

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

ISLANDER EAST PIPELINE COMPANY, L.L.C.

Appellant,

- vs -

STATE OF CONNECTICUT, DEPARTMENT OF
ENVIRONMENTAL PROTECTION ,

Respondent.

**INITIAL MEMORANDUM OF LAW OF ISLANDER EAST PIPELINE
COMPANY, L.L.C. ON APPEAL FROM A COASTAL ZONE MANAGEMENT PLAN
OBJECTION OF THE STATE OF CONNECTICUT, DEPARTMENT OF
ENVIRONMENTAL PROTECTION TO THE ISLANDER EAST PIPELINE PROJECT**

PRELIMINARY STATEMENT¹

Pursuant to § 307(c)(3)(a) of the Coastal Zone Management Act (the “CZMA”) and § 930.127 of the CZMA Regulations administered by the National Oceanic and Atmospheric Administration (“NOAA”), the Islander East Pipeline Company, L.L.C. (“Islander East”) requests the Secretary of Commerce (the “Secretary”) to override the Connecticut Department of Environmental Protection’s (“CTDEP”) denial² of Islander East’s request for a consistency certification for the Islander East Pipeline Project (sometimes “Islander East” or the “Project” or the “IE Project”), a proposed 44.8 mile interstate natural gas pipeline of which 22.6 miles will cross Long Island Sound between the states of Connecticut and New York.

¹ Throughout this Memorandum of Law citation is made to supporting documents contained in Volumes 1 - 4 of the Record on Appeal which is submitted simultaneously herewith.

² In contrast to the State of Connecticut, New York State has issued a General Concurrence that the Islander East Project is consistent with its Coastal Zone Management Plan. Letter from Vance A. Barr, Coastal Resource Specialist, New York State Department of State, to Kevin Law, Nixon Peabody LLP (Jan. 14, 2003) (“NY General Concurrence Letter”).

The Secretary may override Connecticut's denial of a consistency determination for the Islander East Project, because either: 1) the Project is in the national interest, in that it is consistent with the objectives and purposes of the CZMA; or 2) the project is necessary in the interest of national security.³

Since the Islander East Project will further the objectives and purposes set forth in the CZMA in a significant and substantial manner, a federal override of Connecticut's denial of Islander East's consistency statement for the Islander East Project is warranted. Specifically, the Project furthers the national interest in that it is a major energy facility which will provide significant and much needed gas transmission capacity to Long Island and the New York City area as well as Connecticut. As determined by the Federal Energy Regulatory Commission ("FERC"), the Islander East Project will ". . . benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas for anticipated electric generation projects. Additionally, it will introduce pipeline-to-pipeline competition to eastern Long Island markets."⁴

The Project will also further the interests of national security because it will strengthen the energy infrastructure of the Connecticut and New York area. By providing an additional supply of natural gas beyond what currently exists, Islander East will enhance the reliability and flexibility of the energy infrastructure and security of gas supply in this important region. The security of our energy infrastructure is critical in post 9/11 America. Furthermore, the Project will contribute to a lessening of our Nation's dependence on foreign oil which is directly in the interest of national security.

³ CZMA § 302 *et seq.* (2003), 16 U.S.C.S. §1451 *et seq.* (2003); 15 C.F.R. § 930.120 (2003).

⁴ FERC Order on Rehearing and Issuing Certificates, Islander East Pipeline Co., 100 F.E.R.C. 61,276 at ¶ 3 (Sept. 19, 2002) ("Certificate Order").

SUMMARY OF ARGUMENT

A. Ground One: The Project Is Consistent With The Objectives And Purposes Of The CZMA

Ground One requires a showing that the Project is consistent with the objectives of the CZMA, that the national interest outweighs any adverse coastal impacts, and that there are no reasonable alternatives to achieve the purposes of the Project.⁵

The Islander East Project will promote at least four of the important national objectives that are set forth in CZMA Sections 302 and 303 in a significant and substantial manner. First, CZMA Section 303(2)(D) accords “priority consideration” to “orderly processes for siting major facilities related to . . . energy. . . .”⁶ Indeed, President George W. Bush has by Executive Order directed federal agencies to expedite approval of energy-related projects.⁷ Similarly, NOAA has recognized, in the preamble to its present regulations, “[a]n example of an activity that significantly or substantially furthers the national interest is the siting of energy facilities.”⁸ Clearly, the Islander East Project is a major energy facility that will significantly and substantially further the national interest in the development of a reliable and efficient natural gas transportation network.

Second, pursuant to CZMA Section 302(j), the Secretary has noted “a national objective in achieving a greater degree of energy self-sufficiency,” and has recognized that greater use of natural gas can “help lessen the Nation’s reliance on foreign oil” and reduce the “undesirable consequences of oil import dependency.”⁹ In his 2003 State of the Union address, President

⁵ 15 C.F.R. § 930.121 (a), (b), (c) (2003).

⁶ CZMA § 303(2)(D) (2003), 16 U.S.C.S. § 1452(2)(D) (2003). *See* Decision and Findings in the Consistency Appeal of Southern Transportation Company, 1985 NOAA LEXIS 73, *19-20 (Sept. 24, 1985) (“Southern Transportation Co.”) (“[T]he goals of the CZMA include . . . the siting of transportation facilities.”).

⁷ Actions to Expedite Energy-Related Projects, Exec. Order No. 13212, 66 Fed. Reg. 28,357 (May 18, 2001) (“Executive Order”).

⁸ CZMA Federal Consistency Regulations, 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000).

⁹ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc, 1995 NOAA LEXIS 37, *29, *81-82, n. 60 (June 20, 1995) (“Mobil Exploration”). *See* Decision and Findings in the Consistency Appeal of Gulf Oil Corp., 1985 NOAA LEXIS 1, *38 (Dec. 23, 1985) (“Gulf Oil”).

Bush decried the country's dependency on foreign energy sources.¹⁰ The National Energy Policy Development Group ("NEPD Group") which the President commissioned to study and create a National Energy Policy, calls the nation's reliance on foreign oil a serious long-term challenge which has not only grave economic implications, but also makes the country vulnerable to foreign states which might not always have the national interests of the United States at heart.¹¹ In fact, referring to the energy crisis imbalance between supply and demand, the NEPD Group stated that if it is allowed to continue, it "...will inevitably undermine our economy, our standard of living, and our national security."¹² Clearly the Islander East Project will promote greater use of natural gas in the Northeast – the region of the country most dependent on foreign oil¹³ – and thus, will significantly contribute to the CZMA objective of energy self-sufficiency.

Third, CZMA Section 303(2) recognizes the "needs for compatible economic development" in the coastal zone, and the Secretary has found that such economic development is one of the CZMA's objectives.¹⁴ Since the Islander East pipeline will transport natural gas to Long Island and elsewhere in or near the coastal zone, it will facilitate "compatible economic development" in that area.¹⁵ Not only will the natural gas transported by Islander East be used for electrical generation, but it will help sustain the economy of the region. An inadequate energy infrastructure will retard economic activity.

Fourth, the Islander East Project will further "the national policy to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone."¹⁶ By providing natural gas as an alternative to other fossil fuels, the Project will help reduce air

¹⁰ President George W. Bush, *State of the Union Address*, New York Times, Jan. 29, 2003, at A12, col. 2.

¹¹ Report of the National Energy Policy Development Group, *National Energy Policy*, at x (May 2001) ("Energy Report"), available at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf>.

¹² *Energy Report* at viii.

¹³ See *United States Government Asked to Release Emergency Heat*, Reuters News Service (Feb. 7, 2003) (noting that of the nearly 7.7 million U.S. households using oil, 5.3 million – nearly 69% – are in the northeast).

¹⁴ CZMA § 303(2), 16 U.S.C.S. § 1452(2) (2003). See, e.g., Decision and Findings in the Consistency Appeal of Davis Heniford, 1992 NOAA LEXIS 51, *15 (May 21, 1992).

¹⁵ Decision and Findings in the Consistency Appeal of Virginia Electric & Power Co., 1994 NOAA LEXIS 31, *144 (May 19, 1994) ("the project will contribute significantly to the national interest in part because of the extent to which it will further and support economic development in the coastal zone.").

¹⁶ CZMA § 303(i), 16 U.S.C.S. § 1452(1) (2003).

emissions, improve water quality, displace marine petroleum delivery traffic and protect fishery resources in the Region, all of which will preserve, protect, and enhance the resources of the coastal zone.

By advancing the national interest as enumerated above, the Project's benefits outweigh any putative adverse coastal effects.¹⁷ After careful analysis, the FERC already conducted this balancing test and has concluded that Islander East's proposed mitigation, coupled with environmental conditions required by the FERC in its approval of the proposed Project, would sufficiently minimize potential adverse environmental impacts of the proposed project so that the benefits of increased flexibility and reliability of the interstate pipeline grid and the introduction of pipeline-to-pipeline competition to Long Island markets would outweigh the adverse impacts.¹⁸

The last element of Ground One necessary for a federal override is that there are no reasonably available alternatives to the Project as that concept has been defined. An alternative is considered practicable if "it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes" or otherwise could "fulfill the basic purpose of the proposed activity."¹⁹ The FERC considered numerous system alternatives, none of which satisfied the relevant criteria. Moreover, the New York State Public Service Commission ("NYS PSC"), in expressing its support for the Islander East Project over other alternatives, specifically the Eastern Long Island Extension Project²⁰ ("ELI Project") of Iroquois Gas Transmission System, L.P. ("Iroquois"), has noted that no other project would provide flexible, secure and reliable interstate gas pipeline service to Long Island as would the Islander East Project.²¹

¹⁷ 15 C.F.R. § 930.121(b) (2003).

¹⁸ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 80.

¹⁹ 40 C.F.R. 230.10(2) (2003).

²⁰ This project has been withdrawn and abandoned by Iroquois. Documentation of withdrawal of the Iroquois ELI Extension Project will be forwarded to the Secretary as soon as it becomes available.

²¹ Public Service Commission of the State of New York, *Comments on the Draft Environmental Impact Statement*, Docket No. CP01-384-000 *et al.* (May 17, 2002) ("PSC Comments").

B. Ground Two: The Project Is Necessary In The Interest Of National Security

Connecticut's objection to Islander East's consistency determination should be overridden because the Project is necessary in the interest of national security.²² Moreover, a failure to permit the Islander East Project to proceed would significantly impair national security interests. America's efforts to achieve energy self-sufficiency are a key component of the National Energy Policy because, as stated in the Report of the National Energy Policy Development Group ("Energy Report"), America's inability to balance energy supply with growing demand ". . . will inevitably undermine our economy, our standard of living, and our national security."²³

This sentiment has also been expressed by the Secretary of Commerce:

Greater use of natural gas can help lessen the Nation's reliance on foreign oil, reduce the nation's trade deficit, boost the U.S. gross national product, and as a result of these, strengthen our national security interests.²⁴

It can hardly be denied that in the post 9/11 world, America's energy security is a top priority. As the Secretary of the Department of Energy has stated, energy security is a core mission of the Department of Energy.²⁵ The Islander East Project will enhance Long Island's security by providing a second pipeline to cross Long Island Sound to serve new and existing markets, while reducing Long Island's vulnerability to outages in the event that the service provided by other natural gas pipeline operated by Iroquois is disrupted.

²² 15 C.F.R. 930.120 (2003).

²³ *Energy Report* at viii.

²⁴ *Mobil Exploration*, 1995 NOAA LEXIS 37 at *81 (emphasis added).

²⁵ Spencer Abraham, United States Secretary of the Department of Energy, Prepared Statement Before the House Committee on Commerce Regarding the National Energy Policy (June 13, 2001), *in* Federal News Service, June 13, 2001. *See also* Spencer Abraham, United States Secretary of the Department of Energy, Remarks at the National Energy Summit, A National Report on America's Energy Crisis (March 19, 2001).

In sum, the denial of a consistency determination by the State of Connecticut should be overridden because the Islander East Project is both consistent with the objectives of the CZMA and is otherwise necessary in the interest of national security.²⁶

STATEMENT OF FACTS

A. The Islander East Pipeline Project

Project Description

The Islander East Project is a cooperative effort by two separate pipeline companies, Islander East and Algonquin Gas Transmission Company (“Algonquin”), to provide much-needed natural gas transportation capacity to energy markets in Long Island, New York City and Connecticut. Islander East proposes to construct and operate new interstate natural gas pipeline facilities in Connecticut and New York, while Algonquin proposes to construct a new compressor station, upgrade its existing interstate natural gas pipeline facilities in Connecticut, and lease the resulting increased capacity to Islander East. The Project will be comprised of the leased capacity on Algonquin and approximately 44.8 miles of a new, 24-inch-diameter pipeline extending from an interconnection with Algonquin’s existing system near North Haven, Connecticut, across the Long Island Sound, with landfall near Shoreham, Wading River and terminating in Brookhaven, New York. Roughly 10.2 miles of the pipeline will be located in Connecticut and 12 miles will be located on Long Island. The remaining 22.6 miles of pipeline will be located in Long Island Sound.²⁷

The Project is designed to transport 260,000 decatherms (“Dth”) per day of natural gas to generating facilities and local gas distribution companies (“LDCs”) on Long Island and in New

²⁶ 16 U.S.C.S. § 1456(c)(3)(A) (2003).

²⁷ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶¶ 5, 6.; Connecticut Siting Council, Findings of Fact Regarding Islander East Application, Docket No. 221, at 5 (Aug. 1, 2002) (“Siting Council Findings of Fact”). *See* Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy, 88 F.E.R.C. 61,227 (Sept. 15, 1999).

York City.²⁸ Islander East has contracted to provide transportation service to the KeySpan Gas East Corporation, d/b/a KeySpan Energy Delivery Long Island, and The Brooklyn Union Gas Company, d/b/a KeySpan Energy Delivery New York (jointly “KeySpan”). The KeySpan companies are LDCs that currently serve approximately 1.8 million consumers in the New York City boroughs of Brooklyn, Queens and Staten Island, as well as Long Island.

In addition, Islander East has been authorized to provide transportation service to two proposed electrical generation facilities; one to be operated by Brookhaven Energy Limited Partnership, an affiliate of American National Power, located in Yaphank, New York; and the other to a proposed facility in Calverton, New York that was being developed by an affiliate of the AES Corporation.²⁹

B. National Energy Policy and Northeast Regional Limitations Constraining Growth

1. Energy Crisis: Imbalance Between Supply and Demand

In May 2001, the NEPD Group issued their Energy Report, which recognized that the United States is confronting an energy crisis defined by a fundamental imbalance between energy supply and energy demand.³⁰ Subsequent to the issuance of the Energy Report, President Bush issued an Executive Order directing federal agencies and departments to expedite projects that will increase the transmission of energy.³¹ Islander East is such a project and its approval should be expedited by a federal override by the Secretary.

2. Energy Infrastructure Strained to Capacity

The Energy Report chronicled the status of the country’s infrastructure of energy delivery facilities and determined that it was deteriorating and strained to capacity. The NEPD Group

²⁸ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 6. Islander East’s facilities are designed to transport the design capacity of 260,000 Dth per day and up to 285,000 Dth per day when factors change on Algonquin’s C-System. *Id.* at n. 3.

