
In The
United States Court of Appeals
For the
Third Circuit

Case Nos. 26-1252 and 26-1253

NATURAL RESOURCES DEFENSE COUNCIL, INC.; NY/NJ
BAYKEEPER; PRINCETON MANOR HOMEOWNERS ASSOCIATION;
CENTRAL JERSEY SAFE ENERGY COALITION; FOOD & WATCH;
NEW JERSEY LEAGUE OF CONSERVATION
VOTERS EDUCATION FUND; SIERRA CLUB,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

-AND-

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Intervenor-Respondent.

*On Petition for Review of Permits Issued by
The New Jersey Department of Environmental Protection
(Agency Permit No. 0000-25-0012.1 LUP250001)*

**CONSOLIDATED FINAL BRIEF FOR INTERVENOR-RESPONDENT,
TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC**

Christine A. Roy, Esq.
New Jersey Bar No. 020631992
Rutter & Roy, LLP
2052 Route 35, Suite 103
Rivers Edge Professional Building
Wall, New Jersey 07719
Phone: (732) 462-1990
E-mail: CRoy@rutterroy.com

Richard G. Scott, Esq.
New Jersey Bar No. 030642010
Rutter & Roy, LLP
2052 Route 35, Suite 103
Rivers Edge Professional Building
Wall, New Jersey 07719
Phone: (732) 462-1990
E-mail: RScott@rutterroy.com

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United States Court of Appeals for the Third Circuit

**Corporate Disclosure Statement and
Statement of Financial Interest**

No. _____

v.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, _____
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

(Signature of Counsel or Party)

Dated: _____

PRELIMINARY STATEMENT

Given the urgent need for affordable natural gas in the northeast, Intervenor-Respondent, Transcontinental Gas Pipe Line Company, LLC (“Transco”), revived its Northeast Supply Enhancement Project (“NESE” or “Project”), a strategic expansion of its existing system that will deliver natural gas to the Northeast region, and particularly New York City. The Project was extensively reviewed by various federal and state agencies, including the Federal Energy Regulatory Commission (“FERC”), the agency responsible for determining the need for the Project. The New York Public Service Commission (“NYPSC”) also determined that the Project was needed.

Beginning in 2017, Transco sought from the New Jersey Department of Environmental Protection (“NJDEP”) environmental permits needed to construct the Project, including a Freshwater Wetlands individual permit, Waterfront Development (Upland and In-Water) individual permit, Waterfront Development individual permit, Coastal Wetlands individual permit, Flood Hazard Area individual permit, and Water Quality Certificate (“WQC”) under Section 401 of the Clean Water Act, 33 U.S.C. § 1341 (“CWA”)(collectively, the “Permit”). After years of rigorous review and the extraordinary actions that Transco was required to take to address NJDEP’s reasons for denying previous permit applications for the Project, NJDEP finally issued the Permit. Natural Resources Defense Council, Inc.

(“NRDC”) and the NY/NJ Baykeeper, Princeton Manor Homeowners Association, Central Jersey Safe Energy Coalition, Food & Water Watch; New Jersey League of Conservation Voters Education Fund, and Sierra Club (collectively, “Baykeeper”) are challenging NJDEP’s decision to issue the Permit.

NRDC and Baykeeper (together, “Petitioners”) claim that NJDEP, without adequate explanation or analysis, changed its position by granting the Permit to Transco for the Project. Since NJDEP denied Transco’s permit application in 2019, Petitioners claim that NJDEP was required to deny Transco’s 2025 permit application since the Project scope had not changed. However, Petitioners completely ignore that Transco addressed all deficiencies identified in the 2019 denial when it submitted new permit applications in 2020. Petitioners also argue that, for various reasons, NJDEP’s issuance of the Permit violated Section 401 of the CWA and that NJDEP’s reliance on Transco’s draft plans were unlawful and required additional public participation. For the reasons fully stated herein, NJDEP properly issued the Permit and provided rational and reasonable bases for doing so, as supported by the extensive permitting record. As such, NJDEP’s decision to issue the Permit was not arbitrary and capricious.

COUNTERSTATEMENT S OF THE ISSUES ON APPEAL

As to NRDC:

1. Did NJDEP rationally and reasonably determine, based on its technical expertise, application of extensive best management practices (“BMPs”), and knowledge gained from other dredging projects, that Transco’s Project met the applicable water quality standards?
2. Did NJDEP provide a reasoned explanation for its determination that Transco’s Project complies with New Jersey’s water quality standards, including designated uses, within Raritan Bay?
3. Was NJDEP required to further delay the Permit to allow for additional public review and comment on the Water Quality Monitoring Plan (which included an Adaptive Management Plan) when the plan was previously subject to extensive public review and comment?

As to Baykeeper:

1. Did NJDEP adopt or rely on mixing zones in its determination that Transco’s Project met surface water quality standards?
2. Did NJDEP include limitations and monitoring requirements necessary to assure compliance with water quality standards for turbidity and 4,4’-DDE?

3. Did NJDEP comply with public notice requirements related to Transco's updated Stormwater Management Report that was submitted to NJDEP and available for public review with over a month left on the public comment period?

STATEMENT OF RELATED CASES AND PROCEEDINGS

Below are related cases and proceedings:

1. *NY/NJ Baykeeper et al. v. New York State Department of Environmental Conservation et al.*, United States Court of Appeals for the Second Circuit, Docket No. 25-1938. Appeal of the WQC issued by the New York State Department of Environmental Conservation ("NYSDEC") to Transco for the Project in New York.

2. *Central Jersey Safe Energy Coalition et al. v. Federal Energy Regulatory Commission*, United States Court of Appeals for the D.C. Circuit, Docket No. 25-1252. Appeal of the FERC's issuance of a Certificate of Public Convenience and Necessity for the Project.

3. *Transcontinental Gas Pipe Line Company, LLC v. 1.451 Acres of Permanent Easement et al.*, Docket No. 3:26-cv-00018-ZNQ-JTQ (D.N.J.). Transco filed this condemnation action for the taking of a permanent access road easement and temporary workspace easements needed for the construction, operation, and maintenance of a compressor station to be constructed in Franklin Township, Somerset County, New Jersey, as part of the Project.

COUNTERSTATEMENT OF THE CASE

This case seeks review of NJDEP’s decision to issue the Permit (Permit No. 0000-25-0012.1 LUP250001) which included a Section 401 WQC for the Project following years of rigorous review by NJDEP in accordance with all applicable laws, regulations, and rules.

I. Overview of the Project

Transco is a natural gas company within the meaning of the Natural Gas Act, 15 U.S.C. § 717 et seq., (the “NGA”). *See* 192 FERC ¶ 61,184, at P 3 (“2025 FERC Order”), JA 1293-94. The Project is an expansion of Transco’s existing natural gas transmission system in Pennsylvania, New Jersey, and New York, and was designed to provide up to 400,000 dekatherms per day (Dth/d) of firm natural gas transportation capacity to Project customers, National Grid: The Brooklyn Union Gas Company, d/b/a National Grid NY and KeySpan Gas East Corporation, d/b/a National Grid (collectively, “National Grid”). *Id.* at P 1, JA 1293. The Project will allow National Grid to access additional supplies of natural gas and benefit the consuming public by meeting increased residential and commercial demands in Brooklyn, Queens, and Long Island. *Id.* at P 5, JA 1295.

For the Project, Transco will construct a new compressor station, known as “CS 206”, in Franklin Township, Somerset County, New Jersey. *Id.* at P. 4, JA 1294-95. Transco will also construct modifications at its existing compressor station

in Chester County, Pennsylvania. In addition, Transco will construct three new pipeline segments, totaling approximately 37 miles, that will loop (will run generally parallel and connect at both ends to) Transco's existing pipeline system, including a pipeline segment in Lancaster County, Pennsylvania (the Quarryville Loop) as well as a segment in Middlesex County, New Jersey (the Madison Loop) that will run from Middlesex County, New Jersey, to Transco's Rockaway Transfer Point in New York State waters (the Raritan Bay Loop). *Ibid.*

The Madison Loop includes the construction of a 3.43-mile segment of 26-inch diameter pipeline generally paralleling Transco's existing 42-inch diameter Lower New York Bay Lateral pipeline in Middlesex County. The Raritan Bay Loop includes the construction of a 23.5-mile, 26-inch diameter loop (0.2 miles onshore and 23.3 miles offshore) of Transco's Lower New York Bay Lateral in Middlesex County, New Jersey, to the Rockaway Transfer Point in New York State waters. Approximately 6 miles of the Raritan Bay Loop will be constructed in New Jersey waters. *Ibid.*

II. The FERC Process

The FERC is the agency charged with evaluating the need for the Project. 15 U.S.C. § 717, et seq. On March 27, 2017, pursuant to provisions of the NGA, Transco applied to the FERC for authority to construct and operate the Project. *See* FERC Final Environmental Impact Statement, at ES-1, JA 553. On March 23, 2018,

in accordance with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, FERC issued a Draft Environmental Impact Statement. *Id.* at ES-2, JA 554. On January 25, 2019, FERC issued a Final Environmental Impact Statement (“FEIS”) for the Project. *Id.* The FEIS evaluated the potential environmental effects anticipated from the construction and operation of the Project and recommended certain conditions to mitigate impacts to the fullest extent practicable. *Id.* Among those impacts, the FEIS analyzed the impacts of the construction of the Raritan Bay Loop, including impacts from the resuspension of contaminated sediments during construction, and concluded that “[t]he release of sediment-bound contaminants could impact water quality and aquatic organisms along the proposed pipeline route; however, given the relatively short duration of excavation and backfilling activities, and the rapid pace at which resuspended sediments would settle out of the water column, impacts of contaminants on aquatic resources are anticipated to be temporary and minor.” *Id.* at ES-12, JA 555. On May 3, 2019, FERC issued a Certificate, subject to environmental conditions set forth in the FEIS. 167 FERC ¶ 61,110, at P 93(B)(1), JA 71.

