

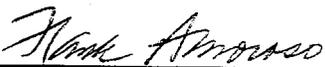
UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Islander East Pipeline Company, L.L.C. )  
 )  
Appellant, )  
 )  
- against - )  
 )  
State of Connecticut Department of )  
Environmental Protection, )  
 )  
Respondent. )

SUPPLEMENTAL MEMORANDUM OF  
ISLANDER EAST PIPELINE COMPANY, L.L.C. IN FURTHER SUPPORT OF  
APPEAL FROM A COASTAL MANAGEMENT PLAN OBJECTION OF FROM AN  
OBJECTION OF THE STATE OF CONNECTICUT DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, TO A CONSISTENCY  
CERTIFICATION FOR THE ISLANDER EAST PIPELINE PROJECT

Respectfully submitted,

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## PRELIMINARY STATEMENT

This Memorandum is submitted to supplement the Record<sup>1</sup> following the Connecticut Department of Environmental Protection's ("CTDEP") Denial on Remand of Islander East Pipeline Company, L.L.C.'s ("Islander East") request for a consistency determination, issued on July 29, 2003 ("Denial on Remand").<sup>2</sup> Pursuant to § 307(c)(3)(a) of the Coastal Zone Management Act (the "CZMA") and § 930.127 of the CZMA Regulations administered by the National Oceanic and Atmospheric Administration ("NOAA"), Islander East reiterates its request to the Secretary of Commerce (the "Secretary") for federal override of CTDEP denial. The Project satisfies the standard set forth in the statute and regulations, to wit, that the Project is in the national interest and the national interest outweighs any adverse environmental impacts that may result from the Project.

The Islander East Pipeline Project ("Islander East" or the "Project") is a proposed 44.8 mile long interstate natural gas pipeline, of which 22.6 miles will cross Long Island Sound between the states of Connecticut and New York. The Project was certificated by the Federal Energy Regulatory Commission ("FERC") on September 19, 2002 ("Certificate Order") following a complete National Environmental Policy Act ("NEPA") review. In issuing its certificate, FERC approved Islander East's proposed construction methods and found the project to be both environmentally acceptable and critically needed to ensure the security and reliability of the natural gas delivery system to Long Island and the region. FERC reaffirmed its Certificate Order in its Order on Rehearing

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<sup>1</sup> Most of the documents referenced in this Supplemental Memorandum are contained in the Exhibit Binders (1-4) submitted with Islander East's original memorandum. Additional documents referenced are contained in Exhibit Binder 5 submitted herewith.

<sup>2</sup> A copy of the Denial on Remand, dated July 29, 2003 is included in the Exhibits accompanying this Memorandum.

issued on January 18, 2003 (the "Order on Rehearing") and specifically addressed concerns raised by the Attorney General for Connecticut and CTDEP in response to their requests for review of the Certificate Order. Following issuance of the Certificate Order, the Order on Rehearing and extensive consultations with CTDEP and other interested agencies, Islander East agreed to modify its construction techniques, at a cost of approximately \$8 million, to reduce further the environmental impacts that FERC found to be acceptable.

CTDEP's denial of consistency certification on remand following those consultations and the submission of significant new information by Islander East is baseless.<sup>3</sup> The Denial on Remand is riddled with serious distortions of fact, unfounded assumptions and misstatements and mischaracterizations of environmental impacts. The purpose of this Memorandum is to correct the Record so that the Secretary is able to render his decision based on **supportable** facts. Islander East's detailed rebuttal to specific environmental matters addressed in the Denial on Remand is set forth in the Appendix hereto. The body of this Memorandum supplements Islander East's original memorandum by responding to the other points raised by CTDEP in the Denial on Remand.

## **I. PROJECT DESCRIPTION AND PROCEDURAL HISTORY**

### **A. Project Description**

The Islander East Project is a cooperative effort by two separate companies, Islander East (owned equally by Duke Energy and KeySpan Corporation) and Algonquin

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<sup>3</sup> The Attorney General of Connecticut issued a press release explaining that the Denial on Remand was part of a campaign to "vigorously and vociferously fight this short-sighted, self-serving project." July 30, 2003 Press Release, available at <http://www.cslib.org/attygenl/mainlinks/linkindex3.htm>. Clearly the advancement of that objective is completely unrelated to the objectives of the CZMA and, as noted below, is an abuse of the federal consistency process.

Gas Transmission Company (“Algonquin”), to provide much-needed natural gas transportation capacity to serve energy markets in Long Island, New York City and Connecticut. Islander East proposes to construct and operate new interstate natural gas pipeline facilities in Connecticut and New York, while Algonquin proposes to construct a new compressor station, upgrade its existing interstate natural gas pipeline facilities in Connecticut, and lease the resulting increased capacity to Islander East. The Project will be comprised of the leased capacity on Algonquin and approximately 44.8 miles of new 24-inch-diameter pipeline extending from an interconnection with Algonquin’s existing system near North Haven, Connecticut, across the Long Island Sound, with landfall in Shoreham, New York and terminating in Brookhaven, New York. Roughly 10.2 miles of the pipeline will be located in Connecticut and 12 miles will be located on Long Island. The remaining 22.6 miles of pipeline will be located in Long Island Sound, of which 11.0 miles will be located in Connecticut waters and 11.6 miles will be located in New York waters.<sup>4</sup>

The Project is designed to transport 260,000 decatherms (“Dth”) per day of natural gas to gas-fired electric generating facilities and local gas distribution companies (“LDCs”) on Long Island and in New York City and to provide a second, separate natural gas transmission crossing to Long Island.<sup>5</sup> Islander East has contracted to provide transportation service to KeySpan Gas East Corporation, d/b/a KeySpan Energy Delivery

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<sup>4</sup> *Certificate Order*, 100 F.E.R.C. 61,276 at ¶¶ 5, 6; Connecticut Siting Council, Findings of Fact Regarding Islander East Application, Docket No. 221, at 5 (Aug. 1, 2002) (“Siting Council Findings of Fact”). See *Certification of New Interstate Natural Gas Pipeline Facilities*, Statement of Policy, 88 F.E.R.C. 61,227 (Sept. 15, 1999).

<sup>5</sup> *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 6. Islander East’s facilities are designed to transport the design capacity of 260,000 Dth per day and up to 285,000 Dth per day when factors change on Algonquin’s C-System. *Id.* at n. 3.

Long Island, The Brooklyn Union Gas Company, d/b/a KeySpan Energy Delivery New York (jointly "KeySpan") and to an electric generation facility to be operated by Brookhaven Energy Limited Partnership, an affiliate of American National Power, located in Yaphank, New York. The KeySpan companies are LDCs that currently serve approximately 1.8 million consumers in the New York City boroughs of Brooklyn, Queens and Staten Island, as well as Long Island.

## **B. Procedural History**

### **1. Connecticut Declines To Issue Consistency Determination**

On April 12, 2002, Islander East submitted a request to CTDEP for a Federal Coastal Zone Management Consistency Determination. By letter dated October 15, 2002, CTDEP advised Islander East that the Project was inconsistent with Connecticut's federally-approved coastal zone management plan.<sup>6</sup> CTDEP acknowledged that energy facilities like the Project are, by definition, facilities which are in the national interest, but, nevertheless, determined that the Project would cause significant adverse environmental impacts on coastal resources.<sup>7</sup> Specifically, CTDEP cited perceived adverse impacts on water quality, shellfish habitat, water dependent uses and tidal wetlands.<sup>8</sup> In addition, CTDEP expressed a preference for the so-called Eastern Long Island ("ELI") System Alternative. This is a hypothetical alternative based on facilities owned or to be constructed by another pipeline company, Iroquois Gas Transmission

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<sup>6</sup> Letter from Arthur J. Rocque, Commissioner, Connecticut Department of Environmental Protection, to Islander East Pipeline Co., LLC, at 5 (Oct. 15, 2002) ("CTDEP Consistency Denial Letter").

