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July 29, 2016

Col. Edward T. Chamberlayne
District Engineer
U.S. Army Corps of Engineers
Baltimore District
State College Field Office
1631 South Atherton Street
State College, Pennsylvania 16801

Attn: Mr. Michael Dombroskie

Re: Application No. CENAB-OPR-P-2014-00475-P12
Williams Gas Pipeline—Atlantic Sunrise Project
Geraldine T. Nesbitt's Comments

Dear Col. Chamberlayne:

Icarus Ecological Services has the pleasure of assisting Ms. Geraldine T. Nesbitt in connection with the proposed Atlantic Sunrise Expansion pipeline project ("ASP"), which proposes two routes across Ms. Nesbitt's property in Wyoming and Luzerne Counties, Pennsylvania. On Ms. Nesbitt's behalf, please accept this letter as her formal comments to the United States Army Corps of Engineers' ("USACE") public notice for the project (PN-16-30). The following comments are intended to supplement the comments previously filed with the Federal Energy Regulatory Commission ("FERC") (public and privileged cultural resource comments were filed with FERC on June 27, 2016; amended public and privileged cultural resource comments were filed with FERC on July 29, 2016). Based on the public notice, the USACE is accepting all comments filed with FERC; however, for your convenience, we are attaching a copy of our amended public comments, which evaluates in detail the Draft Environmental Impact Statement ("DEIS") jointly prepared by FERC and the USACE as a cooperating agency. Our amended public comment letter includes several environmental reports specific to Ms. Nesbitt's property. We have not attached the amended privileged cultural resource comment letter due to the confidentiality of the information (a request that was made by several culturally affiliated, federally recognized Indian Tribes). We respectfully request the USACE carefully review Ms. Nesbitt's amended privileged cultural resources comment letter filed with FERC as it details the remarkable cultural resources on Ms. Nesbitt's land (as a cooperating agency with FERC, the USACE has access to all privileged filings). Further, Ms. Nesbitt is currently seeking an arrangement with several culturally affiliated Indian Tribes to allow these Tribes to reconnect to the numerous ceremonial sites on her property. It is our understanding these Tribes have, or will soon, request formal government-to-government consultation with the USACE and FERC concerning the cultural resources on Ms. Nesbitt's

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property due to the unprecedented quantity and quality of said resources that will be directly impacted by the proposed pipeline routes.

The applicant, Transcontinental Gas Pipeline Company, LLC, plans to provide 1.7 million dekatherms(dt)/day of firm transportation capacity to move Marcellus Shale gas from Susquehanna County in Pennsylvania to Transco's Station 85 in Alabama and various delivery points along the way. The largest component of the ASP is the 183.7-mile greenfield Central Penn Line (CPL), comprised of the CPL North and CPL South segments, stretches from Susquehanna County to Lancaster County, Pennsylvania, cutting through 3.6 miles (applicant's first apparent preferred alternative) or 4.21 miles (applicant's apparent revised preferred alternative) of land owned by Ms. Nesbitt. Ms. Nesbitt has several, significant concerns regarding the ASP and the associated proposed routes across her property, which are discussed below:

I. Background

The Nesbitt family traces their history back to James Nesbitt, who arrived in New Jersey from Scotland in 1685. One of his namesake and one of many descendants, James Nesbitt, left Plymouth Township with his family and settled in Wyoming County, Pennsylvania in the 1830s. His son, Abram Nesbitt, a prominent businessman and philanthropist (he founded the first hospital in the area in 1912), bought the first section of the current ownership in the 1890s. Eventually, 40 other parcels were purchased and added together to form the master tract that is the subject of the fragmentation proposed by the ASP. Excluding a house and a few accessory structures, Ms. Nesbitt's property encompasses approximately 3000 plus acres of undeveloped, contiguous land. Unlike many large tracts of land that remain under original ownership, Ms. Nesbitt's property has not been parceled out for development or significant land disturbance. This lack of development has provided a unique opportunity for environmental resources to thrive. Ms. Nesbitt's property hosts thirteen different upland and wetland habitat communities with rich diversity of animal and plant life; including but not limited to: (1) over 27 individual springs; (2) over 100 bird species breeding on the property; (3) 7 northern long-eared bat maternity roost sites; (4) 133 species of migratory bird species; (5) 6 species of Bird of Conservation Concern; (6) numerous wetland systems, streams and creeks; (7) vernal pools; and (8) plant communities of special concern.

The Nesbitt family's stewardship of the 3000 plus acres of forest land has also allowed significant cultural resources to remain undisturbed, including numerous sacred, ceremonial stone landscapes (*please note Ms. Nesbitt is in the process of coordinating with culturally affiliated tribes to have these and other ceremonial stone landscapes tribally certified).* Based on a preliminary archaeological survey commission by Ms. Nesbitt, informant information, and other related data, a conservative estimate is that the 3,500-acre estate contains unprecedented number archeological and historical sites. Part of the tangible value of the property is the overwhelming amount and distribution of cultural resources present within the property. Ms. Nesbitt feels a responsibility to protect, the landscape and all it holds, including the ceremonial

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stone landscape covering the property. Furthermore, Ms. Nesbitt appreciates the significance these resources hold for culturally affiliated tribes. She has had formal tribal representatives visit the property and is actively working with them to explore opportunities for the tribes to reconnect to those sacred resources. The applicant surveyed Ms. Nesbitt's property for over 6 weeks but appears to have either underreported or completely fail to report the significance (quality and quantity) of cultural resources on the Nesbitt property.

II. Inadequate DEIS: USACE Cannot Base Decisions on an Inadequate EIS

The USACE has stated its intention to rely, for purposes of acting on the applicant's Section 404 permit, on information included in the DEIS prepared to satisfy requirements imposed by the National Environmental Policy Act ("NEPA") by FERC. The DEIS was prepared in connection with Transcontinental Gas Pipeline's ("Transco") application to FERC for approval of the gas pipeline that is under review now by the USACE. The USACE may adopt and rely on conclusions reached and information included in an EIS developed and adopted by another federal agency, it may only do so if the subject EIS "meets the standards for an adequate statement." 40 C.F.R., Sec. 1506.3(a).