On January 31, 2020, Transco filed with FERC an application for an amendment to the Certificate to authorize Transco’s use of an alternate access road to CS 206. 172 FERC ¶ 61,036 (“Amendment Order”), at P 1, JA 187. On July 16, 2020, FERC issued an Order Amending Certificate, which amended the Certificate

to allow for the use of the alternate access road. *Id.* However, given the denials of Transco's CWA Section 401 applications by the NYSDEC and NJDEP in 2020 (discussed in detail below), Transco was prevented from constructing and placing the Project in service within two years of the date of the Certificate, or by May 3, 2021. *See* 2025 FERC Order at P 8, JA 1296. Transco sought and received extensions from FERC which ultimately extended the in-service date until May 3, 2024. *Id.* In granting Transco's extension requests, FERC continued to uphold its findings that the Project was in the public interest and that the FEIS remained valid. *Id.* On April 10, 2024, Transco advised FERC that it would not seek further extension of the in-service date and that it would allow the Certificate to expire. *Id.* On June 10, 2024, FERC vacated the Certificate. *Id.*

III. Transco's Revival of the Project

In 2025, Transco sought to recommence development of the Project given the urgent need for energy transportation infrastructure in the United States, particularly the Northeast. *See Id.* at P 1, JA 1293. On May 29, 2025, Transco filed a petition with the FERC requesting expedited reissuance of the Certificate of Public Convenience and Necessity, as amended, for the Project. *Id.* In its request, Transco stated there had been no change to the purpose, scope, or impact of the Project since the Certificate had been issued. *Id.* at P 9, JA 1296-97. Accordingly, FERC relied on the prior Project FEIS. *Id.* at P 51, JA 1300.

On August 28, 2025, the FERC reissued a Certificate of Public Convenience and Necessity, as amended, for the Project noting “Transco has demonstrated a need for the Northeast Supply Enhancement Project, that the project will not have adverse impacts on existing customers, or existing pipelines and their existing customers, and that it will have minimal impacts on the interests of landowners and surrounding communities.” *Id.* at P 112, JA 1302. As part of its finding of need, FERC found that “there are credible market studies that show that the project may help alleviate reliability issues for project shippers and end-users, provide reliability and system resilience benefits to the wider New York region, and reduce energy prices for consumers” and further that Transco executed new binding precedent agreements for 100% of project capacity. *Id.* at P 42 JA 1298-99.

IV. The Project’s Extensive Permitting History in New Jersey

In order to proceed with the Project, Transco was required to obtain “all applicable authorizations required under federal law (or evidence of waiver thereof).” 167 FERC ¶ 61,110, Appendix A, ¶10, JA 73. Among the federal authorizations required for the Project is a Section 404 permit under CWA, which authorizes the discharge of dredged or fill material into navigable waters. 33 U.S.C. § 1344(a). Furthermore, pursuant to Section 401 of the CWA, an applicant for a Section 404 permit to construct or operate a facility that may result in a discharge to navigable waters must provide the federal permitting agency with “a certification

from the State in which the discharge originates . . . that any such discharge will comply with” applicable state water quality standards. 33 U.S.C. § 1341(a)(1).

As this Court has noted, “New Jersey has assumed authority to issue Section 404 permits and delegated administration of the permitting program to NJDEP, which exercises this authority pursuant to the New Jersey Freshwater Wetlands Protection Act [(“FWPA”)].” *Del. Riverkeeper Network v. Sec’y, Pa. Dep’t of Envntl. Prot. (“Riverkeeper I”)*, 833 F.3d 360, 369 (citing N.J.S.A. 13:9B-1 *et seq.*; 33 N.J. Reg. 3045(a); N.J.A.C. 7:7A-2.1(c); and Memorandum of Agreement between the New Jersey Department of Environmental Protection and Energy and the United States Environmental Protection Agency (1993)). A permit issued by NJDEP pursuant to the FWPA Rules also constitutes the WQC required under Section 401 of the CWA. N.J.A.C. 7:7A-2.1(d). Similarly, a permit issued by NJDEP pursuant to the Coastal Zone Management (“CZM”) Rules includes the WQC. N.J.A.C. 7:7-1.2(e)2.

A. The 2017/2018 Permit Applications and the 2019 Denial

On July 26, 2017, Transco submitted its initial application to NJDEP for the Permit for the Project facilities located in New Jersey. *See* NJDEP Env. Report, at 1, JA 460. However, on June 14, 2018, Transco advised NJDEP that it would withdraw its permit applications and reapply with additional information in order to give NJDEP more time to review its request for a WQC. *See* June 14, 2018

Withdrawal Letter, JA 38. NJDEP acknowledged Transco's withdrawal by letter dated June 15, 2018, and included a list of additional information that Transco must include in any resubmitted application. *See* June 15, 2018 Letter, JA 40.

Transco reapplied for the Permit on June 20, 2018. *See* June 2018 Application, JA 44. In support of the resubmittal, Transco conducted project-specific hydrodynamic and sediment transport and dispersion modeling for various installation methods proposed for the Raritan Bay Loop to numerically predict the suspended sediment plumes and areas of deposition that may be generated by the offshore construction. *Id.*, JA 45-47. The purpose of the modeling was to better estimate potential impacts from suspended and deposited sediments, and to help determine appropriate avoidance and minimization measures. *Id.*, JA 45.

On November 5, 2018, NJDEP held a public hearing in Franklin Township, Somerset County, New Jersey for the freshwater wetland components of proposed CS 206 and the Madison Loop. *See* NJDEP Env. Report at 2, JA 461. NJDEP held another public hearing on March 18, 2019, this time in East Brunswick Township in connection with Transco's Waterfront Development, Coastal Wetland and Flood Hazard Area Permits and its application for temporary dewatering permits from NJDEP's Division of Water Allocation. *See* Public Hearing Transcript, JA 894-96.

On June 5, 2019, NJDEP denied the Permits. *See* 2019 Denial Letter ("2019 Denial"), JA 101. The main basis for the denial was Transco's alleged failure to

demonstrate that it could not avoid impacts to the exceptional resource value wetlands, transition areas, and riparian zone vegetation associated with the access road to CS 206, which was proposed on adjacent property owned by Trap Rock Industries, Inc. (the “Trap Rock Access Road”). *Id.* at JA 106-09. Specifically, NJDEP questioned why Transco could not use and extend an existing access road on another adjacent property to reach CS 206. *Id.* The alternate access road identified by NJDEP was part of the Higgins Farm Superfund Site and is referred to herein as the “Higgins Farm Access Road”. *Id.*, JA 108. In addition, NJDEP found that Transco had not demonstrated a compelling public need for the Project. *Id.*, JA 109-10. Lastly, NJDEP found that Transco’s sediment sampling at that time was “insufficient...to determine if the proposed upland placement facility was acceptable or if surface water quality would be impacted due to resuspension of contaminants at the proposed dredging site.” *Id.*, JA 111-14 NJDEP noted that “Transco's sampling results showed exceedances of the Ecological Saline Water Sediment Effects Range Medium (ER-M)¹ value for bis(2-ethylhexyl)phthalate, phenanthrene, arsenic, manganese, mercury, polychlorinated biphenyls (PCBs) and 4,4'-DDE (pesticides) at certain sample points...”. *Id.*, JA 113. NJDEP concluded that any

¹As noted in the 2019 Denial, “ER-Ms are measures of toxicity in marine sediment that are used in assessing toxicity hazards for trace metals and organic contaminants. Parameters that exceed the ER-M value indicate there is a greater than 50% incidence of adverse effects to benthic communities” 2019 Denial, JA 112.

resubmitted application for the Project “must include a modeling analysis for the above referenced parameters that demonstrates compliance with the SWQS [Surface Water Quality Standards], through the implementation of appropriate best management practices identified in Appendix G [of the Coastal Zone Management (“CZM”) Rules] or otherwise, to avoid adverse water quality impacts.” *Id.*, JA 114.

B. The 2019 Applications and Withdrawals

On June 12, 2019, Transco again resubmitted the permit applications for the Project. *See* June 10, 2019 Cover Letter, JA 74. On June 25, 2019, NJDEP issued a letter finding Transco’s application to be administratively complete but technically incomplete. *See* NJDEP Env. Report at 3, JA 462. In support of its 2019 application and as instructed by NJDEP its 2019 Denial, Transco submitted a contaminant modeling report dated June 26, 2019, entitled “*NESE Contaminant Transport Modeling Results For New Jersey Waters*” (“Modeling Report”). JA 801-827. This report provided an analysis of impacts to water quality during dredging operations for certain contaminants that exceeded ecological ER-M criteria. *Id.*, JA The Modeling Report found that, based on the modeling results, and “coupled with the best management practices Transco has committed to implement support a conclusion that contaminants introduced into the water column during construction will not have an adverse impact on water quality. In addition, any contaminant concentrations that are introduced into the water column will be localized, temporary

and of short duration.” *Id.*, JA 823. In an August 28, 2019 interoffice memo, NJDEP analyzed and accepted the modeling results in the Modeling Report and determined that the Project could meet NJDEP’s water quality standards. *See* NJDEP Interoffice Memo, JA 99-100.