²⁹ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 5; FERC Preliminary Determination on Non-Environmental Issues, Islander East Pipeline Co., 97 F.E.R.C. 61,363 at ¶ 8 (Dec. 21, 2001) (“Preliminary Determination”).

³⁰ *Energy Report* at viii.

³¹ Exec. Order No. 13212, 66 Fed. Reg. 28,357 (May 18, 2001).

emphasized that, “One of the greatest energy challenges facing America is the need to use 21st-Century technology to improve America’s aging energy infrastructure. Americans need a comprehensive, long-term solution to deliver energy to industry and consumers in a reliable and safe manner.”³²

The NEPD Group forecasted that there would be a 45% increase in the demand for electricity by 2020.³³ Department of Energy Secretary Spencer Abraham has noted that, as a consequence of this increase in demand, an additional 1300-1900 new power plants are required nationally, 90% of which will be fueled by natural gas.³⁴ With the increased demand for new energy facilities comes a corresponding need to develop the national gas delivery system. As noted by Secretary Abraham, “But just as challenging, we need to build the transmission lines to go with them. And we have to build tens of thousands of miles of new natural gas and oil pipelines, and processing plants and refineries, to meet increasing demand for natural gas and oil.”³⁵ The Islander East Project is exactly the type of project which will help satisfy this need.

3. Natural Gas

With respect to natural gas, the Energy Report recognized that the natural gas distribution system is comprised of “an aging and inadequate network of pipelines.”³⁶ In order to alleviate this problem the Energy Report estimated that an additional 38,000 miles of new gas pipelines, and an additional 255,000 miles of distribution lines, will need to be constructed.³⁷ The need for significant construction of new gas pipelines is of national significance.

The focus on increasing natural gas usage is driven in part by the decline in domestic oil production. The Energy Report noted that domestic oil production has decreased by almost 40%

³² *Energy Report* at 7-1.

³³ *Energy Report* at 1-13.

³⁴ Spencer Abraham, United States Secretary of the Department of Energy, Prepared Statement Before the House Committee on Commerce Regarding the National Energy Policy (June 13, 2001), *in* Federal News Service.

³⁵ *Id.* See also Spencer Abraham, United States Secretary of the Department of Energy, Remarks to the Detroit Economic Club Outlining National Energy Policy Accomplishments One Year After Release (May 13, 2002), available at http://www.energy.gov/HQDocs/speeches/2002/mayss/DetroitEconomicClub_v.html.

³⁶ *Energy Report* at ix.

³⁷ *Id.*

since 1970. This situation has made the United States more reliant than ever on petroleum from foreign powers. This increasing reliance on foreign sources of oil³⁸ makes the country vulnerable to foreign powers which do not always have the best interests of the United States at heart.³⁹

The greater use of natural gas and the improvement of the national gas infrastructure will help alleviate the nation's dependence on foreign oil. Furthermore, as the Energy Report recognizes, natural gas is a clean alternative source of energy. However, the Energy Report notes that the domestic production of natural gas lags far behind demand. "Currently, natural gas provides about 16 percent of U.S. electricity generation. Seven states obtain over one-third of their generation from natural gas (Rhode Island, New York, Delaware, Louisiana, Texas, California, and Alaska). Perhaps more important, natural gas-fired electricity is projected to constitute about 90 percent of capacity additions between 1999 and 2020. The amount of natural gas used in electricity generation is projected to triple by 2020."⁴⁰ The Energy Report concludes that "Natural gas pipelines have not expanded sufficiently to meet demand."⁴¹ This failing is particularly acute in the downstate New York area which will be serviced by Islander East.⁴²

4. Energy Supplies in the Northeast are Limited by Electric Transmission and Gas Pipeline Bottlenecks

The Energy Report noted that, "This imbalance [between supply and demand], if allowed to continue, will inevitably undermine our economy, our standard of living, and our national security."⁴³ The Energy Report stated that, "Our projected growing dependence on oil imports is a serious long-term challenge. U.S. economic security and that of our trading partners will remain closely tied to global oil market developments. Without a change in current policy, the

³⁸ At the current rate of increased consumption of foreign oil and decreased domestic production, the United States will import two-thirds of its oil by 2020. *Energy Report* at x.

³⁹ *Energy Report* at x.

⁴⁰ *Id.* at 5-18.

⁴¹ *Id.* at 7-1.

⁴² See New York State Energy Research and Development Agency and New York Independent System Operator, *Final Report: The Ability to Meet Future Gas Demands from Electricity Generation in New York State*, prepared by Charles River Associates (July 2002) ("NYSERDA Report").

⁴³ *Energy Report* at viii.

share of U.S. oil demand met by net imports is projected to increase from 52 percent in 2000 to 64 percent in 2020.”⁴⁴ The Energy Report concluded that the United States must have environmentally sound energy projects to connect supply sources to areas of growing demand for energy.⁴⁵

Congress has also been concerned with the energy needs of the Northeast, and directed the FERC to analyze the need for natural gas capacity in the Northeastern United States. In its report entitled “Staff Analysis of Natural Gas Consumption in New England and the Mid-Atlantic States” (“FERC Staff Analysis”), FERC stated, “All projections indicate increasing demand for natural gas in the Northeastern United States over time, and the need for increased capacity to meet that demand. This leads staff to conclude that additional pipeline construction is likely to be required in the near future to meet that demand.”⁴⁶

More pointedly, the Energy Report identified eastern New York as an area where additional natural gas supply is needed.⁴⁷ Yet, the construction of additional capacity is not keeping pace. The Energy Report stated:

To meet this long-term challenge, the United States not only needs to boost production, but also must ensure that the natural gas pipeline network is expanded to the extent necessary. For example, although natural gas electricity generation in New England is projected to increase by 16,000 MW through 2000, bottlenecks may block the transmission of necessary supplies. Unless pipeline constraints are eliminated, they will contribute to

⁴⁴ *Energy Report* at 1-13.

⁴⁵ *Energy Report* at xii, 1-5.

⁴⁶ Federal Energy Regulatory Commission, *Staff Analysis of Natural Gas Consumption and Pipeline Capacity in New England and the Mid-Atlantic States*, December 1999 (“FERC Staff Report”), available at http://www.ogc.doc.gov/ogc/czma/ex_36_letters.pdf. Interestingly, the FERC Staff Analysis mentioned that Senator Lieberman (Connecticut) had advocated the position that his state had the need for additional electric generation and that he had requested that the FERC “ensure that there is sufficient pipeline capacity to meet the demand.” *Id.* at 14. By its approval of the Islander East Project, the FERC is doing what Senator Lieberman asked.

⁴⁷ *Energy Report* at 1-5.

supply shortages and high prices, and will impede growth in electricity generation.⁴⁸

To address the energy crisis, the NEPD Group recommended that the President encourage FERC to use its existing statutory authority to promote competition and encourage investment in transmission facilities.⁴⁹

C. The Energy Situation in New York

1. The Public and Private Need for the Project in the Region

The Islander East Project is designed to provide direct pipeline service to one of the fastest growing gas markets in the country and would enhance supply access and reliability for both Long Island and the central and southern Connecticut gas system. Growth rates for gas in the Long Island and New York City markets have greatly exceeded the national average for the past several years. Much of this demand is the result of growth in the residential load on eastern Long Island. This load growth on Long Island is expected to continue at a rate of approximately 6% per year through 2003, due primarily to homeowner conversions to natural gas.⁵⁰ In addition to servicing traditional LDC markets, the Project is designed to deliver high pressure gas to new power generation facilities expected to be constructed on Long Island, in New York City, and in southern Connecticut to meet the rapidly growing electricity requirements. The Project could also supply natural gas to electric generating facilities and LDCs in Connecticut.

The FERC Certificate Order states that the Islander East Project will “benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas for anticipated electric generation projects. Additionally, it will introduce pipeline-to-pipeline competition to eastern Long Island markets.”⁵¹

⁴⁸ *Id.* at 1-8.

⁴⁹ *Energy Report* at 5-21.

⁵⁰ Islander East Market Data – Market Study, Exhibit “I-1” to Islander East Pipeline Project Abbreviated Application to FERC for a Certificate of Public Convenience and Necessity, Docket No. CP01-384-000 *et al.*, at 5-6 (June 15, 2001) (“Market Data”).

⁵¹ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 5.

A unique feature of the Project is that it provides a separate connection to the existing mainland natural gas infrastructure that significantly enhances the security and reliability of the Long Island and New York energy infrastructure. By providing a second source of competitive supply, Islander East will provide much needed security and reliability to Long Island consumers and businesses in the event of a disruption of gas transportation on Iroquois.⁵² Islander East will also offer the Long Island and New York City markets it will serve greater access to alternate gas supply sources. In addition to the western Canadian gas that Iroquois now delivers, Islander East will provide these markets with Canadian gas from the Sable Island area near Nova Scotia, as well as gas from domestic sources accessible to Algonquin's mainline system.⁵³

2. Downstate New York – Growing Demand for Natural Gas

Long Island and New York City have historically been relatively isolated markets from both a gas and an electric perspective. On the gas side, pipeline capacity limitations into New York City from the west and limitations in the overall New York energy infrastructure have been cited as constraints to growth in natural gas utilization. In the electric power market, transmission and generation limitations in the southeast region of the state require new infrastructure development to meet growing demand and maintain electric system reliability. A report prepared for the New York State Energy Research and Development Agency (“NYSERDA”) recognized the need for additional pipeline capacity in downstate New York to serve this growing demand. The NYSERDA Report concluded: “In the future, gas deliverability in this area will be stressed by the forecasted growth in both traditional gas markets and the increased demand that would be created by new power plants.”⁵⁴ If not addressed, limitations in both electric and natural gas infrastructure could place a limit on growth, jeopardize system reliability, and lead to higher energy costs in these markets. Moreover, gas and electric markets in this area are growing rapidly, thus supporting the need to expand the infrastructure serving this market. The Islander East Project will provide the infrastructure needed to enable gas market growth, as well as provide the means of expanding electric generation in downstate New York.

⁵² FERC Order on Rehearing, Islander East Pipeline Co., 102 F.E.R.C. 61,054 at ¶ 2 (Jan. 17, 2003) (“Rehearing Order”).

⁵³ *Rehearing Order*, 102 F.E.R.C. 61,276 at ¶ 80.

⁵⁴ *NYSERDA Report* at 53.

3. The Long Island and New York City Market

Long Island is classified by the Department of Commerce as a primary Metropolitan Statistical Area for purposes of government statistical analysis.⁵⁵ Nassau and Suffolk counties have a combined population of more than 2.75 million people.⁵⁶ Queens and Brooklyn, which are geographically a part of Long Island, have a combined population of an additional 4.7 million.⁵⁷ Thus, the geographic Long Island area serviced by KeySpan has a total population of 7.5 million. If Long Island (Nassau and Suffolk) were a State, it would be the 32nd largest state in the Union. Utilizing its entire population, Long Island would be considered the 12th largest State. As an economic unit Long Island (Nassau and Suffolk) ranks as the 17th largest metropolitan economy with a total nominal gross output of \$112 billion.⁵⁸ Clearly, Long Island is a metropolitan area imbued with a national interest by virtue of its population and economic output.

Demand for natural gas in the power markets in New York City and Long Island is expected to increase dramatically. It has been projected that the demand for natural gas will rise in the downstate New York region by 11 percent between 2002 and 2005.⁵⁹ This is due to the current shortage of generating capacity in these markets, transmission capacity constraints into the downstate region and the New York Independent System Operator's ("NYISO") requirements that the majority of generation be located within both the New York City and Long Island markets. As a result, more generating capacity will be needed in the target markets, all of which are expected to be gas-fired. The amount of electric generation capacity required for Long Island by 2005 ranges from 386 megawatt ("MW") to 1,800 MW, requiring 62,000 Dth to 288,000 Dth per day of pipeline capacity. New York City is expected to need at least 865 MW

⁵⁵ DRI/WEFA, *The Role of Metro Areas in the US Economy*, prepared for the United States Conference of Mayors (June 6, 2002), available at <http://usmayors.org/70thAnnualMeeting/metroecon2002/metroreport.pdf>.

⁵⁶ H. Carl McCall, New York State Comptroller, *Recent Trends in Long Island Economy*, Report 3-2002 (June 2001), available at <http://www.osc.state.ny.us/osdc/rpt302/rpt302.pdf>.

⁵⁷ United States Census Bureau, U.S. Census 2000. Relevant census information may be accessed at the U.S. Census Bureau homepage, <http://www.census.gov/>.

⁵⁸ H. Carl McCall, New York State Comptroller, *Recent Trends in Long Island Economy*, Report 3-2002 (June 2001), available at <http://www.osc.state.ny.us/osdc/rpt302/rpt302.pdf>.

⁵⁹ *NYSERDA Report* at 52.

by 2005 and over 3,000 MW by 2010. This would require at least 138,000 Dth per day of pipeline capacity by 2005 and at least 487,000 Dth per day by 2010.⁶⁰

4. Islander East Role on Long Island

The only natural gas pipeline presently serving eastern Long Island is the Iroquois pipeline.⁶¹ The Iroquois pipeline, which utilizes a single delivery point to Long Island, was built in the early 1990's. No additional pipeline transmission capacity to serve eastern Long Island has been built since then. As stressed by the FERC in its Order issuing the necessary certificates to the Islander East Project, KeySpan alone currently serves approximately 1.8 million customers, most of whom are residential and small commercial customers who use natural gas for life sustaining uses such as heating and cooking.⁶² Disruption of existing firm service from Iroquois⁶³ for any significant period could require KeySpan to curtail service to approximately 124,000 customers on eastern Long Island.⁶⁴ Such curtailments would have a "significant and possibly disastrous impact" and most certainly would not be in the national interest.

The New York State Reliability Council requires emergency plans to handle any failure of that pipeline.⁶⁵ By providing another source of supply, the Islander East Project will provide significant benefits. The Project will enhance the gas pipeline infrastructure and make the system more secure and reliable. Once the Project is operational, Long Island will be less vulnerable to the failure or interruption in service of either pipeline. Islander East will also

⁶⁰ *Market Data* at 3.

⁶¹ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 37.

⁶² *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 37.

⁶³ The Iroquois Gas Transmission System is a single 24" inch diameter pipeline delivery system composed of approximately 400 miles extending from the Canadian border through New York in to Western Connecticut and across Long Island Sound through Milford, Connecticut to Northport, New York and into the New York City market.

⁶⁴ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 37.