<sup>7</sup> *CTDEP Consistency Denial Letter* at 5.

<sup>8</sup> *CTDEP Consistency Denial Letter* at 3-4.

System ("Iroquois"). Iroquois has since withdrawn its ELI proposal, thereby rendering the hypothetical ELI System Alternative even more evanescent.<sup>9</sup>

## **2. Appeal to the Department of Commerce**

On November 14, 2002, Islander East filed a Notice of Appeal of Connecticut's denial of the consistency determination with the Secretary, seeking a federal override of Connecticut's denial.<sup>10</sup>

## **3. Stay of Appeal and Subsequent Remand**

On March 14, 2003, the parties requested that the Secretary stay the processing of the appeal to allow settlement negotiations to occur between Islander East and CTDEP. This stay was granted and subsequently extended until May 23, 2003. By letter dated May 15, 2003, Islander East requested that the matter be remanded to Connecticut based on Islander East's submission of significant new information regarding the Project and other matters which would affect Connecticut's consistency determination. The remand was granted by letter dated June 2, 2003. The significant new information related to the modifications to its construction techniques which Islander East had agreed to in the course of its consultations with the State and Federal agencies. Thereafter, by letter dated July 29, 2003, Connecticut issued its Denial on Remand.

## **II. RESPONSE TO THE DENIAL ON REMAND**

### **A. Long Island Sound Impacts**

The centerpiece of the Denial on Remand is CTDEP's assertion that the pipeline route extends through the center of the Thimble Islands complex and will have significant

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<sup>9</sup> CTDEP Consistency Denial Letter at 5.

<sup>10</sup> Notice of Appeal to Secretary of Commerce Donald L. Evans from an Objection by the State of Connecticut, Department of Environmental Protection, to a Consistency Certification for the Islander East Pipeline Project (Nov. 14, 2002) ("Notice of Appeal").

adverse environmental impacts on that area and on other aspects of the marine environment. These assertions are simply factually incorrect. As shown on the map appearing on the next page, Islander East intentionally selected a pipeline route to **avoid** the Thimble Islands. In addition, the pipeline was routed further west to avoid the reefs located on the western edge of the Thimble Islands (Browns, Wheaton, Inner, and NW).

Moreover, the pipeline route does not traverse other ecologically sensitive areas of importance. Islander East undertook numerous studies to characterize the biological and physical attributes of the Project area and had numerous discussions with local fishermen and state and federal regulators, in order to document existing resources and identify potential environmental concerns. These studies indicate that the communities crossed by the pipeline route are, in fact, not unusually ecologically sensitive areas of importance but rather are features common throughout much of Long Island Sound. CTDEP's current assertions to the contrary are flatly inconsistent with its submissions to the Connecticut Siting Council, in which CTDEP stated that the seafloor along the pipeline route is "generally featureless, and comprised of soft sediments . . . that are typical of Long Island Sound" and that habitat would be only "temporarily disrupted" and would "recover."<sup>11</sup>

In addition, Islander East has committed to using the horizontal directional drill ("HDD") construction technique, a trenchless technology that will avoid disturbing the

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<sup>11</sup> Letter from CTDEP to the Connecticut Siting Council, May 13, 2002. Similarly, CTDEP's original concerns about the pipeline route, as set forth in its original denial, focused on nearshore impacts. CTDEP's new found concerns about impacts in areas further offshore did not materialize until after Islander East had addressed the nearshore impacts and filed its modified construction techniques during the remand. As demonstrated in the Appendix, CTDEP has also substantially misused a variety of technical data. For example, CTDEP asserts that the construction of the Iroquois project resulted in permanent adverse effects to shellfishing, yet the published studies support the opposite conclusion. Similarly, CTDEP's reliance on the installation of a Hudson River water project over thirty years ago to demonstrate the impacts of construction using current technology is disingenuous.

seafloor sediments, for approximately 0.70 mile of construction under the Connecticut waters of Long Island Sound. South of the point where the HDD exits on the seafloor, the pipeline route was sited in muddy substrates in order to avoid rocky subtidal areas, reefs, eelgrass beds, glacial till, and other sensitive habitat types. FERC's analysis of the proposed routing and construction of the Islander East Project:

*... included an exhaustive study of the project's environmental impacts as required by the National Environmental Policy Act and other environmental statutes; this analysis focused in particular on the impact the proposed project will have on Long Island Sound ... this analysis, which was subject to review and comment by local, state and federal agencies, the public and other entities, concluded that the project would have acceptable environmental impacts, including the crossing in Long Island Sound.*

*[t]he environmental impacts associated with the Sound water crossing have been fully and carefully reviewed by the Commission in a public process and have been found to be acceptable. While we are mindful that the development and construction of pipeline facilities present significant environmental challenges, the Commission must balance these considerations with its overriding responsibility under the NGA to ensure the timely development of an adequate, reliable energy infrastructure.*

*The project will contribute to Long Island's energy security, a particularly vital national consideration at the present time ...*<sup>12</sup>

FERC's final Environmental Impact Statement ("EIS"), which evaluated the proposed routing through Long Island Sound and the potential for sedimentation and impacts on shellfish and benthic organisms at length, concluded that, based on information provided by Islander East; field investigations by Commission staff; literature research; alternatives analysis; comments from Federal, state, and local agencies (including Connecticut agencies); and input from public groups and individual

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<sup>12</sup> Letter from Pat Wood, III, Chairman of FERC, to Mr. Scott Gudes, Deputy Undersecretary for Oceans and Atmosphere, U.S. Department of Commerce, dated March 11, 2003.

citizens, construction and operation of the Islander East Pipeline Project would result in only "limited adverse environmental impact." In addition, the Connecticut Siting Council arrived at a similar conclusion after completing its own independent evaluation. These determinations were made **prior to** the development of the modified construction methods by Islander East, which, as noted, further reduce the environmental impacts of constructing the Project.

Islander East concurs with the conclusions of the final EIS and the Connecticut Siting Council and submits that the Project will result in only temporary, generally minor, and short term environmental impacts. This view is supported by Dr. Roman Zajac, an expert in the field of benthic communities in Long Island Sound. According to Dr. Zajac, the modified construction techniques proposed by Islander East would minimize impacts on benthic communities. Following his review of the modified construction methods and the modeling results, Dr. Zajac states:

*There will be no burial and smothering of seafloor areas adjacent to the transition basin [HDD exit area] and dredge portion of the pipeline with the dredge spoil, reducing the overall area of direct, severe impact. The removal of dredge spoils will eliminate winnowing of sediment on a continual basis to surrounding habitat, and more critically, the potential for severe erosion in the case of a storm event during the construction period.*<sup>13</sup>

CTDEP simply ignored Dr. Zajac's report.

**B. Significant New Information**

Throughout the development of the Project, Islander East has continued to work with Federal and State regulatory agencies to develop construction methods in order to minimize environmental impacts. Islander East has adopted a number of modified

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<sup>13</sup> TRC Corporation, R. Zajac, *Evaluation of Benthic Impacts Associated with Islander East's Modified Offshore Construction Techniques* submitted to CTDEP on March 14, 2003.

offshore construction methods which are enhancements to FERC-approved techniques, including :

- reducing the depth of the pipeline trench along the dredged trench section,<sup>14</sup> which will reduce the area of seabed disturbance and decrease the volume and duration of dredging;
- clamshell dredging and storing dredged material on barges, which will avoid seafloor disturbance and sedimentation due to sidecasting dredged material on the seafloor, in the nearshore areas;<sup>15</sup>
- importing engineered backfill consisting of rock topped by sand to place in the dredged trench and HDD exit after the pipeline is installed to minimize further sedimentation and to restore habitat;
- using a tremie tube to place the backfill material into the dredged trench section, which will allow for more controlled backfilling;
- reducing the number of anchored barge passes for the subsea plow section from four to three, which will in turn minimize the duration of construction, reduce the

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<sup>14</sup> In a letter to FERC dated May 17, 2002, CTDEP indicated that burying the pipeline 3 feet below the seafloor would be acceptable, but recommended a shallower burial depth to minimize sediment disturbance during installation. Islander East reduced the burial depth of the pipeline from 3 feet to 18 inches along the dredged trench section (*i.e.*, between MPs 10.9 and 12.0).

