

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

**ISLANDER EAST PIPELINE COMPANY, L.L.C.**

**v.**

**STATE OF CONNECTICUT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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**UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

IN THE MATTER OF THE COASTAL            }  
CONSISTENCY APPEAL OF THE            }  
ISLANDER EAST PIPELINE COMPANY

JANUARY 26, 2004

**REPLY BRIEF OF THE STATE OF CONNECTICUT**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

The State of Connecticut Department of Environmental Protection (hereinafter “DEP”) hereby files its reply brief in the above-captioned proceedings before the Secretary of Commerce on the appellant Islander East Pipeline Company LLC’s (“Islander East”) request for administrative override of an objection to a request for a certification of coastal consistency under the provisions of the Coastal Zone Management Act (“CZMA”). The DEP as the State of Connecticut’s federally approved management agency under the CZMA has determined that the pipeline project proposed by Islander East is inconsistent with the enforceable policies and programs contained in its Coastal Management Plan.

The project as proposed does not advance a significant or substantial national interest within the scope of the CZMA; and the adverse environmental impacts associated with it in an area of great ecological and socioeconomic importance outweigh any minor contribution to the national interest that it might make. Most importantly, the DEP has identified an alternative to the proposed project that it deems consistent with its CMP. This filing of the state coastal resources management agency explains further why the project proposal is subject to the

objection, and why the Secretary, applying his review regulations, should deny the request for an override and dismiss Islander East's appeal.

This proceeding raises important issues of federalism. The relevant state coastal review authority with direct regulatory control and resource knowledge has, not once, but twice reviewed and rejected this project in favor of a demonstrably superior alternative. Should the Secretary accede to the appellant's invitation to reweigh the carefully drawn state-federal balance of regulatory authority over coastal zone resource management issues, he will have sent a new and stark message to state regulators that their role in this process is essentially meaningless, and, thereby, dismantle the goal that the CZMA legislation principally sought to achieve, that being to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone. . . ." 16 U.S.C. § 1452(2).

The following discussion is divided into two parts, of which the second is a set of detailed responses to certain of Islander East's technical remarks appended to its December 22, 2003 filing, and is included as an appendix to this brief.

## **ARGUMENT**

### **I. THE ALTERNATIVE IDENTIFIED BY THE CONNECTICUT DEP IS DISPOSITIVE OF ISLANDER EAST'S APPEAL**

Because the state management agency has identified in its objection to the request for coastal consistency certification an alternative to the proposed project that it has determined is available and consistent with its CMP, the Secretary on appeal of the agency's determination must accord it weight and, if he agrees, dismiss the request for administrative override.

*Consistency Appeal of A. Elwood Chestnut* (November 4, 1992) at 5. Islander East raises several objections to the DEP's identification of the so-called ELI extension proposal as a suitable alternative that is deemed consistent with the CZMA and the enforceable policies of Connecticut's Coastal Management Plan (CMP). These objections have no merit. The agency's identified alternative would meet the "primary project purpose" of the company and would further allow for expansion of natural gas supplies in the future by taking advantage of gas transmission infrastructural developments that have already been approved by the FERC and those that reasonably would be expected to be approved by the Commission.

**A. The Alternative Has Been Described With Reasonable Specificity**

Pursuant to the Secretary's regulations, a proposed activity is "consistent with the objectives or purposes of the Act [CZMA]" if there is "no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program." 15 C.F.R. § 930.121(c). A state agency applying the enforceable policies of its CMP may describe in its objection to coastal consistency certification "alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program. 15 C.F.R. § 930.63(b). The regulations further indicate that if a state proposes an alternative in its objection letter, the alternative(s) "shall be described with sufficient specificity to allow the applicant to determine whether to, in consultation with the State agency: adopt the alternative; abandon the project; or file an appeal under subpart H." 15 C.F.R. § 930.64(d). The Secretary has determined in a series of decisions interpreting this provision that the states are in the best

position to evaluate the consistency of possible alternatives. *See, e.g., Consistency Appeal of Millenium Pipeline Company, L.P.* (December 12, 2003) at 22.

Islander East asserts that the DEP has “confused” the ELI Extension Project with the ELI System Alternative, the former being a now-withdrawn proposal of the Iroquois Pipeline Co. to transport 175,000 Dth/d from a tap on its existing cross-Sound pipeline; the latter being a NEPA-driven alternatives analysis of the FERC of Islander East’s project that utilized the Iroquois proposal along with additional compression and/or looping to achieve volume commensurate with Islander East’s goal of providing 260,000 Dth/d. Islander East, consistent with its argument throughout this appeal that the FERC’s review constitutes the entirety of analysis for all of the many aspects of the proposed project, nevertheless claims that the FERC did not find that the ELI Extension or Alternative was “superior to the Islander East Project on any basis whatsoever.” I.E. Reply Bf. at 15. The Secretary will find from reviewing Islander East’s FEIS, however, that this assertion is false.

Islander East’s claim not only betrays a willful lack of understanding of the NEPA process and its limitations, but also completely sidesteps the salient issue before the Secretary in *this proceeding*, which is the suitability of alternatives under the CZMA should the objecting state agency identify an alternative that it deems consistent with the enforceable policies of its coastal management program. Here, the DEP identified the extension of the existing Iroquois system as the location of a pipeline that could bring additional natural gas supplies to eastern Long Island in a manner consistent with its CMP. As is clear from DEP’s objection letter<sup>1</sup> of

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<sup>1</sup> Consistency objection letter after remand during pendency of appeal. The DEP’s first letter of documenting its objection to coastal consistency was communicated to Islander East on October 15, 2002.

July 29, 2003, which documents the agency's review of the FERC's ELI system alternative and its filing of the DEIS of the Iroquois Long Island extension project proposal on the record of this appeal, the agency has identified an alternative that is sufficiently specific for the Secretary to ascertain whether the alternative is one upon which he may conclude that the appeal must be dismissed.

The DEP has more than adequately described the components of the alternative that it has identified. It has identified the precise location of the identified alternative, and it has cross-referenced materials that specify the route. Since the identified alternative builds upon both a prior vetted FERC proposal and additional analysis by the FERC environmental staff to address the volume/supply issue, the identified alternative for CMP compliance completely meets the criteria established by the Secretary. *Cf. Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc.* (September 2, 1994) at 44 (North Carolina identified an alternative as "relocation of Mobil's drilling site," but did not identify a location and did not indicate "whether an alternative site would *probably* allow Mobil to conduct drilling discharges consistent with the State's CMP.") (emphasis added.)

The agency has appended to this filing additional materials relevant to the Iroquois application to further inform the Secretary's analysis of this element of Ground I. Those materials demonstrate the following: (1) that the route has been specifically determined and will involve much less additional adverse environmental impact to Connecticut's coastal resources than Islander East's proposal, including the elimination altogether of Horizontal Directional Drilling ("HDD") into open waters of the Sound and in areas of high value as existing coastal dependent and water dependent socioeconomic resources. HDD drilling in areas of unusually

high bedrock concentrations, associated bentonite drilling fluid releases into open waters adjacent to existing shellfisheries, and additional direct destruction of shellfisheries habitat necessitated by the excavation of a receiving pit at the break-out point for the HDD drill hole would be eliminated; (2) that underwater pipe installation at the identified alternative site would impact the far corner of one leased shellfish bed adjacent to an existing underwater pipe corridor, and head for deep water beyond scarifying much less area suitable for shellfishing; (3) that the alternative route's location immediately adjacent to and in an already disturbed benthic environment, where the long-term and likely irreversible adverse impacts are now known and appreciated, lessens the overall or cumulative negative environmental impacts associated with multiple crossings of Long Island Sound along its reach, and in areas that have had—and should not have had—similar intrusions. No nearshore waters are implicated in the execution of the identified alternative.

In addition to specifics of the identified alternative that avoid altogether or minimally impact nearshore water environmental resources, the Iroquois application and other information that Connecticut is providing the Secretary in this appeal demonstrate that some upland infrastructural development necessary to allow for such an extension of the existing cross-Sound pipeline to carry additional volumes of natural gas and the gas of other companies such as Duke Energy's affiliate Algonquin Gas Company has already been approved by the FERC, thus substantially clearing the way for such an alternative to meet the needs identified by Islander East. The approved addition of a compressor station in Brookfield, Connecticut, which would interconnect Iroquois' system with the Algonquin transmission line, will allow the natural gas supplies that Islander East wants to provide to be carried on the Iroquois pipeline up to the point

of the identified alternative underwater pipeline extension in Milford, Connecticut.<sup>2</sup> Additional facilities needed to add further compression are identified in the Iroquois materials.<sup>3</sup>

Islander East disparages the identified alternative by insisting that it must describe facilities exactly capable of providing its applied for volumes, along with its insistence that it must have an “independent” pipeline to provide “system reliability and security of supply.” I.E. Reply Bf. at 16. The insistence that each and every aspect of the Islander East project as proposed must be replicated for an alternative to be “adequate” is aimed at denying the Secretary the ability to engage in any effective alternatives analysis (the “it’s all essential” or “it’s all primary purpose” argument). The company has made that fact abundantly clear in stonewalling each environmental agency responsible for review when the issue of alternatives has arisen: the CEP, the U.S. Environmental Protection Agency (“EPA”), and the U.S. Army Corps of Engineers (“ACOE”). The CZMA consistency review process is but another venue where this claim has been made. The Secretary’s precedents require deference to the state management program’s assessment of this issue. *See Consistency Appeal of Yeoman’s Hall Club* (August 1, 1992) at 6. Islander East, which bears the burden of proof, merely reiterates that the entirety of its project is immune from this inquiry. The company’s position is, simply, that there cannot and will not be any alternatives to this project.<sup>4</sup>

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<sup>2</sup> The FERC certificated the Brookfield compressor station on October 31, 2002. 101 FERC ¶ 61,131 (Docket No. CP02-31-000).

<sup>3</sup> Additional compressor facilities would be planned for Milford, Connecticut. This infrastructural development is not environmentally sensitive in respect to location, because it is adjacent to the city landfill on existing Iroquois property.

<sup>4</sup> The rejection by the FERC of its staff’s NEPA review preference for the ELI alternative as a less damaging environmental option for another pipeline is contrary to the decision making objectives of NEPA. *Cf. Friends of the Bitterroot v. United States Forest Service*, 900 F. Supp. 1368, 1374 (D. Mont.) (claim that an alternative that

The amalgam of these Iroquois-based improvements, which constitutes a complete proposal for the provision of additional volumes of natural gas to the Long Island market via the identified interconnection, is, however, completely sufficient to discharge the state's coastal consistency review burden of proof of identifying an alternative that is consistent with its management program. *Cf. Consistency Appeal of the Virginia Elec. and Power Co.* (May 19, 1994) at 40 (specificity results from a review of all materials of record, not merely descriptions contained in objection letters). A project alternative for the purposes of the Secretary's Element three analysis is *not* required to meet the exact specifications of the proposed project; it is only required to meet the primary or essential purpose of that project. *Id.* at 40. The identified alternative does that: it takes the initial proposal of Iroquois to transmit 175,000 Dth/day along with added compression as projected by the company<sup>5</sup> and by the FERC, in order to achieve pressures sufficient to accommodate the additional volumes. Because the market conditions appertaining at the time of any such future application are necessarily subject to fluctuation, consistent with the more conservative approach suggested in the Iroquois analysis of its proposal, a starting volume figure of at least 175,000 Dth/d of firm service is perfectly acceptable for the purposes of the identification of a CMP-consistent alternative and with Islander East's primary project purpose, as further discussed in the DEP's opening brief.

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would preserve habitat was contrary to the goals of a forest management plan policy of the Service and would be "pointless" was contrary to the basic tenets of NEPA-driven review).

<sup>5</sup> See Iroquois Response to FERC Information Request, February 19, 2002, appended to application materials, *DEP Attachments*, No. 38.