⁶⁵ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 38, citing New York State Reliability Council, *Reliability Rules for Planning and Operating the New York State Power System*, Version 5 (Nov. 12, 2000) available at <http://www.nysrc.org/pdf/Reliability%20Rules%20Rev2%20Ver5%20-%20Final%2011-12-02.pdf>.

provide direct pipeline-to-pipeline competition to eastern Long Island markets.⁶⁶

Another advantage of the Project is that it will provide much needed natural gas transportation services to a recently approved electric generation facility. On August 14, 2002, the New York State Board on Electric Generation Siting and the Environment (“the NYS Siting Board”) issued a Certificate of Environmental Compatibility and Public Need for the construction and operation of the 580 MW Brookhaven Energy Facility at Brookhaven, New York.⁶⁷ In issuing this certificate, the NYS Siting Board found that failure to approve Brookhaven Energy’s proposal “would only serve to delay environmental and public interest benefits of adding this state-of-the-art, natural gas fuel power plant to the Long Island Power grid at a time of projected capacity shortfalls and during the formative years of the Long Island and State-wide competitive market for electricity.”⁶⁸

a. New York State Public Service Commission Favors Islander East Project

In issuing its certificate of need the FERC relied, *inter alia*, on the comments of the NYS PSC emphasizing the need for a totally separate Sound crossing to provide contingency protection for both gas and electric systems against a total loss of supply if damage were to occur to Iroquois.⁶⁹ In comments to the FERC regarding the Draft Environmental Impact Statement (“DEIS”)⁷⁰ in May 2002, the NYS PSC stated:

⁶⁶ Certificate Order, 100 F.E.R.C. 61,267 at ¶ 8. The fostering of competitive markets is one of the goals of FERC. *See* FERC Statement of Policy, 88 F.E.R.C. 61, 227 (Sept. 15, 1999); FERC Order Clarifying Statement of Policy, 90 F.E.R.C. 61,128, 61,397 (Feb. 9, 2000) (“the creation of greater competition would be considered a positive benefit.”)

⁶⁷ Brookhaven Energy Limited Partnership, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need, Case No. 00-F-0566 (New York Siting Board, Aug. 14, 2002), *available at* <http://www.dps.state.ny.us/fileroom/doc12088.pdf>.

⁶⁸ *Id.* at 53.

⁶⁹ *See PSC Comments.*

⁷⁰ Draft Environmental Impact Statement, prepared for Islander East Pipeline Project by the Staff of the Federal Energy Regulation Commission (March 2002).

Load on Long Island, both electric generation and core gas markets are already heavily dependent upon deliveries through the Iroquois system. The New York State Reliability Council rules require that the bulk power system be operated so that the loss of a single gas facility does not result in the loss of electric load. Because of Long Island's dependence on the delivery of significant volumes of gas for electric generation from a single pipeline [Iroquois], the number of gas fired generators must be limited when electric load is above critical system load levels. Consequently, specific dual fuel capable units must be switched to oil burning when loads are above those levels. Similarly on the gas side, the Long Island market is heavily dependent on deliveries over the Iroquois system. Diversifying the gas delivery system by selecting a route that is totally independent of the existing Iroquois Sound crossing will enhance the reliability of the energy infrastructure to Long Island. Additionally, to the extent operational constraints are reduced and increased gas firing does not create a reliability risk, environmental impacts of stack emissions will also be reduced.⁷¹

The NYS PSC supports the Islander East Project for a number of reasons. Given the significant load growth on Long Island which is expected to continue in the foreseeable future, the NYS PSC concluded the Islander East Project will meet Long Island's need for additional capacity. Furthermore, the NYS PSC recognized that Islander East would add competition and strengthen downstream system impacts as important considerations in its support for the Islander East Project. In comments to the FERC on the DEIS, NYS PSC stated, "A critical downstream consideration is the extent to which the route will increase the diversity of gas supply delivery to Long Island."⁷² Based on the contingency protection that Islander East will provide for both the gas and electric systems because it would include a separate Long Island Sound crossing, the NYS PSC recommended approval of the Project.⁷³

⁷¹ *PSC Comments* at 2.

⁷² *PSC Comments* at 1-2.

⁷³ *Id.*

b. Reliability Concerns of KeySpan, Long Island’s Largest Generator of Electricity

Before the FERC, KeySpan expressed reliability concerns that it has with the current natural gas supply situation on Long Island.⁷⁴ These concerns included not only gas distribution but also the cost and reliability of electric supply. Since KeySpan affiliated companies are responsible for most of the generating capacity on Long Island, KeySpan voiced concern that Iroquois is the single interstate natural gas pipeline currently delivering gas for use in KeySpan’s generating plants located in Suffolk County.⁷⁵ The company noted to the FERC that local electric reliability rules issued by the New York State Reliability Council require planning for the single failure of any gas pipeline. In commenting on the possible expansion of Iroquois to the exclusion of Islander East, KeySpan stated that it would significantly complicate and potentially compromise the ability to comply with these reliability standards.⁷⁶

KeySpan also supported Islander East before the FERC, noting that, “Construction of the Islander East pipeline system will create vitally needed firm capacity capable of serving the ever-growing demand for natural gas by both traditional local distribution markets and critically needed new electric generation facilities.”⁷⁷ KeySpan went on to inform the FERC that annual demand for natural gas in the Long Island and New York City service area was forecasted to grow 3.2% annually through 2005. With respect to Long Island alone, KeySpan projected an annual growth rate of 5.9%. KeySpan noted that, “This increase in demand will largely be created by high priority, low load factor residential and small commercial customers – the Commission’s prime constituency.”⁷⁸ In light of these factors, KeySpan advised the FERC that the need for the increased capacity provided by Islander East was “particularly acute.”⁷⁹ The

⁷⁴ Answer of the KeySpan Delivery Companies and KeySpan Utility Services, L.L.C., Submitted to FERC in Opposition to Motion to Consolidate Proceedings and for Comparative Evidentiary Hearing, Docket No. CP01-384-000 *et al*, at ¶¶ 1, 3-4 (April 23, 2002) (“KeySpan Answer”).

⁷⁵ See *KeySpan Answer* at ¶¶ 1, 3-4.

⁷⁶ *Id.*

⁷⁷ *KeySpan Answer* at Appendix “A,” p. 8.

⁷⁸ *Id.*

⁷⁹ *Id.*

Company also mentioned that “a new pipeline into eastern Long Island is needed to alleviate constraints at existing delivery points and along the KeySpan transmission system.”⁸⁰

5. Role of Islander East in Connecticut

The energy situation in Connecticut has been the subject of a recent study⁸¹ commissioned by the Connecticut Siting Council.⁸² This study recognized the potential for natural gas supplies from Nova Scotia to help reduce the region’s reliance on foreign oil. The study concluded that “without increased diversity of supply resources, the State faces an inherent risk of reduced reliability.”⁸³ A project such as the Islander East Project is entirely consistent with state energy policy in Connecticut and other states in New England and will benefit Connecticut.

Notwithstanding these benefits, Connecticut commented to the FERC that Islander East provided no benefits to Connecticut. In its Order on Rehearing denying Connecticut’s request for a change in FERC’s decision granting Islander East the Certificate, the FERC stated, “The fact that Connecticut has chosen not to benefit at this time does not mean that the proposed project will not benefit Connecticut in the future.”⁸⁴ The FERC has found that the Project will increase existing capacity in Connecticut.⁸⁵ The Project will enhance the capability of the Algonquin system which services Connecticut to make available high-pressure gas to power generation facilities and increased deliverability to allow for increased penetration of gas into new and existing markets. Moreover, the ability of the Islander East Project to be able to deliver high pressure to new power generation facilities in southern Connecticut will enable energy providers to meet rapidly growing demand for electricity. In addition, the Islander East Pipeline

⁸⁰ *Id.*

⁸¹ Connecticut Siting Council, *Review of the Connecticut Electric Utilities’ Twenty Year Forecasts of Load and Resources* (Nov. 2001) (“Siting Council Forecast”), available at [http://www.ct.gov/Siting Council/cwp/view.asp?a=950&Q=248302](http://www.ct.gov/SitingCouncil/cwp/view.asp?a=950&Q=248302).

⁸² The Connecticut Siting Council has nine members: five appointed by the Governor including the chairperson, one appointed by the Speaker of House, one appointed by the President Pro-tempore of the Senate, the Chairperson of the Department of Public Utility Control, and the Commissioner of the DEP.

⁸³ *Siting Council Forecast* at 5.

⁸⁴ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 81.

⁸⁵ *Certificate Order*, 100 F.E.R.C. 61, 276.

allows for future pipeline infrastructure capability in the Connecticut market to meet growth in state energy requirements and enhance fuel competition.⁸⁶

Recently approved legislation in Connecticut limiting sulfide dioxide emission limits on older oil-fired electric generation, effective December 31, 2004 will affect 2,700 MW of generation located in Milford, New Haven, Norwalk, Bridgeport, Montville, and Middletown, Ct.⁸⁷ It is likely that a portion of this capacity will be converted to gas or repowered to a more efficient combined cycle configuration.⁸⁸ Indeed, the Connecticut Siting Council projects that “the state’s fuel mix for electric generation will largely change from oil-fired units to natural gas-fired units during the next ten years.”⁸⁹ This will most likely necessitate increased use of natural gas which could stress the existing infrastructure’s ability to provide access to gas supplies. The Islander East Project will allow for increased fuel competition and the option or opportunity to displace higher emission fuels in existing facilities.

In addition to the study mentioned previously, the Connecticut Sate Legislature commissioned a task force to access, *inter alia*, energy resources and infrastructure in southern Connecticut.⁹⁰ In its recently released report, this task force noted that Islander East will be part of a pipeline system that will improve access to natural gas from offshore Nova Scotia.⁹¹ Further, gas from the Sable basin will provide Connecticut with supply basin diversity that will help to protect the state from supply and pipeline interruptions. The Connecticut Task Force Report stated, “Potentially abundant new natural gas supplies off the coast of Nova Scotia in Atlantic Canada constitute an important new energy source for New England, thereby lessening the region’s critical reliance on both residual fuel oil and traditional natural gas supplies from the

⁸⁶ *Market Data* at 5-6, 16.

⁸⁷ *Siting Council Forecast* at 6.

⁸⁸ *Market Data* at 1-1, 3.

⁸⁹ *Siting Council Forecast* at 7.

⁹⁰ Working Group on Southwest Connecticut and the Task Force on the Long Island Sound *Comprehensive Assessment and Report, Part I, Energy Resources and Infrastructure of Southwestern Connecticut* (Jan. 1, 2003), (“Connecticut Task Force Report”), available at <http://www.sustainenergy.org/taskForceWorkingGroup/AssessmentReport1.pdf>.

⁹¹ *Connecticut Task Force Report* at 10.

Gulf Coast and western Canada.”⁹² In words reminiscent of the NYS PSC’s support for Islander East, the Connecticut Task Force stated, “Connecticut enjoys both economic and reliability benefits through more flexible transportation delivery arrangements by existing wholesale transporters as well as heightened natural gas competition across rival gas producing basins.”⁹³ The Project will enhance supply access and reliability for the central and southern Connecticut gas system.

D. FERC Regulatory Approvals Of Islander East Project

1. Preliminary Determination and Draft Environmental Impact Statement

The need for the project has been confirmed by the FERC, which has exclusive authority under the Natural Gas Act (“NGA”)⁹⁴ to determine the need and siting for interstate natural gas pipelines. The FERC issued a Preliminary Determination on Non-Environmental Issues (“Preliminary Determination”) for the Islander East Project on December 21, 2001.⁹⁵ The Preliminary Determination found that subject to an environmental review pursuant to the National Environmental Policy Act (“NEPA”),⁹⁶ the Project is in the ‘public convenience and necessity’ and will fill an immediate market need by serving expected growth in the Northeast market area.⁹⁷

The FERC then conducted an independent, 14-month-long environmental review of the Project pursuant to NEPA. This review included public scoping meetings, correspondence with other agencies, field investigations, site visits and numerous requests to Islander East to clarify the proposed actions or address site-specific concerns. In March 2002, the FERC issued its DEIS on the Islander East Project for public comment. The DEIS concluded that with Islander

⁹² *Id.*

⁹³ *Connecticut Task Force Report* at 10.

⁹⁴ 15 U.S.C.S. § 717 *et seq.* (2003).

⁹⁵ FERC Preliminary Determination on Non-Environmental Issues, Islander East Pipeline Co., 97 F.E.R.C. 61,363 (Dec. 21, 2001) (“Preliminary Determination”).

⁹⁶ 42 U.S.C.S. § 4332 (2003).

⁹⁷ *Preliminary Determination*, 97 F.E.R.C. 61,363 at ¶ 61.

East's proposed mitigation and adoption of measures recommended in the DEIS, construction and operation of the proposed facilities would have limited adverse environmental impact.⁹⁸ In the DEIS, the FERC sought comments on system alternatives, including the ELI System Alternative, which is a hypothetical alternative developed by the FERC staff based on the Iroquois ELI Project. The NYS PSC stated that the Islander East Project was preferable to the ELI Alternative because "diversifying the gas delivery system by selecting a route that is totally independent of the existing Iroquois Sound crossing will enhance the reliability of the energy infrastructure to Long Island."⁹⁹ In addition, Brookhaven Energy commented that the environmental benefits of this Project include reductions in harmful emissions of nitrogen oxides and sulfur dioxide on Long Island of 1,283 tons per year and 678 tons per year, respectively.¹⁰⁰

2. Final Environmental Impact Statement¹⁰¹

Following the conclusion of the public comment process, the FERC issued a FEIS in August, 2002. The FERC prepared the FEIS in accordance with the requirements of NEPA.¹⁰² The FERC determined that with the adoption of its recommended mitigation measures, construction and operation of the Project would have "only a limited adverse environmental impact."¹⁰³ Based on the information submitted by Islander East, the State of Connecticut and its various subdivisions, the public and other interested parties, the FERC concluded that any environmental impacts would be most significant during the construction period and the potential effects of pipeline construction would be mitigated by adherence to Islander East's Erosion and Sedimentation Control Plan ("ESC Plan"), coupled with the FERC's recommendations.¹⁰⁴

⁹⁸ *DEIS* at ES-4.

⁹⁹ *PSC Comments* at 2.

¹⁰⁰ Letter from George M. Pond, Attorney for Brookhaven Energy limited Partnership, to the Hon. Magalie R. Salas, Secretary of the Federal Energy Regulatory Commission, at 2 (Sept. 16, 2002).

¹⁰¹ Final Environmental Impact Statement, prepared for Islander East Pipeline Project by the Staff of the Federal Energy Regulation Commission (Aug. 2002).

¹⁰² 42 U.S.C.S. § 4321 *et seq.* (2003).

¹⁰³ *FEIS* at 5-1.

¹⁰⁴ *FEIS* at 5-3.

