IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICABILITY DETERMINATION, PROGRAM INTEREST NO.: 1615-17-0004.2 (APD200001)	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003616-20 CIVIL ACTION On Appeal from Final Action of the New Jersey Department of Environmental Protection

BRIEF OF APPELLANTS FOOD & WATER WATCH, NEW JERSEY HIGHLANDS COALITION, AND SIERRA CLUB

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PRELIMINARY STATEMENT

Food & Water Watch, the New Jersey Highlands Coalition, and the Sierra Club (the "Environmental Appellants") are leading non-profit environmental organizations. The Environmental Appellants bring this appeal of a final decision by the Respondent New Jersey Department of Environmental Protection ("DEP") to exempt the Tennessee Gas Pipeline Company, L.L.C. ("Tennessee Gas") from regulation under the Highlands Act. This Court must now answer the question of whether the DEP correctly issued a Highlands Applicability Determination. For all the following reasons, this Court should reverse the DEP's decision to exempt Tennessee Gas from the DEP's regulations under the Highlands Act.

The DEP determined that the Project constitutes a "Major Highlands Development" in the Highlands Preservation Area, which generally triggers the need for a Highlands Preservation Area Approval (or permit) under the Highlands Act. The proposed Project consists of the construction, operation, and maintenance of an entirely new $245 million compressor station with appurtenant structures in West Milford, Passaic County. Despite being an entirely new structure, designed only to add service to new customers in the State of New York, the DEP determined that the Project qualifies for a statutory exemption that was expressly enacted only for "routine maintenance and operations, rehabilitation, preservation, reconstruction, repair or upgrade of

public utility lines, rights-of-way, or systems by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act." In addition, the DEP determined that the Project is consistent with the relevant Water Quality Management Plan, as a prerequisite under the Water Quality Planning Act.

Essentially, the DEP failed to strictly and narrowly construe the exemption at issue. The DEP ignored the meaning of the word "routine" in the statutory provision which authorized it to grant the exemption at issue. The entirely new compressor station is not what the Legislature envisioned when it enacted the very narrow exemption for the "routine" upgrade of previously existing public utilities in the Highlands Preservation Area. The proposed pipeline Project represents a new structure serving new out-of-state customers and, therefore, this fossil fuel project poses substantial impacts to local water resources and significant contributions to climate change. The DEP erred when it broadly applied the exemption at issue and failed to require a full permitting process under the Highlands Act.

The goals and purposes of the Highlands Act and the Water Quality Planning Act are frustrated by the DEP's decision to exempt the proposed Project from regulation. The record reflects no showing, or even assertions, that the proposed Project is needed to serve existing customers. The Highlands Act and the Water

Quality Planning Act were both intended to protect the State's precious water resources by requiring the DEP to closely scrutinize impacts to water resources and to implement a command and control permitting scheme.

The Highlands Act was not intended to exempt huge new fossil fuel projects from the DEP's regulatory scheme. There is too much at stake for this proposed Project to be considered exempt from regulation. The Legislature clearly did not intend to hide an elephant like this in the mousehole of the exemption at issue here.

For all the reasons set forth in this brief, the Court must reverse the DEP's erroneous exemption determination. Tennessee Gas must go through the DEP's permitting process under the Highlands Act before it can construct and operate the new compressor station.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The Highlands Water Protection and Planning Act of New Jersey ("Highlands Act") was signed into law in 2004.[2] According to the Highlands Act, amongst other things:

> The Legislature…determine[d]…that it is in the public interest of all the citizens of the State of New Jersey to enact legislation setting forth a comprehensive approach to the protection of the water and other natural resources of the New Jersey Highlands; that this comprehensive approach should consist of the identification of a preservation area of the New Jersey Highlands that would be subjected to stringent water and natural resource protection standards, policies, planning, and regulation; that this comprehensive approach should also consist of the establishment of a Highlands Water Protection and Planning Council charged with the preparation of a regional master plan for the preservation area in the New Jersey Highlands as well as for the region in general; that this comprehensive approach should also include the adoption by the Department of Environmental Protection of stringent standards governing major development in the Highlands preservation area.[3]

The Highlands Act itself included a number of "exempt[ions] from the provisions of [the] [A]ct, the regional master plan, [and] any rules or regulations adopted by the Department of Environmental Protection pursuant to [the] [A]ct."[4] One of these exemptions is Exemption #11 under N.J.S.A. § 13:20-28(11), which applies to "the routine maintenance and operations, rehabilitation, preservation,

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[1] The "Statement of Facts" and "Procedural History" in this matter are inextricably intertwined. Therefore, they are presented together here in one section for ease of reference.
[2] N.J.S.A. § 13:20-1 to -35.
[3] N.J.S.A. § 13:20-2.
[4] N.J.S.A. § 13:20-28(a).

reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this [A]ct."[5] Exemption #11 is also in DEP's Highlands Rules under N.J.A.C. 7:38-2.3(a)11 and uses language nearly identical to the Highlands Act statute: "The routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act."[6]

In 2013, in the case of In re New Jersey Dept. of Environmental Protection Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223 (App. Div. 2013) (hereinafter, "*Highlands Applicability*"), the Appellate Division considered a challenge by Friends of Fairmount Historic District to DEP's decision to deem an electrical substation proposed by Jersey Central Power & Light in Tewksbury Township as qualified for Exemption #11. While not resolving the question of law of whether the adjective "routine" modifies the term "upgrade" in the statutory and regulatory language of Exemption #11, the Appellate Division in *Highlands Applicability*

[5] N.J.S.A. § 13:20-28(11)
[6] N.J.A.C. 7:38-2.3(a)11

did outline what type of project would qualify as a "routine upgrade" (described below under "Legal Argument").

On August 28, 2020, Tennessee Gas Pipeline Company, L.L.C. ("Tennessee Gas") submitted to the New Jersey Department of Environmental Protection ("DEP") its Highland Applicability Determination – Highlands Exemption Request regarding its East 300 Upgrade Project ("HAD Request"). Aa0026. Tennessee Gas asserted that "the portion of its Project within the [Highlands] Preservation Area" – the construction, operation, and maintenance of a new compressor station ("Compressor Station 327") and appurtenant structures – "qualifies for Exemption #11 and is therefore exempt from the Highlands Act." Aa0052. In its HAD Request, Tennessee Gas made no mention of the 2013 Appellate Division case, *Highlands Applicability* (though it later made a brief reference in its own response to public comments, Aa1329), and did not attempt to justify the construction, operation, and maintenance of new Compressor Station 327 as a "routine upgrade" and therefore qualified for Exemption #11. Instead, Tennessee Gas asserted that "the construction, operation, and maintenance of [new Compressor Station] 327 is an 'upgrade' to [Tennessee Gas's] existing 300 Line gas pipeline system." Aa0052. (emphasis added). In doing so, Tennessee Gas cited as precedent two prior DEP Highlands Applicability Determinations – from 2010 and 2012 – that preceded the 2013 Appellate Division case, *Highlands*

Applicability. In its HAD Request, Tennessee Gas also made claims regarding the need for Project – such as that it "is also necessary to provide added reliability during planned and unplanned maintenance activities on [Tennessee Gas's] natural gas transmission system within the state and to provide natural gas to customers in the northeastern United States" – that have not been verified by the Federal Energy Regulatory Commission ("FERC"). Aa0079. (emphasis added).

On October 16, 2020, the Highlands Council sent DEP a letter with its determination that the construction, operation, and maintenance of new Compressor Station 327 was consistent with the goals of the Highlands Act. Aa0328. The Highlands Council's letter only explicitly referenced part of the statutory and regulatory language of Exemption #11 – "the routine maintenance and operations, rehabilitation, preservation, …" – and made no mention of whether Highlands Council considered the construction, operation, and maintenance of new Compressor Station 327 to be either a "routine upgrade" or an "upgrade." Aa0328.

From January to May 2021, DEP received hundreds of public comments on Tennessee Gas's HAD Request – all of them in opposition to the construction, operation, and maintenance of new Compressor Station 327. Aa0337 to Aa1322. These public submissions included a joint comment from Food & Water Watch, New Jersey Sierra Club, and New Jersey Highlands Coalition questioning whether the

proposed activity satisfied the statutory and regulatory language of Exemption #11 (i.e. "[t]his is not a routine maintenance or update, but a massive expansion project that should not receive an exemption from the Highlands Act."). Aa0339. These public submissions also included multiple comments from individuals associated with the Sierra Club questioning whether the proposed activity – given its potential negative environmental impacts – was consistent with the goals and purposes of the Highlands Act (i.e. "[t]he site of the new compressor station is…in the middle of the Highlands Preserve right next to a C1 steam and above the Wanaque and Monksville reservoir. The project will impact environmentally sensitive areas in the Highlands and the drinking water for over 3 million people."). E.g. Aa1061.

In May 2021, counsel for Tennessee Gas submitted material to DEP arguing that Tennessee Gas was a "public utility" under Exemption #11. Aa1327 to Aa1333.

On June 23, 2021, DEP issued both its Highlands Applicability Determination ("HAD") and its Water Quality Management Plan Consistency Determination ("WQMP CD") for the construction, operation, and maintenance of new Compressor Station 327. In DEP's HAD, the state agency stated the following:

> After a careful review of the information submitted, it has been determined that the Project described above qualifies for Exemption No. 11 for "routine maintenance and operations, rehabilitation, preservation, reconstruction, repair or upgrade of public utility

> lines, rights-of-way, or systems by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act." Aa0001.

DEP's HAD made no mention of the 2013 Appellate Division case, *Highlands Applicability*, or whether it considered the proposed activity to be either a "routine upgrade" or "upgrade." Aa0001. DEP's HAD failed to mention the state agency's receipt of hundreds of public comments regarding the proposed activity and did not provide any type of response to these public comments. Aa0001. In addition, breaking from its own past precedent when issuing a HAD regarding Exemption #11, DEP did not include a provision in the HAD deferring to the expert agency (here, FERC) to determine the need for the proposed activity.

On August 13, 2021, Food & Water Watch and New Jersey Highlands Coalition submitted a Notice of Appeal ("NOA") and Case Information Statement ("CIS") challenging DEP's June 23, 2021 Decision regarding the construction, operation, and maintenance of new Compressor Station 327. On September 20, 2021, Food & Water Watch and New Jersey Highlands Coalition submitted an Amended NOA to add Sierra Club as an Appellant in this matter. On April 15, 2022, Food & Water Watch, New Jersey Highlands Coalition, and Sierra Club (collectively, "Environmental Appellants") submitted a Further Amended NOA and CIS, adding Tennessee Gas as an "interested party," pursuant to an April 11, 2022 Order from the New Jersey Supreme Court. Aa1334 to Aa1346.

On April 21, 2022, FERC issued a Certificate for Tennessee Gas's East 300 Upgrade Project. FERC, Order Issuing Certificate, 179 FERC ¶ 61,041 (April 21, 2022). In this FERC Certificate, that expert agency only found evidence of market need in New York (by Con Edison) for the Project – not reliability need by Tennessee Gas's existing customers.

LEGAL ARGUMENT

I. STANDARD OF REVIEW
(Aa0001)

Regarding questions of law, DEP's June 23, 2021 Decision is subject to the *de novo* standard of review. The Supreme Court of New Jersey has stated that "we are in no way bound by an agency's interpretation of a statute or its determination of a strictly legal issue, particularly when that interpretation is inaccurate or contrary to legislative objectives[.] Like all matters of law, we apply de novo review to an agency's interpretation of a statute or case law."[7] It is well settled that "courts give no deference to agencies with respect to determinations of issues of law; they apply a de novo standard of judicial review."[8] Regarding question of fact, DEP's June 23, 2021 Decision is subject to the "arbitrary and capricious" standard of review. The Appellate Division "will reverse an agency decision if it is arbitrary, capricious, or unreasonable or if it is not supported by credible evidence in the record."[9] Here, Environmental Appellants challenge DEP's June 23, 2021 Decision – which consists of both its Highlands Applicability Determination ("HAD") and its Water Quality Management Plan Consistency Determination ("WQMP CD") – as constituting both an

[7] Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27, 17 A.3d 801 (2011) (internal citations and quotation marks omitted).
[8] In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 93 (App. Div. 2004).
[9] In re N.J. Pinelands Com'n Resolution, 356 N.J. Super. 363, 372 (App. Div. 2003).

error of law and errors regarding the facts, as described further below.

DEP's HAD consists of two components.[10] The first component is whether the Project can be considered "[t]he routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems, by a public utility."[11] The second component is whether the Project "is consistent with the goals and purposes of the Highlands Act."[12] The first component is a question of law and thus subject to the *de novo* standard of review. The second component is a question of fact and thus subject to the "arbitrary and capricious" standard of review. DEP's WQMP CD is a mixed question of law and fact.

[10] Technically, the HAD consists of a third component: whether or not the proposed activity is being conducted by a "public utility." While Tennessee Gas saw the need to submit materials to DEP justifying itself as "public utility," it did not cite any New Jersey court ruling upholding an interpretation of "public utility" under Exemption #11 that would include an interstate natural gas pipeline transmission company such as Tennessee Gas. Aa1327 to Aa1333.

[11] N.J.A.C. 7:38-2.3(a)(11).

[12] Id.

II. TENNESSEE GAS'S PROJECT DOES NOT QUALIFY FOR EXEMPTION # 11 FROM THE HIGHLANDS ACT
(Aa0001)

A. Exemption #11 Must Be Strictly and Narrowly Construed to Only Allow for a "Routine Upgrade" Rather than Simply an "Upgrade"
(Aa0001)

Exemption #11 is both in the Highlands Act statute [see N.J.S.A. 13:20-28(a)(11)] and DEP's Highlands Rules [see N.J.A.C. 7:38-2.3(a)(11)]. The exact meaning of the phrase "the **routine** maintenance and operations, rehabilitation, preservation, reconstruction, repair, or **upgrade** of public utility lines, rights of way, or systems, by a public utility"[13] – specifically, whether the word "routine" not only modifies "maintenance and operations" but also "upgrade" – is a question of law that is foundational to the application of Exemption #11 by DEP.

Regarding statutory interpretation, Courts are guided by "the bedrock assumption that the Legislature did not use any unnecessary or meaningless language."[14] We therefore presume that each of the statute's words means something and "'is not mere surplusage.'"[15] Here, this assumption indicates that the word "routine" cannot be read out of the Highlands Act statute; the word "routine" cannot be ignored. In addition, absent a consensus definition, it is

[13] N.J.S.A. 13:20-28(a)(11) (emphasis added).
[14] Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 587, 59 A.3d 561 (2013) (quoting Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 418-19, 982 A.2d 445 (2009)) (internal quotation marks omitted).
[15] Id. [quoting Cast Art Indus. v. KPMG LLP, 209 N.J. 208, 222, 36 A.3d 1049 (2012)].

appropriate to utilize the interpretive maxim *noscitur a sociis*: "the meaning of a word or a particular set of words in a statute may be indicated, controlled or made clear by the words with which it is associated."[16] In Exemption #11, the meaning of "upgrade" (and the other words in this exemption) is clear by the word with which it is associated: "routine." That is, this maxim leads to an interpretation of the exemption's statutory language as follows: if any "maintenance and operations" are not "routine," then they are not exempt; if any "rehabilitation, preservation, [or] reconstruction" is not "routine," then they are not exempt; and if any "repair[] or upgrade" is not "routine," then they are not exempt.

Moreover, regarding regulatory interpretation, a reviewing court "cannot rearrange the wording of the regulation, if it is otherwise unambiguous, or engage in conjecture that will subvert its plain meaning. In short, [the court] must construe the regulation as written."[17] Here, this means that this Court must acknowledge that the word "routine" in the regulatory language is not clearly separated off and meant to only apply to "maintenance and operations." For example, the regulatory language is not "The routine maintenance and operations; rehabilitation, preservation,

[16] Falcone v. Branker, 135 N.J. Super. 137, 146-47, 342 A.2d 875 (Law Div.1975) (emphasis added).
[17] U.S. Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012) (internal citation omitted) (emphasis added).

reconstruction, or repair; or upgrade of public utility lines, rights-of-way, or systems, by a public utility"; the use of semi-colons in this manner would clearly indicate that the word "routine" was meant to only modify "maintenance and operations."

Significantly, this Court has long relied on the well settled legal principle that "any exemption from a comprehensive legislative 'policy designed to protect environmental interests' must be 'strictly construed.'"[18] Given that Exemption #11 is an exemption from the Highlands Act – a comprehensive legislative policy designed to protect environmental interests – this well settled legal principle clearly applies here. Yet, Environmental Appellants note, DEP in the 2013 case of *Highlands Applicability* took the position that "[t]he Legislature intended the word 'routine' to [only] modify the words 'maintenance and operations' because this clause is separated from the rest of the list by a comma."[19] In *Highlands Applicability*, the Appellate Division did not settle the question of whether "routine" applies to "upgrade" in Exemption #11. But, if this Court rules in favor of DEP's past interpretation of Exemption #11, that would constitute a broad

[18] In re N.J. Dep't of Envtl. Prot. Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 235 (App. Div. 2013), quoting M. Alfieri Co., Inc. v. N.J. Dep't of Envtl. Prot. & Energy, 269 N.J. Super. 545, 554 (App.Div.1994), aff'd o.b., 138 N.J. 642 (1995) (emphasis added).

[19] Brief of Respondent New Jersey Department of Environmental Protection in *Highlands Applicability* (June 6, 2012), pg. 30. Pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(3), this Court should take judicial notice of this Brief. Environmental Appellants can supply this Brief to the Court upon request.

construction of Highlands Act. Instead, this Court must rule in favor of Environmental Appellants interpretation of Exemption #11, which conforms to the well settled legal principle to strictly construe any exemption from a comprehensive legislative policy designed to protect environmental interests.

Finally, Environmental Appellants note that, in the 2013 case of *Highlands Applicability*, DEP took the position that an interpretation of "routine" applying to "upgrade" "would make no sense."[20] DEP argued that "Appellants suggests that only routine upgrades be exempted. Yet, upgraded lines, rights-of-way and systems are hardly routine. Indeed, these often take years to plan and complete, as compared to routine activities which generally serve to replace existing but aging infrastructure."[21] But the phrase "routine upgrade" is, in fact, used in the energy industry context in ways that are quite common sense. For example, in FERC Order in 2007, a dissenting Commissioner referred to "the question of whether a project is merely a **routine upgrade** necessary to maintain reliable service to existing customers, or a more proactive upgrade that brings broad ranging public interest benefits."[22] And in another FERC Order from 2007, "[p]arties

[20] Brief of Respondent New Jersey Department of Environmental Protection in *Highlands Applicability* (June 6, 2012), pg. 31.
[21] Id.
[22] FERC Order Accepting Revised Tariff Sheets Subject to Revision and Establishing Technical Conference (July 24, 2007), Docket Nos. ER07-576-000 and ER07-576-001, (Commissioner Kelly, dissenting in part) (emphasis added).

claim[ed] that the requested incentives for the Rancho Vista Project [were] not justified because the Project is a routine investment…. [one of the parties] argue[d] that the Rancho Vista Project [was] a **routine upgrade** from the existing Mira Loma substation which, in the near future, [would] be inadequate to serve SCE's growing load."[23]

In light of the principles of statutory and regulatory interpretation outlined above and the common sense use of the phrase "routine upgrade" in the energy industry context, the word "routine" in Exemption #11 clearly applies to "upgrade."

B. In 2013, the Appellate Division Determined that a "Routine Upgrade" is One Whose Purpose is to Serve the Reliability Needs of a Public Utility's Existing Customer Base (Aa0001)

Unfortunately, "[n]either 'routine' nor 'upgrade' are defined in the [Highlands Act] statute."[24] And Environmental Appellants are not aware of any New Jersey court having settled the question of whether "routine" applies to "upgrade" in Exemption #11. In 2013, however, the Appellate Division did outline what type of project would qualify for a "routine upgrade," as described below.

In the 2013 case of *Highlands Applicability*, the Appellate Division considered a challenge by Friends of Fairmount Historic

[23] FERC, Order Granting Petition for Declaratory Order, 121 FERC ¶ 61,168 (November 16, 2007), P 112 (emphasis added).
[24] In re New Jersey Dept. of Environmental Protection Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 237 (App. Div. 2013).

District to DEP's decision to deem an electrical substation proposed by Jersey Central Power & Light ("JCP&L") in Tewksbury Township as qualified for Exemption #11. As summarized by the Appellate Division, "BPU found the substation necessary, noting that residential customers in the area increased by thirty-percent between 1999 and 2006, resulting in twenty-percent overloads during peak periods, and that the substation as planned and placed would help to ensure adequate voltage levels."[25] BPU's September 14, 2009 Order authoring JCP&L to construct the substation summarized the testimony of a JCP&L employee as attesting that "the proposed Substation is required to meet existing need"[26] and "that, in addition to electrical load demand and voltage issues, the Substation is needed to address reliability."[27] BPU concluded that "JCP&L has submitted credible evidence of **current** need for the Substation."[28] Overall, the Appellate Division in *Highlands Applicability* concluded that "Given JCP & L's obligation [to maintain regular and uninterrupted electric service to its customers] and BPU's findings, it appears clear that, even if the exemption is interpreted as requiring that **an upgrade be "routine,"** a project that is **limited** to what is necessary to satisfy JCP & L's duty to provide **'regular and uninterrupted electric service to**

[25] Id. at 227 (emphasis added).
[26] BPU Order, Docket No. EO09010010, pg. 4 (September 14, 2009) (emphasis added).
[27] Id. (emphasis added).
[28] Id. at 13 (emphasis added).

its customers' falls within the exemption intended by the Legislature."[29]

Therefore, *Highlands Applicability* stands for the general principle that a "routine upgrade" has the purpose of serving the reliability needs of a public utility's existing customer base. This general principle makes sense in light of the everyday meaning of the word "routine": "done as part of what usually happens, and not for any special reason."[30] And it makes sense in the context of the energy industry in particular: serving the reliability needs of its existing customer base is part of a public utility's ordinary course of business. For example, FERC has touched on this concept in a 2007 Order stating the following:

> [A]n applicant asserting that the scope of any proposed transmission expansion project is **not** routine should submit data distinguishing the project from other transmission projects or upgrades that are constructed in the **ordinary course** of **maintaining** a utility's transmission system to provide **safe and reliable service to its customers**.[31]

[29] *Highlands Applicability*, 433 N.J. Super. at 237 (App. Div. 2013) (emphasis added).
[30] Cambridge Dictionary (last accessed August 25, 2022), *available at* https://dictionary.cambridge.org/us/dictionary/english/routine.
[31] FERC Order Accepting Revised Tariff Sheets Subject to Revision and Establishing Technical Conference (July 24, 2007), Docket Nos. ER07-576-000 and ER07-576-001, at P 53 (emphasis added).

C. Here, the Purpose of TN Gas's Project is to Satisfy the *Market* Need of *New* Customers – Not the *Reliability* Need of TN Gas's *Existing* Customers

(Aa0001)

While DEP's HAD Decision failed to articulate any specific rationale for its decision that Tennessee Gas's Project qualified as "The routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems, by a public utility" – in contrast to its prior HAD decisions in 2010 and 2012 regarding Tennessee Gas's 300 Line Project and Northeast Upgrade Project ("NEUP"), respectively (discussed further below in Section II.D) – Environmental Appellants assume that DEP accepted Tennessee Gas's assertion in its HAD Request that the "the construction, operation, and maintenance of [new Compressor Station] 327 is an 'upgrade' to [Tennessee Gas's] existing 300 Line gas pipeline system." Aa0052 (emphasis added).[32] As established above, however, Tennessee Gas's proposed activity regarding Compressor Station 327 must be a "routine upgrade" to qualify for Exemption #11 and the relevant standard is whether its purpose is serving the reliability needs of Tennessee Gas's existing customer base.

[32] DEP's failure to articulate a rationale on this issue renders its decision regarding the first component of Exemption #11 arbitrary and capricious even if the related question of law were decided in the state agency's favor. In addition, Environmental Appellants note that – even if we assume that DEP accepted Tennessee Gas's proposed activity as an "upgrade" – the agency failed to establish why the construction of an entirely "new" compressor station and appurtenant structures to serve "new" customers in New York constituted an "upgrade" of an existing system.

Here, Tennessee Gas asserts in its HAD Request that there are two reasons why the overall East 300 Upgrade Project is needed: "Tennessee's Project is necessary [1] to meet the **market** needs of its Project Shipper [i.e. Con Edison] and [2] to enhance the reliability and capacity of natural gas to its customers in the northeastern United States." Aa0077 (emphasis added). But, in the FERC Certificate issued on April 21, 2022 for the East 300 Upgrade Project, that expert federal agency only found evidence of the first reason (i.e. market need for the Project by Con Edison). In the Certificate, FERC states that "ConEd has shown that natural gas demand in its service territories is exceeding its available firm natural gas interstate pipeline capacity and that additional transportation capacity is needed to serve **its existing and new customers**…To meet this demand, ConEd entered into a precedent agreement [with Tennessee Gas] for firm transportation service on the [P]roject."[33] Overall, FERC states that "the proposed [P]roject will enable Tennessee [Gas] to provide up to 115,000 Dth per day of firm transportation service, which constitutes **100% of the project's capacity**, to ConEd."[34] In fact, FERC "[found] that Tennessee[] [Gas's] [P]roject will not adversely affect service to Tennessee[] [Gas's] existing customers. The [P]roject will enable Tennessee [Gas] to provide long-term, firm transportation service

[33] FERC, Order Issuing Certificate, 179 FERC ¶ 61,041 (April 21, 2022) P 17 (emphasis added).
[34] Id. at P 20 (emphasis added).

to ConEd through the proposed upgrades to Tennessee[] [Gas's] system **while maintaining** existing service."[35] Thus, FERC found that sole purpose of the East 300 Upgrade Project (including Compressor Station 327) was the market need of Con Edison – not Tennessee Gas's reliability need.

FERC's April 21, 2022 Certificate – despite being issued after DEP's June 23, 2021 HAD Decision – should, based on DEP's own prior precedent, be considered dispositive of the issues of whether and why Tennessee Gas's Compressor Station 327 is needed. In DEP's July 15, 2009 Amended HAD for JCP&L's proposed substation – an intrastate project and thus subject to New Jersey BPU's authority – DEP "explicitly deferred to BPU for the determination as to the necessity of the substation."[36] And in DEP's February 11, 2010 HAD for Tennessee Gas's 300 Line Project – an interstate project and thus subject to FERC's authority – DEP similarly deferred to FERC for the determination as to the necessity of the Project.[37] As a

[35] Id. at P 18 (emphasis added).
[36] *Highlands Applicability*, 433 N.J. Super. at 229 (App. Div. 2013). DEP stated "'JCP & L is a public utility regulated by [BPU]. JCP & L maintains a Tariff for Service with BPU, which requires that JCP & L maintain regular and uninterrupted electric service to its customers. The Department does not have the expertise to assess statements concerning the need to expand existing electrical systems, and defers to the BPU or other appropriate agency, to make a final determination in this regard.'" Id. (quoting DEP's July 15, 2009 Amended HAD) (emphasis added).
[37] See DEP's February 11, 2010 HAD for Tennessee Gas's 300 Line Project ("The Department of Environmental Protection does not possess the required expertise in regional energy demand and delivery systems to conclusively determine the need for the proposed project. The Department notes that the Federal Energy Regulatory Commission (FERC) is the agency responsible to determine the necessity of this and other natural gas conveyance projects. Therefore, the Department's determination is issued subject to and

result, pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(3), this Court should take judicial notice of FERC's April 21, 2022 Certificate for the East 300 Upgrade Project. At the very least, DEP's June 23, 2021 HAD should be declared arbitrary and capricious for failing to follow DEP's own prior precedent of including a stipulation that DEP would be deferring to the appropriate expert agency (here, FERC) to make a final determination regarding the need for Compressor Station 327.

D. The Two Prior DEP HADs that Tennessee Gas Cites in Its HAD Request as Precedents Were not "Routine Upgrades" and Have not been Upheld by New Jersey Courts.

(Aa0001)

In its HAD Request, Tennessee Gas states that "Tennessee [Gas] received Exemption #11 in connection with its 300 Line Project in 2010 and its Northeast Upgrade Project ('NEUP') in 2012, so there is a precedent for an exemption to be granted for this Project [i.e. the East 300 Upgrade Project]." Aa0078 (emphasis added). The portion of the 300 Line Project within the Highlands Preservation Area was 10.94 miles of the proposed 17.26 miles of pipeline loop in New Jersey (i.e. known as "the 325 Loop Segment"). Aa0225. And DEP did indeed find that "installation of a 30-inch underground natural gas pipeline along the existing 24-inch underground natural gas pipeline which ties in at both ends to the

---

conditioned upon FERC's issuance of a certificate of public convenience and necessity authorizing the project."). Aa0228. (emphasis added).

existing 24-inch pipeline for the express purpose of increasing the transmission capacity of the existing 24-inch pipeline qualifies as an upgrade to a public utility line or system." Aa0228. (emphasis added). But this DEP decision regarding the 300 Line Project preceded the 2013 case of *Highlands Applicability* and should be analyzed under the proper statutory construction of "routine upgrade" – not simply "upgrade." Therefore, since DEP explicitly deferred in its February 11, 2010 HAD to FERC as "the agency responsible to determine the necessity of this and other natural gas conveyance projects," Aa0228, the FERC Certificate for the 300 Line Project is dispositive of the issue of the exact purpose of the relevant New Jersey portion of the 300 Line Project.

In its May 14, 2010 Certificate for the 300 Line Project, FERC stated that "Tennessee [Gas] proposes to replace certain compression facilities in order to increase overall system reliability (the Replacement Component) and, at the same time, to increase the pipeline capacity of its existing 300 Line System by an incremental 350 million cubic feet per day (MMcf/d) to meet an expressed market need (the Market Component) (jointly, the 300 Line Project)."[38] FERC stated that "all the capacity of the proposed Market Component expansion is currently subscribed under precedent agreement by [EQT Energy LLC (EQT)]."[39] And "the Market

[38] FERC, Order Issuing Certificate And Approving Abandonment, 131 FERC ¶ 61,140 (May 14, 2010), P 3 (emphasis added).
[39] Id. at P 9 (emphasis added).

Component involves the construction of eight pipeline loop segments totaling 127.4 miles of 30-inch diameter pipe"[40]; in particular, "[i]n New Jersey, the proposed looping consists of 10.0 miles in Sussex County, and 6.0 miles in Passaic County."[41] Therefore, the purpose of the relevant New Jersey portion of the 300 Line Project was the market need of EQT – not the reliability need of Tennessee Gas; consequently, the activity reviewed by DEP did not qualify as a "routine upgrade" under the general principles from the 2013 case of *Highlands Applicability*. Accordingly, DEP's February 11, 2010 HAD for the 300 Line Project is not a valid precedent for the East 300 Upgrade Project currently at issue.

As for Tennessee Gas's NEUP, the portion of this project within the Highlands Preservation Area was "approximately 7.6 miles of new 30-inch outside diameter underground natural gas pipeline adjacent to the existing 24-mch natural gas pipeline," Aa0291, as well as "above ground improvements." Aa0291. DEP characterized the proposed activity as a "**new** upgrade project." Aa0291 (emphasis added) and did indeed "determine[] that the project…qualifie[d] for [Exemption #11]." Aa0297. But, as with the 300 Line Project, this DEP decision regarding NEUP preceded the 2013 case of *Highlands Applicability* and should be analyzed under the proper statutory construction of "routine upgrade" – not

[40] Id. at P 6.
[41] Id.

simply "upgrade" (let alone "new upgrade"). Therefore, while here DEP did not explicitly defer to FERC to determine the need for the proposed activity, it is still logical to consider the FERC Certificate for NEUP dispositive of the issue of the exact purpose of the relevant New Jersey portion of NEUP; this FERC Certificate was issued by the government agency with the expertise to determine the issue of need.