Relevant to this discussion and as the DEP pointed out, there are other pipelines that feed into Long Island, most notably Transco, which address supply and reliability concerns.<sup>6</sup> Overall, a great deal of connectivity already exists in the natural gas supply system in New York and lower New England. *See DEP Attachments*, No. 37. Islander East has admitted that and it would, in fact, utilize the gas of other pipeline companies as part of the volume that it would seek to supply. *See* n. 21, *infra*. For example, the Iroquois proposed project would “be integrated into Iroquois’ existing mainline, thereby benefiting from the redundancy of compression if an unplanned outage occurs.” *DEP Attachments*, No. 38 [Iroquois application] at Vol. II, 10-4.<sup>7</sup> Iroquois’ Eastchester extension, now completed, directs natural gas supplies to the New York City market area, but it is important to note here that the company installed a T-valve on the line in the vicinity of Glen Cove, Long Island, thereby allowing for future delivery of service to Long Island markets. The South Commack, New York landfall of the existing Iroquois pipeline and its connection with pipeline facilities on Long Island (for example, KeySpan’s existing line) obviously mean that additional infrastructural development is possible if not guaranteed to further address the transmission needs of eastern Long Island, the identified object of Islander East’s proposed services.

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<sup>6</sup> Islander East chides DEP for mentioning the Eastchester Extension, because it is designed to move natural gas supplies into Westchester County and not farther eastward into Long Island, and for mentioning Transco, because this pipeline, though it carries natural gas supplies into Long Island, enters Long Island at its “westernmost end.” Islander East misses the point, which is that extension of existing transmission facilities is possible without another shore-to-shore crossing of Long Island Sound. The ELI alternative identified by the DEP is the counterpart to the Eastchester project, that is, a branching off an existing line to redirect natural gas supplies to market areas. The fact that Transco’s pipeline enters Long Island from the western end is a distinction without meaning in this context, because Transco is connecting with pipeline infrastructure that already exists or which can or will be constructed to reach eastern Long Island.

<sup>7</sup> Iroquois additionally noted that Islander East’s project “lacks redundancy of compression due to the fact that the project will be solely dependent upon compression being installed in Cheshire, Connecticut.” Iroquois application at Vol. II, 10-4.

The ELI alternative could, as Iroquois noted in its application materials to the FERC, be further looped and connected to a second pipeline coming from the shore to maximize operating pressures in the system and increase capacity. Iroquois, however, wisely rejected this alternative as having too much associated adverse environmental impact, and Islander East points to this as proof that a identified alternative predicated upon this proposal could not serve its own project purposes. That is not correct. The identification and rejection of alternatives that would further increase capacity on the Iroquois system does *not* demonstrate the inability of the identified ELI proposal to carry supplies sufficient to address Islander East's projected need, if it ever materializes.<sup>8</sup> In fact, Iroquois states in its application that, though its initial project proposal was for an amount of natural gas transmission less than Islander East's, its proposal "offers measured growth into this region and eliminates the concern of an overbuild scenario. *Yet, Iroquois' proposed 20-inch crossing of Long Island Sound offers tremendous growth opportunity through compression expansions if the Long Island market does indeed achieve the growth that is being forecasted.*" *Id.* at 10-5 (emphasis added).<sup>9</sup> Looking to this point, the FERC NEPA review staff focused upon additional compression via the now certificated Brookfield Compression Station, which links Iroquois' system to that of Algonquin. Accordingly, the superiority of the *ELI route* can be matched by adequate capacity improvements onshore.

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<sup>8</sup> The Iroquois Project application, at 1-3, states that it "will provide the incremental pipeline capacity necessary to meet the growing demands of this market area. Additionally, this project will offer customers on Long Island increased access to Sable Island gas through the backfeed of the Algonquin system, and, through displacement opportunities, access markets in New York City . . ." The proposed 20" diameter pipeline "would be designed for a maximum allowable pressure (MAOP) of 1,440 psig from the mainline tap in Long Island Sound to the meter station at the pipeline terminus. The FERC certificated the non-environmental aspects of the project in September, 2002, but did not get to the FEIS stage of the ELI proceedings prior to Iroquois' withdrawal. *See DEP Attachments*, No. 39.

Finally, the ability of the extension to be installed has been questioned by Islander East in its reply brief, and it argues that the DEP has identified an alternative that will be difficult and that will necessitate future disruptions to the environment as it needs to be maintained over time. Difficulties anticipated as likely to arise from the implementation of an alternative under the CZMA regulations of the Secretary have nevertheless been found by him to be reasonable. *See Millenium* at 29. Available information, however, suggests that Islander East's objections are overblown and that, for example, spud-mounted barges could be utilized instead of anchors and cable sweeps (which occupy more space) and that inspection of the integrity of the line would not be an unduly invasive procedure, since the introduction point for the inspection devices would be close to the surface, at the arch of the pipe after it leaves the hot tap, thereby not disturbing the tap.

The DEP has, therefore, sufficiently identified an alternative to the proposed project that is specific in respect to the particulars of its contours and implementation that the Secretary can further evaluate both its availability and its reasonableness. *See Millenium* at 24.

**B. The Identified Alternative Route Is Consistent With The Connecticut CMP**

The alternative route and project identified by the Connecticut DEP is one which could be conducted consistent with the state agency's coastal management plan. The Secretary looks to and accepts the finding of consistency of a state that has identified an alternative to the objected to proposed project or activity. *Millenium* at 23 and n. 68; *Consistency Appeal of Korea*

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<sup>9</sup> Iroquois also indicated that its proposed extension would have a design delivery pressure into the facilities of KeySpan on Long Island "on a year round basis well in excess of 800 psig versus Islander East's proposed design delivery pressure of approximately 350 psig." *DEP Attachments*, No. 38 at Vol. II, 10-5.

*Drilling Co.* (January 19, 1989) at 23. Therefore, the state has met the second element upon which it bears the burden of proof. *See Millenium* at 23.

Islander East's independence argument, which is the basis for its refusal to evaluate the Iroquois extension route, is simply not sufficient rebuttal for the purposes of CZMA alternatives analysis. Islander East keeps defaulting to its view that the FERC has already determined these issues in the company's favor. As further support for this proposition, Islander East points to the FERC Secretary Patrick Wood's comment letter in this record in which he opines that "there is no reasonable alternative which would permit the Islander East Project to be constructed consistent with the policies of Connecticut's Coastal Zone Management Plan and that will fulfill the Commission's statutory mandates under the Natural Gas Act."<sup>10</sup> This assertion is flawed in two major respects. First, Islander East's project is *not* consistent with the CZMA and the state's management plan, and in this appeal the Secretary [of Commerce] accepts the propriety of that finding as a given. *Millenium* at 22 ("[F]or the purposes of this decision, the modifications to the project that are consistent with New York's Coastal Management Program are those described in New York's objection letter . . . as well as in its Initial and Reply Briefs and supporting materials."); *see also Korea Drilling Co.* at 23.

Secondly, the fulfillment of the statutory mandates of the FERC under the Natural Gas Act has absolutely no bearing upon the Secretary's review of a CZMA consistency objection. The CZMA review process before the state management agency and the Secretary's appeal jurisdiction are co-ordinate and not subordinate to the FERC's consideration of a project

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<sup>10</sup> The FERC's statutory mandate under the Natural Gas Act does not *require* this or any other certificated project to be constructed.

proposal. *See* DEP’s Opening Bf. at 11 *et seq.* At best, this observation by Mr. Wood simply misconstrues the nature of the CZMA consistency process; at worst, it reflects the point of view that Islander East shares that the FERC’s decision making “should be the end of the matter,” an assertion that willfully misconstrues both the Natural Gas Act and the Coastal Zone Management Act.<sup>11</sup> I.E. Reply Bf. at 16.

**C. The Identified Alternative Route Is Available**

Islander East has not borne its burden of proof to demonstrate that the alternative identified by the management agency is not available. According to the Secretary, “availability” “refers to the ability of the appellant to implement an alternative that achieves the primary or essential purpose of the project.” *Millenium Pipeline Co., L.P.* at 24.

Islander East contends that no ELI Extension is available, because no such proposal is being proposed by anybody. That is *not* the criterion by which the Secretary evaluates availability. CZMA review does not restrict the DEP to the choice between competing proposals. The purpose of the review for coastal consistency and the identification of an alternative is to get a proposed project in line with the enforceable policies of the management agency’s CMP. The DEP has identified a better *route*, and the primary project purpose is satisfied as well. Islander East then asserts that it cannot implement the identified alternative, because it has no means of “acquiring the Iroquois facilities,” or of “requiring Iroquois to

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<sup>11</sup> The FERC’s own decisions granting certificates of public necessity and convenience do not even go so far, because they recognizes that CZMA review is entirely separate and apart from decisions made by the FERC pursuant to the Natural Gas Act; and, further, that the inability of an applicant to obtain a certification of coastal consistency and any other required federal permits, such as a Corps of Engineers Section 404 dredging permit, *precludes* the FERC from issuing a license at the end of its process. *See Islander East Order after Rehearing* (January 17, 2003) at ¶ 119.

negotiate or enter into agreements which would permit Islander East joint ownership of or access to those facilities.” In support of this proposition Islander East cites discussion in the *Millenium* decision in which the Secretary stated that alternatives are “unavailable” where no portion of the alternative could be undertaken without the agreement of a third party. *Millenium* at 30 n. 97, citing *Consistency Appeal of the Virginia Elec. & Power Co. (“VEPCO”)* (May 19, 1994) at 45. Accordingly, Islander East argues that “because use of the Iroquois facilities is essential to construction of either ELI alternative, this project could not be constructed without Iroquois’ consent and active participation in the project.” I.E. Reply Bf. at 17.

Islander East’s argument is not persuasive and it has not borne its burden of proof upon this aspect of Element three, because its claim fails to consider the particular facts and the heavily regulatory environment in which gas transmission proposals are vetted, and, further, because the DEP’s identified alternative falls within an exception to the very rule of the Secretary upon which Islander East relies. The transportation of natural gas in interstate commerce is a comprehensively regulated activity. The FERC’s powers under the Natural Gas Act are extensive. *See* 15 U.S.C. § 717(b). Those powers also include cognizance over the interconnection of gas pipelines. As noted previously, the natural gas pipeline system exhibits a high degree of connectivity, as any casual review of proposals before the FERC would indicate. Consistent with the FERC’s policies to promote an open market in this commodity, the existing Iroquois line is an “open access pipeline.” Precisely because of that designation, Iroquois may act to transport other companies’ gas, and, because of that designation, Islander East could apply to hook up to the Iroquois mainline.

The real issue is whether Islander East is correct in asserting categorically that it has no ability to obtain the use of Iroquois' pipeline for the purpose of the joint transportation of natural gas supplies and the routing of those supplies through the proposed extension to markets on eastern Long Island. The Secretary's criterion for unavailability as articulated in the *VEPCO* decision does not rely upon any similar comprehensive regulatory scheme, and the criterion is not as preclusive as Islander East argues. In *VEPCO*, the suggested alternative of obtaining the surplus water supply of a sister municipality is characterized by the Secretary as a purely private contractual matter. The Secretary stated in the *Millenium* decision that "the need for agreement with a third party will not make an alternative unavailable if there is an established process to obtain the necessary approval." *Millenium Pipeline Co., L.P.* at 31 n. 97. New York had suggested that there was a process in the utility industry whereby use of one company's right-of-way by another company could be addressed on a case-by-case basis, and that utilities had, in the past, allowed projects to be constructed with a reduction in the spacing of infrastructure. *Id.* The Secretary found this a satisfactory response to the unavailability argument, noting the following:

Both the specific and general past industry practice is sufficient evidence, for purposes of the Element 3 analysis, to conclude the existence of a process sufficient to satisfy the *VEPCO* exception. To find otherwise would: (a) unreasonably burden a state to obtain concurrences in the limited period available for preparing its appeal briefs; (b) be unnecessary, given the lack of evidence suggesting such concurrence will not be received; (c) conflict with past appeal decisions, which do not require that an alternative be immediately available to the appellant . . .; and (d) potentially make alternatives for all projects unavailable.

*Id.* This "exception" to the *VEPCO* restriction on identified alternatives applies in this appeal as well.