With respect to water quality, the FEIS noted that water quality would be affected primarily by suspension of sediments during dredging activities. The FERC concluded that these impacts to water quality would be short term in nature, remarking that the elevated turbidity levels caused by sediment dispersion typically return to background levels within days of completion of backfilling. “Thus, impacts to the water quality of the Sound near the Connecticut shore from trenching activities would be expected to be temporary, lasting no more than several months.”¹⁰⁵

During its environmental review, FERC also considered shellfish habitat. The FERC concluded that there would be mostly short term impacts, but potentially some long term impacts to the benthic species near the footprint of the proposed Project. FERC concluded that it expected the shellfish communities to recover within five years, although it acknowledged that such recovery could take longer in certain instances.¹⁰⁶ With regard to wetlands the FERC concluded that, “in general, impact on wetlands would be temporary and minor since Islander East and Algonquin would implement the ESC Plan during construction and operation of the facilities.”¹⁰⁷

The FERC also evaluated alternatives to the Islander East Project. The FERC concluded that most of these alternatives did not offer any significant environmental benefits over the proposed project route. However, the FERC staff did identify the ELI System Alternative, the hypothetical system developed by FERC staff as an environmentally preferable alternative because it had a shorter route across Long Island Sound and avoided more shellfish leases.¹⁰⁸ Notably, however, the FEIS went on to qualify this preference by highlighting the Project’s advantages with regard to the flexibility and reliability of the interstate pipeline grid, competition, market need, precedent agreements, and lease agreements. Furthermore, the FERC staff concluded that, “We also note that there is no proposed proposal before the Commission to construct this system alternative.”¹⁰⁹ As discussed, *infra*, this putative alternative is hypothetical

¹⁰⁵ FEIS at 5-3.

¹⁰⁶ FEIS at 5-5.

¹⁰⁷ FEIS at 5-6.

¹⁰⁸ FEIS at 5-11.

¹⁰⁹ FEIS at 4-6.

in nature and cannot constitute a reasonable alternative as that term has been interpreted by the Secretary.

3. The FERC Certificate

On September 19, 2002, the FERC, after carefully balancing its staff's environmental analysis with the required non-environmental policy considerations, along with the substantial commentary from participants in that proceeding, issued an Order on Rehearing and Issuing Certificate ("Certificate Order") for the Islander East Project.¹¹⁰ The Certificate Order concluded that the proposed facilities are required by the public convenience and necessity. It also found that the FERC's approval of the Islander East Project will "benefit the public interest because it will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources and increased availability of gas for anticipated electric generation projects. Additionally, it will introduce pipeline-to-pipeline competition to eastern Long Island markets."¹¹¹

Exercising its authority under the NGA,¹¹² the FERC stated that it is required to make decisions concerning the siting of pipelines and the interests of energy consumers on a national basis. As part of its evaluation, the FERC is required to consider whether there are reasonable alternatives to the Project. It considered all the alternatives to the Islander East Project and found Islander East will provide significant benefits, such as much needed competition, security and reliability that could not be provided by the hypothetical ELI System Alternative, the Iroquois proposed ELI Project or any other alternative.

4. FERC Denies Rehearing to Connecticut

A number of parties, including the State of Connecticut, moved for rehearing of the FERC's Certificate Order. Connecticut challenged the issuance of certificates for the Islander East Project on a number of grounds, including that the Project is not environmentally acceptable

¹¹⁰ *Certificate Order*, 100 F.E.R.C. 61,276.

¹¹¹ *Id.* at ¶ 3.

¹¹² In explaining the FERC's mandate under the NGA and NEPA the FERC cited *State of Louisiana v. FPC*, 503 F.2d 844 at 876 (5th Cir. 1974), for the principle that NEPA simply adds secondary responsibility to the FERC's statutorily mandated duties.

and that other alternatives are preferable. In its Rehearing Order, issued on January 17, 2003, the FERC reexamined all the environmental concerns that had been raised, as well as all the possible alternatives to the Islander East Project, and completely rejected all challenges to the Project.¹¹³ It reaffirmed the conclusion of the Certificate Order that the Project is required by the public convenience and necessity, explaining that, “after taking the hard look required by NEPA,” it had properly concluded that the “other values of the proposed project outweighed what the FEIS described as the project’s limited, but acceptable, environmental costs.”¹¹⁴ The FERC also stated, “The Commission, as well as others, including the New York PSC and New York Reliability Council, believes it is important to plan for the single failure of any gas pipeline. Accordingly, the Commission is reasonably assured that it is in the public interest to approve a pipeline facility that will continue to provide service to high priority customers in the event service from other alternative pipelines experience long term disruptions.”¹¹⁵

E. Connecticut Siting Council Approval of the Islander East Project

The Connecticut Siting Council (“Siting Council”) is charged with “balancing . . . the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreation values. . . .”¹¹⁶ Pursuant to FERC’s policy of encouraging applicants to co-operate with state siting authorities regarding the siting of pipeline facilities, environmental mitigation measures, and construction procedures,¹¹⁷ Islander East applied to the Siting Council for a certificate of environmental compatibility and public need for the Connecticut portion of the Project.

To inform itself concerning the issues raised by the application, the Siting Council solicited and obtained comments from other state agencies, including the CTDEP, the towns

¹¹³ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶¶ 39-44, 45-62, 132-187.

¹¹⁴ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 62.

¹¹⁵ *Id.* at ¶ 90; see also New York State Reliability Council, *Reliability Rules for Planning and Operating the New York State Power System*, Version 5 (Nov. 12, 2000) available at <http://www.nysrc.org/pdf/Reliability%20Rules%20Rev2%20Ver5%20-%20Final%2011-12-02.pdf>.

¹¹⁶ Conn. Gen. Stats. § 16-50g (2001).

¹¹⁷ See *Maritimes & Northeast Pipeline, L.L.C., Algonquin Gas Transmission Co.*, 97 F.E.R.C. 61,345 (Dec. 21, 2001).

within which the proposed facilities were to be constructed, and the public. To this end, the Siting Council held four public hearings in Branford, North Branford, Cheshire and North Haven, and five consultations with the Town of Branford alone. Additionally, the Siting Council conducted five days of evidentiary hearings in which witnesses were subject to cross-examination.

At the conclusion of this process, the Siting Council issued a Certificate of Environmental Compatibility and Public Need for the Connecticut portion of the Islander East Project. In its opinion accompanying the certificate, the Siting Council noted that “many of the concerns expressed by the parties and the interveners, and residents who spoke or submitted written comments to the Siting Council can be mitigated through the thoughtful implementation of a detailed Development and Management (D&M) Plan, which we will require prior to commencement of construction or installation.”¹¹⁸ The Siting Council expressed confidence that “the installation of the off-shore segment of the proposed pipeline will not have significant impacts to shellfish resources located proximate to the proposed pipeline.”¹¹⁹

F. New York State Issues General Concurrence to the Islander East Project

Since the Project is also located within the State of New York as well as the State of Connecticut, it was necessary that the Project be submitted to the New York State Department of State (“NYSDOS”) for a determination as to whether the Project is consistent with the New York State Coastal Management Program.¹²⁰

¹¹⁸ Connecticut Siting Council, Opinion Regarding Islander East Application, Docket No. 221, at 5 (Aug. 1, 2002) (“Siting Council Opinion”).

¹¹⁹ *Siting Council Opinion* at 5.

¹²⁰ It is the Long Island Sound Coastal Management Program (“LISCMP”) that sets public policy for federal and state actions affecting the economic and environmental resources of the Long Island Sound coast. *See* 19 NYCRR Part 600.6 (2003) (codifying the full text of the LISCMP); NY CLS Exec § 923 (2002). The LISCMP was financially aided by a federal grant from the United States Department of Commerce National Oceanic and Atmospheric Administration’s office of Ocean and Coastal Resource Management under the CZMA and replaces the New York State Coastal Management Program for the Long Island Sound. The LISCMP has promulgated thirteen policies which are the basis for federal and state consistency determinations for activities affecting the Long Island Sound coastal area. *See* NYCRR Part 600.6 (2003).

By letter dated January 14, 2003, the NYSDOS determined that the Project meets New York's General Consistency Concurrence Criteria and issued a General Concurrence that the Islander East Project is consistent with the Long Island Sound Coastal Management Plan and all its policies.¹²¹ In reaching their concurrence, New York State had before it much of the same data that was before the State of Connecticut. New York's General Concurrence is in accord with the CZMA requirement that states "consider the national interest in energy development in balancing resource protection with coastal uses."¹²²

G. New York State Water Quality Certification

As required under the Clean Water Act,¹²³ Islander East applied to the New York State Department of Environmental Conservation ("NYSDEC") for a Section 401 Water Quality Certificate ("401 Water Quality Certificate"). On February 7, 2003 the NYSDEC issued Islander East a 401 Water Quality Certificate.¹²⁴ This is an umbrella permit which incorporates all other regulatory approvals required by the State of New York including approvals for freshwater wetlands crossings, pursuant to Article 24 of the New York State Environmental Conservation Law ("ECL"), tidal wetlands crossings, pursuant to Article 25 of the ECL, protected water crossings, pursuant to the New York State Wild, Scenic and Recreational Rivers Act, Article 15, Title 27 of the ECL, the State Pollutant Discharge Elimination System Permit, and the New York State Coastal Erosion Hazard Areas approval, pursuant to Article 34 of the ECL. In issuing the 401 Water Quality Certificate, NYSDEC found the Project to be in compliance with all New York State environmental laws and regulations. Thus, along with the General Concurrence issued by NYSDOS, Islander East has obtained all required New York State environmental approvals for the Project.

¹²¹ See *NY General Concurrence Letter*.

¹²² 67 Fed. Reg. 44407, 44409 (July 2, 2002).

¹²³ Clean Water Act § 401, 33 U.S.C.S. § 1341 (2003).

¹²⁴ Letter from NYSDEC to Islander East approving application for a Section 401 Water Quality Certificate (Feb. 7, 2003).

H. Connecticut Declines To Issue Consistency Determination

In April, 2002, Islander East submitted a request to the State of Connecticut for a Federal Coastal Zone Management Consistency Determination. By letter dated October 15, 2002, the CTDEP advised Islander East that the Project was inconsistent with Connecticut's federally-approved coastal zone management plan.¹²⁵ The State of Connecticut acknowledged that energy facilities like the Project are, by definition, facilities which are in the national interest, but nevertheless determined that the Project would cause significant adverse environmental impacts on coastal resources.¹²⁶ Specifically, the CTDEP mentioned what it perceived as the adverse impacts on water quality, irrevocable and permanent destruction of shellfish habitat, displacement of a water dependent use and the negative impact on tidal wetlands.¹²⁷ In addition, the CTDEP expressed a preference for the ELI System Alternative, which the FERC staff had identified as environmentally preferable to the Project (although ultimately rejected by FERC).¹²⁸

I. Appeal to the Department of Commerce

Thereafter, Islander East filed a Notice of Appeal of Connecticut's denial of the consistency determination with the Secretary of the Department of Commerce dated November 14, 2003, seeking a federal override of Connecticut's denial.¹²⁹

¹²⁵ Letter from Arthur J. Rocque, Commissioner, Connecticut Department of Environmental Protection, to Islander East Pipeline Co., LLC, at 5 (Oct. 15, 2002) ("CTDEP Consistency Denial Letter").

¹²⁶ *CTDEP Consistency Denial Letter* at 5.

¹²⁷ *CTDEP Consistency Denial Letter* at 3-4.

¹²⁸ *CTDEP Consistency Denial Letter* at 5.

¹²⁹ Notice of Appeal to Secretary of Commerce Donald L. Evans from an Objection by the State of Connecticut, Department of Environmental Protection, to a Consistency Certification for the Islander East Pipeline Project (Nov. 14, 2002) ("Notice of Appeal").

ARGUMENT

POINT I

THE ISLANDER EAST PROJECT IS CONSISTENT WITH THE PURPOSES AND OBJECTIVES OF THE CZMA

The Coastal Zone Management Act establishes a partnership among federal and state governments with respect to the preservation, control and development of coastal zone resources. In order to reconcile differences which may arise between the state and federal partners, the Act provides an override mechanism to protect against parochialism by local interests in derogation of the national interest. “The CZMA directs the Secretary to consider whether an activity that a State has determined to be inconsistent with the enforceable policies of its management program is nonetheless consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.”¹³⁰ The Secretary is authorized to override a determination by a State that a particular project or activity requiring federal agency approval is inconsistent with the State’s coastal zone management plan. The regulations governing appeals to the Secretary provide that in order to prevail the Appellant must demonstrate that:

(a) The activity furthers the national interest as articulated in §§ 302 or § 303 of the Act, in a significant or substantial manner.

(b) The national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively.

(c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the . . . [state’s coastal] management program.¹³¹

The rules governing appeals of state denials of consistency determinations provide that the proponent must satisfy each of these three elements in order to warrant a federal override of the State. In determining the national interest, the Secretary will consider: (a) the views of

¹³⁰ 65 Fed. Reg. 77124, 77149.

¹³¹ 15 C.F.R. § 930.121 (2003), 68 Fed. Reg. 77,124.

federal agencies; (b) the federal laws and statements of the President and federal agencies and; (c) reports, studies and plan issued by federal agencies.¹³² As set forth in this Memorandum and the accompanying Record, the Islander East Project is consistent with the CZMA's objectives in each of those three respects.

A. Element One: The Project Furthers the National Interest

1. The National Interest In Siting Major Energy Facilities

The CZMA provides that priority consideration should be given to siting major facilities related to energy. The siting of a pipeline like Islander East is without any question an activity which is in the national interest. The Secretary has emphasized the paramount importance of siting of energy facilities like the Project. Indeed, in articulating the manner in which the national interest is determined, the Secretary has stated "An example of an activity that significantly or substantially furthers the national interest is the siting of energy facilities."¹³³

The State of Connecticut has codified the principle that siting energy facilities is in the national interest. This concession was noted in Connecticut's Consistency Denial letter which necessitated the instant appeal which states, "Energy facilities are, by definition in CGS section 22a-93(14), facilities and resources which are in the national interest."¹³⁴

Specific jurisdiction over interstate natural gas pipelines resides in the FERC. Congress has vested exclusive jurisdiction with the FERC in determining the location of interstate pipelines.¹³⁵ The FERC has a "broader mandate to promote a secure, high quality, and

¹³² 15 C.F.R. § 923.1 (2003).

¹³³ 65 Fed. Reg. 77124, 77150. To determine whether a project significantly or substantially furthers the national interest, NOAA encourages appellants and States to consider three factors: (1) The degree to which the activity furthers the national interest; (2) the nature or importance of the national interest furthered as articulated in the CZMA; and (3) the extent to which the proposed activity is coastal dependent.

¹³⁴ *CTDEP Consistency Denial Letter at 5, citing* Conn. Gen. Stat. § 22a-93(14) ("Facilities and resources which are in the national interest' means: . . . (G) energy facilities serving state-wide and interstate markets, including electric generating facilities and facilities for storage, receiving or processing petroleum products and other fuels . . .").