In its May 29, 2012 Certificate for NEUP, FERC notes that "Tennessee [Gas] states it has precedent agreements for long-term firm transportation services utilizing the full capacity of the proposed Northeast Upgrade Project with two shippers, Chesapeake Energy Marketing, Inc. (Chesapeake) and Statoil Natural Gas LLC (Statoil)."[42] Overall, FERC concluded that "[b]ased on the benefits Tennessee's proposal will provide to **the project shippers**, the lack of adverse effects on existing customers and other pipelines and their captive customers, and the minimal adverse effects on landowners or communities along the route, we find…that Tennessee's proposed Northeast Upgrade Project is required by the public convenience and necessity."[43] Therefore, the purpose of the entire NEUP (including the relevant New Jersey

[42] FERC, Order Issuing Certificate and Approving Abandonment, 139 FERC ¶ 61,161 (May 29, 2012), P 6 (emphasis added).
[43] Id. at P 17 (emphasis added). In this Certificate, FERC does note in passing that "the project will help alleviate pipeline constraints in the region by increasing pipeline capacity to the high-demand markets in the northeast." Id. at P 15. But this finding does not appear to have been a basis for FERC's finding of need for NEUP.

portion) was the market need of Chesapeake and Statoil – not the reliability need of Tennessee Gas; consequently, the activity reviewed by DEP did not qualify as a "routine upgrade" under the general principles from the 2013 case of *Highlands Applicability*. Accordingly, DEP's April 25, 2012 HAD for NEUP is not a valid precedent for the East 300 Upgrade Project currently at issue. In addition, neither DEP's HADs regarding 300 Line Project or NEUP have been upheld by New Jersey courts – unlike DEP's HAD regarding JCP&L's substation; thus, DEP's HADs regarding 300 Line Project and NEUP should be accorded less deference by this Court than DEP's HAD regarding JCP&L's substation.

E. Interpreting Exemption #11 as Only Allowing for "Routine Upgrades" Makes Sense in Light of the Highlands Act's Overall Statutory Scheme

(Aa0001)

To the extent that this Court – notwithstanding Environmental Appellants' arguments above regarding the specific language of Exemption #11 – still finds that Exemption #11 is open to "more than one interpretation, [then] the broader legislative scheme, [the Highlands Act's] history, and relevant sponsor statements may also inform [this] Court's interpretation in light of the statute's overall policy and purpose."[44] Here, it is clear from other sections of the Highlands Act that its "overall policy and purpose" is to set a high bar to any development in the Preservation Area

[44] Frugis v. Bracigliano, 177 N.J. 250, 280 (2003) (emphasis added).

in order to protect this environment. For example, under N.J.S.A. § 13:20-2 ("Findings, declarations relative to the "Highlands Water Protection and Planning Act"), "The Legislature…f[ound] and declare[d]…that the State should take action to delineate within the New Jersey Highlands a preservation area of exceptional natural resource value that includes watershed protection and other environmentally sensitive lands where **stringent** protection policies should be implemented."[45] N.J.S.A. § 13:20-2 also refers to "the adoption by the Department of Environmental Protection of **stringent** standards governing major development in the Highlands preservation area."[46] And N.J.S.A. 13:20-10 ("Goals of regional master plan") lists one of the "[t]he goals of the regional master plan with respect to the preservation area" as "prohibit[ing] or limit[ing] to the **maximum** extent possible construction or development which is incompatible with preservation of this unique area."[47]

In light of the "overall policy and purpose" of the Highlands Act to establish "stringent protection" and "stringent standards" as so to prohibit or limit construction or development "to the maximum extent possible," interpreting Exemption #11 as only allowing for "routine upgrades" would set the bar for construction or development appropriately high. In contrast, interpreting

[45] N.J.S.A. § 13:20-2 (emphasis added).
[46] Id. (emphasis added).
[47] N.J.S.A. 13:20-10 (emphasis added).

Exemption #11 as allowing for simply "upgrades" would set the bar inappropriately low. This lower bar would, in effect, allow for what are truly "expansions" of an existing public utility system and, consequently, the presumably greater negative environmental impacts than "routine upgrades." Thus, this lower bar would open the door too wide to construction or development in the Highlands preservation area.

In fact, in their joint public comments, Food & Water Watch, the NJ Sierra Club, and the NJ Highlands Coalition submitted material to DEP based on a past precedent that perfectly illustrates why interpreting Exemption #11 as allowing for simply "upgrades" would set the bar too low for construction or development and, thus, risk significant environmental damage. Referring to Tennessee Gas's NEUP – for which (as established above) Tennessee Gas qualified for Exemption #11 in 2012 based on the Project being simply an "upgrade" – these joint comments note that "[i]n 2013, [Tennessee Gas] expanded its pipeline system through North Jersey which caused serious and lasting damage to the Highlands region. Mudslides and siltation occurred in both Lake Lookover and Bearfort Waters, and [Tennessee Gas] failed in their responsibility to reforest areas they clear cut." Aa0339. (emphasis added). Had DEP properly interpreted Exemption #11 as only allowing for "routine upgrades," Tennessee Gas's 300 Line Project would have failed to pass this higher bar and the Project's

consequent environmental damage would have been prevented, in keeping with the "overall policy and purpose" of the Highlands Act.

F. The Proposed Construction, Operation, and Maintenance of New Compressor Station 327 is not Consistent with the Goals and Purposes of the Highlands Act
(Aa0001)

As noted above, the second component of DEP's June 23, 2021 HAD is determining whether the Project "is consistent with the goals and purposes of the Highlands Act."[48] And this second component is a question of fact and thus subject to the "arbitrary and capricious" standard of review. Here, the extent of DEP's analysis appears to just be the following two points:

- Point #1: "After a careful review of the information submitted, it has been determined that the Project described above qualifies for Exemption No. 11 for 'routine maintenance and operations, rehabilitation, preservation, reconstruction, repair or upgrade of public utility lines, rights-of-way, or systems by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act.'" Aa0001 (emphasis added)

- Point #2: "Additionally, the Department received positive comments from the Highlands Council on October 16, 2020. Therefore, the proposed Project is deemed exempt from the provisions of the Highlands Rules, subject to the following limitation(s)…" Aa0002 (emphasis added)

Regarding Point #2, DEP is in no way obligated to defer to the Highlands Council's comments (in which it did "find that the

[48] N.J.A.C. 7:38-2.3(a)(11).

project is consistent with the goals of the Highlands Act." Aa0330. In the 2013 case of *Highlands Applicability*, the Appellate Division pointed out that "DEP is charged with **the responsibility** to 'formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State.'"[49] Therefore, it is DEP – not the Highlands Council – that makes the final determination of whether the Project is consistent with the goals and purposes of the Highlands Act. Thus, the Highlands Council's comments were only one factor for DEP to weigh in making its own final determination regarding the second component of the agency's June 23, 2021 HAD.

Regarding Point #1, DEP's reference to "the information submitted" makes no mention of the hundreds of public comments that the agency received regarding Tennessee Gas's Project. And these public comments included statements arguing that the Project was not consistent with the goals and purposes of the Highlands Act. For example, one of the goals of the Highlands Act is "the protection of the water…of the New Jersey Highlands."[50] But in their joint public comments, Food & Water Watch, the NJ Sierra Club, and the NJ Highlands Coalition argued that "The proposal which includes a 19,000 hp polluting compressor as well as backup

[49] *Highlands Applicability*, 433 N.J. Super. at 237-238 (App. Div. 2013) (quoting N.J.S.A. 13:1D-9) (emphasis added).
[50] N.J.S.A. § 13:20-2.

generators, and hazardous pipeline liquids storage tanks, is out of compliance with the goals of the Highlands Act….Hazardous liquids stored on site…have the potential to leak into the groundwater and make their way into Hewitt Brook and the Monksville Reservoir." Aa0339. In another example, Kevin Bannon ("an individual associated with the Sierra Club") argued that "[t]he site of the new compressor station is…in the middle of the Highlands Preserve right next to a C-1 stream and above the Wanaque and Monksville reservoir. The project will impact environmentally sensitive areas in the Highlands and the drinking water for over 3 million people." Aa1061. Another natural resource that the Highlands Act indicates should be protected is "clean air."[51] But in their joint public comments, Food & Water Watch, the NJ Sierra Club, and the NJ Highlands Coalition argued that "During planned and unplanned blowdowns as well as accidents and leaks, the compressor will release methane and VOCs including chromium, benzene, radon, NOx into the air." Aa0339.

In its June 23, 2021 HAD, DEP appears to have either (1) not factored into its decision these public comments at all or (2) did so, but failed to provide its reasoning for rejecting them in an agency response to comments. Under either scenario, DEP's decision

[51] Id.

was "arbitrary and capricious" as it was not the product of reasoned decision making.

III. DEP'S DETERMINATION THAT THE PROPOSED PROJECT IS CONSISTENT WITH THE WQMP IS ARBITRARY AND CAPRICIOUS BECAUSE IT DID NOT VIEW THE TOTALITY OF THE PROPOSED PROJECT.

(Aa0001)

DEP's HAD is premised on the erroneous determination that "the proposed Project is 'Consistent' with the WQMP and is in accordance with the WQMP rules." Aa0002. But the DEP failed to account for the totality of the proposed project, including all the impacts (including cumulative impacts) from the proposed construction and use of the new compressor station, office building, and appurtenances. The only factor DEP weighed in making this fundamental consistency determination was the anticipated gallons of water used and flushed per day. Aa0002. The DEP's consistency determination myopically ignored the total impacts that should be anticipated from the proposed project, including the deforestation and addition of impervious surfaces that will be associated with the construction and use of the new compressor station and appurtenances - all beyond just the number of gallons of water that might enter the septic system itself. Critically, the DEP ignored the impacts to water resources that will likely result from the increased use of fossil fuels associated with this project, including climate change impacts and air pollution that will in turn become or cause water pollution.

The DEP's enabling statute, N.J.S.A. 13:1D-1 to -137, authorizes the agency to "formulate comprehensive policies for the conservation of the natural resources of the State [and] the promotion of environmental protection . . . ."[52] With specific regard to water resources, the Water Quality Planning Act (WQPA), N.J.S.A. 58:11A-1 to -16, provides for the restoration and maintenance of water quality in this State, including a planning process to control and maintain water quality.[53] In re Adoption of N.J.A.C. 7:15-5.24(b), the Appellate Division explained as follows:

> The Federal Act 'requires identification of areas with substantial water quality control problems and initiation of areawide Waste Treatment Management plans.' [internal citations omitted]. Accordingly, towards the goal of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the waters of the State[,]" N.J.S.A. 58:11A-2(b), the WQPA mandates the creation of wastewater treatment management planning areas and authorizes the DEP to set water quality standards, implement areawide waste treatment management plans within each of the planning areas, and adopt rules and regulations to effectuate the objectives of the WQPA. N.J.S.A. 58:11A-5, -7 and -9; see also Toll Bros., Inc. v. N.J., Dep't of Envtl. Prot., 242 N.J. Super. 519, 526, 577 A.2d 845 (App.Div.1990).[54]

The DEP's regulations that implement the WQPA mandate that:

> All projects and activities affecting water quality shall be developed and conducted in a manner that is consistent with this chapter and adopted areawide plans. The Department shall not issue a permit or approval that

[52] N.J.S.A. 13:1D-9.
[53] N.J.S.A. 58:11A-2. See In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 558 (App. Div. 2011).
[54] See In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 559 (App. Div. 2011).

> conflicts with an adopted areawide plan or this chapter.[55]

This mandatory prohibition expressed by the DEP in its implementing regulations means that a consistency determination under the relevant WQMP is a precondition or prerequisite determination that must be made by the DEP before any other associated permit or approval can be issued that could have an impact on water quality. Therefore, if anything in the proposed HAD exemption was inconsistent with the adopted areawide plan then the DEP and this Court would be constrained to stop its analysis right there and deny the proposed exemption for that reason alone. The requisite consistency determination is not meant to be an afterthought, or limited in scope, it must include all of the foreseeable and potential impacts from the proposed activity.

The scope of the requisite WQMP consistency determination in this case is set forth and envisioned by the DEP's regulation that specifically implements the WQPA, as follows:

> For projects or activities in the Highlands preservation area, a complete application for a consistency determination review shall include **all** relevant information identified pursuant to N.J.A.C. 7:38-9.2 or 9.5. The Department shall perform consistency determination reviews for projects and activities in the Highlands preservation area in accordance with N.J.A.C. 7:38-11.2, 11.3, and 11.7.[56]

[55] N.J.A.C. § 7:15-3.2. (emphasis added)
[56] N.J.A.C. 7:15-3.2(g) (emphasis added)

Clearly, the DEP is supposed to engage in a comprehensive analysis and is not just limited to basing its consistency decision on the gallons per day used and flushed into the proposed septic system. For example, the DEP's regulations that implement the Highlands Act, at N.J.A.C. 7:38-9.2, requires the applicant for a HAD (in this case the Respondent Tennessee Gas) to submit a plethora of expertly detailed information, including all of the following:

> A folded site plan, certified by a licensed New Jersey Professional Engineer clearly showing:
>
> i. **All proposed site improvements;**
>
> ii. **The total area of proposed disturbance** including the supporting calculation;
>
> iii. **The total area of existing impervious surface at the site and total area of additional impervious surface to be added to the site** as a result of the project or activity including all supporting calculations;
>
> iv. **A delineation of all forest on the site. If the proposed activity will disturb any forest area, the area calculations for the proposed disturbed portions of forest;** and[57]

It should be apparent that the DEP's WQMP consistency determination in this case does not include a review of the totality of the impacts. In fact, the DEP's HAD stated that the basis for its WQMP consistency determination was only that the "Proposed wastewater is less than 2000 gallons per day and water use of 650 gallons per day." Aa0002. The DEP did not make a clear record

[57] N.J.A.C. 7:38-9.2 (b)(4)

which proves to this Court that it relied on any other relevant information that it was required to consider, such as the amount of deforestation and additional impervious surface that would be necessary for the proposed project. Critically, the DEP ignored the impacts to water resources that will result from the increased use of fossil fuels associated with this project, including climate change impacts. Therefore, the HAD is premised on an insufficient WQMP consistency determination, which is a prerequisite under the WQPA, and the HAD is fatally flawed.

The DEP asserts that it reviewed the "Project for consistency with the WQMP rules and the provisions and recommendations of the Northeast WQMP." Aa0002. However, this is misleading because there are no such things as "the provisions and recommendations of the Northeast WQMP." The Northeast WQMP is not like a municipal master plan that can be reviewed as a cohesive document. The Northeast WQMP consists only of a series of unconnected documents that designate sewer service areas and, therefore, the DEP obviously didn't consider the impact to the water sources from the construction of this proposed project (in its totality).[58]

A review of the October 16, 2020 letter from Highlands Council to the DEP reveals some but not all of the considerations the DEP was required to take into account when it made the requisite WQMP

[58] See DEP, "Water Quality Management Planning Program," "Northeast," *available at* https://www.nj.gov/dep/wqmp/wmpadopted.html#northeast.

consistency determination. Aa0328. For example, the Highlands Council concluded that "The efforts to avoid, minimize and mitigate for resource impacts are sufficient to find that the project is consistent with the goals of the Highlands Act." Aa0330. However, the DEP failed to make the same considerations with regard to the WQMP.

CONCLUSION

For the reasons set forth above, DEP's June 23, 2021 Decision – which consists of both its Highlands Applicability Determination ("HAD") and its Water Quality Management Plan Consistency Determination ("WQMP CD") – constituted both an error of law and errors regarding the facts. Consequently, DEP's June 23, 2021 Decision must be invalidated.

Respectfully submitted,

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Dated: September 2, 2022

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003616-20T1

IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICIBILITY DETERMINATION, PROGRAM INTEREST No.:1615-17-0004.2 (ADP200001)	:	CIVIL ACTION ON APPEAL FROM A FINAL DECISION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF AND APPENDIX OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date Submitted: October 31, 2022

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PRELIMINARY STATEMENT

The Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 to 13:20-35 (the Highlands Act), directs the Department of Environmental Protection (DEP) to regulate development in the Highlands Region. N.J.S.A. 13:20-2. Certain activities are exempt from the Act. N.J.S.A. 13:20-28. Exemption #11, at issue here, exempts "the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility" that is "consistent with the goals and purposes of" the Highlands Act. N.J.S.A. 13:20-28(a)(11).

On June 23, 2021, DEP issued Tennessee Gas Pipeline, LLC (TGP) a Highlands Applicability Decision (HAD), which determined TGP's proposed additional compressor station along TGP's existing natural gas pipeline system in West Milford Township, Passaic County, is exempt from the Highlands Act. DEP reasonably found TGP to be a public utility upgrading its utility system. The compressor station will be in a former quarry with minimal impacts to natural resources, including wastewater. Appellants Food & Water Watch, the Highlands Coalition, and the Sierra Club appealed the HAD, relying on factual misstatements and novel legal theories that ignore tenets of statutory interpretation and find no support in DEP's regulations. The substantial

evidence in the record supports DEP's decision, which is entitled to deference and should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

a. The Highlands Act and DEP's Permitting Regulations.

In 2004, the Legislature enacted the Highlands Act, N.J.S.A. 13:20-1 to 13:20-35, recognizing that the Highlands Region is an "essential source of drinking water, providing clean and plentiful drinking water for one-half of the State's population" that "contains other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, includes many sites of historic significance, and provides abundant recreational opportunities." N.J.S.A. 13:20-2. The Act establishes a "preservation area" within the Highlands Region, which has "exceptional natural resource value" subject to stringent water and natural resource protection standards, policies, planning, and regulation. Ibid. Property in the preservation area must adhere to a regional master plan (RMP) created by the New Jersey Highlands Water Protection and Planning Council (Highlands Council) that embodies these values. N.J.S.A. 13:20-10; N.J.S.A. 13:20-14. The Act also

[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

delegates to DEP the responsibility to implement a Highlands permitting review program. N.J.S.A. 13:20-3; -31 to -34. Accordingly, DEP has promulgated rules effectuating the permitting program at N.J.A.C. 7:38-1.1 through -14.2, implemented by DEP's Division of Land Resource Protection (formerly the Division of Land Use Regulation). N.J.S.A. 13:20-32.

The Highlands Act exempts certain activities from requiring a permit, subject to DEP's exemption determination documented by a HAD. N.J.S.A. 13:20-28(a); N.J.A.C. 7:38-2.3(a). Even if a proposed activity is exempt, the applicant must still obtain any and all other applicable approvals from DEP, the State, the federal government, or local entities before performing the activity. N.J.A.C. 7:38-2.3(c). If a proposed activity is not exempt from the Highlands Act and constitutes "major development" in the preservation area, it requires a "Highlands preservation area approval" from DEP before construction activities commence. N.J.S.A. 13:20-31 through -34; N.J.A.C. 7:38-2.2. Regardless of an activity's Highlands Act exemption status, DEP must also find that the activity is consistent with the applicable areawide Water Quality Management Plan (WQMP). N.J.A.C. 7:38-2.4(a) and (e).

At issue here is DEP's interpretation and application of Exemption #11, which exempts from the Highlands Act activities involving "the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair,

or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act[.]" N.J.S.A. 13:20-28(a)(11); N.J.A.C. 7:38-2.3(a)(11).

b. <u>TGP Seeks a Highlands Act Exemption for Its Project.</u>

TGP is a natural gas company "primarily engaged in the business of transporting natural gas in interstate commerce[.]" (Aa52).[2] It "owns and operates an interstate natural gas transmission system" throughout the southern and eastern United States. (Aa53).[3] This system runs from "Texas and Louisiana, and the Gulf of Mexico, through the states of Texas, Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New York, New Jersey, Massachusetts, New Hampshire, Rhode Island, and Connecticut." (Aa53). The "300 Line" is one section of TGP's existing system, consisting of approximately 128 miles of underground pipeline and above-ground appurtenant facilities in Pennsylvania and New Jersey.

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[2] "Ab" refers to Appellants' September 2, 2022 amended merits brief, and "Aa" its appendix. "Ra" refers to DEP's appendix attached to this brief.

[3] Owing to its status as a "natural gas company," the Federal Energy Regulatory Commission (FERC) regulates TGP's transportation and sale of natural gas in interstate commerce. 15 U.S.C. § 717, <u>et seq.</u> FERC's jurisdiction and its decisions are distinct from DEP's review of TGP's Project.

(Aa78). TGP's existing right-of-way for its 300 Line passes through West Milford Township, Passaic County. (Aa55).

Previously, DEP determined that two of TGP's prior 300 Line projects in the Highlands Region preservation area were exempt from the Highlands Act through Exemption #1A (Aa224; Aa290). Both projects were considered "upgrades" to TGP's natural gas pipeline "system." (Aa78). On February 11, 2010, DEP found that TGP's project to add approximately 350,000 dekatherms per day of natural gas capacity by constructing 10.94 miles of 30-inch diameter gas pipeline adjacent to TGP's existing 24-inch pipeline and other above-ground appurtenances was exempt. (Aa224-237). DEP's April 25, 2012 HAD exempted TGP's proposal to construct another 7.6 mile segment of 30-inch diameter gas pipeline on the 300 Line with above-ground appurtenances that added 636,000 dekatherms per day of TGP's capacity and impacted over 100 acres of land. (Aa279; Aa290-300).

To deliver additional natural gas to its customers, TGP now proposes to add new compressor units at two existing compressor stations along the 300 Line in New Jersey and Pennsylvania and construct a new natural gas compression station, identified as "CS 327," in West Milford Township. (Aa53-54). West Milford Township is a municipality entirely within the Highlands Region Preservation Area and only CS 327 is at issue here. N.J.S.A. 13:20-7(a) and (b).

(Aa52). CS 327 would be located at Block 4601, Lot 17 commonly known as 960 Burnt Meadow Road (the Property), for which TGP was a contract purchaser at the time of application. (Aa29; Aa34). The Property is forty-seven acres and historically disturbed as it was operated as a former gravel quarry, then a temporary pipeyard, and most recently a recycling storage facility. (Aa29; Aa37-39; Aa52; Aa55; Aa64; Aa75; Aa197). The compressor station, which "act[s] as the 'engine[]' that power[s] an interstate natural gas pipeline system as each station compresses the gas to move it through the pipeline[,]" (Aa77), would consist of a new electric motor driven compressor unit, auxiliary equipment, and an office building to operate the station (the Project). (Aa54-55). TGP anticipates its project will add 115,000 dekatherms per day to its system capacity. (Aa54).

On August 31, 2020, TGP applied for a HAD, asking DEP to find TGP's Project exempt from the Highlands Act under Exemption #11. (Aa3; Aa21; Aa52). TGP's application explained why the Project is exempt from the Highlands Act. (Aa77-84). TGP described itself as a "public utility" as defined in New Jersey's Department of Public Utilities Act of 1948 at N.J.S.A. 48:2-13(a). (Aa78). It also explained that its Project is an "upgrade" of its existing pipeline "system[,]" the 300 Line. (Aa78-80). TGP submitted substantial information about Highlands open waters and other water resources, steep

slopes, rare, threatened, and endangered plant and animal species, forests, unique and irreplaceable land types, and historic and archaeological areas on the Property to demonstrate consistency with the goals and purposes of the Highlands Act. (Aa64-77; Aa79-84). TGP also submitted calculations of its estimated wastewater flow to illustrate the Project's consistency with the areawide WQMP. (Aa31).

c. DEP Reviews TGP's HAD Application and Determines the Project is Exempt from the Highlands Act.

On September 23, 2020, DEP published its receipt of TGP's HAD application in the DEP Bulletin, a bimonthly list of construction permit applications recently filed with or acted upon by DEP, initiating the start of a thirty-day public comment period. N.J.A.C. 7:38-11.4. (Aa3-5). DEP issued notice again on February 4, 2021 for a second public comment period. (Aa10; Aa336). On February 25, 2021, DEP informed TGP that, due to a technological issue, many public comments were unintentionally deleted from its servers. (Aa336). As a result, DEP determined it would hold an additional thirty-day public comment period, lasting until April 2, 2021. (Aa14; Aa331-335).

On October 16, 2020, the Highlands Council submitted a letter to DEP reviewing the HAD application and the Project's potential natural resource impacts. (Aa328-330). To ensure it "give[s] great consideration and weight" to the Council's RMP, DEP consults with the Highlands Council about Highlands

applications such as TGP's. N.J.A.C. 7:38-1.1(i). The Highlands Council noted the Property is historically disturbed, characterized by invasive vegetation, isolated patches of forest, non-functional open water buffers and riparian areas, and disconnected and non-functional critical wildlife habitat. (Aa330). It explained that approximately 285 feet of existing gravel access road was within an open water buffer and riparian area and has been in its present condition since the 1960s when it served the Property's former quarry. (Aa329). The Council also observed that the Property contained five areas of trees, only one of which qualifies as a forest, a regulated Highlands resource. (Aa329). In this forest, TGP proposes to remove twenty-three trees to install a security fence, which would impact .64% of mapped critical wildlife habitat on the Property. (Aa330).

Based on these facts, the Council found that the Project avoided and minimized impacts to Highlands resources. (Aa330). The Council noted that the tree removal will have a "de minimis effect" on Highlands resources, observing that TGP proposed a planting plan to mitigate for the trees removed, and construction would be subject to seasonal timing restrictions to minimize impacts on critical wildlife. (Aa330). The Council also recognized TGP's use of green infrastructure for stormwater management. (Aa330). In sum, the Council found that TGP's Project is consistent with the goals of the Highlands

Act and the Council would not object to DEP's issuance of an Exemption #11 for the Project. (Aa330).

Appellants submitted public comments on March 12, 2021, (Aa341-344), and April 20, 2021, (Aa337-340), to DEP. On April 15, 2021, DEP met with Appellants to answer questions about TGP's application. (Aa337). Appellants argued that the Project is not exempt from the Highlands Act, alleging TGP is not a public utility project serving the public interest for New Jersey residents and the Project is thus not a routine maintenance or update, and that DEP must evaluate cumulative impacts on the Highlands Region and protect it from expansion. (Aa338-340). Appellant Sierra Club and its members urged DEP to analyze alleged impacts to stormwater, C1 streams, air quality, and threatened and endangered species. (Aa341-344; Aa1061-1322).

DEP received numerous other public comments opposing the Project. (Aa345-Aa1322). In all, DEP considered over 800 comments, the vast majority of which were "form" comments containing the same general objections that the Project will cause "negative impacts on our water supply, public health, safety, and our environment." (Aa345-1060).

DEP provided the comments to TGP and considered additional information from TGP in response before making the HAD decision. On May 20, 2021, TGP directly responded to Appellants' comments, expanding on its

status as a "public utility" and explaining that the Project is an "upgrade" of a "system." (Aa1327-1330). TGP also highlighted that the Highlands Council found the Project would cause minimal environmental impacts, and FERC considered the environmental impacts as negligible or minor. (Aa1329-1330).

On June 23, 2021, considering TGP's application and supplementation, the Highlands Council's letter, and the public comments received, DEP issued the HAD, determining that the Project qualified for Exemption #11 and was consistent with the areawide WQMP. (Aa1). The HAD explained that TGP met the Exemption #11 regulation and noted that the Highlands Council concurred with its decision. (Aa1-2). It also found that the Project is consistent with the Northeast WQMP because the Project's proposed wastewater output will be less than 2,000 gallons per day and will use less than 650 gallons of water per day. (Aa2). On July 7, 2021, DEP published notice of its decision in the DEP Bulletin. (Aa18).

d. Appellants' Appeal.

On August 13, 2021, Appellants appealed the HAD but did not identify TGP as a party. Accordingly, on August 30, 2021, TGP moved to intervene of right, which Appellants opposed while DEP did not. On September 28, 2021, the court denied TGP's intervention. On October 4, 2021, TGP moved for reconsideration or, in the alternative, permissive intervention. Again,

Appellants opposed. On October 25, 2021, the court denied both motions. TGP moved for leave to appeal the orders to the Supreme Court, which was granted and heard on March 29, 2022. On April 11, 2022, the Supreme Court remanded the case to the Appellate Division, ordering Appellants to add TGP as an "interested party."

On June 16, 2022, DEP filed the Statement of Items Comprising the Record on Appeal. On August 31, 2022, Appellants filed their brief and appendix. Motion practice followed concerning Respondents' brief deadlines, as Appellants declined to consent to any extensions and instead filed a motion to accelerate the appeal. The court granted both the extension and acceleration motions.

ARGUMENT

DEP APPROPRIATELY ISSUED THE HAD DETERMINING THAT TGP'S PROJECT IS EXEMPT FROM THE HIGHLANDS ACT, AND ITS DECISION IS ENTITLED TO DEFERENCE.

The DEP's decision to issue the HAD to TGP is owed deference. The court's review of agency decisions is limited. Capital Health Sys., Inc. v. N.J. Dep't of Banking & Ins., 445 N.J. Super. 522, 535 (App. Div. 2016) (citing In re Stallworth, 208 N.J. 182, 194 (2011)); In re N.J. Dep't of Env't Prot. Conditional Highlands Applicability Determination, Program Interest No.

435434, 433 N.J. Super. 223, 235 (App. Div. 2013). A final agency decision is entitled to "substantial deference" and should not be overturned unless "(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record." Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007) (citing In re Taylor, 158 N.J. 644, 656 (1999)); N.J. Highlands Coal. v. N.J. Dep't of Env't Prot., 456 N.J. Super. 590, 602 (App. Div. 2017). The burden of proving arbitrary, capricious or unreasonable action is upon the challenger. Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 422 N.J. Super. 227, 234 (App. Div. 2011).

The court defers to an agency's interpretation of rules within its sphere of authority, unless the interpretation is "plainly unreasonable." In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016). An agency's "interpretation of statutes and regulations within its implementing and enforcing responsibility" is entitled to deference. Bueno, 422 N.J. Super at 234 (internal punctuation and citation omitted); see also Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985) ("[T]he grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals." (internal punctuation and citation omitted)).

Substantial deference must be extended to an agency's interpretation and application of its own regulations, particularly on technical matters within the agency's special expertise. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004). Here, DEP is the agency "charged with the responsibility to 'formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State.'" Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. at 237 (quoting N.J.S.A. 13:1D-9). Specifically, the Legislature directed DEP to "increase[] standards more protective of the environment . . . for development in the preservation area of the New Jersey Highlands" pursuant to duly promulgated rules and regulations, at N.J.A.C. 7:38. N.J.S.A. 13:20-2.

In the HAD, DEP reasonably determined that TGP's Project is exempt from the Highlands Act. Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. at 238. DEP's wastewater disposal systems review is also entitled to deference. Dowel Assocs. v. Harmony Twp. Land Use Bd., 403 N.J. Super. 1, 31 (App. Div. 2008). Thus, DEP's decision is owed substantial deference and should be affirmed.

A. DEP Properly Issued the HAD, Finding Exemption #11 Applicable to TGP's Project and that the Project is Consistent with the Goals and Purposes of the Highlands Act. (Responds To Appellants' Brief Point II A-F).

