

The analysis, although incomplete, appears to suggest that the [ELI] alternative would be practicable, shorter in length (both onshore and offshore), cross fewer streams, avoid designated shellfish beds, affect fewer residences, and minimize trenching in the nearshore environment. Consequently, the ELI alternative . . . appears to meet the stated project purpose and need while discernably reducing potential adverse impact to the aquatic environment.

Letter of Christine Godfrey, Chief, Regulatory Division of the ACOE, June 17, 2002 to FERC.

Finally, the DEP's decision that is the subject of this appeal itself describes numerous, specific failures of the applicant to provide adequate and timely responses to requests for information and concludes: "The missing information together with the insufficient alternative analysis necessarily render the various pending applications including this request for Federal Consistency Certification incomplete." (Decision, p. 10.)

Because the Corps of Engineers, the EPA and the DEP have all noted, the record is fatally deficient in critical information regarding impacts and alternatives, the Secretary must dismiss this appeal and uphold the Decision of the DEP.

VI. Policy and the CZMA

Upon reviewing this appeal, there are compelling reasons for the Secretary to uphold the decision of the DEP. As discussed above, the project is particularly destructive and the location could not be worse. Furthermore, the company's assertion that its pipeline is needed because "more is better" does not address or refute the fact that a better alternative is clearly available. In addition, Congress' clear intent under the CZMA is to include the coastal states in the process. There are good reasons for this decision. The states are directly affected by the development and obliteration of coastal resources. The states already have, in most cases, deep experience in regulating coastal issues and have both the motivation and the ability to implement coastal review programs. Not surprisingly, Congress placed the task of CZMA review on those states willing to accept it.

In this case, DEP has twice reviewed and rejected this project on clear, well-supported technical grounds. These two careful and complete technical reviews by DEP of a project that has also been identified as causing severe environmental impacts by the EPA, NOAA and the Corps are plainly entitled to respect and deference by the Secretary.

Conclusion.

The EPA, the Corps of Engineers, DEP, NMFS, and the staff of FERC all agree that this project will have severe, adverse environmental impacts and that a preferable alternative exists. The proposed Islander East route will result in serious damage to vital coastal resources and permanently convert important areas of water-dependent activity to non-water dependent uses. Even assuming the need for the project as described by Islander East, other alternatives can meet that need with much less impact to the Long Island Sound. Finally, significant information is still lacking that is necessary for a proper evaluation of the project. Accordingly, Islander East's request for an override must be denied.


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CERTIFICATION

I hereby certify that a copy of the foregoing was sent via Airborne Express Overnight or mailed, first class postage prepaid on this 19th day of November, 2003 to:

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MEMORANDUM

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Assessment of "Need" for the Islander East proposed gas pipeline

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Introduction:

The Islander East project (the "Project") is a proposed natural gas pipeline running from Connecticut, across Long Island Sound, to Long Island, New York.¹ The project will interconnect with the existing C-system of the Algonquin pipeline ("AGT") at North Haven, CT, will enter Long Island Sound at Branford, CT, and will come ashore on Long Island at Wading River (near Brookhaven, N.Y.) and interconnect on Long Island with the gas distribution system of KeySpan Energy ("KeySpan"), the local gas distribution company (or "LDC") serving Long Island.

The Project also entails upgrades to the existing Algonquin pipeline system in Connecticut affecting approximately 13.7 miles of existing parallel pipelines and the installation of a new compressor station by AGT in Cheshire, CT. The Project proposes to lease these incremental facilities on the AGT system. Approximately 22.6 miles of the proposed new pipeline will be located offshore in Long Island Sound, 10.2 miles will be located on onshore in Connecticut and, 12 miles located onshore in Long Island. The Project is sponsored by a limited liability company formed by subsidiaries of Duke Energy, the owner of AGT, and KeySpan. The anticipated construction cost of the Project is \$149.6 MM and its originally anticipated in-service date was November 1, 2003. Commencement of construction has been delayed pending receipt of necessary regulatory and environmental permits.