¹³⁵ NGA, 15 U.S.C.S. § 717 *et seq.* (2003).

environmentally responsible interstate natural gas pipeline infrastructure to meet the energy needs of the nation as a whole.”¹³⁶

In its Certificate Order, the FERC stated:

Under the NGA [Natural Gas Act], the Commission is charged with furthering the public interest in authorizing the construction and operation of interstate natural gas pipelines. This entails consideration of many interests and goals. As Congress, the Commission, and the courts have interpreted it over the decades, this mission includes, among other things, the assurance of adequate supplies of natural gas to consumers, and the assurance of adequate competition among suppliers to cut costs and improve market conditions for the benefits of consumers.¹³⁷

Accordingly, the FERC is the federal body which is primarily charged with making evaluations of interstate pipeline projects from a national perspective. The FERC is empowered to “make choices in the interest of energy consumers nationally”.¹³⁸

The FERC has determined that the Islander East Project will increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources with increased availability of gas for anticipated electric generation projects.¹³⁹ Based on its review of the market data and the precedent agreements with those entities anxious to purchase gas from the Project filed by Islander East, the FERC concluded that the Project is needed and is therefore in the public convenience and necessity.¹⁴⁰ This is a clear determination by the agency with primary jurisdiction that by facilitating and expanding the use of natural gas in Connecticut, Long Island and New York City the Project advances the national interest.

Further evidence that the Project is in the national interest is the fact that it will contribute to the satisfaction of one of the major goals set forth in the National Energy Policy as expressed

¹³⁶ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 63.

¹³⁷ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 46.

¹³⁸ *National Fuel Gas Supply Corp. v. New York State Public Service Council*, 894 F.2d 571, 579 (2d Cir. 1990).

¹³⁹ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 3.

¹⁴⁰ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶¶ 8, 70.

in the Energy Report, *i.e.*, the revitalization and enhancement of the nation's aging and deteriorating pipeline infrastructure.¹⁴¹ Long Island and New York City have historically been relatively isolated markets from both a gas and an electric perspective. On the gas side, pipeline capacity limitations into New York City from the west, and limitations in the New York Facilities System have been cited as limits to growth in gas requirements. The NYSERDA Report concluded: "In the future, gas deliverability in this area will be stressed by the forecasted growth in both traditional gas markets and the increased demand that would be created by new power plants."¹⁴² If not addressed, limitations in both electric and natural gas infrastructure could place a limit on growth, jeopardize system reliability, and lead to higher energy costs in these markets. Thus, the rapidly growing gas and electric markets in these regions illustrates the need to expand the infrastructure in this market. The Islander East Project provides the infrastructure needed to enable gas market growth, as well as provide the means of expanding electric generation in these markets.¹⁴³

Next, the Project will support the development of additional gas-fired electric generation capacity. As noted by Senator Hillary Rodham Clinton, the New York Independent System Operator ("NYISO") supports the development of additional gas-fired electric plants and the associated expansion of the region's natural gas transmission infrastructure. The NYISO has stated, "It is critical that new plants be located 'in-city' and 'on-island' to maintain reliability, enhance competition and support economic growth."¹⁴⁴

In addition, the Islander East Project will constitute a critical link connecting downstate New York and southern Connecticut to the Maritime and Northeast Pipeline System. With the January 1, 2000, inauguration of Atlantic Canada's Maritimes & Northeast Pipeline, New England is now at the beginning of the line for natural gas flowing across the border from

¹⁴¹ *Energy Report* at ix.

¹⁴² *NYSERDA Report* at 53.

¹⁴³ Islander East also has the potential to expand from 285,000 Dth/day to 500,000 Dth/day to meet future market demands. *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 49.

¹⁴⁴ Letter from Hillary Rodham Clinton, Senator of New York, to Hon. Patrick Wood III, Chairman of the Federal Energy Regulatory Commission (June 25, 2002); see New York Independent System Operator, *Power Alert: New York's Energy Crossroads*, at 8 (March 2001) ("NYISO Report"), available at http://www.nyiso.com/topics/articles/news_releases/power_alert_wp.pdf

Canada at Calais, Maine with the potential to service the Long Island markets.¹⁴⁵ Given the ever-growing demand for natural gas in the area, the lack of new transmission facilities and Long Island's need for "on-island" sources of electricity, the Project will satisfy a number of critical objectives with respect to the priority consideration which should be accorded to siting major energy facilities.

The CZMA provides that priority consideration should be given to siting major facilities relating to energy. President George W. Bush has also identified the national interest of siting energy facilities in his Executive Order mandating that the various departments of the government "expedite projects that will increase production, transmission, or conservation of energy."¹⁴⁶ Certainly, the transmission of 260,000 Dth/day of natural gas to customers advances the national interest in a significant and substantial consideration to major energy facilities. The Secretary has emphasized the paramount importance of siting of energy facilities like the Project. The siting of a pipeline like Islander East is without any question an activity which is in the national interest.

2. The Islander East Project Will Contribute To The National Goal of Energy Self-Sufficiency

Pursuant to CZMA Section 302(j), the Secretary has noted a national objective in achieving a greater degree of energy self-sufficiency and has recognized that the greater use of natural gas can "help lessen the Nation's reliance on foreign oil" and reduce the "undesirable consequences of oil import dependency."¹⁴⁷ The NEPD Group calls the nation's reliance on foreign oil a serious long-term challenge which has not only grave economic implications but also makes the country vulnerable to foreign states which might not always have the national interests of the United States at heart.¹⁴⁸ In fact, referring to the energy crisis imbalance between supply and demand, the NEPD Group stated that if it is allowed to continue, it "... will

¹⁴⁵ *Energy Report* at 8-7.

¹⁴⁶ Exec. Order No. 13212, 66 Fed. Reg. 28,357 (May 18, 2001).

¹⁴⁷ *Mobil Exploration*, 1995 NOAA LEXIS 37, *29, *81-82. *See Gulf Oil*, 1985 NOAA LEXIS 1 at *38.

¹⁴⁸ *Energy Report* at x.

inevitably undermine our economy, our standard of living, and our national security.”¹⁴⁹

Since the Islander East Project will result in greater natural gas use in the Northeast, which is the region of the United States most dependent on foreign oil, it will significantly contribute to the CZMA objective of energy self-sufficiency. This is especially true to the extent the natural gas delivered to the region by Islander East will displace foreign overseas energy sources.

3. Fostering Need for Compatible Economic Development

Section 303(2) of the CZMA recognizes the “needs for compatible economic development” in the coastal zone, and the Secretary has found that such economic development is one of the CZMA’s objectives.¹⁵⁰ Since the Islander East Project will transport natural gas to Long Island and other areas in the coastal zone, it will facilitate “compatible economic development” in the coastal zone.

The additional supplies of natural gas that will be provided by the Project will help support new gas-fired electric generating facilities. This will not only assist Long Island in meeting its growing power needs, but will be more protective of the environment. The NYISO has stated that with demand for electricity and natural gas increasing on Long Island, additional gas-fired electric plants will need to be developed, along with the associated expansion of the region’s natural gas transmission infrastructure.¹⁵¹ The NYISO has stated “it is critical that new plants be located “on-island” to maintain reliability, enhance competition and support economic growth.”¹⁵² NYSERDA has noted that the increased supply of natural gas to Long Island will enable the use of larger quantities of cleaner-burning natural gas and provide for better contingency protection.¹⁵³

¹⁴⁹ *Energy Report* at viii.

¹⁵⁰ 16 U.S.C.S. §1452(2) (2003). *See, e.g.*, Decision and Findings in the Consistency Appeal of Davis Heniford, 1992 NOAA LEXIS 51, *15 (May 21, 1992).

¹⁵¹ *See NYISO Report*.

¹⁵² *NYISO Report* at 8.

¹⁵³ *NYSERDA Report* at 55.

Given the actual need and projected growth of natural gas use on Long Island, the FERC concluded “that with appropriate environmental conditions, Islander East’s proposed project can be made environmentally acceptable and that the public interest requires that the Commission approve Islander East’s proposal and issue it a certificate to construct and operate its proposed facilities.”¹⁵⁴ By providing additional energy infrastructure, Islander East will promote price and market stability. Islander East will provide a new source and secondary, independent energy supply to Long Island and, as such, serve to support continued and future compatible economic development.

4. Protection and Development of Resources in Coastal Zone

The Islander East Project will further “the national policy to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone.”¹⁵⁵ By providing natural gas as an alternative to other fossil fuels, the Project will help reduce air emissions, improve water quality and protect fishery resources in the Region, all of which will preserve, protect, and enhance the resources of the coastal zone.

In addition to the need for new facilities to meet growing load, new power facilities are also needed to replace older generation facilities. Half of the existing power generating capacity on Long Island is over thirty years old and is composed of plants that are far more polluting and significantly less efficient than new power plants. If newer power plants are substituted for older generating units on Long Island, environmental quality would be improved, the emission of global warming gases reduced, and development of coastal resources would be enhanced through increased access to reliable and predictable supply.¹⁵⁶ Additional use of natural gas that is delivered by pipeline will also reduce surface transportation of fossil fuels and potential water quality impacts associated with air emissions.

¹⁵⁴ *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 60. “The Commission has imposed numerous environmental conditions that require extensive consultation between the pipeline applicants and local agencies.” *Id.* at ¶ 4.

¹⁵⁵ CZMA § 303(i), 16 U.S.C.S. § 1452(1) (2003).

¹⁵⁶ Comments of the Long Island Association (Long Island’s largest business organization which acts as a regional chamber of commerce) to the FERC in Support of the Islander East Project, at 2 (May 30, 2002).

Islander East provides a number of other benefits beyond providing incremental pipeline capacity to a growing market. First, Islander East enhances reliability by adding a separate pipeline onto Long Island. Second, the Project leads to higher levels of deliverability in Connecticut and southeastern New York markets. Third, the Project will further diversify the supply portfolio of the customers in market by allowing increased access to Sable Island gas through the backfeed of the Algonquin system. Fourth, Islander East will deliver high pressure gas to those areas which need higher pressures to support electric generation, such as the New Haven area. Fifth, the Project will allow greater access to Sable Island gas which should serve to enhance price competition.¹⁵⁷

This Project provides the type of gas infrastructure development that the rapidly growing Long Island, New York City, and Connecticut markets require. It provides a competitive pipeline alternative with a number of reliability and flexibility benefits to customers in these markets. The added flexibility of the pipeline system onto Long Island provides operational benefits for the entire southeast New York market, by avoiding the existing bottlenecks of the local distribution network of the New York Facilities System, which currently receives roughly 60 percent of its gas supply on the western edge of their service territory. The Project provides another pipeline option for Long Island, adding a second separate underwater line across Long Island Sound in addition to Iroquois. This allows for deliveries into Long Island from the east and now from the north, thus enhancing gas supply reliability. Islander East also provides access to numerous supply basins throughout the North American pipeline system, including domestic US supplies, western Canadian supplies, and most important, east coast Canadian supplies, through Algonquin's and its affiliated upstream pipelines.¹⁵⁸

The Project is designed to meet several important objectives. First, the Project will deliver significant quantities of high-pressure gas to rapidly growing gas markets in a region historically constrained by inadequate pipeline capacity. Second, the addition of pipeline capacity from this Project will provide access to gas supplies from all the major supply basins in North America, including the newly developed resources from off-shore Nova Scotia. Third, the

¹⁵⁷ *Market Data* at 4.

¹⁵⁸ *Market Data* at 5-6.

completion of this project, in conjunction with other pipeline projects currently under construction in the Northeast, will expand customers' fuel supply options, not only among competing natural gas suppliers, but also between gas and oil. This will increase fuel supply competition and facilitate competition in the region's newly restructured power market. Fourth, the Project will provide significant operating flexibility to both the Connecticut and New York markets, with improved deliverability and higher pressure gas. Fifth, the Project will provide enhanced reliability to a region that has traditionally faced pipeline capacity constraints, by adding new pipeline capacity infrastructure and increased deliverability to the entire Northeast market.¹⁵⁹

In sum, the first element of Ground One for the Secretary's consideration is that the proposed activity must advance the national interest in a significant and substantial manner. The NOAA has advised that, "The dictionary definition of substantial includes 'considerable in importance, value, degree, amount or extent.' In other words, the activity must be more than related to one of the category of objectives described in §§ 302 or 303 [of the CZMA] – it must contribute to the national achievement of those objectives in an important way or to a degree that has a value or impact on a national scale. The use of the word significant (which is defined as 'important, notable, valuable') is added to convey NOAA's view that a project can be of national import without being quantifiably large in scale or impact on the national economy."¹⁶⁰

The Islander East Project clearly satisfies this criteria. As a major energy facility the Project is entitled to priority consideration.¹⁶¹ Certainly, the transportation of 27.5 million cubic feet of natural gas per day to markets where it is needed to meet current and projected requirements advances the national interest in a significant and substantial manner.

Moreover, the increased use of natural gas is recognized as a measure to help ensure national energy self-sufficiency by reducing dependence on the use of petroleum from foreign overseas sources. Given the history of turmoil in the Middle East, it can hardly be debated that the transportation of natural gas by the Project to the populous and vital economy encompassed

¹⁵⁹ *Market Data* at 7.

¹⁶⁰ CZMA Federal Consistency Regulations, 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000) (citations omitted).

¹⁶¹ Exec. Order No. 13212, 66 Fed. Reg. 28,357 (May 18, 2001).

by Long Island, New York City and Connecticut will substantially advance national interest. Similarly, the compatibility of natural gas usage with economic development in the coastal zone, as well as the fact that this Project will develop and enhance coastal zone resources by reducing air contamination and surface traffic and improving water quality operate in an important and valuable way to foster the national interest as expressed in the CZMA. Accordingly, the Project is undoubtedly in the national interest in a substantial and significant manner.

B. Element Two: The National Interest furthered by the Islander East Project outweighs any adverse coastal effects

Element two requires a balancing of the national interests fostered by the Project against any adverse coastal effects. In weighing the national interest against the adverse coastal effects, the Secretary is required to be mindful of the statute which requires that each federal agency activity “. . . shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State Management Programs.”¹⁶² This element requires the Secretary to consider the adverse coastal effects separately and cumulatively.¹⁶³

At the outset it is important to note that the national interest demonstrated in connection with this Project is of exceptional magnitude and therefore will necessitate a greater showing of adverse impacts to coastal resources than might otherwise be required. Given the magnitude of the national interest here, putative, speculative or unsubstantiated allegations of adverse effects on coastal resources cannot tip the balance. In this case, the national interests fostered by the Project decidedly outweigh any adverse coastal impacts claimed to exist by Connecticut.

The Secretary should also recognize the adverse coastal effects which will result if the Project is not permitted to go forward. As noted by Senator Hillary Rodham Clinton: “In

¹⁶² CZMA § 307, 16 U.S.C.S. § 1456(c)(1)(A) (2003).