Exemption #11 applies to TGP's Project. DEP determined that the Project is for "the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility" and that the Project "is consistent with the goals and purposes of [the Highlands Act.]" N.J.S.A. 13:20-28(a)(11); N.J.A.C. 7:38-2.3(a)(11). (Aa1). Appellants' contentions that TGP is not performing an exempt activity and that the activity is not consistent with the goals and purposes of the Highlands Act are not supported by the relevant statutory language or the record.[4]

[4] Appellants do not challenge that TGP is a public utility for purposes of Exemption #11. (Ab12). The "public utility" definition is set forth in the "Department of Public Utilities Act of 1948" at N.J.S.A. 48:2-13. N.J.S.A. 13:20-3. There, "public utility" is defined as every "association, corporation or joint stock company . . . that now or hereafter may own, operate, manage or control within this State any . . . pipeline . . . system, plant or equipment for public use[.]" N.J.S.A. 48:2-13. TGP operates a pipeline system for public use and is thus a "public utility." DEP has consistently expressed in rulemaking that activities by privately-owned utility companies that serve to deliver or provide gas to public systems are eligible for Exemption #11. 38 N.J.R. 5011(a) at Response to comment 296 (Dec. 4, 2006).

1. DEP properly found that Exemption #11 applies to TGP's Project and accords with the statute and case law. (Responds to Appellants' Brief Point II A, B, C, D, and E).

After considering all documents within the record, DEP found that TGP's Project is an exempted activity. (Aa1; Aa21; Aa26). It is reasonably characterized as an upgrade of a nationwide pipeline system, a small part of which is located in the Highlands Region. (Aa53; Aa55; Aa78). TGP's Project proposes to construct a compressor station and associated infrastructure on the preexisting 300 Line to transport additional natural gas to its customers. (Aa55).

As described above, utility servicers use compressor stations to move natural gas through a pipeline system. (Aa77). Stated differently, "[a] compressor station 'boosts the system pressure' along pipelines in order to 'maintain required flow rates.'" Myersville Citizens for a Rural Cmty., Inc. v. Fed. Energy Regulatory Comm'n, 783 F.3d 1301, 1312 (D.C. Cir. 2015) (quoting Dominion Transmission, Inc. v. Summers, 723 F.3d 238 (D.C. Cir. 2013)). By necessity, a compressor station is part of a broader – usually preexisting – natural gas transmission system. A stand-alone compressor station would be useless and have no function without a pipeline system to service. Exemption #11 of the Highlands Act states that an "upgrade" of a public utility "line, rights-of-way, or system[]" is an exempt activity. N.J.S.A. 13:20-28(a)(11); N.J.A.C. 7:38-2.3(a)(11). DEP thus fairly determined, consistent

with its prior decisions for projects on TGP's 300 Line, (Aa78), that the Project to construct a compressor station to boost pressure on TGP's existing 300 Line is an "upgrade" of TGP's "line, rights-of-way, or systems." (Aa1).

DEP's exemption determination here follows longstanding agency practice on other utility upgrades. Ever since the exemption was codified in DEP's rules, DEP has consistently interpreted the word "routine" in Exemption #11 as only modifying "maintenance and operations." (Ab15). See 38 N.J.R. 5011(a) at Response to comment 3 and 4 (Dec. 4, 2006). DEP's prior decisions demonstrate this understanding. For instance, DEP determined that TGP's prior projects adding infrastructure to its pre-existing pipeline system were "upgrades" that were exempt from the Highlands Act through Exemption #11. (Aa78; Aa224-237; Aa290-300). Notably, these two linear upgrades to TGP's system were much larger in scope, with TGP's first upgrade adding 350,000 dekatherms per day to TGP's natural gas shipping capacity and TGP's second upgrade project adding 636,000 dekatherms per day and affecting over 100 acres of land with nearly sixteen acres of permanent impacts. (Aa229; Aa279; Aa291). By comparison, the Project minimally affects only forty-seven already disturbed acres and will add 115,000 dekatherms/day to TGP's capacity. (Aa37-39; Aa54; Aa197). Applying the same regulatory interpretation, DEP approved an Exemption #11 for a system "upgrade" consisting of a substation along Jersey

Central Power & Light's (JCP&L) right-of-way for electrical transmission lines, which this court affirmed. 433 N.J. Super. at 227-28. TGP's proposed CS 327 Project fits snugly within DEP's long-standing and confirmed system upgrade interpretation, and thus, DEP reasonably determined it is exempt from the Highlands Act.

Appellants argue that the Legislature did not intend for all upgrades of a pipeline system to be exempt from the Act. Rather, they interpret Exemption #11 to only apply to "routine" upgrades. (Ab13-19; Ab27-30). Their arguments are unavailing.

First, Appellants claim that the word "routine" in Exemption #11 must apply to each and every word in the list of exempt activities, and not just the words "maintenance and operations" that directly follow it. (Ab13-15). But a disjunctive sentence utilizing "or" as in this statutory provision signifies that each phrase is "distinct and separate from each other." State v. N.T., 461 N.J. Super. 566, 571 (App. Div. 2019) (quoting State v. Frank, 445 N.J. Super. 98, 106 (App. Div. 2016)). Each clause stands on its own as a separate, potentially exempt activity. "[R]outine maintenance and operations" is set off from the rest of the list by a comma. N.J.S.A. 13:20-28(a)(11). By a plain reading of the statute, then, "routine" only modifies "maintenance and operations."

Nonetheless, Appellants argue that DEP's interpretation only makes sense if "maintenance and operations" were separated from the rest of the list by a semicolon rather than a comma. (Ab14-15). Indeed, the Legislature could have drafted the statute in that way, but it did not. See Morella v. Grand Union/New Jersey Self-Insurers Guar. Ass'n, 391 N.J. Super. 231, 241 (App. Div. 2007) (interpreting that a statute "with a 'semicolon' after the first antecedent phrase, and a 'comma' after the second antecedent phrase and before the modifying phrase" only applies the modifying phrase to the second antecedent phrase.).

Nor did it need to. The comma functions the same as a semicolon would. Elliot Coal Mining Co. v. Dir., Office of Workers' Comp. Programs, 17 F.3d 616, 630 (3d Cir. 1994) ("Under the normal rules of English punctuation for words in a series, it is the absence of a comma or other punctuation before the coordinate conjunction 'or' that would indicate it and its modifier, the limiting adjective clause, are to be treated separately rather than as part of the whole series."). By using a conjunctive word to pair "maintenance" and "operations," the Legislature signaled that "routine" applies only to those two activities, and not the rest of the disjunctive list. Equal Emp't Opportunity Comm'n v. Thrivent Fin. for Lutherans, 700 F.3d 1044, 1050 (7th Cir. 2012) (recognizing that "the use of the conjunction 'and' indicates that the adjective" modifies both subsequent nouns.); cf. Marigrove, Inc. v. Pinto (In re Aereas), 644 F. App'x

959, 962 (11th Cir. 2016) (stating that an adjective at the beginning of a series applies to all items within the list.). Appellants' statutory interpretation would render the word "and" in "maintenance and operations" superfluous.

Appellants' interpretation leads to absurd applications of the exemption as well. "Routine" is not defined by the Highlands Act but generally means "of a commonplace or repetitious character" or "of, relating to, or being in accordance with established procedure." Merriam-Webster.com Dictionary, www.merriam-webster.com/dictionary/routine (last visited Oct. 31, 2022). While Appellants argue extensively over what a "routine upgrade" could be under DEP's rules and dicta in case law (Ab17-19), they do not explain what the Legislature would have meant by applying "routine" to other activities in the statutory list, thereby creating a "routine rehabilitation," a "routine preservation," or a "routine reconstruction." "Routine" cannot apply to these activities and cannot be what the Legislature sought DEP to exempt. Such "absurd or unreasonable results are of course to be avoided." Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n, 267 N.J. Super. 361, 393 (App. Div. 1993) (quoting State v. Gill, 47 N.J. 441, 444 (1966)).

Second, Appellants argue that an exemption for "routine upgrades" rather than all "upgrades" fits with the Highlands Act's statutory scheme, as the narrower "routine upgrades" would set a higher bar for development. (Ab27-

29). They suggest that this policy would align with DEP's charge to "prohibit or limit to the maximum extent possible construction or development [in the preservation area] which is incompatible with preservation of this unique area." N.J.S.A. 13:20-10(b). However, they ignore that the Project proposes a compressor station in a former, historic quarry. (Aa52).

This activity is not only permissible in the Highlands RMP, but encouraged, exhorting developers "to take advantage of the opportunities associated with development and/or redevelopment of" grayfields." (Ra1; Ra3).[5] Grayfields are "sites usually containing industrial or commercial facilities exhibiting signs of abandonment or underutilization in areas with existing infrastructure." (Ra1; Ra3). Accordingly, the RMP promotes "compatible growth opportunities, which "include in-fill development, adaptive re-use, [and] redevelopment. . . in existing developed areas," and seeks to identify "brownfields, grayfields, and underutilized properties" with redevelopment potential "compatible with resource protection and smart growth principles." (Ra2). By choosing the former quarry grayfield for CS 327, TGP's Project is encouraged by the RMP and in line with the Highlands Act. In

[5] DEP asks the court to take judicial notice of references to the Council's RMP. The RMP is judicially noticeable as determinations of a government agency or subdivision. N.J.R.E. 201(a); N.J.R.E. 202(b); Manata v. Pereira, 436 N.J. Super. 330, 337 n.3 (App. Div. 2014).

addition, as explained below, the Project's location at the Property impacts minimal natural resources.

Appellants also suggest that by exempting this Project and not holding applicants to the stricter "routine upgrade" standard, DEP is not comporting with its directive to "prohibit or limit to the maximum extent possible construction or development which is incompatible with preservation of this unique area." N.J.S.A. 13:20-10(b)(9). Yet even in setting forth the exemption, the Legislature ensured that the preservation area's sensitivity would be considered by requiring DEP to evaluate consistency with the Highlands Act's goals and policies. N.J.S.A. 13:20-28(a)(11); N.J.A.C. 7:38-2.3(11). The Legislature only required this additional consideration for Exemptions #9 and #11. N.J.S.A. 13:20-28(a)(9) and (11). DEP also mandates exempt Projects to be consistent with the areawide WQMP. N.J.A.C. 7:38-2.4(a)(e). As explained above, this Project is proposed on a decidedly former industrial use site, and constructing a compressor station there, rather than on a less historically disturbed site, ensures that fewer natural resources are impacted and meets the Highlands statutory and regulatory requirements. Finally, DEP consulted with the Highlands Council to assure the Highlands resources were considered and the Council concurred with providing an exemption for TGP's Project. Thus, these statutory requirements have been met.

Third, Appellants argue that Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. at 237, defined "routine upgrade" and implies that interpretation should be followed here. (Ab17-19). But Appellants misstate that case. There, DEP issued JCP&L a HAD under Exemption #11 to construct an electrical substation within an existing electrical system right-of-way. 433 N.J. Super. at 226, 228. There, as here, appellant argued that Exemption #11 applies to only routine upgrades, and DEP and JCP&L argued that any upgrade can receive the exemption. Id. at 234, 236-37. The court did not decide whether the exemption applies to an "upgrade" or only a "routine upgrade." 433 N.J. Super. at 237. Rather, it found that JCP&L's project would be exempt "even if the exemption is interpreted as requiring that an upgrade be 'routine[.]'" Ibid. (emphasis added). Its characterization of a routine upgrade is nothing more than dicta and not precedential.

Appellants similarly mistakenly proclaim that the JCP&L case stands for the proposition that a "routine upgrade" is one based upon "reliability need" and not "market need." (Ab17-19). However, the court did not discuss "market need" or "new customers," let alone incorporate those terms as limitations to Exemption #11. The court instead quoted DEP's HAD for the project, noting JCP&L sought to "maintain regular and uninterrupted electric service to its

customers[.]" 433 N.J. Super. at 229, 237. That HAD explained that DEP "does not have the expertise to assess statements concerning the need to expand existing electrical systems, and defers to the BPU or other appropriate agency, to make a final determination in this regard." Id. at 229.

Notwithstanding Appellants' argument that because FERC uses the term "routine upgrade" in its orders, DEP should use it too (Ab16-17), DEP's position that natural gas need determinations are beyond the scope of its Highlands Act responsibilities is well-founded. 433 N.J. Super. at 229. The Act focuses on "stringent water and natural resource protection." N.J.S.A. 13:20-2. Nowhere is DEP directed to evaluate utility "need" or how a utility should operate. This is exactly what FERC and the Board of Public Utilities evaluate in their natural gas transmission project reviews. 15 U.S.C. § 717f; Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. at 237. Indeed, "[t]he principles of comity and deference to sibling agencies are part of the fundamental responsibility of administrative tribunals charged with overseeing complex and manifold activities" when two or more agencies have jurisdiction over separate components – such as need and environmental impacts - of the same action. Hackensack v. Winner, 82 N.J. 1, 32 (1980) (quoting Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 531-32 (1978)). It is thus irrelevant to this HAD whether FERC uses the term "routine upgrade." DEP

does not consider whether the proposed project ultimately serves new or existing customers for Highlands exemption purposes. DEP's HAD is a separate and distinct determination subject to New Jersey's statutes and DEP's rules, which focus on whether the project is a "system" "upgrade." N.J.S.A. 13:20-28(a)(11).

For all of these reasons DEP correctly determined that TGP's Project is exempt from the Highlands Act as an "upgrade" to TGP's existing natural gas transmission "system[.]"

2. TGP's Project is consistent with the goals and purposes of the Highlands Act. (Responds to Appellants' Brief Point II F).

The substantial evidence in the record supports DEP's finding that the Project is consistent with the goals and purposes of the Highlands Act. In the preservation area, DEP "shall give great consideration" to the Highlands Council's RMP, N.J.A.C. 7:38-1.1(g), as its purpose it to "protect and enhance the significant values of the resources" in the Highlands Region. N.J.S.A. 13:20-10(a); N.J.S.A. 13:20-2. DEP is not bound to defer to the Council's findings or recommendations. Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. at 238. Nor did DEP do so here, only noting that it "received positive comments" from the Council. (Aa2). Nonetheless, DEP does consider the comments in the course of its exemption decisions, as it did here. N.J.A.C. 7:38-1.1(g). DEP also

incorporated the Act's direction to protect or preserve "the quality and quantity of surface and ground waters, . . . forests, wetlands, vegetated stream corridors, steep slopes, and critical habitat for fauna and flora[,]" N.J.S.A. 13:20-10(b)(1) and (3), into its standards at N.J.A.C. 7:38-3.

The record demonstrates that "TGP has avoided and minimized impacts to Highlands resources in the siting and design of the facilities." (Aa330). The Property is a historically disturbed, former quarry that consists of few natural resources. (Aa64; Aa79; Aa200-205). For instance, because of the historic disturbances, the site is "characterized by invasive species and small, isolated patches of forested areas." (Aa197-211; Aa330). Only one area of trees of approximately two acres is considered a "forest" by DEP's rules. (Aa206; Aa330). Thus, TGP's security fence installation that requires the removal of less than a tenth of an acre, or twenty-three trees, was a de minimis impact on the resource, (Aa206-208; Aa329-330), which TGP is mitigating by replacing an equivalent area of trees. (Aa71; Aa195-196; Aa330). Similarly, because of the former quarry operations, open waters, riparian areas, and critical wildlife areas are disconnected and cut off from respective resource areas outside the Property. (Aa64-66; Aa330). The only intrusion within Highlands open water buffers or riparian zones is 285 feet of a preexisting gravel access road which has been regularly used since the 1960s. (Aa69; Aa329-330). And TGP is also

minimally affecting steep slopes, rare, threatened, and endangered plant and animal species habitat, and historic and archaeological areas. (Aa69-72; Aa74-77). Thus, the Project will cause minimal impacts to Highlands resources and TGP is mitigating those minor impacts.

Appellants argue that the Project is not consistent with the goals and purposes of the Highlands Act. (Ab30-33). They first criticize DEP for not mentioning the public comments DEP received that support Appellants' position, citing public comments from themselves and their members. (Ab31-32). DEP is not required to respond to public comments, but it must consider them. Matter of Thomas Orban/Square Props., LLC, 461 N.J. Super. 57, 79 (App. Div. 2019). DEP did so. Notably, all of the public comments received are part of the record. (Aa337-Aa1322). Further, DEP requested that TGP respond to Appellants' comments. (Aa1327-Aa1330). Indeed, DEP underwent multiple public comment periods to ensure all commenters would be heard. (Aa3-5; Aa10; Aa14; Aa331-335). And many of the comments raised either general concerns or issues such as Project need which would be better addressed by other agencies.

Regardless, the issues Appellants raise in their brief do not demonstrate that the Project is inconsistent with the goals and purposes of the Highlands Act. They allege that "[h]azardous liquids stored on site . . . have the potential to leak

into the groundwater and make their way into Hewitt Brook and the Monksville Reservoir" and thereby impact drinking water quality. (Ab32) (emphasis omitted). But the only hazardous liquids stored on-site will be those used for "fuel storage, equipment refueling, and equipment maintenance." (Aa68). TGP indicated that they will "routinely inspect storage and tank areas to help reduce the potential for spills" and have a plan to immediately respond to a spill or leak. (Aa68; Aa143-153). TGP also will not store any hazardous substances in the flood hazard area or within 100 feet of any waterbody, further averting risk of contamination. (Aa69; Aa148). During construction, TGP also has training and inspection plans to address unanticipated contaminated soils or groundwater safely. (Aa154-155).

Appellants also allege that the Project's compressor will "release methane and VOCs including chromium, benzene, radon, [and] NOx into the air." (Ab32). This is inaccurate. The compressor is powered by electricity, which will not create emissions. (Aa55; Aa80). The only emissions the Project would create will be an "emergency generator, a heater, and infrequent venting that will occur during operation and maintenance of the facility." (Aa80). Those emissions would be subject to separate permitting requirements by DEP, not at issue here. (Aa80).

Given the Project's demonstrated minimal natural resource impacts, DEP correctly found it is consistent with the goals and policies of the Highlands Act.

B. DEP correctly determined that TGP's Project is consistent with the Areawide WQMP. (Responds to Appellants' Brief Point III).

DEP also applied its rules to the substantial evidence in the record to determine the Project is consistent with the areawide WQMP.

"The Legislature has entrusted to the DEP the enforcement of a complex system of water pollution control." SJC Builders, Ltd. Liab. Co. v. State of N.J. Dep't of Env't Prot., 378 N.J. Super. 50, 54 (App. Div. 2005). In furtherance of this statutory charge, the State has twelve areawide WQMPs to plan for impacts on the State's waters related to development's water use and wastewater generation. N.J.S.A. 58:11A-2, -4, -5; N.J.A.C. 7:15-1.2(a)(1). The WQMP includes a series of wastewater management plans, a description of existing and future maps of wastewater service areas and selected environmental features and treatment works. N.J.A.C. 7:15-4.1. DEP may not issue an exemption for a project that is inconsistent with adopted WQMPs. N.J.S.A. 58:11A-10; N.J.A.C. 7:38-2.4(e). DEP assesses consistency of the WQMP in the Highlands Region through its Highlands rules. N.J.A.C. 7:15-3.2(g). The rules do allow for new individual subsurface disposal systems, commonly known as septic systems, "where the sanitary wastewater design flow is 2,000 gallons per day or less" and

the project satisfies DEP's Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A. N.J.A.C. 7:38-3.4(b) and (c). This capacity standard is the same for septic systems outside of the Highlands Region as well. N.J.A.C. 7:14A-22.4(a)(3); N.J.A.C. 7:15-3.2(f)(5).

TGP's Project is within the Northeast WQMP. (Aa10). To dispose of wastewater that will be generated by its office building and control room, TGP proposes one individual subsurface sewage disposal system that will generate under 2,000 gallons per day. (Aa32). This implicates DEP's Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A-1.2(a), and TGP accordingly used those standards to calculate its estimated wastewater flow. N.J.A.C. 7:38-3.4(b); N.J.A.C. 7:9A-2.1, -1.8, -7.4. (Aa31).

TGP's office building and control room is an "establishment" that is not a "single residential occupancy," and the corresponding subpart of the rule directs applicants to estimate sewage flow based upon the "types of activities that are expected to occur that will generate sanitary sewage, the size of the facility and the maximum expected number of persons that may be served during any single day of operation." N.J.A.C. 7:9A-7.4(a) and (c). Based upon the square footage of the proposed office building, control room, and shower, TGP calculated it would produce approximately 603.125 gallons per day of wastewater. N.J.A.C. 7:38-9.2(c). (Aa32). This Project would not require DEP

permitting through a treatment works approval or New Jersey Pollution Discharge Elimination System permit because the system connected to TGP's office building and control room will handle less than 2,000 gallons of wastewater per day of sanitary sewage only. N.J.A.C. 7:9A-1.8(a)(2) and (b). TGP also calculated that its projected peak water use would be 650 gallons per day utilizing one well. (Aa32). Due to the low volumes of discharge and water use, DEP found that the wastewater generation and water use met the applicable Highlands regulations and the Project will be consistent with the Northeast WQMP. (Aa2).

Appellants' novel theory as to how TGP should have calculated its estimated wastewater does not dispute TGP's calculations under N.J.A.C. 7:9A, but rather proclaims that TGP should have considered the "total impacts that should be anticipated from the proposed project, including the deforestation and addition of impervious surfaces[.]" (Ab33-38). Appellants also argue DEP should have considered "climate change impacts" to "the impacts to water resources that will result from the increased use of fossil fuels associated with this project." (Ab37).

Appellants attempt to add requirements to DEP's rules, citing broad policies within various statutes and regulations. (Ab34-35). However, Appellants do not propose how TGP or DEP could calculate water impacts from

impervious cover or deforestation. Nor can they, as the requirements they attempt to wedge into this process do not exist. Thus, DEP could not use nonexistent requirements to deny the Project.

Nonetheless, as discussed above, the alleged impacts to natural resources are minimal. There is no "deforestation" as Appellants claim – TGP will only remove and replace twenty-three trees within 10.39 acres of trees, and only 2.17 of those acres can be defined as a forest. (Aa330). Water resources likewise should not be impacted as the compressor station is sufficiently set back from surface waters and TGP has a spill plan in place. (Aa68; Aa143-155).

Thus, DEP correctly found the Project consistent with the WQMP under its existing water quality rules.

CONCLUSION

For those reasons, the court should affirm DEP's HAD decision.

Respectfully submitted,

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Dated: October 31, 2022

Superior Court of New Jersey
Appellate Division

IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICABILITY DETERMINATION, PROGRAM INTEREST NO.: 1615-17-0004.2 (APD 2000001)	**Appellate Division DOCKET NO. A-003616-20** **STATE AGENCY DOCKET NO. 1615-17-0004.2 (APD200001)**

BRIEF AND APPENDIX OF RESPONDENT, TENNESSEE GAS PIPELINE COMPANY, L.L.C.

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PRELIMINARY STATEMENT

This Appeal arises out of a challenge to the June 23, 2021 Highlands Applicability Determination ("HAD") issued by the New Jersey Department of Environmental Protection ("NJDEP"), finding that the portion of Tennessee Gas Pipeline Company, L.L.C.'s ("Tennessee") East 300 Upgrade Project ("Project") within the Highlands Preservation Area qualifies for an exemption from the Highlands Water Protection and Planning Act ("Highlands Act"), N.J.S.A. 13:20–1 et seq. Specifically, NJDEP determined that Tennessee's construction, operation, and maintenance of a new electric motor driven compressor station connected to Tennessee's existing pipeline system qualified for Exemption #11, which authorizes "the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of the [Highlands Act]". Aa0001.

Appellants argue that NJDEP ignored the word "routine" and that Exemption #11 applies only to "routine upgrades". Under this interpretation, Appellants argue that Tennessee's Project could not be considered a routine upgrade. However, the NJDEP did not ignore the word "routine" in issuing the HAD, but simply read the exemption to apply the word "routine" to "maintenance and operations" only, not to upgrades. This is the only interpretation that makes sense. The plain language of the exemption makes clear that upgrades to existing utility systems, provided that

those upgrades are consistent with the goals and purposes of the Highlands Act, are exempt from the Highlands Act, NJDEP's implementing rules, and the Highlands Regional Master Plan. N.J.S.A. 13:20–28(a)(11). The NJDEP has consistently interpreted the exemption to apply to upgrades to utility systems. In addition, in determining whether a project is consistent with the goals and purposes of the Highlands Act, NJDEP has looked to whether the project avoids impacts to Highlands resources to the extent practicable and, where such impacts are unavoidable, that those impacts are minimized.

Here, Tennessee is authorized by the Federal Energy Regulatory Commission ("FERC") to construct a new electric motor driven compressor station (designated as "CS 327") and appurtenant facilities to compress and move natural gas through its existing pipeline system. Tennessee's federally authorized facilities will have minimal impacts on Highlands resources as Tennessee took significant measures to avoid regulated features in selecting the location for CS 327. Importantly, Tennessee sited its facilities within a highly disturbed parcel previously used as a quarry and for other commercial and industrial purposes. In doing so, Tennessee avoided direct impacts to wetlands, State open waters, streams, and other waterbodies. Tennessee's HAD application also included various avoidance and minimization measures, including measures to minimize impacts to Highlands resources such as upland forest areas, steep slopes, and threatened and endangered species.

Tennessee's efforts to avoid and minimize impacts to Highlands resources were confirmed by the Highlands Water Protection and Planning Council ("Highlands Council") in an October 16, 2019 letter to the NJDEP. In that letter, the Highlands Council thoroughly analyzed the Project's impacts on Highlands resources and Tennessee's efforts to avoid and minimize those impacts. The Highlands Council found those efforts to be "sufficient to find that the project is consistent with the goals of the Highlands Act." Aa0330.

Appellants also claim that NJDEP failed to adequately address public comments submitted in opposition to the Project. While NJDEP presumably reviewed all written public comments, NJDEP was not required to respond to these comments, which were conclusory and provided no factual support. In issuing the HAD to Tennessee, NJDEP appropriately relied on the findings of the Highlands Council and followed its own rules in ultimately determining that Tennessee's Project is consistent with the areawide water quality management plan. NJDEP, as the expert administrative agency charged with enforcing the Highlands Act, ultimately determined that Tennessee's efforts to avoid, minimize, and mitigate impacts to Highlands' resources were sufficient to find that the Project was consistent with the goals and purposes of the Highlands Act.

For the reasons set forth fully herein, NJDEP's decision should be affirmed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Tennessee is a "natural gas company" under the Natural Gas Act, 15 U.S.C. §717 et seq. ("NGA") and is primarily engaged in the business of transporting natural gas in interstate commerce, and, as such, is regulated by the FERC as to facilities, construction, rates, and types of service. Tennessee's facilities are "interstate natural gas pipeline facilities" which are subject to the regulatory authority of the FERC and of the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration. Aa0052.

On June 30, 2020, pursuant to provisions of the NGA, Tennessee submitted an application to the FERC seeking issuance of a certificate of public convenience and necessity to construct and operate the Project. Aa0053. The Project is designed to provide up to 115,000 dekatherms per day (Dth/d) of additional firm transportation capacity on Tennessee's interstate natural gas pipeline system that will be used to provide service for Tennessee's Project customer. Aa0054. The Project represents an approximately $246 million investment by Tennessee. 179 FERC ¶ 61,041 P 8(April 21, 2022); TGPa0001.[1]

As part of the Project, Tennessee will construct, operate, and maintain as part of its existing pipeline system CS 327 and appurtenant facilities on property

[1] "TGPa" refers to Tennessee's appendix. This Court should take judicial notice of the FERC Order pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(3). Relevant sections of the FERC Order are included in Tennessee's appendix for the Court's convenience.

identified as Block 4601, Lot 17 in the Township of West Milford, Passaic County, New Jersey (the "CS 327 Site"), which is located within the Highlands Preservation Area as designated under the Highlands Act. Aa0052. By way of background, compressor stations compress natural gas by raising the pressure to "push" gas through the pipeline. Gas enters a series of scrubbers and strainers, is compressed by the compressor, cooled, and then continues through the pipeline until it is delivered to a customer or reaches the next compressor station. Aa0053.

On August 28, 2020, Tennessee, as it has done for two previous projects within the Highlands Preservation Area, applied to NJDEP for the HAD seeking a determination from the NJDEP that its Project qualifies for Exemption #11 under the Highlands Act as an upgrade to its existing pipeline system. Aa0026.[2] As set forth in its HAD application, Tennessee sited CS 327 to avoid and minimize impacts to Highlands resource areas to the greatest extent practicable. The CS 327 Site is an

[2] Tennessee applied for the HAD consistent with FERC's policy of encouraging cooperation between interstate natural gas companies and state and local agencies. Paragraph 87 of the FERC Certificate provides in part: "The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unnecessarily delay the construction or operation of facilities approved by this Commission." 179 FERC ¶ 61,041 P 87; TGPa0005. Given that the FERC has issued a Notice to Proceed, the construction of CS 327 would be unnecessarily delayed if this Court were to invalidate the HAD since another (more protracted) approval process would be required. TGPa0041.

existing cleared and disturbed site previously used as a quarry, as temporary contractor/pipe yards for several projects, and most recently for storage and recycling efforts. A copy of Tennessee's site plan depicting the location of Tennessee's proposed facilities in relation to certain Highlands resources, including streams, freshwater wetlands, flood hazard areas, riparian zones, and Highlands open water buffers was included as part of the HAD application. Aa0324. Tennessee's permanent facilities will be located outside of these features.

Tennessee's HAD application also extensively detailed its efforts to minimize impacts to Highlands resources such as upland forest areas; rare, threatened and/or endangered plant and animal species habitat; steep slopes; and historic and archeological resources. Tennessee included in its HAD application a Forest Assessment (Aa0197) prepared by a State-Approved Forrester to determine the extent of tree removal on the CS 327 Site and included a planting plan (Aa0195) that would mitigate for the minimal number of trees proposed to be removed. Tennessee's application also included various mitigation plans, including, but not limited to, a steep slopes mitigation plan (Aa0069), an Unanticipated Discoveries Plan related to historic and archeological resources (Aa0212), a draft Spill Prevention and Control Plan (Aa0143), and a copy of FERC's Upland Erosion Control, Revegetation and Maintenance Plan (Aa0087).

As required by the Highlands Rules at N.J.A.C. 7:38-9.2(b)5ii, Tennessee provided a copy of the complete HAD application to the Highlands Council. See

Aa0019. Although NJDEP is ultimately responsible for issuing a HAD, its determinations regarding Exemption #11 are made in consultation with the Highlands Council.[3] On October 16, 2020, the Highlands Council issued a letter to the NJDEP stating that it does not object to the NJDEP's issuance of Exemption #11 for the Project and finding that Tennessee's "efforts to avoid, minimize and mitigate for resource impacts are sufficient to find that the project is consistent with the goals of the Highlands Act." Aa0330.

Notice of Tennessee's HAD application was published in the September 23, 2020 DEP Bulletin. Aa0003. The comment period was extended over several months through March 2021. Aa0007, Aa0011. During this extended public comment period, NJDEP received hundreds of public comments on Tennessee's HAD application, the overwhelming majority of which were form comments, i.e., substantially identical written comments. See Aa0337 through Aa1177.

On June 23, 2021, NJDEP issued the HAD to Tennessee, determining that the portion of Tennessee's Project in the Highlands Preservation Area qualified for Exemption #11, and was consistent with the goals and purposes of the Highlands Act as well as the areawide WQMP. Aa0001. In its approval letter, the NJDEP

[3] Highlands Council Project Review Procedures, accessed at https://www.nj.gov/njhighlands/projectreview/guidance/procedures.pdf. Relevant sections are included for the Court's convenience at TGPa0007 through TGPa0013. This Court should take judicial notice of this guidance document pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(3).

referenced and relied on the findings in the Highlands Council's October 16, 2020 letter. Aa0002.