The Project filed for a certificate of public convenience and necessity ("CEPCN") with the Federal Energy Regulatory Commission ("FERC") on June 15, 2001. FERC issued its Preliminary Determination ("PD") for the Project on December 21, 2001, in which it approved the economic and regulatory (non-environmental) aspects of the Project. *Islander East Pipeline Co. LLC*, 97 FERC ¶61,363 (2001). FERC reserved for later decision issuance of the certificate, pending its review of the environmental impacts of the Project, which it then decided, issuing the CEPCN to the Project, in its order issued on September 19, 2002, *Islander East Pipeline Co. LLC*, 100 FERC ¶61,276 (2002). Subsequent to these FERC approvals, the Project failed to receive its consistency approval under the Coastal Zone Management Act from the Connecticut Department of

¹ The Project is proposed to be approximately 44.8 miles in length and consist of a 24-inch, pipe with 900 pounds per square inch maximum allowable operating pressure.

Environmental Protection (“DEP”). In addition, the Project’s approval from the Army Corps of Engineers is still pending.

This report assesses and critiques the “need” for the proposed pipeline.

Summary and Conclusions:

Islander East premises the need for its project on precedent agreements indicating commitment for 260,000 Dth/day out of the total proposed incremental capacity of 285,000 Dth/day. The power plant developer counter-parties to these precedent agreements do not need the incremental capacity, either because (in the case of AES) they appear to have ceased project development or (in the case of ANP) have made alternate arrangements. The LDC counter-party is a partner in the proposed pipeline so it is not clear whether and to what extent its commitment to utilize the gas is binding. Islander East also premises the need for its project on a general assessment of the gas market on Long Island that substantially overstates the anticipated growth rate of gas usage on the island (by a factor of 4 or more) and inflates substantially the likely gas requirements of the power sector. In addition, the Islander East market study fails to analyze the ability of the substantial increases in gas pipeline delivery infrastructure planned and/or under construction for the New York City metropolitan area to fully displace any requirement for the relatively small incremental volumes which will be made available by the Islander East project.

Detailed Discussion:

The Project’s sponsor, in its application for a CEPCN to FERC, justified the need for the Project, in part, by submitting “precedent agreements” for rights to transport volumes of gas. These agreements were with different divisions of KeySpan for delivery to its New York City area (referred to as “KEDNY”) and Long Island area (referred to as “KEDLI”) local gas distribution systems and with two developers of proposed power plants on Long Island, namely: (a) AES Endeavor, a division of AES Corporation (AES Calverton); and (b) Brookhaven Energy Limited Partnership, an affiliate of American National Power (ANP Brookhaven). The Project will serve primarily as a radial extension of the existing AGT system and will permit the transportation of gas supply from the existing AGT system to delivery points on Long Island. The Project itself adds no new gas supplies, rather it is a build out and extension of the existing gas transportation infrastructure.

The specific transportation volume commitments indicated in each of the precedent agreements entered into by Islander East are as follows:

Table I – Islander East Proposed Transportation Volumes ²						
Proposed Customer:	Maximum Daily Quantity at Year Beginning					
	11/1/03	11/1/04	11/1/05	11/1/06	11/1/07	11/1/08
ANP Brookhaven	90,000	90,000	90,000	90,000	90,000	90,000
AES Endeavor	60,000	60,000	60,000	60,000	60,000	60,000
KEDLI maximum (after yearly election)	60,500	82,500	112,750	134,750	162,250	162,250
KEDLI minimum (after yearly election)	60,500	71,500	92,000	114,000	138,000	162,250
KEDNY maximum (after yearly election)	49,500	67,500	92,250	110,250	132,750	132,750
KEDNY minimum (after yearly election)	49,500	58,500	75,500	93,000	112,000	132,750
Total Maximum MDQ ³	260,000	300,000	355,000	395,000	445,000	445,000
Total Minimum MDQ	260,000	280,000	317,500	357,000	400,000	445,000

The proposed transportation capacity of the pipeline will be initially 285,000 DTH/day. The remaining 25,000 DTH/day of available capacity (after accounting for the volumes designated in the precedent agreements) is proposed for interruptible and short-term services. The timing and scope of upgrades to the line to increase the capacity to accommodate the maximum volumes authorized under the precedent agreements in later years is “not certain” (IE application, p.22). Required upgrades would occur through the addition of incremental compression capacity and pipeline looping. *Id.* at 22.

The Project sponsors assert that these projected incremental transportation volumes will be demanded and can be met by the proposed Project for delivery into Long Island and that, implicitly, existing and other new gas infrastructure projects are insufficient to meet the same requirements.⁴ As described in greater detail below, these assertions are problematic or incorrect and/or based on faulty assumptions.

