



STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION



July 29, 2003

Mr. Gene H. Muhlherr, Jr.
Islander East Pipeline Company, LLC
454 East Main Street, Route 1
Branford, CT 06405

RE: **Islander East Pipeline Company, LLC, Federal Consistency Remand
FERC Docket No. CP01-384-000, et al.
ACOE Application No. 200103091**

Dear Mr. Muhlherr

I am writing in response to the June 2, 2003 letter from James R. Walpole of the National Oceanic and Atmospheric Administration ("NOAA") Office of the General Counsel. By means of Mr. Walpole's letter and pursuant to 15 CFR §930.129(d), the United States Department of Commerce ("Commerce") remanded the above-referenced proceeding to the State of Connecticut Department of Environmental Protection ("Department") for reevaluation of the project's consistency with the enforceable policies of Connecticut's federally-approved Coastal Zone Management Program ("CZMP"). The Department has considered the project revisions formally proposed by Islander East Pipeline Company, LLC ("Islander East") in two letters dated March 13, 2003 from Gene Muhlherr to Charles Evans and March 27, 2003 from Joseph Reinneman to Susan Jacobson.

A. HISTORY

In 2001, Islander East Pipeline Company, LLC ("Islander East") submitted applications to the Federal Energy Regulatory Commission ("FERC") and the U.S. Army Corps of Engineers ("ACOE") to authorize construction of a natural gas transmission pipeline system through the Connecticut municipalities of Cheshire, North Haven, East Haven, North Branford and Branford and across Long Island Sound from Branford, CT to Long Island, NY.

Islander East submitted a request to FERC for a Certificate of Public Convenience and Necessity (Docket No. CP01-384-000, et al.) under section 7(c) of the Natural Gas Act and submitted a permit application to the ACOE pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (Application No. 200103091). In response to these applications and pursuant to Section 307 of the Coastal Zone Management Act of 1972, as amended, Subpart D of 15 CFR §930, the Department in 2002 conducted a review of the proposed activities which require federal licenses or permits to be reviewed for consistency with the enforceable policies of the State's federally-approved CZMP. On October 15, 2002, the Department issued an objection to Islander East's consistency certification statement regarding both the FERC certificate and the ACOE permits pursuant to 15 CFR §930.63.

On November 14, 2002, Islander East appealed to the Secretary of Commerce ("Secretary") pursuant to 15 CFR §930, subpart H, to override this objection. While the appeal was pending with the Secretary, the Department met on numerous occasions¹ with Islander East along with federal and state resource agencies. The goal of these meetings was to discuss alternatives which could reduce the environmental impacts of the proposed work. While Islander East mainly focused on construction methodology modifications, the Department continued to express a desire for Islander East to evaluate alternative pipeline locations. To allow these discussions to continue, the Department and Islander East agreed to a

¹ Meeting dates: January 7, 2003, February 3, 2003, February 27, 2003, March 4, 2003, and April 15, 2003

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stay of the appeal with the Secretary until July 31, 2003, pursuant to 15 CFR §930.129(c). By letters dated March 13, 2003 and March 27, 2003, Islander East submitted a revised proposal which is discussed below. As indicated above in the Secretary's June 2, 2003 letter, the matter was remanded to the Department for reconsideration of its federal consistency determination in light of these proposed project modifications.

B. FEDERAL CONSISTENCY DETERMINATION

Islander East modified the proposed scope of work by making the following changes to the work proposal: (1) reducing the total number of passes of the lay barge; (2) changing the manner in which the sediment excavated from the dredged section would be disposed of – from sidecasting to offshore disposal; (3) changing the material which would be used in backfilling the dredged trench – from native material to stone. See Appendix A for a list of the most recent application modifications. Since Commerce has characterized these changes as "significant new information" introduced by Islander East², the Department has agreed to formally review these modifications. The new information, as referenced by Commerce, includes information that was developed and submitted subsequent to the Department's federal consistency objection dated October 15, 2002. The June 2, 2003 letter also indicated that Commerce had denied Islander East's request to include within the purview of the remand, information not yet received by the Department at the time of Islander East's May 15, 2003 letter requesting the remand. While the modifications which constitute the "significant new information" were provided to the Department in letters dated March 13, 2003 and March 27, 2003, the Department has received additional correspondence from Islander East in support of its application. Despite the short time frames imposed, the Department has chosen to review all pertinent information and modifications received to date³, including the information received on May 28, 2003 in response to a Department request to Islander East for additional information regarding the pending 401 Water Quality Certificate and state permit applications.