On August 13, 2021, Appellants, Food & Water Watch and New Jersey Highlands Coalition, filed a Notice of Appeal challenging the HAD. Since the Notice of Appeal did not name Tennessee as an interested party, on August 30, 2021, Tennessee filed a motion to intervene in the appeal pursuant to R. 4:33. Appellants opposed Tennessee's motion to intervene. Tennessee's motion to intervene was denied on September 23, 2021, as was its motion for reconsideration and motion for permissive intervention on October 25, 2021. On November 12, 2021, Tennessee filed a motion for leave to appeal with the New Jersey Supreme Court challenging the denial of its motions to intervene. The New Jersey Supreme Court granted leave to appeal on February 11, 2022 and issued an Order on April 11, 2022 remanding the case back to the Appellate Division to allow Appellants to file an amended Notice of Appeal and Case Information Statement naming Tennessee as an interested party.

Since issuance of the HAD to Tennessee, FERC staff issued its Final Environmental Impact Statement ("FEIS") for the Project pursuant to FERC's obligations under the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq.[4] As part of the FEIS and the Environmental Assessment attached thereto,

[4] This Court should take judicial notice of the FEIS pursuant to N.J.R.E. 202(b) and

FERC staff analyzed the impacts of the Project on various resources, including wetlands, surface and groundwater resources, cultural resources, air quality, plant and animal species, soils, and impacts on land use, recreation, and visual resources. TGPa0014. FERC staff also responded to comments received by other agencies and members of the public on the Project. The FERC staff ultimately concluded in the FEIS that, by implementing the various mitigation measures outlined in the FEIS, the Project would not result in significant environmental impacts. TGPa 0022 through TGPa0028.

On April 21, 2022, FERC issued its Order Issuing Certificate ("FERC Certificate") authorizing Tennessee to construct and operate the Project. 179 FERC ¶ 61,041; TGPa0001. In the FERC Certificate, FERC found "that the public convenience and necessity requires approval of Tennessee's" Project. Id. at P 85; TGPa0004. Appellant, Food & Water Watch, is currently challenging the FERC Certificate in the U.S. Court of Appeals for the D.C. Circuit. See Food & Water Watch v. FERC, Docket No. 22-1214 (D.C. Cir. Petition filed Aug. 19, 2022). On October 6, 2022, FERC issued a delegated order approving Tennessee's request to proceed with construction of CS 327.[5] TGPa0041. On October 24, 2022, FERC

N.J.R.E. 201(b)(3). Relevant sections of the FEIS are included for the Court's convenience at TGPa0014 through TGPa0040. The entire FEIS can be accessed at https://elibrary.ferc.gov/eLibrary/filelist?accession_num=20210924-3065

[5] This Court should take judicial notice of the delegated order pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(3). A copy of the delegated order is included in Tennessee's appendix for the Court's convenience.

issued an Order on Rehearing and Denying Stay ("Rehearing Order") in which it sustained its previous order issued on April 21 and denied the motions for stay filed by Appellant, Food and Water Watch.[6] 181 FERC ¶ 61,051, P2; TGPa0043. In the Rehearing Order, FERC rejected Food and Water Watch's request for a stay, finding that "Food and Water Watch's generalized claims of harm in its motion do not constitute sufficient evidence of irreparable harm that would justify a stay." Id. at P10-11; TGPa0046 and TGPa0047. FERC concluded that it "continue[s] to find, based on all information in the record, that the public convenience and necessity requires the East 300 Upgrade Project." Id. at P41; TGPa0048.

STANDARD OF REVIEW

NJDEP's decision to grant Exemption #11 to Tennessee is entitled to substantial judicial deference. It is well established that in reviewing an administrative agency's decision, appellate courts have a limited role. Clowes v. Terminix Int'l., Inc., 109 N.J. 575, 587-588 (1988); Public Service Elec. and Gas Co. v. N.J. Dept of Environment Protection, 101 N.J. 95, 103 (1985); Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963). In fact, appellate courts will not typically reverse an agency's judgment in the absence of a finding that it was "arbitrary, capricious, or

[6] This Court should take judicial notice of the Rehearing Order pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(3). Relevant sections of the Rehearing Order are included in Tennessee's appendix for the Court's convenience.

unreasonable, or it was not supported by substantial credible evidence in the record as a whole." Henry, 81 N.J. at 579–80 (citing Campbell, 39 N.J. at 562). In determining whether agency action is arbitrary, capricious, or unreasonable, appellate review is limited to determining:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

In re Carter, 191 N.J. 474, 482-483 (2007). Expanding upon these inquiries, the Supreme Court has stated that "[a]rbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is [valid] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Worthington v. Fauver, 88 N.J. 183, 204-5 (1982).

In conducting this limited review, courts have accorded agency actions the presumption of validity and reasonableness, and, in this context, the burden is on the challenger to overcome these presumptions. Bergen Pines Hosp. v. Dept. of Human Serv., 96 N.J. 456, 477 (1984). In other words, courts accord considerable weight to the interpretation of a statute by the agency responsible for enforcing the statute.

See In re Stemark Associates, 247 N.J. Super. 13, 18 (App. Div. 1991) (citing Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973)). This is particularly true when the issue under review is directed to the agency's special "expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007); see also In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 415, 431-32 (2004) (stating that NJDEP's interpretation was justified by the "fundamental maxim that the opinion as to the construction of a regulatory statute of the expert administrative agency charged with enforcement of that statute is entitled to great weight."); see also TAC Associates v. New Jersey Department of Environmental Protection, 202 N.J. 533, 541 (2010) (stating that "interpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation."). This is because the agency has the "staff, resources and expertise to understand and solve those specialized problems." Bergen Pines Hosp., 96 N.J. at 474.

It should be noted, however, that courts also recognize that, as a general matter, exemptions from statutes are strictly construed. See M. Alfieri Co., Inc. v. N.J. Dep't of Envtl. Prot. & Energy, 269 N.J. Super. 545, 554 (App.Div.1994) (citing Wright v. Vogt, 7 N.J. 1, 6 (1951)); see also In the Matter of New Jersey Department of Environmental Protection Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 226 (App. Div. 2013) (finding that any "exemption from a comprehensive legislative policy designed to protect

environmental interests must be strictly construed."). Nevertheless, even though exemptions from statutes are strictly construed, courts are clear that they must also be reasonably construed and may be "expanded or limited to effectuate the manifest reason and obvious purpose of the law." Wright, 7 N.J. at 6-7 (stating that "[t]he spirit of the legislative act will prevail over the literal sense of terms."); see also In re Stemark Associates, 247 N.J. Super. at 19 (stating that an exemption in a statute "must be read to give effect to all its parts without reaching an absurd result").

For the reasons fully set forth herein, the NJDEP's issuance of Exemption #11 is presumed to be valid and reasonable, and Appellants have failed to overcome these presumptions.

LEGAL ARGUMENT

I. NJDEP CORRECTLY DETERMINED THAT TENNESSEE'S PROJECT QUALIFIES FOR EXEMPTION #11 (Aa0001)

NJDEP correctly determined that Tennessee's construction, operation, and maintenance of a new electric motor driven compressor station at the CS 327 Site, which will be connected to and a part of Tennessee's existing pipeline system, qualified for Exemption #11. The Highlands Act exempts the upgrade of utility systems which are consistent with the goals and purposes of the Highlands Act. N.J.S.A. 13:20-28a(11) and N.J.A.C. 7:38-2.3. In this regard, NJDEP is the only agency that makes Highlands exemption decisions. It was, and is, NJDEP's responsibility to determine whether Tennessee's Project is exempt pursuant to

N.J.S.A. 13:20-28a(11). Moreover, NJDEP is the expert administrative agency charged with creating and implementing policies to preserve and promote the natural resources of the Highlands region. As such, the applicable standard of review requires strong deference to NJDEP's determination in the context of statutory interpretation.

Based upon the record in this case and applicable law, the Court should affirm NJDEP's decision to exempt Tennessee's Project. NJDEP's decision to exempt the portion of Tennessee's Project within the Highlands Preservation Area from the Highlands Act is not arbitrary and capricious, follows the plain language of the statute, and is well-supported by the evidence in the record. At no time did NJDEP act with "willful and unreasoning action, without consideration and in disregard of circumstances." Worthington, 88 N.J. at 204-5. Here, NJDEP conducted a comprehensive review of Tennessee's Project and considered input from the Highlands Council, as well as public comments. NJDEP, as the expert administrative agency charged with enforcing the Highlands Act, ultimately determined that Tennessee's efforts to avoid, minimize and mitigate impacts to Highlands resources were sufficient to find that the Project was consistent with the goals and purposes of the Highlands Act. Therefore, NJDEP's decision should be affirmed.

A. The Plain Language Of Exemption #11 Does Not Require Upgrades To Be "Routine". (Aa0001)

NJDEP correctly interpreted and applied the plain language of Exemption #11 to Tennessee's Project. The Highlands Act exempts the following from regulation:

> the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act. N.J.S.A. 13:20-28a(11)[emphasis added]

Appellants wrongly contend that NJDEP erred in determining that the Project was exempt because it is not a "routine upgrade". Ab12.[7] Appellants' interpretation of Exemption #11 would require a complete distortion of the plain meaning of the statutory language. Contrary to Appellants' interpretation, the word "routine" does not modify "upgrade of public utility[8] lines, rights of way, or systems." If it did, it would also mean that "routine" modifies "rehabilitation, preservation,

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[7] "Ab" refers to Appellants' amended merits brief filed on September 2, 2022.

[8] Appellants note that New Jersey courts have not ruled on whether the interpretation of "public utility" under Exemption #11 applies to interstate natural gas pipelines. See Ab fn. 10. While Tennessee is ultimately regulated by FERC as an interstate natural gas pipeline company, for purposes of NJDEP's analysis of HAD applications, Tennessee has consistently been considered as a "public utility" under the New Jersey Public Utility Act, N.J.S.A. 48:2-13. NJDEP confirmed that "pipelines and infrastructure that serve to deliver or provide gas and electricity to public systems are considered a public utility and, therefore, eligible for the exemption [#11]." See 38 N.J.R. at 5011a, Response to Comment 296 (Dec. 4, 2006). Just because New Jersey courts have not ruled on this issue does not mean that less deference should be accorded to NJDEP's treatment of interstate natural gas pipeline companies as "public utilities". On the contrary, NJDEP is the expert administrative agency charged with enforcing the Highlands Act and its exemptions and, therefore, must be given substantial deference.

reconstruction, [and] repair", but this would make no sense and thus would be an absurd interpretation. Instead, basic rules of statutory interpretation dictate that the word "routine" modifies "maintenance and operations", which is then followed by a comma and then a list of other exempted activities, including "rehabilitation, preservation, reconstruction, repair." The Legislature thereafter included the word "or" to mean a different basis for the exemption. As this Court has stated, "[w]hen items in a list are joined by a comma or semicolon, with an 'or' preceding the last item, the items are disjunctive" and the clauses "are distinct and separate from each other." State v. Smith, 262 N.J. Super. 487, 506 (App. Div. 1993). Therefore, "routine maintenance and operations" is separate and apart from an "upgrade", and the upgrade of utility lines, the upgrade of rights-of-way, and the upgrades of systems are all exempt activities. N.J.S.A. 13:20-28a(11).

Appellants argument that Tennessee's Project must be a "routine upgrade" to qualify for Exemption #11 is not only contrary to the plain language of the Highlands Act, but also NJDEP's consistent interpretation of the exemption. In a factually similar case, in connection with the HAD issued to Jersey Central Power & Light Company's ("JCP&L") Califon Substation, a historic preservation group claimed that JCP&L's project was not a "routine upgrade" and not consistent with the goals and purposes of the Highlands Act. See In the Matter of New Jersey Department of Environmental Protection Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 234 (App. Div. 2013)("In re

Highlands Applicability"). On appeal to the Appellate Division, NJDEP argued before the court that the word "routine" was meant to only modify the activities of "maintenance and operations", and not the other activities set forth in the exemption. Id. at 237. Without deciding whether the exemption requires that upgrades be routine, the court held that JCP&L's project was a routine upgrade as it was necessary to satisfy the company's duty under its tariff with the New Jersey Board of Public Utilities to "maintain regular and uninterrupted electric service to its customers." Id.

Likewise, here, even if this court were to interpret Exemption #11 as requiring that an upgrade be "routine", Tennessee's Project would still fall within the exemption as FERC has determined that the Project is necessary to enhance the reliability and capacity of natural gas to its customers in the northeastern United States and is an "upgrade" of Tennessee's existing pipeline system. In fact, NJDEP has historically and consistently interpreted the exemption and granted exemption #11 to Tennessee on past projects. Specifically, Tennessee received Exemption #11 in connection with its 300 Line Project in 2010 ("300 Line Project") and its Northeast Upgrade Project ("NEUP") in 2012, so there is a precedent for an exemption to be granted to a pipeline company for upgrades of its existing pipeline system, similar to the exemption granted for this Project.

Tennessee's 300 Line Project included the construction of approximately 128 miles of 30-inch diameter underground pipeline looping, consisting of, among other

things, one 17.2-mile pipeline loop in northern New Jersey, 15.9 miles of which is located in the Highlands region and 10.9 miles of which is within the Highlands Preservation Area. In April 2009, Tennessee submitted an application for a HAD under Exemption #11. By resolution dated November 12, 2009, the Highlands Council stated that it "… finds that the revised project, including specifically the Comprehensive Mitigation Plan, constitutes "routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility" and that the project is "consistent with the goals and purposes" of the Highlands Act. Aa0078. By letter dated February 16, 2010, the Executive Director of the Highlands Council confirmed the 300 Line Project's exemption from the Highlands Act. Aa0221. NJDEP ultimately approved the exemption by letter dated February 11, 2010. Aa0224. In granting Exemption #11, NJDEP found that N.J.S.A. 13:20-28(a)(11) does not limit the scope of an exemption to an existing right of way or utility line; rather, it also extends to upgrades of "systems". Aa0228. Therefore, NJDEP concluded that installation of a pipeline along an existing pipeline which ties in at both ends for the express purpose of increasing the transmission capacity of the existing line qualifies as an "upgrade" to a "system". Id.

Similarly, NEUP was an extension of Tennessee's existing pipeline system and involved the construction of approximately 7.6 miles of new 30-inch diameter pipeline in New Jersey, located entirely within the Highlands Preservation Area. In

addition to the pipeline construction, there were aboveground improvements installed, including mainline valves and a pig receiver, and modifications to an existing meter station. Aa0078. In July 2011, Tennessee submitted an application for a HAD under Exemption #11. Similar to the 300 Line Project, by resolution dated February 16, 2012, the Highlands Council determined that NEUP constituted "routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility" and that the project was "consistent with the goals and purposes" of the Highlands Act. Aa0286. By letter dated March 20, 2012, the Executive Director of the Highlands Council confirmed NEUP's exemption from the Highlands Act. Aa0238. NJDEP approved the exemption by letter dated April 25, 2012. Aa0290.

As discussed above, Tennessee received Exemption #11 in connection with its 300 Line Project and NEUP, so there is precedent for an exemption to be granted to a pipeline company for upgrades to its existing pipeline system, similar to the exemption granted for this Project. Moreover, the fact that the Project includes construction of an aboveground facility that connects to Tennessee's existing pipeline system does not change the fact that the Project qualifies for Exemption #11. As noted above, NEUP included pipeline looping and aboveground facilities and both aspects of the project were found to be an "upgrade" to Tennessee's existing 300 Line system. Similarly, the new CS 327 is an "upgrade" of Tennessee's

existing 300 Line system[9].

Tennessee's Project is necessary to meet the needs of its Project Shipper, as found by the FERC in the certificate order authorizing the Project. In addition to meeting the needs of the Project shipper, the Project will also assist in eliminating capacity constraints in the region, especially during periods of peak demand, ensuring the region is able to meet residential, commercial, and industrial heating and cooling needs, will provide added reliability during planned and unplanned maintenance activities on Tennessee's natural gas transmission system within the State and to provide natural gas to customers in the northeastern United States. Tennessee will upgrade its existing pipeline system by constructing CS 327 thereby adding compression. In addition to constructing CS 327, Tennessee will also upgrade its existing compressor stations in Pennsylvania and Wantage Township, New Jersey. By constructing CS 327 instead of additional pipeline segments[10],

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[9] Appellants noted that NJDEP failed to establish why the construction of new CS 327 is an "upgrade" of an existing system. Abfn32. However, what Appellants seem to ignore is the fact that the new CS 327 will be constructed along and will be connected to Tennessee's existing 300 Line pipeline system. In fact, approximately 300 feet of piping and 1,400 feet of suction and discharge piping will be constructed to tie CS 327 into Tennessee's existing 300 Line pipeline. Aa0054. Tennessee is only proposing to add compression to its existing system. No new mainline pipe is proposed to be installed.

[10] FERC staff noted in the FEIS that construction of a pipeline segment as an alternative to CS 327 "would require around 23 miles of pipeline resulting in 279 acres of temporary disturbance, including impacts on 19 acres of wetlands and 8 waterbodies; and require 121 acres of permanent operational right-of-way impact. In addition, this alternative would impact over 200 private landowners, none of

Tennessee was able avoid impacts to environmental resources. Therefore, the construction, operation and maintenance of CS 327 qualifies for Exemption #11 as it would be an upgrade to Tennessee's existing 300 Line gas pipeline system.

In addition, Appellants argue that Tennessee's exemptions for its 300 Line Project and NEUP have not been upheld by any New Jersey court and, therefore, they should be "accorded less deference". See Ab27. This is an absurd and convoluted argument. Just because Tennessee's prior exemptions were not challenged in court does not make them any less significant or precedential. On the contrary, NJDEP is the expert administrative agency charged with enforcing the Highlands Act and its exemptions. Therefore, based on the standard of review noted above and NJDEP's consistent interpretation of Exemption #11, NJDEP's decision should be accorded great deference.

Moreover, Appellants' reliance on In re Highlands Applicability to suggest that a project may only be a routine upgrade under Exemption #11 if it serves the "reliability needs" of a public utility's "existing customer base" is completely misguided. See Ab20. However, as Appellants admit, In re Highlands Applicability did not decide the issue as to whether Exemption #11 requires an upgrade to be "routine". The Court simply assumed for the sake of argument that "routine" applied

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whom are directly affected by the Project as proposed." FERC staff ultimately concluded that a pipeline alternative "would not offer a significant environmental advantage over the proposed construction of CS 327" and was therefore not recommended. TGPa0037 through TGPa0040.

and analyzed JCP&L's project as such. Further, the Court held that serving the reliability needs of existing customers is one way (not the only way) that a project could be considered "routine". Consistent with the Court's holding in In re Highlands Applicability, Tennessee's Project serves, among other purposes, to enhance the reliability to existing customers of the Project shipper, Consolidated Edison Company of New York, Inc. ("ConEd"), and would be considered "routine" under the Court's analysis. Appellants erroneously claim that the FERC Certificate only references meeting the need for new customers but then they quote FERC's finding that the "natural gas demand in [ConEd's] service territories is exceeding its available firm natural gas interstate pipeline capacity and that additional transportation capacity is needed to serve [ConEd's] existing and new customers." See Ab33, quoting the FERC Certificate, 179 FERC ¶ 61,041 P 17 (April 21, 2022) (emphasis Tennessee's). Accordingly, even if this Court were to agree with Appellants' interpretation of Exemption #11, the Project would still qualify as a routine upgrade to meet the needs of a project shipper.

B. The Construction, Maintenance and Operation of CS 327 Is Consistent With The Goals And Purposes Of The Highlands Act. (Aa0001)

NJDEP correctly determined that Tennessee's Project is consistent with the goals and purposes of the Highlands Act, and it appropriately relied on the findings of the Highlands Council in making that determination. Appellants make a muddled argument that NJDEP's HAD was "not the product of reasoned decision making"

because NJDEP either failed to consider any public comments or, if it did, failed to provide any explanation for rejecting them. Ab32. Appellants conveniently ignore the fact that NJDEP extended the public comment period several times during its review to ensure that the public comment process was robust. Nevertheless, NJDEP was under no obligation to respond to each and every conclusory or unfounded comment submitted by members of the public. "An agency must engage in fact-finding to the extent required by statute or regulation, and provide notice of those facts to all interested parties." In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 594 (App. Div. 2004).

While it is true that NJDEP is ultimately responsible for issuing a HAD and is not required to rely on the findings of the Highlands Council, NJDEP is also not precluded from relying on those findings. As Appellants admit, NJDEP specifically relied on the Highlands Council's October 16, 2020, letter in issuing the HAD to Tennessee. See Ab30. NJDEP was right to do so, as the Highlands Council's letter detailed the Project's minimal impacts to Highlands resources and Tennessee's avoidance and proposed efforts to further minimize and mitigate those impacts.

For instance, the Highlands Council noted that Tennessee is siting its facilities outside of identified water resources (i.e. wetlands, transition areas, state open waters, riparian zones, and floodplains) while also minimizing impacts to upland portions of the watershed by reusing a previously disturbed site. Aa0328. It found that compliance with timing restrictions imposed on construction by NJDEP

Division of Fish and Wildlife in consultation with US Fish and Wildlife Service would minimize impacts to critical threatened and endangered species habitat. Aa0330. The Highlands Council also acknowledged Tennessee's proposed use of permanent stormwater Best Management Practices ("BMPs"), such as rain gardens or bioretention basins, to accommodate proposed impervious surfaces, which BMPs would comply with NJDEP's stormwater regulations for green infrastructure. Id.

Further, and contrary to the Appellants' claims of "deforestation", the Highlands Council found that the Project would have "a de minimis effect" on Highlands upland forest areas. Aa0330. Tennessee retained the services of a State-approved forester to perform a Forest Assessment of the five (5) areas on the CS 327 Site where trees are proposed to be removed. Aa0197. Of these areas, only one constituted an upland forest under the Highlands Rules, N.J.A.C. 7:38-3.9, and even then, only a minimal number of trees[11] in this area would be removed due to the installation of a safety fence around the perimeter of Tennessee's facilities. Even though Tennessee was seeking an exemption from the Highlands Act and the Highlands rules, Tennessee applied the substantive standards of the Highlands Rules at N.J.A.C. 7:38-3.9(h) in developing a planting plan to mitigate for the minor impacts from tree removal, which was reviewed and approved by the Highlands

[11] Tennessee's forester determined that only 0.09 acres (i.e., 23 trees, only 4 of which are greater than 6 inches in diameter at breast height) of upland forest were proposed to be removed by installation of the security fence. Aa0206.

Council staff. See Aa0195 and Aa0330, respectively.

Appellants point to a few public comments submitted either by themselves or their members during the extensive public comment period to suggest that these comments raised issues of fact that warranted a direct response from NJDEP. However, these comments are nothing more than conclusory allegations with no factual support. For instance, the joint comment from Appellants references "blowdowns" but provides no analysis as to how this would impact Highlands resource areas. Ab32, citing Aa0339. And the individual member of the Sierra Club quoted by Appellants states without any support that "[t]he project will impact environmentally sensitive areas in the Highlands and the drinking water for over 3 million people." Ab32, quoting Aa1061. NJDEP was not required to respond to these comments, and it clearly rejected them when it adopted the findings of the Highlands Council in determining the Project is consistent with the goals and purposes of the Highlands Act.

Based on the above, the NJDEP appropriately relied on the information within Tennessee's HAD application and the findings of the Highlands Council in determining that the Project is consistent with the goals and purposes of the Highlands Act. Accordingly, NJDEP's decision should be accorded the presumption of validity and reasonableness. See Bergen Pines Hosp., 96 N.J. at 477.

II. NJDEP'S DETERMINATION THAT TENNESSEE'S PROJECT IS CONSISTENT WITH THE WQMP IS NOT ARBITRARY AND CAPRICIOUS (Aa0001)

Appellants contend that NJDEP's determination that the Project is consistent with the Water Quality Management Plan ("WQMP") is arbitrary and capricious because NJDEP failed to consider the totality of the Project, including all impacts from construction of CS 327. Ab32. Specifically, Appellants claim that NJDEP relied only on the fact that the projected wastewater would be less than 2,000 gallons per day. Ab36. However, as explained by the references relied upon by Appellants in their own brief, the Water Quality Planning Act ("WQPA"), N.J.S.A. 58:11A-1 et seq., and the NJDEP's Water Quality Management Planning Rules specifically relate to proposed wastewater treatment facilities, and NJDEP has specifically found in its rules that projects like Tennessee's are consistent with the relevant areawide WQMP.

"[T]he WQPA mandates the creation of wastewater treatment management planning areas and authorizes the DEP to set water quality standards, implement areawide waste treatment management plans within each of the planning areas, and adopt rules and regulations to effectuate the objectives of the WQPA." In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 559 (App. Div. 2011)(emphasis added) citing N.J.S.A. 58:11A-5, -7 and -9. The Legislature made clear that the objective of the WQPA was to:

> restore and maintain the chemical, physical and biological integrity of the waters of the State, including groundwaters, and the public trust therein; and that areawide waste treatment management planning processes should be developed and implemented in order to achieve this objective and to assure adequate control of sources of water pollutants in the State. The Legislature further declares that wherever practicable and feasible waste treatment management planning areas shall be coterminous with county boundaries, and that wherever appropriate county governments shall perform such areawide waste treatment management planning; that the Department of Environmental Protection shall conduct areawide waste treatment management planning for all areas of the State without a designated planning agency, and that said Department of Environmental Protection shall establish a continuing planning process which will encourage, direct, supervise and aid areawide planning and which will also incorporate water quality management plans into a comprehensive and cohesive Statewide program directed toward the achievement of water quality objectives…

N.J.S.A. 58:11A-2(emphasis added). The WQPA was clearly meant to protect water quality through waste treatment management planning. To that end, the NJDEP must determine that a project is consistent with an adopted areawide WQMP prior to issuing a permit or approval for that project. N.J.S.A. 58:11A-2; N.J.A.C. 7:15-3.2. Since Tennessee's Project is within the Highlands Preservation Area, it was required to submit an application for a WQMP consistency determination to NJDEP and provide "all relevant information identified pursuant to N.J.A.C. 7:8-9.2" as part of its HAD application. N.J.A.C. 7:15-3.2(g).

Curiously, Appellants point to the items set forth in N.J.A.C. 7:8-9.2(b)4 as the informati on relevant to NJDEP's WQMP consistency determination, but that section of the Highlands Rules clearly sets forth the information needed for NJDEP to determine whether a proposed project is a major Highlands development regulated under the Highlands Act. See N.J.A.C. 7:8-9.2(b). The information relevant to the NJDEP's WQMP consistency determination is actually set forth in N.J.A.C. 7:8-9.2(c) and includes information on the proposed method of wastewater treatment, amount of wastewater flow in gallons per day, and water supply demand for the proposed development. See N.J.A.C. 7:8-9.2(c). All of this information was provided to NJDEP as part of Tennessee's HAD application and is, in fact, required to complete the HAD application form. See Aa0031-0032.

Importantly, under NJDEP's Water Quality Management Planning Rules, the construction of a subsurface sewage disposal system, i.e., a septic system, that has a projected flow of less than or equal to 2,000 gallons per day is deemed consistent with the adopted areawide WQMP. Specifically, N.J.A.C. 7:15-3.2(f) lists those activities that are consistent with the adopted areawide WQMP, including activities identified under N.J.A.C. 7:14A-22.4 that do not require a treatment works approval from the NJDEP. N.J.A.C. 7:15-3.2(f)5. Activities that do not require a treatment works approval include, among others, "building, installing, operating or modifying an individual subsurface sewage disposal system where the aggregate projected flow of the facility, using the criteria established in N.J.A.C. 7:9A, is less than or equal to

2,000 gallons per day of sanitary sewage." N.J.A.C. 7:14A-22.4(a)3.

As set forth in Tennessee's HAD application, the total amount of wastewater generated by Tennessee's Project would be less than 2,000 gallons per day. See Aa 0031-0032. As such, a treatment works approval from NJDEP would not be required under N.J.A.C. 7:14A-22.4(a)3 and the Project would therefore be consistent with the adopted areawide WQMP pursuant to N.J.A.C. 7:15-3.2(f)5. Accordingly, NJDEP's consistency determination was in accordance with its own rules.

Even assuming, as Appellants suggest, that the WQPA gave NJDEP carte blanche authority to regulate any activity that could remotely impact water quality, Appellants conveniently ignore the fact that Tennessee designed CS 327 to completely avoid Highlands open water areas, including wetlands, streams, and other surface waterbodies. There will only be minor and temporary impacts to mapped, previously disturbed riparian zones and transition areas, which would be used as contractor yards and laydown areas during construction. Aa0056. These areas would only be used for up to six months and then restored to their pre-construction condition. Aa0066. With respect to groundwater, Tennessee will implement construction practices designed to reduce and/or mitigate potential impacts on groundwater during construction. Tennessee and its contractors will adhere to these practices related to groundwater protection including specifications for trench breakers and dewatering as well as restrictions on refueling and storage of hazardous substances. Aa0066-0068. Accordingly, the Project will have minimal,

if any, impacts on surface and groundwater resources.

Moreover, Appellants wrongly contend that impacts to water resources will result from air pollution. Ab33. There is nothing in the record to support this contention. CS 327 will be electric driven. As a result, Tennessee has avoided air quality impacts as the only new emission sources would be an emergency generator, a heater, and infrequent venting that will occur during operation and maintenance of the facility. Aa0080. Emissions at CS 327 would not trigger any federal stationary source air permitting requirements, and Tennessee only requires general permits from NJDEP for the new emergency generator and the new heater. Air pollutant emissions would also occur on a short-term basis during the construction of CS 327, including emissions from operation of construction equipment and fugitive dust generated by surface disturbance and vehicle travel on unpaved roads. Tennessee has mitigated these impacts by implementing a fugitive dust control plan during construction activities. A copy of Tennessee's Fugitive Dust Control Plan was attached to Tennessee's HAD application. See Aa301. Any air quality impacts associated with construction would be short-term and revert to pre-construction conditions upon completion of Project construction.

It is clear from the record that NJDEP followed its own rules in determining that the Project is consistent with the areawide WQMP. Even if all impacts of the Project were required to be considered in making its WQMP consistency determination, there is no evidence in the record to suggest that Tennessee's Project

would have a negative impact on water quality. NJDEP's decision should be accorded the presumption of validity and reasonableness. See Bergen Pines Hosp., 96 N.J. at 477. Therefore, NJDEP's determination that the Project is consistent with WQMP is not arbitrary and capricious and should be affirmed.

CONCLUSION

For the foregoing reasons, Tennessee respectfully requests that this Court affirm NJDEP's decision to issue Exemption #11 and dismiss this Appeal.

Respectfully submitted,

RUTTER, & ROY, LLP
Attorneys for Respondent, Tennessee Gas Pipeline Company, L.L.C.

By: *s/Richard G. Scott*
RICHARD G. SCOTT

Dated: October 31, 2022

IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICABILITY DETERMINATION, PROGRAM INTEREST NO.: 1615-17-0004.2 (APD200001)	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003616-20 CIVIL ACTION On Appeal from Final Action of the New Jersey Department of Environmental Protection

REPLY BRIEF OF APPELLANTS FOOD & WATER WATCH, NEW JERSEY HIGHLANDS COALITION, AND SIERRA CLUB

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Dated: November 7, 2022

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[1] "Aa" refers to Appellants' appendix

PRELIMINARY STATEMENT

This case raises the question of whether the legislature intended the Respondent Department of Environmental Protection ("DEP") to grant the Respondent Tennessee Gas Pipeline L.L.C. ("Tennessee Gas" or "TGP") an exemption from the DEP's ordinary permitting requirements under the Highlands Water Protection and Planning Act (the "Highlands Act"). Food & Water Watch, the New Jersey Highlands Coalition, and the Sierra Club (the "Environmental Appellants") assert that the DEP's application of the Highlands Act runs afoul of the very narrow statutory exemption for "routine" utility work by a "public utility." The plain language and statutory intent of the Highlands Act does not authorize the DEP to exempt the proposed project from the DEP's permitting requirements.