¹⁶³ “It is not NOAA’s intent that the cumulative benefits of a proposed activity be weighed against coastal effects. Not only could this lead to the consideration of an endless stream of benefits from the flow of commerce, it could diminish one of the essential purposes of the CZMA to assist States in planning, restoring and conserving coastal resources. The reordered language is intended to make clear that to override a State’s objection the Secretary must find that the national interest found to be furthered in a significant or substantial manner in section 930.121(a), outweighs the potential individual or cumulative effects the proposed activity may have on coastal uses and resources.” 65 Fed. Reg. 77124, 77150-1.

considering the potential environmental impacts of a natural gas pipeline on the Long Island Sound, it is of equal importance to consider the environmental impacts if additional natural gas supplies are not brought to Long Island. Currently, there are two power plants under construction in Shoreham which will be fueled by oil until natural gas supplies are brought to the area. This not only poses additional environmental risk to the Long Island Sound, but furthers the region's dependence on foreign oil imports. Significantly reducing foreign oil imports to a metropolitan region of Long Island's size should clearly be a component of a comprehensive national energy strategy."¹⁶⁴

In addition, it is well-documented that the use of natural gas results in fewer air emissions than the use of other fossil fuels. By increasing the use of natural gas and in doing so displacing the use of fuel oil, the Project will contribute to a reduction in pollution to water. As noted by the NEPD Group: "Programs to reduce air pollution also help clean up water bodies. For example, reducing electric utilities' air emissions of NO_x and SO₂ and vehicles' NO_x emissions reduces eutrophication and acid deposition in estuaries, both of which can harm fish populations and threaten commercial and recreational yields."¹⁶⁵ By increasing the use of natural gas in the service of Islander East, and in doing so displacing the use of fuel oil, the Project will contribute to a reduction in air and water pollution.

1. Environmental Impacts

The CTDEP claims in several places in its Consistency Denial Letter that the Project would have significant or permanent adverse environmental impacts.¹⁶⁶ These claims are unsubstantiated, contrary to the findings made by FERC and fail to take into account Islander East's proposed mitigation. Islander East has consulted with numerous agencies and conducted extensive studies to characterize the existing environment, avoid sensitive habitats, and understand the potential impacts of the proposed construction techniques. During the course of the FERC review process, Islander East modified its route, construction techniques, and

¹⁶⁴ Letter from Hillary Rodham Clinton, Senator of New York, to Hon. Patrick Wood III, Chairman of the Federal Energy Regulatory Commission (June 25, 2002).

¹⁶⁵ *Energy Report* at 3-7.

¹⁶⁶ *See CTDEP Consistency Denial Letter.*

proposed mitigation based on this confirmation to minimize impacts on the environment. The Project as currently proposed would not have a significant or permanent impact on the environment. The FEIS prepared by FERC corroborates this view. It concluded that construction and operation of the proposed Project will result in a limited adverse environmental impact and that with the use of proposed and recommended mitigation measures, it would be an environmentally acceptable action.¹⁶⁷

It is not clear how the CTDEP could have reached a different conclusion; but the CTDEP's review has certainly been shorter, less extensive, and less interactive than the FERC's. Moreover, the CTDEP does not appear to have conducted or cited any studies or provided any evidence to support its claims of significant and permanent impacts or counter Islander East's or the FERC's conclusions that impacts would not be significant.

The Consistency Denial Letter identifies four areas where significant adverse impacts and inconsistencies with the Connecticut CZMP occur: 1) water quality; 2) shellfish habitat; 3) water dependent use; and 4) tidal wetlands. This section will address each of these claimed impacts. Islander East reserves the right to address any additional or new adverse environmental impacts which the State may contend will be caused by the Project.

a. Water Quality

The CTDEP acknowledges that the Connecticut Water Quality Standards "allow for temporary or short-term . . . changes in water quality as a result of discharge, such as dredging."¹⁶⁸ However, Connecticut contends that Islander East's installation duration will constitute a long term disturbance. The installation duration for Islander East is similar and in some instances shorter, than numerous approved dredging projects that have occurred along the Connecticut shoreline over the past several decades. The CTDEP routinely approves dredging operations including those in the Project area, *e.g.*, the Tilcon shipping channel whose operations occur in the same vicinity as the Islander East Project and last longer than the Islander East projected installation period. Consequently, the degree to which the Project will adversely affect

¹⁶⁷ FEIS at ES-5.

¹⁶⁸ CTDEP Consistency Denial Letter at 3.

coastal resources is a major point of disagreement. Nevertheless, there are several significant reasons to conclude that the Project's adverse effects on water quality will be minimal.

Islander East provided substantial information to the CTDEP in support of Islander East's position. The pipeline will cross a portion of Long Island Sound where high turbidity levels are a normal condition. Islander East has conducted a 12-month long water quality sampling program which has demonstrated that the water of Long Island Sound where the Islander East pipeline will be installed is naturally turbid. Suspended material concentrations are high and range between 10 and 100 mg/l within the open waters of the Long Island Sound. Several factors contribute to the high turbidity of the water including wave action, tidal currents, wind and shellfishing harvesting activities. Although construction of the Project will suspend some additional sediment, the Islander East company has conducted a considerable amount of sediment modeling, which establishes that the effect of construction on water quality will be incremental, temporary (*i.e.*, limited to a relatively short period of time) and localized to the immediate area of construction.¹⁶⁹

Additionally, Islander East has proposed several mitigation measures to minimize water quality impacts, including: directionally drilling the Connecticut landfall; implementing procedures to recover drilling fluids at the drill exit hole within Long Island Sound; reducing the height and length of time trench spoil piles will be present; using subsea plowing and mid line anchor buoys; and burying the pipeline below the seabed.¹⁷⁰ Based on extensive sediment modeling, Islander East has also reduced the height of the spoil mounds created during the excavation of the transition basin and has modified the pipeline installation procedures to reduce the length of time spoil mounds will be subject to erosion from tidal and wave action from three months to three weeks. The reduction in the height of the spoil mounds and the shorter duration between excavation and backfilling operations will result in less spoil mound erosion. These mitigation measures reduce the potential adverse coastal effects on water quality in the Sound significantly.¹⁷¹

¹⁶⁹ See *FEIS* at 3-28 – 3-39.

¹⁷⁰ *FEIS* at 3-28 – 3-39.

¹⁷¹ *Id.*

Furthermore, under the FERC Certificate, Islander East is required to monitor the near-shore areas for sedimentation impacts.¹⁷² The monitoring is designed to ascertain whether the erosion and deposition exceed either the depth of sediment deposition or the real extent of coverage that was estimated by Islander East's modeling. In the event that either of these factors exceed the model parameters then Islander East is responsible for additional mitigation. The nature of the additional mitigation will be determined in consultation with the lease holder and/or appropriate Federal or state agency.¹⁷³ The Project, therefore, will not as the CTDEP contends, result in significant impacts on benthic organisms, their habitat, or the overall water quality of the Sound. Construction will not result in the point source discharge of nutrients, toxins, heavy metals, or pathogens into Connecticut waters of Long Island Sound, nor will it permanently alter temperature, pH, dissolved oxygen levels or the salinity of the water.

The CTDEP has taken inconsistent positions on the effects of the installation of the Islander East pipeline. In a May 13, 2002 letter to the Connecticut Siting Council, CTDEP stated that "Most of the area affected will be soft sediment habitats that support a well-developed invertebrate community that is common to central Long Island Sound. This habitat within the construction corridor will be temporarily disrupted, and will take a period of time to recover."¹⁷⁴

Yet, in its Consistency Denial Letter, the CTDEP concluded that the sidelaying of dredged sediments ". . . is a longer-term disturbance that will have significant adverse impacts . . . , **possibly**, on water quality through sediment suspension."¹⁷⁵ The speculative nature of the impact of the pipeline installation which CTDEP characterized as only "possibly" affecting water quality, is not sufficient to support a conclusion that there will be an adverse impact on water quality. The only information proffered by CTDEP in support of its conclusion that there will be long term degradation of water quality is reference to events involving the Iroquois pipeline construction in the early 1990's.

¹⁷² *Certificate Order*, 100 F.E.R.C. 61,276, Appendix "A" at ¶ 55.

¹⁷³ *Id.*

¹⁷⁴ Letter from Charles H. Evans, Director of the Office of Long Island Sound Programs, Connecticut Department of Environmental Protection, to Mortimer A. Gelston, Chairman, Connecticut Siting Council (May 13, 2002).

¹⁷⁵ *CTDEP Consistency Denial Letter* at 3 (emphasis added).

In asserting potential impacts to water quality, Connecticut relies on information from the Iroquois construction project to support its conclusion that the Islander East Project will have permanent adverse impacts on water quality.¹⁷⁶ The CTDEP citation of the impacts of the Iroquois project to support any of its conclusions regarding environmental impacts is both circumstantial and largely irrelevant. The existing Iroquois pipeline was constructed in a different location, in a different environment, and using different construction methods than those proposed by Islander East.

As far as the potential release of contamination during installation of the Project, the CTDEP advised the FERC that “assessments to date of the pipeline corridor sediments have not indicated that any contamination problems are present.”¹⁷⁷ Accordingly, in the FEIS, the FERC concluded that:

Trenching activities could also release a portion of the contaminants into the water column. As previously mentioned, the locations where the slightly elevated levels of contaminants were detected would be trenched using the subsea plow. This trenching method primarily redistributes the sediment to either side of the trench and does not resuspend much sediment, thus minimizing the release of contaminants into the water column. The contaminants released would be expected to be diluted by tidal and wave generated currents. Most mobile fish and benthic organisms would be expected to avoid the construction activity and would not be impacted by the contaminant release. Those organisms that did remain in the area could be exposed to relatively low concentrations of sediment contaminants for a short period of time. Utilizing the measured sediment contaminant concentrations, we made a conservative estimate of potential water column contaminant concentrations resulting from trenching (see section 3.3.3.1). The results of these calculations indicate that water column contamination concentrations would remain well below CTDEP water quality standards for both acute and chronic effects to saltwater organisms. Therefore, no chronic impacts to fish or benthic marine

¹⁷⁶ *CTDEP Consistency Denial Letter* at 3.

¹⁷⁷ Letter from Connecticut Department of Environmental Protection to FERC regarding Draft Environmental Impact Statement, Islander East Pipeline Project (May 17, 2002).

organisms would be anticipated from the release of contaminants into the water column as a result of trenching activities.¹⁷⁸

When all the data and the determinations of the FERC and the Connecticut Siting Council are considered, the Secretary should have no trouble reaching the conclusion that the potential adverse impact on water quality by the Project is minimal.

b. Shellfish Habitat

Islander East disagrees with the CTDEP's characterizations of project impacts on shellfish habitat and the CTDEP's suggestions that the pipeline route crosses extensive oyster habitat. Islander East has undertaken a number of studies to characterize the biological and physical attributes of the project area and has had numerous discussions with local fisherman in order to document existing resources and identify potential environmental concerns. Islander East's investigations have demonstrated that the pipeline route will not affect hard bottom areas that could be considered high quality oyster habitat.¹⁷⁹ Additionally, while some clams, oysters, lobsters, fish, crabs, and other benthic species are present in the Project corridor, Islander East's studies show that these organisms do not occur in unusually high numbers, but rather in a manner common to much of the Long Island Sound shoreline in Connecticut.¹⁸⁰

Islander East selected the pipeline alignment and developed the proposed construction techniques specifically to minimize environmental impact on shellfish habitat. The pipeline route was sited in muddy substrates and avoids rocky subtidal areas, eelgrass beds, glacial till, and other sensitive habitat types. Additionally, Islander East has committed to horizontally directionally drilling the Connecticut landfall and has developed a plan to contain and recycle drilling mud, which will avoid impacts on the shoreline and town shellfish leasebeds.¹⁸¹

¹⁷⁸ *FEIS* at 3-65.

¹⁷⁹ *FEIS* at 3-55 – 3-76.

¹⁸⁰ *FEIS* at 3-75 – 3-76.

¹⁸¹ *FEIS* at 2-11 – 2-46.

Through discussions with local fisherman, Islander East has determined that the state shellfish beds along the pipeline route are used by the existing leaseholders to harvest clams.¹⁸² Clams, like the majority of the other benthic species inhabiting the soft sediments along the pipeline route, are adapted to a depositional environment. Species such as clams, polychaete worms, tubicolous amphipods, and other burrowing benthos can tolerate episodic deposits of sediment, such as sediment deposition that occurs following a winter storm or the passing of a tropical depression. These organisms are mobile and move upward as the sediment is deposited and have mechanisms for clearing sediment from feeding and breathing organs. The majority of the benthic species will, therefore, not be affected by construction.¹⁸³

Islander East has also committed to using a subsea plow to install the pipeline in waters deeper than 20 feet, which will minimize the displacement of sediments along the sea bottom. The narrow width of the disturbed sediments created by the subsea plow will allow recolonization of benthic species through larval settlement and migration from adjacent areas within 3 to 5 years.¹⁸⁴ Islander East has also reached agreements with affected leaseholders whereby they will harvest shellfish in areas to be affected prior to construction and Islander East has committed to compensate the fishermen reasonably for temporary damages and loss of production. Furthermore, Islander East will reseed state shellfish beds with clams, which has proven effective at other sites and is consistent with the existing use of the leasebeds.

CTDEP's objection to the Islander East Project contradicts its own written comments to the Connecticut Siting Council. For example, in its Consistency Denial Letter, the CTDEP stated that "the proposed project will . . . degrade, irrevocably alter and permanently destroy essential shellfish habitat through alteration of the benthic environment; . . . traverse approximately 4.2 miles . . . resulting in the direct disturbance through trenching and plowing of approximately 45 acres of oyster habitat"; and "permanently destroy 45 acres of leased or

¹⁸² *FEIS* at 3-70 – 3-71, 3-105 – 3-107.

¹⁸³ *FEIS* at 3-55 – 3-60.

¹⁸⁴ *FEIS* at 3-61.

potentially leasable shellfish habitat.”¹⁸⁵ It appears that Connecticut is taking the position that the seafloor along the Project corridor is hard substrate which is essential to oyster attachment.

However, this contention about the substrate in the Project corridor is directly contradicted by materials submitted by CTDEP to the Connecticut Siting Council. In a letter to the Siting Council dated May 13, 2002 (“Connecticut Siting Council Letter”), the CTDEP described the seafloor along most of the pipeline route as “generally featureless, and comprised of soft sediments¹⁸⁶ (fine-grained, silty-sand and mud) that are typical of Central Long Island Sound.”¹⁸⁷ The Connecticut Siting Council Letter also concluded that the “habitat within the construction corridor will be temporarily disrupted and will take a period of time to recover” (*i.e.*, the impacts of construction would be temporary and the affected areas would recover over a period of time.).¹⁸⁸ Given Connecticut’s inconsistent statements, the conclusion reached by the CTDEP in its Consistency Denial Letter should not be given any weight.

In the Consistency Denial Letter, Connecticut takes a position with respect to shellfish habitat restoration which is scientifically unsound. Connecticut states that, “Once a hard bottom has been disturbed . . . [i]t is not possible to restore the fine-grained cohesive sediment and the soft sediment is unsuitable for oysters.”¹⁸⁹ However, this position is inconsistent with NOAA’s own observations as reported by the FERC in its denial of Connecticut’s request for rehearing:

Information provided on the National Oceanic and
Atmospheric Administration’s (NOAA) Coastal Services
Center website indicates that oyster attachment sites include

¹⁸⁵ CTDEP Consistency Denial Letter at 3-4.