The Islander East federal consistency file including all supporting information submitted to the Department was evaluated in light of the enforceable policies of the State of Connecticut's federally-approved coastal zone management program. Based on this review, the Department has determined that the activities as proposed by Islander East in the proposed location would cause significant adverse impacts to coastal resources and water-dependent uses and would, therefore, be inconsistent with the enforceable policies of the Connecticut CZMP. Accordingly, the Department hereby objects to Islander East's consistency certification in accordance with 15 CFR §930.63(b).

The following discussion provides the basis for the Department's finding that the proposed activity is inconsistent with the specific enforceable policies despite the project revisions and additional supporting information. While Islander East has made some effort to reduce adverse environmental impacts subsequent to the October 15, 2002 determination by the Department, the incorporation of the revised construction methodologies in an alternative location which has less significant resource and use conflicts would substantially increase the feasibility of developing an acceptable proposal for a pipeline crossing of Long Island Sound. To this end, as allowed under 15 CFR §930.63(b), the Department has provided guidance which would enable Islander East to develop a feasible and prudent alternative which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the state's enforceable policies. These are discussed in the "Alternatives" section, below.

² James R. Walpole letter dated June 2, 2003.

³ See Appendix B for dates of modifications to the Islander East proposal and additional supporting information submitted by Islander East since Connecticut's Federal Consistency objection of October 15, 2002.

C. NATURAL FEATURES

In order to understand the potential adverse impacts of this project as currently designed and proposed to be sited, it is imperative to consider the diversity of geological and biological features in close proximity to the proposed work corridor. The Thimble Islands are situated within the nearshore waters of the Town of Branford. Many of the larger islands are east of the work corridor but several exposed rock outcroppings are located to the west, so this work corridor extends through the center of the Thimble Islands complex. The Thimble Islands consist of a total of 141 islands and exposed rock outcroppings creating a total of 15 miles of coastline⁴ within 6.2 linear miles. This hummocky topography formed of bedrock is found nowhere else in Long Island Sound.

The geological uniqueness of this island and rocky outcrop complex is only rivaled by the natural diversity it provides. The Thimble Islands typically emerge from relatively shallow waters, approximately 30' deep. In addition to this significant area of shallow water-land interface where biological diversity is the most rich and productive, this area hosts unique subtidal conditions including submerged rock reefs and a diversity of benthic habitats which range from soft mud to compacted sand and gravel. Each of these habitat types supports a complex community of sessile organisms, epifauna and infauna, each in their own way critical to the overall health and rich diversity of the surrounding marine ecosystem. These benthic features also include varying types of substrates, each of which creates robust shellfishing grounds suitable for hard clams, soft clams and oysters. This area is generally recognized as important colonial waterbird nesting habitat⁵, a waterfowl wintering area⁶, and one of only four primary seal haul-out areas in the State⁷. This productive region currently supports 3 full-time commercial lobstermen and 14 licensed shellfishermen as well as numerous recreational fishermen⁸. Historically, the area supported as many as 5 commercial lobstermen with 15 other part-time lobstermen also fishing the area at one time or another.

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

D. DISCUSSION OF ENFORCEABLE POLICIES AND ADVERSE IMPACTS

Due to the extensive and geographically wide-ranging scope of the proposed work, a number of the enforceable policies of the State's CZMP are applicable. The coastal resources which are in close proximity to the proposed work include: coastal waters, nearshore waters, offshore waters, islands, rocky shorefront, shellfish concentration areas, tidal wetlands, and general resources, as defined in Connecticut General Statutes (CGS) section 22a-93(7). Each of these resources is associated with a set of corresponding resource policies that are enforceable policies of Connecticut's CZMP, CGS section 22a-92. In addition, specific coastal resource use policies (CGS section 22a-92) and adverse impacts (CGS section 22a-93(15)) are identified in the Connecticut CZMP and must be used in conjunction with the

⁴ Total coastline was measured through use of Geographic Information System by measuring total perimeter of all island features within the town boundary.

⁵ Information provided by CTDEP Colonial Waterbird Database.

⁶ Information provided by Min Huang, CTDEP Wildlife Division and Jack Barclay, University of Connecticut.

⁷ Information provided by Amy Ferlund, The Maritime Aquarium at Norwalk.