The proposed $246 million dollar project is a major development in the Highlands Preservation Area, which ordinarily requires a specific permit called a Highlands Preservation Area Approval ("HPAA"). The project is non-routine and only intended to serve new customers in the State of New York. Based on these circumstances, and the plain language and intent of the Highlands Act, this Court must now hold that the DEP's issuance of the exemption was in error and that the proposed project must be fully vetted according to the DEP's ordinary permitting review requirements.

STATEMENT OF FACTS AND PROCEDURAL HISTORY [2]

The Environmental Appellants rely on the statement of facts and procedural history as it was set forth in the Appellant's Initial Brief. In addition, this Court granted the Environmental Appellant's motion to accelerate this appeal because Tennessee Gas has begun construction of the project at issue.

LEGAL ARGUMENT

I. THE DEP ERRED BY FAILING TO GIVE PROPER MEANING TO THE WORDS "ROUTINE" AND "PUBLIC UTILITY" IN THE STATUTORY EXEMPTION.

(Aa0001)

The statutory exemption that is central to this appeal, is set forth in the Highlands Act as follows:

> The following are exempt from the provisions of this act….
>
> (11) the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act;
>
> [N.J.S.A. 13:20-28(a)(11), emphasis added.]

The Environmental Appellants' take the position that the word "routine" in the above-quoted language is critical to understanding and implementing the entire provision. The DEP disagrees, taking the contrary position that the word "routine" cannot be read in conjunction with "upgrade" in the above-quoted language. The

[2] The facts and procedure are interrelated, so they are presented together.

DEP argued that it "...correctly determined that TGP's Project is exempt from the Highlands Act as an 'upgrade'...." DEP brief at 24. Tennessee Gas similarly argued that "Contrary to Appellants' interpretation, the word 'routine' does not modify 'upgrade of public utility lines, rights of way, or systems.'" TGP brief at 15. The problem with the Respondents' arguments in this case is that neither Respondent recognizes the appropriate and expressed limitations presented by the legislative decision to use the words "routine" and "public utility" in the above-quoted statutory language.

The Respondents' arguments ignore the well settled legal principle that "any exemption from a comprehensive legislative 'policy designed to protect environmental interests' **must be 'strictly construed.'"** In re N.J. Dep't of Envtl. Prot. Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 235 (App. Div. 2013), quoting M. Alfieri Co., Inc. v. N.J. Dep't of Envtl. Prot. & Energy, 269 N.J. Super. 545, 554 (App.Div.1994), aff'd o.b., 138 N.J. 642 (1995) (emphasis added). A broad or expansive reading of the statutory exemption at issue here is contrary to this binding and well established jurisprudence, which requires a strict and narrow construction.

The statutory exemption at issue here has threshold limitations which, if strictly and narrowly construed, would have legally constrained the DEP to deny the requested exemption. For the DEP to consider any proposed project as exempt,

the project must be part of a "routine" as that is the first and most important word employed by the legislature in the statutory provision at issue. N.J.S.A. 13:20-28(a)(11). In addition, any proposed utility work must be done by a public utility which is operating "...under privileges granted or hereafter to be granted by this State or by any political subdivision thereof." N.J.S.A. 48:2-13(a).

Here it is undisputed that the proposed project is not a part of any normal "routine" utility work. It is also clearly established that the Respondent TGP is not operating "...under privileges granted or hereafter to be granted by this State or by any political subdivision thereof" and, therefore, is not a "public utility" as that term is defined by the State's very specific definition at N.J.S.A. 48:2-13(a) and included by reference in the Highlands Act, at N.J.S.A. 13:20-3. Despite being an interstate pipeline governed by FERC and the federal Natural Gas Act, the record in this appeal is devoid of any showing that Tennessee Gas satisfies the statutory definition of "public utility" as it is found in the State's Highlands Act. The Environmental Appellants assert that Tennessee Gas does not satisfy that narrow definition. More importantly, the Court should recognize that the legislative intent to greatly narrow the universe of potential exemptions is clearly displayed by this use of the expressly defined term ("public utility") in N.J.S.A. 13:20-28(a)(11).

Just because the Respondents assert that the proposed project is primarily located in a former historic quarry, and will only cut through surface waters that

were previously impacted by the former quarry operation, does not mean that the agency has employed the appropriate limiting standards in its application of this statutory exemption. If the Court holds otherwise then it will open the floodgates for any imaginable "upgrade" of any imaginable "system" by any purported out-of-state "public utility" to claim an entitlement to the exemption at issue.

The DEP concedes that the consistency determinations at issue in this HAD do not rise to the level of scrutiny that the DEP ordinarily requires in its review of an application for a Highlands Preservation Area Approval ("HPAA" or permit). In addition, the DEP concedes that if the proposed project is not exempt under the specific provision at issue in this appeal then an HPAA would be required under the Highlands Act. Critical to understanding the reasons the DEP's issuance of the exemption is inappropriate is the *fundamental starting point* that the proposed project has *not* been the subject of any permit application or associated review under the Highlands Act. The HAD application and review procedure is only a cursory form of a jurisdictional analysis and *not a permit review*. Thus, the Respondents are wrong to pretend that the DEP's decision at issue in this appeal constituted a full or adequate environmental review of the proposed project. This Court should have no assurance from the DEP's flawed jurisdictional determination that the proposed project will not result in inappropriate environmental harms.

The DEP argued that "Ever since the exemption was codified in DEP's rules, DEP has consistently interpreted the word 'routine' in Exemption #11 as only modifying 'maintenance and operations.' (Ab15). See 38 N.J.R. 5011(a) at Response to comment 3 and 4 (Dec. 4, 2006)." DEP brief at 16. But a review of the DEP's Responses to comments in the New Jersey Register reveals that the DEP only addressed issues raised by commenters regarding cell towers and did not include any discussion of the word "routine" as it is at issue in this case. Obviously, the DEP could find nothing directly on point in any of its regulatory promulgations to support its instant argument regarding the extent of "routine" in the relevant statutory provision so it stretched this particular citation as far as it thought it could go. The DEP's erroneous interpretation of the statutory exemption at issue in this appeal is simply not worthy of any judicial deference, and the regulatory history provides no support in that direction.

The DEP's attempt to contort the language of the statutory exemption (to cordon off the word "routine" from the word "upgrade") must fail. The DEP's theory of statutory construction in this case relies on the tenuous position that the word routine cannot reasonably apply to rehabilitation, preservation, reconstruction, repair, or upgrade. DEP brief at 19. But the DEP's failure to strictly and narrowly construe the provision, and associated failure to recognize the plain and obvious meaning attributed to the word routine in this context, renders

the DEP's decision making process as entirely unreasonable and in violation of the legislative intent behind the statutory exemption that is at issue here.

The DEP incorrectly relies on the case of State v. N.T., 461 N.J. Super. 566, 571 (App. Div. 2019), for the proposition that the "or" in this statutory language sets the word "upgrade" as apart or separate from the word "routine". The statutory language in that case did not deal with a statutory provision that is grammatically similar to the exemption at issue in this case. And the DEP's reliance on the case of Morella v. Grand Union/New Jersey Self-Insurers Guar. Ass'n, 391 N.J. Super. 231, 240 (App. Div. 2007), is also misplaced. That case actually supports the Environmental Appellants' reading of the statutory exemption at issue here precisely because the legislature chose not to employ semicolons.

The DEP should have looked at this Court's published decision in the matter of N.J. Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 513 (App. Div. 2015), which is directly on point with regard to the grammatical construction and interpretation of the word "or" as it is used in the statutory provision at issue in this appeal. The DEP ought to be well aware of this Court's published decision in Alloway Twp., where this Court held that "...even though it chose to use the disjunctive 'or,' the Legislature did not mean that either the 'owner' or 'the person in control,' **but not both**, could be subject to DEP's enforcement action." Ibid., emphasis added. The Court in Alloway Twp. provided the following quotation and

citation to make this point perfectly clear: **"'[I]t has long been settled that the disjunctive 'or' in a . . . statute may be construed as the conjunctive 'and' if to do so is consistent with the legislative intent.'"** Ibid., quoting State v. Holland, 132 N.J. Super. 17, 24, 331 (App. Div. 1975).

The same logic applies in this case. As in this Court's published decision interpreting the DEP's authority under the Safe Dam Act in Alloway Twp., the legislature's use of the words "or upgrade" in the Highlands Act only make sense if the word "or" in that provision is conjunctive with the previous words in the list. Thus, in N.J.S.A. 13:20-28(a)(11), the word "routine" applies to both "maintenance and operations" **AND** "upgrade" - just like the legislature meant to include both "owners" **AND** "operators" when it said "owner or operator" in the Safe Dam Act. The guidance from this Court's published decision in Alloway Twp. clearly militates in favor of the Environmental Appellants' proffered reading of the Highlands Act. Based on the binding precedent set in Alloway Twp., this Court must now reject the DEP's distorted view of the Highlands Act.

The DEP goes too far afield - to the 3rd, 7th, and 11th Circuit Court of Appeals. Those federal cases cited by the DEP simply do not prove what the DEP argues they prove. The case the DEP relied on from the 3rd Circuit actually stands for the proposition that a list separated by commas must be read meaningfully all together, as proffered by the Appellants in this case. The 3rd Circuit rejected the

agency's "distorted view of the statutory language" because the "use of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to all of the previous phrases and not merely the immediately preceding phrase." Elliot Coal Mining Co. v. Dir., Office of Workers' Comp. Programs, 17 F.3d 616, 630 (3d Cir. 1994). The same must be done here, as "routine" and "public utility" must be applied to all the other phrases and not merely the immediately adjacent phrase. The cases the DEP cited from the 7th and 11th Circuit, while dealing with labor and employment and bankruptcy issues at the federal level, offer no support for the DEP's distorted interpretation of the Highlands Act.

This Court must now decide that the DEP's failure to give proper meaning to the words "routine" and "public utility" in the Highlands Act was a fatal error in the DEP's issuance of the exemption to Tennessee Gas. The proposed project is too big, too unique, and does not deserve entitlement to the very narrow and limited statutory exemption at N.J.S.A. 13:20-28(a)(11), which was only intended for routine utility work.

II. THE PROPOSED PROJECT IS NOT CONSISTENT WITH THE BROAD POLICIES OF THE WATER QUALITY MANAGEMENT ACT.

(Aa0001)

The Court need not reach this Point II because the DEP's failure to give proper meaning to the words "routine" and "public utility" in the Highlands Act is dispositive, see Point I. However, if the Court feels it is necessary then the Environmental Appellants present this Point II.

The DEP's Water Quality Management Plan Consistency Determination was erroneously focused *only* on the number of gallons of wastewater which will be flushed down the drain as part of the proposed project. DEP brief at 28, TGP brief at 26. The Environmental Appellants assert that the broad policies of the Highlands Act and the Water Quality Management Act ("WQMA") necessitate a wider and more complex Water Quality Management Plan Consistency Determination by the DEP.

The legislature set forth its findings in the WQMA, as follows:

> The Legislature finds that the people of the State have a paramount interest in the restoration, maintenance and preservation of the quality of the waters of the State for the protection and preservation of public health and welfare, food supplies, public water supplies, propagation of fish and wildlife, agricultural and industrial uses, aesthetic satisfaction, recreation, and other beneficial uses; and that the severity of the water pollution problem in the State necessitates continuing water quality management planning in order to develop and implement water quality programs in concert with other social and economic objectives. The Legislature further finds that water quality

> is dependent upon factors of topography, hydrology, population concentration, industrial and commercial development, agricultural uses, transportation and other such factors which vary among and within watersheds and other regions of the State and that pollution abatement programs should consider these natural and man-made conditions that influence water quality. The Legislature further finds that the State's groundwaters are a precious and vulnerable resource.
>
> [N.J.S.A. 58:11A-2(a), emphasis added.]

And in the next subsection, the legislature declared as follows:

> The Legislature declares that the objective of this act is, wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State, including groundwaters, and the public trust therein….
>
> [N.J.S.A. 58:11A-2(b), emphasis added.]

Thus, the legislature's declarations make it clear that the DEP ought not to myopically focus on only wastewater to determine consistency with and/or to achieve the objectives of the WQMA and the Highlands Act. The legislature recognized that water quality planning requires a comprehensive analysis, including a searching look at all the wide ranges of natural and constructed features which may contribute to water pollution.

The legislature did not proclaim lightly that "This act [the WQMA] shall be liberally construed." N.J.S.A. 58:11A-11. When the legislature said "The commissioner shall not grant any permit which is in conflict with an adopted areawide plan," it did not mean that water pollution which may be caused from anything other than wastewater can legitimately or reasonably be ignored by the

DEP when it makes consistency determinations for purposes of exerting the State's jurisdiction under the Highlands Act. N.J.S.A. 58:11A-10.

The Respondents make much of the fact that the WQMA expressly references "waste treatment management plans." TGP brief at 26, emphasis in original. But just because the WQMA places an expressed emphasis on "waste treatment management plans" does not mean that it is only focused on that single source or vector of potential water pollution in its broad mandates for statewide water quality planning efforts. In fact, the methodology required by the legislature in the WQMA includes a requirement that the DEP also deal with impacts to "aquifer recharge areas," as follows:

> The Department of Environmental Protection, within two years of the effective date of this act [1988], shall prepare and publish a methodology which shall allow the user to define, rank and map aquifer recharge areas. In conjunction with this methodology, the department shall prepare and publish model land use regulations or best management practices designed to encourage ecologically sound development in aquifer recharge areas and to restrict therein those activities known to cause groundwater contamination.
>
> [N.J.S.A. 58:11A-13]

Therefore, in order to make an accurate Water Quality Management Plan Consistency Determination in this case, the DEP was required to also determine whether the proposed project would have any impact to mapped aquifer recharge areas and if so whether the proposed impacts were consistent with objectives of both the Highlands Act and the WQMA. But the DEP did not do that in this case.

The DEP's overly narrow Water Quality Management Plan Consistency Determination failed to look at potential impacts to the aquifer recharge areas, as it was specifically directed to do by the legislature in the WQMA.

In addition, the legislature clearly provided the DEP with an open ended mandate that included - **but was not limited to** - wastewater treatment planning. N.J.S.A. 58:11A-7. The DEP's regulation entitled "Water quality management plan consistency assessment" is set forth in relevant part, at N.J.A.C. 7:15-3.2. Clearly, the DEP's jurisdictional determination, or Water Quality Management Plan Consistency Determination, ought to have included a review of all the potential vectors or sources of water contamination from the proposed project, as envisioned by the legislature in the Highlands Act, and not just the gallons of water flushed into the proposed septic system.[3]

Confusingly, the DEP argued that "Appellants do not propose how TGP or DEP could calculate water impacts from impervious cover or deforestation. Nor can they, as the requirements they attempt to wedge into this process do not exist. Thus, DEP could not use nonexistent requirements to deny the Project." DEP brief

[3] Highlands Exemptions #9 and #11 are the only Exemptions that are granted with the condition that the activity is *consistent* with the goals and purposes of this Act. The benchmarks for finding consistency with the Highlands Act, and specifically addressing exemptions, are provided at N.J.A.C. 7:38-1.1(i) and (j). These regulations are in addition to those expressly listed at N.J.A.C. 7:38-9.2 or 9.5 and N.J.A.C. 7:38-11.2, 11.3, and 11.7, as required for consistency determinations as set forth by the DEP's regulations that implement the WQMA, at N.J.A.C. 7:15-3.2.

at 30-31. In fact, the DEP routinely employs very specific methods and pays very close attention to deforestation and impervious cover in some of its primary regulations which share the same objectives as the WQMA. See the DEP's Coastal Zone Management ("CZM") rules which implement the Wetlands Act of 1970, the Flood Hazard Area Control Act, the Waterfront Development Act, and the Coastal Area Facility Review Act ("CAFRA").

For instance, the DEP has duly promulgated a very detailed subchapter in the CZM rules which "...sets forth requirements applicable in general land areas and certain special areas for impervious cover and vegetative cover on sites in the upland waterfront development area and in the CAFRA area." N.J.A.C. 7:7-13.1, emphasis added. Accordingly, the DEP's argument that it could not look at potential water impacts from impervious cover or deforestation should be rejected by this Court. The DEP knows how to do this and does so routinely. It should have considered these issues as part of its Water Quality Management Plan Consistency Determination in this case.

In addition, the DEP's 2020 New Jersey Scientific Report on Climate Change provides the unambiguous and inconvenient truth that "...Human activities, particularly the emissions of heat trapping greenhouse gases from the burning of fossil fuels and land use changes like deforestation, have increased atmospheric carbon dioxide concentrations by more than one third since the early 1900s

(Bereiter et al. 2015) and are now the primary driver of climate change (Global Change 2020)." See DEP's 2020 Report on Climate Change. Critically, the DEP reported that "New Jersey's water quality will be impaired as extreme precipitation events increase runoff, bringing excess sediment and contaminants to New Jersey's streams." [Id. at xi.]

The proposed project is going to significantly increase downstream GHG emissions and induce demand for greater upstream fossil fuel extraction and, therefore, significantly exacerbate climate change impacts to water quality in New Jersey. The DEP's overly narrow focus on only wastewater, to satisfy its broad legislative mandate to protect from all sources of potential water pollution, echoes and reflects some of the opening sentiments expressed this morning at the first day of the COP27 summit in Egypt. **"We are on a highway to climate hell with our foot on the accelerator,"** said United Nations Secretary General Antonio Guterres. The DEP's consistency determination reflects an utter failure "to restore and maintain the chemical, physical and biological integrity of the waters of the State, including groundwaters, and the public trust therein…." N.J.S.A. 58:11A-2(b). CONCLUSION: This Court must reverse the DEP's exemption.

Respectfully submitted,
/s/ Daniel A. Greenhouse

IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICABILITY DETERMINATION, PROGRAM INTEREST NO.: 1615-17-0004.2 (APD200001)	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003616-20 CIVIL ACTION Appeal from Final Action of the New Jersey Department of Environmental Protection

SUPPLEMENTAL BRIEF OF APPELLANTS FOOD & WATER WATCH, NEW JERSEY HIGHLANDS COALITION, AND SIERRA CLUB

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Dated: November 11, 2024

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[1] "Aa" refers to Appellants' appendix, which was filed with the Appellants' Initial Brief in this appeal, on September 22, 2022.

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New Jersey, Climate Change Resilience Strategy (Oct. 2021), dep.nj.gov/wp-content/uploads/climatechange/nj-climate-resilience-strategy-2021.pdf

Highlands Council, Regional Master Plan
nj.gov/njhighlands/master/rmp/final/highlands_rmp_112008.pdf

New Jersey DEP, Water Quality Management Planning Program, nj.gov/dep/wqmp/wqmps.html

2024 New Jersey Statewide Water Supply Plan, dep.nj.gov/water-supply-plan/

PRELIMINARY STATEMENT

This Court must now determine whether the DEP erroneously refused to consider the project's air pollution emissions when the DEP found the project to be consistent with the broad policies and goals of the Highlands Water Protection and Planning Act. The project's air pollution emissions include consequential GHG emissions that will significantly contribute to the ongoing climate crisis and will unquestionably result in adverse environmental impacts to the local Highlands Preservation area. Clearly, this massive fossil fuel expansion project is inconsistent with the legislative goals and purposes of protecting the natural resources in the Highlands from unwise development and the DEP erroneously failed to consider or make any record of this project's significant environmental impacts from climate change when it issued the Highlands Applicability Determination (HAD).

The DEP has admitted that there is a proven connection between anthropogenic climate change and costly damage to the local water, air, and forest resources in the Highlands. More specifically, the DEP has admitted and does not dispute that projects like this will contribute to and exacerbate the current climate crisis and, therefore, this project will significantly damage the local environment in the Highlands. Therefore, the DEP was legally constrained to account for the project's air pollution emissions and find that the project is incongruous with the

legislative goals and purposes of protecting the natural resources in the Highlands. But the DEP refused to take the project's air pollution emissions into account and erroneously ignored all of these adverse impacts to the environment when it determined the project was consistent with the broad policies and goals of the Highlands Act.

In addition, this Court must also determine the separate but related question of whether the DEP's finding of consistency, under the Water Quality Planning Act, can be sustained based on an administrative record that consists only of the number of gallons of effluent that are anticipated to be sent into the septic system on any given day. The DEP is required to identify and account for other factors or elements of water pollution, including changes to stormwater runoff from this project and its potential impact to vulnerable waterways. Therefore, the DEP's finding that the project is consistent with the relevant Water Quality Management Plan is not supported by the requisite administrative record and findings.

Food & Water Watch, the New Jersey Highlands Coalition, and the Sierra Club (the "Environmental Appellants") are leading non-profit environmental and conservation organizations. Collectively, the Environmental Appellants represent hundreds of thousands of individual members who are deeply interested in protecting and preserving the safety of our environment and our natural resources for future generations. The DEP's myopic decision to exempt this project from its

ordinary permitting review under the Highlands Act sets the bar too low to meet the legislative mandate for serious and sustainable environmental protections in the face of unwise development proposals in the Highlands. The DEP's overly broad interpretation and application of Exemption 11 in this case fails to reckon with adverse and unsustainable environmental impacts from climate change and will open the floodgates for any imaginable "upgrade" of any imaginable "system" in the Highlands, which will contribute to further unwise sprawling development in the region.

The Legislature did not intend to hide an elephant like this in the mousehole of Exemption 11. The DEP failed to employ any reasonable limiting factor for this project and chose instead to completely ignore the massive environmental threats associated with this project's contributions to climate change and unwise sprawl. The Environmental Appellants respectfully request that this Court reverse the DEP's decision and require the project to go through the DEP's ordinary environmental permitting process. In the alternative, at the very least, the DEP should be ordered to transfer the matter to the Office of Administrative Law for further fact finding regarding the scope and extent of the project's impact to the environmental resources in the Highlands as a basis for its consistency determinations.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

The Environmental Appellants primarily rely on the Statement of Facts and Procedural History in its initial brief, submitted to this Court on September 22, 2022. In addition, on August 31, 2023, this Court decided that "the language of Exemption 11 and its statutory context, as well as the history of the Highlands Act, all point to the Legislature having intended to exempt only routine upgrades to a public utility's lines, rights of way or systems in the Preservation Area from the strictures of the statute." Matter of Proposed Constr. of Compressor Station, 476 N.J. Super. 556, 561 (App. Div. 2023). Accordingly, this Court "vacate[d] the HAD and remand[ed] for the DEP to consider whether Tennessee's proposed compressor station qualifies as a 'routine upgrade' to its pipeline system, entitling it to a HAD under our construction of the language of Exemption 11." Ibid. This Court did not reach the Appellants' second argument regarding the DEP's Water Quality Management Plan consistency determination. Id. at 563, n.7.

On January 11, 2024, the DEP issued a new HAD with a supporting staff report. Rma004.[3] The DEP's old and new HAD determinations were made without the benefit of any record or analysis of the project's air pollution emissions or its contribution to global climate change and the associated adverse impacts to

[2] The facts and procedure are interrelated, so they are presented together.
[3] "Rma" refers to the DEP's motion appendix, filed with this Court on August 26, 2024.

the natural resources in the Highlands areas. The DEP intentionally ignored the project's air pollution emissions and any factors or elements of climate change impacts from this project to support the DEP's final determination that the project is consistent with the broad legislative goals and objectives in the Highlands Act. The DEP stated that "Those [air] emissions would be subject to separate permitting requirements by DEP, not at issue here." See page 27 of DEP's brief in this appeal, dated October 31, 2022.

Subsequent to the DEP's issuance of the new HAD, the New Jersey Supreme Court granted TGP's petition for certification, reversed this Court regarding the applicability of "routine" in Exemption 11, and issued a remand "to allow for specific findings as to the consistency of the project within the Highlands Act." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312 (2024). The Supreme Court provided that "...it will be necessary to consider the [totality of the] circumstances of the project…." Ibid.

The DEP filed a motion to supplement the record with only part of the record of its new HAD final agency decision, which was granted by this Court. In addition, this Court issued an order granting TGP's motion to hold the Environmental Appellants' appeal of the new HAD in abeyance pending the outcome of this appeal regarding the original HAD. This supplemental brief followed.

LEGAL ARGUMENT

I. THE DEP ERRONEOUSLY FOUND THIS PROJECT TO BE CONSISTENT WITH THE BROAD POLICIES OF THE HIGHLANDS ACT AND THE REGIONAL MASTER PLAN. (Aa0001)

The Supreme Court provided that "In determining whether construction of Compressor Station 327 is consistent with the Highlands Act's 'goals and purposes,' see N.J.S.A. 13:20-28(a)(11), *it will be necessary to consider the circumstances of the project*…." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312 (2024), emphasis added. Thus, the New Jersey Supreme Court intended for the DEP and this Court to fully consider and account for the *totality of the circumstances* surrounding the project, including its contribution to the ongoing climate crisis. The DEP erred when it issued the HAD without any consideration or accounting of the project's impact to Highlands resources due to its emissions of air pollutants and contributions to global climate change.

The legislative intent evinced by the term "consistent with the goals and purposes of this act" was to broadly cast a wide net over all of the project's impacts to the environmental resources in the Highlands, including impacts attributable to sprawling development and global warming. The DEP disagreed, by taking the contrary position that "the goals and purposes of this act" did not include any requirement that the DEP assess or consider the project's role in sprawl development or its air pollution emissions (including its contributions to the

ongoing climate crisis). Yet, the DEP made no findings of whether the project will play a role in more unwise sprawling development in the region or if this massive expansion of fossil fuel use and emissions of air pollutants (greenhouse gas emissions ("GHG emissions")) will adversely impact the Highlands. The DEP hid the truth that this project's GHG emissions will unquestionably have adverse impacts on the natural resources in the Highlands. Despite the overwhelming and known environmental threats posed by this project, the DEP has taken the position that the goals and purposes of the Highlands Act will not be hindered by the project's role in sprawl development, its air pollution emissions, and associated contribution to anthropogenic climate change.

Much like the allegations of local harm from air pollution (or GHG emissions) in Massachusetts v. EPA, 549 U.S. 497, 522 (2007), the Environmental Appellants' instant allegations of damage to the local Highlands resources cannot be ignored in the DEP's Highlands Act consistency determination. Critically, the petitioners in that case (Massachusetts and eleven other states *including New Jersey*) were found to have Article III standing based on the concrete and particularized harm posed to their local resources by air pollution in the form of GHG emissions. Ibid. The implications of Massachusetts v. EPA, are that the natural resources in the Highlands are also concretely and particularly injured from the project's air pollution and global GHG emissions, for purposes of this appeal.

This point, from Massachusetts v. EPA, has been cited in an important administrative matter, regarding the DEP's application of New Jersey's environmental laws and permitting decisions. Chief Administrative Law Judge John R. Tassini (now J.S.C.) explained persuasively, as follows:

> Safeguarding the public health, safety and welfare is an essential governmental function and police power. Environmental protection laws, given their clear purpose of protection of public health, safety and welfare, are entitled to especially liberal construction for their beneficent objectives. Also, given the insidious and cumulative effect of the destruction and losses of our natural resources, that the effect of the loss of a particular resource may not be exactly quantifiable or may seem minimal, is not a reason to exclude it from protection under the applicable laws. Lom-Ran Corp. v. Dep't of Envtl. Prot., 163 N.J. Super. 376, 384-85, 388 (App. Div. 1978) New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). Dunes, among other benefits, provide natural buffers to water and waves and habitat for wildlife and the general prohibition of development in dunes is consistent with CAFRA. Since dunes provide natural buffers to water and waves, the general prohibition of development in dunes is also reasonable given global warming and predicted resulting phenomena, including the rise in sea level. See Massachusetts et al. v. Envtl. Prot. Agency, U.S. , 43 127 S.Ct. 1438, 167 L.Ed. 2d 248 (2007) 16 U.S.C.A. § 1451(l).
>
> [North Bayview, LLC v. NJ DEP, 2007 N.J. AGEN LEXIS 782, 39-40 (Dec. 3, 2007).]

Just as the DEP's permit decision that implemented the Coastal Area Facility Review Act ("CAFRA") was reinforced and informed by the holding in Massachusetts, the same logic should be applied here with regard to the DEP's implementation of the Highlands Act. Furthermore, if the State of New Jersey, as

an actual petitioner in Massachusetts, prevailed on its claim before the Supreme Court of the United States that local harms must be accounted for and redressed by the judiciary when facing the known threats from global air pollution, then it should be held to the same standard with regard to the DEP's instant consistency determination under the Highlands Act. See First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007).

The DEP argued in its initial brief, filed with this Court on October 31, 2022, at page 24, that "The substantial evidence in the record supports the DEP's finding that the Project is consistent with the goals and purposes of the Highlands Act." The DEP reasoned that it "...incorporated the Act's direction to protect or preserve 'the quality and quantity of surface and ground waters, . . . forests, wetlands, vegetated stream corridors, steep slopes, and critical habitat for fauna and flora[,]' N.J.S.A. 13:20-10(b)(1) and (3), into its standards at N.J.A.C. 7:38-3." Id. at 25. The DEP substantiated its consistency determination by relying entirely on its finding that "The record demonstrates that 'TGP has avoided and minimized impacts to Highlands resources in the siting and design of the facilities.' (Aa330)." Ibid. However, the DEP's finding that the environmental impacts have been "avoided and minimized" simply cannot be taken seriously by anyone who believes in the overwhelming scientific consensus that increased GHG emissions will exacerbate climate change and be the proximate cause of associated

environmental degradation to the Highlands resources. The DEP's administrative record is not credible in this regard.

The DEP's dubious finding that the Project "avoided and minimized impacts to the Highlands resources" is not based on any credible record or factual reality of the project's air pollution (GHG emissions) or the inevitable environmental damage to the Highlands resources from anthropogenic climate change. The DEP erroneously and improperly failed to consider this project's role in unwise sprawl development and its air pollution emissions, including its significant contribution to the ongoing climate crisis.

The Highlands Act clearly and expressly intended the DEP to consider impacts to air quality from the project. See N.J.S.A. 13:20-2 ("The Legislature further finds and declares that **the New Jersey Highlands is an essential source of drinking water, … clean air**, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora…."). Yet the DEP erroneously argued that "Those [air] emissions would be subject to separate permitting requirements by DEP, not at issue here." See page 27 of DEP's brief submitted to this Court on October 31, 2022, emphasis added. If the DEP strictly and narrowly construed the goals and purposes of the Highlands Act then it must have addressed all environmental impacts to the Highlands resources, including the project's emissions of air pollution which will result in anthropogenic climate change and

associated environmental degradation to all of the Highlands resources. The DEP's assessment of the project's air pollution, including its GHG emissions, should be found somewhere in the administrative record to support the HAD. But the DEP intentionally stuck its head in the sand on this important issue. If it had made such an assessment then it would have been constrained to find that the project's GHG emissions are clearly incongruous or inconsistent with the goals and purposes of the Highlands Act.

Here it is undisputed that the proposed project will have significant environmental impacts because it is a massive expansion of TGP's fossil fuel infrastructure, which will enable TGP to buy, ship, and sell "115,000 dekatherms per day (Dth/d) of additional gas per year." See TGP's Brief, filed with this Court on October 31, 2022, at page 4. The reason for this massive expansion in fossil fuel infrastructure is to enable further sprawl development in the region, which was precisely the type of development pressure that caused the legislature to pass the Highlands Act. N.J.S.A. 13:20-2. According to the Federal Energy Regulatory Commission's Final Environmental Impact Statement (the "FEIS"), the Commission concluded that "...**we acknowledge the Project's direct and downstream emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources,**

and would contribute to climate change…." TGPa00023[4], emphasis added. Therefore, there is no question or dispute in this appeal of whether this project will contribute to climate change. For context regarding the scope and size of this project's anticipated impact, the Federal Energy Regulatory Commission used a conservative methodology to determine that: "...the total social cost of GHGs from the project is calculated to be $5,790,928,380 (in 2020 dollars)." See paragraph 61 of FERC's Order Issuing Certificate, April 21, 2022. It is difficult to comprehend how the DEP has decided to intentionally ignore these enormous negative externalities (*$6 billion dollars of externalized damages to the public goods*) if it is being faithful to its stringent environmental protection mandates.