There is another similar industry practice in the gas transmission business, and that is sharing capacity and the interconnection of pipelines. *See, e.g. Application of Portland Natural Gas Transmission System.*<sup>12</sup> Islander East has not shown that an agreement with Iroquois for interconnection and shared capacity on its pipeline from Brookfield, Connecticut to the point of the underwater tie-in falls short of this established industry practice. The company states only that “[n]o one is currently proposing either project, least of all Iroquois.” I.E. Reply Bf. at 17. A joint proposal to undertake the identified alternative would clearly be within the authority of the FERC to permit, and the FERC itself has *not* said that such a venture would not or could not be entertained. *See* Record, Letter of the FERC to Sen. G. Gunther (August 12, 2003), in NOAA’s November 5, 2003 Public Hearing Materials.<sup>13</sup> Because joint or co-operative ventures are common in the interstate transportation of gas supplies, it would eviscerate the alternatives analysis of Element three for the conclusion to be drawn that no alternative is available just because no *current* proposal exists to respond to the identified alternative.

Neither has Islander East shown that there exists no process by which the FERC could compel the proposed interconnection.<sup>14</sup> It is possible for a natural gas transmission company to file a complaint with the FERC after having been refused an interconnection with another company’s pipeline for the purpose of moving natural gas supplies into a market area to serve its

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<sup>12</sup> The Portland Natural Gas Transmission System Maritimes and Northeast Pipeline, LLC and Portland Natural Gas Transmission System (Doc. No. CP96-248-000 *et seq.*, CP96-249-000 *et seq.*, CP97-238-000), the PNGTS pipeline’s main supply line proposal contained facilities jointly proposed with another pipeline company, Maritimes, to interconnect with the main supply line and lay 35.2 miles of mainline from Westbrook, Maine to Well, Maine, and approximately 66 miles of mainline from Wells, Maine to Dracut, Massachusetts. The FERC certificated this proposal. *See DEP Attachments*, No. 40.

<sup>13</sup> The FERC states that “[i]f Iroquois or Islander East intended to pursue such a project, an application, including market data and an environmental report, would be required for our review.” Nothing in this correspondence suggests that the FERC could not entertain such a proposal.

suppliers. The complaint is in the nature of a claim of anti-competitive practices that unfairly prevent the petitioning company from competing in the gas supply market place for the area in question. In the *Portland Natural Gas Transmission System* proceeding, a pipeline company called North Atlantic sought to intervene. North Atlantic did not own any facilities or engage in any natural gas transportation, but it claimed that it anticipated filing with the FERC in the near future an application to construct and operate a new gas pipeline that would transport natural gas from the Sable Island region of Canada to the Northeast United States. North Atlantic indicated that it might seek to interconnect with the Portland Natural Gas – Maritimes joint facilities. North Atlantic’s major issue was the ability of the certificated joint facilities to give Portland a competitive advantage in rates due to the manner in which costs for the joint facilities were to be rate-absorbed. Of relevance to the instant appeal is the request that North Atlantic made of the FERC that it “should impose a condition on any authority we issue requiring PNGTS (Portland) and Maritimes to provide alternative pipelines a right to interconnect with the Phase I Joint Facilities on an open and nondiscriminatory basis.” PNGTS Jnt. Applic. at ¶ 62,147. The FERC responded as follows:

PNGTS may not discriminate unduly in providing services or in constructing facilities to receive gas supplies; however, North Atlantic does not state that it has proposed or been refused any interconnect by PNGTS. If at some future point North Atlantic actually proposes such an interconnect and believes it is receiving unduly discriminatory treatment, it may then file a complaint with the Commission.

*Id.*

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<sup>14</sup> Contrary to the assertion of Islander East, the CZMA review state agency does not have to possess the coercive authority to effect implementation of its identified alternative.

In *ANR Pipeline Company v. Transcontinental Gas Pipe Line Corp.*, 91 FERC ¶ 61,066 (April 14, 2000), *DEP Attachments*, No. 41, the petitioner (“ANR”) filed a complaint with the FERC requesting an order directing the respondent (“Transco”) to install an interconnection with ANR on its mainline facilities, which interconnection would allow ANR to deliver natural gas for certain of its shippers on a firm basis into the respondent’s mainline facilities near an active sales market obviating interruptible service via a lateral belonging to the respondent. As part of its complaint, ANR alleged that Transco has allowed the construction of many mainline interconnections with other pipelines, and that its refusal of a similar interconnection for ANR “shows undue discrimination, in conflict with the Commission’s pro-competitive policies.” *Id.* at ¶ 61,232. The FERC agreed and rejected Transco’s assertion that in ordering the interconnection the FERC had exceeded its authority, asserting that it was empowered under Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717(c), to address anticompetitive preference and prejudice. The FERC cited specifically to its own precedent, and its policy that upon an adequate showing a party desiring access to a pipeline may obtain an interconnection. *Id.* at 61,244.<sup>15</sup>

On the jurisdictional issue, Transco had argued that the FERC’s authority to remedy undue discrimination was not intended to override what it argued were the limited circumstances under Section 7 (15 U.S.C. § 717f) whereby a natural gas company may be ordered to construct facilities. The FERC again disagreed, and stated that its powers under Section 5 were sufficient

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<sup>15</sup> The conditions precedent for a shipper to *compel* an interconnection, according to the FERC in the *ANR* proceeding, included willingness to bear the costs of interconnection construction or construct the facilities itself in compliance with the pipeline’s technical requirements; not adversely affect the pipeline’s operations; not diminish service to the pipeline’s existing customers; not cause pipeline as a result of the proposed interconnection

to account for situations in which it needed to order an interconnect as a remedy for undue discrimination. “[T]he NGA [Natural Gas Act] also permits the Commission to compel pipelines to construct interconnects necessary to effect or facilitate [natural gas] transportation, particularly when the construction is to be at the applicants’ expense. [n]or does Section 7(a) operate in this case to limit this broad authority.” ¶ 61,245. The authority to address undue discrimination carries with it by necessary implication the authority to regulate service. *Id.*

The details of how any such complaint by Islander East would be handled by the FERC are unknown and premature at this juncture. Issues of capacity or operational constraints must be proved, and they are all dealt with by the FERC on a case-by-case basis.<sup>16</sup> But what is clear, particularly in light of the North Atlantic intervention example cited above, is that there is a regulatory mechanism that Islander East could invoke to press its case for an interconnection with the Iroquois line at issue. Frankly, given the interest formerly expressed by Iroquois in this line, but its stated inability to proceed owing to market support, it is unlikely that a joint venture between this company and Islander East would be unattractive, since both companies would benefit, and, most importantly in terms of the bigger picture, the purported advantage of increasing natural gas supplies to the Long Island market will have been addressed.

Accordingly, based upon industry practice and an established process respecting the interconnections of gas pipelines, the DEP asserts that Islander East has not borne its burden of proof to demonstrate to the Secretary that the identified alternative is unavailable. It is both

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to violate applicable environmental or safety laws; and not cause the pipeline to violate its right-of-way or other contractual obligations.

<sup>16</sup> See, e.g. *SunShine Interstate Transmission Co.*, 67 FERC ¶ 61,229, ¶ 61,699-61,700 (unless limitations are specifically stated and supported, the FERC “should give little credence to claims by competitors of potential operational or capacity limitations”).

possible and probable that an arrangement will be arrived at whereby the extension off the Iroquois system at Milford, Connecticut could be achieved, to the benefit of all, but, most importantly, within the parameters of Connecticut's CMP and without creating a whole new and separate area of environmental impact and detriment to water-dependent important designated uses such as shellfisheries and shellfishing in the Thimble Islands reach of Long Island Sound. The Secretary should find for the state on this part of Element three.

Finally, to the extent that feasibility is factored into the availability inquiry, it is clear that Islander East has chosen not to seriously contest the issue.<sup>17</sup> Under the reasonableness prong of the alternatives analysis, it suggests that DEP has not considered the environmental harm to be occasioned by a high-pressure tap operation needed to make an interconnection with an active gas transmission line. I.E. Bf. at 18. To the extent that this unsupported and conclusory point is relevant at all, it goes to a feasibility issue, and the Secretary has required an appellant to show *with specificity* that “any of the difficulties it identified present obstacles that cannot be overcome through reasonable efforts.” *Millenium* at 36. Hot-tap technology is in fact available to address the proposal; were it not, Iroquois would not have proposed its ELI extension in the first place. As to the DEP's responsibilities, the identification of an alternative does not mean that necessary environmental permit conditions or the like would no longer be required.

*Millenium* at 23-24 n. 68.

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<sup>17</sup> As the Secretary noted in his decision in *Millenium*, even significant difficulties with an alternative do not inexorably lead to the conclusion that it is unavailable or unreasonable. Such discounted objections include those of “extreme difficulty,” “too expensive” and too “time consuming” to implement. *Millenium* at 29 and n. 94, citing *Consistency Appeal of Chevron, U.S.A., Inc.* (October 29, 1990). Islander East has not even attempted to meet these criteria.

The fourth and final part of the Element three analysis requires the appellant to show that the identified alternative of the state management agency is unreasonable. On this point, Islander East inappropriately attempts to shift the burden of proof back upon the DEP to undertake the required demonstration of too great cost relative to environmental advantage of the identified alternative. E. Bf. at 17. As noted in the DEP's opening brief, this criterion necessitates the weighing of additional costs associated with the implementation of the identified alternative against the environmental benefit of *avoiding* the impacts associated with the appellant's preferred project.

Islander East never argues that the proposed interconnection would be cost prohibitive. Islander East has proffered no information respecting whether doing an interconnection with the Iroquois system at Milford would involve additional costs. Owing to the use of shared existing pipeline, it seems almost intuitive that the extension alternative identified by DEP would be less costly. Iroquois, for example, has gone ahead with the Brookfield compressor station anyway, thereby constructing an integral component of the identified alternative, an interconnection with and compression services for the Algonquin line's lower pressures. The addition of more compression at Milford was not problematic from a siting perspective then nor would it be so now, and it is not cost prohibitive. An absence of information on additional costs to the appellant for constructing an identified alternative routing leads inexorably to the conclusion that the identified alternative is reasonable. *See Millenium* at 33, 37.

Finally, as part of its reasonableness argument, Islander East contends that DEP has not carefully weighed the dangers associated with the proposed interconnection. It asserts, without any reasoning whatsoever, that "the environmental costs of expanding Islander East to meet the

growing needs of the market are far less than the environmental costs of expanding any of the ELI-based alternatives.” I.E. Bf. at 18. In this regard, all of the environmental review agencies strongly disagree with Islander East. *See* comments of U.S. EPA, ACOE, NMFS. Each one of these agencies has concurred with DEP’s conclusion that the Thimble Islands area is ecologically significant; that the shellfisheries and shellfishing of this reach of the Sound will suffer grave damage; and that an extension off the already impacted Iroquois alignment is environmentally preferable. U.S. EPA reiterated this point most recently when it concluded, based upon the available information that “practicable alternatives to the Islander East proposal exist (e.g. the Eastern Long Island Extension) that would less adversely impact the aquatic environment.” *DEP Attachments*, No. 42 (Letter dated October 28, 2003 to James R. Walpole, General Counsel, NOAA, enclosing prior U.S. EPA correspondence dated September 5, 2003, September 30, 2002 and May 21, 2002). NMFS, commenting to Iroquois on the proposed ELI project of the company, said it had few concerns so long as the tap occurred offshore. Bringing the pipeline back to shore would cause problems for shellfish and winter flounder. *DEP Attachments*, No. 43.

In this latest criticism of the Islander East project, EPA stated that the “least environmentally damaging practicable alternative” standard that must be applied to the proposed project’s Clean Water Act (“CWA”) Section 404 permit administered by the ACOE

closely, though not identically, resembles the alternatives determination that the Secretary must make in determining whether to override a state’s consistency objection. In this case, Islander East has not completed an acceptable alternatives analysis pursuant to CWA § 404. We recommend that your final decision reinforce that Islander East prepare a thorough and complete alternatives analysis, consistent with previous comments that EPA submitted.

*Id.* The implication contained in this language is unmistakable: Islander East cannot show that there is no available alternative, because it has determined to date not to undertake any such analysis.

We are addressing in this appeal the serious, even devastating, environmental costs of implementing any portion of Islander East's preferred route. The ecological and commercial costs when factored into the CZMA program are precisely what is at issue. Clearly, Islander East sees no connection between the environmental damage that it will do and the profit maximization of its project. This is an all-or-nothing strategy on the part of the company, which is why it has bucked and battled the CZMA process from the beginning. The company has not demonstrated that the identified alternative is unreasonable. Put in the context of the override regulations of the Secretary, the company has said nothing reasonable about the unreasonableness issue. The Secretary must necessarily conclude that Islander East has not met its burden of proof as to this aspect of Element three; he should end the analysis of the issues on appeal at this point; and he should dismiss Islander East's appeal of the DEP's coastal consistency denial.