On July 12, 2019, NJDEP issued a technical deficiency letter confirming that Transco’s application was complete for review but identified two deficiencies, one related to stormwater management calculations and the other related to Transco’s continued proposed use of the Trap Rock Access Road. *See* July 12, 2019 Deficiency Letter, JA 96. NJDEP again questioned Transco’s position that the Higgins Farm Access Road was not a practicable alternative and noted that Transco had not shown that it could not amend the FERC Certificate to permit Transco’s use of the alternate road. *Id.*, JA 97-98. On October 25, 2019, Transco withdrew its Waterfront Development (upland and in-water) permit and Coastal Wetlands permit applications and reapplied for these same permits on October 28, 2019. *See* NJDEP Env. Report at 4, JA 463. However, on November 26, 2019, Transco withdrew all permit applications. *Id.* On November 27, 2019, NJDEP issued a letter to Transco confirming the withdrawal of the applications and setting forth the following information that would need to be included if Transco decided to reapply: (1) concurrence from New York as to the public need for the Project “to ensure that the Project is not constructed in New Jersey without an endpoint in for the proposed

additional capacity”; (2) justification that the Higgins Farm Access Road does not represent a practicable alternative; and (3) information about water quality monitoring and adaptive management strategies during dredging activities. *See* Nov. 27, 2019 Letter, JA 741.

C. The 2020 Application and Denial

On January 6, 2020, Transco and NJDEP held a conference call to discuss Transco’s intent to resubmit permit applications for the Project. *See* Jan. 6, 2020 Meeting Minutes, JA 745. During the call, NJDEP staff informed Transco that chemical contaminant monitoring is not typically required and that turbidity monitoring would be sufficient to evaluate whether there were any potential exceedances in SWQSS described in N.J.A.C. 7:9B. *Id.* JA 746-47; *see also* January 21, 2020 application Cover Letter, JA 186.

On January 21, 2020, Transco resubmitted applications to NJDEP for the Permit. *See* NJDEP Env. Report at 4, JA 463. This time, Transco included the Higgins Farm Access Road as the preferred access road to CS 206, thereby eliminating approximately 2.9 acres of permanent wetlands impacts and addressing the main basis for the 2019 Denial. *See* Jan. 21, 2020 Application Cover Letter, JA 185-86. As part of the 2020 application, Transco also included a draft water quality monitoring plan, which included adaptive management strategies for dredging activities. *See* 2020 Application, Appendix N, JA 153. On May 15, 2020, NYSDEC

denied Transco's request for a WQC for that portion of the Project in New York waters. *See* NJDEP 2020 Denial Letter ("2020 Denial"), JA 116. That same day, NJDEP denied Transco's application for the Permits. *Id.* The sole basis for the 2020 Denial was NJDEP's contention that Transco failed to demonstrate a compelling public need for the Project, as required by the FWPA Rules at N.J.A.C. 7:7A-10.4.²

D. The 2025 Application and Issuance of the Permits

On May 30, 2025, Transco filed a new application with NJDEP for the Permit (the "2025 Application"). *See* 2025 Application Cover Letter, JA 564; NJDEP Env. Report at 5, JA 464. Transco submitted its 2025 Application as it existed at the time of the 2020 Denial with substantially the same information, which was the result of years of analysis and numerous technical meetings and calls with NJDEP. *See* 2025 Application Cover Letter, JA 564. As a result, Transco's 2025 Application reflected changes and refinements made in response to numerous agency consultations during NJDEP's extensive prior review of the Project, which began in 2017. However, Transco noted in its application that additional information would be forthcoming, including an updated Stormwater Management Report to address changed stormwater design at CS 206 to meet the revisions to NJDEP's Stormwater Management Rules since the 2020 Application. *Id.*

² Although Transco did not challenge the 2020 Denial at the time it was issued, Transco maintains that the Project before NJDEP in 2020 satisfied the substantive requirements for issuance of the Permit.

On July 21, 2025, NJDEP issued a technical deficiency letter requesting technical information regarding the revised design of the stormwater management facilities at CS 206 to comply with the updated Stormwater Management Rules, N.J.A.C. 7:8. *See* July 21, 2025 Deficiency Letter, JA 933-34. On August 6, 2025, the DEP Bulletin was published, which provided public notice of the virtual public hearing, the process for participating at the hearing, that NJDEP would accept written comments on the application, and that the end of the public comment period would be 15 days after the public hearing. *See* NJDEP Env. Report at 5; NJDEP Notice of Public Hearing, JA 447. The notice also reiterated that the public could review copies of the permit application at the municipal clerk's office in Franklin Township, Old Bridge Township, or the Borough of Sayreville or by appointment at NJDEP's Trenton Office. *Id.*

On August 21, 2025, with more than a month left in the public comment period, Transco provided supplemental information addressing the July 21, 2025 deficiency letter; specifically, the updated Stormwater Management Report showing compliance with the updated rules. *See* August 21, 2025 Transmittal Letter, JA 936. On September 10, 2025, NJDEP held a virtual public hearing on the 2025 Application. *See* Env. Report at 5, JA 464.

On September 18, 2025, the NYPSC issued its Order Regarding Long-Term Natural Gas Plan and Requiring Further Actions document. *See* Transco Response

to Comments, JA 318. NYSPSC agreed, based on the February 2020 National Grid Long Term Capacity report, that there is a need for more reliable source of natural gas supply that the proposed NESE project would provide, should it receive all required approvals. *Id.*, JA 322.

On November 7, 2025, NYSDEC issued the WQC for the portions of the Project located in New York. *See* NJDEP Env. Report at 5, JA 464. That same day, NJDEP issued the Permit after years of reviewing the Project. Permit, JA 13. The Permit was extensive and included a significant number of conditions, including several pre-construction conditions, as well as the implementation of various BMPs to minimize turbidity, such as using a closed environmental clamshell bucket, prohibiting barge overflow, and required certain dredging practices. *Id.* JA 17-18; NJDEP Dredge Report, JA 542-544. The Permit also required Transco to employ an independent dredging inspector to monitor dredging activities. *See* Permit at 5, Condition 21, JA 17.

STANDARD OF REVIEW

NJDEP's decision to issue Transco the Permit, which included the WQC under the CWA, is subject to the arbitrary and capricious standard of review. *Del. Riverkeeper Network v. Sec'y, Pa. Dep't of Envntl. Prot.*, 833 F.3d at 377. Under this standard, the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" that are found to be "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

The scope of review under the “arbitrary and capricious” standard is “narrow, and a court is not to substitute its judgment for that of the agency.” *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); *Motor Veh. Mfrs. Assn. of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). An action is arbitrary and capricious only if the agency “failed to examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* at 42–43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)). The court must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

An agency is due “substantial deference” under the arbitrary and capricious standard, and the validity of the agency’s action is presumed. *SBC Inc. v. FCC*, 414 F.3d 486, 496 (3d Cir. 2005); *see also Sierra Club v. United States EPA*, 972 F.3d 290, 298 (3d Cir. 2020) (noting that even when “[a]n agency has engaged in line-drawing determinations” a court will review primarily to determine whether the result is “‘patently unreasonable’ or run[s] counter to the evidence before the agency.”). The Court has a responsibility to “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transp., Inc.*,

419 U.S. at 286; *see also* *Keystone Conemaugh Projects LLC v. United States EPA*, 100 F.4th 434, 445 (3d Cir. 2024). In fact, a court need only determine that “the agency has acted within a zone of reasonableness and ... reasonably considered the relevant issues and reasonably explained the decision.” *Prometheus Radio Project*, 592 U.S. at 423. Moreover, the burden of proof rests with the party challenging the agency action. *See Frisby v. U.S. Dep’t of Hous. & Urban Development*, 755 F.2d 1052, 1055 (3d Cir. 1985).

Even after the United States Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which held that a court is no longer compelled to accept an agency’s interpretation of an ambiguous statute, a court must still accept an agency’s factual findings as conclusive “if they are supported by substantial evidence given the record as a whole.” *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 472-473 (3d Cir. 2025) (quoting *Crozer-Chester Med. Ctr. v. NLRB*, 976 F.3d 276, 283-84 (3d Cir. 2020)); *see also* *Loper Bright*, 603 U.S. at 392 (the Administrative Procedures Act “does mandate that judicial review of agency policymaking and factfinding be deferential.”).

ARGUMENT³

Before addressing Petitioners' arguments, it is important to understand that the standards for the issuance of a WQC for coastal and offshore impacts come from NJDEP's CZM Rules at N.J.A.C. 7:7-1.1 *et seq.* See N.J.A.C. 7:7-1.2(e). Where a regulated activity requires a coastal permit, such as a Waterfront Development Permit, and a WQC, the coastal permit includes the WQC. N.J.A.C. 7:7-1.2(e)2. In other words, these are not separate permits. Petitioners' arguments focus too narrowly on New Jersey's SWQS and not on NJDEP's longstanding and practical approach to reviewing and permitting projects like Transco's, which involve dredging, under the CZM Rules. While applications for WQCs "shall also be reviewed in accordance with all applicable statutes and regulations administered by [NJDEP] including the SWQS, N.J.A.C. 7:9B," the starting point for any analysis must be the CZM Rules. N.J.A.C. 7:7-1.2(e).

³ Petitioners' briefs attach numerous member affidavits purportedly to establish standing. While Transco does not concede standing, Transco has elected not to contest Petitioners' standing. Transco, however, objects to any request by Petitioners that this Court consider any factual or technical aspects of those affidavits as they are outside the administrative record before NJDEP at the time of its decision. See *NVE Inc. v. HHS*, 436 F.3d 182, 189 (3rd Cir. 2006) quoting, *Camp v. Pitts*, 411 U.S. 138, 142 (1973)) ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); see also *Horizons International, Inc. v. Baldrige*, 811 F.2d 154, 162 (3rd Cir. 1987) quoting, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, (1971). ("The task of the reviewing court is to apply the appropriate APA [Administrative Procedure Act] standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.")