The State and the DEP admitted that anthropogenic climate change is adversely impacting New Jersey's environment and its natural resources. Governor Murphy issued Executive Order 100 ("EO100"), on January 27, 2020, which provided, in part, as follows:

> WHEREAS, the international scientific community has reached an overwhelming consensus that the Earth is warming due to increasing atmospheric levels of carbon dioxide and other greenhouse gases; and
>
> WHEREAS, there is also overwhelming consensus that such temperature increases are contributing to rising sea levels, an increase in the frequency and intensity of severe weather events, and numerous other adverse environmental impacts that have threatened and will continue to threaten our communities, economies, and public health; and

[4]TGP's appendix, filed with brief on October 31, 2022.

> WHEREAS, it is also widely accepted that human activity, and in particular society's emissions of greenhouse gases, has driven and continues to drive global climate change and its corresponding impacts on our natural environment; and
>
> [52 N.J.R. 365(a), (March 2, 2020).]

In addition, DEP Commissioner Catherine R. McCabe issued Administrative Order 2020-01 ("AO1"), also on January 27, 2020, to reiterate and implement Governor Murphy's EO100.[5] By issuing AO1, the DEP acknowledged and repeated the unambiguous sentiments in EO100 regarding anthropogenic climate change and its direct impact on the State's environment. Moreover, AO1 expressly directed the DEP to "...integrate climate change considerations, such as sea level rise and chronic flooding, into its regulatory and permitting programs…." Ibid.

EO100 and AO1 have the force and effect of law, just like directives issued by the New Jersey Attorney General. See In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 487 (2021). EO100 and AO1 are legally binding upon the DEP's permitting decisions, including the instant HAD. Therefore, the DEP's failure to account for this project's air pollution emissions and associated environmental impacts in the instant consistency determination is an inappropriate deviation from the letter and intent of both EO100 and AO1.

[5] See dep.nj.gov/wp-content/uploads/njpact/docs/dep-ao-2020-01.pdf

In June of 2020, the DEP issued its "2020 New Jersey Scientific Report on Climate Change" in which it announced that the effects of climate change on New Jersey's environment "...are significant and wide-ranging, requiring a comprehensive and forward-thinking response by all levels of government, economic sectors, communities, and populations."[6] The DEP's 2020 Report explained in detail how anthropogenic climate change will specifically and adversely impact the Highlands environment in NJ. For example, the 2020 Report explains how the Highlands forest resources (p. 85), wetlands (p. 96), and terrestrial systems (p. 115), are all expected to be adversely impacted by climate change (in very specific ways).

In October of 2021, the DEP issued another report titled "Climate Change Resiliency Strategy" which further addressed the necessity of revising its regulations to adapt to climate change in New Jersey, including the DEP's intention to study and adapt its regulations to the reality of climate change impacts in New Jersey. The Climate Change Resiliency Strategy report highlighted the accepted fact that "*New Jersey's water quality will be impaired as extreme precipitation events increase runoff, bringing excess sediment and contaminants to New Jersey's streams*."[7]

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[6] See *2020 New Jersey Scientific Report on Climate Change* (June 2020), p. vi. dep.nj.gov/wp-content/uploads/climatechange/nj-scientific-report-2020.pdf.
[7] Michael Baker International, Inc., *State of New Jersey, Climate Change Resilience Strategy* (Oct. 2021) at 2, emphasis added.

The Highlands Regional Master Plan ("RMP") was adopted in 2008 by the Highlands Council, pursuant to the mandates in the Highlands Act. The RMP expressly recognizes the critical element of "Air Quality" as a function of appropriate land use planning and the overall implementation of the Highlands Act, as follows:

> This [Air Quality] element addresses the connection between land development patterns, automobile transportation and the creation of air pollutants affecting the Highlands Region. Because development patterns also affect energy use, improved regional growth patterns also help address global warming issues to some extent. The element also calls for additional monitoring of toxic air pollutants from both within and nearby the Region.
>
> [nj.gov/njhighlands/master/rmp/final/highlands_rmp_112008.pdf, at page 19.]

Thus, the RMP expressly acknowledges the association between unwise sprawl development, regional growth patterns, and the regulation of energy use and public utilities with regard to the health of the Highlands natural resources. The RMP also expressly linked climate change considerations to implementation of the RMP because, "Forests sequester atmospheric carbon and contribute to combating global warming." Id. at 137. In addition, the RMP unequivocally pronounced that the legislative intent to regulate GHG emissions in the Global Warming Response Act

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dep.nj.gov/wp-content/uploads/climatechange/nj-climate-resilience-strategy-2021.pdf.

is compatible with and also a function of the implementation of the broad goals and policies of the Highlands Act, as follows:

> The RMP policies support the State Global Warming Response Act in reducing the level of greenhouse gas emissions in the state by the year 2020 through the reduction of mobile sources, resource protection and energy efficient practices.
>
> [Id. at 210.]

Accordingly, the DEP erred when it failed to make any record of this project's air pollution emissions and its associated contribution to increased GHG emissions when it decided that the project was consistent with the goals and objectives of the Highlands Act and the RMP. The DEP was constrained to assess the totality of the circumstances of the project including its GHG emissions.

The Legislature mandated, in the Highlands Act, that the DEP implement a "...comprehensive approach to the protection of the water and other natural resources of the New Jersey Highlands; that this comprehensive approach should consist of the identification of a preservation area of the New Jersey Highlands that would be subjected to stringent water and natural resource protection standards, policies, planning, and regulation…" N.J.S.A. 13:20-2. The DEP's HAD is arbitrary and capricious because the DEP is fully aware that the project is going to result in air pollution that will contribute to and exacerbate the ongoing climate crisis in ways that will specifically injure the precious natural resources in the preservation areas of the New Jersey Highlands.

Just because the Respondents assert that the proposed project is primarily located in a former quarry, does not mean that the agency has employed the appropriate limiting standards of "consistency" in its application of this statutory exemption or that it has considered the totality of the circumstances. If this Court affirms the DEP's consistency determination then it will open the floodgates for any imaginable "upgrade" of any imaginable "system" by any purported out-of-state "public utility" to claim an entitlement to Exemption 11.

The DEP made the bald assertion that "if the detailed activities were not considered exempt under this section, the described impacts to Highlands Resources would generally be permittable by the Highlands Act under a Highlands Preservation Area Approval." Rma012. However, TGP's counsel represented to the Appellate panel, during oral argument in this appeal on February 8, 2023, that if TGP was required to seek and obtain an HPAA, the Project would have to be redesigned because of its proximity to an on site Category One waterway. Thus, the DEP and TGP must concede that the consistency determination at issue in this HAD does not equate to a permit and the project has not appropriately been deemed "permittable" according to the DEP's formally noticed regulations. It is deeply troubling that the DEP would make such a finding without all of the necessary prerequisites, according to the letter and spirit of its duly promulgated Highlands rules.

II. THE DEP FAILED TO MAKE AN ADEQUATE WATER QUALITY MANAGEMENT PLAN CONSISTENCY DETERMINATION. (Aa001)

The DEP failed to make an adequate "Consistency Assessment" according to the Water Quality Planning Act and Water Quality Management Planning Rules, because it failed to make any findings regarding pollutant limitations and other requirements of the areawide water quality management plans applicable to the waterways into which the project will create and discharge stormwater. The DEP's HAD is premised on the erroneous determination that "the proposed Project is 'Consistent' with the WQMP and is in accordance with the WQMP rules." Aa0002. But the DEP utterly failed to account for the *totality* of the proposed project, including all the impacts from the construction and use of the new compressor station, office building, and appurtenances. The only factor DEP weighed in making this fundamental consistency determination was the anticipated gallons of water used and effluent that it anticipated would enter the septic system on a daily basis. Ibid. The DEP's consistency determination myopically ignored the totality of the circumstances and impacts that must be anticipated from the proposed project.

It is beyond dispute that the project resulted in the addition of significant impervious surfaces on the site, as well as being the proximate cause of increased stormwater runoff from its ongoing contribution to air pollution (GHG emissions)

and exacerbation of the global climate crisis. See Massachusetts v. EPA, 549 U.S. 497, 522 (2007) (where it was held, "That these climate-change risks are 'widely shared' does not minimize Massachusetts' [and New Jersey's] interest in the outcome of this litigation.) Just because the project will be the proximate cause of harm on a global scale does not minimize the fact that it will also be the proximate cause of dramatic changes in precipitation and stormwater runoff in the Highlands Preservation areas, in contravention to the goals and policies of the Highlands Act and the Water Quality Planning Act. Ibid.

These impacts to water resources cannot legitimately go unaccounted for in the DEP's instant consistency determinations, under both the Highlands Act and the Water Quality Planning Act. It is undisputed that this project will significantly increase GHG emissions that will exacerbate global climate change. The DEP has admitted that increases in GHG emissions will unquestionably result in measurable impacts to precious water resources in the Highlands Preservation areas and other areas in New Jersey. See 54 N.J.R. 2169(a) (Dec. 5, 2022) and 55 N.J.R. 1385(b) (July 17, 2023). In its formal rule promulgation, the DEP said:

> Global warming has, and is expected to continue to, result in changes in climate, the type and extent of which vary depending upon locality. One such change, which is particularly relevant to this rulemaking, is the increase in average global temperature; this change will cause earth's atmosphere to hold more water vapor, which leads to a higher potential for increased and more intense precipitation in certain regions (NJDEP, 2020).

> [54 N.J.R. 2169(a), at page 2172. Emphasis added.]

In accordance with the Water Quality Planning Act, the DEP issued the 2024 Statewide Water Supply Plan. See dep.nj.gov/water-supply-plan/. The DEP acknowledged that:

> It is well documented that New Jersey is not immune to the impacts of climate change and is in fact already facing significant direct and indirect consequences, some of which are more severe than those experienced in most other regions of the country and the world.
>
> [Id. at 33.]

The DEP explained that, although the impacts to water supplies may be complicated and the subject of ongoing research, recent years have shown a trend of increasingly intense rainfall events followed by periods of little or no rain, and with the increased uncertainty posed by these weather patterns, it can become challenging for water supply managers to ensure the availability of water resources during dry periods. Climate change also results in Harmful Algal Blooms ("HABs"), which have been and continue to be extremely harmful to the Highlands water resources.

> During the summer of 2022, extremely low precipitation and streamflow led the DEP to declare a Drought Watch […] and rampant harmful algal blooms (HABs) were worsened by extremely warm temperatures and intense precipitation. One such HAB broke records for duration, and its toxin levels threatened the water supply of 800,000 residents.
>
> [Id. at iv-v.]

The DEP admitted, as follows:

> The Water Supply Management Act (N.J.S.A. 58:1A-13) requires DEP to prepare a Statewide Water Supply Plan that assesses the state of our water supplies and identifies the policies necessary to ensure that the State and its water providers are adequately prepared for current and future water supply challenges. As discussed throughout this report, these challenges have been exacerbated by anthropogenic climate change that will present as a progressive risk multiplier in the years ahead and which must be more fully considered in the development and implementation of water supply policy.
>
> [Id. at 213.]

While the number of gallons of effluent to be expected to flow into the septic system on any given day is a key determination for a Consistency Assessment, it is insufficient standing alone. The DEP must consider this project's contribution to climate change as a part of its consistency determination.

The DEP is also required to make a record regarding Total Maximum Daily Loads ("TMDLs")[8] and any wasteload allocations[9] for impaired waters,[10] as well as

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[8] A "Total maximum daily load" or "TMDL" is the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will continue to meet water quality standards for that particular pollutant. See N.J.A.C. 7:9B-1.4.

[9] A wasteload allocation is the amount of a pollutant that is allocated to a specific point source, and combined with other sources, makes up the TMDL, or total maximum daily load. See N.J.A.C. 7:9B-1.4 (definition of wasteload allocation). Stormwater discharged through an outfall is considered a point source discharge under the Clean Water Act. 33 U.S.C. § 1362(14).

[10] Impaired waters are those that do not support their designated uses because they exceed the pollutant levels required by the surface water quality standards. These are commonly referred to as impaired waters. Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 907 (11th Cir. 2007).

any additional requirements contained in the applicable Areawide Water Quality Management Plans ("Areawide WQM Plans"). The DEP must consider and make a record of this information in order to determine consistency with the applicable Areawide WQM plan, but it did not. The Court should vacate and remand the permit to the agency to develop an adequate record and provide a reasoned Consistency Assessment. Musconetcong Watershed Ass'n v. NJ DEP, 476 N.J. Super. 465, 488 (App. Div. 2023).

Under the WQPA, "The commissioner shall not grant any permit which is in conflict with an adopted areawide plan." N.J.S.A. 58:11A-10. The Water Quality Management Planning Rules ("WQMP Rules") similarly provide that, "The Department shall not issue a permit or approval that conflicts with an adopted areawide plan *or this chapter*." N.J.A.C. 7:15-3.2(a)(emphasis added). Regarding consistency with "*this chapter*," it is critical to note that Subchapter 5 of *this chapter*, "sets forth the processes for identifying and listing the 303(d) List of Water Quality Limited Waters, setting the priorities and schedule for development of total maximum daily loads (TMDLs) to address impairments in water quality limited waters, and for developing TMDLs and plans to implement TMDLs." N.J.A.C. 7:15-5.1. Thus, consistency with "*this chapter*" also requires that surface water quality be considered, including TMDLs.

Exemptions #9 and #11 in the Highlands Act are the only Exemptions that

are granted with the express condition that the activity is consistent with the goals and purposes of the Highlands Act. The benchmarks for finding consistency with the Highlands Act, and specifically addressing exemptions, are provided at N.J.A.C. 7:38-1.1(i) and (j). These regulations are in addition to those expressly listed at N.J.A.C. 7:38-9.2 or 9.5 and N.J.A.C. 7:38-11.2, 11.3, and 11.7, as required for the DEP to make the requisite consistency determinations as set forth by the DEP's regulations that implement the WQMA, at N.J.A.C. 7:15-3.2. Therefore, the regulatory web, or layered approach, to consistency determinations under both the WQMA and the Highlands Act, ought to persuade this Court that absolutely no stone is allowed to be left unturned in the administrative record here, including information about changes in stormwater runoff from climate change, TMDLs, and potential impacts to sensitive water bodies.

Regarding the areawide plan or Areawide WQM Plan, these are developed at the county level, and "identify and address selected water quality and wastewater management issues for a particular jurisdictional area, including strategies to address both point and nonpoint source pollution. The Areawide WQM Plan is the basis by which the Department and the designated planning agencies (DPAs) conduct selected water quality management planning activities for a particular area of the State." N.J.A.C. 7:15-2.3. In contrast, a "'[w]astewater management plan' or 'WMP' means a written and graphic description of

wastewater service areas, and wastewater treatment needs." N.J.A.C. 7:15-1.5. WMPs "are [only] components of the areawide plan." In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 560 (App. Div. 2011).[11] The WQPA and WQMP Rules require consistency with the Areawide plans, including TMDLs and identification of potentially impacted nearby waters. N.J.S.A. 58:11A-10; N.J.A.C. 7:15-3.2(a). The Areawide WQM Plan at issue in this matter does not appear in this administrative record, nor does it otherwise appear to be available to the public anywhere else, which is a fatal flaw in this administrative record. How can any reviewing tribunal assess the adequacy of the DEP's consistency determination if there is no WQM Plan in the record to compare it with?

In 2015, the DEP amended the WQM Rules, seeking to "streamline" and "simplify" the planning process, including the Consistency Assessment. As a part of these proposed revisions, the DEP "eliminate[d] the separate formal consistency determination review as part of the water quality planning process" and shifted this requirement to the permitting process, "when actual proposals and current conditions can be part of the decision making." 47 N.J.R. 2531(a) (Oct. 19, 2015). The DEP explained that, "*If a WQM plan has additional requirements, or a wasteload allocation in an adopted TMDL has been established, these must also be addressed in order for the proposal to be consistent.*" 47 N.J.R. 2531(a) (Oct 19,

[11] DEP, Water Quality Management Planning Program web page, available at nj.gov/dep/wqmp/wqmps.html (emphasis added).

2015) (emphasis added); 48 N.J.R. 2244(a) (Nov. 7, 2016) (response to comment #164). But the DEP made no findings regarding wasteload allocations or TMDLs anywhere in the record of the instant decision.

In this case, Stormwater will flow off of the newly created impervious surfaces into Hewitt Brook, which runs along the North-west boundary of the property. Hewitt Brook is a Category-1 Trout Production Stream with an associated flood hazard area and 300 foot riparian zone. Rma006. Entirely absent from the record is DEP's consideration or determination of whether Hewitt Brook or those that it feeds will be adversely impacted by this project.

CONCLUSION

For all the above reasons, this Court should reverse the HAD, or in the alternative, remand the matter for further findings.

Respectfully submitted,

/s/ Daniel A. Greenhouse

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Superior Court of New Jersey
Appellate Division

IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICABILITY DETERMINATION, PROGRAM INTEREST NO.: 1615-17-0004.2 (APD 2000001)	**Appellate Division DOCKET NO. A-003616-20** **STATE AGENCY DOCKET NO. 1615-17-0004.2 (APD200001)**

SUPPLEMENTAL BRIEF OF RESPONDENT, TENNESSEE GAS PIPELINE COMPANY, L.L.C.

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PRELIMINARY STATEMENT

This matter is on remand from the New Jersey Supreme Court to review the two remaining issues in this appeal. The issues are whether the New Jersey Department of Environmental Protection ("NJDEP") appropriately determined that the portion of Tennessee Gas Pipeline Company, L.L.C.'s ("Tennessee") East 300 Upgrade Project ("Project"), identified as Compressor Station 327 ("CS 327"), located within the Highlands Preservation Area is consistent with (1) the goals and purposes of the Highlands Water Protection and Planning Act ("Highlands Act"), N.J.S.A. 13:20–1 et seq.; and (2) the areawide water quality management plan ("WQM Plan").

As to these issues, Appellants now claim (without any legal authority) that NJDEP failed to analyze air pollution and climate change impacts from CS 327. The Highlands Act, though, covers specific resource areas and air is not one of them. Further, CS 327 is an electric driven compressor station, meaning the only new emission sources are an emergency backup generator and infrequent venting that may occur during operation and maintenance of the facility.

NJDEP correctly determined that CS 327 was consistent with the goals and purposes of the Highlands Act and the WQM Plan. Tennessee sited CS 327 in a heavily disturbed industrial site that was previously used as a quarry and Tennessee designed the CS 327 facilities so that there would be no permanent impacts to Highlands resource areas. These efforts to avoid and minimize impacts were

acknowledged by the New Jersey Supreme Court in In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312, __ (2024). In addition, NJDEP reviewed the required information provided by Tennessee and ultimately determined that CS 327 is consistent with the WQM Plan as the septic system has a projected flow of less than or equal to 2,000 gallons per day.

Finally, Appellant, Food and Water Watch, previously and extensively litigated the issues of air pollution and climate change impacts from the Project, including CS 327, with the Federal Energy Regulatory Commission ("FERC") and on appeal to the D.C. Circuit Court of Appeals. Both FERC's Order Issuing Certificate ("Certificate Order") and its analysis as to air pollution and climate change in its Final Environmental Impact Statement ("FEIS") were upheld by the D.C. Circuit Court of Appeals. Thus, Appellants are precluded from taking a second bite at the apple by relitigating the air pollution and climate change issues before this Court. For the reasons set forth fully herein, NJDEP's decision should be affirmed.

SUPPLEMENTAL PROCEDURAL HISTORY

On August 31, 2023, this Court issued its decision in Matter of Proposed Constr. of Compressor Station, 476 N.J. Super. 556 (App. Div. 2023), interpreting Exemption #11 of the Highlands Act to exempt only "routine upgrades to a public utility's lines, rights of way or systems in the [Highlands] Preservation Area…" Id. at 561. This Court also vacated NJDEP's June 23, 2021 Highlands Applicability Determination issued to Tennessee ("Original HAD") and remanded the matter back

to NJDEP to determine whether CS 327 qualified as a "routine upgrade" to Tennessee's pipeline system. Id. at 574. Given this determination, this Court did not address Appellants' remaining arguments. Id. at 563, n. 7 and 572, n. 13.

On September 1, 2023, in response to this Court's August 31, 2023 decision, Tennessee submitted supplemental information to NJDEP and requested a new HAD and WQM Plan consistency determination ("Consistency Determination"). On October 10, 2023, Tennessee filed a Notice of Petition for Certification with the New Jersey Supreme Court (Docket # 088744) to review the August 31, 2023 decision. On October 19, 2023, Tennessee filed its Petition for Certification with the New Jersey Supreme Court, which was granted on February 2, 2024.

On January 11, 2024, NJDEP issued a new HAD ("New HAD") and Consistency Determination in accordance with this Court's August 31, 2023 decision. Rma001-002.[1] The New HAD was accompanied by NJDEP's staff report setting forth NJDEP's findings as to CS 327. Rma003-016. On August 6, 2024, the New Jersey Supreme Court reversed this Court's August 31, 2023 decision, holding that "routine" under Exemption #11 of the Highlands Act only modified the activities of "operations and maintenance." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. at __. The Supreme Court remanded the matter back to this Court to review the remaining substantive issues. Id. On August 26, 2024,

[1] "Rma" refers to NJDEP's Appendix to its Motion to Supplement the Record filed on August 26, 2024.

NJDEP filed a motion to supplement the record with the New HAD decision and its supporting staff report. On September 11, 2024, this Court granted NJDEP's motion and ordered the parties to submit supplemental briefing on the remaining issues and address whether the matter should be remanded to NJDEP or the OAL for further fact-finding.

FACTUAL BACKGROUND

Tennessee relies on the facts as set forth in its initial merits brief filed with this Court on October 31, 2022. The facts below are for the convenience of the Court and to provide relevant federal agency and judicial determinations directly related to the arguments made by Appellants in their supplemental brief.

I. East 300 Upgrade Project

Tennessee is a "natural gas company" under the Natural Gas Act, 15 U.S.C. §717 et seq. ("NGA") and is primarily engaged in the business of transporting natural gas in interstate commerce[2], and, as such, is regulated by the FERC as to facilities, construction, rates, and types of service. Tennessee's facilities are "interstate natural gas pipeline facilities" which are subject to the regulatory authority of the FERC and of the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration. Aa0052.

[2] Importantly, and contrary to the claims of Appellants, Tennessee does not buy or sell the gas it transports. Asb11. "Asb" Refers to Appellants' supplemental brief.

In response to the needs of a local natural gas distribution company, Consolidated Edison Company of New York, Inc. ("ConEd"), for incremental firm pipeline transportation service to meet its customers' demands, Tennessee filed an application with the FERC on June 30, 2020, pursuant to section 7(c) of the NGA, requesting that FERC issue a certificate of public convenience and necessity to construct and operate the Project. Aa0053. The Project is designed to provide up to 115,000 dekatherms per day (Dth/d) of additional firm transportation capacity on Tennessee's interstate natural gas pipeline system that will be used to provide service to ConEd. Aa0054. Tennessee's Project is a discrete project designed to meet the needs of a discrete customer.

As part of the Project, following FERC approval, Tennessee constructed, and is now operating and maintaining, CS 327 and appurtenant facilities in the Township of West Milford. TGPsa001.[3] The Project also included the installation of new compressor units at both its existing Compressor Station 325 in Wantage Township, and its existing Compressor Station 321 in Clifford Township, Pennsylvania. Aa0053. The Project only consists of new compression facilities; it does not include any new pipeline. Aa0084.

II. FERC's Comprehensive Review

FERC conducted a thorough review of the Project. Consistent with its

[3] "TGPsa" refers to Tennessee's Supplemental Appendix submitted herewith.

responsibilities under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, FERC staff prepared an in-depth Environmental Assessment ("EA") for the Project.[4] TGPsa002. The EA addressed a wide range of environmental impacts, including geology, soils, groundwater, surface water, wetlands, fisheries, wildlife, vegetation, species of special concern, socioeconomics, land use, recreation, visual impacts, cultural resources, air quality, noise, reliability and safety, and cumulative impacts. Id. The EA acknowledged that CS 327 would be located within the Highlands Preservation Area and recognized the objectives of the Highlands Act. TGPsa013. In addition, the EA addressed greenhouse gas emissions ("GHGs") associated with construction and operation of the Project by quantifying the direct emissions of the Project, and describing how the Project would affect New Jersey's satisfaction of its greenhouse gas emissions reductions goals. TGPsa014-020. The EA concluded that the Project "would not constitute a major action significantly affecting the quality of the human environment." TGPsa021.

FERC staff subsequently issued a Draft EIS, which incorporated the EA's analysis and conclusions, except for those related to the Project's impact on climate change. TGPa0015.[5] FERC staff then issued a Final EIS, which addressed all

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4 This Court should take judicial notice of the EA pursuant to N.J.R.E. 202(b) and N.J.R.E. 201(b)(3). Relevant sections of the EA are included in Tennessee's appendix for the Court's convenience.

5 "TGPa" refers to Tennessee's appendix submitted with its initial merits brief on October 31, 2022.

substantive comments received on the Draft EIS, including those of Appellant, Food and Water Watch. TGPa0014. The Final EIS concluded that construction and operation of the Project would not result in significant environmental impacts, except for the Project's effect on climate change, the significance of which FERC staff explained it was unable to determine. TGPa0015, 0023.

On April 21, 2022, FERC issued its Certificate Order authorizing Tennessee to construct and operate the Project. 179 FERC ¶ 61,041; TGPa0001. In the Certificate Order, FERC found "that the public convenience and necessity requires approval of Tennessee's" Project. Id. at P 85; TGPa0004. The Certificate Order directly addressed Appellant, Food and Water Watch's arguments regarding climate change. See Id. at P59-61. On May 19, 2022, Appellant, Food & Water Watch, sought rehearing of the Certificate Order. TGPa0043. On rehearing, FERC reached the same result as the Certificate Order and denied Food and Water Watch's request for a stay ("Rehearing Order"). Tenn. Gas Pipeline Co., 181 FERC ¶61,051, at P 3 (2022); TGPa0043. The Rehearing Order fully considered the significance of the GHG emissions, reaffirmed FERC's holding, and responded to additional comments from Appellant, Food & Water Watch. In the Rehearing Order, FERC rejected Food and Water Watch's request for a stay, finding that "Food and Water Watch's generalized claims of harm in its motion do not constitute sufficient evidence of irreparable harm that would justify a stay." Id. at P10-11; TGPa0046-0047. FERC concluded that it "continue[s] to find, based on all information in the record, that the

public convenience and necessity requires the East 300 Upgrade Project." Id. at P41; TGPa0048.

Appellant, Food & Water Watch, then challenged the FERC Certificate in the U.S. Court of Appeals for the D.C. Circuit. See Food & Water Watch v. FERC, Docket No. 22-1214 (D.C. Cir. Petition filed Aug. 19, 2022). The D.C. Circuit issued its decision on June 14, 2024 upholding the Certificate Order and denying Food & Water Watch's petitions for review. See Food & Water Watch v. FERC, 104 F.4th 336 (D.C. Cir. 2024).

LEGAL ARGUMENT

This Court directed the parties to file supplemental briefs addressing whether this matter should be remanded to the NJDEP or the Office of Administrative Law ("OAL") for further fact finding. Here, only two issues remain in this Appeal. Given that the record before this Court was previously supplemented by the NJDEP, the record already contains every fact concerning these issues, including specific findings by NJDEP as to the consistency of CS 327 with the goals and purposes of the Highlands Act and consistency with the applicable WQM Plan. Accordingly, remand to the NJDEP or the OAL is unnecessary.

I. CS 327 IS CONSISTENT WITH THE GOALS AND PURPOSES OF THE HIGHLANDS ACT (RESPONDING TO APPELLANTS' POINT I)

Exemption #11 authorizes "the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines,

rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of the [Highlands Act]." N.J.S.A. 13:20-28a(11)(emphasis added). In remanding this matter, the Supreme Court provided guidance as to how this Court should analyze whether CS 327 is consistent with the goals and purposes of the Highlands Act. Specifically, the Supreme Court stated, "[i]n determining whether construction of Compressor Station 327 is consistent with the Highlands Act's 'goals and purposes,' it will be necessary to consider the circumstances of the project, including the fact that Compressor Station 327 is being built upon already disturbed lands that are unsuitable for vegetation and wildlife, among other arguments Tennessee presents." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312, __(2024)(emphasis added)(internal citation omitted).

A. The Highlands Act and Implementing Rules Do Not Require An Analysis of Air Pollution and Climate Change Considerations.

Appellants argue that the Supreme Court intended, through the guidance set forth above, for NJDEP to "consider and account for the totality of the circumstances surrounding the project, including its contribution to the ongoing climate crisis." Asb6. Appellants interpretation would improperly enlarge the scope of NJDEP's review under the Highlands Act, and is not supported by the plain language of the Highlands Act or the Supreme Court's guidance. As the Supreme Court explained:

> [t]he goals of the preservation area are chiefly to promote preservation and conservation, N.J.S.A. 13:20-10(b)(1) to (8), but the final goal explicitly states that development should be limited to the maximum extent possible when it is '*incompatible*

> *with preservation of this unique area*,' *id.* at *(9)*. Simply stated, the Highlands Act does not preclude development in this area; it limits only development that is incompatible with preservation and would therefore cause a decline in the environmental quality of the region." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. at ____ (emphasis in the original).

Since the construction, operation, and maintenance of CS 327 has no permanent impacts on Highlands resource areas, CS 327 is clearly compatible with preservation and would not cause a decline in the environmental quality of the region. As acknowledged by NJDEP, the Highlands Council, and the New Jersey Supreme Court, Tennessee took significant measures to avoid regulated features by siting CS 327 in a highly disturbed parcel previously used as a quarry and for other commercial and industrial purposes. Rma012, Aa0330, In re Proposed Constr. of Compressor Station (CS327), 258 N.J. at ___. In doing so, Tennessee avoided impacts to wetlands, State open waters, streams, and other waterbodies, and there are no permanent impacts to flood hazard areas, riparian zones, or Highlands open water buffers.[6] Tennessee's HAD application also included various avoidance and minimization measures, including measures to minimize impacts to Highlands resources such as steep slopes, and threatened and endangered species. Aa0064-77.

Given the absence of permanent impacts on Highlands resource areas as a result of the Project, Appellants now argue that NJDEP failed to "assess or consider

[6] Since the issuance of the Original HAD, Tennessee relocated its security fence to completely avoid impacts to upland forest, thereby further avoiding impacts to Highlands resources. Rma012.

the project's role in sprawl development or its air pollution emissions (including its contributions to the ongoing climate crises)." Asb7. Appellants never raised the issue of sprawl development before NJDEP or in their initial brief before this court, see Ab30-33[7] and Aa0337-0340, and only generally alluded to air pollution and climate change impacts in their initial brief. See Ab32. For the reasons set forth below, these arguments have no merit.

Contrary to Appellants' newly raised claim that the purpose of the Project will "enable further sprawl development in the region", Asb11, the Project was designed to meet the needs of one of Tennessee's shippers, ConEd, to serve its customers in New York City and Westchester County, New York. As such, the Project was not designed to meet the needs of customers in the Highlands Region and would clearly not induce sprawl or any other development within the Preservation Area. NJDEP, in its staff report issued as part of the New HAD, specifically found that, "[t]he project will not serve any customers within the Highlands region and … [a]s such, the project will not promote growth or development in the Highlands region." Rma014. As such, NJDEP assessed whether the Project would induce sprawl development within the Highlands Region and appropriately determined that it would not.