The USACE's own regulations do not allow a district commander to adopt an EIS previously adopted by another federal agency if the "district commander finds substantial doubt as to technical or procedural adequacy or omission of factors important to the USACE's decisions. 33 C.F.R., Sec. 230.21. No matter how adequate the evaluation by a cooperating agency, its adoption of an inadequate EIS is ineffectual. *Sierra Club v. Marsh*, 714 F. Supp. 539 (U.S.D.C. Me. 1989). In *Sierra Club v. Marsh*, the Court found that the USACE's could not rely and base its decisions on an EIS prepared the by Federal Highway Administration, where the EIS was deemed inadequate because of its failure to discuss reasonably foreseeable secondary impacts of the proposed project and further, did not discuss all reasonable alternatives to the project.

With regard to the USACE's review of the project in this instance, the comments and information included herewith conclusively shows that the DEIS prepared by FERC and on which the USACE now relies is inadequate in several aspects, including but not limited to the following (for a more detailed assessment of the deficiencies, see the attached amended public comments filed with FERC):

- The DEIS fails to provide information showing need for the proposed project.
- The DEIS fails to provide information sufficient to demonstrate compliance by the project with the requirements for the Endangered Species Act or the Migratory Bird Treaty Act.
- The DEIS fails to accurately catalog or analyze adverse impacts to historical and cultural resources existing with the project area generally and specifically on Ms. Nesbitt's property.
- The DEIS fails to accurately catalog or analyze impacts to wetlands or water quality.

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- The DEIS wholly fails to provide a robust or complete alternatives analysis from which a reasonable conclusion could be reached that less environmentally damaging pipeline routes exist that could practicably be utilized in comparison to the pipeline route advocated by Transco.

III. The Application Does Not Comply with the USACE's Mitigation Rules

The USACE's mitigation rule, found in 40 C.F.R. Sec. 230, Subpart J, sets out the requirements for mitigation of unavoidable wetland impacts. As is described, in detail, in the materials included with these comments, the application and supporting data fail to meet or comply with the most basic requirements of the rule. As a preliminary consideration, it is still unclear which pipeline route, especially as it relates to Ms. Nesbitt's property, the applicant intends be evaluated by the USACE as part of this application. Clearly, no analysis can be conducted of the wetland impacts proposed for the project when the actual footprint of the pipeline is unsettled.

In addition, as is noted in the included reports, there is inaccurate and conflicting information presented by the applicant regarding the exact acreage and location of wetland impacts associated with the project. Where the extent of wetland acreage impacted by a project is inaccurate or miscalculated, the administrative record supporting any decision by the USACE on such information is incomplete and no decision may be made on such a record, even where the USACE contends the deviation is de minimus in scale. *Black Warrior Riverkeeper v. U.S. Army Corps of Engineers*, 781 F. 3d 1271 (Eleventh Cir. 2015).

Discussed further herein is the preliminary requirement that a permit applicant demonstrate that it has taken all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. 40 C.F.R. Sec. 230.91(c)(2). Compensatory mitigation can only be considered following such a demonstration by an applicant. The applicant's demonstration regarding avoidance and minimization is lacking as discussed further herein, which is highlighted by the fact that it readily found alternative routes for the project after submitting its application to the USACE and to FERC. As further noted in the reports submitted herewith, the applicant's characterization of the nature and type of impacts the project will cause have not been appropriately described making any mitigation plan for the project unacceptable.

For those impacts that are acknowledged by the applicant, the applicant proposed use of "permittee responsible mitigation" which, although permitted by the USACE's mitigation rule, is the least favored form of mitigation provided for in the rule. 40 C.F.R. Sec. 230.93(a)(1). The applicant's "plan" lacks detail sufficient to show compliance with the rule. The rule provides that compensatory mitigation may consist of "restoration, enhancement, establishment, and in certain circumstances, preservation" of wetland resources, and further, restoration should "should generally be the first option considered." 40 C.F.R. Sec. 230.93(2). The mitigation proposed to offset impacts must also be of the same type as those being impacted. 40 C.F.R. Sec. 230.93(3)(b).

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Again, as described in detail in the attached amended public comments and associated reports filed with FERC, the mitigation proposed by the applicant herein is deficient in all of the following respects:

- It provides no actual plans or specifications for the mitigation proposed.
- It fails to provide the type and location of the mitigation proposed.
- It fails to demonstrate type for type mitigation related to the specific wetland resources being impacted.
- It provides no performance standards for the mitigation proposed to enable the USACE and the public to assess success or failure of the proposal.
- It does not utilize the best available scientific information to assess performance of the mitigation proposed.
- It does not provide adequate monitoring of the proposed mitigation to determine success.

IV. The Application Does Not Comply with the 404(b)(1) Guidelines

While the USACE is responsible for issuing dredge and fill permits under the Clean Water Act, the U.S. Environmental Protection Agency's ("EPA") Section 404(b)(1) Guidelines govern the issuance of any individual permits in addition to the USACE's regulations. These Guidelines are binding when considering individual permits to discharge, dredge, or fill material in wetlands. The USACE cannot issue a permit unless the Guidelines are satisfied. These Guidelines establish four independent restrictions (*see* 40 C.F.R. §230.10(a)-(d)): (1) a prohibition against the discharge of dredged or fill material if a practicable alternative with less adverse impact is available; (2) prohibitions against discharges of dredged or fill material that causes or contributes to violations of applicable water quality standards, violate toxic effluent standards or prohibitions, jeopardize endangered or threatened species, or violate the requirements of the Marine Protections, Research, and Sanctuary Act of 1972; (3) prohibitions against discharges of dredged or fill material that "causes or contribute to significant degradation of the waters of the United States; and (4) prohibitions against discharges of dredged of fill material "unless appropriate and practical steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."

A. The Application Fails to Adequately Analyze Practical Alternatives

The requirement that the USACE consider practicable alternatives is the cornerstone of Section 404 compliance. The Guidelines provide that "[n]o discharge of dredge or fill material will be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." While the USACE utilizes a "general balancing" approach for the agency's public interest review, the Guidelines does not allow practical alternatives to be weighed against other factors; if a practical alternative that avoids impacts to aquatic resources is available, then a permit may not issue. Further, wetlands are considered "special aquatic sites" (*see* 40 C.F.R. §230.3(q-1); 230.41) meaning impacts to wetlands are considered to be most severe under the Guidelines (*see* 40 C.F.R. §230.1(d)).