Under the CZM Rules, NJDEP regulates and ensures avoidance and minimization of adverse impacts on water quality from “new dredging” by requiring permittees to implement BMPs and, where appropriate, water quality monitoring. The rules provide that new dredging for the installation of submerged pipelines “is conditionally acceptable provided the dredging complies with the conditions of [N.J.A.C. 7:7-12.7], the general water area rule specific to the project and the energy facility use rule, where applicable.” N.J.A.C. 7:7-12.7(h). New dredging “shall” be conducted in accordance with Appendix G to the CZM Rules, which sets forth NJDEP’s policies and procedures used to review permit applications for dredging activities in tidal waters. N.J.A.C. 7:7-12.7(b). Specifically, Appendix G describes various BMPs that may be required “to minimize the potential for, and magnitude of, adverse environmental impacts that could result from dredging operations.” Appendix G at 11. These BMPs include, but are not limited to, the use of a closed clamshell with environmental bucket and dredging procedures such as maximizing the size of the “bite” of the clamshell and reducing the speed with which the clamshell is withdrawn from the water column. *Id.* In areas of contaminated sediments, NJDEP requires that there be no barge overflow, which limits the dispersal of contaminated sediments from the dredging site. *Id.*

In addition to complying with Appendix G, new dredging must show that “[t]urbidity concentrations (that is, suspended sediments) and other water quality

parameters at, downstream, and upstream of the dredging site...shall meet applicable Surface Water Quality Standards at N.J.A.C. 7:9B.” N.J.A.C. 7:7-12.7(c)10iii. NJDEP “may require permittee to conduct biological, physical, and chemical water quality monitoring before, during, and after dredging and disposal operations to ensure that water quality standards are not exceeded.” *Id.* However, the CZM Rules provide that “[i]f predicted water quality parameters are likely to exceed Surface Water Quality Standards at N.J.A.C. 7:9B...., or if pre-dredging chemical analysis of dredged material, including surface water and ground water quality predictive analyses, reveals significant contamination, then [NJDEP] will work cooperatively with the applicant to fashion acceptable control measures and will impose seasonal restrictions...” N.J.A.C. 7:7-12.7(c)10(iv). Taken together, the CZM Rules provide a practical and flexible approach to guiding NJDEP’s review of dredging projects.

I. NJDEP’S POSITION WAS CONSISTENT THROUGHOUT ITS EXTENSIVE REVIEW OF THE PROJECT AND COMPLIED WITH APPLICABLE LAW. (Responding to NRDC Point II)

NRDC argues that NJDEP changed its position on several key issues without sufficient explanation or analysis, and instead, NJDEP relied only on New York’s issuance of a WQC for the Project. NRDC Br. at 28. In support of this argument, NRDC relies upon several U.S. Supreme Court cases in which the agencies unilaterally and unexpectedly altered their interpretation of important regulations. *See* NRDC Br., pp. 28-31. However, these cases do not apply here

since NJDEP did not alter its interpretation of its regulations. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015) (holding that an agency is not required to use notice-and-comment procedures when it issues a new interpretation of a regulation that deviates significantly from its previously adopted one); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (holding that the Federal Communication Commission's decision to change its policy on banning certain expletives was neither arbitrary nor capricious); *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983) (holding that the National Highway Traffic Safety Administration's decision to rescind the passive restraint requirement in its safety standards was arbitrary and capricious). NJDEP engaged in years of rigorous review of the permit applications for Transco's NESE Project. At each withdrawal or denial, NJDEP provided Transco with a list of outstanding items and deficiencies that would need to be satisfied for it to issue the Permit. These remained consistent, and by the time Transco applied in 2020, it had satisfied almost all of these deficiencies, except for public need, which NJDEP claimed could not be satisfied without New York's approval of the Project.

A. NJDEP'S Decision To Issue the Permit Was Based On Its Rigorous Review of The Project and Compliance with its Regulations, Not Solely On Public Need. (Responding to NRDC Point IIA)

NRDC claims that NJDEP's decision to issue the Permit was arbitrary and capricious in that NJDEP solely relied on NYSDEC's issuance of a WQC for the

Project to satisfy public need instead of requiring compliance with New Jersey's water quality standards. NRDC Br. at 32. However, NRDC ignores the extensive record and Transco's responses to NJDEP's deficiency letters and denials over the years. NJDEP did not identify deficiencies with Transco's analysis of water quality impacts in its 2020 Denial as Transco, at that point, had addressed that deficiency through the submittal of the Modeling Report. The only outstanding deficiency in the 2020 Denial was public need. 2020 Denial, JA 123-25. Clearly, NJDEP's Environmental Report, Dredging Report, Engineering Report, and Response to Comments document all demonstrate that NJDEP analyzed the Project for compliance with all applicable rules and regulations, not just whether the Project was needed. *See* JA 460, 525, 419, respectively. Thus, NJDEP's decision to issue the Permit was reasonable and justified based on the extensive evidence in the permitting record and was not arbitrary and capricious.

B. NJDEP Issued The Permit Because Transco Satisfied All Deficiencies And Demonstrated Compliance With the Rules. (Responding to NRDC Point IIB).

NRDC argues that NJDEP denied Transco's permit application in 2019 because the Project would adversely impact surface water quality and then did a "180-degree flip" when it issued the Permit since the Project did not change. NRDC Br. at 34. NRDC claims that NJDEP did so without reasoning, analysis, or justification in support of its decision. However, NRDC completely ignores that

NJDEP provided Transco with specific instructions in the 2019 Denial as to what information would be necessary in any resubmittal, including the following:

Accordingly, the available information indicates that the proposed dredging could adversely impact surface water quality and that Transco has not sufficiently demonstrated how it would avoid adverse impacts to surface water quality. Any resubmittal of NESE Project application must include a modeling analysis for the above referenced parameters that demonstrates compliance with the SWQS, through the implementation of appropriate best management practices identified in Appendix G or otherwise, to avoid adverse water quality impacts. [Emphasis Added]. 2019 Denial, JA 114._

Transco complied with NJDEP's instructions and, in support of its June 12, 2019 application, Transco submitted the Modeling Report which contained an analysis of impacts on water quality during dredging operations for certain contaminants that exceeded ecological ER-M criteria. *See* Modeling Report, JA 801-827.

NRDC also ignores that, in an August 28, 2019 interoffice memo, NJDEP analyzed and accepted the modeling results in the Modeling Report and determined that the Project would meet NJDEP's water quality standards. JA 99-100. NJDEP specifically concluded:

Based on the review of from [*sic*] [The Army Corps of Engineers] and the references provided on the CHEMMAP model, [Office of Dredging & Sediment Technology] accepts the model to determine potential effects of contaminants during dredging operations. The dredging project would be implemented based on the rate of production (provided by modeling at slack tide provision), and the above referenced BMPs which will ensure that the dredging operation and cap jet equipment will meet the NJDEP Surface Water Quality Standards. JA 100

In support of its conclusion that Transco's Project will meet SWQS, NJDEP explained in its Dredging Report that it accepted the CHEMMAP model after consultation with the U.S. Army Engineer Research and Development Center. JA 536. NJDEP also noted in the Dredging Report that other research projects, led by the Army Corps of Engineers in highly contaminated areas, also concluded that the dredging projects did not have a significant impact on benthic communities and fishery resources if BMPs are implemented. *Id.*, JA 537.

On November 27, 2019, after Transco withdrew its 2019 application, NJDEP wrote to Transco identifying the following issues that must be addressed in any resubmission: (1) concurrence from New York to confirm the purported public need; (2) justification that the Higgins Farm Access Road to CS 206 in Franklin Township does not represent a practicable alternative; and (3) information about water quality monitoring and adaptive management strategies during dredging activities. JA 741-43.

On January 21, 2020, Transco resubmitted the NESE permit applications to NJDEP and included all information requested by NJDEP in its November 27, 2019 letter. Specifically, Transco took the unusual step of amending its FERC Certificate for authorization to use the Higgins Farm Access Road, which addressed the first basis for the 2019 Denial. *See* Amendment Order, JA 187. Transco also included a draft water quality monitoring plan which also identified potential adaptive

management strategies to address water quality exceedances during offshore construction. *See* Draft Water Quality Monitoring Plan, JA 153. However, on May 15, 2020, NJDEP ultimately denied Transco’s permit application, finding that Transco had failed to demonstrate that the Project would comply with the FWPA Rules at N.J.A.C. 7:7A-10.4, which requires that a project satisfy a compelling public need. *See* 2020 Denial, JA 116. Thus, at the time of the 2020 Denial, Transco satisfied two of the three issues identified in the 2019 Denial.

After nearly a decade since the submittal of Transco’s 2017 application and Transco’s commitment to meeting the applicable NJDEP regulations, NJDEP issued the Permit on November 7, 2025. As the permitting record reflects and as set forth in NJDEP’s Environmental Report and Dredging Report issued in support of the Permit, NJDEP issued the Permit because Transco met NJDEP’s regulations and satisfied all deficiencies set forth in the 2019 and 2020 Denials, including public need. Accordingly, NJDEP’s decision to issue the Permit was not arbitrary and capricious.

1. NJDEP Properly Determined That Transco’s Project Is Consistent With Designated Uses. (Responding to NRDC Point IIB(1)(2)).

NRDC argues that NJDEP failed to explain how the Project would be consistent with designated uses of the Raritan Bay. *See* NRDC Br. at 35. The Project areas within the Raritan Bay are designated as saline estuary (SE1) waters and saline coastal (SC) waters. Designated uses for SE1 and SC waters are identical and

include (1) shellfish harvesting in accordance with N.J.A.C. 7:12; (2) maintenance, migration and propagation of the natural and established biota; (3) primary contact recreation; and (4) any other reasonable uses. *See* N.J.A.C. 7:9B-1.12(d) and (g). NJDEP addresses impacts on these uses in its Environmental Report, Dredging Report, and Response to Public Comment document issued in support of the Permit.