Iroquois Pipeline also applied for a CEPCN with FERC to approve a pipeline project (the so-called ELI project) crossing Long Island Sound from Milford, CT, to Brookhaven, LI, with an anticipated delivery capacity of 175,000 DTH/day. This project, although executing precedent agreements with different counter-parties than Islander East, essentially paralleled the Islander East project and would have served the same ultimate market on Long Island. FERC issued a PD approving the non-environmental aspects of the ELI project by order, dated September 19, 2002, 100 FERC ¶61,275 (2002). Iroquois

² Application of Islander East Pipeline Company, LLC, FERC docket CP01-384-000 (June 15, 2001) at p. 21. (The Islander East FERC application is referred to hereafter as the “IE Application”).

³ MDQ is the maximum daily quantity measured in dekatherms. A dekatherm is 10 therms. A therm has the heating content equivalent of approximately 100 cubic feet of natural gas.

⁴ These assessments of the gas market on Long Island are contained in a report prepared by Merrimack Energy for Islander East and filed as Exhibit I-1 in the IE Application.

has reportedly subsequently withdrawn the project based on, among other factors, uncertainties relating to permitting and lack of adequate demand. Iroquois' withdrawal of the ELI project is, at a minimum, indication that incremental demand beyond that asserted to exist by Islander East is insufficient to support incremental pipeline capacity.

In the remainder of this report, we analyze the Islander East Pipeline Project's projected demand, by focussing on the asserted two groups of potential users of the facility – the power plant developers (AES and ANP) and the LDC (KEDLI and KEDNY).

Power Plant Developers.

The two power plant project developers which signed precedent agreements to utilize the pipeline, either are currently not going forward with further project development (AES) or have negotiated alternative arrangements to acquire gas supplies (ANP). The volumes nominated under these precedent agreements comprise more than half of the capacity of the line; so that uncertainty about the commitments of these developers is a critical issue for the viability of the pipeline.

AES, the parent of the entity developing the AES Calverton project, is a global power plant developer and operator. Along with many other companies in the electric power generation business during the past year, AES has experienced extreme financial stresses entailing the selling of power plant assets, the surrender of assets to secured lenders and the halting of power plant development efforts. Reflecting this status, the AES Calverton project has not advanced in development.⁵ While no official announcement has been issued canceling the project, it is anticipated that the project will not be pursued.

do not require it to utilize the Islander East pipeline, if the pipeline is not constructed. The ANP project was granted a certificate of environmental compatibility and public need by the New York State Board on Electric Generation Siting and the Environment ("NYSB") under New York's so-called Article X process, by orders dated April 8, 2002 (the "Recommended Decision) and August 14, 2002 (the "Final Order"), in Case No. 00-F-0566. The Final Order was later confirmed in an "Order Denying Petition for Rehearing and Granting Petition for Clarification" dated October 24, 2002. The Long Island Power Authority ("LIPA"), the franchised electric utility operating on Long Island, objected to the project and intervened actively against it during the course of the proceeding.

In its review of the ANP project, the NYSB noted that the project "may be able to directly connect to the proposed Islander East Pipeline facility." But, it also noted that the project

⁵ The New York Public Service Commission's web-site for Article X applications does not indicate that the AES/Calverton project has even initiated the Article X process by filing any preliminary scoping statements.

may negotiate with KeySpan Energy if the Islander East Pipeline Company facility is not a viable option. The topic agreement describes the upgrades KeySpan Energy's distribution system would require if it were to supply gas to the [ANP] Project. If the upgrades are installed, no adverse impacts are expected to occur to the existing gas transmission and distribution systems from the operation of the Project. Recommended Decision at 52.

The ANP project is anticipated to begin construction in the first quarter of 2003, with construction anticipated to take approximately two years.

Both precedent agreements entered into by Islander East and AES and ANP have termination and cancellation dates, which may be exercised if the pipeline project fails to receive its required permits by certain dates. Specifically, AES can cancel the precedent agreement, if permits are not granted to the pipeline project by certain outside dates, all of which have now passed. ANP can similarly cancel its precedent agreement. In addition, ANP and AES each had a one-time option, which must have been exercised by June 1, 2002, to reduce their capacity commitments by up to 40,000 and 20,000 DTH/day, respectively. It is not known whether these cancellation and/or volume reduction options have been exercised. If such rights have been exercised in light of the development uncertainties and issues facing the power projects, this would eliminate a substantial portion of the anticipated usage of the proposed pipeline.