**II. ISLANDER EAST'S PROPOSED PROJECT IS INCONSISTENT WITH ITS CLAIM TO BE A PROJECT THAT EITHER SIGNIFICANTLY OR SUBSTANTIALLY ADVANCES THE NATIONAL INTEREST**

If the Secretary does not find that the identified alternative proposed by the Connecticut DEP is available or reasonable, then he must default to further consideration of the elements of Ground I under the applicable regulations. He must consider whether the Islander East proposed project significantly or substantially furthers the national interest, and he must also consider, if

he finds that the project does so, whether the adverse environmental impacts associated with the project outweigh the national interest policies of the CZMA so identified.

The DEP's opening brief set forth the correct series of inquiries that the Secretary must make in analyzing a claim by an appellant that its project furthers a national interest policy or objective identified in Sections 302 and 303 of the CZMA. First, Connecticut argued and proved that Islander East's pipeline did not implicate the siting of a major energy facility as that term is understood in the context of the CZMA and coastal consistency review. The project is not coastal dependent, as are examples of shore-based facilities that need to be on the water (the example given was that of fuel receiving facilities, such as marine terminals—an altogether different use of the term “pipeline”—or electrical generating plants that have required barged-in fuel supplies of coal). In theory, the Islander East project would not have to implicate coastal zone resources at all, were it to utilize an all-overland route heading into New York and Long Island from its western end. A marine terminal, on the other hand, remains wedded to the availability of port facilities.<sup>18</sup> Islander East's project is, therefore, not entitled to priority consideration, because it is not coastal dependent. Even if it were so, the CZMA requires “priority consideration” to be given “to the maximum extent practicable” of locating new commercial and industrial developments “in or adjacent to areas where such development already exists.” 16 U.S.C. § 1452(2)(D). The DEP's identified alternative meets that criterion,

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<sup>18</sup> Islander East argues that its pipeline “must enter and exit the water somewhere.” I.E. Bf. at 7. The company concedes the critical point that the DEP is making. Since it is just a pipe, it may enter and exit the water in a variety of places, and in places not as sensitive from a resource management perspective. Consistent with the DEP's identified alternative, it does not even have to “enter” the water at all, but could connect in the water with an existing pipeline. Where it exits the water is a matter within the jurisdiction of the State of New York.

as Islander East's project route does not, because it would locate the pipeline extension in an area of existing underwater "development."

Because the state-approved CMP is already deemed to have addressed the requirement of including energy facilities in the planning and management process, and it is not required to place the siting of energy facilities above other national interests, which include demonstrably coastal dependent resources that the state is obligated to protect, Islander East's argument that it is pursuing a project that is of signal import and that is owed priority consideration is false. As the DEP pointed out with reference to Outer Continental Shelf development and its own CMP-FEIS, the siting of energy-related facilities should be developed "in an orderly manner consistent with national energy and environmental policies." DEP Opening Bf. at 31. Nothing has occurred in the intervening years to alter that sound conclusion. Executive Order No. 13212 upon which Islander East has placed great reliance, states nothing that is inconsistent with Connecticut's federally approved CMP. The Order states that "[t]he increased production and transmission of energy *in a safe and environmentally sound manner* is essential to the well-being of the American people. . . [A]gencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, *while maintaining safety, public health, and environmental protections.*" Executive Order No. 13212 (May 18, 2001), 66 Fed. Reg. 28,357, §§ 1, 2 (emphasis added). DEP Attachments, No. 44.

Second, the DEP made the argument that Islander East's provision of Canadian sourced natural gas did not have an impact upon any goal of achieving domestic self-sufficiency as a way to lessen dependence upon foreign sources. DEP Opening Bf. at 33-34. Islander East responds

that Connecticut's argument is naïve in respect to energy supply issues.<sup>19</sup> The company points to the existence of free trade agreements with Canada that effectively remove the boundaries between the countries. That does not lead inexorably to the conclusion that Canada would or could never restrict exports. The Canadian National Energy Board suggests that it has the ability through its Market Based Procedure to examine cases where it is alleged that domestic buyers of natural gas are unable to achieve procurements on terms similar to proposed sales for export. *See* Canadian National Energy Board, FAQs ("On What Basis Does the NEB Authorize Exports of Natural Gas?").<sup>20</sup> This observation is made by the NEB in the context of its further statement that the natural gas market in North America is a fully integrated one. *See also DEP Attachments*, No. 45 (Natural Gas Intelligence Newsletter article, August 12, 2002, "Canadian Battle Over Sharing East Coast Reserves Expands.")

Despite the existence of integrated markets, the fact remains that our energy self-sufficiency is not achieved by the importation of gas from foreign suppliers. Therefore, it is altogether accurate to posit that the CZMA goal of "attaining a greater degree of energy self-sufficiency" from "new or expanded energy activity in or affecting the coastal zone," 16 U.S.C. § 1451(j), is unaddressed by a project such as that proposed by Islander East. Cf. 16 U.S.C. § 1451(f) (recognition that activities *in* the Great Lakes, territorial sea, exclusive economic zone, and Outer Continental Shelf "are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coast and

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<sup>19</sup> Islander East has difficulties reading treaties. The citation to an Agreement Concerning Transit Pipelines, 28 U.S.T. 7449 (1977), refers to "transit pipelines" carrying hydrocarbons from the country of origin through the other country for delivery back to the country of origin. That is inapplicable to the description of Islander East's source of supply (Canadian) and point of delivery (United States).

<sup>20</sup> The website of the Canadian National Energy Board is found at <http://www.neb.gc.ca/energy/ngprice>.

ocean waters”) (emphasis added). The issue thus is articulated in the context of domestic, not foreign, locations, consistent with the CZMA’s reach.

Third, the Connecticut DEP argued from the text of the CZMA that any claims made that a project such as that proposed by Islander East was necessary for “compatible economic development in the coastal zone” was myopic and did not give adequate consideration to the full range of values the inhere in CZMA policies. DEP Opening Bf. at 35-37. Islander East’s project constitutes but one of several proposals; that it has been certificated by the FERC is of no great weight in respect to the CZMA policy requirement that development be compatible with such other values as ecological, socioeconomic, cultural and historic values. The Secretary’s review of requests for override routinely seeks to grapple with *all* of these values, not simply any respecting energy issues, including claimed benefits to accrue from infrastructural development or increased supply.

Islander East quotes the New York Siting Board, to the effect that the ANP Brookhaven proposed new generating facility, which “will be served by Islander East” must go on line at the earliest opportunity, in order to provide certain environmental and public interest benefits. I.E. Reply Bf. at 6.<sup>21</sup> In fact, Brookhaven Energy Project’s Article X application before New York authorities, Section 9, *see DEP Attachments*, No. 46, specifies the supplier options available to the project’s location. The data do not suggest that Islander East’s proposed volumes would be

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<sup>21</sup> The schedule of construction for this and other generation facilities is irrelevant to the issues in this proceeding. Available information indicates that the Brookhaven project has been repackaged for reconsideration by the Long Island Power Authority, the buyer of the electricity, which last year called for new bids in May, 2003. It will be delayed, as well as the Calverton project upon which Islander East depends for its showing of need for service. Because these precedent agreements may not be firm, it does not make much sense to make capacity on the ELI pipeline a major issue of “primary purpose.” *See also DEP Attachments*, No. 47 (Branford Blue Ribbon Comm.).

critical for the project. In a related vein, the same filing indicates that KeySpan Energy<sup>22</sup>, was undertaking upgrades within its own existing pipeline corridors; would be servicing the Project; and was planning further infrastructural upgrades to reach farther into eastern Long Island. The Project stated that the local gas system owned by KeySpan has firm transportation contracts with four pipelines serving Long Island: Williams-Transco, Iroquois, Texas Eastern Transmission Corporation and Tennessee Gas Pipeline. *See also* Correspondence, J. Shaw to Office of General Counsel, NOAA (November 15, 2003) in response to remarks of R. Lukas, KeySpan re CZMA consistency. The Project's viability is not integrally tied to the approval of Islander East's project. In response to a public inquiry respecting such dependence, the Project responded as follows:

KeySpan owns and operates a gas lateral located in the LIE right of way adjacent to our site. This lateral is our primary source of fuel. Our arrangement with KeySpan is for transportation services. Supply will be acquired from a variety of different players who supply gas to the region. We have reserved a transportation position on Islander East Pipeline but our project is not dependent upon the pipeline being built.

*DEP Attachments*, No. 48 (Correspondence from Robert Charlebois, Brookhaven Energy, to J. Shaw (October 3, 2001). If the Project must go on line at the earliest opportunity, there is nothing to suggest that it cannot do so without Islander East.<sup>23</sup>

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<sup>22</sup> KeySpan has interests in both Iroquois and Islander East. *See* DEP Attachments, No. 38 ( Vol I); comments of K. Kennedy, November 5, 2003 public hearing, at 253.

<sup>23</sup> This brings up the topic of displaced natural gas made available to Long Island markets as a result of the infrastructural improvements that have brought Sable Island gas from the Maritimes to the greater Boston area. The proximity of those market area to the source of supply concomitantly means that gas that previously would have come to the Boston region from U.S. Gulf sources and western Canada would be available in markets such as Long Island. *See* Long Island Task Force Report (June 3, 2003), page 64 n. 125 at <http://www.sustainenergy/TaskForceWorkingGroup/AssessmentReport2>. The FERC had posed an interrogatory that noted that the HubLine pipeline of Algonquin had capacity substantially less than that proposed by Islander East. Islander East answered that additional supplies could be accessed due to interconnections with other

The supply issues loudly proclaimed by Islander East do not establish that need for this project at this time is so great that other coastal consistency policies should be hijacked in the process. The Long Island Task Force Report (June 3, 2003), which was largely an industry document, corroborates this observation. In its discussion of supply needs for New York and the Long Island area, it relied upon the so-called Charles River Report prepared as part of New York's 2002 Energy Plan. The Task Force summarizes a portion of that report as follows:

The study included integrated modeling of the natural gas pipeline and electric generation systems, with a particular focus on the downstate area, including Long Island. The study concluded that "New York has sufficient gas delivery capacity to deliver the amounts of gas required for 2005 generation projects and pipeline expansion scenarios analyzed, including the scenarios where pipeline expansions are limited to those currently under construction." The base case model assumed that the Eastchester Pipeline would be the only new pipeline operating within Long Island Sound. With no further pipeline expansions post-2003, the study predicted that oil would continue to be burned at roughly historical levels on many days in the winter and a few days in the summer. The study concluded that if pipeline capacity to New York City and Long Island were increased, less oil would be burned. The study did not specify where such pipeline additions would or should be constructed.

Task Force Report Part II, n. 20, *supra*, § 2.4.2 at 70 ("Natural Gas Supply, Demand and Infrastructure on Long Island"). The same Charles River Report further explains that:

With the advent of U.S. imports from the Sable Island production (offshore Nova Scotia), the Northeast finally had relatively short haul production from the north that greatly expanded both the pipeline delivery capacity, as well as the supply of gas in the region and enhanced

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pipelines belonging to Iroquois, Tennessee and Texas Eastern. Accordingly, the claim that Islander East is an important project because it will bring Sable Island gas to New York markets is overblown and misleading. Appropriately, the Task Force concluded that "The quantity of Atlantic Canada gas that will, in the future, be destined for markets in Connecticut and Long Island is unknown." *Id.* at 65 (emphasis added).

the flexibility of pipeline deliveries. These incremental pipeline flows not only supplied new markets (e.g. new combined cycle electric generators in New England), but also offloaded pipeline capacity coming from the south so that capacity might be used in other areas. Sable Island gas does reach into New York occasionally. Much more importantly, however, is the fact that it meets some of New England's market requirements, thereby allowing the pipeline capacity that flows through New York (to New England) to be utilized in New York, if needed. This displacement effect . . . is of greater regional consequence than the actual volume itself.