¹⁸⁶ Note that soft sediments are not suitable for oyster habitats.

¹⁸⁷ Letter from Charles H. Evans, Director of the Office of Long Island Sound Programs, Connecticut Department of Environmental Protection, to Mortimer A. Gelston, Chairman, Connecticut Siting Council, at 6 (May 13, 2002). “Department of Agriculture’s Bureau of Aquaculture will be providing comments directly to the Siting Council on this matter. Lobstermen fishing in the area will be temporarily displaced, although fishermen in the area have met with Islander East representatives and appear to have worked out a method to avoid damage to or loss of the gear. Most of the area affected will be soft sediment habitats that support a well-developed invertebrate community that is common to Central Long Island Sound. This habitat within the construction corridor will be temporarily disrupted, and will take a period of time to recover.” *Id.*

¹⁸⁸ Letter from Charles H. Evans, Director of the Office of Long Island Sound Programs, Connecticut Department of Environmental Protection, to Mortimer A. Gelston, Chairman, Connecticut Siting Council, at 6 (May 13, 2002).

¹⁸⁹ CTDEP Consistency Denial Letter at 3.

almost any hard surface such as other living oysters, oyster shell, rocks, docks, pilings, and glass bottles, and that oyster larvae may preferably select oyster shell as a substrate. The website goes on to state that commercial oyster harvesters often “seed” areas with oyster shell (called “culch”) to promote spat settlement. This information indicates that appropriate site preparation of disturbed areas (e.g., replacement with oyster shell or other hard surface) could serve to mitigate impacts of oyster beds, averting the “permanent destruction” of shellfish habitat claimed by the Connecticut AG and DEP. Therefore, the Commission is reasonably assured that, if necessary, Islander East can replace the damaged oyster habitat.¹⁹⁰

The CTDEP’s claim that the Iroquois project has had a long term detrimental environmental impact on shellfish beds is suspect as there has been an approximately 54% increase in leased shellfish beds along and near the Iroquois pipeline route since Iroquois was constructed.¹⁹¹ This increase supports Islander East’s view that the impact of pipeline construction is both temporary and short term and that the seafloor and shellfish beds will recover following construction.

The issue of shellfish habitat was considered by the FERC which rejected Connecticut’s analysis. In order to mitigate any adverse impacts to the shoreline and to the shell fish lease areas off of the Connecticut shore, the FERC has required that: “Before construction, Islander East shall file with the Secretary of Energy for review and written approval from the Director of OEP, [Office of Energy Projects] a plan to perform long-term monitoring to assess the impacts of pipeline construction to the sea floor of Long Island Sound.”¹⁹² This monitoring will continue for at least 5 years or until the habitats have recovered. The monitoring to be undertaken includes comparison of disturbed areas with other nearby similarly configured control areas. The monitoring plan will also focus on nearshore shellfish habitat and monitoring results will be submitted to the FERC.¹⁹³ Given the safeguards and environmental conditions imposed on

¹⁹⁰ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 154.

¹⁹⁰ See Cultivated Shellfish Lease-Beds along Iroquois Pipeline Route, from Connecticut Department of Agriculture, Aquaculture Division, Map of Oyster Grounds Milford – West Haven, Conn. (May 21, 1992), and Map of Oyster Grounds Milford – West Haven, Conn. (Oct. 7, 1999).

¹⁹² *Certificate Order*, 100 F.E.R.C. 61,276, 62,128 at ¶ 23.

¹⁹³ *Id.*

Islander East by the FERC, it is doubtful that there will be significant or long term damage to shellfish habitat by virtue of the Project.

c. Water Dependent Uses

In its Consistency Denial Letter, Connecticut contends that natural gas transmission via pipeline is a non-water dependent use because it can be located inland and does not require direct access to, or location in, marine or tidal waters.¹⁹⁴ This conclusion ignores the fact that Islander East proposes to deliver gas to Long Island, New York which is after all an island, surrounded by water on all sides. There is no other practical way to transport natural gas to Long Island except by pipeline across the waters of Long Island Sound. Accordingly, the Project is a water dependent use and is consistent with water dependent uses as defined by Section 22a-93 of Chapter 444 of the Connecticut Coastal Zone Management Act (the “Act”).¹⁹⁵

This section of the Act includes as a water-dependent use, facilities that require direct access to, or location in, marine or tidal waters including industrial uses that are dependent upon water-borne transportation, which in the case of the Islander East Project would involve the sea to land transfer of natural gas. The Islander East pipeline by the State’s own definition is a water dependent use¹⁹⁶ and cannot have the adverse coastal effect of displacing water dependent use with a non-water dependent use.

Islander East also differs with the CTDEP regarding the potential impact of the Project on other water dependent uses. Islander East has consulted with the Coast Guard and other agencies and has worked extensively with local fisherman groups and Tilcon to avoid or minimize

¹⁹⁴ CTDEP Consistency Denial Letter at 4.

¹⁹⁵ Conn. Gen. Stat. § 22a-93 (2001).

¹⁹⁶ Conn. Gen. Stat. § 22a-93(16):

'Water-dependent uses' means those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: Marinas, recreational and commercial fishing and boating facilities, finfish and shellfish processing plants, waterfront dock and port facilities, shipyards and boat building facilities, water-based recreational uses, navigation aides, basins and channels, industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site and uses which provide general public access to marine or tidal waters

impacts on water dependent uses during construction.¹⁹⁷ Offshore construction of the pipeline is scheduled during the winter months to avoid the peak fishing season. Pursuant to the FEIS, Islander East will notify and coordinate with fisherman regarding the construction schedule and has developed a gear compensation program to compensate commercial fisherman for any gear that is lost as a result of construction.¹⁹⁸ The pipeline will be buried beneath the seabed and following its installation, will not preclude or interfere with recreational boating, commercial shipping, future lobster migration or other water dependent uses.¹⁹⁹ Thus, the Project will not adversely affect water dependent uses in Long Island Sound.

d. Tidal Wetlands

The Consistency Denial Letter contends that pipeline construction will physically alter and negatively impact two tidal wetlands: CT-A37 (MP 9.6) and CT-A21 (MP 9.8).²⁰⁰ Although both wetlands will be temporarily disturbed by construction, Islander East does not believe that either wetland will be significantly impacted.²⁰¹

Islander East completed wetland delineations along its proposed pipeline route in accordance with federal and state methodologies. During the delineations, Islander East documented wetland vegetation, hydric soils, and made observations of wetland hydrology.²⁰² The two wetlands referred to in the Consistency Denial Letter are located on the west side of the Branford Steam Railroad (“BSRR”) and are separated from adjacent tidal wetlands to the east by the existing railroad bed. There is no apparent surface or subsurface connections between the two wetlands and the adjacent tidal waters. The CTDEP classifies tidal wetlands as “those areas now or formerly connected to tidal waters, and whose surface is at or below an elevation of 1-foot above local extreme high water.”²⁰³

¹⁹⁷ FEIS at 3-105 – 3-107.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ CTDEP Consistency Denial Letter at 4.

²⁰¹ FEIS at 3-92 – 3-99.

²⁰² *Id.*

²⁰³ Gen. Conn. Stat. § 22a-29 (2001).

Wetland CT-A37 is a mostly emergent wetland located south of the Amtrak Railroad and immediately west of the BSRR. Only a small area along the northern edge of wetland CT-A37 is classified as palustrine forested wetland. The majority of the wetland is covered and dominated by common reed (*Phragmites australis*), which is a highly aggressive and invasive species.²⁰⁴

Wetland CT-A21 consists of a small freshwater pond (approximately 2 to 3 feet deep) located west of the BSRR. Common reed dominates the edge of the open water pond and red maple, swamp rose mallow (*Hibiscus palustis*), southern arrowwood (*Viburnum dentatum*), chokecherry (*Prunus serotina*) and maleberry (*Lyonia ligustrina*) occur on the west side of the open water pond. Water quality data and field observations of the pond indicate that there are high levels of total nitrogen (3.8 ppm) and suspended solids (visual observations). The water in the pond is grayish-blue with poor water clarity. Suspended solids from the crushed basalt on the adjacent railroad beds may be the cause of the poor water clarity and the unusual grayish-blue color of the water. The pond does not meet the state's water quality standards of A or B. The low water quality of the pond and the monotypic composition of the wetland vegetation decrease the wildlife habitat value for mammals, birds, and fish. Since there are no surface water connections to tidal waters located east of the BSRR, it is extremely unlikely that there are any significant fish or shellfish populations or significant spawning activity occurring within the pond.²⁰⁵

The Project will cross both wetlands using specialized construction techniques designed to minimize wetland impacts during pipeline installation. Islander East will limit the amount of equipment working in wetlands and limit vegetation clearing to trees and shrubs. To avoid excessive disruption of wetland soils and the native seed and rootstock within the soils, stump removal, grading, topsoil segregation, and excavation will be limited to the area immediately over the trenchline. Since little or no grading will occur in wetlands, restoration of the contours will be accomplished during backfilling.²⁰⁶

²⁰⁴ See Profile of *Phragmites australis*, U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station, Fire Sciences Laboratory (Jan. 2003), available at http://www.fs.fed.us/database/feis/plants/graminoid/phraus/botanical_and_ecological_characteristics.html.

²⁰⁵ FEIS at 3-98 – 3-99.

²⁰⁶ FEIS at 3-92 – 3-99.

Pipeline installation will not permanently fill or degrade the two wetlands; alter the natural functions; nor destroy essential wildlife, finfish or shellfish habitat through the significant alteration of the composition, migration patterns, distribution, breeding or other population characteristics of the natural species or significant alteration of the natural components of the habitat. Following construction of the pipeline, the original contours will be restored and the disturbed wetland will be reseeded. Islander East expects that emergent vegetation will become reestablished within one or two growing seasons and the functions and values of the wetlands will return to pre-construction conditions. The adjacent forest buffer along Wetland CT-A21 will continue to provide wildlife habitat for food, resting, breeding, and nesting cover.²⁰⁷

Islander East will conduct post-construction monitoring and will prepare reports for each of the first three years, at a minimum, or until each wetland is successfully revegetated. The reports shall include an inventory of exotic nuisance plant species present on the construction right-of-way. For any wetlands that have not been restored by the third growing season, Islander East and Algonquin shall file with the Secretary a site-specific plan to restore these problem areas, for review and written approval by the Director of the FERC Office of Energy Projects.²⁰⁸

After due consideration of the data, studies and plans submitted, the FERC concluded that construction and operation of the proposed project will result in a limited adverse environmental impact.²⁰⁹ The FEIS further concludes that if the project is constructed and operated as proposed by Islander East in accordance with the recommended mitigation measures, it would be an environmentally acceptable action.²¹⁰ FERC issued a certificate of Public Convenience and Necessity to Islander East to construct and operate the Project.²¹¹ The Secretary should likewise conclude that there is no significant adverse coastal effect with respect to wetlands which outweigh the national interest.

²⁰⁷ *FEIS* at 3-98 – 3-99.

²⁰⁸ *FEIS* at 3-98 – 3-99.

²⁰⁹ *FEIS* at ES-5.

²¹⁰ *Id.*

²¹¹ *See Certificate Order*, 100 F.E.R.C. 61,276.

C. Element Three: There is no reasonable alternative to the Islander East Project which is available or practicable to fulfill the basic purpose of the Project

“The Secretary is limited in consideration to reasonable alternatives that meet in whole or at least in part the appellant’s purpose. The Secretary does not consider alternatives that are unrelated to or do not meet in some reasonable way the appellant’s objective in proposing the activity.”²¹² An alternative is considered practicable if “it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes” or otherwise the alternative could “fulfill the basic purpose of the proposed activity.”²¹³

1. ELI System Alternative

The CTDEP in its Consistency Denial Letter relies on the FERC staff’s statement that the ELI System Alternative is environmentally preferable.²¹⁴ However, the ELI System Alternative does not meet the Secretary’s criteria for a reasonable alternative. The ELI System Alternative is neither reasonable nor practicable because it is a hypothetical only and has not been proposed by any applicant.²¹⁵ Even more significant, the Iroquois ELI Project on which the hypothetical was based has been withdrawn and abandoned.

In the DEIS, FERC’s environmental staff create an alternative known as the ELI System Alternative, based on the alignment of the Iroquois Eastern Long Island Extension Project (“ELI Extension Project”). The ELI System Alternative was identified as only being capable of carrying the natural gas volumes proposed by Islander East and not the volumes proposed by the ELI Extension Project. Although the FEIS for the Islander East Project described the ELI

²¹² 65 Fed. Reg. 77124, 77151 (Dec. 8, 2000).

²¹³ 40 C.F.R. § 230.10(2) (2003).

²¹⁴ *CTDEP Consistency Denial Letter* at 5.

²¹⁵ To be considered viable, the ELI System Alternative would also involve construction of additional facilities including a 10,000 HP compressor that are not proposed to be constructed by any applicant. Iroquois currently has pending in a separate FERC proceeding the approval of a 10,000 hp compressor station in Brookfield, CT that is not part of its ELI Extension Project but is required to transport the 175,000 Dth/day of capacity for the ELI Extension Project. In considering the ELI System Alternative, FERC’s environmental staff not only assumed that the Brookfield Compressor Station would be certificated and constructed but also recommended that another 10,000 hp of compression would be required to transport Islander East’s volumes along the ELI System Alternative. These additional facilities are not included in the ELI Extension Project application or any other application. *FEIS* at Section 4.2.1, page 4-6.

System Alternative as environmentally preferable to the Islander East Project, the FERC staff carefully qualified its comment noting that the ELI Extension Project would not be constructed and that the staff did not take into consideration the purpose of the Islander East Project, *i.e.*, enhancing the flexibility and reliability of the interstate pipeline grid, promoting competition, serving identified market need, and recognizing the underlying agreements for the Islander East Project.²¹⁶

Although the State of Connecticut has seized on this statement of the FERC staff regarding the hypothetical alternative called the ELI System Alternative, this is not a reasonably available alternative because it does not satisfy the relevant criteria. The ELI System Alternative is neither reasonable, nor practicable. The FERC recognized this fact in its January 17, 2003 Order on Rehearing when it concluded that the Islander East Project will provide much needed competition and reliability that the ELI System Alternative cannot.²¹⁷

Assuming for discussion purposes that the ELI System Alternative was proposed by an applicant and could be constructed, it still cannot fulfill the purpose and need of the Islander East Project; which is to provide up to 260,000 Dth/day of natural gas to energy markets in Connecticut, Long Island, and New York City by November, 2003.

Furthermore, the ELI System Alternative does not meet Islander East's stated purpose of increasing the security and reliability of the existing natural gas pipeline system serving the New York markets by the installation of a second pipeline across Long Island Sound. The FERC stated that "the proposed Islander East project will provide much needed security and reliability by providing a second facility to access supply in the event something happens to either of the pipeline facilities."²¹⁸ The ELI System Alternative would rely on the existing Iroquois pipeline located in Long Island Sound and thus would only compound the dependency of natural gas consumers on a single-line delivery system. This system configuration would make Long Island vulnerable to any disruptions to that system.