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Consequently, such impacts must be avoided if the project purpose can be realized by practicable alternatives that: (1) do not involve a discharge of dredged or fill material into the waters of the United States or (2) result in less adverse discharges of dredge or fill material at other locations in waters of the United States. (*see* 40 C.F.R. §230.10(a)(1)).

Further, where an activity is proposed to be located in wetlands (special aquatic sites) that does not require location in wetlands to fulfill its basic purpose (i.e., a non-water dependent activity), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise. Interestingly, the applicant has already demonstrated the existence of practicable alternatives that have less adverse impact on the aquatic system exist by virtue of the revised pipeline routes submitted to FERC after the public notice for the subject USACE permit was published in addition to the collocation alternatives that are discussed in the DEIS but were erroneously dismissed. It is important to note that the USACE has not provided any information that suggests it has conducted any further practical alternatives analysis other than what was attempted in the DEIS. Consequently, our comments about the deficiencies related to the selection and assessment of practical alternatives focus on the DEIS.

A determination that a project is non-water dependent necessitates a more persuasive showing by an applicant than would otherwise be the case concerning lack of alternatives to a project involving discharge of fill into wetlands purposes of issuing a Clean Water Act wetland fill permit. *Town of Abia Springs v. U.S. Army Corps of Engineers,* ___ F. Supp. 3d ___, 2015 WL 9315745 (E.D. La. 2015).

The b(1) guidelines establish dual regulatory presumptions. First, a practicable alternative is available "where the activity associated with a discharge which is proposed for a special aquatic site ... does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose," unless clearly demonstrated otherwise. 40 C.F.R. § 230.10(a)(3). *Northwest Environmental Defense Center v. U.S. Army Corps of Engineers* 2013WL1294647 (D.C. Oregon 2013). Second, "where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge to a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem," also unless clearly demonstrated otherwise. *Id.* If one of these presumptions applies, the applicant bears the burden of providing "detailed, clear and convincing information proving that an alternative with less impact is impracticable." *Sierra Club v. Van Antwerp,*

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58, 69 (D.D.C.2010). The applicant has totally failed of rebut these two regulatory presumptions in the application under review here

The first element of the alternatives analysis required by NEPA and by the USACE's Section b(1) guidelines is that the applicant must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *See* 40 C.F.R. §1502.13. This statement highlights two important points that have not been appropriately addressed in this instance: (1) the project purpose and need is distinct from the proposed action and (2) and that the proposed action is an alternative to be considered but not the purpose and need. The intent behind these two points is to ensure the reviewing agency does not define the purpose of and the need for the action in unreasonably narrow terms. Stated another way, the evaluation of alternatives is an evaluation of means to accomplish the general goal of an action. Consequently, the proposed action cannot also be the stated purpose and need or the agency has effectively prejudiced the outcome. If the stated purpose and need is the proposed action, then the purpose and need has been defined too narrowly to scope alternatives.

While the USACE may consider the applicant's goals, it should do so with a degree of skepticism in dealing with self-serving statements from the prime beneficiary of the project. Both the USACE and the EPA are required to independently review and define the project's overall purpose. *See* 40 C.F.R. 325, app. B(9)(c)(4), stating "[w]hile generally focusing on the applicant's statement, the USACE will, in all cases, exercise independent judgment in defining the purpose and need for the project from the applicant's and the public's perspective;" *See also Bersani v. U.S. Environmental Protection Agency*, 674 F. Supp. 405, 415 (N.D.N.Y. 1987). For example, an applicant's contractual constraints and profit margins should not be accepted wholesale as the purpose and need of an agency action so as to narrow the range of alternatives. If an agency excessively restricts/limits the range alternatives, then both NEPA and the Clean Water Act's requirements are violated.

The purpose and need statement frames and scopes the range of alternatives that must be evaluated and compared. The consideration of alternatives is a fundamental requirement that is at the heart of NEPA and environmental impact statements. *See* 40 C.F.R. §1502.14. An agency must "[r]igorously explore and objectively evaluate all reasonable alternatives." *See* 40 C.F.R. §1502.14. An agency must also give plausible reasons for rejecting any alternatives that were eliminated from the environmental impact statement. Simply stated a rule of reason is applied in determining the range of alternatives. Further, discussions of alternatives that are simply conclusory in nature are inadequate in violation of NEPA and the USACE's requirements. This means that an agency must "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."

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See 40 C.F.R. §1502.14(b). This means that an agency must compare all selected alternatives and not simply evaluate the proposed preferred alternative. Further, an agency cannot "commit resources prejudicing selection of alternatives before making a final decision." *See* 40 C.F.R. §1502.2(f).

In this case, USACE and FERC state in the DEIS, "[a]ccording to Transco, the purpose of the project is to provide an incremental 1.7 million dekatherms per day (MMdth/d) of year-round firm transportation capacity from the Marcellus Shale production area in northern Pennsylvania to Transco's existing market areas, extending to the Station 85 Pooling Point in Choctaw County, Alabama." There are two fatal flaws in this statement. First, full disclosure allowing for meaningful public participation requires FERC and USACE to state the purpose according to FERC and USACE and not the applicant. Second, what has apparently been adopted as the project purpose is actually the applicant's proposed action As noted above, proposed actions and project purpose are two different concepts. By adopting the applicant's proposed action as the project purpose, the applicant has excessively narrowed the range of alternatives that could be selected. Therefore, any subsequent alternative analysis is fundamentally flawed from the start.

Throughout the document, Project, project, proposed project, and proposed action are used non-exclusively, thereby confusing the intent reflected in the DEIS and precluding both NEPA's and the b(1) Guidelines' mandate for full disclosure and stating an appropriate purpose by which a reasonable range of alternatives can be selected. In addition, this statement is completely void of any need statement to support the stated purpose of the action. As noted above, there is not adequate statement of need found in the DEIS pursuant to either NEPA or the b(1) Guidelines. Instead, the DEIS simply states, "[w]hile this EIS briefly describes Transco's stated purpose, it will not determine whether the need for the need for the Project exists, because this will be determined by the Commission." This statement acknowledges that the DEIS is void of the NEPA or b (1) Guidelines mandated need statement.