Final Report, *The Ability to Meet Future Gas Demands from Electricity Generation in New York State*, Prepared for New York State Energy Research and Development Authority and New Independent System Operator, Charles River Associates (July, 2002) at Appendix A ("New York Gas and Electric System Infrastructure," sec. A-1, pg. 72. *DEP Attachments*, No. 49.

Islander East levels the charge against Connecticut that it has ignored New York authorities. On the contrary, the materials commissioned by New York authorities do not corroborate the claims made by them in support of Islander East's particular project.

Compatible development of the coastal zone will necessarily include energy infrastructure. No one denies this. Compatible development of the coastal zone need not, however, suffer a net loss if the Islander East project is not constructed, or constructed at a different location consistent with Connecticut's CMP. In this sense, Islander East's project is not "necessary" for such development over time to proceed. In fact, were it to proceed as proposed, compatible economic development as understood in the context of the CZMA would be ill-served, because it would proceed at the expense of other coastal dependent activities that are presently threatened and are entitled to be conserved. 16 U.S.C. § 1451(c), (d), (e), (g), (h);

§ 1542(1), § 1452(2)(A), (C), (J)(specific reference to the siting of “aquaculture facilities within the coastal zone”).

Fourth, Islander East’s project does nothing to advance the CZMA’s policies of protecting the resources of the coastal zone. The company’s claims for air quality improvement are too sketchy to be meaningful in the present context. No one disputes that gas-fired generation facilities would be cleaner burning than those fired by oil or coal. But there is no direct evidence for the company’s claim absent detailed analysis of actual facility conversions, or facility retrofits or other improvements. None of this has been verified or quantified. The bare assertion that the implementation of *this* project will result in the implementation of *these improvements* and a net reduction in air emissions, for example, is inadequate to support the claim that the proposed project protects the resources of the coastal zone.

Furthermore, it is both unreasonable and illogical to insist as Islander East does that future need for electrical power generation on Long Island benefits the coastal zone. One aspect of a project such as this that has many impacts—expanded gas transportation infrastructure—cannot nullify all the other impacts associated with it. Appropriate siting and regard for competing uses of coastal resources is an essential goal of the implementation of the enforceable management policies of the CZMA. And yet, Islander East responds that Connecticut has minimized the FERC’s findings and orders, and ignored New York regulatory authorities. .E. Reply Bf. at 7. CZMA coastal consistency review is not a “parochial” exercise; it is a coordinate responsibility mandated by federal law.

Accordingly, the national interest is not furthered by the Islander East project in a significant or substantial manner, and the Secretary should find that the company has not carried its burden of proof and persuasion on this element.

**III. THE ENVIRONMENTAL COSTS ASSOCIATED WITH THE COMPANY'S PROPOSED ROUTE LOCATION ARE NOT OUTWEIGHED BY ANY NATIONAL INTEREST MANIFESTED BY THE PROJECT**

Islander East argues that the national interest in its preferred route outweighs any environmental harm associated with it. That claim is based upon skewed science and wholly unjustified assumptions respecting its ability to minimize or compensate for the environmental damage that the project will cause. The company persists in its view that any and all environmental issues have already been canvassed by the FERC NEPA review, and, *ipso facto*, its showing on this prong of a CZMA consistency appeal is self-evident. The argument distorts the law, the facts and the Secretary's precedent. It is a particularly untenable proposition in light of the Secretary's recently released decision in the *Millenium Pipeline Co.* consistency appeal. In that proceeding, as in this, the FERC had certificated the preferred route of the pipeline company. The company, in its appeal papers, argued repeatedly that the FERC environmental review process was sufficient in all respects. Nevertheless, the Secretary did not conclude, as he was urged to do, that Millenium's project was consistent with the CZMA due to its prior favorable NEPA review by the FERC; he upheld New York's consistency objection.

Islander East incorrectly calls DEP's characterization of the FERC's NEPA review a "red herring." NEPA forces the lead agency to undertake a "hard look" at the environmental issues attending a proposed major federal action, but it mandates no particular action.<sup>24</sup> The inquiry in

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<sup>24</sup> The FERC agrees with the State. See Order re Certificate (September 19, 2002) at ¶ 57.

no way resolves the issue of the quality and nature of CZMA consistency.<sup>25</sup> Too often, the EIS that the FERC prepared simply reflects a broad-based judgment that a problem can be addressed by appropriate conditions, or it defers to other policy preferences of the agency. The identification and handling of the Long Island Extension alternative is indicative of this approach, as the FERC NEPA review staff were quick to point out. Islander East FEIS at 4-6. Another example of this approach is the lack of any information on the NEPA review record of what the alternatives are to failure of the HDD that Islander East proposed in its vain attempt to silence criticism of its dredging through prime shellfish habitat and lease areas. The FEIS did not examine this contingency, and the company's monitoring plan, FEIS, App. N., only speaks to possible losses of drilling fluid.<sup>26</sup> The FEIS recommends only that the company prepare a site-specific plan for presentation to environmental review agencies like the DEP and ACOE in the event that the directional drill is unsuccessful. FEIS at 3-53. That information has been to date provided to neither agency; and Islander East would prefer not to provide it prior to decision making on the propriety of its proposed project, because of the grave consequences of dredging a trench through salt marsh and nearshore waters. *See, e.g., DEP Attachments, App-C* (videotape of 1992 Iroquois open trenching installation). The after-the-fact consequences of this reasoning

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<sup>25</sup> On a related point, Islander East claims that the DEP's comments on the significance of Clean Water Act Section 401 certification misconstrues the nature of CZMA review, especially in light of NOAA's revised regulations which removed the Clean Water Act and Clean Air Act references from consideration as elements of CZMA override review by the Secretary. All that the DEP indicated was that there had been the issuance of a tentative determination to deny Section 401 certification by Connecticut and that this would constitute a determinative decision on the project. DEP never linked its observation to the CZMA consistency determination that the Secretary must make in the instant proceeding.

<sup>26</sup> The FEIS makes a veiled reference to the use of the Long Island landfall method, which is open-cut trenching. *See Appendix commentary.* The FERC in other applications has stated that "site-specific plans" for HDD failure involve "flume or open-cut techniques." *See, e.g., Portland Nat. Gas Transmission System – Maritimes and N.E. Pipeline, LLC & Portland Nat. Gas Transmission System*, 80 FERC ¶ 61,345, 62,167 (September 24, 1997).

render nugatory effective conservation and management of critical coastal resources.<sup>27</sup> The CZMA review necessarily has to delve into these matters independently of NEPA review and expose, as the DEP has done here, the gaps in critical information that represent the likely adverse environmental impacts.

Elsewhere, the FERC EIS simply lacks detail respecting such matters as subsurface geology<sup>28</sup> or any real acknowledgement of the irrevocable changes that the laying of the pipeline will have upon the benthic substrate which is essential for the continued health of the shellfisheries in the area. The FEIS found that the proposed HDD construction technique would avoid some presently unleased shellfish areas, but not all, given limits on the distance that the technique could cover. Thereafter direct trenching of bed areas would take place. FERC staff recite that areas of “potential value” as lease areas under the jurisdiction of both the town of Branford and the State of Connecticut are unleased and “recovering from commercial harvesting activities” in this path. FEIS at 3-69. Nevertheless, under its mitigation discussion, the FERC never even mentions the impact to unleased but commercially viable shellfish habitat. FEIS at 3-105-106. The FEIS concludes that Islander East’s execution of agreements with certain shellfish bed lease holders who would be affected by trench excavation and anchor corridors, and the

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<sup>27</sup> Cf. Comments of Wm. Horne, member, Branford Blue Ribbon Committee, November 5, 2003 public hearing, at 28 (HDD failure leaves only two alternatives: (1) installing the pipeline below Tilcon’s shipping channel, where heavily-laden barges have been documented tipping over; and (2) installing the pipeline through a salt marsh to the east that is part of a natural and habitat area belonging to the Branford Land Trust, town of Branford and State of Connecticut.

<sup>28</sup> The subsurface analysis of the FERC staff wholly misconstrues the significance of the geological formations prevalent in the Branford reach of Long Island Sound. See comments of Dr. C. Cuomo, November 5, 2003 public hearing at 122 (no attention by Islander East to probability of encountering bedrock; existence of geologic fault—“eastern border fault”—in area). Dr. Cuomo specifically faulted the DEIS and FEIS as inadequately handling these issues. The lay commentators at the November 5, 2003 public hearing expressed a better understanding of the Thimble Island area as one preeminently composed of granitic bedrock outcropping, reefs and other features.

company's establishment of a compensation fund to provide damages for ruined gear—during construction—constitute sufficient measures that “would effectively reduce and minimize impacts on commercial fishing activities.” *Id.* at 5-7; *see also FERC Order*, September 19, 2003, ¶ 77. The FERC certification order gave short shrift to the Branford Blue Ribbon Committee's estimate of major losses to its commercial shellfishery in the final order, suggesting that legal remedies might be a suitable form of mitigation.<sup>29</sup> It stated: “Additionally, we note that Islander East is responsible for potential damages that are a direct result of the construction of its pipeline.” *Id.*

As the DEP has demonstrated, however, the impacts to shellfisheries substrate are irrevocable and far longer than merely “during construction.” *DEP Attachments*, Vol. II, No. 23. These are irrevocable impacts that have an impact post-construction: they are not “compensable” and it is highly doubtful that they can be adequately mitigated.<sup>30</sup> As Dr. Stewart noted before both the Siting Council and in his comments at the NOAA public hearing of November 5, 2003, there is a lack of “substantial science” addressing trench environments or bottom studies of

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*See, e.g.*, comments of Shaw, November 5, 2003 public hearing transcript at 59;-60; comments of Balestracci at 78-79; additional comments at 185.

<sup>29</sup> Duke Energy, Algonquin Gas Company's HubLine project's installation delays caused the company to agree to pay Massachusetts five million dollars as a “contribution” to a fund to assess, “mitigate” and restore long term impacts to aquatic resources and habitat associated with the project's activities conducted outside the construction window. In essence, the Commonwealth was put in the position of having to authorize work to proceed during the summer months in order to limit the damage already done by the project and to get it concluded as soon as possible. This is an untenable position to be in: to have to allow construction during a period when it never would have been allowed in order to avoid even greater damage to the aquatic resources by waiting until the next winter construction season. *See* J. Shaw submissions, November 5, 2003 public comment submissions.

<sup>30</sup> The FEIS is more forthcoming than the FERC order respecting remedies against the company. It defaults to the following conclusion that has no meaning from an environmental resource and conservation perspective at all: “However, Islander East is responsible, both onshore and offshore for any damages caused by construction activities. Islander East could be taken to court for damages, including loss of productivity to shellfish beds. If evidence is given that proves that Islander East is responsible for causing the damage, the courts would determine the proper compensation.” FEIS at 3-107. This after-the-fact reasoning cannot suffice for purposes of coastal consistency review.

pipelines.<sup>31</sup> Pub. Hearing Rec. Tr. at 39. The evidence from those whose livelihood depends upon an undisturbed and undispoiled habitat corroborates this skeptical assessment of claims that impacts are temporary or that habitat will rebound to its previous condition. This so-called “anecdotal” information is based upon comparative shellfishing in both the Thimble Island area (undisturbed) and the Milford area where the existing underwater pipeline is located (disturbed). *DEP Attachments*, Vol. I, No. 4 (pre-filed testimony of L. Williams); Branford Blue Ribbon Committee Hearings, Attachment 12, *Public Comment Filings*. Islander East’s assertion that DEP has no “studies” to demonstrate permanent damage is entirely misleading, and equally so is its attempt to distinguish the pipe laying operation that it will undertake from that pursued by Iroquois at Milford. The trench excavation and barge laying techniques, for example, are exactly the same.<sup>32</sup> The company’s claim that no “direct” impacts are at issue in the nearshore waters, I.E. Bf. at 31, is simply not credible.

Islander East asserts that the Thimble Island area is a “hyperbolic fiction” created by the DEP to shore-up its consistency objection. *Cf.* Branford Blue Ribbon Committee Hearings, *passim*; *see, e.g.*, Attachment 15 (comments of J. Waters). The appropriateness of the DEP’s discussion of this area as special is well-documented, and the citations in the July 29, 2003 objection to coastal consistency, citing federal resource agency evaluation of the area, are no fiction. *See, e.g.* NOAA NMFS Correspondence, June 4, 2003, *DEP Attachments*, Vol. II, No.