The Merrimack Study, utilized to justify the Islander East project, also analyzed power plant sector gas demands as a general matter. The Study sought to demonstrate a continuing general need for gas supplies to serve new power plant construction on Long Island, buttressing the specific volumes nominated in the executed precedent agreements. This analysis, however, incorrectly identifies anticipated developments in that sector and inflates the likely gas requirements relating to power plant development.

Both the proposed ANP and AES power projects together (comprising over 1000 MW in installed capacity) and the ANP project alone exceed the projected growth in summer electric peak load on Long Island of 313 MW for the period 2002-2005.⁶ It is also the case, that new electric generating capacity, if constructed, will operate typically at substantially improved efficiencies when compared with older generation, with conversion efficiencies (converting a given amount of gas into electricity) nearly 40% better than existing generating facilities. Thus, if the ANP plant is constructed it can be anticipated to displace existing oil and gas-fired electric generation located on Long Island, producing more power utilizing substantially less gas than equivalent generation produced by existing facilities. The Merrimack Study also incorrectly assumed that

⁶ New York Power Alert, II (2002). The Power Alert II study issued by New York Independent System Operator ("NYISO") substantially revised the forecasts for incremental power generation in New York from those utilized by Islander East in its market study. Power Alert II revised the need for new electric generation in New York downwards by 17%. This reduction was due to, among other things, a shift in some electric demand to PJM, the power pool serving primarily Pennsylvania, New Jersey and Maryland, reductions in electric demand due to 9/11 and the recent installation of 440 MW of peaking generation by the New York Power Authority throughout the NYC metropolitan area.

**Office of Attorney General
State of Connecticut
Islander East Project "Need" Analysis Update
August 13, 2003**

1. Introduction and Summary:

This memorandum provides an update of a previous report analyzing the "need" justification for the Islander East natural gas pipeline project (the "Project"), prepared in March, 2003 (the "Initial Report").

The memorandum focuses on two developments of material importance to the "need" justification for the Project, namely:

- (a) changes in the pace and magnitude of development of Eastern Canadian off-shore natural gas resources; and
- (b) changes in projections of the price of natural gas.

As described below, both these developments are adverse to the viability of the Project and make the Project's justification of need more problematic than as described in the Initial Report.

2. Eastern Canadian Off-Shore Natural Gas Resources.

In its application to the Federal Energy Regulatory Commission ("FERC"), the Project emphasized as a major benefit justifying the Project that it afforded Long Island and Connecticut greater access to off-shore Eastern Canadian natural gas. *See, Application of Islander East Project*, FERC docket CP01-384-000 *et al.*, (June 15, 2001) pp. 12, 15 and Exhibit I-1, Merrimack Energy, *Islander East Market Study (June, 2001)* (sometimes referred to below as the "Merrimack Study") pp. 3, 4. By implication, if the Project afforded access to natural gas sourcing from eastern Canada by way of backhauls on the Algonquin pipeline, as well as existing gas delivery arrangements from western Canada and the US Gulf Coast, the Project presumably would improve the flexibility of gas supply to its potential customers. Recent disappointing results in natural gas exploration and production activities in off-shore Eastern Canada, however, substantially undercut this important premise for the Project.

Offshore Canadian natural gas production began at the end of 1999, with the commencement of production at the Sable Offshore Energy ("SOE") Project, which supplies the newly constructed Maritimes and Northeast Pipeline ("MNP"). MNP connects through eastern Canada across Maine to the northern terminus of the existing Tennessee Gas Pipeline in northeastern Massachusetts. Production in offshore Canada occurs under very difficult conditions, requiring a relatively large infrastructure investment in both deep-sea exploration wells and pipeline gathering and ocean-to-shore

delivery systems. The National Energy Board of Canada (“NEB”) estimates that stand-alone project viability requires at least 1.5 – 6 Tcf¹ of reserves to justify this investment, with a development time-frame of approximately 6 years.² Individual well development is estimated to cost in excess of \$50 million.³ These thresholds for development viability are substantially greater than for equivalent onshore development in other natural gas basins on the continent and can be anticipated to discourage development of the offshore Eastern Canadian natural gas prospects.