The DEIS states at ES-14. "As alternatives to the proposed action, we evaluated the no-action alternative, system alternatives, route alternatives, and minor route variations. While the no-action alternative would eliminate the short- and long-term environmental impacts identified in the EIS, the stated objectives of Transco's proposal would not be met." It is not clear how the alternatives do not meet what should be stated as the purpose of the project, which is to provide a means of moving natural gas to its customers. The alternatives do not meet the objectives of the proposed action, but that is not the decision to be made.

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The DEIS further augments the foundational purpose and need flaw with the following statement, "[a] viable system alternative to the Project would have to provide the pipeline capacity necessary to transport and additional 1.7 MMDth/d of natural gas at the contracted volumes from the production areas of northern Pennsylvania to the delivery points required by the precedent agreements signed by the Project Shippers. A viable system alternative would need to provide these services within a timeframe reasonably similar to the Project." This statement clearly demonstrates the applicant's contractual terms and self imposed timeframes was inappropriately guiding both the statement of project purpose and the range of alternatives rather than the general goal of provided natural gas to a market. By adopting this self-serving statement, the reviewing agencies inappropriately become the advocate for the applicant's business goals/preferred alternative, defeating the purpose of both NEPA and the Clean Water Act. Having the applicant's contractual terms, self imposed time constraints, and precedent agreements frame the range of alternatives is unreasonable and a gross violation of both NEPA and the Clean Water Act. It is clear that the applicant has already committed itself financially and contractually to the preferred alternative. By adopting the applicant's financial and contractual commitments as the agency's statement for the purpose and need, FERC and USACE have essentially adopted the applicant's commitments as their own (become invested). As noted above, an agency cannot commit resources prejudicing selection of alternatives, meaning the agencies here cannot commit to an outcome before determining the range of alternatives. Despite this prohibition, that is what has occurred in this instance. Essentially what this DEIS reflects is that any applicant can guarantee a preferred alternative/outcome under both NEPA and the Clean Water Act by simply executing contracts before submitting an application.

With this in mind, it puts into question the mere conclusory statements by the applicant, FERC, and USACE that dismiss several alternatives that would utilize collocation (less impacts to aquatic resources than the applicant's preferred alternative). For example, the DEIS appears to dismiss existing pipelines systems as alternatives because they are reportedly "not near" the production area and thus would require expansion. The DEIS attempts to support this determination with another conclusory statement that the expansion of existing pipeline systems would not offer an environmental advantage; however, FERC and USACE fail to provide any support for this statement. The DEIS continues by concluding collocation would result in more acreage being impacted versus the applicant's preferred alternative. This conclusory statement is not supported by an underlying analysis and erroneously assumes quantity of acreage equates to quality of environmental factors harmed. NEPA and the EPA's b(1) guidelines require FERC and USACE take a hard look at the amount of environmental harm, which is primarily driven by the quality of environmental factors on the land and not the size of the land. Consequently, the

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loss of 10 acres of highly valuable environmental habitat (such as wetlands) could result in far greater harm than the loss of 50 acres of environmentally low value land.

Further, as noted earlier, the DEIS appears to treat collocation impacts and new impacts (green) the same (equivalent in nature) when in reality, they are enormously different. As presented in the document, impacts to (for example) 10 miles of forest are the same whether it is greenfield construction or placed along an existing right-of-way. What was not considered is that the loss of environmental functional values in greenfields (unimpacted areas) is far greater than collocation because those existing right of ways have already experienced those impacts. So what the DEIS fails to address is the that collocation avoids and minimizes new impacts. By comparison, it would not be reasonable to assume impacts derived from resurfacing a parking lot are the same as constructing a new parking lot within an interior forest. Similarly, effects were not adequately evaluated or compared among alternatives for the 19 minor route alternatives presented in the DEIS.

The DEIS unreasonably relies upon the applicant's reasons to dismiss alternatives that would avoid greenfield pipelines (collocation) due to the number of people affected. For example, the applicant dismisses the Transco System Alternative because 768 residences would be within 50 feet of the Transco System Alternative compared to 55 residents along the applicant's preferred alternative. What is not considered is that since the Transco System Alternative would collocate with Transco's existing pipelines for 91 percent of its length, most, if not all of those 768 residences would already be living within 50 feet or so of an existing pipeline. A hard look and objective evaluation would have resulted in the DEIS disclosing how many new residences would be impacted by the Transco Systems Alternative versus new residences impacted by the preferred alternative; however, this alternative was not objectively explored.

Without any reasoning, the applicant's conclusion that, due to the amount of commercial, industrial, and residential development that has occurred adjacent to the Transco's existing right of ways, this alternative is not feasible is accepted. What is not disclosed or considered is how far away are these developments from the edge of the right-of-ways and exactly how many structures would need to be removed to utilize this alternative. These developments have already been impacted by an existing pipeline and utilization of an existing right of way for this proposed project would avoid, or at least greatly reduce, new impacts along 91 percent of the project's length. This means the Transco Systems Alternative leaves only 9 percent of area subject to new impacts (22.7 miles) whereas the applicant's proposes 143.1 miles of new impacts, which equates to new impacts along 72% of the length of the pipeline. Simply because development is

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adjacent to an existing right of way does not mean it will be impacted by collocation within that right of way; another example of implausible reasoning to dismiss alternatives.

The fundamental flaw is the DEIS assumes that impacts between collocation and new construction are the same when they are in fact enormously different because most, if not all, impacts that would likely occur from a new pipeline have already occurred along existing right of ways and existing pipelines. Simply put, the comparison of environmental impacts between collocation and new construction made is an "apples to rocks" comparison and not an "apples to apples" comparison. The DEIS attempts to make a comparison between the Transco Systems Alternative and the proposed project in table 3.2.3-1 by listing a meager six environmental components while ignoring numerous other environmental factors such as: soils, karst, mineral resources, seismicity, paleontological resources, cultural resources, groundwater resources, surface water resources, vegetation, invasive species, edge interior forest habitat, wildlife, aquatic resources, protected species, migratory birds, and effects, public lands. Selectively picking a limited number of environmental factors to compare and ignoring numerous other relevant environmental factors in order to get a desired result is not a hard look, or an objective evaluation, or a plausible approach to assessing alternatives. This dubious tactic is prevalent throughout the DEIS and not just with this particular alternative.