Specifically, NJDEP, reviewed impacts to designated uses through Transco’s extensive offshore alternatives analysis. *See* Transco’s 2025 Env. Report, Appendix C 3-1 – 3-24, JA 749-72. Transco analyzed multiple potential alignments of the Raritan Bay Loop against siting criteria such as logistical and engineering constraints, environmental constraints, and marine uses and potential conflicts. The report concluded that the selected alternative would have the least impacts to existing uses and resources. [emphasis added]. *Id.* at 3-23, JA 771.

NJDEP addressed public comments concerning impacts to recreation in the Raritan Bay and specifically referenced FERC’s conclusion in the FEIS that “any impacts on fishermen, recreational boaters, and whale-watching businesses would be temporary and minor and would resolve upon completion of construction.” *See* NJDEP Response to Comments Document at 28, JA 446. NJDEP further conditioned the Permit on Transco providing notice of offshore construction activities and schedules to the U.S. Coast Guard. *See* Permit, Pre-Construction Condition 3, JA 14. NJDEP further found that “Transco will utilize horizontal

directional drill (HDD) technology when installing the portion of the offshore pipeline route across the Ambrose Channel to further reduce the impacts on recreational and general water-based transit in that area.” *Id.*

NJDEP also considered and addressed impacts to shellfish habitat and shellfish in its Environmental Report and in its Response to Comments. *See* NJDEP Env. Report at 10-12, 43-44, JA 470-72, 503-504; NJDEP Response to Comments, JA 435-36. NJDEP correctly determined that the area of work impacted by the Raritan Bay Loop is not subject to the Shellfish Habitat Rule, N.J.A.C. 7:7-9.2, as the waters crossed by the Raritan Bay Loop are on the CWA Section 303(d) list of impaired waters and classified as prohibited for shellfish harvesting, though NJDEP issues permits that allow surf clam harvesting for bait only from the waters north of Sandy Hook. *See* NJDEP Env. Report at 10-12, JA 470-72; Transco’s 2025 Statement of Compliance at 44-45, JA 848-49.

NRDC also argues that NJDEP did not adequately address Project impacts to shellfish and its alleged reversal from its 2019 Denial. NRDC Br. at 34. However, impacts to shellfish were not identified as a reason for the 2019 Denial. *See* 2019 Denial, JA 101-15. In fact, as part of its 2017 permit application, Transco submitted a report entitled “Evaluation of Risks to Ecological Receptors due to Resuspended Contaminants” which analyzed bioaccumulation of sediment contaminants. *See* 2025 Statement of Compliance, Appendix L, JA 711-23. The report concluded that

there is a low risk of adverse effects on ecological receptors, including hard clams, from exposure to metals and organic contaminants in sediment that will be suspended in the water column and redeposited during Project-related dredging/jetting activities. *Id.*, JA 723.

Further, NJDEP fully addressed impacts to surf clams in its Environmental Report and provided its analysis as to why the Project satisfies the applicable rules as to Surf Clam Areas, N.J.A.C. 7:7-9.3. *See* NJDEP Env. Report at 10-12, 43-44, JA 469-71, 503-504. NJDEP acknowledges that the Raritan Bay Loop crosses documented Atlantic surf clam areas and that the Project will directly disturb surf clam habitat. *Id.*, JA 469-71. However, NJDEP ultimately concluded that Project impacts will be temporary and therefore will not constitute “development which would result in the condemnation, destruction, or contamination of surf clam areas” pursuant to N.J.A.C. 7:7-9.3. *Id.* JA 471. In support of this determination, NJDEP found that surf clam populations are expected to recover within a short period (one to three years) following construction. *See* MRA Memo, JA 313. Accordingly, the record supports NJDEP’s finding that the Project will be consistent with designated uses.

2. NJDEP Properly Determined That Existing Uses In The Raritan Bay Wil Be Maintained. (Responding to NRDC Point II(B)(2))

NRDC also claims that NJDEP failed to address how the Project would maintain existing uses in the Raritan Bay consistent with N.J.A.C. 7:9B-1.5(a)(6)

that “existing uses shall be maintained and protected,” and with N.J.A.C. 7:9B-1.5(d)(2)(iv) that “water quality characteristics that are generally better than, or equal to the water quality standards shall be maintained within a range of quality that shall protect the existing/designated uses as determined by studies acceptable to the [NJDEP], relating existing/designated uses to water quality.” However, as explained *supra* at IB1, impacts on these waters are only expected to be temporary, minor, and limited to the active construction areas. Accordingly, existing uses in Raritan Bay will be maintained and NJDEP’s decision to issue the Permit was not arbitrary and capricious.

3. NJDEP’s Determination That Transco’s Project Meets SWQS Was Reasonable and Justified. (Responding to NRDC POINT IIB(3))

NRDC argues that NJDEP reversed its 2019 conclusions and failed to address ER-M standards for certain contaminants, specifically, 4,4'-DDE, manganese, bis (2-ethylhexyl) phthalate and phenanthrene and claims that NJDEP did not provide any explanation in support of its decision. NRDC Br. at 43-46. However, NRDC’s claim appears to confuse ER-M thresholds for sediment contaminants with SWQS. The ER-M thresholds relate to sediment concentrations (mg/Kg) and were used as screening criteria for when contaminants might be a concern but are not an NJDEP standard for contaminant concentrations (modeled as micrograms/L) in the water column.

Further, in its Environmental Report, NJDEP acknowledges that Transco

provided NJDEP with additional modeling for chemical fate transport of the above-mentioned contaminants in order to predict potential effects to the water column during dredging activities. JA 520. The Dredging Report also specifically addresses the ER-M exceedance issue identified in the 2019 Denial and confirms that Transco provided the additional modeling for chemical fate transport for the contaminants identified by NJDEP. JA 536. In its Response to Comment document, NJDEP concluded that, “based on the modeling, monitoring, and BMPs in place, any temporary increases in turbidity or contaminant levels are expected to be minimal and will not result in long-term impacts to water quality or aquatic life.” NJDEP Response to Comments Document at 7, JA 425.

For these reasons, NJDEP’s determination was not arbitrary and capricious.

II. NJDEP DID NOT VIOLATE THE CWA BY CONDITIONING THE PERMIT ON TRANSCO PROVIDING UPDATED COMPLIANCE PLANS. (Responding to NRDC Point IIIA; Baykeeper Point IV(C)).

NRDC argues that NJDEP violated the CWA when it included Permit conditions requiring Transco to submit future compliance plans for NJDEP approval. NRDC Br. At 47-48. Specifically, NRDC claims that NJDEP could not rationally conclude that Transco complied with New Jersey’s water quality standards without first approving the water quality monitoring plan and the adaptive management plan. NRDC Br. at 48. NRDC also argues that NJDEP’s deferral of the compliance plans violated the CWA requirements for public

participation. *See* NRDC's Brief at 46-51. However, the law clearly allows NJDEP to condition the Permit and the public had ample opportunity to review and comment on the draft plans.

A. NJDEP Properly Conditioned The Permit On Submission Of A Water Quality Monitoring Plan And Adaptive Management Plan To Assure Compliance With SWQS. (Responding to NRDC Point IIIA.1 &2)

NRDC claims that NJDEP's Permit conditions requiring Transco to submit an Adaptive Management Plan and Water Quality Monitoring Plan are vague and do not assure compliance with New Jersey's water quality standards. NRDC Br. at 49. However, Section 401(d) of the CWA does not prohibit the submittal of future compliance plans, it simply allows for monitoring requirements to be implemented to ensure compliance, which is exactly what NJDEP did in this instance. NRDC also acknowledges that the CWA allows a certifying authority to grant certification with conditions, *see* 40 C.F.R. § 121.7(d), and is not disputing that the CZM Rules allow NJDEP to issue conditional permits. *See* N.J.A.C. 7:7-1.4(a). In fact, the CZM Rules expressly provide that NJDEP may require a permittee to conduct monitoring to ensure that water quality standards are not exceeded. *See* N.J.A.C. 7:7-12.7(c)10iii.

In support of its position, NRDC relies on *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) for the proposition that the submittal of future compliance plans does not ensure compliance with applicable water quality

standards. However, *Waterkeeper* is distinguishable from the case here. That case involved an EPA rule that would have authorized regulated entities to develop and implement, as part of the NPDES permit, nutrient management plans that would not be subject to review and approval by regulating agencies. *Waterkeeper*, 399 F.3d at 498-99. *Waterkeeper* does not involve a WQC under Section 401 of the CWA but a challenge to an EPA rule promulgated pursuant to Section 402, 33 U.S.C. § 1342. Also, despite NRDC's claims, the compliance plans are subject to NJDEP's review and approval as they are construction related special conditions within the Permit (unlike the NPDES permit in the *Waterkeeper* case). Further, the Project remains subject to monitoring and oversight by NJDEP during construction to ensure ongoing compliance with water quality standards. *See e.g.*, Permit at 4, Condition 10, JA 16. The Court in *Waterkeeper* determined that the future nutrient management plan was an impermissible self-regulating permitting regime that empowered the agency to issue permits in the absence of any meaningful review of the terms of the plans to be developed. *Waterkeeper*, 399 F.3d at 498-99. However, there is nothing self-regulating about the draft water quality monitoring plan, which was subject to public review and comment and is subject to review by NJDEP.

Nor is there anything unusual about the manner in which the Permit was issued. For example, courts have upheld issuance of a WQC contingent upon acquisition of future permits and recognizes that doing so does not violate the CWA

nor fail to ensure compliance with water quality standards. As articulated by the Third Circuit, “[w]hen the Department conditions a Certification on the later acquisition of other permits, the agency may issue the Certification without engaging in the substantive review that will eventually be required to grant the permits.” *See e.g., Del. Riverkeeper Network v. Sec’y Pa. Dep’t. of Env’tl. Prot.*, 903 F.3d 65 (3d Cir. 2018)(“*Riverkeeper III*”), citing *Riverkeeper I*, 833 F.3d 360 (3d Cir. 2016).