<sup>15</sup> The Final Report on the installation of the Iroquois pipeline which CTDEP cites in support of its contention that pipeline installation is likely to result in adverse impacts on shellfish is completely inapplicable, since that Report studied the installation of pipeline facilities that involved sidecasting dredged spoil on the seafloor, where Islander East will place dredged spoil on barges for offshore disposal. More important, the Final Report concluded that installation of the Iroquois facilities did not result in adverse impacts. See *An Investigation of Sedimentation Induced by Gas Pipeline Laying Operations in the Vicinity of the Oyster Bed Lease Areas, Milford, Connecticut, Final Report*, Bohlen, Cohen and Strobel, University of Connecticut (1992) ("pipeline placement produced no measurable variation in suspended material concentrations with values remaining equal to or less than those observed during the pre-project period"). *Id.* at 28.

area affected by subsea plowing, and reduce the number of anchor strikes and cable sweeps associated with subsea plowing.

As shown in Tables 1 and 2, Islander East's use of these modified construction methods will avoid, or, significantly reduce, the environmental impacts associated with the originally proposed methods by reducing the area affected by construction, the duration of construction, and the extent and depth of sediment deposition.

Construction Technique as Stated in the Final EIS	Final EIS Connecticut (acres)	Proposed Amendment Barge Spoil (acres)
HDD Exit Area Direct & Indirect Impacts	23.8	8.4
Dredge Section Direct & Indirect Impacts	115	5.6
Total Acreage	138.8	14.0
Change in Acreage	N/A	-124.8 (- 90%)

Table 2

Acreage Comparison between Four Subsea Plow Passes and Three Subsea Plow Passes

Construction Technique as Stated in the Final EIS	Final	Reduced	Percent Decrease	Final	Reduced	Percent Decrease
	EIS All Waters (acres)	Plow Passes All Waters (acres)		EIS CT Waters (acres)	Plow Passes CT Waters (acres)	
Anchor Strikes	9.7	7.3	24.7%	4.3	3.2	25.6%
Anchor Cable Sweep	2,807	2,307	17.8%	1,245	1,023	17.8%
Plowing/Burial	183	183	0%	81.2	81.2	0%
Total Acreage	3,000	2,497	16.8%	1,331	1,107	16.8%
<b>Change in Acreage</b>	N/A	<b>-503</b>		N/A	<b>-224</b>	

Islander East's sediment modeling demonstrates that implementation of the modified construction methods will minimize the nearshore sedimentation to the area immediately adjacent to the HDD exit area and the dredged trench. Furthermore, the placement of the excavated material on barges will eliminate disturbance by spoil mounds and eliminate the secondary impacts of sediment transport from wave action and tidal currents. Specifically, sediment modeling indicates that no area in the dredge trench section will experience sediment depositions greater than 3 millimeters, which is less than the critical burial depth of juvenile oysters and clams (Opinion dated September 5, 2002 in Docket No. 224, Connecticut Siting Council).<sup>16</sup>

While the Denial on Remand briefly references these changes, the Denial states in conclusory fashion that these dramatic and costly modifications are not enough. It is difficult to conceive of a natural gas pipeline water crossing less disruptive to sensitive coastal resources than Islander East as now proposed. While Islander East acknowledges

<sup>16</sup> Islander East's further comments on the matters claimed by CTDEP to be contrary to its CZMP are set forth in the Appendix.

that Connecticut has the right to protect and preserve significant coastal resources, it is incumbent on the State to exercise that right responsibly. Connecticut's elevation in the Denial on Remand of truly minor environmental impacts to a level where all other important considerations are superseded is not a responsible exercise of state power under the CZMA.

C. **National Interest**

Islander East's original memorandum fully demonstrated that the Islander East Project, which will provide critically needed gas supplies and enhance the security and reliability of the Northeast energy infrastructure, is in the national interest. Not only will the Islander East Project provide alternative supply to plants serving the region but it will provide critical supplies to fuel new plants and supports the development of new plants that will increase the reliability of the electric system. Recent events, and in particular the blackout experienced on August 14, 2003, only confirm the need for the Project. It is a matter of public record that the blackout affected at least 8 states and that a total of 9,300 square miles covering the United States and Canada were without power. Early estimates indicate that 80% of New York was without power at the height of the blackout, and that over 300,000 customers across Connecticut were without power. In three minutes, 21 power plants shut down. Seven airports grounded planes. In New York City alone, there were 800 elevator rescues, 80,000 calls to 911, 5,000 emergency medical services calls, and 60 serious blazes.<sup>17</sup>

The wide-ranging effects of the blackout are a graphic illustration of the vulnerability of the energy delivery system in the Northeast United States. They also

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<sup>17</sup> <http://www.cnn.com/2003/US/08/15/blackout.glance.ap/index.html>.

illustrate the degree to which the energy facilities in the Northeast states are interconnected and interdependent in terms of energy supply and demand.<sup>18</sup> Islander East is a project which is specifically designed to increase the interconnections among the Region's energy resources by providing an alternate source of supply to the gas-fired generating plants serving the Region. By strengthening the reliability of the energy infrastructure, Islander East will help ensure that events such as those that were experienced during and after the August 14, 2003 blackout do not become common experiences. It is difficult to imagine a project which is more clearly in the national interest.

D. Water Dependent Use

In the Denial on Remand, CTDEP indicated that natural gas transmission via pipeline is not a water dependent use and that construction of the pipeline would permanently alter and render 5.5 acres of the seafloor unsuitable for commercial shellfishing. To the contrary, natural gas transmission **to an island** is a water dependent use, and construction and operation of the pipeline will not preclude other water dependent uses, as described below and in the Appendix.

Water dependent uses are defined as industrial uses dependent upon waterborne transportation, which cannot reasonably be located or operated at an inland site (CGS § 22a-93(16)). The Connecticut General Statutes define an island as land surrounded on all sides by water (CGS § 22a-93(7)(J)). Based on these definitions, it is clear that the transportation of natural gas via pipeline to Long Island requires direct access to, or

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<sup>18</sup> Connecticut conveniently ignores the fact that it has no indigenous natural gas, and that approximately 90% of the natural gas consumed in the state of Connecticut is delivered on facilities constructed through the state of New York.

location in, marine or tidal waters. The Long Island market is not, and could not be, served by an inland pipeline located outside marine or tidal waters.

Because Islander East is water dependent, there is no impermissible displacement of water dependent uses by a non-water dependent use.

E. Alternatives

As part of its NEPA review, FERC staff prepared a final EIS which evaluated alternatives to the Islander East Project. The final EIS concluded that most of these alternatives did not offer any significant environmental benefits over the proposed Project. However, FERC staff did identify one alternative -- the ELI System Alternative, a hypothetical system alternative developed by staff -- as environmentally preferable because it had a shorter route across Long Island Sound and avoided more shellfish leases.<sup>19</sup> Notably, however, the staff went on to qualify this preference by highlighting Islander East's advantages with regard to the flexibility and reliability of the interstate pipeline grid, competition, market need, and market commitments. Furthermore, FERC staff "note[d] that there is no proposed proposal before the Commission to construct this system alternative."<sup>20</sup>

In its September 19, 2002 Certificate Order, FERC, after carefully balancing its staff's environmental analysis with the required non-environmental policy considerations, along with the substantial commentary from participants in that proceeding, concluded that the Project should be constructed as proposed because it will "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 for

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<sup>19</sup> FEIS at 5-11.