Ultimately, neither the DEIS or the applicant has provided the in-depth alternatives analysis required by NEPA and the Section b(1) guidelines. The DEIS alternative analysis, per 40 C.F.R. §1502.14 :

> *should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:*
>
> > *(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.*
> >
> > *(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.*

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(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

The DEIS falls well short of complying with the above requirement because: (1) no environmentally preferable alternative was identified; (2) no comparison was made with regard to non-quantifiable types of impacts; and (3) reasonable alternatives were summarily dismissed without any analysis of alternatives presented to indicate those alternatives were not environmentally preferable or feasible.

In summary, the DEIS does not rigorously explore or objective evaluate alternatives, especially collocation opportunities. Instead the DEIS relies upon mere conclusory statements without any discussion or analysis. There is nothing in the DEIS that supports the conclusions and bold statements made, which leaves the public nothing to objectively review much less FERC and USACE. The DEIS is void of any analysis that supports the conclusion that existing projects (collocation) would not be environmentally preferable (or feasible) in comparison with the proposed action. Instead, the applicant's strange "apples to rocks" comparisons are put forward. Essentially, an issuance of a Section 404 permit would circumvent the required "sequencing" set forth in the Guidelines; namely, avoidance alternatives must be exhausted before any consideration of minimization or mitigation. In the instant case, the applicant is asking the USACE to skip avoidance and go straight to minimization and mitigation. It is a violation of the Clean Water Act to allow an applicant "buy down" the impacts of their preferred alternative when there exist practicable alternatives, such as the Transco Systems Alternative, that would avoid those impacts.

B. The Application Does Not Demonstrate Compliance with Water Quality Standards, Migratory Bird Treaty Act, or Endangered Species Act

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1. *Water Quality Standards*

The Guidelines prohibit discharges of dredge or fill material that would cause or contribute to violations of applicable water quality standards. In the instant case, the USACE and FERC determined in the DEIS that impacts to water quality and wetlands would be mitigated so long as Transco complied with Pennsylvania's water quality certificate (now subject to challenge for having failed to consider the project's impacts on water quality and instead relying on a yet-to-be-issued erosion and sedimentation permits and water obstruction and encroachment permits) and the still pending Section 404 permit. The USACE made this determination without engaging in a robust, independent analysis of water quality and wetlands issues. In essence, both agencies are "kicking the can down the road" twice: FERC and USACE are relying on the section 401 certificate, which in turn relies on yet to be issued state permits. This is an empty review in violation of NEPA and the Clean Water Act. Moreover, even if the state's review was adequate, by relying on the state exclusively, the DEIS improperly delegates the USACE's NEPA and Clean Water Act obligations to other agencies.

2. *Migratory Bird Treaty Act*

The MBTA is a criminal statute which prohibits the taking and killing of migratory birds. The MBTA allows for misdemeanor and felony penalties for violation of the act. Section 703(a) of the MBTA states in pertinent part: "Unless and except as permitted by regulations ... it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, [or] sell ... any migratory bird." The regulations which implement the MBTA define the term "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." The list of migratory birds protected under the MBTA is located at 50 C.F.R. §10.13 (2015). The information submitted by the applicant not only fails to show compliance with the MBTA, it in facts demonstrates that the project will, in fact cause a take of species protected by the MBTA.

While the information submitted by the applicant (included in the DEIS and the DMBP identifies potential project impacts on Birds of Conservation Concern (BCCs) in interior forests, it fails to adequately avoid or mitigate for impacts to these birds. Table 4.6.1-4 of the DEIS lists 18 BCCs that are considered to regularly occur in the project area. Ten of these species utilize forest habitats for feeding, cover, or nesting. Section 3.2.5.1 of the DMBP provides a good discussion of the minimum area requirements of some of the interior forest BCCs, noting that certain BCCs may require unbroken interior forest tracts greater than 1000 acres to maintain viable breeding populations. The DEIS states that 45 separate interior forests will be crossed by the project, resulting in direct construction impacts to 270.4 acres of interior forest and indirect impacts to 1993.8 acres of interior forest. Section 5.2.1 notes that project corridor will bisect 66 interior forest patches (which differs from the 45 interior forests reported as impacted elsewhere in the DEIS/DMBP). The pipeline's crossing of these interior forest patches will create 116 new

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(smaller) forest patches. Over one-third of these new forest patches will no longer meet Transco's minimal size criterion for an interior forest (i.e., 225 acres). Specific information on the project's interior forest impacts is presented in the DMBP's tables and figures, but all of the figures and half of the tables referenced were inexplicably omitted from the DEIS version of the DMBP.

The DMBP also presents a variety of avoidance and minimization measures that, for the most part, do not adequately protect migratory birds or BCCs. The proposed avoidance and mitigation measures stated in the DEIS and DMBP are inadequate to protect migratory birds because (1) the alternative and modified routes are not considered, the amount of forested land crossed is not minimized, (2) Transco's use of temporary workspace was dictated only by avoidance of interior wetland forest crossing but not for upland interior forests, (3) Transco's proposal to avoid clearing during migratory bird nesting season between April 1 and July 31 does not include all high-value migratory bird habitats – and Transco's clearing of interior forests (which are designated as migratory bird Key Habitat Areas) outside of the primary nesting season will do nothing to ameliorate the loss of interior forests due to creation of forest edges and (4) clearing outside breeding season in key habitat areas will NOT avoid impacts on BCCs, (birds of conservation concern) contrary to Transco's claims. For additional discussion, see Appendix A.

The DEIS also omits discussion of potential impacts, such as the effect of project clearing impacts on open land birds of concern (at least four BCCs use the open lands that will be occupied by the project); (Appendix A) or impacts on migratory birds with non-forest nesting preferences.

Not only does the DEIS lack sufficient data to conclude that the project complies with the MBTA, the information provided suggests the opposite: that Transco will very likely *violate* the MBTA by taking protected birds. Indeed, the DEIS acknowledges that the intentional take of migratory birds is an anticipated result of the project being constructed

Transco and USFWS are fully aware that direct and indirect incidental takes of migratory birds will occur during project construction, as evidenced by the following statement on DEIS p. 4-92:

> Adult migratory birds are generally highly mobile and would be able to avoid project vehicles and equipment during clearing, grading, excavation, and maintenance activities. Eggs and young birds would be more susceptible to crushing, mortality, or injury while defending their nests or young. Transco would avoid mortalities or injuries of breeding birds and their eggs or young by clearing vegetation outside of the breeding season to the extent practicable, particularly in

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> key habitat areas. Transco would also conduct vegetation maintenance activities during the operations phase of the Project outside of the breeding season.