In *Riverkeeper III*, the petitioners asserted that Pennsylvania’s decision to issue a WQC for Transco’s Atlantic Sunrise Project, conditioned on Transco obtaining substantive permits in the future, was arbitrary, capricious, or otherwise not in accordance with law. *Riverkeeper III*, 903 F.3d at 76. The petitioners claimed the agency’s decision was arbitrary because it certified Atlantic Sunrise’s water quality compliance based on a pledge that Transco would demonstrate substantive compliance in a future permit application rather than in the application for the WQC itself. *Id.* Like here, the petitioners argued that without a present demonstration of compliance, the agency’s decision that Atlantic Sunrise would comply with Pennsylvania water quality standards could not have been based on anything but guesswork. *Id.* This Court rejected this argument, noting that the agency’s preferred procedure for considering certifications along with other permits was not arbitrary or capricious in part because no construction could begin before the agency grants the substantive permits. *Id.*, citing *Riverkeeper I*, 833 F.3d at 386-87.

NJDEP's decision to issue the Permit with conditions is allowed by law, customary, and reasonable, and is entitled to substantial deference. Accordingly, NJDEP's decision to issue the Permit was not arbitrary and capricious.

B. The Public Reviewed And Commented on the Water Quality Monitoring Plan and Adaptive Management Plan. (Responding to NRDC Point IIIB; Baykeeper Point IV(C)).

NRDC argues that NJDEP's reliance on future plans violated the CWA's public participation requirements set forth in 33 U.S.C. § 1251(e). However, 33 U.S.C. § 1251(e) requires "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by...any State under this Act." The water quality monitoring plan and adaptive management plan are not "plans established by the State" but were developed by Transco. Even if 33 U.S.C. § 1251(e) applies, this provision merely provides that "public participation...shall be provided for, encouraged, and assisted." Here, the public had an extensive opportunity to review and comment on Transco's draft plan. In fact, the plans were submitted with Transco's 2020 and 2025 permit applications. *See* JA 153 and 829; *See* NRDC's Brief, p. 55. NRDC acknowledges that the public had the opportunity to review and comment on the draft plan since it references the comments from Princeton Hydro. *See* NRDC brief at 18, 55-58. Accordingly, NRDC's argument is contradicted by the facts.

NRDC again relies upon *Waterkeeper*. Transco disagrees with NRDC's application of the Second Circuit holding in *Waterkeeper* here given that the cases are distinguishable as discussed *supra*. In addition, NRDC acknowledges this Court's decision in *Riverkeeper I* in which the petitioner argued that it was deprived of an opportunity to comment on Transco's permit application because Transco submitted the revised analysis after the close of the public comment period. However, this Court found that the petitioner was not prejudiced and that the petitioner reviewed the revised analysis and submitted additional written comments from its members and two drilling experts, among other things. *Riverkeeper I*, 833 F.3d at 378. The Court held that "[a] party challenging the sufficiency of the public comment process bears the burden of showing it was prejudiced by the lack of opportunity to comment." *Id.* Accordingly, since the public had the opportunity to comment on the draft plans, Petitioners cannot show that they were deprived of the opportunity to comment or that they were prejudiced.

For these reasons, NJDEP's issuance of the Permit, with conditions requiring Transco to submit a final Water Quality Management Plan and Adaptive Management Plan was not arbitrary and capricious.

III. NJDEP DID NOT RELY ON MIXING ZONES IN ISSUING THE PERMIT AND PROPERLY EXERCISED ITS DISCRETION IN REQUIRING TRANSCO TO MONITOR TURBIDITY (Responding to Baykeeper Point II).

Baykeeper argues that NJDEP improperly relied on regulatory mixing zones in issuing the Permit to Transco and that the Permit does not require monitoring of toxic substance concentrations within the mixing zones. Baykeeper Br. at 28. Regulatory mixing zones are defined as “areas of surface waters established pursuant to this chapter for the purpose of initial mixing, dispersion, or dissipation of wastewater effluent at or near the discharge point,” N.J.A.C. 7:9B-1.4 (emphasis added). This argument must fail for several reasons. For one, NJDEP did not approve or rely upon mixing zones. In fact, there is no mention of mixing zones in the Permit, the Environmental Report, or the Dredging Report. In addition, since Transco does not propose to discharge wastewater effluent, this rule does not apply. Lastly, the Permit requires monitoring of toxic substance concentrations via turbidity monitoring, which is an acceptable form of monitoring and consistent with Transco’s modeling results.

Water quality criteria may be exceeded within the regulatory mixing zone but must be met at the edge of the mixing zone. N.J.A.C. 7:9B-1.5(h)1(ii). Regulatory mixing zones are prohibited for discharges to areas waters with documented occurrences of any threatened or endangered species if the discharges would likely have an adverse effect on the species or its habitat. N.J.A.C. 7:9B-1.5(h)5iv.

Regulatory mixing zones are also prohibited for new discharges of certain pollutants, such as 4,4'-DDE, mercury, and PCBs. N.J.A.C. 7:9B-1.5(h)5(vii). Baykeeper claims that the Permit allows for regulatory mixing zones for the new discharges of 4,4'-DDE, mercury, and PCBs and regulatory mixing zones within threatened and endangered species habitat. Baykeeper Br. at 29-36.

Contrary to Baykeeper's arguments, neither the Permit, Environmental Report, Dredging Report, nor Transco's draft water quality monitoring plan refer to mixing zones. This is because mixing zones only relate to discharges of wastewater effluent, which Transco is not proposing to discharge. *See* N.J.A.C. 7:9B-1.4. The only reference to mixing zones by NJDEP is in its response to comments document, in which NJDEP responds to Petitioners' comments related to mixing zones, and simply refers to the nomenclature used by Transco in its Modeling Report, i.e., that "[Transco's] model predicted maximum concentration within a 500-foot mixing zone at a rate of 7,500 cubic feet per hour (cf/hr)." *See* NJDEP Response to Comments at 6, JA 424. Transco raised the concept of mixing zones with NJDEP during the permit process to obtain guidance regarding whether they might be applied to the Project, as they were in New York. *See e.g.*, 2025 Transco Env. Report, Appx. A, April 25, 2018 Meeting Minutes, JA 729. While Transco refers to a "mixing zone" in the Modeling Report and discussed mixing zones with NJDEP

during the permitting process, Transco did not request and NJDEP did not adopt or otherwise rely on mixing zones when issuing the Permit.

Instead, NJDEP complied with the CZM Rules and required Transco to implement various BMPs to minimize turbidity, including requiring closed environmental clamshell bucket, no barge overflow, and implementation of certain dredging practices. *See* Dredging Report, JA 531. The Project was also reviewed by New Jersey Fish and Wildlife, National Marine Fisheries, and the Threatened and Endangered Species Unit of NJDEP, and timing restrictions were required to protect certain species, consistent with N.J.A.C. 7:7-12.7(c)10iv. *See* Permit at 7-8, JA 19-20 .

Baykeeper also takes issue with Transco's draft water quality monitoring plan and argues that Transco must show compliance with standards for other water quality parameters, not just turbidity. Baykeeper interprets N.J.A.C. 7:7-12.7(c)10iii to mean that since turbidity concentrations and other water quality parameters, including toxic substances, must meet SWQS, NJDEP should have required Transco to monitor these other parameters. Baykeeper claims that because the Permit required monitoring of turbidity without also requiring monitoring of toxic substances, the Permit violates Section 401(d) of the CWA. Baykeeper Br. at 32-33. However, the record reflects that NJDEP provided guidance to Transco that only

turbidity monitoring is required for dredging projects. *See* January 6, 2020 Meeting Minutes, JA 746-47.

NJDEP has discretion whether to require monitoring and, if monitoring is required, what parameters should be monitored. *See* N.J.A.C. 7:7-12.7(c)10iii (“The Department may require the permittee to conduct biological, physical, and chemical water quality monitoring before, during, and after dredging and disposal operations to ensure that water quality standards are not exceeded”)(emphasis added). NJDEP exercised that discretion and conditioned the Permit on Transco updating its water quality monitoring plan to include certain monitoring conditions. *See* Permit at 4, Condition 9, JA 16. Baykeeper takes issue with the condition requiring monitoring, claiming the phrase “within the operation” is vague, Baykeeper Br. at 34, but this clearly means as near as practicable to the dredging or jet trenching activities.

Lastly, NJDEP provided guidance to Transco on monitoring requirements prior to Transco submitting the 2020 application. Specifically, NJDEP advised Transco that it typically does not require chemical contaminant monitoring and that turbidity would be sufficient to evaluate whether surface water quality exceedances have occurred. *See* January 6, 2020 Meeting Minutes, JA 746-47.

NJDEP found that “[b]ased on the modeling, monitoring, and BMPs in place, any temporary increases in turbidity or contaminant levels are expected to be minimal and will not result in long-term impacts to water quality or aquatic life.”

NJDEP Public Comment Response at 7, JA 425. For these reasons, NJDEP’s permit condition requiring a turbidity monitoring plan was reasonable and not arbitrary and capricious.

IV. THE PERMIT INCLUDES LIMITATIONS AND MONITORING REQUIREMENTS NECESSARY TO ASSURE COMPLIANCE WITH WATER QUALITY STANDARDS FOR TURBIDITY AND 4,4’-DDE. (RESPONDING TO BAYKEEPER POINT III)

Section 401(d) of the CWA requires that any WQC “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure” compliance the CWA and state water quality standards. 33 U.S.C. 1341(d). The CZM Rules related to new dredging provide that “[t]urbidity concentrations ... and other water quality parameters at, downstream, and upstream of the dredging site...shall meet applicable Surface Water Quality Standards at N.J.A.C. 7:9B.” N.J.A.C. 7:12.7(c)10iii. Because the Permit includes conditions related to water quality monitoring that reasonably assure compliance with New Jersey’s SWQS, it is consistent with the CWA and the CZM Rules and NJDEP’s decision to issue the Permit was not arbitrary and capricious.