⁸ Information provided by Mark Johnson, CTDEP Fisheries and David Carey, CT Dept. of Ag. Bureau of Aquaculture.

"Adverse impacts on future water-dependent development opportunities' and 'adverse impacts on future water-dependent development activities' include but are not limited to (A) locating a non-water dependent use at a site that (i) is physically suited for a water-dependent use for which there is a reasonable demand or (ii) has been identified for a water-dependent use in the plan of development in the municipality or the zoning regulations; (B) replacement of a water-dependent use with a non-water-dependent use; and (C) siting of a non-water-dependent use which would substantially reduce or inhibit existing public access to marine or tidal waters" CGS §22a-93(17).

Policy References: CGS section 22a-359(a) as referenced by CGS section 22a-92(a)(2); CGS section 22a-92(c)(2)(A); CGS section 22a-92(c)(1)(D); CGS section 22a-92(a)(1); CGS section 22a-383 as referenced by CGS section 22a-92(a)(2); CGS section 22a-92(a)(3); CGS section 22a-92(b)(1)(A); CGS section 22a-93(17), and CGS section 22a-93(15)(G).

4. TIDAL WETLANDS

Pipeline installation will cause an impact to two tidal wetland areas. These areas are more specifically identified by the applicant as wetland CT-A37 and pond CT-A21. The wetland is approximately 0.68 acres and the pond, 0.25 acres. The applicant has submitted additional information¹⁶ indicating that mitigation is possible for wetland CT-A37 by maintaining an existing, deteriorated pipe which will reintroduce tidal flow into the area.

The proposed draining of the pond and subsequent installation of the pipeline may, however, permanently degrade this wetland habitat and minimize its value as wildlife habitat. As such, the Department finds that this activity would likely create a significant adverse impact to tidal wetlands inconsistent with the enforceable policies of the CZMP under the following definition:

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Policy References: CGS section 22a-93(15)(H); CGS section 22a-92(b)(2)(E); CGS section 22a-33 as referenced by CGS section 22a-92(a)(2); CGS section 22a-92(a)(1); CGS section 22a-1, as referenced by CGS section 22a-92(a)(2); and CGS section 22a-93(15)(G).

5. NATIONAL INTEREST FACILITIES AND RESOURCES

Energy facilities are, by definition in CGS section 22a-93(14), facilities and resources which are in the national interest. However, each energy facility must still conform to all appropriate statutory standards. Given the significant adverse impacts to coastal resources discussed above, the proposed pipeline in this location has not been properly planned and controlled and, if installed, will adversely affect the quality of the environment in a manner inconsistent with the provisions of CGS section 16-50g. *Further, the Connecticut CZMP also defines facilities and resources which are in the national interest to include the protection of tidal wetlands and the restoration or enhancement of Connecticut's shellfish industry on an equal footing with energy facilities.* This particular pipeline proposal by Islander East is inconsistent with the Connecticut CZMP because it does not meet applicable state environmental standards as discussed above. (See CGS section 16-50g, and CGS section 22a-92(a)(10).)

In addition, we have also been advised that the "need" for natural gas on Long Island is questionable.¹⁷ Although project need is not an issue before the Department in the current proceeding, this issue is

¹⁶ Appendix G. Additional information was submitted with cover letter dated May 27, 2003.

¹⁷ Appendix H. Letter dated July 9, 2003 from Attorney General Richard Blumenthal to Charles Evans.

relevant and germane to any determination made by the Secretary of Commerce regarding a request to override a state's Federal Consistency Certification.

E. ALTERNATIVES

In light of the significant adverse impacts of the proposed route and the inconsistencies with the enforceable policies of the CZMP, the Department has considered project alternatives and siting criteria which may avoid or minimize such adverse impacts. The proposal to install the pipeline in this location is unacceptable due to the adverse impacts to coastal resources as discussed above. The applicant should seek alternative designs and sites which could qualitatively and quantitatively reduce such impacts.

One such alternative, the ELI System Alternative, was previously noted in the Department's October 15, 2002 letter to Islander East. Staff have reviewed FERC's Final Environmental Impact Statement (FEIS), FERC/EIS-0143F dated August 2002. While the FEIS is problematic for a number of reasons, some of which are enumerated in the U.S. Environmental Protection Agency letter dated September 30, 2002 from Robert Varney to Magalie Salas, it does provide an alternative analysis. The FEIS describes in section 4.2.1 an option entitled "ELI System Alternative" which appears feasible, as it would meet essentially the same energy needs while eliminating some of the anticipated adverse impacts altogether and reducing others.