SOE began to experience a decline in production in 2002, requiring an acceleration of development of nearby fields in order to maintain production levels.⁴ In addition, the one additional potential provider of gas supplies over the next five years, EnCana’s Deep Panuke project, was put on hold indefinitely in February of this year.⁵ EnCana reported an estimated three and one half years of potential production available from the find, which very likely does not justify the incremental investment required to bring the field into production.⁶

Various parallel developments echo the current view of poor prospects for offshore Eastern Canada gas production. These include: (a) deferral of any expansion in the MNP. In April, 2003, MNP asked that its filing at FERC for expansion of its facilities’ throughput capacity to New England by 400,000 Mcf/Day be put on hold.⁷ FERC continues to process the application, but awaits a status report from the MNP sponsors by December, 2003.⁸ The EnCana gas production would have utilized the expanded capacity on the MNP line; with its cancellation the prospect for expansion of the MNP is substantially reduced; and (b) El Paso Corporation announced the postponement of its

¹ Tcf means trillion cubic feet.

² NEB, *The Maritimes Natural Gas Market: An Overview and Assessment* (June, 2003) (the “NEB Study”), p. 12.

³ Alexander’s Oil and Gas Connections, *Nova Scotia’s Offshore Oil Position Looks Foggy*, (June 3, 2003).

⁴ NEB Study at 11. Others have reported that reserves available to the SOE Project, originally made in 1979, now are estimated at less than one third of the original estimates. Alexander’s Gas and Oil Connections, *Nova Scotia’s Offshore Oil Position Looks Foggy* (June 3, 2003).

⁵ EnCana Press Release (Feb. 14, 2003).

⁶ *Id.*

⁷ The NEB Study reports the incremental capacity applied for by MPN as 400,000 Mcf/Day. NEB Study at 10. FERC reports it as 385,000 Dth/Day. 104 FERC ¶ 61,143 at para. 1 (July 28, 2003). This constitutes nearly a doubling of MNP’s current daily throughput capacity from the Maritime Canadian provinces. “Mcf” means thousand cubic feet.

⁸ *Maritimes and Northeast Pipeline LLC*, 104 FERC ¶61,143 (July 28, 2003).

proposed Blue Atlantic pipeline project, entailing the construction of an offshore pipeline from the Eastern Canadian offshore production facilities to the New York City area.⁹

Absent additional supplies from offshore Eastern Canada, the presumed expansion in flexibility of the gas delivery system attendant on the Islander East project is substantially reduced. In these circumstances, Islander East, rather than facilitating bi-directional supplies and increased flexibility, instead may primarily wind up competing for scarce north-bound natural gas pipeline delivery capacity into New England from the existing Algonquin and Tennessee natural gas pipelines serving New England from the south.

3. Natural Gas Pricing.

In its filing at FERC for a certificate of public convenience and necessity (“CPCN”), the Project relied on a market assessment which projected high rates of growth in annual natural gas sales to customers in Keyspan’s local distribution gas company franchise on Long Island and to electric generators located on the Island. Merrimack Energy, *Islander East Market Study* (June, 2001).¹⁰ As noted in the Initial Report, these anticipated high rates of growth in gas consumption are highly problematic. Moreover, the Project’s market assessment appeared not to have undertaken any analysis of the responsiveness of consumption growth to the changes in the price level and price volatility of natural gas.

Since the preparation of the market assessment supporting the Project’s FERC application, natural gas pricing has exhibited substantial upward movement on average (almost double) and dramatically increased volatility, even when compared with alternative fuels.¹¹ A chart is attached showing changes in monthly average prices of natural gas at the wellhead as reported by the US Energy Information Administration (“EIA”) which demonstrates this development.

These increases in price level and price volatility can be anticipated to reduce materially annual growth rates for gas consumption assumed in the Project’s market assessment, obviously developed based on lower and less volatile gas pricing prevalent at the time of the preparation of the assessment.¹² Even though the price elasticity of residential

⁹ Alexander’s Gas and Oil Connections, *Nova Scotia’s Offshore Oil Position Looks Foggy* (June 3, 2003). Note that in the Initial Report the Blue Atlantic project was listed as one of many other gas delivery facilities under development or in construction to serve the New York City area. Removing the Blue Atlantic project from that analysis still leaves a number of projects with sizeable incremental new capacity under development or construction to serve the metropolitan New York City area.