A. The Permit Reasonably Assures Compliance with SWQS for Turbidity in Saline Coastal Waters. (Responding to Baykeeper Point III(A)).

The Raritan Bay Loop will be constructed within SE1 waters between mileposts 12.16 and 14.01 and between mileposts 26.55 and 28.30 and within SC

waters between mileposts 28.30 and 30.64.⁴ See 2025 Application, Environmental Report at 91, JA 589. Baykeeper argues that the Permit does not assure compliance with New Jersey’s water quality criteria for turbidity for the portion of the Raritan Bay Loop within SC waters. Baykeeper Br. at 37.

New Jersey’s surface water criteria provide that turbidity levels in SC waters “shall not” exceed 10.0 Nephelometric Turbidity Units (“NTU”). N.J.A.C. 7:9B-1.14(d)13. As explained in Transco’s Environmental Report submitted with the 2025 Application, the model used for the Project was designed to simulate and compute total suspended sediment (“TSS”) concentrations and deposition and therefore does not predict levels of turbidity. See Transco’s Environmental Report at 91 JA 589. Transco noted, however, that a general relationship between TSS and turbidity can be established for relatively homogenous sediments, and varies widely depending on site-specific sediment characteristics, and has been observed to range up to approximately 6 mg/L per 1 NTU for previous dredging projects. *Id.* Baykeeper argues that using 50mg/L is “patently unreasonable” as a benchmark for compliance with turbidity criteria. Baykeeper Br. at 39. However, NJDEP reviewed this information and included a condition that requires Transco to monitor turbidity using a nephelometer that would record turbidity in NTUs, consistent with New

⁴ Baykeeper incorrectly identifies the starting milepost for SC waters at milepost 26.5. Baykeeper’s Br. at 37.

Jersey's SWQS. *See* Permit at 4, Condition 10, JA 16.

Given the conditions within the Permit requiring compliance with an approved water quality monitoring plan and the monitoring of turbidity in NTUs, coupled with the use of BMPs and adaptive management practices during construction, and the limited duration of disturbance, NJDEP's issuance of the Permit was reasonable and assured compliance with the SWQS for turbidity.

B. The Permit Reasonably Assures Compliance with Human Health Criterion for 4,4'-DDE. (Responding to Baykeeper Point III(B)).

Baykeeper notes that the human health criterion for 4,4' DDE in saline waters is 0.00022 micrograms per liter, but that Transco's modeling predicts 0.001 micrograms per liter. Baykeeper's Br. at 40, citing N.J.A.C. 7:9B-1.14(f)(7) and Transco's Modeling Report, JA 823. Baykeeper raises concerns over potential exceedances and impacts on designated uses for SC waters, which include shellfish harvesting and primary contact recreation, like wading, swimming, diving, surfing, and water skiing. N.J.A.C. 7:9B-1.12; N.J.A.C. 7:9B-1.4.

The human health criteria are established to ensure that toxic substances in the State's waters do not reach levels that are harmful to humans and have been established in saline water due to fish consumption. *See* N.J.A.C. 7:9B-1.5(a)5. The criteria also aim to protect human and aquatic life by ensuring that toxic substances do not bioaccumulate to levels that would render them unfit for human consumption.

See N.J.A.C. 7:9B-1.5(a)4. Despite Baykeeper's claims, the human health criterion are not implicated by Transco's work in these areas since, as discussed above, Raritan Bay is on the Section 303(d) list of impaired waters and is classified as prohibited for shellfish harvesting. *See* 2025 Statement of Compliance, at 44, JA 848. In addition, primary contact activities will not be occurring during active construction. Accordingly, the human health criterion is not implicated by Transco's construction activities.

Further, as part of Transco's late 2018 geotechnical and geochemical site investigation, Transco collected vibracore samples from 69 sites along the Raritan Bay Loop route. 4,4'-DDE was detected in the sediments at two locations (identified as at VC208 and VC214) at concentrations that exceeded ER-M screening criteria. *See* Transco's Environmental Report at 114, JA 615; Modeling Report, JA 817. These areas are proposed to be trenched and backfilled using the clamshell dredge method with an environmental bucket. *See* 2025 Application, Env. Report, at 21, JA 572. The concentrations noted by Baykeeper from Transco's Modeling Report are based on a dredging rate of 7,500 cf/hr. JA 823. However, Transco noted in the Modeling Report that it would reduce the dredging rate to 4,800 cf/hr at both locations and would implement a 1-hour slack tide pause at location VC214 to address concerns related to PCBs, which would further reduce contaminant concentrations from dredging. *Id.* Modeling results also show that TSS will return

to ambient conditions within 1.1 hours in these areas after they are backfilled. *See* Transco’ Env. Report, at 98. JA 597.

Based on the analysis in the Modeling Report, the implementation of BMPs and water quality monitoring during construction, and the location and duration of the disturbance, the Permit reasonably assures compliance with human health criterion for 4,4’-DDE. Accordingly, NJDEP’s decision to issue the Permit is not arbitrary and capricious.

V. NJDEP COMPLIED WITH THE PUBLIC NOTICE AND COMMENT REQUIREMENTS OF THE CWA AND ITS OWN FWPA RULES (Responding to Baykeeper’s Point IV)

Baykeeper argues that NJDEP violated the CWA by failing to provide public notice and an opportunity to comment on Transco’s updated Stormwater Management Report for CS 206. Baykeeper Br. at 41. Baykeeper notes that the Stormwater Management Report submitted with the 2025 application was not updated to show compliance with the Stormwater Management Rules, N.J.A.C. 7:8, which were amended since Transco’s 2020 application. *Id.* NJDEP published notice of the public hearing and comment period on July 16, 2025, and posted Transco’s application materials to its website on a webpage dedicated to the Project.⁵ In accordance with the public notice, the public comment period ran through September

⁵ [NJDEP | Transcontinental Gas Pipeline Co. – Northeast Supply Enhancement Project | Transcontinental Gas Pipeline Co. – Northeast Supply Enhancement Project](#)

25, 2025. *See* Notice of Public Hearing, JA 447. On July 21, 2025, NJDEP asked Transco to update its Stormwater Management Report to conform with the rule changes. *See* July 21, 2025 Deficiency Letter, JA 933-34. Transco submitted the new Stormwater Management Report and soil testing data on August 21, 2025, with more than a month left on the public comment period. *See* August 21, 2025 Transco Response, JA 936.

Baykeeper argues that because NJDEP did not post the August 2025 Stormwater Management Report to its website, it was prejudiced. However, NJDEP was not required to post the updated Stormwater Management Report (or any application materials) to its website. NJDEP was only required to make the report available to the public for review and comment, which it did. NJDEP complied with its public notice obligations under the CWA and its own regulations. Since the updated Stormwater Management Report was made available to the public more than a month before the end of the public comment period, and because Baykeeper was aware that Transco would be updating its Stormwater Management Report, Baykeeper cannot show that it was prejudiced.

A. Neither the Clean Water Act nor NJDEP Regulations Require Notice of Transco’s Updated Stormwater Management Report. (Responding to Baykeeper Point IV(A)).

Section 401 of the CWA does not require any specific public notice and comment procedure, only that the State “shall establish procedures for public notice

in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.” 33 U.S.C. § 1341(a)(1); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 903 F.3d 65, 75 (3d Cir. 2018). Since Baykeeper raises issues with the notice of the revised Stormwater Management Report, which was reviewed by NJDEP pursuant to the FWPA Rules, N.J.A.C. 7:7A-2.7(2017), the FWPA Rules would govern public notice requirements.

Under the FWPA Rules, both Transco and NJDEP have certain obligations to provide public notice. Transco was required to provide public notice of its permit application no more than 30 days prior to submitting its application and no later than the date the application was submitted to NJDEP. N.J.A.C. 7:7A-17.2. This includes sending a copy of the notice to various municipal and county agencies and officials, and all landowners within 200 feet of above-ground facilities associated with the Project. N.J.A.C. 7:7A-17.3(b). Transco was also required to publish notice of the application in the local newspaper in accordance with N.J.A.C. 7:7A-17.4, and provide a copy of the entire application, as submitted to NJDEP, to the municipal clerk for each municipality in which the Project is located. N.J.A.C. 7:7A-17.3(d), (a), respectively. Each of these notices is required to state that a complete copy of the application is available for review at the municipal clerk's office or by appointment at NJDEP's Trenton office. N.J.A.C. 7:7A-17.3(e), 17.4(b)7. Transco

documented its public notice in accordance with N.J.A.C. 7:7A-17.5. *See* 2025 Application, Compliance Statement, Appendix B, JA 619. There is no dispute that Transco’s public notice complied with the FWPA Rules.

As to NJDEP’s public notice obligations, the FWPA Rules require that NJDEP “publish notice in the DEP Bulletin of the receipt of each administratively complete application, the status of the application during review, and the [NJDEP’s] decision to approve or deny the application.” N.J.A.C. 7:7A-19.1(e). To that end, NJDEP published notice in the July 16, 2025 edition of the Bulletin that the 2025 Application was administratively complete.⁶ NJDEP published notice of the public hearing in the August 6, 2025 edition of the Bulletin⁷, which provided a 15-day post-hearing comment period. *See* NJDEP Env. Report at 5, JA 464. There is no requirement under the FWPA or its implementing rules that NJDEP create a webpage for a project and post permit application materials for public consumption. Nor is there a requirement that NJDEP publish notice every time a report supporting a permit application is revised. NJDEP is only required to make the application materials available to interested parties upon request, which it did here. *See* N.J.A.C. 7:7A-17.3(e), 17.4(b)⁷(requiring that public notices advise the public that the

⁶ DEP Bulletin, July 16, 2025, https://dep.nj.gov/wp-content/uploads/bulletin/bu2025_0716.pdf, p. 69.