Specifically, the ELI System Alternative consists of an extension stemming from the Iroquois pipeline which is currently in place from Milford, CT to Northport, NY. By tapping into an existing pipeline at an offshore location, all nearshore impacts are eliminated. The FEIS indicates that this alternative, while providing a similar level of gas availability to Long Island, would minimize installation impacts by reducing the overall length of new pipe by 5.5 miles, and cross approximately 5205 fewer feet of shellfish leases. In short, concurring with our finding, the FEIS reads:

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Islander East has repeatedly chosen to dismiss this option by saying, most recently, that the proposal was withdrawn by the applicant. At first glance, this withdrawal would appear to render this alternative infeasible, yet, closer scrutiny reveals just the opposite. Since the original applicant has withdrawn their proposal to construct a pipeline in this manner, it becomes an *available* option for Islander East, and a more favorable one with respect to consistency with Connecticut's federally approved CZMP.

Even if, as Islander East now argues, the above-referenced ELI option does not meet the project purpose for an additional separate gas line to Long Island, there are a host of viable alternative locations, that, if fully explored, would likely reveal a site that both meets the project purpose and is acceptable with respect to Connecticut CZMP consistency. The proposed pipeline's siting through one of the most unique, productive and diverse habitat complexes along the Connecticut shore would have significant adverse impacts that are inconsistent with the enforceable policies of the CZMP. While pipeline construction is not inherently inconsistent with the CZMP, the siting of it in this location is. In sum, the Department is charged with ensuring that only that alternative with the least environmental impact is utilized. In the interest of protecting sensitive coastal resources and finding any project consistent with the CZMP, the only acceptable alternative must combine *both* the least invasive construction techniques with the most appropriate siting of the facility.

The Department has asked the applicant for alternatives analysis information on numerous occasions, most recently in a letter dated May 5, 2003¹⁸. One of the most significant informational gaps which

¹⁸ Appendix I

remain outstanding is an analysis of such project location alternatives. Islander East, however, has declined to provide this information to the Department beyond the more limited analysis developed for the FERC Environmental Impact Statement. Please see Islander East's response letter dated May 27, 2003 submitted as Appendix G.

While the applicant has developed and proposed alternative construction methodologies for the proposed alignment which would somewhat reduce the potential adverse environmental impacts at any chosen location, Islander East contends that FERC has certified the proposed route and it is not the Department's responsibility to conduct an alternatives analysis to determine which route has the least environmental impact or is most consistent with Connecticut's CZMP. The Department recognizes that the proposed route is the one for which FERC has, in our opinion provided its Certificate inappropriately and contrary to Federal law¹⁹. An alternative route with less impact may also be found acceptable by FERC if so reapplied for by Islander East Pipeline Company, LLC. It is the responsibility of the applicant to fully evaluate alternatives as a part of the Federal Consistency Review process and demonstrate that there are no feasible alternate alignments that could further minimize adverse impacts on Connecticut's coastal resources and water-dependent uses. The Department can only find the alternative with the least impact consistent with the CZMP.

The Department advises that the applicant consider alternative alignments across Long Island Sound that would take maximum advantage of existing subtidal conditions. These include corridor locations and alignments:

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F. OUTSTANDING APPLICATION MATERIAL

The Department has made a good faith effort to work with Islander East to complete the application package. However, due in part to the wide scope of work, the frequent revisions to the proposal, and the unwillingness of Islander East to allow the various state regulatory processes applicable to this project to be conducted concurrently as one process, the following necessary information has yet to be provided to the Department or, to our knowledge, the federal licensing agencies. This missing information together with the insufficient alternative analysis necessarily render the various pending applications including this request for Federal Consistency Certification incomplete.

¹⁹ State of Connecticut ex rel. Blumenthal v. FERC, No. 03-1066; Arthur J. Rocque v. FERC, No. 03-1075 (United States Court of Appeals for the District of Columbia Circuit).

HDD monitoring and operations plan – In Islander East's May 28, 2003 submission²⁰, it was indicated that the Department would receive a draft plan entitled *Directional Drilling Monitoring and Operations Program* by May 30, 2003. No such plan has been received by the Department to date. Such a plan would provide protocols for response and mitigation in the event that a frac-out occurred during drilling operations.