Another way of stating the above paragraph is that Transco anticipates there will "mortalities or injuries" to breeding birds when non-Key Habitat Areas (which represent 85% of the project route in Pennsylvania) are cleared during the primary breeding period.

If all reasonable and prudent measures were to be taken by Transco to avoid bird takes, there might be basis for arguing that the takes are unintentional. If reasonable and prudent protection measures are discarded, not because they are infeasible, but because they increase the project's construction cost, it is clearly arguable that the takes are intentional. This latter argument is further strengthened by the fact that linear construction projects in other parts of the county routinely implement these protection measures. Transco's election to not diligently look for nesting birds in advance of clearing is an intentional choice. A *considered* decision not to act involves just as much intentionality as a decision to act. (Appendix A).

In addition, the DEIS does not include or propose measures to protect migratory birds that are standard practice on other linear projects in the United States. In many parts of the U.S., compliance with the MBTA no-take requirement is maximized by the implementation of measures that are not even considered as an alternative in the DEIS. For linear projects in the western U.S., it is a standard provision that nesting bird surveys be conducted immediately prior to clearing, and if nests or breeding territories are identified, then no-work buffers are placed around the nest areas. The buffer size is dependent upon the species involved, that species' tolerance to disturbance, and the physical features of the site (e.g. if the nest site is shielded from activity on the ROW by vegetation or terrain). Nest buffers are put in place for nests within the ROW footprint as well as nests located adjacent to the ROW.

Implementation of this measure involves qualified avian biologists conducting pedestrian and auditory sweeps of the project corridor in advance of clearing. If nests are found, buffers are flagged/staked in the field and no construction activity is allowed within the buffers. The biologists periodically monitor nest activity to ensure the timely identification of either nest success or nest failure, at which time the buffers are removed and work may proceed. Surveys are considered reliable if they occur within seven days of the start of clearing. If clearing has not occurred by the seventh day, a resurvey is required to identify any new nesting birds. Once clearing has occurred, no further surveys are required as long as regular construction activity continues. If construction activities pause for more than seven days at a given site, the uncleared habitats adjacent to the ROW must be resurveyed to identify any new nests.

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While this is potentially expensive measure to ensure compliance with the MBTA to the fullest extent possible, it is an impact avoidance measure that both Transco and FERC are likely familiar with, and it should have been discussed and identified as an alternative impact mitigation measure in the DEIS and DMBP.

The DEIS does not discuss any of the agency recommended mitigation that may have been offered. The DMBP (p. 6-1) states: "Transco is consulting with the USFWS to identify compensatory mitigation requirements for impacts on migratory bird habitats……Transco will develop a detailed compensatory mitigation plan addressing impacts on USFWS-managed resources upon receipt of the HEA results and recommendations from the USFWS." Inasmuch as the DMBP included as part of the DEIS is Version 3, and this DMBP version preceded the DEIS release by roughly five months, the DEIS is deficient in not presenting at least a preliminary discussion on USFWS migratory bird mitigation requirements.

While the MBTA has not been determined to create an independent remedy against the USACE for taking of species protected by the MBTA as a consequence of the USACE's exercise of its permitting authority, when the information submitted by an applicant for a Section 404 permit clearly shows the project proposed by the applicant may affect birds protected by the MBTA, the USACE must consider those impacts in determining whether the permit can be issued. Where the data reviewed by the USACE demonstrates that species protected by the MBTA will be adversely affected by a proposed project, some action must be proposed by the applicant to eliminate the impact of the taking of such species. See *Friends of the Boundary Mountains v. U.S. Army Corps of Engineers*, 24 F. Supp. 3d 105 (D. Me. 2014), citing *American Bird Conservancy Inc. v. F.C.C.*, 516 F. 3d 1027 (D.C. Cir. 2008). Further, reliance on an opinion/determination issued by the United States Fish and Wildlife Service that provides compliance with a migratory bird mitigation plan to act as a substitute for the permits required by the MBTA would be a clear violation of the MBTA because MBTA does not authorize incidental take nor does it allow take to occur by any other means than a permit specifically issued pursuant to the MBTA. Neither the USACE nor the Fish and Wildlife Service have the legal authority to allow a mitigation plan substitute for a permit under the MBTA.

3. Endangered Species Act

The Endangered Species Act requires the USACE to consult with the U.S. Fish and Wildlife Service to ensure their actions do not jeopardize the continued existence of a federally listed threatened or endangered species. This consultation is intended to assist the USACE in determining whether any federally listed threatened or endangered species, or designated critical habitat occur in the vicinity of a proposed project. Section 9 of the ESA makes it unlawful for any person to take threatened or endangered species. The term take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such

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contact. The term harm is further defined to include significant habitat modification or degradation which "actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, migrating, feeding, or sheltering." [50 CFR sec 17.3] This means significant habitat modification that results in the impairment of a species' essential behavioral patterns may constitute a violation of the ESA's take prohibition. Therefore, the ESA formal consultation process is critical to ensure avoidance, minimization, and mitigation for any take under the ESA. This formal Section 7 consultation concludes with a biological opinion and incidental take statement that issues take for the given authorized project.

As detailed in the attached amend public comments filed with FERC, there has been no demonstration that the ASP would comply with the ESA. The fact that the USACE and Commission purposefully delayed formal consultation under Section 7 until May 11 2016, (6 days after the DEIS was published) highlights two critical points: 1) they have not taken a hard look at species protected by the ESA; and 2) full disclosure of ESA related issues has been obstructed. This precludes the public, especially affected landowners from being able to be aware of, review, or comment on any ESA issues. Instead, the public is forced on a scavenger hunt to find various pieces throughout the immense docket related to informal meetings with the Service, and put them together to form some hazy picture of what the USACE and Commission could have considered. This is a clear violation of NEPA and ESA.