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<sup>31</sup> Islander East downplays the significance of Dr. Stewart’s testimony. I.E. Bf. at 31. His comments about the “Sound” generally are of greater import than any “site specific” study for which the company calls. His thirty years’ experience with this natural resource is rich and applicable to the type of decision making at issue in this proceeding. *See* NOAA Pub. Hearing (November 5, 2003) Transcript at 39.

<sup>32</sup> Islander East, I.E. Reply Bf. at 43, cites Dr. Zajac’s assessment that anchor depressions “add dimensionality to the system” of benthic organisms in support of the proposition that there is no harm done to shellfish bed habitat. The

17. According to Islander East, the Connecticut Siting Council is the *last* word on matters of environmental impact, including resource identification, although it lacks the specific resource expertise of the sort exhibited in and needed for the coastal consistency judgment of the state environmental management agency. Islander East insists that the Council more accurately described the route and did not note “adverse effects on the Thimble Islands,” as if anyone were seriously contending that the proposed pipeline is aimed at bisecting one of the islands themselves. *See* I.E. Reply Bf. at 10.

This is rhetorical posturing; it is not argument based upon the sum of ecological resources and commercial adverse impacts to which the DEP made reference. On the contrary, it is Islander East’s reference to its “narrow pipeline corridor” that invites the Secretary to perceive environmental impacts occasioned by the Islander East project as confined and, by logical extension, minimized. Nevertheless, as the DEP has shown, those impacts associated with the pipeline laying operation are far more extensive than the right-of-way; they can be hundreds of feet from the trench, reflecting anchor strikes, holes and substrate scarification caused by the barge laying equipment and the tug boats’ adjustments to tide, currents and weather conditions in shallower water. *See DEP Attachments*, No. 50 (Iroquois map of pipe laying equipment permanent impacts). Islander East’s response to this concern is to assert that the seafloor around the Thimble Islands is already disturbed by electrical cables and similar signs of human activity that show up on navigation charts for the area. Several of the larger Thimble Islands are inhabited and utilities do support them, but these incidental characteristics of the nearshore

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linkage is a non sequitur: if the substrate is scarified and render unsuitable for shellfish harvesting, the added “dimensionality” is a matter of academic interest only.

waters do not equate to the massive impacts associated with the drilling, anchoring, dredging, trenching and plowing necessary to lay a large gas transmission pipeline in the seafloor of this area.<sup>33</sup>

Islander East also asserts that DEP cannot be correct in the application of its CMP because the project was deemed by New York to be consistent with its CMP. The company states that two different conclusions cannot obtain “on the same body of water.” This claim demonstrates better than any other how completely the company misunderstands and has distorted the facts of this case. The differences in the geological and ecological characteristics of the Connecticut and New York shores of Long Island Sound are patent. The Long Island shore is glacially created lateral moraine, relatively ecologically featureless and lacking the estuarine abundance of the northern, Connecticut, shore where the drainage areas, shallow embayments and other indicia of ecological abundance obtain. This difference accounts for the fact that the shellfisheries are to be found off the northern, not the southern shores of the Sound.<sup>34</sup> It is hardly surprising at all that New York’s Department of State evaluated the pipeline’s impact upon the New York waters of the Sound and did not find significant CMP-related issues sufficient for it to file an objection to the request for a certification of coastal consistency.

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<sup>33</sup> As far as the Tilcon navigation channel is concerned, the DEP as the state management agency already explained in its opening brief how this feature of the Branford nearshore area is coastal dependent in a way that Islander East’s pipeline cannot be; moreover, the existence of the aforesaid channel is effectively grandfathered in place, since it long pre-dates the existence of the management agency’s authority to review for coastal consistency under its approved CMP.

<sup>34</sup> The FEIS at least correctly recited that “[there are no commercially or recreationally fished shellfish beds at the Long Island landfall approach,” but whether the FERC staff understood why that would have been so is not apparent from review of the document.

Islander East would have the Secretary ignore the comment on record from co-ordinate agencies with environmental resource review obligations, specifically the U.S. EPA and the ACOE. I.E. Reply Bf. at 11 Islander East states that “CTDEP is the only agency that has continued to assert that the project will have unacceptable impacts since Islander East’s adoption of those modified procedures.” I.E. Reply Bf. at 12. This statement is patently inaccurate, as review of the agency documentation demonstrates. First, the project modification of the company only relates to a small portion of the pipe laying construction project. Second, agency comment from U.S. EPA, NMFS, FWS has been broader. For example, U.S. EPA further commented on September 5, 2003 (long after Islander East’s modest modification addressing sediment stockpiling in the trenched portion of the project around MP-12 had been submitted). The agency specifically noted that “the applicant has recently proposed construction techniques to minimize project impacts from its preferred alternative . . .” DEP Attachments, Vol. II, No. 15. The EPA then stated:

[T]he applicant still has not demonstrated that the modified preferred alternative represents the least environmentally damaging practicable alternative. Furthermore, the alternatives analysis is incomplete. Despite the lack of a complete analysis and even after considering the reductions in the impacts associated with the modified preferred alternative, it appears that practicable alternatives to the Islander East proposal exist *which would result in less adverse impact to the aquatic environment*. Therefore we believe that the proposed project has failed to satisfy the § 404(b)(1) guidelines and it does not qualify for § 404 permit issuance.

*Id.* (emphasis added). U.S. EPA has since re-affirmed its conclusion regarding the Islander East preferred alternative. *See Attachment No. 42.*

Contrary to Islander East's assertion, NMFS' June 4, 2003 comments demonstrate an objection to the proposed project that is broad in scope, not narrowed to a particular aspect of the construction proposed. "Removal . . . of both resource and habitat within the actual construction corridor," as discussed in the June 4, 2003 NMFS commentary, refers to the actual dredging and trenching; anchor placement scarification associated with barge laying equipment and barge mooring and positioning. *DEP Attachments*, Vol. II, Nos. 17, 23. No aspect of the company's preferred alternative, even as modified, squares with NMFS' assessment that the reduction of adverse impacts associated with the project would depend upon "[s]election of an alignment with fewer shellfish resources [and] elimination of the trenching [.]" *Id.*

Finally, Islander East asserts that the DEP's position relative to projects of this sort is one of imposition of a "zero tolerance" standard "on any activities it considers sensitive." I.E. Bf. at 12. The company willfully misconstrues the position of the agency, which is that the route chosen by Islander East has been located in an area that should not be degraded. The company has asserted that there is no truth to the resources identified as suitable for protection by the agency. It asserts that the agency—and the characterization would apply to the federal resource agencies that have commented on this project just as readily—is simply wrong regarding the existence of those resources. The company denies that the area through which the pipeline will pass is suitable for shellfishing. Even the FERC did not make that mistake. *See FEIS* at 3-69. At the ACOE public hearing in August, 2003, Jonathan Waters, one of the shell fishermen who works the Branford area, related information based upon his experience to the Corps of Engineers. Mr. Waters affirmed that the area within the pipeline corridor was productive oyster ground and then produced an oyster that he had harvested the day of the public hearing. ACOE

Public Hearing (August 5, 2003) at 63; *see also* NOAA Pub. Hearing (November 5, 2003) Rec. Tr. at 54.<sup>35</sup>

Islander East's technical comments also assert that the DEP is inconsistent in its treatment of projects involving surface waters of similar if not identical classification. I.E. Reply Bf. at 25. In point of fact, other projects mentioned by Islander East, such as telecommunications cables and even the Cross Sound electrical transmission cable, are much more modest in scale than the installation of a two-foot diameter gas transmission pipeline. As to the Iroquois project, much has been learned in the intervening decade since that project was installed respecting impacts to the benthic environment and the ability of shellfisheries to rebound from such disturbance of the substrate. The Iroquois installation area remains disturbed, as a subsurface chart of the project area demonstrates. In short, the DEP as the management agency must make judgments under incessant pressure to utilize the coastal zone for a variety of development purposes. It cannot maintain the "zero tolerance" standard that Islander East ascribes to it; but it must and does draw necessary distinctions between projects that are acceptable under the applicable laws and facts, and those which are not so. *See, e.g., DEP Attachments*, Vol. II, No. 14 (May 27, 2003 letter of Gene Muhlherr to Charles H. Evans, Director, DEP-OLISP).

Upon review of the record as a whole it is obvious that the adverse environmental impacts that will be occasioned by the Islander East project as proposed for this site are of great

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<sup>35</sup> Mr. Waters also wanted to respond to then recently published comments in a local newspaper attributed to John Sheriden of Duke Energy and Islander East. According to Mr. Sheriden, the DEP was in error to conclude that the project would adversely affect oystering in the Sound, and that there were *no* oysters found during Islander East's scan of the seabed location for the proposed pipeline. *See also* I.E. Reply Bf. at 30 n. 86.

magnitude and that they are inconsistent with the goals and policies of the management agency's CMP. *See also* 16 U.S.C. § 1452(2)(C) [national policy to "at least" provide for "the management of coastal development to improve, safeguard . . . and to *protect natural resources and existing uses of those waters*"] (emphasis added). The installation of the pipeline along the company's preferred route will destroy benthic habitat and generally negatively affect the aquatic environment. The risks of HDD failure, with the prospect of open trenching as the default installation technique, the entire proposal to release drilling fluids into the open water in a receiving excavation and the need for further trenching to reach plowable installation depths constitute unacceptable impact to an area that has particular ecological significance in terms of shellfisheries, finfish fisheries and habitat. U.S. EPA is calling for more information. The ACOE has made similar requests. Into the balance one has the legacy of a prior pipeline project and a growing understanding of how these projects negatively alter the aquatic environment. These impacts constitute serious, cumulative adverse impacts to the biological and socioeconomic uses of the coastal zone, all significant in light of the Secretary's view that not just a proposed project in isolation but its relationship to the entirety of direct and *indirect* impacts occasioned by it are necessary for the assessment of impact. DEP Opening Bf. at 42.

The Secretary must contend with the company's simplistic assertion that increasing natural gas supplies to a greater number of market areas is in the national interest. Nevertheless, as the Secretary himself has indicated, national interests are not static but must be evaluated from all available perspectives, which include the views of federal agencies, federal laws and policy statements, as well as the review of plans, reports and studies issued by federal agencies.

*Consistency Appeal of Mobil Oil and Producing Southeast, Inc.*, (September 2, 1994) at 38. For

example, the U.S. EPA's Section 404 Guidelines, in which it articulates its "least environmentally damaging practicable alternative," is a statement of agency policy that informs permitting under the federal Clean Water Act, and it has a documented relevance to the instant proceeding. The Fish and Wildlife Service's 1991 report designating the Branford reach of Connecticut's Long Island Sound coastline as significant coastal habitat, including tidal flats, salt marshes and the Thimble Islands, is another example of studies that the Secretary utilizes to inform his dynamic view of the national interest. Executive Orders clearly figure into this set of considerations, and Islander East has frequently cited Order No. 13212 in support of its contention that its project is in the national interest. The Secretary will consider also, however, that the order directs the pursuit of the nation's energy policy in a manner that is environmentally responsible and that minimizes adverse environmental impact.

The Secretary's assessment of the *extent* of the proposed activity's contribution to the national interest is vital to his assessment of Element two. The Islander East project will provide additional natural gas supplies to Long Island if permitted, but its contribution is not essential or even exceptional in any manner in light of infrastructural improvements that exist or are otherwise planned to increase gas supplies to eastern Long Island. The project's benefits are incremental and questionable, too, in light of end-user projects not going forward (AEP Endeavor-Calverton) or projects which have indicated (Brookhaven) no direct and necessary dependence upon these gas supplies. This proceeding contrasts sharply with other override decisions of the Secretary involving oil and gas exploration in the continental shelf. There, the potential recovery of very significant amounts of product placed a heavy weight on the balance of costs versus benefits. This project, however, does not present the same calculus so as to draw

the Secretary's attention to the broadest horizon. The contribution of this project to the national interest is, at best, minimal. *Cf. Mobile Oil Exploration and Producing Southeast* at 40.

In light of these considerations, the Secretary cannot conclude that any national interest contribution of the Islander East project outweighs the grave adverse environmental effects associated with it.