HDD failure contingency plan – The Department has yet to receive a contingency plan or alternate methodology in the event that the use of the HDD methodology became impractical due to site conditions. The Department must presume that Islander East has considered this prospect and has developed a contingency plan to connect the offshore portion of the work with the upland pipeline in the event that HDD is not employed. Being a newer technology, the Department is aware that unusual or unanticipated subsurface circumstances could very possibly reduce the length of, or altogether preclude, HDD use in the nearshore area. Any alternative methodology being contemplated as a back-up approach would need to be fully evaluated as a part of the Federal Consistency Review of this project.

The most probable contingency plan for this event would likely entail an excavated or dredged channel between shore and the 4000' mark offshore. Employment of this methodology would be catastrophic to the nearshore shellfishery since these are existing, worked shellfish beds, through which the trench would have to be cut. This work would go directly through four beds under the jurisdiction of the Town of Branford Shellfish Commission. Trenching through this area would be particularly devastating since additional dredging in the shallow waters would have to occur just to allow shallow water access for the deeper-draft work barges.

Additionally, a pipeline installed in this location through trenching would temporarily impede navigation into a commercial quarry operation (Tilcon) and permanently become a safety concern. Obviously, no discussions have occurred regarding the burial depth or type of pipeline cover for this alternative. A shallow burial depth would expose the pipeline to damage from anchors belonging to heavy rock-laden barges which regularly access the Tilcon site and other catastrophes such as the January 2003 overturned barge described in Appendix I.

ACOE application modifications pursuant to the Ocean Dumping Act - The most recent modifications call for dredging and the open water disposal of 24,000 to 30,000 cubic yards of sediment. The Marine Protection, Research and Sanctuaries Act (MPRSA 33U.S.C. Sec. 1401 et seq.), as amended, specifically requires that all projects disposing of 25,000 cubic yards or greater must be evaluated to determine the potential environmental impact of such activities and must be authorized by the ACOE, an action also subject to prior Federal Consistency Review under this proceeding. This authorization is subject to U.S. Environmental Protection Agency review and concurrence. Environmental evaluations must be conducted in accordance with the requirements and criteria promulgated in Title 40, Code of Federal Regulations, Parts 220-228 (40 CFR 220-228). The Department is not aware of any detailed revisions to the pending ACOE application for such authorization. Further, no consideration of dredging or disposal has been made in regard to the potential contingency plan in the event that HDD fails.

G. NOTIFICATION

In accordance with 15 CFR §930.63(e), the Department's objection includes the following statement:

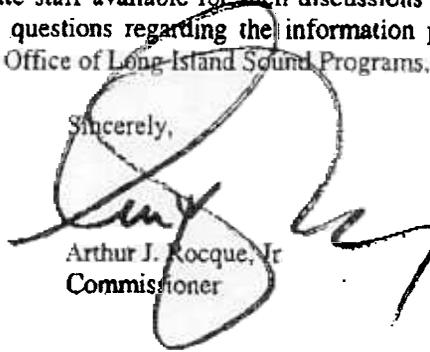
Pursuant to 15 CFR §930, subpart H, and within 30 days from receipt of this letter, you may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of

²⁰ Appendix G.

national security. A copy of the request and supporting information must be sent to the Connecticut management program and the federal permitting or licensing agencies. The Secretary may collect fees from you for administering and processing your request.

Should the applicant wish to discuss other less environmentally damaging alternatives to the proposed pipeline alignment, I will make appropriate staff available for such discussions at the earliest mutually agreeable opportunity. If you have any questions regarding the information provided herein, please contact Mr. Charles Evans, Director of the Office of Long Island Sound Programs, at (860) 424-3034

Sincerely,



Arthur J. Rocque, Jr.
Commissioner

AJR/PBF/slj/che

cc: Colonel Thomas L. Koning, US Army Corps of Engineers
Magalie Salas, Federal Energy Regulatory Commission
Douglas Brown, NOAA/Office of Ocean and Coastal Resource Management
David Kaiser, NOAA/Office of Ocean and Coastal Resource Management
Bill O'Beirne, NOAA/Office of Ocean and Coastal Resource Management
Richard Blumenthal, Connecticut Attorney General
Joseph C. Reinemann, Islander East, LLC
Robert Varney, EPA Regional Administrator, Region 1