Further, the DEIS the USACE is relying upon lacks information for revising finding of effects determination for the northern long-eared bat. Transco's May 2016 Biological Assessment (BA) revises the DEIS effects determination for the Northern Long-eared Bat (NLEB) from "may affect, likely to adversely affect" to "may affect not likely to adversely affect." Neither the DEIS nor the BA provide an adequate technical basis for this revision. In fact, the May 2016 Updated Agency Correspondence (1 September 2015 meeting notes) show that the USFWS believed there was no possibility of reaching a "may affect not likely to adversely affect" determination for the NLEB, simply due to the staggering amount of forested area being removed (1,258 acres). Ms. Nesbitt's property is home to 7 NLEB maternity roosts, and should be considered a core area for the species, but was not adequately evaluated or considered. Similarly, the USACE in the DEIS inappropriately relies upon misrepresentations of bog turtle impacts. In the DEIS, the USACE and FERC determine project impacts to a single known wetland complex used by the bog turtle. However, the USACE and FERC have not considered the impacts to bog turtles within construction right of ways and additional temporary work spaces located within wetland areas.

Finally, Northeastern Bulrush (which FERC determined in the BA transmittal to the U.S. Fish and Wildlife Service on May 11, 2016, that the corridor *may affect, and is likely to adversely affect*) may occur on the Nesbitt property (Ms. Nesbitt's land manager reports witnessing the Northeastern Bulrush on her property). However, FERC and the USACE set the deadlines for comments to be due prior to the only part of the growing season that this bulrush can be identified (late July-August). The timing of the DEIS and Section 404 commenting

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essentially prevents the landowner from being able to survey for the bulrush and from being able to file comments regarding impacts to the bulrush and other species.

C. The Application Does Not Demonstrate Avoidance of Significant Degradation of Waters of the United States and Does Not Demonstrate Appropriate Minimization of Impacts

USACE must first exhaust all practicable avoidance alternatives, which has not been done, as discussed earlier. Regardless, as more fully detailed in the attached amended public comments submitted to FERC, the applicant has not provided adequate resource protection and impact minimization measures. For example, the applicant argues that the use of sediment barriers at the edge of additional temporary work spaces is sufficient minimization and would avoid significant degradation of water of the United States. This assumption is problematic for the following reasons:

- Increasing the work areas in fact increases the footprint of impacts and sediment barriers do nothing to minimize the increase footprint impacts or prevent degradation of the waters
- FERC already requires use sediment barriers so the applicant is not proposing anything additional to minimize the increased footprint of impacts
- Use of sediment barriers within wetlands will confine sedimentation to an enlarged portion of the wetlands rather than minimizing impacts or avoid significant degradation of waters

Further, the applicant has not demonstrated how it minimize impacts resulting from horizontal directional drilling by failing to consider environmental consequences of mud releases into water of the United States. Such mud releases can have significant ecological impacts to water systems (degradation). The applicant also fails to demonstrate any meaningful minimization of impacts to stream crossings. The applicant purports that the proposed wet open-cut crossings method will be used for construction at dry waterbodies in order to avoid downstream sediment and turbidity releases. The problem is that the applicant is proposing 8 such crossing across perennially flowing creeks/streams without proposing any minimization or mitigation of impacts.

Finally, the USACE has not, based on the DEIS, considered groundwater dependent wetland systems and fails to address impacts to springs. As noted earlier, there are over 27 springs on Ms. Nesbitt's property; 10 of which are within 150 feet of proposed routes. There has been no discussion on how the ASP will impact the integrity of these springs and downstream waters. Further, the applicant misrepresents the flow behavior of the groundwater. The applicant purports the groundwater hydrology is gravity driven based on porous soils. However, the geology on Ms. Nesbitt's property is not porous soils but fractured rock whereby the flow of groundwater is driven by pressure and not gravity. Consequently, the placement of a pipeline could permanently change the flow paths of the groundwater and springs. This could result in numerous wetlands, creeks, and streams on Ms. Nesbitt's property being disconnected from their

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respective water source, degrading the waterbodies. The USACE has not considered these impacts because it is relying upon the applicant's flaw assumptions of the geology of the area, specifically Ms. Nesbitt's 3000 plus acres. *See* groundwater report for the Nesbitt property attached to the amended public comments filed with FERC.

V. Public Interest Review

In addition to the 404 (b)(1) Guidelines, the USACE is required to perform a public interest review, which is review of the benefits and detriments of the proposed project. Through this review, the USACE evaluates impacts on the public interest such as: economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, land use, recreation, tribal interests, and landowner considerations.

In the instant case, the proposed project has only one shipper with two customers serving Japan and one gas marketer. Therefore, at the most, the project will only benefit three private entities that do not serve a public gas or electric utility that sells to the public. The business and financial desires of those financially invested in the ASP should not be confused as a public benefit or in the public interests especially considering the significant impacts that will be caused by the project. The lack of public benefit or interest is augmented by the fact the project is subject to a 20-year contract, and once that contract expires there is no guarantee that the applicant will not abandon the pipeline. Consequently, this project is a temporary project at best that will perpetually burden affected landowners such as Ms. Nesbitt and permanently destroy irreplaceable cultural resources on her property (see the amended privileged comments filed with FERC) and permanently alter the hydrology (surface and ground) on her property, which in turn will have permanent adverse, ecological impacts. The burdens to the affected landowners like Ms. Nesbitt include but are not limited to: (1) interference with land uses such as Ms. Nesbitt's silviculture activities; (2) diminished property values and lost revenues from the land; and (3) increased insurance costs. When all of these are weight against the temporal benefits to three private entities that do not sell gas to the public, it is clear that this project in not in the public interest as proposed.

VI. The Application Does Not Demonstrate Compliance with the NHPA

Included with Ms. Nesbitt's comments submitted to FERC regarding the DEIS for the project is a Privileged Cultural Resources Report prepared by professional archeologists who surveyed and cataloged extensive cultural and historical resources found on her property. Because of its protected confidentiality, that report is not included with these comments, however, the USACE (as a cooperating agency) has the ability to access the report through the DEIS comments submitted by Ms. Nesbitt to FERC. It is critical that the USACE access and review this document as part of its review of the impacts of the activities proposed in the USACE permit application will have on the significant cultural and historic resources specific to Ms. Nesbitt's property.

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The regulation adopted to implement Section 106 of the National Historic Preservation Act ("NHPA") require that the USACE, in this instance, make a reasonable and good faith effort to identify historic properties, 36 C.F.R. Sec. 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. Sec. 60.4; assess the effects of an "undertaking" on any eligible historic properties found, 36 C.F.R. Sec. 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. Sec. 800.6, 800.9(b); and avoid or mitigate any adverse impacts. In other words, a valid NHPA analysis involves a "three-step process of identification, assessment, and mitigation." *Mid States Coalition for Progress v. Surface Trans. Bd.*, 345 F.3d 520, 553 (8th Cir. 2003). The information provided in this instance for compliance with NHPA fails on all three of these elements.