²¹⁶ *FEIS* at 4-6.

²¹⁷ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 5.

²¹⁸ *Id.*

This critical distinction was emphasized by the NYS PSC which noted that both the ELI Project and the Islander East Project would meet eastern Long Island's need for additional capacity by providing an additional delivery point to eastern Long Island. "However, in evaluating these two alternative routes, the competitive market and downstream system impacts are important considerations which should weigh heavily in the decision of which route to certify. A critical downstream consideration is the extent to which the route will increase the diversity of gas supply delivery to Long Island. . . . The Islander East proposal provides contingency protection for both the gas and electric systems because it would include a separate Sound crossing. This separate pipeline would provide protection against total loss of supply if damage were to occur to the Iroquois line upstream of the interconnection to the ELI facilities."²¹⁹

The NYS PSC explained its reasoning which led it to conclude that the Project was preferable to the ELI Project as follows:

The New York State Reliability Council rules require that the bulk power system be operated so that the loss of a single gas facility does not result in the loss of electric load. Because of Long Island's dependence on the delivery of significant volumes of gas for electric generation from a single pipeline (Iroquois), the number of gas fired generators must be limited when electric load is above critical system load levels. Consequently, specific dual fuel capable units must be switched to oil burning when loads are above those levels. Similarly on the gas side, the Long Island market is heavily dependent on deliveries over the Iroquois system. Diversifying the gas delivery system by selecting a route that is totally independent of the existing Iroquois Sound crossing will enhance the reliability of the energy infrastructure to Long Island. Additionally, to the extent operational constraints are reduced and increased gas firing does not create a reliability risk, environmental impacts of stack emissions will also be reduced.²²⁰

²¹⁹ *PSC Comments* at 1-2.

²²⁰ *PSC Comments* at 2. See New York State Reliability Council, *Reliability Rules for Planning and Operating the New York State Power System*, Version 5 (Nov. 12, 2000) available at <http://www.nysrc.org/pdf/Reliability%20Rules%20Rev2%20Ver5%20-%20Final%2011-12-02.pdf>.

The concerns of the NYS PSC were echoed by KeySpan which is the largest generator of electricity on Long Island.²²¹ KeySpan is currently Iroquois' largest firm transportation customer. In comments to the FERC KeySpan noted that Iroquois is currently the only natural gas transmission pipeline that services Suffolk County, Long Island. Moreover, the Iroquois pipeline utilizes a single delivery point located in South Commack, Long Island. KeySpan advised the FERC that any significant disruption of service from Iroquois could interfere with energy delivery to up to approximately 124,000 KeySpan customers in Eastern Long Island.²²² Consequently, KeySpan supported the Project before the FERC based, *inter alia*, on the second source of supply that the Project will supply. KeySpan concluded, "Thus, the construction of Islander East significantly enhances the reliability of the KeySpan Delivery Companies' distribution services."²²³

In addition to reliability concerns, KeySpan advised the FERC that the Islander East Project was preferable to the ELI Alternative because Islander East would help to satisfy growing demand.²²⁴ Noting the ever-growing demand for natural gas by both traditional local distribution markets and critically needed new electric generation facilities, KeySpan advised the FERC that, "The incremental capacity created by the Islander East project will enable the KeySpan Delivery Companies to serve their growing markets reliably, particularly on the eastern end of Long Island where the need for new pipeline capacity is particularly acute."²²⁵

Moreover, in its Rehearing Order, the FERC made it clear that it does not support a one pipeline alternative for projects that cross Long Island Sound. The FERC stated:

²²¹ KeySpan Generation LLC (KeySpan Generation") generates up to 4000 megawatts of generating capacity on Long Island. This capacity constitutes most of the generating capacity on Long Island.

²²² KeySpan's reliability concerns extended not only to gas distribution but also to the cost and reliability of electric supply. Local electric reliability rules issued by the New York State Reliability Council require planning for the single failure of any gas pipeline. The expansion of Iroquois to the exclusion of Islander East would significantly complicate and potentially compromise the ability to comply with these reliability standards. Answer of the KeySpan Delivery Companies and KeySpan Utility Services, L.L.C., Submitted to FERC in Opposition to Motion to Consolidate Proceedings and for Comparative Evidentiary Hearing, Docket No. CP01-384-000 *et al*, at ¶¶ 1, 3-4 (April 23, 2002) ("KeySpan Answer").

²²³ *KeySpan Answer* at ¶ 3.

²²⁴ *KeySpan Answer* at Appendix "A," p. 8.

²²⁵ *Id.*

Even assuming, for argument sake, that only one pipeline would be built for the combined capacity of Iroquois' ELI and the Islander East Projects, that pipeline would have to be a facility similar to the proposed Islander East Project. **An alternative similar to the ELI System Alternative that would use the existing Iroquois' facility cannot accomplish the policy goals satisfied by a second pipeline similar to the proposed Islander East Project.**²²⁶

Simply put, a one pipeline alternative will not provide the attributes of reliability and flexibility required by the FERC in order to be considered a reasonable alternative.

Not only do increased reliability and ability to satisfy projected growth in demand support the conclusion that Islander East is preferable to the ELI System Alternative conjured up by the FERC staff, the ELI System Alternative is nothing more than a concept. Indeed, the ELI Extension Project on which the ELI System Alternative is based has been withdrawn by Iroquois. Consequently, there is no doubt that the ELI System Alternative should be a non-issue in this proceeding. Under these circumstances, the Secretary should determine that there is no reasonable alternative to Islander East.

²²⁶ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 102 (emphasis added).

2. Cross Bay, Blue Atlantic Pipeline Et Al.

NOAA has noted that, “Recent changes in NOAA’s regulations ensure that the Secretary’s findings regarding alternatives will not be restricted, but will be informed and based on the Secretary’s independent administrative record for each case.”²²⁷ Connecticut has raised other possible alternatives at various stages of the Islander East application process. While most of these projects do not qualify as reasonable alternatives on their face, this memorandum without conceding even facial validity, will address the Cross Bay and Blue Atlantic Pipeline projects.

The Cross Bay Project was authorized by the FERC to provide an additional 125,000 Dth per day by upgrading and constructing of facilities from New Jersey to the southwestern end of Long Island. The FERC certificate was vacated at the request of Cross Bay.²²⁸ The FERC concluded in both the FEIS and the Certificate that this was not a reasonable alternative because the volumes proposed by Cross Bay were that half of Islander East,²²⁹ the fact that it had been withdrawn, and that Cross Bay proposed to rely on volumes from western United States and western Canada, unlike the eastern Canadian supplies provided by Islander East.

Shortly after the FERC Certificate was issued to Islander East, El Paso Corporation (“El Paso”) announced plans to develop a natural gas pipeline from Nova Scotia to New York and New Jersey.²³⁰ On its request for rehearing of the issuance of the FERC Certificate, Connecticut urged that the FERC’s alternative analysis was defective because the FERC failed to consider the proposed Blue Atlantic Pipeline. Connecticut claimed that the Blue Atlantic Pipeline should be considered a reasonable alternative, notwithstanding the fact that El Paso is

²²⁷ Thus, the Secretary may wish to consider alternatives which may not have been presented to the FERC. Given that one of the purposes of the Islander East Project is to enhance the flexibility and reliability of the energy infrastructure servicing Long Island and Connecticut by installing a second natural gas pipeline under Long Island Sound, there are no reasonable alternatives to achieve this result. Nevertheless, this memorandum will address some of the putative alternatives that have been put forth by the State of Connecticut. By responding to these and any other so-called alternatives, Islander East does not waive its rights or claims under the doctrines of FERC preemption or the Commerce Clause of the United States Constitution. Islander East reserves its rights to reply to any other so-called alternatives Connecticut may raise in subsequent filings.

²²⁸ Cross Bay Pipeline Co., LLC, Order Vacating Certificate 98 FERC 61,080 (2002).

²²⁹ See *FEIS* at 4-7.

²³⁰ See <http://www.blueatlantic.net/>.

conducting engineering studies for this potential project. The FERC rejected the Blue Atlantic Pipeline as a reasonable alternative, noting that much of the information on that project had not yet been developed. The FERC concluded that, “The Blue Atlantic Pipeline would be highly speculative and would lack the detail essential for assessing its impact or conducting a meaningful alternative comparison with other projects. NEPA does not require that the Commission consider potential effects (or alternatives) that are highly speculative or indefinite.”²³¹

More important, the FERC went on to note that the Blue Atlantic Pipeline was not a reasonable alternative because it cannot meet the purpose of the Islander East Project. The Blue Atlantic Pipeline is designed to service markets solely in New York City, not Long Island. Moreover, the FERC stated, “It is not self evident that a 750-mile subsea pipeline would necessarily offer any significant environmental benefits over the 50-mile Islander East Project, other than the fact that, as presently proposed, it will not be located in Connecticut or Long Island Sound.”²³² Accordingly, the FERC concluded that the Blue Atlantic Pipeline is not a reasonable alternative that warranted an analysis in the FEIS. The Rehearing Order held that “We also find that the final EIS considered all reasonably foreseeable alternatives, as required by NEPA. The Connecticut AG’s request for rehearing on this issue is denied.”²³³

In sum, the ELI System Alternative is clearly not a reasonable alternative because it is not available, it is not practicable, nor is it capable of adequately fulfilling an elemental purpose of the Islander East Project. Similarly, other “alternatives” have been evaluated by the FERC and been determined to be unsuitable. In issuing certificates for the Islander East Project, the FERC evaluated all the reasonable alternatives and determined that there are no practicable alternatives that meet the purpose and need of the Islander East Project. Thus, all three elements of Ground One of the CZMA requirements necessary for the Secretary to override the consistency denial of the CTDEP, have been met.

²³¹ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 48. *See* *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985).

²³² *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 49.

²³³ *Rehearing Order*, 102 F.E.R.C. 61,054 at ¶ 49.

POINT II

THE ISLANDER EAST PROJECT IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY

Where a project is necessary in the interest of national security, the Secretary is authorized to override a State objection to a request for a CZMA consistency determination.²³⁴ In this case, a failure to permit the Islander East Project to proceed would significantly impair national security interests in at least two respects.

First, the core mission of the Department of Energy “is national security which is itself founded in large part on energy security.”²³⁵ In a speech before the Committee on International Relations of the U.S. House of Representatives on June 20, 2002, Secretary of Energy Spencer Abraham stated that, “energy security is a fundamental component of national security and a prerequisite to continued economic growth.”²³⁶ The Islander East Project will reduce Long Island’s dependence on one single point of entry, the Iroquois pipeline. The agencies most interested in reliability of the natural gas infrastructure, the FERC and NYS PSC, each have approved the Project, *inter alia*, on the basis of Islander East’s acknowledged ability to provide contingency protection to the natural gas supplies of Long Island. Not only will the Islander East Project provide contingency protection, completion of the Project will enhance the ability to redirect natural gas in emergencies by virtue of providing a greater degree of interconnectivity of the regional natural gas infrastructure.

The enhanced reliability and security which comes from a second separate supply capability cannot be underestimated. Since 9/11 there is a greater urgency to the government’s mission of security of our energy system. DOE Secretary Abraham has vowed that, “We will

²³⁴ 15 C.F.R. § 930.122 (2003).

²³⁵ Spencer Abraham, United States Secretary of the Department of Energy, Remarks regarding the Fiscal Year 2003 Budget Rollout (Feb. 4, 2002), *available at* http://www.energy.gov/HQDocs/speeches/2002/febss/FY2003BudgetRollout_v.html.

²³⁶ Spencer Abraham, United States Secretary of the Department of Energy, Statement Before the Committee on International Relations, U.S. House of Representatives, June 20, 2002, *available at* http://www.energy.gov/HQDocs/testimony/2002/20020620_v.htm.

ensure that America's energy infrastructure is secure and protected."²³⁷ The tragic events of 9/11 have taught us that America is not impervious to attacks on its basic structures. As New York City was the target of a terrorist attack on 9/11, it is certainly reasonable to be concerned about Long Island's dependence on a single entry point pipeline like Iroquois. The Secretary should consider providing a second supply of natural gas to Long Island which is directly proximate to New York City, to be necessary to national security. The importance in protecting New York City from energy chaos by strengthening its energy infrastructure would appear to be self-evident. The national security would be significantly enhanced if the Islander East Project is permitted to proceed.

Second, the Islander East Project is necessary in the interest of national security because it will have the effect of reducing our country's dependence on foreign oil. As the Secretary has recognized, "Greater use of natural gas can help lessen the Nation's reliance on foreign oil, reduce the nation's trade deficit, boost the U.S. gross national product, and as a result of these, strengthen our national security interests."²³⁸ This theme was sounded by Energy Secretary Spencer Abraham at the first annual Energy Efficiency Summit dated October 25, 2001 where he stated, "that our heavy reliance on fossil fuel leaves us increasingly dependent on foreign nations for oil and gas, with serious national security implications. And that our energy infrastructure – the transmission line and pipelines that move electricity, gas and oil – is wholly inadequate to meet our needs in the twenty first century."²³⁹ In a speech President George W. Bush made to the Carpenter's Joint Apprenticeship Center in Pittsburgh, Pennsylvania on September 2, 2000 he stated "the less we import oil from foreign sources, the more our national security is strong."²⁴⁰ Over the last half century, events in the Middle East have demonstrated all too clearly, our Nation's reliance on foreign oil creates a vulnerability which threatens our national

²³⁷ Spencer Abraham, United States Secretary of the Department of Energy, Remarks regarding the Fiscal Year 2003 Budget Rollout (Feb. 4, 2002), *available at* http://www.energy.gov/HQDocs/speeches/2002/febss/FY2003BudgetRollout_v.html.

²³⁸ *Mobil Exploration*, 1995 NOAA LEXIS 37, *81-82.

²³⁹ Spencer Abraham, United States Secretary of the Department of Energy, Remarks at the Alliance to Save Energy Luncheon Keynote Address, October 25, 2001, *available at* http://www.energy.gov/HQDocs/speeches/2001/octss/AllianceToSaveEnergy_v.html.

²⁴⁰ President George W. Bush, Remarks at the Carpenters Joint Apprenticeship Center Labor Day Picnic, Pittsburgh, PA (Sept. 2, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/09/20020902.html>.

security. For these reasons, the Secretary should determine that the Islander East Project is necessary in the interest of national security.

CONCLUSION

In sum, the denial of a consistency determination by the State of Connecticut should be overridden because the Islander East Project is in the national interest and consistent with the objectives of the CZMA. Alternatively, the Secretary should find that the Project “is otherwise necessary in the interest of national security.”²⁴¹ The Islander East Project satisfies the standards of both Ground One and Ground Two of the Regulations implementing the CZMA, and thus the Secretary should override the CTDEP’s objection.

Respectfully submitted,

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²⁴¹ CZMA § 307(c)(3)(A), 16 U.S.C.S. § 1456(c)(3)(A).

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