¹⁰ The Report was filed as Exhibit I-1 to Islander East’s application for a CPCN with FERC

¹¹ See, e.g., Wall Street Journal, *Concern Rises About Inadequate US Natural Gas Supply* (May 23, 2003); Wall Street Journal, *Natural Gas Prices Are Likely to be Higher and Amid Tight Supplies* (April 30, 2003).

¹² The EIA’s projection of future gas prices is up and projection of national gas consumption growth is down significantly from prior forecasts. See, Railroad Commission of Texas, *Natural Gas Trends* (July 14, 2003)(“The average wellhead price of natural gas is projected to be \$4.73, \$4.65, \$4.76, and \$3.96 per Mcf for the 3rd and 4th quarters of 2003 and 1st and 2nd quarters of 2004, respectively, according to the Energy Information Administration’s (EIA) July 2003 “Short-Term Energy Outlook.” The price of natural gas

demand for natural gas may be relatively low, the severe price swings in natural gas can be presumed to have a significant effect on overall annual incremental growth rates and important adverse impacts on more price elastic commercial and industrial use of natural gas. EIA, presumably in part reflecting these changes in pricing behavior, has dramatically decreased their forecasts of annual consumption growth in natural gas. In its 2001 annual report, EIA projected national annual growth at 3.4% during 2000-2002 and 2.3% thereafter.¹³ EIA's July 2003 "Short-Term Energy Outlook" now projects natural gas demand to decrease by 0.1% from 2002 to 2003 and to increase by 1% from 2003 to 2004.

Most notably, Federal Reserve Board Chairman Alan Greenspan recently, in his testimony before the US House Energy and Commerce Committee, underlined the tightening of the supply-demand balance for natural gas, the longer term fundamental upward movement in price and the related prospect for reduced consumption in response to price increases.¹⁴ Increased price volatility also discourages investment in supply which could, at least in part, counter-balance these trends, as gas production companies are less likely to invest if price increases are highly variable.¹⁵

These trends in natural gas pricing further support the conclusion of the Initial Report that incremental gas consumption requirements on Long Island were substantially overstated in the Project's market assessment. Correspondingly, the incremental need proposed to be addressed by the Islander East Project is significantly less than that set forth in the Project's need justification.

averaged \$2.96 for 2002, and is projected to average \$4.97 for 2003, and \$4.34 for 2004. According to the EIA, U.S. natural gas demand is expected to decrease by 0.1 percent from 2002 to 2003 to 22.39 Tcf, and increase by 1.0 percent from 2003 to 2004 to 22.62 Tcf." The Project's own market assessment had estimated an overall (including both electric and gas distribution demand) annual increase in Long Island gas consumption of 2.5%. Merrimack Study, p. 54. The study did not address the potential impacts on gas consumption growth resulting from variations in price.

¹³ EIA, *U.S. Natural Gas Markets: Recent Trends and Prospects for the Future* (May, 2001) pp. xii, xiii.

¹⁴ See Wall Street Journal, *Verbatim Text of Greenspan's Testimony on Natural Gas* (June 10, 2003) (Chairman Greenspan stated in relevant part: "Yesterday the price of gas for delivery in July closed at \$6.31 per million Btu. That contract sold for as low as \$2.55 in July 2000 and for \$3.65 a year ago. Futures markets project further price increases through the summer cooling season to the peak of the heating season next January. Indeed, market expectations reflected in option prices imply a 25 percent probability that the peak price will exceed \$7.50 per million Btu. Today's tight natural gas markets have been a long time in coming, and futures prices suggest that we are not apt to return to earlier periods of relative abundance and low prices anytime soon.

In summary, the long-term equilibrium price for natural gas in the United States has risen persistently during the past six years from approximately \$2 per million Btu to more than \$4.50. The perceived tightening of long-term demand-supply balances is beginning to price some industrial demand out of the market. It is not clear whether these losses are temporary, pending a fall in price, or permanent.").

¹⁵ See, e.g., EIA, *Natural Gas Markets: Recent Trends and Prospects for the Future* (May 2001), p. xi.

EIA Reported Monthly Average US Natural Gas Wellhead Price