The information provided in the DEIS submitted to FERC and the analysis associated therewith fails to appropriately identify the area of potential effects for the project as a whole. Section 106 requires the lead agency, in consultation with the State Historic Preservation Officer to determine and document the area of potential effects for the proposed action. 36 C.F.R. Sec. 800.4 (a)(1). The "area of potential effects" is defined at 36 C.F.R. Sec. 8000.16(d):

> "Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."

While the DEIS discusses the area of potential effects for some resources, that discussion is devoid for others. Without such a discussion, no meaningful evaluation of the location and extent of impacts can be made. The applicant has attempted to improperly constrain the geographic area reviewed to the area immediately adjacent to pipeline route, rather than looking at the impacts that extend beyond the pipeline right-of-way.

The failure to present the area of potential effects for the document as a whole constitutes an arbitrary and capricious decision on the part of FERC. The usual practice for infrastructure projects is to designate a corridor along the proposed project where potential effects may occur. This corridor may be wider or narrower for various types of effects, but it typically encompasses the entire project. *See generally* Valley Community Preservation Com'n v. Mineta, 373 F. 3d 1078 (10th Cir. 2004). Such a corridor should have been designated, and the failure to do so demonstrates a lack of good faith in determining the area of potential effects.

The NHPA analysis also fails because of the failure of the agencies to properly consult with several culturally affiliated, federally recognized Indian Tribes regarding the impacts associated with the project (see the amended privileged comments filed with FERC regarding the referenced Tribes). Under the NHPA, a federal agency is required to consult with Indian tribes during the § 106 process. This duty applies without regard to where the historic property is located. 36 C.F.R. § 800.2 (c)(2)(ii). Further, Indian tribes "are entitled to special consideration in the course of an agency's fulfillment of its consultation obligations. Quechan Tribe of Fort

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Yuma Indian Reservation v. U.S. Dept. of Interior, et al., 755 F.Supp. 2d 1104, 1109 (S.D. Cal. 2010). The consultation process must provide the Indian Tribe a reasonable opportunity to (1) identify its concerns about historic properties, (2) advise on the identification and evaluation of historic properties, (3) articulate its views on the undertaking's effects on those properties having traditional religious and cultural importance, and (4) participate in the resolution of adverse effects. 36 C.F.R. § 800.2 (c)(2)(ii)(A). Importantly, consultation should begin early in the planning process. Id. Federal agencies owe a fiduciary duty to Indian tribes, and at a minimum, must comply with general regulations and statutes. Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 788 (9th Cir. 2006).

There is nothing in the DEIS to suggest that the USACE or FERC has made any attempt whatever to satisfy their tribal consultation duties. In fact, the USACE and FERC acknowledges in its DEIS that no formal consultation with federally recognized Indian tribes has taken place. Not only has USACE and FERC failed to consult *early* in the planning process, it has completely failed to consult at all with several culturally affiliated tribes, and has violated its fiduciary duty to those tribes with whom USACE should have been consulting.

The DEIS impermissibly proposes that the §106 inquiry be deferred until after the Final Environmental Impact Statement and Record of Decision are issued. While true that NHPA authorizes a tiered approach to the Section 106 process, it does not authorize deferring the process until after a Final Environmental Impact Statement or Record of Decision has been issued. The reason for this is simple: the Section 106 process may reveal that the Final Environmental Impact Statement or Record of Decision must be amended or supplemented. Counsel on Environmental Quality, Executive office of the President: NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 (March 2013).

VII. Due Process Violations

As more fully discussed in the attached amended public comments filed with FERC, Ms. Nesbitt has not been blocked from meaningful public participation in the NEPA and Section 404 process. Both NEPA and the Administrative Procedure Act (APA) require full disclosure of information upon which agency decisions are based – the former, to allow for meaningful public participation, and the latter, to satisfy due process considerations. *See Klamath-Siskiyou Wildlife Center v. BLM*, 387 F.3d 989 (2004) (remanding environmental assessment where agency did not provide sufficient information to permit meaningful public scrutiny as required by NEPA); *Williston Basin Inter. Pipeline v. FERC*, 165 3d 54, 63 (D.C. Cir. 1999) ("It is well-established that "[a] party is entitled ... to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."). Moreover, the importance of access to the information underlying the USACE and FERC's environmental review and ultimate decision, along with the opportunity to challenge it, is heightened here because Ms. Nesbitt and dozens of other landowners face the seizure of their properties by eminent domain if the project is authorized.

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Ms. Nesbitt's ability to review the critical information needed to file timely comments in response to the proposed USACE permit, the DEIS, and on the merits of the proposed project, have been hampered at every turn. The fact that FERC and the USACE (as a cooperating agency) did not issue a supplemental DEIS or extend the comment period after the applicant filed 39 new reroutes two weeks after the DEIS was published highlights the due process obstacles FERC and the USACE have constructed. With regard to the Section 404 permitting process, Ms. Nesbitt appreciates that USACE extended the commenting period; however, the USACE failed to provide any additional information. Therefore, the public, including Ms. Nesbitt, are left guessing which routes the USACE is considering for permitting. Further, the USACE has not made key documents and information readily available for review. On June 7, 2016, Ms. Nesbitt submitted a Freedom of Information Act request with the USACE. The USACE has yet to provide Ms. Nesbitt with any documentations from the request. Consequently, the USACE has put Ms. Nesbitt in a position whereby she has to guess what the USACE is considering in addition to the DEIS.

For all the reasons discussed above and in the amended public comments and amended privileged comments submitted to FERC, the applicant has not demonstrated sufficient compliance with the Clean Water Act, NEPA, MBTA, ESA, and NHPA to warrant issuance of a Section 404 permit. Therefore, Ms. Nesbitt respectfully requests the USACE deny issuance of a Section 404 permit until such time as compliance with the necessary legal requirements have been adequately demonstrated.

Thank you for your consideration, and feel free to contact me if you have any questions or comments regarding this letter.

Sincerely,

Thomas Estes

Icarus Ecological Services
8639 Ranchwood Ln.
St. Augustine, FL 32092
904.307.9911
www.icaruses.com