As to air pollution and climate change impacts, Appellants provide no legal

[7] "Ab" refers to Appellants' initial merits brief filed September 2, 2022.

basis for their claims that NJDEP must review these impacts in the context of a HAD application under the Highlands Water Protection and Planning Act. (emphasis added) Appellants cite to the Legislature's statement of policy in enacting the Highlands Act, N.J.S.A. 13:20-2, which states:

> The Legislature further finds and declares that the New Jersey Highlands is an essential source of drinking water, providing clean and plentiful drinking water for one-half of the State's population, including communities beyond the New Jersey Highlands, from only 13 percent of the State's land area; that the New Jersey Highlands contains other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, includes many sites of historic significance, and provides abundant recreational opportunities for the citizens of the State. (emphasis added)

This is the only reference to air quality in the entire statute, and it is clear from reading the Highlands Act as a whole that the Legislature was concerned with the impact of major development within the Highlands Region on water resources.

Furthermore, in enacting the Highlands Act, the Legislature set forth the goals of the Regional Master Plan ("RMP") in protecting and enhancing the environmental resources within the Highlands Region. See N.J.S.A. 13:20-10. As it pertains to the Preservation Area, those goals include, among others, the protection, restoration, and enhancement of surface and ground waters, the protection of "other resources of the Highlands Region, including but not limited to contiguous forests, wetlands, vegetated stream corridors, steep slopes, and critical habitat for fauna and flora", and the conservation of water resources. See N.J.S.A. 13:20-10b(1)-(9). Notably,

protection of air quality and climate change considerations are not specifically identified as goals of the Highlands Act or RMP.

Moreover, as directed by the Legislature pursuant to N.J.S.A. 13:20-32, NJDEP promulgated regulations and developed substantive standards related to Highlands resource areas identified under the Highlands Act. The NJDEP clearly did not interpret the Highlands Act as requiring it to establish substantive standards related to air quality. NJDEP's Highlands Act Rules define "Highlands resource area" as "those features of the Highlands that merit special protection pursuant to N.J.S.A. 13:20-32b, such as Highlands open waters; flood hazard areas; steep slopes; forested areas; rare, threatened or endangered species habitat; rare or threatened plant habitat; areas with historic or archaeological features; and unique or irreplaceable land types." N.J.A.C. 7:38-1.4. The substantive standards related to these resources are set forth under N.J.A.C. 7:38-3 et seq. Notably, NJDEP did not establish substantive standards related to air quality.

While NJDEP has authority to regulate emissions pursuant to the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., and implementing rules at N.J.A.C. 7:27-1.1 et seq., that permitting scheme is separate and apart from the process under the Highlands Act. As such, NJDEP was not required to review the impacts of CS 327 on air quality in reviewing Tennessee's HAD application. In its staff report for the New HAD, NJDEP acknowledged public comments it received regarding air and other environmental impacts but noted that "whether or not the project is determined

to be exempt from the Highlands Act, [Tennessee] still must abide by any applicable freshwater wetlands, flood hazard, stormwater, water quality or air quality regulations." Rma016 citing N.J.A.C. 7:38-12.1(a)(15).

B. Appellants' Reliance On Irrelevant And Non-Binding Authorities Should Be Rejected.

Given the absence of any statutory or regulatory basis for Appellants' arguments, Appellants rely on irrelevant and non-binding case law and authorities, policy statements, studies, and executive and administrative orders to argue that NJDEP was required to consider impacts of air pollution and climate change considerations. Specifically, Appellants cite to the U.S. Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007) and an administrative law decision in North Bayview, LLC v. NJ DEP, 2007 N.J. AGEN LEXIS 782 (Dec. 3, 2007). The Supreme Court in Massachusetts v. EPA merely held that states have Article III standing to challenge the U.S. Environmental Protection Agency ("EPA") denial of the state's rulemaking petition, and that the EPA has the authority under the Clean Air Act to regulate greenhouse gas emissions from motor vehicles. The administrative law decision in North Bayview, LLC v. NJ DEP simply acknowledged the rationale for NJDEP's regulation of development within dunes under the Coastal Area Facility Review Act and noted that dunes protect shore communities from sea level rise brought about by climate change. Id. 39-40. Neither of these decisions relate to the scope of NJDEP's review under the Highlands Act

nor do they have any bearing on whether CS 327 is consistent with the goals and purposes of the Highlands Act.

Similarly, Appellants' arguments related to Governor Murphy's Executive Order 100 ("EO100") and NJDEP Commissioner Catherine R. McCabe's Administrative Order 2020-01 ("AO1"). Appellants claim, without citing any case law, that EO100 and AO1 have the force of law and are binding on NJDEP's permitting decision in issuing the HAD to Tennessee. See Asb 13. These orders have no bearing on Tennessee's HAD application as they merely required, among other things, NJDEP to amend its regulations to incorporate climate change considerations into its various permitting processes. See. e.g., EO100(requiring NJDEP within two years of the date of the Order to adopt Protecting Against Climate Threats ("PACT") regulations.)[8]

Appellants also erroneously claim that NJDEP was required to find that CS 327 is consistent with the RMP. Asb16. But the Highlands Act only requires that NJDEP find that CS 327 is consistent with the goals and purposes of the Act itself, not the RMP. N.J.S.A. 13:20-28a(11). A project that qualifies for an exemption

[8] Consistent with EO100 and AO1, NJDEP has proposed, among other rule proposals, its Resilient Environments and Landscapes ("REAL") Rules, comprehensive amendments to the Coastal Zone Management Rules, Freshwater Wetlands Protection Act Rules, Flood Hazard Area Control Act Rules, and Stormwater Management Rules. The REAL Rules have not yet been adopted. A copy of the rule proposal can be found at https://dep.nj.gov/rules/notice-of-rule-proposals/20240805b/

under the Highlands Act is exempt from not only the Highlands Act and its implementing rules, but also the RMP. N.J.S.A. 13:20-28a. Thus, NJDEP was not required to determine whether CS 327 is consistent with the RMP.

Lastly, Appellants argue that NJDEP was not "faithful to its stringent environmental protection mandates" by failing to consider whether the Project would contribute to climate change. Asb12. Specifically, Appellants rely on the discussion in the FERC Certificate Order regarding the method of determining the social cost of GHGs. Appellants failed to disclose to this Court that Appellant, Food and Water Watch, raised the issue of the social cost of GHGs during FERC's review of Tennessee's application for the Certificate Order. FERC calculated the social cost of GHGs in the Certificate Order but refused to rely on the methodology, which was upheld by the D.C. Circuit. See 181 FERC ¶61,051, at P60 n. 129 (stating, "the [FERC] is not applying the social cost of carbon herein because it has not determined which, if any, modifications are needed to render that tool useful for project-level analyses."); see also Food & Water Watch v. FERC, 104 F.4th at 346 (upholding FERC's determination and holding that "FERC need not attempt to monetize those emissions through a Social Cost of Carbon model, which FERC views as unreliable for analyzing individual projects."). Thus, Appellants' argument regarding the social cost of GHGs methodology is irrelevant.

C. Appellants' Arguments are an impermissible collateral attack on the Certificate Order.

The D.C. Circuit did not agree with Food and Water Watch as to their claims related air pollution and climate change, so they are now attempting to relitigate these issues here. In doing so, Appellants are engaging in an impermissible collateral attack on the Certificate Order. The NGA provides the U.S. Courts of Appeals with "exclusive jurisdiction to affirm, modify, or set aside FERC's order." Adorers of the Blood of Christ v. FERC, 897 F.3d 187, 189 (3d Cir. 2018) quoting 15 U.S.C. 717r(b), (d)(1) (internal quotations omitted). As the Third Circuit has stated, "in answering the question of whether a claim is an impermissible collateral attack, [the various circuit courts] each focus their attention not on the plaintiffs' characterization of their claim but rather on whether the claim 'could and should have' been presented to FERC because the claims raise 'issues inhering in the controversy.'" Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co LLC, 53 F.4th 56, 64 (3d Cir. 2022)(quoting City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 339 (1958)). Further, the prohibition on the collateral attack of a FERC certificate applies in both state court and the federal district courts. See Am. Energy Corp. v. Rockies Express Pipeline LLC, 622 F.3d 602, 605 (6th Cir. 2010)(stating that "[e]xclusive means exclusive, and the Natural Gas Act nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court.").

Here, Appellants' claims related to air pollution and impacts on climate change were considered by FERC and by the D.C. Circuit Court of Appeals, and

were rejected. Specifically, Appellant Food and Water Watch submitted comments to FERC during the NEPA review process, sought rehearing of the FERC Certificate Order pursuant to 15 U.S.C. 717r(a), and the D.C. Circuit Court of Appeals reviewed the issues raised by Food and Water Watch. At each step of the way, Food and Water Watch challenged FERC's analysis of the Project's impacts on climate change and failed. As such, Appellants cannot relitigate these same issues before this Court as they are an impermissible collateral attack on the Certificate Order.

D. The Highlands Act and Implementing Regulations are Preempted.

As noted in its initial merits brief, Tennessee applied for the HAD consistent with FERC's policy of encouraging cooperation between interstate natural gas companies and state and local agencies. 179 FERC ¶ 61,041 P 87. However, the Highlands Act regulates within a field occupied by federal regulation, and to the extent the Highlands Act could be used as "an obstacle to the accomplishment of the full purposes and objectives of Congress", is preempted.

It is well settled that Congress, through the Natural Gas Act, has "occupied the field of matters relating to the wholesale sales and transportation of natural gas in interstate commerce." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 305 (1988) "[R]egulation of [the] rates and facilities [of natural gas companies is] a field occupied by federal regulation." Id. at 307. To that end, Congress expressly delegated to FERC the power to regulate the "construction or extension of any facilities" for the "transportation or sale of natural gas." 15 U.S.C. 717f(c)(1)(A).

In addition, Congress, through the Pipeline Safety Act, 49 U.S.C. 60101 et seq., has expressly preempted state safety regulations. See 49 U.S.C. 60104(c)(providing that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation). Taken together, the regulatory scheme established by Congress governs almost every aspect of the transportation and sale of natural gas in interstate commerce, including the siting, construction and operation of natural gas facilities. Algonquin LNG v. Loqa, 79 F.Supp.2d 52 (D.R.I. 2000). As such, any state or local law that purports to regulate matters addressed by federal law will be deemed preempted. Id.

The designation of Highlands Preservation Area by the Legislature is essentially regional zoning. Numerous federal courts have held that local zoning ordinances that regulate the siting, construction and operation of interstate natural gas pipeline facilities are preempted. See Dominion Transmission, Inc. v. Town of Myersville Town Council, 982 F.Supp.2d 570, 579 (D.M.D. 2013)(holding portions of town's code directly affecting the siting, construction, or operation of pipeline company's compressor station were null and void as applied); AES Sparrows Point LNG, LLC v Smith, 470 F.Supp.2d 586 (D.M.D. 2007)(holding that zoning ordinance prohibiting LNG terminals within a certain distance from residential and business zones was preempted by the Natural Gas Act); Loqa, 79 F.Supp.2d 52 (holding that "Congress clearly has manifested an intent to occupy the field and has preempted local zoning ordinances and building codes to the extent that they purport

to regulate matters addressed by federal law"). Because Congress, through the NGA, has regulated comprehensively the siting, construction and operation of natural gas facilities, state and local regulations pertaining to these same issues are preempted.

The Highlands Act directly affects matters that are regulated by FERC under the comprehensive federal regulatory scheme set forth under the Natural Gas Act; specifically, the siting, construction and operation of CS 327. FERC approved the construction of Tennessee's Project, including the CS 327 facilities, and authorized Tennessee to construct and place these facilities in service. See 179 FERC ¶ 61,041; TGPsa001. In approving the Project, the FERC found that Tennessee's proposed facilities will be used to transport natural gas in interstate commerce and are in the public convenience and necessity pursuant to the Natural Gas Act. See 179 FERC ¶ 61,041 P85; TGPa0004. Accordingly, because Congress has manifested its intent to occupy the field of transportation of natural gas in interstate commerce, which includes the siting, construction and operation of compressor stations, there is "no room" for NJDEP to do the same through application of the Highlands Act. Loqa, 79 F.Supp.2d at 52.

Not only does the application of the Highlands Act to Tennessee's facilities regulate within a field occupied by federal law, but it directly conflicts with federal law. As the Supreme Court held in Schneidewind, a conflict exists "when it is impossible to comply with both state and federal law or where the state law stands

as an obstacle to the accomplishment of the full purposes and objectives of Congress." Schneidewind v. ANR Pipeline Co., 485 U.S. at 300 (internal citations and quotations omitted). Courts have held that state laws are preempted where FERC directly addressed those same issues covered by state law. See National Fuel Gas Supply Corp. v. Public Service Com'n of State of N.Y., 894 F.2d 571, 579 (2d Cir. 1990). (holding that "[t]he matters sought to be regulated by the [New York Public Service Commission] were [] directly considered by the FERC [and] [u]nder Schneidewind, such direct consideration is more than enough to preempt state regulation.")

Assuming Appellants prevail on their air pollution and climate change arguments, and this Court were to vacate and remand the matter back to NJDEP, NJDEP's review and ultimate conclusion regarding these issues may conflict with FERC's extensive review, which was upheld by the D.C. Circuit. Doing so "would be tantamount to conferring on the [NJDEP] the power to review and nullify FERC's decision regarding the [construction] of a facility used in the interstate transportation and sale of natural gas." Loqa, 79 F.Supp.2d at 52. The FERC determined that Tennessee's Project, including CS 327, is in the public convenience and necessity. Furthermore, the "inevitable result" of any further administrative processes under the Highlands Act would "present[] an obstacle to accomplishing the important federal purpose of ensuring that adequate and affordable natural gas is provided to home owners and businesses." Id.; see NE Hub Partners, L.P. v. CNG Transmission

Corp., 239 F.3d 333, 348 (3d Cir. 2001)(holding that "[i]f it is evident that the result of a process must lead to conflict preemption, it would defy logic to hold that the process itself cannot be preempted"). For these reasons, the Highlands Act and implementing rules, to the extent such act and rules are used to delay or prevent the construction and operation of a FERC certificated project, would be preempted as applied to Tennessee's Project.

II. NJDEP'S CONSISTENCY DETERMINATION IS NOT ARBITRARY AND CAPRICIOUS (RESPONDING TO APPELLANTS' POINT II)

As explained in Tennessee's initial merits brief, the construction of a septic system that has a projected flow of less than or equal to 2,000 gallons per day does not require a treatment works approval under N.J.A.C. 7:14A-22.4 and, pursuant to N.J.A.C. 7:15-3.2(f)5, is deemed consistent with the adopted areawide WQM Plan. TGPb28-29. Since the total amount of wastewater generated by CS 327 is less than 2,000 gallons per day, CS 327 is consistent with the adopted areawide WQM Plan.

However, Appellants again argue that NJDEP is required to consider the "totality of the circumstances" related to CS 327 when determining consistency with the areawide WQM Plan. Asb18. Appellants admit that the number of gallons of effluent to be expected to flow into the septic system is "a key determination for a Consistency Assessment" but is "insufficient standing alone." Asb21. Appellants' rationale is that the Project will significantly increase GHG emissions that will exacerbate global climate change and would be "the proximate cause of dramatic

changes in precipitation and stormwater runoff in the Highlands Preservation areas." Asb19. These are the same arguments that Appellants made in connection with NJDEP's determination of CS 327's consistency with the goals and purposes of the Highlands Act and should be rejected for those same reasons.

In addition, Appellants claim that NJDEP is required "to make a record regarding [total maximum daily loads ("TMDLs")] and wasteload allocations for impaired waters and any additional requirements contained in the applicable Areawide [WQM Plans]." Asb21-22. The basis for Appellant's argument is that the WQMP Rules provide that "[t]he Department shall not issue a permit or approval that conflicts with an adopted areawide plan or *this chapter*." Asb22 quoting N.J.A.C. 7:15-3.2(a)(emphasis in Appellants' brief). Appellants' contention is that "this chapter" includes Subchapter 5 which sets forth the process for identifying and listing impaired waters pursuant to Section 303(d) of the Clean Water Act and for developing and implementing TMDLs. N.J.A.C. 7:15-5.1 et seq. However, there is nothing in the WQMP Rules that requires NJDEP to make a record regarding TMDLs or wasteload allocations as part of its WQM Plan consistency review. See N.J.A.C. 7:15. Appellants can only point to a single sentence in NJDEP's 2015 rule proposal for the WQM Rules, which states: "If a WQM plan has additional requirements, or a wasteload allocation in an adopted TMDL has been established, these must also be addressed in order for the proposal to be consistent." Asb24 quoting 47 N.J.R. 2531(a)(Oct. 19, 2015). Notably, Appellants omitted the first part

of NJDEP's explanation, which provides that it applies to projects or activities that fall within N.J.A.C. 7:15-3.2(b) through (d). However, as explained above and in Tennessee's initial merits brief, CS 327 is deemed to be consistent with the WQM Plan because it falls under N.J.A.C. 7:15-3.2(f)(5) as CS 327 does not require a treatment works approval, which is not disputed by Appellants. See Asb18-25.

Further, TMDLs are typically handled through the New Jersey Pollutant Discharge Elimination System ("NJPDES") permitting program under which NJDEP regulates the discharge of pollutants to surface and ground waters. N.J.A.C. 7:14A-2.1(a). A person may not "discharge any pollutant except in conformity with a valid NJPDES permit" unless specifically exempt. N.J.S.A. 58:10A-6; N.J.A.C. 7:14A-2.1(d). The NJPDES permits establish limits and conditions to ensure water quality standards are met. N.J.A.C. 7:14A-2.4; N.J.A.C. 7:14A-13.2(a)(2). Stormwater NJPDES permits may be required for a particular activity to control stormwater based on a TMDL. N.J.A.C. 7:14A-24.2(a)(7). Here, Tennessee obtained a 5G3 NJPDES permit to manage stormwater during construction. See N.J.A.C. 7:14A-24.7; TGPsa024.

Again, as noted in Tennessee's initial merits brief, the WQMP Rules set forth the process by which NJDEP reviews projects and activities within the Highlands Preservation Area and the information needed for NJDEP to make a Consistency Determination. Specifically, the WQMP Rules provide that "[f]or projects or activities in the Highlands preservation area, a complete application for a

Consistency Determination review shall include all relevant information identified pursuant to N.J.A.C. 7:38-9.2 or 9.5" and shall be conducted in accordance with N.J.A.C. 7:38-11.2, 11.3, and 11.7. N.J.A.C. 7:15-3.2(g). Since Tennessee sought an exemption under the Highlands Act, it was required to provide the information set forth in N.J.A.C. 7:38-9.2, which includes information on the proposed method of wastewater treatment, amount of wastewater flow in gallons per day, and water supply demand for the proposed development. See N.J.A.C. 7:38-9.2(c). All of this information was provided to NJDEP as part of Tennessee's HAD application. See Aa0031-32. NJDEP reviewed this information in accordance with N.J.A.C. 7:38-11.2 and 11.7 and ultimately found CS 327 to be consistent with the areawide WQM Plan. For these reasons and those set forth in Tennessee's initial merits brief, NJDEP's Consistency Determination was in accordance with the WQMP Rules.

CONCLUSION

For the foregoing reasons, Tennessee respectfully requests that this Court affirm NJDEP's decision to issue Exemption #11 and Consistency Determination.

Respectfully submitted,

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By: *s/Richard G. Scott*
RICHARD G. SCOTT

Dated: January 10, 2025

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003616-20T1
IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICABILITY DETERMINATION, PROGRAM INTEREST No.: 1615-17-0004.2 (ADP200001)	CIVIL ACTION ON APPEAL FROM A FINAL DECISION OF THE DEARTMENT OF ENVIRONMENTAL PROTECTION

SUPPLEMENTAL BRIEF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date Submitted: January 13, 2025

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. The Highlands Act and Exemption #11.

In 2004, the Legislature enacted the Highlands Water Protection and Planning Act ("Highlands Act" or "Act"), N.J.S.A. 13:20-1 to -35, recognizing that the Highlands Region is an "essential source of drinking water, providing clean and plentiful drinking water for one-half of the State's population" and providing a "vital link to the future of the State's drinking water supplies." N.J.S.A. 13:20-2. The Legislature also recognized that the Region "contains other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, includes many sites of historic significance, and provides abundant recreational opportunities." N.J.S.A. 13:20-2. The Act establishes a "preservation area" within the Highlands Region, which has "exceptional natural resource value" subject to stringent water and natural resource protection standards, policies, planning, and regulation. Ibid.

Proposed development in the preservation area must adhere to a regional master plan (RMP) created by the New Jersey Highlands Water Protection and Planning Council (Highlands Council) that embodies the Highlands Act's

[1] Because they are closely related, the procedural history and statement of facts are combined for efficiency and the court's convenience.

values. N.J.S.A. 13:20-10; N.J.S.A. 13:20-14. The Act also requires DEP to implement a Highlands permitting review program. N.J.S.A. 13:20-3; -31 to -34. Accordingly, DEP has promulgated rules effectuating the permitting program at N.J.A.C. 7:38-1.1 through -14.2, implemented by DEP's Division of Land Resource Protection (formerly the Division of Land Use Regulation). N.J.S.A. 13:20-32.

Any "major development" in the preservation area is generally subject to Highlands permitting review. N.J.A.C. 7:38-1.1 to -14.2. N.J.S.A. 13:20-3; -31 to -34. However, certain activities are exempt from permitting requirements and, when granted, a Highlands Area Determination ("HAD") documents the exemption determination. N.J.S.A. 13:20-28(a); N.J.A.C. 7:38-2.3(a). Relevant here, N.J.S.A. 13:20-28(a)(11) (Exemption #11) exempts a utility project from the Act's permitting requirements if the project proposes "routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act." (emphasis added). The Legislature only required DEP to evaluate consistency with the Highland Act's goals and policies for Exemptions #9 (involving transportation projects) and #11 (involving utility projects). N.J.S.A. 13:20-28(a)(9) and (11). Regardless of an activity's Highlands Act exemption status, DEP must also find

that the activity is consistent with the applicable areawide Water Quality Management Plan (WQMP). N.J.A.C. 7:38-2.4(a) and (e).

B. Tennessee Gas Pipeline Seeks a Highlands Act Exemption for Its Project.

Tennessee Gas Pipeline, LLC ("TGP") is a natural gas company "primarily engaged in the business of transporting natural gas in interstate commerce[.]" (Aa52).[2] It "owns and operates an interstate natural gas transmission system" throughout the southern and eastern United States. (Aa53).[3] The "300 Line" is one section of TGP's existing system, consisting of approximately 128 miles of underground pipeline and above-ground appurtenant facilities in Pennsylvania and New Jersey. (Aa78). TGP's existing right-of-way for its 300 Line passes through West Milford Township, Passaic County. (Aa55). West Milford Township is a municipality entirely within the Highlands Region preservation area. N.J.S.A. 13:20-7(a) and (b).

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[2] "Aa" refers to Appellant's appendix filed August 31, 2022, and "Ab" refers to Appellant's Supplemental Brief filed November 11, 2024. "Ra1 to 3" refers to Respondent DEP's appendix filed October 31, 2022, and "Ra4 to 17" refers to DEP's supplemental appendix filed with this brief.

[3] As TGP is a "natural gas company," the Federal Energy Regulatory Commission (FERC) regulates TGP's transportation and sale of natural gas in interstate commerce. 15 U.S.C. § 717, et seq. FERC's jurisdiction and its decisions are distinct from DEP's review of TGP's Project.

To deliver additional natural gas to its customers in New York, in 2020 TGP proposed to construct a new natural gas compression station along the 300 Line, identified as "CS 327," in West Milford Township. (Aa53-54). TGP proposed to construct CS 327 on a forty-seven acre property that was historically disturbed by gravel quarry operations, then a temporary pipeyard, and most recently a recycling storage facility. (Aa29; Aa37-39; Aa52; Aa55; Aa64; Aa75; Aa197). The compressor station, which "act[s] as the 'engine[]' that power[s] an interstate natural gas pipeline system as each station compresses the gas to move it through the pipeline[,]" (Aa77), consists of a new electric motor driven compressor unit, auxiliary equipment, and an office building to operate the station (the Project). (Aa54-55).

On August 31, 2020, TGP applied for a HAD, asking DEP to find TGP's Project exempt from the Highlands Act under Exemption #11. (Aa26). TGP submitted substantial information about Highlands open waters and other water resources, steep slopes, rare, threatened, and endangered plant and animal species, forests, unique and irreplaceable land types, and historic and archaeological areas on the Property to demonstrate consistency with the goals and purposes of the Highlands Act. (Aa64-77; Aa79-84). TGP also submitted calculations of its estimated wastewater flow to illustrate the Project's consistency with the areawide WQMP. (Aa31-32).

C. The 2021 HAD

On June 23, 2021, DEP issued TGP a HAD which determined the Project is exempt from the Highlands Act. (Aa1). Before DEP issued the HAD, on October 16, 2020, the Highlands Council sent DEP a letter reviewing the HAD application and the Project's potential natural resource impacts. (Aa328-330). To ensure it "give[s] great consideration and weight" to the Council's RMP, DEP consults with the Highlands Council about Highlands applications such as TGP's. N.J.A.C. 7:38-1.1(i).

In its consistency determination, the Highlands Council found that TGP's "efforts to avoid, minimize and mitigate for resource impacts are sufficient to find that the project is consistent with the goals of the Highlands Act." (Aa330). The Council noted that the Project is located in a historically disturbed former quarry with invasive vegetation and "disconnected" and "non-functional" resources. (Aa64; Aa79; Aa200-205; Aa330). Because of its former industrial use, the site is "characterized by invasive species and small, isolated patches of forested areas." (Aa197-211; Aa330). Only one area of trees of approximately two acres is considered a "forest" by DEP's rules. (Aa206; Aa330). Thus, the Highlands Council determined that TGP's security fence installation that requires the removal of twenty-three trees, was a de minimis impact on the resource, (Aa206-208; Aa329-330), which TGP is mitigating by replacing an

equivalent area of trees, and that constructing the Project with seasonal timing restrictions to minimize impacts on critical wildlife. (Aa71; Aa195-196; Aa330).

The Council also found that both the Highlands open water buffers and riparian areas were non-functional because "they are disconnected from waterbodies which lie off site" due to the prior quarry's operations which "created [an] artificial topographic disconnection." (Aa330). The only intrusion within Highlands open water buffers or riparian zones is 285 feet of a preexisting gravel access road which has been regularly used since the 1960s. (Aa69; Aa329-330). And TGP is also minimally affecting steep slopes, rare, threatened, and endangered plant and animal species habitat, and historic and archaeological areas. (Aa69-72; Aa74-77). The Council also recognized TGP's use of green infrastructure for stormwater management which used "permanent stormwater Best Management Practices to accommodate for impervious surfaces" including "structural low impact development" methods such as rain gardens or bioretention basins. (Aa330). Thus, the Highlands Council concluded that the Project will cause minimal impacts to Highlands resources and TGP is mitigating those minor impacts. (Aa330).

DEP concurred with the Council's recommendation that the Project is consistent with the goals of the Highlands Act and adopted the Council's analysis. (Aa2). DEP also reviewed TGP's WQMP analysis which followed

the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A-1.2(a), as the Highlands regulation at N.J.A.C. 7:38-9.2(c) requires. (Aa2). TGP calculated that the square footage of the proposed office building and control room along with a shower would produce a combined 603.125 gallons per day of wastewater. (Aa32). TGP also calculated that its projected peak water use would be 650 gallons per day using one well. Ibid. DEP thus found that the Project is consistent with the Northeast WQMP because the Project's proposed wastewater output will be less than 2,000 gallons per day and will use less than 650 gallons of water per day. (Aa2).

Appellants Food & Water Watch, New Jersey Highlands Coalition, and Sierra Club (Appellants) appealed the 2021 HAD, docketed as A-3616-20.

D. The Appellate Division Vacated The 2021 HAD and DEP Reconsidered and Reissued a HAD to TGP in 2024.

On August 31, 2023, the Appellate Division vacated the 2021 HAD. In re Proposed Constr. of Compressor Station (CS327), 476 N.J. Super. 556, 561 (App. Div. 2023), rev'd, 258 N.J. 312 (2024). The panel ruled that a utility project must be a "routine" upgrade to qualify for Exemption #11. Id. at 568 (emphasis added). Since the panel vacated the 2021 HAD because the upgrade was "routine," the panel did not reach other briefed issues, which included whether the Project is consistent with the goals and purposes of the Act, id. at 572, n. 13, or with the applicable WQMP, id. at 563, n. 7. The court vacated the

2021 HAD and remanded the application to DEP to consider whether the Project "can qualify as a 'routine upgrade' to [TGP's] pipeline system." Id. at 574.

Following the panel's remand instructions, in September 2023, DEP requested additional information from TGP about whether the Project is a routine upgrade and initiated a new public comment period. (Ra7). On January 11, 2024, after it consulted with the Highlands Council again, considered additional information including TGP's supplemental submissions and public comments, DEP issued a new HAD decision, again finding the Project met Exemption #11. (Ra4). Per the court's instructions, DEP's analysis primarily addressed whether the Project is routine, (Ra9-12), but DEP also confirmed its prior conclusions that the Project is consistent with the goals and purposes of the Act, (Ra13–14), and with the Northeast WQMP. (Ra4-5).

Relevant here, on October 13, 2023, DEP asked the Highlands Council to again review the Project and make a recommendation on Highlands consistency. (Ra13). The Council responded on October 25, 2023, confirming "its prior findings that the project is consistent with [the] goals and purposes of the Highlands Act." Ibid. DEP relied "on the Council's review to assess compliance with this portion" of the Exemption # 11 criteria and found "no valid countervailing reason to not determine that the project is consistent with the goals and purposes of the Highlands Act." Ibid.

The same Appellants from the 2021 Appeal also appealed the 2024 HAD, docketed here as A-1858-23 (the 2024 Appeal).

E. The Supreme Court Reverses, Reinstating The 2021 HAD And Remanding The Matter To This Court With Instructions To Continue The 2021 Appeal.

While the remand proceedings were ongoing, in February 2024, our Supreme Court granted TGP's petition for certification to review the Appellate Division's August 31, 2023 decision. 256 N.J. 350 (2024). The Court ultimately reversed, finding it "undisputed" that TGP is a public utility, and holding that an "upgrade" need not be "routine" to be exempt from the Highlands Act. In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312, 330-331 (2024).

The Court remanded to the Appellate Division for "specific findings" on whether DEP correctly determined that the Project is consistent with the goals and purposes of the Highlands Act. Id. at 332. In doing so, the Court recognized that "the Highlands Act does not preclude development in [the preservation area]; it limits only development that is incompatible with preservation and would therefore cause a decline in the environmental quality of the region." Ibid. The Court also advised that, in considering whether construction of the compressor station is consistent with the goals and purposes of the Highlands Act, "it will be necessary to consider the circumstances of the project, including

the fact that Compressor Station 327 is being built upon already disturbed lands that are unsuitable for vegetation and wildlife." Ibid.

F. The Instant Appeal on Remand From the Supreme Court

On remand to this court, DEP moved to supplement the record to include the 2024 HAD and staff report for a complete understanding of the events that followed the Appellate Division's initial remand of the 2021 HAD. On September 11, 2024, the court granted DEP's motion to supplement the record and directed Appellants to file its supplemental brief within thirty days, and Respondents to file their supplemental briefs thirty days thereafter. Also in its September 11, 2024 Order, the court directed the parties to "address in their briefs whether the matter should be remanded to the agency or the Office of Administrative Law for further fact-finding."