<sup>20</sup> FEIS at 4-6.

anticipated electric generation projects. Additionally, it will introduce pipeline-to-pipeline competition to eastern Long Island markets.”<sup>21</sup>

Exercising its authority under the NGA,<sup>22</sup> FERC stated that it is required to make decisions concerning the siting of pipelines and the interests of energy consumers on a national basis. As part of its evaluation, FERC considered all of the identified alternatives to the Islander East Project and found Islander East will provide significant benefits, such as much needed competition, security and reliability that could not be provided by the hypothetical ELI System Alternative, the Iroquois proposed ELI Project or any other alternative. Since that time, Iroquois has abandoned its proposed ELI Project. Any alternative based on ELI or other Iroquois facilities would require cooperation between the competing pipelines, the development of a new project and the filing and processing of new regulatory applications, all of which would consume many months, if not years. There is no assurance that any such alternative would be supported by the market and it would not offer the security and reliability enhancements Islander East was designed to provide. Precisely because such an alternative would not accomplish those policy goals, there is also no assurance that any such alternative would be certificated by FERC.

Moreover, ELI- and Iroquois-based alternatives would by definition be technically difficult and, because they would require construction of an underwater hot tap on a high pressure pipeline ten feet below the existing seafloor – the **only** pipeline now serving

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<sup>21</sup> Certificate Order at ¶ 3.

<sup>22</sup> In explaining FERC’s mandate under the NGA and NEPA FERC cited *State of Louisiana v. FPC*, 503 F.2d 844 at 876 (5th Cir. 1974), for the principle that NEPA simply adds secondary responsibility to FERC’s statutorily mandated duties.

eastern Long Island – raise a host of safety engineering and environmental issues that are not posed by Islander East. These issues are ignored by CTDEP. For all of these reasons, FERC correctly determined that the ELI-based alternative is not a viable alternative to the Islander East Project.

The Denial on Remand nonetheless continues to assert that there are “a host of viable alternative locations”<sup>23</sup> capable of advancing Islander East’s objectives that have significantly fewer and smaller individual and cumulative impacts than the Islander East Pipeline Project. CTDEP’s blanket statement is unsupported – CTDEP does not provide a list or even a hint of other acceptable alternatives, other than the ELI System Alternative (which even it acknowledges “does not meet the project purpose for an additional separate gas line to Long Island”).<sup>24</sup>

CTDEP does indicate that, although construction of a natural gas pipeline within the limits of the Town of Branford is not consistent with the CZMP, a pipeline route might be consistent with the CZMP if it:

- is in or adjacent to existing gas, electric or telecommunication lines in areas which have been previously disturbed;
- makes use of dredged or maintained channels in the nearshore area;
- is devoid of concentrated shellfish habitat, populations or harvesting operations;
- is in an area where benthic diversity is low; and
- passes through areas of degraded water quality.

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<sup>23</sup> Denial on Remand at 9.

<sup>24</sup> Denial on Remand at 9.

CTDEP's criteria are either impractical or impossible to achieve. Installation of a pipeline in previously disturbed areas in proximity to existing utility lines poses significant safety hazards. For example, during the 2002-2003 construction of Iroquois' Eastchester extension, a pipe lay barge snagged and damaged electric cables, which was followed by an anchor drop which damaged additional cables.<sup>25</sup> Similarly, placement of pipelines within navigation channels may affect vessel movements in the channels and impact lightering and anchorage areas.

The Islander East pipeline was sited in cohesive soft sediment to avoid sensitive habitats. The ELI System Alternative, by contrast, is located in an area dominated by hard bottom habitat that supports primarily oysters, and has been described by Iroquois as "the best shellfish area in Connecticut."<sup>26</sup> Construction of this Alternative, which CTDEP purports to prefer, would disturb this habitat not only during initial construction, but successively every 7 to 10 years for required internal inspection at the interconnection with the existing Iroquois facility.<sup>27</sup>

Finally, any conceivable pipeline route across Long Island Sound would have to pass through high quality waters, **and** would require the plowing at least 8.9 miles of pipeline.<sup>28</sup> Therefore, by these measures, no alternative, regardless of location, could be deemed acceptable by CTDEP. In sum, after exhaustive study, neither Islander East, nor

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<sup>25</sup> Long Island Power Authority, Minutes of the 154 Meeting held on March 26, 2003.

<sup>26</sup> Iroquois Gas Transmission System Report submitted with the Application for site-specific regulation of the Connecticut portion of the Iroquois Natural Gas Transmission Pipeline. Volume 1 at page IV-82.

<sup>27</sup> Iroquois Gas Transmission System, Application for Certificate to Environmental Compatibility and Public Need, March 25, 2002, page 193 at paragraph 1.

<sup>28</sup> The Denial on Remand states that the proposed 8.9 miles of subsea plow installation will result in an unacceptable level of impact. Islander East notes that the subsea plow is recognized as a more environmentally benign offshore construction method than the alternative installation method, jetting (final EIS, Section 3.3.3.2). No possible alternative, not even the theoretical ELI System Alternative, can be constructed without plowing more than 8.9 miles of pipeline.

CTDEP, nor FERC have identified a viable “alternative” (including the ELI System Alternative) which even purports to meet CTDEP’s criteria.

F. **Other Salient Issues**

1. **Need**

The Denial on Remand states that CTDEP has “been advised that the ‘need’ for natural gas on Long Island is questionable,” citing a July 9, 2003 letter from the Attorney General.<sup>29</sup> This “question” is both irrelevant and baseless. The Denial on Remand itself acknowledges that “project need is not an issue before the Department in the current proceeding.” FERC, the federal agency which is responsible for determining the need for the Project, has done so unequivocally on three separate occasions, as further detailed in Islander East’s original memorandum.

2. **Alleged Incomplete Portions of IE Project Application**

CTDEP asserts that the record is incomplete because there are three missing documents – the HDD Monitoring and Operations Program (“HDD Program”); an HDD failure contingency plan; and an ocean dumping application.<sup>30</sup> Again, this assertion is not accurate.

a. The HDD Program was provided to CTDEP with Islander East’s original application in February 2002 and again in the revised July 2002 filing. This Program was based, in part, on previous programs including the Cross Sound Cable program, which has been approved by CTDEP. At no point during the lengthy review process nor during the proclaimed “good faith effort” to work with Islander East did CTDEP

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<sup>29</sup> Denial on Remand at 8.

<sup>30</sup> Denial on Remand at 10.

comment or identify inadequacies with Islander East's Program. For CTDEP to allege at this point that the HDD Program has not been provided can only lead Islander East to conclude that CTDEP has not fully reviewed the application materials, or is only now identifying deficiencies with materials included in Islander East's original application.

b. In its May 5, 2003 request for supplemental information, CTDEP requested that Islander East "identify and provide alternative locations and installation techniques [for HDD installation] for possible conditional authorization." In its response, Islander East outlined the measures to be taken to minimize the risk of the HDD and the contingency steps to be taken. The response outlines the plan for each potential failure and provides contingencies for the potential failures. Islander East has consistently committed that, in the event an alternative location or new installation method must be utilized, Islander East will seek all required regulatory approvals prior to proceeding. In addition, FERC Certificate Order requires Islander East to complete the HDD pilot hole successfully prior to proceeding with offshore construction. These measures and commitments from Islander East demonstrate its overall commitment to minimize environmental impact from construction.

c. The U.S. Army Corps of Engineers ("ACOE") Ocean Dumping Application is a routine filing which was submitted to CTDEP and ACOE jointly the day the Denial on Remand was issued.