**IV. NO NATIONAL SECURITY INTERESTS WOULD BE SIGNIFICANTLY IMPAIRED IF ISLANDER EAST'S PROJECT AS PROPOSED IS NOT ALLOWED TO PROCEED**

Islander East's reply brief renews its claim that it is entitled to a finding by the Secretary under Ground II that a national security interest will be significantly impaired if the project is not allowed to go forward as proposed by the company. Islander East has, however, brought nothing but conclusory statements of certain federal officials—revised since their first responses to the Secretary's solicitation of comment—to support its claim. The DEP argued in its opening brief that the Secretary's own precedents precluded a finding in favor of the company upon this ground.

The Secretary has indicated in his consistency appeal decisions an unwillingness—and rightly so—to be stampeded into a Ground II finding on the basis of insubstantial national security impairment arguments, even when advanced by co-ordinate agencies within the Government. As he has stated, “[t]he regulation establishing the criteria for an override based on Ground II sets up a very difficult test.” *Consistency Appeal of Chevron U.S.A., Inc.* (October 29, 1990), at 71. In *Consistency Appeal of Mobil Exploration and Producing U.S., Inc. [Mobil Pensacola Decision]*(June 20, 1995), the Secretary, as here, received comment letters from the Department of Energy, *id.* at 39 n. 60, and the Department of the Interior's Minerals

Management Service, *id.* at 47-48. The Secretary observed that the linkage between the particular project and the “impairment of national security” must be “specific,” stating:

[T]he regulations at 15 C.F.R. § 930.122 require the Secretary to review whether national security would be significantly impaired if the activity were not permitted to proceed "as proposed". This requirement is clear that there must be a specific link between a particular project and a significant impairment of national security if the project is not allowed to proceed as proposed. Mobil does not offer any persuasive reason for reading this requirement more broadly. Nor do previous appeals suggest any other interpretation. However, a decline in domestic production may increase the significance of an individual project to the national security. This determination will depend on the facts of each individual case.

*Mobil Exploration and Producing* at 46 n.70. Because Islander East’s proposal is merely a service interconnection that does not represent any similar major “reversal” in the overall national natural gas supply market, this proposal also makes no persuasive argument for diluting the Secretary’s standards on a Ground II finding.

The assertion that the energy security of this region depends upon the construction of the Islander East project *in particular* is pure hyperbole; and discredits the seriousness of the Administration’s energy initiatives. National security impairment was linked by the Department of Energy in the *Mobile Exploration and Producing* consistency appeal to the events of the first Persian Gulf War. Domestic energy security was there, as here, associated with national defense and national security, and even then the Secretary was unpersuaded that a Ground II finding was warranted by the evidence in the record.<sup>36</sup>

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<sup>36</sup> The Secretary observed in the 1994 *Mobile* consistency appeal that the arguments regarding the nation’s need for energy independence from foreign oil sources was even then one of “long standing,” citing President Nixon’s November 7, 1973 announcement of “Project Independence.” *Consistency Appeal of Mobile Exploration and*

The Department of Energy offers no commentary on precisely how Islander East's specific proposal, if not allowed to proceed, would constitute a significant impairment of a national security interest. The Secretary has rejected such generalities in previous consistency appeals, sharply observing that "[g]eneral statements that a national security interest will be significantly impaired *without more specific information* to support these assertions *do not meet the regulatory criteria*. The Secretary will give considerable weight to the comments of any Federal agency that delineates *how* a national security or defense interest will be significantly impaired." *Consistency Appeal of Chevron U.S.A., Inc.* (October 29, 1990), at 71 (emphasis added); *see also Consistency Appeal of Amoco Production Company* (July 20, 1990) at 58 ("The letters sent to Federal agencies in this appeal concerning Ground II requested specific information concerning Amoco's proposed project. The Federal agencies responded with general, conclusive statements that there is a national security interest in OCS oil and gas exploration. Such general statements without more specific information do not meet the criteria established in the regulation.").<sup>37</sup> The Secretary is required to make an "independent assessment" of the national security issue for the purposes of a Ground II finding, and, to that end, the Secretary requests "specific information" concerning the project involved in the consistency appeal.<sup>38</sup> *Id.*

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*Producing, Southeast* at 38 n. 63. If Islander East's preferred route and project constitutes the exception to this dry but accurate observation of the overall place of particular energy supply proposals in the grander scheme of the Nation's security, it has not been explained. Current Secretary Abraham's commentary before the Committee on International Relations, cited in Islander East's Reply Brief at 19 n. 54 does not add anything to the debate, but, most pointedly, does not speak to the proof threshold set by the Secretary of Commerce's regulation for a Ground II finding.

<sup>37</sup> Even the assertion by other federal agencies that a proposed natural gas project is environmentally friendly was in and of itself an insufficient assertion to which the Secretary could accord any weight in a Ground II assessment. *Consistency Appeal of Chevron U.S.A., Inc.* (January 8, 1993) at 29.

<sup>38</sup> "It is evident from the legislative history of the consistency provisions of the CZMA that the Secretary should seek to reconcile national security needs [if demonstrated on the record] and the State (coastal) management

Federal agencies that merely mouth the text of the Secretary's regulations or speculate about the national security impairment to be occasioned by loss of the project that is the subject of the appeal cannot possibly assist the Secretary in making the Ground II finding, and no more is evident in the instant appeal.

The provision of incremental natural gas supplies to Long Island by means of Islander East's preferred route, when there is an identified environmentally preferable and coastal zone management consistent alternative route that will accomplish the same goal, and where there are existing pipelines into Long Island whose end users can be expanded in number through extension of service lines, is an ordinary circumstance of energy company market expansion. No conceivable impairment of national security would or could arise from any objective consideration of what is pending before the Secretary. The Secretary weighed what was at risk in *Mobile Exploration and Producing*, and he should come to no different conclusion on Ground II in this appeal. In fact, the Secretary pointed out in *Consistency Appeal of Mobile Oil Exploration and Production Southeast, Inc.* (September 2, 1994) at 39-40 that the natural gas calculated by the Department of the Interior's Minerals Management Service to be lost by non-implementation of Mobile's exploration plan was "speculative." Moreover, the Secretary concluded in this appeal that the denial of one project proposal where other projects would not inevitably be precluded was further reason not to make a finding under Ground II. *Id.*; cf. *Mobile Pensacola Decision* at 48 (applicant had other approved lease areas in vicinity to carry out exploration). Similarly, in the instant appeal, the fact that DEP was able to identify an

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program in the case of conflicts." *Consistency Appeal of Exxon Co., U.S.A.* (February 18, 1984) at 26, citing Congressional record and legislative history of the CZMA.

alternative that it deemed consistent with its CMP is proof positive that a vague claim of an unspecified “significant impairment” that will befall national security interests if that particular project is not implemented cannot control the Secretary’s decision. *See Consistency Appeal of Chevron U.S.A., Inc.* (October 29,1990) at 72 (conclusion that an alternative under Ground I is reasonable precludes finding of national security impairment under Ground II).

### **CONCLUSION**

For all of the foregoing reasons, the State of Connecticut DEP respectfully requests that the Secretary deny Islander East’s request for an override of the objection to a certification of coastal consistency and dismiss the company’s appeal.

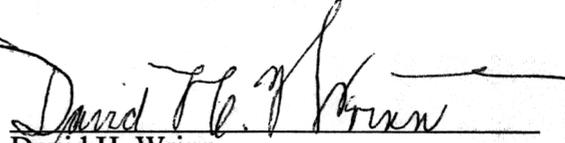
Dated at Hartford, Connecticut, this 24<sup>th</sup> day of January, 2004.

Respectfully submitted,

ARTHUR J. ROCQUE, JR.,  
COMMISSIONER OF  
ENVIRONMENTAL PROTECTION

RICHARD BLUMENTHAL  
ATTORNEY GENERAL

BY:



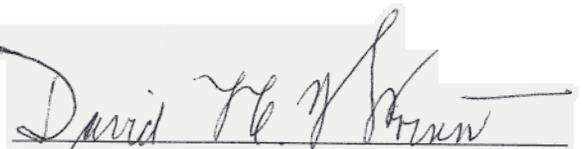
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**CERTIFICATION**

I hereby certify that a copy of the foregoing Reply Brief of the State of Connecticut Department of Environmental Protection was transmitted by overnight courier service, this 24th day of January, 2004 to:

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## **APPENDIX**

### **TECHNICAL COMMENTS IN RESPONSE TO ISLANDER EAST'S REPLY BRIEF PART II**

#### **I. Alternatives**

DEP staff gave careful consideration to the initial FERC application of Iroquois Gas Transmission System, L.P. For Certificate of Public Convenience and Necessity. FERC Docket No. CP02-52-000. Even in its initial incomplete state, the application provided enough evidence to determine that a pipeline sited in this previously disturbed location was preferable to one located in the Thimble Islands. This preference was stated in the DEP's Iroquois Siting Council comments dated August 19, 2002. Islander East East implies that it has been victimized by the DEP as not having been privy to the agency's pipeline routing preference. However, as early as May 17, 2002 in the FERC Draft EIS comments for Islander East East, the DEP mentioned the ELI alternative offered "potential advantages over the Islander East East proposal."

Islander East has attempted to trivialize the DEP's suggestion of utilizing existing disturbed corridors. For the very same reasons utility companies try to use existing utility corridors on the upland, the DEP is encouraging the sharing of existing pipelines and corridors in the water. By tapping into an existing pipeline two miles offshore at a depth of approximately -30', nearshore shallow-water impacts are, for the most part, completely eliminated. By contrast, the first two miles of the proposed Islander East pipeline will directly impact 5.5 acres of shellfish habitat plus anchor scarring and potential bentonite releases and indirect sedimentation impacts to a much larger area. It is the disturbance to

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<sup>1</sup> *DEP Attachments, App-A.*

this nearshore, productive habitat that the DEP is most interested in eliminating or minimizing to the greatest extent possible.

Islander East has indicated that the sharing of an existing line (Algonquin) was one of the main reasons for choosing the proposed location. (Islander East Reply brief, page 28.) It would appear that the existing Iroquois pipeline could be utilized as the same factors apply:

- location of the existing Iroquois pipeline system;
- location of Islander East's customers;
- capacity of the existing Iroquois pipelines and the improvements that would be required on Iroquois's existing pipeline systems to deliver the required volumes;
- length of new pipeline that would be required;
- existence and location of existing onshore utility or transportation corridors that could be used to minimize environmental impacts; and
- environmental resources that would be impacted by construction and operation; and the overall constructability of the pipeline route.

Most important to the goals of Connecticut's CMP, use of the existing Iroquois line would have the added benefit of *avoiding* the highly productive marine habitat of the Thimble Islands region. Cumulative adverse impacts to shellfisheries and shellfishing uses of coastal waters is also lessened as a consequence. While there will be adverse impacts associated with a tap off of the Milford shore, these impacts in the vicinity of the existing pipeline are acceptable, and they are acceptable in part because of the prior benthic disturbance at the site.

## **II. Thimble Islands**

Islander East's own environmental consultants recognize the ecological value of the Thimble Islands complex. Pellegrino's report, *Bottom Characterization Surveys Of*

*Select Subtidal And Nearshore Environments Off Juniper Point (Branford, CT, Final Report (January 1, 2004)*<sup>2</sup> described the location of the pipeline as follows:

- “The construction corridor for the proposed gas pipeline (from about milepost 10.5 to 13.0), as defined by the anchor spread to be used for construction barges, is studded with about ten named and twelve mapped but unnamed rocky outcrops. There are also approximately six named Thimble Islands in the vicinity.”

“In addition to the 25 or more small named islands, collectively called the Thimble Islands, there are numerous named and unnamed rocky outcrops throughout the region.”

The environmental affects of the proposed construction must be evaluated within the context of the entire Thimble Islands complex which includes the numerous named and unnamed subtidal and exposed rocky outcrops.