To briefly address the court's question, there is no need for further fact-finding because the record consists of ample, undisputed evidence for the court to decide the limited issue on remand. Also, potentially sending the matter to the Office of Administrative Law (OAL) would give Appellants, who are third-parties to TGP's application, an administrative hearing contrary to the Administrative Procedure Act's prohibition on that, as well as extensive case law. N.J.S.A. 52:14B-3.1 and 3.3; see e.g. In re Freshwater Wetlands Statewide

Gen. Permits, 185 N.J. 452, 463-4 (2006); In re NJPDES No. NJ0025241, 185 N.J. 474 (2006).

The court extended appellants' time to file their brief until November 12, 2024, and later extended TGP's time to file to January 9, 2025 and DEP's time to file to January 13, 2025.

LEGAL ARGUMENTS

I. DEP APPROPRIATELY ISSUED THE HAD DETERMINING, IN RELEVANT PART, THAT THE PROJECT IS CONSISTENT WITH THE GOALS AND PURPOSES OF THE HIGHLANDS ACT. (Responds To Appellants' Brief Point I).

DEP's HAD determination that the project is consistent with the goals and purposes of the Highlands Act should be affirmed because it is supported by substantial evidence in the record and DEP's regulatory interpretation is owed deference.

Appellate review of an administrative agency's final determination is limited and deferential. In re Herrmann, 192 N.J. 19, 27 (2007). "The 'fundamental consideration' in reviewing agency actions is that a court may not substitute its judgment for the expertise of an agency 'so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.'" In re Distrib. of Liquid Assets, 168 N.J. 1, 10 (2001) (citation omitted). The burden of proving arbitrary, capricious, or unreasonable action is on the challenger. Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund,

422 N.J. Super. 227, 234 (App. Div. 2011).

Moreover, an agency's "interpretation of statutes within its scope of authority and its adoption of rules implementing the laws for which it is responsible" is entitled to "great deference." In re N.J.A.C. 7:1B-1.1 Et. Seq., 431 N.J. Super. 100, 115-116 (App. Div. 2013); see also Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985) ("[T]he grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislative goals." (citations and internal quotation marks omitted)); Am. Cyanamid Co. v. State, Dep't of Env't Prot., 231 N.J. Super. 292, 312 (App. Div. 1989) (holding agency's statutory interpretation "is entitled to substantial weight"). Courts "extend substantial deference to an agency's interpretation and application of its own regulations, particularly on technical matters within the agency's special expertise." Pinelands Pres. Alliance v. N.J. Dep't of Env't Prot., 436 N.J. Super. 510, 524 (App. Div. 2014). Thus, a court will not reverse an agency decision "because of doubts as to its wisdom or because the record may support more than one result." In re N.J. Pinelands Comm'n Resolution, 356 N.J. Super. 363, 372 (App. Div. 2003).

The substantial evidence in the record supports DEP's finding that the Project is consistent with the goals and purposes of the Highlands Act. Since the project is exempt, it need not directly comply with the provisions of the

Highlands Act, the RMP, or any rules adopted by DEP to implement the Act. N.J.S.A. 13:20-28(a). According to the Supreme Court's guidance, Exemption 11's requirement that the Project be "consistent with the goals and purposes" of the Act, N.J.S.A. 13:20-28(a)(11), only requires that the development not be "incompatible with preservation" and "therefore cause a decline in the environmental quality of the region." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312, 332 (2024).

Here, ample evidence in the record supports the DEP's conclusion that the Project will not cause a decline in the region's environmental quality. As noted above, DEP consulted with the Highlands Council per N.J.A.C. 7:38-1.1(h), and ultimately relied on the Council's analysis which found – on two separate occasions – that the Project is "consistent with the goals and purposes of the Highlands Act" under Exemption #11. (Aa330; Ra13). The Council identified TGP's efforts to minimize Project impacts, beginning with siting the Project in a historically disturbed former quarry with invasive vegetation and "disconnected" and "non-functional" resources. (Aa64; Aa79; Aa200-205; Aa330). For example, the former industrial site has "small, isolated patches of forested areas," (Aa197-211; Aa330), and only one area of trees of approximately two acres is considered a "forest" by DEP's rules. The Project will only remove twenty-three trees, (Aa206-208; Aa329-330), which TGP will

mitigate by replacing an equivalent area of trees. (Aa71; Aa195-196; Aa206; Aa330). Similarly, because of the former quarry operations, open waters, riparian areas, and critical wildlife areas are disconnected and cut off from respective resource areas outside the Property. (Aa64-66; Aa330). The only intrusion within Highlands open water buffers or riparian zones is 285 feet of a preexisting gravel access road which has been regularly used since the 1960s. (Aa69; Aa329-330). And the Project also minimally affects steep slopes, rare, threatened, and endangered plant and animal species habitat, and historic and archaeological areas. (Aa69-72; Aa74-77). Based on this information, although DEP is not bound to defer to the Council's findings, Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 238 (App. Div. 2013), DEP found "no valid countervailing reason" to disagree that the Project is consistent with the goals and purposes of the Highlands Act. (Ra13).

Appellants argue that DEP's consistency analysis "failed to consider this project's role in unwise sprawl development and its air pollution emissions, including its significant contribution to the ongoing climate crisis." (Ab10). As support for its novel arguments, Appellants attempt to add requirements to DEP's rules, citing broad policies within various statutes and regulations. (Ab12-14). Appellants' claims about the impacts of the Project are speculative,

unsupported by a fair interpretation of the Act and misunderstand the narrow facts on which DEP may base its decision.

As the Supreme Court noted, the goals for the Highlands preservation area "are chiefly to promote preservation and conservation" of the region's unique resources." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312, 332 (2024); N.J.S.A. 13:20-10(b)(1) to (8). The Legislature placed special emphasis on the water resources in the preservation area, and its goals to "protect, restore, and enhance the quality and quantity of surface and ground waters therein" and "promote conservation of water resources." N.J.S.A. 13:20-10(b)(1), (6). Notably, for development in the Highlands Region, the Highlands Act and Rules do not contain separate air pollution standards for projects in the Region, but projects may otherwise be subject to the standards of the Air Pollution Control Act, N.J.S.A. 26:2C-1.1 to -68. Indeed, while the Act directly incorporates other statutory regimes into the Highlands project permitting scheme, it does not include the Air Pollution Control Act. See N.J.S.A. 13:20-30(a) (statutory regimes incorporated into Highlands permits).

Contrary to Appellants' speculation that TGP's project will have wide-spread impacts to the Highlands resources, the reality is that "the compressor station in association with an existing pipeline system" transports natural gas to "'upstream' customers in New York." (Ra15). As such, as DEP determined,

"the project will not promote growth or development in the Highlands region [,] will not significantly impact Highlands resources" and, thus "is consistent with the 'spirit and intent' of the Highlands Act." Ibid. Despite its claimed concern for potential air pollution impacts, the undisputed facts show that the compressor is powered by electricity, which will not create emissions. (Aa55; Aa80). The only emissions the Project would create will be an "emergency generator, a heater, and infrequent venting that will occur during operation and maintenance of the facility." (Aa80). Those emissions would be subject to separate permitting requirements by DEP that are not at issue here. Ibid.

Appellants' concern that the Project will "contribut[e] to increased [greenhouse gas] emissions" is outside the scope of DEP's review. One of the Appellants, Food and Water Watch, appropriately raised their concerns about the Project's potential climate impacts to FERC, during its consideration of the project under the federal Natural Gas Act, 15 U.S.C. Section 717f(c). FERC addressed the Project's climate change impacts in its own project approval, which the DC Circuit Court of Appeals affirmed when Food and Water Watch challenged that approval on climate change grounds. Food & Water Watch v. FERC, 104 F.4th 336 (D.C. Cir. 2024). The Highlands Act does not require DEP to find a project does not meet the goals of the Act due solely to its climate emissions, as they have no direct bearing on the limited Highlands resources

such as water quality, steep slopes, and threatened or endangered species impacted by constructing a compressor station in a former quarry.

Appellants' speculative theories fail to overcome the DEP's determination that the Project is consistent with the goals and purposes of the Act and will not, as the Supreme Court construed, "cause a decline in the environmental quality of the region." In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312, 332 (2024).

II. DEP CORRECTLY FOUND THE PROJECT IS CONSISTENT WITH THE NORTHEAST WATER QUALITY MANAGEMENT PLAN. (Responds To Appellants' Brief Point II).

DEP properly applied the Highlands rules to the substantial evidence in the record regarding the Project's wastewater generation and water use to determine the Project is consistent with the areawide WQMP. To argue otherwise, Appellants focus on concerns about climate change and impervious surfaces, but neither are relevant under the WQMP rules. They also ignore New Jersey's broader water quality impact regulatory regime.

DEP's project decision comports with the requirements of the Water Quality Planning Act ("WQPA"), N.J.S.A. 58:11A-1 to -16, as amended by the Highlands Act, and the WQMP rules, N.J.A.C. 7:15, and is supported by the record. Moreover, as contemplated by the WQPA and the WQMP rules, DEP's other regulatory programs, such as the New Jersey Pollution Discharge

Elimination System ("NJPDES") program, separately address stormwater and any applicable total maximum daily load ("TMDL") requirements.

By way of background, the WQPA and its companion statute, the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 to -60, "constitute the Legislature's response to the Federal Water Pollution Control Act, 33 U.S.C. 1251 to 1376, which established an integrated federal system to address water pollution" nationally. In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 558 (App. Div. 2006). Both statutes are intended to restore and maintain the quality of waters of the State. N.J.S.A. 58:11A-1; N.J. Builders Ass'n v. Fenske, 249 N.J. Super. 60, 64 (App. Div. 1991).

Among other elements, the WQPA requires the development of Areawide WQM Plans. N.J.S.A. 58:11A-5. Areawide WQM Plans are statutorily required to, among other things: (1) identify and establish construction priorities for necessary water treatment works to meet municipal waste treatment needs; (2) create a regulatory program that addresses point and nonpoint sources; (3) identify entities and financing necessary to carry out the plan; and (4) identify and address specific pollution sources such as agricultural pollution, mine-related sources of pollution, construction activity pollution, and saltwater intrusion. N.J.S.A. 58:11A-5(a)-(k). The State has twelve areawide WQMPs to plan for impacts on the State's waters related to development's water use and

wastewater generation. N.J.S.A. 58:11A-2, -4, -5; N.J.A.C. 7:15-1.2(a)(1). The WQMP includes a series of wastewater management plans, a description of existing and future maps of wastewater service areas and selected environmental features and treatment works. N.J.A.C. 7:15-4.1. A WQMP also includes Total Maximum Daily Loads (TMDLs), which calculate the maximum amount of a pollutant from all point and nonpoint sources that a waterbody that is impaired for one or more pollutants can receive. N.J.A.C. 7:15-1.5, -5.3. The WQPA dictates that "[a]ll projects and activities affecting water quality in any planning area shall be developed and conducted in a manner consistent with the adopted [Areawide WQM Plan] . . . . The commissioner shall not grant any permit which is in conflict with an adopted [Areawide WQM Plan]." N.J.S.A. 58:11A-10; see also N.J.A.C. 7:15-3.2(a). Consistent with this requirement in the Highlands preservation area, an applicant must apply for a WQMP consistency determination according to the Highlands Rules, as TGP did here. N.J.A.C. 7:15-3.2(g); N.J.A.C. 7:38-2.4(e).

As water quality plays a central role in the Highlands Act, the Legislature chose to modify the way the water quality management planning process works in the Highlands. Specifically, the Highlands Act incorporated the WQPA's requirements into the Highlands permitting scheme, N.J.S.A. 13:20-33. The Act also instructed DEP to set a "septic system density standard" at a level "to

prevent the degradation of water quality" as well as "to protect ecological uses from individual, secondary, and cumulative impacts, in consideration of deep aquifer recharge available for dilution." N.J.S.A. 13:20-32(e). Relevant here, the Act also amended the WQPA by revoking any previously issued sewer service approvals that had not been built by the time the Act had passed. N.J.S.A. 58:11A-7.1. DEP explained that "[s]eptic systems are intended to be the long term method of wastewater management in the preservation area[,]" and, further, the Surface Water Quality antidegradation provisions for Category One waters would apply to Highlands open waters. 37 N.J.R. 4767(a)(Dec. 19, 2005). The Highlands Rules DEP promulgated accordingly incorporated the WQPA standards. Id.; see also 40 N.J.R. 4000(a) (July 7, 2008) (modifying WQMP rules after the Act passed).

The Highlands rules allow for new individual subsurface disposal systems, commonly known as septic systems, "where the sanitary wastewater design flow is 2,000 gallons per day or less" and the project satisfies DEP's Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A. N.J.A.C. 7:38-3.4(b) and (c). This capacity standard is the same for septic systems outside of the Highlands Region as well. N.J.A.C. 7:14A-22.4(a)(3); N.J.A.C. 7:15-3.2(f)(5).

DEP also requires any applicant seeking to amend a WQMP in the

Highlands region to simultaneously submit the application to the Highlands Council to "ensure" the Council has "an opportunity to make recommendations prior to Department review of the application." 47 N.J.R. 2531(a) (Oct. 19, 2015). This is because "the Highlands Council conducts its own consistency determination for projects or activities" by reviewing the project "against the RMP, the Water Supply Management Act . . . and other requirements, as appropriate." Ibid. Though TGP did not require a WQMP amendment, the Highlands Council did review the Project and twice concurred that it met all Highlands requirements. (Aa330; Ra13)

TGP's Project is in the Northeast WQMP, in an area designated for septic service, not sewer service. (Aa10; Ra5). To dispose of the wastewater that will be generated by its 3,500 square foot office building and 925 square foot control room, TGP proposes one individual subsurface sewage disposal system that will generate under 2,000 gallons per day. (Aa32). As this implicates DEP's Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A-1.2(a), TGP used those standards to calculate its estimated wastewater flow. N.J.A.C. 7:38-3.4(b); N.J.A.C. 7:9A-2.1, -1.8, -7.4. (Aa31). Based upon the square footage of the proposed office building, control room, and shower, TGP calculated it would produce approximately 603.125 gallons per day of wastewater. N.J.A.C. 7:38-9.2(c). (Aa32). TGP also calculated that its

projected peak water use would be 650 gallons per day utilizing one well. (Aa32). Due to these low volumes, DEP found that the wastewater generation and water use met the Highlands regulations and the Project will be consistent with the Northeast WQMP. (Aa2; Ra4).

Despite the Project's compliance with the applicable rules, once again, Appellants attempt to cast a wide net by faulting DEP for not considering the Project's impacts that they claim will be "the proximate cause of dramatic changes in precipitation and stormwater runoff in the Highlands preservation areas in contravention of the goals and policies of the Highlands Act and the Water Quality Management Act." (Ab18-19). Appellants insist that "DEP must consider this project's contribution to climate change as part of its consistency determination." (Ab21). However, climate change emissions – either standing alone or via their impact on water quality – are not incorporated within the WQPA, the Highlands Act or either set of rules. Indeed, Appellants cite no authority to explain how applicants or DEP could determine a proposed project's climate change implications on water quality. (Ab18-21). Similarly, Appellants' passing references to the Project's increased impervious cover and stormwater runoff lack any citations to WQMP-related standards for either

metric for the simple reason that none exist.[4] Thus, DEP could not deny the Project based on WQMP inconsistency with nonexistent requirements.

Finally, Appellants' allegations that the Project may impact surface waters or violate TMDL allocations ignore the substantial regulatory water quality backdrop that remains beyond the Highlands permitting regime. To begin, Appellants identify no specific TMDL that may be violated here and their concern for Project impacts to Hewitt Brook, an adjacent stream, is assuaged by evidence in the record showing Project setbacks and a spill plan will avoid permanent impacts and the previously disturbed riparian area near the Brook will only experience temporary construction impacts. (Aa68; Aa143-155).

More broadly though, water quality is addressed in numerous ways. For instance, as part of the WQPA statewide application (including in the Highlands), the DEP Commissioner must undertake a continuing planning process ("CPP") which, among other things, assesses water quality statewide to set goals and standards and develops a statewide implementation strategy to achieve those standards. N.J.S.A. 58:11A-7. That strategy incorporates the

[4] Even though the WQMP consistency here did not require stormwater analysis, the record shows that TGP nonetheless addressed stormwater to the Council's satisfaction by designing "permanent stormwater Best Management Practices" that accommodate for impervious surfaces including low-impact structural BMPs, such as rain gardens or bioretention basins per DEP's separate stormwater regulations. (Aa330).

TMDLs as well as other federal requirements.[5] The CPP "is broadly accomplished throughout the Department" in order "to achieve the water quality standards and objectives and meet the requirements of the [WQPA] and the Clean Water Act." N.J.A.C. 7:15-2.2. DEP's CPP sets forth the comprehensive manner in which DEP addresses water quality.[6]

DEP has implemented this CPP strategy to ensure there is no conflict with water quality and areawide WQMPs through separate regulatory programs including the Stormwater program and the NJPDES permitting program, which would implement any necessary requirements arising from any applicable TMDL. The 2015 WQMP rule proposal explained that DEP proposed to revise the WQMP rules to better integrate them with existing permitting programs:

> By combining the determination of technical WQM plan consistency with the review and assessment of a permit application's technical merits, the technical criteria of the applicable environmental regulations will serve as the determination of consistency with the water quality and quantity considerations of a WQM plan….

---

[5] These statutes, rules, and processes form the backbone of DEP's water pollution oversight and are augmented by other authorities as well. See, e.g. In re Stormwater Management Rules, 384 N.J. Super. 451, 454-55 (App. Div. 2006) (describing objectives of Stormwater Management Act, N.J.S.A. 40:55D-93 to -99 which applies to municipalities and DEP).

[6] New Jersey Department of Environmental Protection, Water Resources Management New Jersey's Continuing Planning Process: Executive Summary (January 7, 2025, 11:57 PM), https://www.nj.gov/dep/wqmp/docs/cpp.pdf (emphasis added).

> [See 47 N.J.R. 2531(a) (Oct. 19, 2015) (emphasis added).]

As such, DEP's WQMP rulemaking contemplated that existing permitting and regulatory programs, such as the NJPDES and stormwater requirements would also address WQMP consistency requirements, including applicable TMDLs.

As the substantial record on appeal demonstrates DEP applied the correct Highlands rules to the Project here, DEP correctly found the Project consistent with the WQMP under its existing water quality rules.

CONCLUSION

For these reasons, the court should affirm the Department's exemption decision.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: __/s/__Kathrine M. Hunt___
Kathrine M. Hunt
Deputy Attorney General

Dated: January 13, 2025

IN THE MATTER OF PROPOSED CONSTRUCTION OF COMPRESSOR STATION (CS327), OFFICE BUILDING AND APPURTENANT STRUCTURES, HIGHLANDS APPLICABILITY DETERMINATION, PROGRAM INTEREST NO.: 1615-17-0004.2 (APD200001)	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003616-20 CIVIL ACTION Appeal from Final Action of the New Jersey Department of Environmental Protection

SUPPLEMENTAL REPLY BRIEF OF APPELLANTS FOOD & WATER WATCH, NEW JERSEY HIGHLANDS COALITION, AND SIERRA CLUB

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Dated: January 23, 2025

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[1] "Aa" refers to Appellants' appendix, which was filed with the Appellants' Initial Brief in this appeal, on September 22, 2022.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

The Appellants rely on the Statement of Facts and Procedural History in their Supplemental Brief, submitted to this Court on November 11, 2024.

LEGAL ARGUMENT

I. DEP ARBITRARILY IGNORED REASONABLY FORESEEABLE ADVERSE ENVIRONMENTAL IMPACTS TO HIGHLANDS RESOURCES FROM THIS PROJECT'S AIR POLLUTION AND ITS CONTRIBUTIONS TO SPRAWL, BECAUSE THESE IMPACTS ARE NOT SPECULATIVE AND MUST BE CONSIDERED.

(Aa0001)

DEP argued, in its supplemental brief, that the "Appellants' claims about the impacts of the Project are speculative, unsupported by a fair interpretation of the Act and misunderstand the narrow facts on which DEP may base its decision." DEP at 14-15. But the Appellants' claims about the impacts of the Project are not speculative. In fact, DEP has initiated a formal complaint against the fossil fuel industry, which is pending in the Superior Court with Docket MER-L-001797-22. DEP's positions and assertions in that case are directly contrary to its claim that climate change impacts are only "speculative" in this matter. DEP summarized its position, in its own words, as follows:

> For decades, the fossil fuel industry has misled consumers and the public about climate change. Since at least the 1950s, its own scientists have consistently concluded that fossil fuels produce carbon dioxide and other greenhouse gas pollution that can have catastrophic consequences for the planet and its people. The industry took these

[2] The facts and procedure are interrelated, so they are presented together.

> internal scientific findings seriously, investing heavily to protect its own assets and infrastructure from rising seas, stronger storms, and other climate change impacts. But rather than warn consumers and the public, fossil fuel companies and their surrogates mounted a disinformation campaign to discredit the scientific consensus on climate change; create doubt in the minds of consumers, the media, teachers, policymakers, and the public about the climate change impacts of burning fossil fuels; and delay the energy economy's transition to a lower-carbon future. This successful climate deception campaign had the purpose and effect of inflating and sustaining the market for fossil fuels, which in turn drove up greenhouse gas emissions, accelerated global warming, and brought about devastating climate change impacts to the State of New Jersey….
>
> [See Paragraph 1 of the DEP's complaint, MER-L-001797-22.]

Thus, as a matter of both justice and fairness, the DEP must be precluded or estopped from taking a position in this case that is directly contrary to the State's position in Mass. v. EPA and its complaint against the fossil fuel industry. First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007). DEP's argument that "the impacts of the Project are speculative" rings hollow because the DEP is fully aware that climate change impacts are actually "devastating" to the State. Ironically, DEP has asked this Court to join it in a loud chorus of "Don't Look Up"[3] in this case, while complaining of that posture in another case.

[3] netflix.com/title/81252357 - The 2021 movie titled "Don't Look Up" is about scientists who discover an asteroid on a collision course with earth and the resulting battle between the honest scientists who want to publicize the truth and dishonest, short-sighted profiteers who begin a campaign to enrich themselves by convincing people to "Don't Look Up". The DEP's assertion that the harms from this Project are only "speculative" is a prime example of the misinformation and fraud that the DEP complained of in its Complaint quoted above.

DEP argued that it found "'no valid countervailing reason' to disagree that the Project is consistent with the goals and purposes of the Highlands Act." DEP at 14. It did not find any "countervailing reason" because it blatantly *ignored* the scientific and regulatory realities that it has been directed to follow and that it has expressly relied on in numerous other circumstances and cases. DEP continues to *ignore* all these reasons in its supplemental brief in this matter, even when faced with these specific details in the Appellants' supplemental brief. DEP failed to address its role in Mass. v. EPA, including the Appellants' instant argument that it is legally precluded from changing its position from that case to this case. In addition, DEP failed to address the impact of EO100 and AO1, including the Appellants' instant argument that those orders are legally binding on DEP in this matter. Further, the DEP failed to address its own policy statements and regulatory promulgations regarding the scientifically proven and foreseeable impacts from climate change to Highlands resources. DEP arbitrarily failed to consider all these reasons which would have required the DEP to deny the instant exemption. DEP certainly didn't need to look far for these reasons because they are already well within the DEP's purview and knowledge. Therefore, it is exceedingly confusing to hear the DEP proclaim in its supplemental brief that it couldn't find even one countervailing reason. Appellants could understand if the DEP reasoned through the reasonably foreseeable climate change impacts from the Project and decided to

move forward with the exemption, BUT the DEP ignored all the climate change impacts from the project and didn't reason through them.

As this Court has already explained in this appeal, "It is thus beyond cavil that the Highlands Act represents 'a comprehensive policy designed to protect environmental interests,' exemptions from which are to be strictly construed." Matter of Proposed Constr. of Compressor Station, 476 N.J. Super. 556, 566 (App. Div. 2023). Considering this well settled legal principle, it is difficult to understand why DEP argued that it is restricted to only a "narrow" factual basis for its instant consistency determination under the Act. To the contrary, DEP cannot look narrowly at the potential environmental impacts from this Project because it was required to err on the side of caution and look broadly at the facts with respect to all of the goals and purposes of the Highlands Act. DEP was constrained to deny the exemption request and to require an ordinary permitting process under the Highlands Act if there were any reasonable doubts about potential environmental degradation to Highlands Resources as a result of the proposed Project.

As the Appellants argued in their supplemental brief at page 12, the Appellants are not seeking to challenge FERC's certificate of approval in this appeal. Rather, the Appellants presented support to this Court from FERC's expressed findings regarding the climate change impacts from this Project. Neither Respondent rebutted or disputed FERC's finding, presented in the Environmental

Appellants' supplemental brief at 12, that "...the Project's direct and downstream emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and would contribute to climate change…." Nor did either Respondent rebut or dispute that FERC's certificate is based on its finding that "...the total social cost of GHGs from the project is calculated to be $5,790,928,380 (in 2020 dollars)." Those undisputed facts are critical to this Court's review of the DEP's refusal to address the totality of the Project's reasonably foreseeable environmental impacts to the Highlands resources in its instant consistency determination. The District Court's affirmance of FERC's certificate of approval supports the Appellants' instant argument that DEP was required to consider the resulting environmental degradation from this Project in its consistency determination under the State's Highlands Act.

If TGP wanted to challenge DEP's jurisdiction under the Act then it ought to have filed a separate appeal to pursue any assertions of federal preemption claims. This Court should not make a ruling in this appeal based on federal preemption claims, as that was never an issue raised by the Appellants. It appears, and may very likely be the case, that DEP was threatened and pressured by TGP into granting it the instant exemption based on threats that TGP would file a federal lawsuit to assert federal preemption if the DEP refused the exemption request. The DEP may have preferred to take its chances defending this appeal rather than

facing a federal preemption suit. But TGP's federal preemption arguments are not a valid or logical reason for this Court to affirm the DEP's exercise of its jurisdiction under the Highlands Act in granting the exemption in the first place.

TGP argued, at page 11 of its supplemental brief, that "the Project was not designed to meet the needs of customers in the Highlands Region and would clearly not induce sprawl or any other development within the Preservation Area." However, TGP's argument is contradicted by its previous assertion, at page 20 of its Brief submitted to this Court on October 22, 2022. Previously, TGP asserted, as follows:

> In addition to meeting the needs of the Project shipper, the Project will also assist in eliminating capacity constraints in the region, especially during periods of peak demand, ensuring the region is able to meet residential, commercial, and industrial heating and cooling needs, will provide added reliability during planned and unplanned maintenance activities on Tennessee's natural gas transmission system **within the State….**

Thus, it is apparent from TGP's previous assertions in this appeal that this Project will play a critical role in expanding capacity for even more sprawl development "**within the State**" and it is arbitrarily unclear from the DEP's final decision how it determined otherwise. It bears repeating that the DEP is required to construe the exemption from the Act narrowly, in favor of a precautionary approach towards the legislative intent. If the Project will enable further sprawling development in and around the Highlands region then the DEP should have scrutinized that issue with

regard to the legislative scheme for proper planning purposes, rather than allowing the development to move forward without specifically addressing the legislature's concerns. The RMP clearly requires an in-depth proactive planning approach towards developments of this size and scope in the Preservation area, rather than just allowing them via an exemption.

II. DEP ARBITRARILY IGNORED REASONABLY FORESEEABLE IMPACTS TO WATER QUALITY FROM THIS PROJECT'S CONTRIBUTION TO CLIMATE CHANGE AND THE ADDITION OF IMPERVIOUS SURFACES.

(Aa001)

DEP argued that the "Appellants focus on concerns about climate change and impervious surfaces, *but neither are relevant under the WQMP rules*." DEP at 17, emphasis added. Nothing could be further from the truth. The WQMP rules required the DEP to take a broad and searching look at how this Project might be consistent with the relevant WMP. Again, DEP has focused too narrowly in its consistency assessments here and, sadly, it has failed to meet its obligations under the law. Considering DEP's admissions that climate change and newly constructed impervious surfaces are increasingly and specifically damaging Highlands water resources, it is impossible to understand how the DEP can rest its decision on an argument that those impacts are irrelevant and must be ignored under the WQMP rules. It is truly bizarre that DEP would rely only on its septic density rules under

the Highlands regulations to make an overall determination of consistency with the areawide WQMP. As the Environmental Appellants argued in their Initial Brief in this matter, at pages 35-37, DEP's regulations implicate a much broader requirement for the DEP to review and consider potential impacts to water quality under the instant consistency determinations, beyond how many gallons of water get flushed into the septic system on a daily basis. See N.J.A.C. 7:15-3.2 and N.J.A.C. 7:38-9.2.

DEP argued that "...as contemplated by the WQPA and the WQMP rules, DEP's other regulatory programs, such as the New Jersey Pollution Discharge Elimination System ("NJPDES") program, separately address stormwater and any applicable total maximum daily load ("TMDL") requirements." DEP at 18-19. But this is more nonsense from the DEP because the consistency assessment is a *prerequisite* that comes *before* any permit can be issued. Under the Water Quality *Planning* Act, all projects "shall be *developed* and conducted in a manner consistent with the adopted areawide plan." N.J.S.A. 58:11A-10. DEP's own rule says the Consistency Assessment must precede the permit. N.J.A.C. 7:15-3.2(a). Compliance with potential NJPDES permits during and after construction of the project does not satisfy the requirement to determine if the project is consistent with the Areawide WQM Plan *before* the project is built. The same is true of any other permit which might implicate TMDL requirements. Future permits may

regulate the conduct of the facility, but not its development in the initial planning stages, which is precisely when the WQPA and implementing regulations require the DEP to assess broadly all potential impacts to water quality.

The purpose of the DEP's regulations is frustrated here because the DEP permitted the construction of a facility when the discharges and corresponding permits that will be required in the future could be incompatible with the WQPA. Entirely absent from the record is DEP's consideration of whether the many water bodies surrounding this Project, including a nearby drinking water reservoir, will be adversely impacted by the additional impervious surfaces and additional stormwater runoff from this Project. See Aa0037, Aa0039, Aa0178, and Aa0194 for visual representations of the numerous and varied water bodies surrounding this Project. Monksville Reservoir is located approximately 1,200 feet east of the location of the compressor station. Aa0066.

III. REVERSAL OF THE EXEMPTION OR A REMAND FOR A PUBLIC HEARING WOULD BOTH BE APPROPRIATE REMEDIES. (Aa001)

Appellants' first argument is that the HAD is not in accordance with the Act and must be reversed. In the alternative, there should be a remand with public hearings required so that quasi-judicial findings could be made by the DEP,

regarding the totality of this Project's environmental impacts in the Highlands, to support the HAD.

DEP argued that "…sending the matter to the Office of Administrative Law (OAL) would give Appellants, who are third parties to TGP's application, an administrative hearing contrary to the Administrative Procedure Act's prohibition on that, as well as extensive case law." DEP at 10. But the Appellants do not need to be given full party status at the OAL and, instead, can be authorized to participate in the proceedings as would be helpful and constructive to a sound outcome. N.J.A.C. 1:1-16.6. Clearly, DEP has not yet made a credible record of the totality of the potential adverse environmental impacts from this Project on the Highlands resources. Therefore, an appropriate remedy (short of invalidating the HAD entirely) would be an order from this Court requiring public hearings (whether at the OAL or not) as a basis for the DEP to make these requisite adjudicative determinations on remand, to support an assessment of whether the reasonably foreseeable extent of damage from this Project is consistent with the Act.

Respectfully submitted,

/s/ Daniel A. Greenhouse