Therefore, Islander East submits that no outstanding information remains to be provided in this case. Further CTDEP has failed to identify in timely fashion any

deficiencies or raise substantive questions with these materials during the course of this lengthy review process.

### 3. Other Inaccuracies in the Denial on Remand

#### a. *Extensive and Geographically Wide Ranging Scope*

CTDEP states in the Denial on Remand that “Due to the extensive and geographically wide-ranging scope of the proposed work, a number of the enforceable policies of the State’s CZMP are applicable.”<sup>31</sup>

It is a distortion to refer to this Project as “extensive and geographically wide ranging.” The proposed installation corridor for the Islander East Pipeline Project is typical of work corridors for interstate pipeline projects of this nature, which have in the past and will in the future occur routinely in the waters of the United States. For instance, the Islander East Project involves the dredging of less than 30,000 cubic yards of sediment. This volume is less than half the volume authorized by CTDEP and ACOE in 1995 for navigation channel dredging activities proposed by Tilcon for its barge terminal. Islander East’s pipeline crosses under the Tilcon navigational channel along the segment that is installed using HDD technology.

#### b. *Good Faith Effort to Work with Islander East*

The Denial on Remand states that “The Department has made a good faith effort to work with Islander East . . .”.<sup>32</sup>

Islander East submits that this is not true. From the earliest contacts with CTDEP, Islander East sought comments on project plans and feedback on application materials. CTDEP has provided no such feedback except in its CZMP denials. For instance:

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<sup>31</sup> Denial on Remand at 3.

<sup>32</sup> Denial on Remand at 10.

- Islander East submitted its original application to CTDEP on February 13, 2002. CTDEP is charged with conducting a completeness review of applications within 45 days of receipt, and providing feedback to the applicant on any deficiency in that application. Despite repeated requests (both in writing and in face-to-face meetings), Islander East never received any written comments on its application.
- At a meeting on August 2, 2001, Islander East provided a preliminary offshore study plan to CTDEP and requested comment. The purpose of this plan was to define the scope of offshore studies necessary to provide information for CTDEP review. The study plan, entitled *Long Island Sound Sampling, Analysis, and Study Plan*, was also filed with FERC in a *Supplemental Data Filing* dated October 4, 2001. Again, despite repeated attempts by Islander East to solicit feedback, CTDEP never provided recommendations or comments on the study plan to Islander East. Islander East proceeded with the study plan and provided the information outlined in the study plan to CTDEP as work was completed.
- Islander East included in its original February 13, 2002 application a “*Horizontal Directional Drill Operation and Maintenance Program*.” This program identifies the steps Islander East would follow to monitor, detect and clean up any inadvertent release of bentonite drilling mud during the HDD process. At no point during the review process did CTDEP identify any deficiencies with this program. CTDEP’s statement in the Denial on Remand that this information is currently outstanding reflects either a lack of review of Islander East’s application

materials or a willingness to ignore the Record in making its adverse determination on consistency.

- Despite agreeing to host a series of multi-agency meetings to discuss the modifications to Islander East's proposed construction modifications, CTDEP staff did not provide feedback, nor voice concerns with Islander East's proposals during those meetings, and only articulated its concerns in the Denial on Remand. Islander East entered into these meetings with the understanding that open, constructive communication and feedback would be provided by CTDEP. In reality, the only feedback CTDEP has provided has been the Denial on Remand. Islander East contends that this raises a question of genuine commitment on the part of CTDEP to administer the state's Coastal Zone Management Program objectively for the Islander East Project.

CTDEP's comment about Islander East's refusal to allow regulatory programs to run concurrently evidently refers to Islander East's position that the processes for CZMA review, Section 401 (Clean Water Act) review are delegated Federal activities and Structure, Dredging and Fill Permit review are governed by State law. The notion that Islander East was "unwilling to allow" CTDEP to engage in a unified process misstates both Islander East's power and its intentions. The Connecticut Legislature in passing a moratorium prohibiting any final agency action regarding energy projects crossing Long Island Sound (and extending it another year until June 2004 actually) prevents CTDEP from running its regulatory programs concurrently, with regard to Islander East's Project.

### CONCLUSION

The Attorney General of Connecticut issued a press release<sup>33</sup> the day after the Denial on Remand was issued, calling Islander East an “environmental nightmare” and a “potential disaster offer[ing] no benefit justifying the severe, irreplaceable damage to precious natural resources, fragile marine ecosystems, and pristine shellfish beds.” He went on to say that “the [CT]DEP has rightly found – a second time – that Islander East’s project would be an environmental catastrophe . . .” and that “we will continue to vigorously and vociferously fight this shortsighted, self-serving project, which offers nothing but environmental havoc and high costs for Connecticut.” Not one single statement made by the chief legal officer of Connecticut in his press release is supported by fact. Not only do the Attorney General’s comments in his press release assail the comprehensive federal regulatory responsibilities carried out by FERC and the entire final EIS process, it signals that Connecticut’s actions here are motivated by politics and parochialism. It certainly raises grave doubt as to CTDEP’s discharge of its duties under the CZMA. After the catastrophic events associated with the blackout of August 14, 2003, the entire Nation is now aware of the need for new, reliable energy infrastructure in the Northeast. The parochial interests of one state should not be allowed to stymie a project which is expressly designed to enhance the security and reliability of the energy infrastructure in the Northeast.

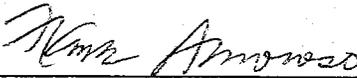
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<sup>33</sup> July 30, 2003 Press Release, available at <http://www.cslib.org/attygenl/mainlinks/linkindex3.htm>.

Based on the entire Record in this matter, a federal override of the State's denial of a consistency determination is warranted.

Respectfully submitted,

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Dated: August 20, 2003

## APPENDIX

### Matters Claimed By CTDEP On Remand To Be Contrary To Coastal Zone Management Plan

#### A. The Project's Impact on Water Quality

##### 1. Thimble Islands area

In the Denial on Remand, CTDEP claimed that the Project would extend through the center of the Thimble Island complex. As shown on Project maps filed with CTDEP, and provided with this Supplemental Memorandum, the Islander East Pipeline Project does **not** extend through the Thimble Islands. To the contrary, the Islander East Pipeline Project was in fact sited to avoid the Thimble Islands area. In addition, the pipeline was routed further west to avoid the reefs located on the western edge of the Thimble Island (Browns, Wheaton, Inner, and NW).

Additionally, the Denial on Remand stated that the route would impact the diversity of geological and biological features of the Thimble Islands area. The Islander East Pipeline route was specifically sited to avoid rocky subtidal areas, eelgrass beds, glacial till, and other sensitive habitat types. Islander East undertook numerous studies to characterize the biological and physical attributes of the Project area and had numerous discussions with local fisherman and State and Federal regulators in order to document existing resources and identify potential environmental concerns. These studies demonstrate that the communities crossed by the pipeline route are, in fact, not unusually ecologically sensitive areas of importance, nor are they diverse. But rather, the features of the Project area are common throughout much of Long Island Sound.

This fact was corroborated by CTDEP in its May 13, 2002 letter to the Connecticut Siting Council, in which it described the seafloor along the pipeline route as “generally featureless, and comprised of soft sediments (fine-grained, silt-sand, and mud) that are typical of Central Long Island Sound.” The CTDEP letter concluded that “habitat within the construction corridor will be temporarily disrupted and will take a period of time to recover” (*i.e.*, construction impacts would be temporary and affected areas would recover). CTDEP confirmed these views in its May 17, 2002 letter to FERC, stating that “[m]ost of the route crosses fine-grained cohesive sediments. The bottom is relatively featureless for most of the route. These observations agree with a number of surveys done to characterize the seafloor.”