The Pellegrino report further describes the rocky outcrops and reefs as providing “many additional environmental niches” which “increase the overall biodiversity of the region” and “provide important habitat as well as feeding and refuge functions”. The report also adds “these hard substrates provide structural complexity to a relatively homogeneous soft bottom habitat.” Islander East has chosen to ignore this report and all the geologic features of the Thimble Islands complex and focus solely on the sediments. In Islander East’s brief, it was asserted “that the pipeline route avoids rocky subtidal areas, eelgrass beds<sup>3</sup>, glacial till, and hard bottom habitats that could be considered high quality oyster habitat” so there is no basis for the DEP’s suggestion that there would be impacts to shellfish beds. This statement is unsupportable and false. As previously described in the July 29, 2003 remand decision, pipeline installation and the subsequent

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<sup>2</sup> Characterization Surveys Of Selected Subtidal And Nearshore Environments Off Juniper Point (Branford, CT), Final Report, January 2002, Peter Pellegrino.

<sup>3</sup> Eelgrass does not grow in this portion of Long Island Sound.

backfill in the trenched segment between MP 10.9 and MP 12 would directly destroy 5.5 acres of shellfish habitat, five acres of which are in Town of Branford commercial lease beds. An area much larger than the five acres would be eliminated from harvesting because of the associated anchor scars and holes. The required turning radius of the commercial harvesting equipment makes the unproductive commercial harvest area even larger.

The DEP does not doubt that Islander East has attempted to route the proposed pipeline through the Thimble Islands complex in a manner as to avoid trenching directly through hard bottom. Installation techniques through hard bottom would most likely require additional labor and technology, such as blasting, to which this DEP would be further opposed because of the resulting adverse environmental impacts to this sensitive region. But even if it is possible to avoid directly trenching or plowing through rocky outcrops, reefs or other hard bottom, these valuable habitats that completely surround the pipeline corridor will be subject to sedimentation, anchor scarring, cable sweep and potential bentonite releases.

The DEP's initial May 8, 2002 Siting Council and May 17, 2002 FERC Draft EIS comments regarding sediment along the corridor were based solely on information provided in the application material. Since that time, the DEP has learned a great deal more about the geology of the Thimble Islands complex that was not provided by the applicant. Most importantly, neither the letter to the Connecticut Siting Council nor the letter to FERC regarding the Draft EIS included comments from the Connecticut Department of Agriculture, Bureau of Aquaculture. Aquaculture concerns weighed heavily in the DEP's consistency objection. (May 28, 2002 letter from John Volk, CT-DOA, Division of Aquaculture, to Cori Rose, ACOE, with fax date of September 5, 2002 and October 4, 2002 memo from John Volk to Sue Jacobson).

### **III. Water Dependent Use**

In addition to the overall extensive environmental harm associated with the installation of a pipeline through the Thimble Islands complex, the prominent factor for the DEP's objection to the pipeline is the irreversible damage to an existing water- and coastal zone dependent use, shellfishing. The shellfishing industry in the Thimble Islands region thrives because of the excellent water quality and exceptional habitat conditions. Of particular importance to maintaining the existing shellfishing use of this area is authorization by the DEP of Agriculture, Aquaculture Division (DA/AD) for harvest of shellfish for direct human consumption. The DA/AD "Approved" designation, which is the most stringent and, therefore, the most difficult to achieve, recognizes that the water is of sufficiently high quality to allow for direct human consumption of shellfish from these beds without the requirement for relocation and depuration of the shellfish prior to shipment to market (see map in Appendix D). Although many of Connecticut's marine waters are classified SA or SB/SA, the areas are limited where suitable habitat exists and monitoring data documents the exceptionally good water quality necessary to receive an "Approved" designation by DA/AD. In general, the waters off Branford support forty-six percent (46 %) of shellfishing areas approved for direct harvest in eastern Connecticut<sup>4</sup>.

In Islander East East's reply brief, there was a general, inaccurate description of shellfish harvesting equipment and the impacts of the proposed backfill on harvesting.<sup>5</sup> The equipment that the company is describing is much larger and not generally used in the Thimble Islands region or Long Island Sound. The Attachments to this filing contain diagrams and photos of oyster and clam dredges typically used in this region of Long

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<sup>4</sup> Statistics provided by DEP Water Bureau.

Island Sound. The hydraulic clam dredge, usually no more than four hundred pounds, is a steel sled with a basket on it towed by a vessel. Seawater is pumped down a hose at low, not high, pressure as Islander East maintains, to a manifold on the front of the sled where it is directed through nozzles onto the sea floor to loosen the softer sediments into which clams burrow. (Oysters do not burrow but cling to the substrate surface.) Teeth, up to two inches long, extend below the runners and steer the clams into the basket. Critical to a “perfect” tow is achieving the proper balance between teeth, manifold angle<sup>6</sup>, water pressure for the type of bottom, boat speed, line length and current flow. An uneven surface or abrupt changes in sediment type will create problems with the tow. The front of the dredge may sink into a pit and possibly hang-up on the depression wall or the baskets may fill with sediment. Since the basket has holes approximately one inch wide, dredging through an area of gravel backfill will result in the basket filling with higher incidences of gravel accumulation. Harvesters will avoid these areas because of the amount of time and energy expended on gear complications.

Oyster dredges are generally much smaller than clam dredges, approximately 30” x 60” and 30 to 300 pounds in weight.<sup>7</sup> Contrary to Islander East’s assertion, oyster dredges do not employ high pressure water jets connected to a manifold on the dredge. (Such equipment would damage the substrate.) The teeth are 2.5” long and are at a 90 degree angle to the frame. Factors influencing a tow include current, substrate, boat speed and maintenance of a 45-degree angle on the tooth bar. As with the clam dredge, an uneven surface or abrupt changes in sediment type will create problems with the tow.

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<sup>5</sup> pages 50 and 51

<sup>6</sup> *DEP Attachments, App-B.*

<sup>7</sup> *DEP Attachments, App-B.*

Pipeline installation permanently alters the seafloor. A photo taken of a bottom profile image six years after the Iroquois pipe installation is provided in the attachments to this filing.<sup>8</sup> The substrate ‘moguls’ left on the bottom are about one foot deep and significant enough for shellfish harvesters to avoid the area with their equipment. Also provided in the DEP Attachments by way of comparison is a map of the anchor strike and drag marks associated with installation of the Iroquois pipeline. This survey confirm that the “anchor impact craters” associated with pipeline installation extend well beyond the proposed trench area. With this survey in mind, it is easy to visualize how 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.

Islander East’s application materials indicate that it is their goal to achieve a finished substrate equivalent to the adjacent benthic surface with a proposed acceptable tolerance of +2’ to –1’. Even if this range can be achieved, for the reasons stated above, the area would be rendered unsuitable for shellfish harvesting. Such substrate impacts would be insignificant in an area where shellfish resources were scarce or where traditional harvest shellfishing techniques were not employed.

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<sup>8</sup> *DEP Attachments, App-B.*

#### **IV. Horizontal Directional Drilling**

The FERC FEIS for the Islander East project states that “Geotechnical investigations are necessary for verification and have begun off the Connecticut coast. Analysis of the data collected is ongoing, but preliminary indications are that HDD should be feasible there.” The DEP has asked Islander East repeatedly for a copy of this survey. To date, Islander East has never directed the DEP to a copy of any geotechnical investigations. Given the absence of this data and Islander East’s refusal to identify an alternative to HDD for the Connecticut approach, the DEP was precluded from evaluating Islander East’s intentions if HDD were to fail.

Islander East’s FERC application materials, however,<sup>9</sup> describe HDD failure:

*[I]n some situations, horizontal directional drilling may entirely fail and the water body may not be able to be crossed using this method. The presence of glacial till or outwash interspersed with boulders and cobbles, fractured bedrock, or non-cohesive coarse sand and gravels increase the likelihood drilling may fail due to refusal of the drill bit or collapse of the bore hole in non-cohesive, unstable substrate.*

For the Long Island approach, the FERC FEIS states “Islander East East would use the originally proposed Long Island landfall approach if the HDD fails in this location”.

June, 2001 application materials to FERC identify the originally proposed Long Island approach as that of dredged trenching.

This technique was the one utilized by the Iroquois Gas Transmission System pipeline off the Milford shoreline in 1991. A video of this activity is provided in the attachments to this filing.<sup>10</sup> As previously described in its October 15, 2002 and July 29, 2003 decisions, the experience of the DEP with such installation has not been favorable.

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<sup>9</sup> Environmental Report Accompanying the FERC Section 7c Application, June 2001, Vol. of 5 at 1-39.

The DEP would find trenching through the nearshore waters of the Thimble Islands complex inconsistent with the enforceable policies of the Connecticut CZMP.

If HDD were to fail at the Connecticut landfall, any alternative methodology being contemplated as a back-up approach would need to be fully evaluated as a part of the federal coastal consistency review of this project.

#### V. Other Points

- *Islander East's claim that the engineered backfill plan will provide suitable habitat for oysters and clams.*

The material proposed as backfill has nothing to do with providing shellfish habitat. At the April 15, 2003 multi-agency meeting, Islander East and agency representatives, included National Marine Fisheries (NMFS) discussed a backfill material that would not be subject to scour or sedimentation. The purpose of the backfill material was clearly called out in the Haley and Aldrich<sup>11</sup> study: "The purpose of our study is to evaluate proposed sand backfill materials available from local sources and provide comments and recommendations for:

- Suitability of proposed backfill
- Maximum height of free-fall (from sea bottom to bottom of tremie pipe) to minimize loss of fine grained soil)
- Optimum size of tremie pipe
- Potential for long term scour of the backfill material."

While the proposed bankrun gravel will most likely lessen (not eliminate) adverse impacts associated with scour and sedimentation, the backfill will permanently alter the

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<sup>10</sup> DEP Attachments, App-C.

<sup>11</sup> The accuracy of the sieve chart provided by Islander East is inaccurate. Sieve openings for ASTM 2" are 50.00 mm. DEP Attachments, App-D.

bottom habitat. The Haley and Aldrich study makes no comparison between the proposed backfill and the existing substrate. As previously mentioned, the basket size of the harvesting equipment is such that a substantial proportion of the bankrun gravel will tend to accumulate in the basket or cage. Islander East makes no connection between the proposed backfill characteristics and its impact on harvesting. The continuity of substrate is directly relevant to the issue of whether these bottom manipulations will affect commercial harvesting relative to natural conditions, another topic that Islander East has not addressed.

Finally, no efforts have been made to determine the ecological consequences arising from the proposed placement of engineered backfill. Islander East has been quick to criticize the DEP's position regarding permanent habitat alterations, but, as here, has offered no ecological analysis of the proposed substrate alteration to justify its claims that no impacts to shellfisheries will obtain.

*All groups present at this meeting agreed that nothing could replace the habitat value of the original substrate.* Islander has pointed to statements regarding complete bottom recovery in The Garrett Group Report as conclusive. As discussed at the April 15, 2003 meeting, however, and as further clarified in the report entitled *Macrobenthic Community Structure Along The Proposed Islander East Pipeline Route In Long Island Sound* by Pellegrino,<sup>12</sup> there are dramatic differences in community structure of a disturbed versus a non-disturbed substrate. Pipeline installation will not only disrupt and permanently change the substrate, but it will also change the community structure from high-order or late successional stage species to early-stage opportunistic species. The recovery time, if there is any recovery, for the succession back to high-order species is

unknown. While the DEP finds the suspended sediment work done by the Garrett Group helpful, the report is not strong in its discussion of benthic organisms and the agency does not subscribe to it. Pellegrino's work, on the other hand, is noted for its expertise in the subfield of macrobenthic community structure.

- *Islander East's assertion that ". . .drilling mud released during the pilot hole phase of the HDD installation will be recovered during the excavation of the transition basin and placed into barges for offshore disposal."*

Under no circumstances will the DEP authorize open water disposal of bentonite, as it is not naturally occurring sediment form in Long Island Sound. This removal mechanism was not mentioned in the report *Directional Drilling Monitoring and Operations Program For Natural Gas Pipeline Installation in Long Island Sound for Islander East Pipeline., L.L.C.*, TRC Environmental Corporation (February 4, 2002). Additionally, the agency considered the Operations Program in the report deficient in its response to complete and immediate removal of bentonite. As discussed in the DEP's July 29, 2003 remand decision and objection to Islander East's request for coastal consistency certification, the likely possibility of a bentonite release would be catastrophic to adjacent shellfish beds.

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<sup>12</sup> Final Report, January 2002, section 4.0.