⁷ DEP Bulletin, August 6, 2025, https://dep.nj.gov/wp-content/uploads/bulletin/bu2025_0806.pdf, p. 7.

application is available for review at NJDEP’s Trenton office). As a “government record” under New Jersey’s Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1 *et seq.*, the updated Stormwater Management Report was available to the public upon request. *See* N.J.S.A. 47:1A-1 (requiring that public agencies make government records “readily accessible for inspection, copying, or examination” unless exempt from public access). The record clearly demonstrates that NJDEP complied with the public participation requirements of Section 401 and its own regulations by making the updated Stormwater Management Report available for public review and comment.

In addition to meeting its regulatory obligations to provide public notice, as a courtesy, on July 11, 2025, NJDEP emailed representatives from Baykeeper and other interested parties advising them directly that Transco’s 2025 Application was deemed administratively complete, that a copy of the application would be posted to its website, and that the public would have 30 days to comment on the application from the date the notice of application is published in the July 16, 2025 Bulletin. *See* July 11, 2025 email from Joslin Tamagno, JA 919. NJDEP also advised Baykeeper and the other interested parties that it has discretion to consider comments submitted after the end of the comment period. *Id.*

Instead of addressing NJDEP's obligations under Section 401 or NJDEP's FWPA Rules, Baykeeper relies solely on the Congressional declaration of goals and policy set forth in the CWA, 33 U.S.C. § 1251(e), which provides, in its entirety:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act [33 USCS §§ 1251 et seq.] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes. (emphasis added)

Baykeeper takes great pains to frame the updated Stormwater Management Report as a "plan" under 33 U.S.C. § 1251(e) and argues that NJDEP was therefore required to provide public notice and comment on the updated report. However, as noted above, 33 U.S.C. § 1251(e) applies to "the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by...any State under this Act." The updated Stormwater Management Report was prepared by Transco to demonstrate compliance with NJDEP's Stormwater Management Rules. It is not a "plan" established by NJDEP pursuant to the CWA.

Baykeeper relies on *Waterkeeper*, 399 F.3d 486 in arguing that the updated Stormwater Management Report was required to be noticed for public comment under 33 U.S.C. § 1251(e). As explained herein *supra*, *Waterkeeper* is distinguishable from this case. For one, *Waterkeeper* does not involve a WQC under Section 401 of the CWA but a challenge to an EPA rule promulgated pursuant to

Section 402, 33 U.S.C. § 1342. EPA's rule would have authorized regulated entities to develop and implement nutrient management plans as part of the NPDES permit that would not be subject to review and approval by regulating agencies. *Waterkeeper Alliance*, 399 F.3d at 498-99. These plans would also not be subject to review or comment by the public. *Id.* The Court in that case held that the nutrient management plans constitute effluent limitations, and, therefore, under EPA's rule, would have been shielded from public scrutiny and comment in violation of 33 U.S.C. § 1251(e). The cases are factually distinguishable as the updated Stormwater Management Report was not shielded from the public review but was available from NJDEP through the OPRA process.

Furthermore, unlike the supplemental analysis referenced in *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 833 F.3d 378-79, which was submitted to NJDEP after the public comment period, here, Transco submitted the updated stormwater analysis with more than a month left on the public comment period and more than two and a half months before NJDEP issued the Permit. *See* August 21, 2025 Transco Response Letter, JA 936. Baykeeper had the opportunity to comment on the updated report but failed to do so.

Even if 33 U.S.C. § 1251(e) applies, Baykeeper fails to demonstrate how NJDEP ran afoul of this provision since it merely provides that "public participation...shall be provided for, encouraged, and assisted" by EPA and the

States. It does not define what “public participation” means, and it does not in any way require public notice every time a “plan” that is part of a permit application is revised. As set forth above, NJDEP complied with its public notice and comment obligations under the CWA and the FWPA Rules and thus, its actions were not arbitrary and capricious.

B. Baykeeper Has Not Demonstrated That It Has Been Prejudiced. (Responding to Baykeeper Point IV(B)).

Even if this Court were to find that NJDEP failed to comply with its notice obligations under the CWA or NJDEP’s own regulations, Baykeeper’s claim should still fail due to its inability to demonstrate any prejudice. “A party challenging the sufficiency of the public comment process bears the burden of showing it was prejudiced by the lack of opportunity to comment.” *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot.*, 833 F.3d 360, 378 (3d Cir. 2016)(citing *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008)).

In its cover letter submitted along with the 2025 Application, Transco specifically noted that its application was “essentially identical” to the 2020 application but that “given the amendments to the stormwater management rules since that time, Transco will submit updated plans and reports to reflect these changes, as necessary, in the coming weeks.” *See* 2025 Application Cover Letter, JA 564. At several points within Transco’s Compliance Statement to the 2025 Application, Transco notes that the Stormwater Management Report would be

updated to reflect the revised Stormwater Management Rules. *See e.g.*, Statement of Compliance at 35, 112, 114 , 141, JA 847, 863, 864, 865. Baykeeper’s attorney submitted an OPRA request seeking copies of Transco’s 2025 application materials, which request was fulfilled by NJDEP on June 16, 2025. *See* July 15, 2025 email from Katlin Morrison, Esq. to Joslin Tamagno, JA 920. Baykeeper acknowledged receipt of Transco’s transmittal letter and application materials from NJDEP through OPRA. JA 921. The initial 2025 Application, including Transco’s Statement of Compliance, was also posted to NJDEP website. JA 923. As such, Baykeeper was on notice that Transco would be updating its Stormwater Management Report to reflect the revised Stormwater Management Rules. However, there is no evidence in the record that Baykeeper filed additional OPRA requests with NJDEP for the Stormwater Management Report, despite having months to do so.

In addition, as it relates to the information posted on NJDEP’s website, Baykeeper’s attorney acknowledged in an email to NJDEP that the information on NJDEP’s website may not be complete. *See* July 15, 2025 email from Katlin Morrison, Esq. to Joslin Tamagno, JA 921. In response, NJDEP advised Baykeeper that “OPRA is recommended if you wish to receive all information currently available.” JA 920. Baykeeper even admits that NJDEP “received the [updated Stormwater Management Report] while there was substantial time left in the public comment period.” Baykeeper Br. at 42. Baykeeper cannot now claim that it did not

have an opportunity to comment on the updated Stormwater Management Report when the report was available, but Baykeeper failed to avail itself of the process of obtaining a copy of the updated report – a process it was familiar with.

Lastly, the updated Stormwater Management Report has been available to Baykeeper since August 21, 2025. Despite having had access to this information for months, Baykeeper never raises any substantive issues with the updated report. Instead, Baykeeper makes general assertions that it “pointed out significant errors in the May Stormwater Plan, including that it failed to comply with the intervening stormwater rules, and would have done the same if given the opportunity to review the operative August Stormwater Plan.” Baykeeper Br. at 48. Transco updated the report and its plans to demonstrate compliance with the Stormwater Management Rules, and NJDEP found that Transco’s Project complied with those rules. *See* NJDEP Engineering Report, JA 448; NJDEP Env. Report, JA 488. Baykeeper provides no details as to what information it would have provided that may have impacted NJDEP’s review of the updated Stormwater Management Report or its decision to issue the Permit. Its general assertions are insufficient to establish prejudice as required by the Administrative Procedure Act. *See, e.g., Delaware Riverkeeper Network v. Secretary Pa. Dep’t of Env’t Protection*, 833 F.3d 360, 378 (3d Cir. 2016).

NJDEP complied with the CWA and its regulations by making the updated Stormwater Management Report available for public review and comment. Baykeeper and the public had ample opportunity to obtain a copy of the updated report from NJDEP but, for whatever reason, Baykeeper failed to avail itself of that process. Thus, Baykeeper was not prejudiced.

CONCLUSION

For the reasons set forth above, Transco respectfully requests that the Court deny the Petitions.

Respectfully submitted,
RUTTER, & ROY, LLP
Attorneys for Intervenor-Respondent,
Transcontinental Gas Pipe Line Company, LLC

Dated: June 3, 2026

By: *s/Christine A. Roy*
Christine A. Roy

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

CERTIFICATE OF ADMISSION TO THE BAR

Pursuant to 3d Cir. L.A.R. 28.3(d), I hereby certify that Christine A. Roy, Esq and Richard G. Scott, Esq., attorneys for Intervenor-Respondent, are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: June 3, 2026

s/Richard G. Scott

Richard G. Scott, Esq.

NJ Bar No.: 030642010

Rutter & Roy, LLP

2052 Route 35, Suite 103

Rivers Edge Professional Building

Wall, New Jersey 07719

Phone: (732) 462-1990

Fax: (732) 462-1993

E-mail: RScott@rutterroy.com

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and 3d Cir. L.A.R.

31.1(c), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,994 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii);
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font;
3. The text of the electronic brief filed with the Court is identical to the text of the paper copies of the brief filed with the Court;
4. The PDF file containing this brief electronically filed with the Court via the electronic filing system was scanned for viruses using Bitdefender Endpoint Security Tool Version 8.26.4.632, and no virus was detected.

Dated: June 3, 2026

s/Richard G. Scott
Richard G. Scott, Esq.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that this brief was filed electronically through the court's docketing system. All parties to this case are Filing Users and are served electronically by the Notice of Docket Activity.

Dated: June 3, 2026

s/Richard G. Scott
Richard G. Scott, Esq.