With respect to the impact of the pipeline excavation on water quality, direct impacts along the dredged trench section will be limited to the excavated trench because sediment excavated from the trench will be placed on barges. This will dramatically reduce the potential for suspended sedimentation to impact water quality.

## **2. Suspended Sediment**

In the Denial on Remand, CTDEP stated that, despite the reduction of sediment mounding for a one mile section of the installation route, there will be significant adverse impacts on water quality and benthic organisms and their habitat caused by sediment suspension resulting from 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. Islander East disagrees with CTDEP’s conclusion that the plowing and dredging would cause significant adverse impacts on water quality and benthic communities.

Islander East's sediment modeling demonstrates that implementation of the modified construction methods will minimize the nearshore sedimentation to the area immediately adjacent to the HDD exit area and the dredged trench.<sup>34</sup> Furthermore, the placement of the excavated material on barges will eliminate disturbance by spoil mounds and will eliminate the secondary impacts of sediment transport from wave action and tidal currents. Specifically, sediment modeling shows that no area in the Connecticut nearshore will experience sediment depositions greater than 3 millimeters, which is less than the critical burial depth of juvenile oysters and clams.<sup>35</sup> In addition, sediment modeling conducted along the subsea plow section of the route concludes that the dispersion of displaced sediments caused by passage of the mechanical plow should be minimal to non-existent.<sup>36</sup>

Given the geography of Long Island Sound, 8.9 miles or more of the subsea plow construction method would also be required in connection with any alternative evaluated by CTDEP. Islander East has demonstrated to CTDEP on numerous occasions that use of the subsea plow to install the pipeline in waters deeper than 20 feet will minimize the displacement of sediments along the sea bottom. The width of the disturbed sediments created by the plow is narrow in the context of Long Island Sound, and the area will recolonize with benthic species through larval settlement and migration from adjacent

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<sup>34</sup> Applied Science Associates, *Results of SSFATE Model Simulations, Nearshore Connecticut, Long Island Sound*, February 2003.

<sup>35</sup> *Connecticut Siting Council Opinion, Docket No. 224, September 5, 2002.*

<sup>36</sup> Bohlen, W. Frank, Howard-Strobel, M.M., Thatcher, M.L., *An Initial Evaluation of Marine Sediment Dispersion Associated with the Installation of the Islander East Natural Gas Pipeline*, April 8, 2002.

areas as early as the spring/summer following construction and certainly within 3 to 4 years.<sup>37</sup>

### 3. Bentonite Releases

In the Denial on Remand, CTDEP stated that an inadvertent release of drilling fluid could result in significant adverse impacts on water quality, marine organisms, and shellfish resources in this generally high-quality marine environment.

Islander East provided CTDEP with the *Directional Drilling Monitoring and Operations Program for Natural Gas Pipeline Installation in Long Island Sound for Islander East Pipeline Company, L.L.C.* ("HDD Program") in February of 2002. Islander East developed its HDD Program based on CTDEP-approved Cross Sound Cable Monitoring and Operation Program. The HDD Program outlines the steps Islander East intends to follow to monitor, contain and clean up unanticipated releases of drilling fluid. Therefore, no long term impacts to water quality, marine organisms, or shellfish resources would be expected from the unanticipated release of drilling fluid. CTDEP's claim that an unanticipated release of drilling fluid could be "catastrophic" to shellfish populations is not supported by studies or evidence from the agency.

#### B. Impacts to Shellfish and Shellfish Habitat

CTDEP found in its Denial on Remand that the proposed activity would create a significant adverse impact on shellfish habitat. It cited the alteration of habitat, the suspension of sediments, and the potential for an unanticipated release of drilling fluid

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<sup>37</sup> Testimony of R. Zajac, Connecticut Siting Council, April 11, 2002, page 134, at lines 17 and 18.

(commonly called a frac-out) as the rationale for determining the significant adverse impact determination. Islander East believes its project is consistent with the CZ

MP because impacts on shellfish and shellfish habitat will be minimal and temporary. The following supports the Islander East conclusions.

### **1. Alteration of Habitat**

In the Denial on Remand, CTDEP stated that the section of pipe to be installed through trenching will eliminate existing clam habitat. To the contrary, through its modified construction method, Islander East will be able to control and monitor the backfilling operations of the dredged trench section, which will minimize sedimentation while enhancing shellfish habitat.

Islander East's original construction method involved sidecasting dredged materials adjacent to the HDD exit area and the dredged trench section (in waters less than 20 feet). Following installation, the native dredged material would have been replaced. This construction method is consistent with common industry practice throughout the United States, allows for short construction duration, and is feasible using commonly available equipment. However, several agencies expressed concerns regarding potential sediment deposition and the extent of direct impacts resulting from the sidecasting spoils. Islander East subsequently evaluated and developed alternative construction methods which include the *Engineered Backfill Plan* ("Backfill Plan") to address these concerns.

Islander East filed its Backfill Plan with CTDEP on March 27, 2003 and discussed the Backfill Plan at the multi-agency review meeting on April 15, 2003. The Backfill Plan will involve placing rock around the pipeline followed by placing sand over

the top of the trench. This method will protect the pipeline and minimize environmental impacts of sedimentation. In addition, the use of sand will allow Islander East to match more closely the existing seabed contours. Furthermore, because sand flows, a tremie tube (a long conduit that contains and directs material to the seafloor) can be used for backfilling. The tremie tube allows for more controlled placement of the backfill as compared to a clamshell bucket and was successfully used by Iroquois on their recently constructed Eastchester Project located in the New York waters of Long Island Sound.

A potential concern raised during the April 15, 2003 multi-agency meeting with using sand as backfill is that the sandy materials may be subject to scouring by wave or tidal currents that could potentially result in a depression over the pipeline trench. To address this concern, Islander East evaluated bottom velocity data and conducted geotechnical studies using materials of varying grain sizes which confirmed that gravelly coarse- to fine-grained sand would not be subject to erosion or scour. Islander East provided both CTDEP and the U.S. Army Corp of Engineers with copies of the geotechnical study in May 2003.

Islander East believes that the Backfill Plan provided to CTDEP on March 27, 2003 provides the best combination of advantages and has few or no disadvantages associated with it. This view is consistent with feedback received from agencies during the April 15, 2003 meeting. As discussed in this meeting, representatives of the Department of Agriculture, Division of Aquaculture, agreed that the sand proposed for use in the Backfill Plan would provide a substrate that could be utilized by clams and oysters and would not create habitat for shellfish predator species. Islander East further notes that the Backfill Plan, which specifies backfilling the trench with rock topped with

sand in the HDD exit area and dredge section, will result in equal or greater habitat for naturally occurring oysters as compared to existing sediments in the project area.

## 2. Suspension of Sediment and Impact on Shellfish Habitat

The Denial on Remand erroneously states that: “shellfish and shellfish habitat will also be impacted by elevated levels of suspended sediments resulting from benthic disturbance.”<sup>38</sup> Islander East selected the pipeline alignment and developed its construction methods to minimize environmental impact from suspended sediments on shellfish habitat. Islander East has presented data and studies to CTDEP to support Islander East’s position that the Project will result in minimal suspended sediments and that the water quality after the installation will be similar to background levels.

The pipeline route is sited in soft sediments and avoids rocky subtidal areas, eelgrass beds, glacial till, and other sensitive habitat types. Through discussions with local fishermen, Islander East has determined that the state shellfish lease beds along the pipeline route are used by the existing leaseholders to harvest clams. Clams, like the majority of the other benthic species inhabiting the soft sediments along the pipeline route, are adapted to a depositional environment. Species such as clams, polychaete worms, tubicolous amphipods, and other burrowing benthos tolerate episodic deposits of sediment, such as sediment deposition that occurs following a winter storm or the passing of a tropical depression. These organisms are mobile and move upward as the sediment is deposited and have mechanisms for clearing sediment from feeding and breathing organs. The majority of the benthic species will, therefore, not be affected by construction.

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<sup>38</sup> Denial on Remand at 6.

The fact that these areas will recover is supported by the experience of the Iroquois pipeline in 1991. Although oysters do not appear to have returned to areas disturbed by construction of the Iroquois pipeline, the disturbed area has been recolonized with hard-shell clams. Three new shellfish leases totaling 1,114 acres have been established directly along the existing Iroquois pipeline in areas where no such leases existed previously. This indicates that areas in the vicinity of the Iroquois pipeline are now economically viable for shellfish production. Establishment of three new shellfish leases along the Iroquois pipeline route confirms that there will be no long term impact on the soft bottom lease areas used for clams along the Islander East pipeline route. This also demonstrates that installation of a pipeline parallel to the existing Iroquois pipeline, through hard-bottomed oyster grounds, would have a greater impact on shellfish resources than installation along the Islander East route.

Although CTDEP has indicated its preference for the ELI System Alternative, that alternative would require construction of a domed facility to cover the subsea tap, within an oyster bed. Islander East submits that construction of a permanent subsea facility 10 feet below the seafloor and within an oyster bed would have far greater impacts on shellfish habitat than would construction of the Islander East Project. This is supported by the fact that previous evaluations of the ELI project focused only on direct impacts, and did not account for indirect impacts of sediment deposition.

Islander East's construction methods are designed to reduce: i) sedimentation, ii) the area affected, and, iii) the duration of potential impacts. Based on the results of sediment modeling, Islander East has modified its construction methods to eliminate spoil mounds, and instead will place dredged sediment on barges, which will avoid spoil

mounds on the seafloor. Islander East has also decreased the depth and, therefore, the width of the dredged trench by reducing the depth of cover from 3 feet to 18 inches.

Compared to sidecasting the dredged material on the seafloor, the barging of the spoil will reduce the total area disturbed for the dredged section and the HDD exit area from approximately 138.8 acres to 14.0 acres in Connecticut nearshore waters less than 20 feet deep. This is a 90 percent total reduction in direct and indirect impacts.

Depositional effects are expected to be essentially non-existent beyond the immediate proximity of the trench and will not affect the local populations of any marine organisms. Modeling conducted for the project indicates that a small amount of sediment will go into suspension and fall out within 50 feet of the dredge trench.<sup>39</sup> An even smaller fraction of very fine sediments will go into longer term suspension and become indistinguishable from the background levels present in Long Island Sound. Because the dredging will move along the route, organisms inhabiting the seafloor will only be exposed to this localized increase in sediment for a brief time.

At the HDD exit area, trenching will result in minimal sediment suspension. Sediment transport modeling has shown that deposition resulting from dredge operations at the exit point will be localized (within a few hundred feet) and of minimal depth (less than a few millimeters). Given the episodic nature of natural storm events that stir up considerable sediment loads in shallow water areas of the Connecticut shoreline, most organisms have adaptive mechanisms to survive and will merely experience the dredged suspended sediments as one more event out of the many experienced over the course of their lifetime.

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<sup>39</sup> Applied Science Associates, *Results of SSFATE Model Simulation Nearshore Connecticut, Long Island Sound*, February 2003.

Based on the construction methods involving dredged spoil placement on barges and offsite disposal, HDD drilling fluid capture, and mechanical plowing, as shown by the most recent sediment transport and deposition modeling, there would be *de minimis* impacts to the marine resources outside of the pipeline corridor.<sup>40</sup> In fact, suspended sediments are anticipated to be at elevated levels above background only within short distances from the construction activities. Any localized impacts that do occur as a result of suspended sediments and deposition can be divided into two categories, water column effects and benthic effects. The suspended sediment effects in the water column are temporary in the vicinity of the individual construction activities involving sediment disturbance. The benthic sediment effects will be limited to within 50 to 100 feet of the construction activity. These small area/temporary effects will have minimal impacts on local populations of benthic and pelagic species and their habitats.

This view is supported by Dr. Roman Zajac, an expert in the field of benthic communities in Long Island Sound. According to Dr. Zajac, the modified construction techniques proposed by Islander East would minimize impacts on benthic communities. Specifically, Dr. Zajac notes,

*There will be no burial and smothering of seafloor areas adjacent to the transition basin [HDD exit area] and dredge portion of the pipeline with the dredge spoil, reducing the overall area of direct, severe impact. The removal of dredge spoils will eliminate winnowing of sediment on a continual basis to surrounding habitat, and more critically, the potential for severe erosion in the case of a storm event during the construction period.*<sup>41</sup>

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<sup>40</sup> Id.

<sup>41</sup> TRC Corporation, R. Zajac, *Evaluation of Benthic Impacts Associated with Islander East's Modified Offshore Construction Techniques* submitted to CTDEP on March 14, 2003.

CTDEP states in the Denial on Remand that the Project would “. . . degrade, irrevocably alter and permanently destroy essential shellfish habitat through alteration of the benthic environment.”<sup>42</sup> Islander East, through its sediment modeling work and off shore studies, has successfully demonstrated that its Project will have only minimal, short term effect on the suspended sediment levels in Long Island Sound and that effects on the benthic environment will also be short term and temporary.

### 3. Effect of the Frac-Outs on Shellfish and Shellfish Habitat

As noted above, CTDEP’s claim that a frac-out could be “catastrophic” to shellfish populations is unsubstantiated by studies or agency reports. Islander East’s HDD Program will minimize the impacts of an unanticipated release of drilling fluid. The Program was submitted to CTDEP in Islander East’s February 2002 permit application, and again in July 2002, and outlines the procedures Islander East will implement during the HDD construction process to monitor for unanticipated releases, mitigate impacts from releases, and clean-up releases. As FERC described in the final EIS, the drilling fluid will flocculate and settle to the seafloor when exposed to salt water.<sup>43</sup> Thus, after a release is detected, and the proper mitigation measures are taken to control the release, the clean-up of the drilling fluid is routine. Therefore, utilization and adherence to the HDD Program will minimize impacts to the Long Island seafloor and shellfish communities along the pipeline route, should an unanticipated release of drilling fluid occur.

Islander East’s HDD Program also outlines containment and clean-up measures to minimize impacts from any potential drilling fluid released at the entry and exit areas

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<sup>42</sup> Denial on Remand at 4.

<sup>43</sup> FEIS at 3-53, ¶ 4.

during the HDD process. The majority of the drilling fluid used during drilling of the pilot hole will return and be recycled at the on shore entry point. Additionally, given the characteristics of the drilling fluid, the small amount that may be released at the exit side will congeal and settle in close proximity to the exit point. Because the pilot hole will be drilled prior to excavating the transition basin, excess drilling fluid located in the footprint of the transition basin will be recovered during the excavation of the transition basin.

Prior to the reaming process, Islander East will install a closed fluid containment system. This closed fluid containment system will involve the installation of a casing pipe at the exit point of the pilot hole and a jack-up vessel and equipment to support the casing pipe. During reaming, the drilling fluid from the exit hole will be contained in the casing pipe. The drilling fluid can then be recycled and reused, or disposed of according to Islander East's *Spill Prevention, Control, and Countermeasure Plan*.<sup>44</sup>

Because the anticipated release of drilling fluid would likely occur at the HDD exit point, where the HDD exit area will be excavated, no impacts on shellfish beds are expected from anticipated releases of drilling fluids.

Based on Islander East's knowledge of the HDD construction method, the highest probability of a frac-out occurs during the drilling of the pilot hole. Specifically, the portions of the drill path near the HDD entry and exit points where the depth of cover is diminished. For the Islander East Pipeline Project, these concerns are diminished because the entry point of the drill path is onshore Connecticut about 500 feet from shore, and the exit point is approximately 500 feet from the nearest designated shellfish bed.

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<sup>44</sup> FEIS at Appendix D, August 2002.

The depth of the drill path will be greater than 100 feet below the seafloor when it reaches the shoreline. If a frac-out were to occur onshore, no shellfish habitat would be impacted, and no shellfish mortality would occur. Between approximate MP 10.8 and MP 10.9 (the exit point of the HDD), the drill path passes underneath undesignated shellfishing grounds. Therefore, a frac-out at or near the exit hole would not have a “catastrophic” impact on shellfish as claimed by CTDEP.

### **C. Impact on Water Dependent Use**

As explained in the body of this submission, Islander East disputes CTDEP’s conclusion that the Islander East Project is not a water dependent use. In addition to the definition of a water dependent use, Islander East takes exception to CTDEP’s claims regarding impacts on the Town of Branford commercial lease beds. The dredged trench section of the Islander East Pipeline Project is located between MPs 10.9 and 12.0 as shown on Map-03, which was filed with CTDEP on March 13, 2003. Currently, there are no designated Town of Branford commercial lease beds located along this segment of the pipeline route.

To reduce construction impacts further, Islander East consulted with Connecticut lobstermen and fishermen early in the planning phase of the Project to identify and address concerns regarding construction and operation of the pipeline. Based on input from these stakeholders, Islander East developed the following measures to minimize, and in some cases avoid entirely, impacts on commercial and recreational fishing:

- Install the pipeline under the Town of Branford commercial shellfish beds using the HDD construction technique;

- Install the pipeline during the winter months to avoid the peak fishing season;
- Utilize spotters during construction to identify and relocate commercial fishing gear; and
- Harvest actively cultivated commercial shellfish beds located along the pipeline prior to construction followed by reseeded the lease beds with clams following construction.

In the Denial on Remand, CTDEP claims that the placement of coarse- to fine-grained sand along the dredged trench section will complicate commercial shellfish harvesting and render this area unusable. As previously stated, commercial shellfishing does not occur along this segment of the pipeline route. However, if commercial leasebeds are designated in this area in the future, construction and operation of the Islander East Pipeline will not preclude harvesting operations. As detailed in the Backfill Plan, Islander East will bury the pipeline with a nominal 18 inches of cover along the dredged trench section, which is consistent with CTDEP's recommendations to FERC.<sup>45</sup>

After the pipeline is installed in the trench, Islander East will cover the pipeline with rock followed by approximately 12 inches of coarse- to fine-grained sand. Because commercial clam dredges typically penetrate only 1 to 3 inches into the seafloor,<sup>46</sup> installation of the pipeline 18 inches below the seabed would not interfere with future

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<sup>45</sup> In a letter to FERC dated May 17, 2003, CTDEP indicated that burying the pipeline 3 feet below the seafloor would be acceptable, but recommended a shallower burial depth to minimize sediment disturbance during installation. Islander East reduced the burial depth of the pipeline from 3 feet to 18 inches along the dredged trench section.

<sup>46</sup> Connecticut Siting Council Hearing, Docket No. 221 (page 143, lines 21 and 22), April 17, 2002

commercial shellfish harvesting. In fact, the Backfill Plan will promote another water dependent use by enhancing clam and oyster habitat<sup>47</sup> along the dredged trench section. As discussed during the April 15, 2003 multi-agency meeting, Federal and State agencies agreed that the sand proposed for use in the Backfill Plan would provide a substrate that could be utilized by clams and oysters, and would not create habitat for shellfish predator species. In fact, the Backfill Plan will result in equal or greater habitat for naturally occurring oysters as compared to existing sediments in the project area.

To enhance shellfish restoration further, Islander East reached agreements with the three state commercial shellfish lease holders whose leased shellfish beds will be affected by the Islander East Pipeline Project. Specifically, Branford River Lobster, L.L.C. ("Branford River Lobster"), whose leasebed will be crossed by the pipeline centerline, and Riverpoint Shellfish, L.L.C. ("Riverpoint Shellfish") and Poppa C. L.L.C. ("Poppa C"), whose leasebeds are located within the anchor corridor, concur that the measures identified in the agreements will mitigate impacts on their commercially leased shellfish beds as described below.

As defined in Islander East's agreement with Branford River Lobster, Islander East will notify Branford River Lobster sixty days prior to the commencement of construction. Branford River Lobster will harvest or relocate shellfish on their shellfish leasebed to remove shellfish from the Islander East work area prior to construction. At Islander East's expense, Branford River Lobster will seed clams at a density equal to, or, reasonably exceeding, the number that existed prior to construction in the work area

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<sup>47</sup> The CTDEP notes in its Denial on Remand at 5, that oysters prefer a hard substrate and clams prefer a sand substrate.

following installation. In addition, Islander East will provide an "as built" survey of the coordinates of the pipeline following construction.

As defined in Islander East's agreement with Riverpoint Shellfish, Islander East will notify Riverpoint Shellfish sixty days prior to the commencement of construction. Riverpoint Shellfish will harvest or relocate shellfish on their shellfish leasebed to remove shellfish from the Islander East work area prior to construction. Islander East will provide an "as built" survey of the coordinates of the pipeline following construction.

As defined in Islander East's agreement with Poppa C, Islander East will notify Poppa C within sixty days prior to the commencement of construction. Poppa C will harvest or relocate shellfish on their shellfish leasebed to remove shellfish from the Islander East work area prior to construction. At Islander East's expense, Poppa C will seed clams in the work area following construction in numbers which they estimate to be sufficient to replace the shellfish resource that was harvested in the work area prior to construction. Islander East will provide an "as built" survey of the coordinates of the pipeline following construction.

Based on the Project purpose and need, it is clear that the Islander East Pipeline Project is a water dependent use as defined by the Connecticut General Statutes. The Islander East Pipeline Project will not preclude other water dependent uses and, in fact, will promote recreational and commercial shellfishing by enhancing habitat and reseeding beds following construction.

#### **D. Tidal Wetlands**

In the Denial on Remand, CTDEP stated that “the proposed draining of the pond [CT-A21] and subsequent installation of the pipeline may permanently degrade this wetland habitat and minimize its value as wildlife habitat.”<sup>48</sup> Therefore, CTDEP determined that the Islander East Pipeline Project would be inconsistent with the enforceable policies of the CZMP based on the conclusion that Islander East would likely create a significant adverse impact to tidal wetlands. Islander East objects to the conclusion reached by CTDEP as pond CT-A21 is a minimal value wetland, and the impacts to wildlife habitat will be temporary. Perhaps for these reasons, CTDEP preferred this route to Islander East’s originally proposed route and requested in its comments on the draft EIS that FERC adopt this route variation. In a letter to FERC dated May 17, 2002, CTDEP indicated that the Pond Variation along the southern portion of the Branford Steam Railroad corridor was preferable to Islander East’s originally proposed route because “It avoids the Branford Land Trust Property, minimizes forest clearing and the crossing of uneven terrain, reduces the length of the pipeline route, and removes unwanted invasive vegetation.” Removal of this invasive vegetation would enhance wetland and wildlife habitat. FERC concurred, and required Islander East to adopt this route variation.

In addition, CTDEP did not consider Islander East’s site-specific restoration plan in reaching its conclusion.

Islander East provided a wetland evaluation letter report for pond CT-A21 to CTDEP on May 27, 2003, which demonstrated that the low water quality of the pond and

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<sup>48</sup> Denial on Remand at 8.