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EXPRESS MAIL

U.S. Army Corps of Engineers
New England District
696 Virginia Road
Concord, MA 01742

Attn: Alex Kostra
alexander.a.kostra@usace.army.mil

Re: File No. NAE-2016-00505. Response to Public Notice – Request for an Environmental Impact Statement (EIS) and Public Hearing - Invenergy Thermal Development LLC's Proposed Clear River Energy Center (CREC) and Burrillville Interconnect Project (BIP) Burrillville, Rhode Island –

Dear Mr. Kostra:

I am writing on behalf of my client, the Town of Burrillville, Rhode Island (“the Town”) to provide commentary on a Clean Water Act (“CWA”) Section 404 Wetlands Application (“the application”) (file No. NAE-2016-00505) to the U.S. Army Corps of Engineers – New England District Regulatory Division (“ACOE-NED”). The application was submitted by Invenergy Thermal Development LLC (the “Applicant”) for the proposed construction of the Clear River Energy Center (CREC) proposed off Wallum Lake Road in Burrillville, Rhode Island. Construction of the facility as proposed would involve work within watercourses and vegetated wetlands resulting in direct and indirect impacts to waters of the United States.

The Town and various stakeholders share several concerns related to the adverse impacts to the environment that the construction and operation of this plant would have should this application be approved without due regard to its environmental impacts. We conveyed those concerns initially in a letter dated March 6, 2019 that was submitted to your office. A copy of that letter is attached as **Exhibit 1**. That letter requested that an Environmental Impact Statement (EIS) be prepared and listed a number of reasons why an EIS is required for this project pursuant to the National Environmental Policy Act of 1969. Shortly thereafter, we were

told via written correspondence from your office that Invenergy had not yet submitted a complete application and therefore the formal comment period had not yet opened.

However, on March 22, 2019, Invenergy's Consultants, ESS Group, on behalf of the CREC and Burrillville Interconnect Project (BIP) project team, sent correspondence to the ACOE-NED providing comments and "clarifications" on our March 6, 2019 letter. Furthermore, additional information was submitted to the Rhode Island Energy Facility Siting Board (RIEFSB) at the close of the CREC Facility hearing in early April 2019 and included the following:

- *Addendum to Application to Alter Freshwater Wetlands Narrative Sections 5.0 – 8.0 Clear River Energy Center and Burrillville Interconnection Project Burrillville, Rhode Island*, (dated "March 2019"), and
- *Compensatory Mitigation Plan Clear River Energy Center & Burrillville Interconnection Project Burrillville, Rhode Island* (dated March 29, 2019).

On June 4, 2019 we received an email from the ACOE-NED listserv that the agency had released the Public Notice stating that they had received an application from Invenergy requesting a permit to construct the Clear River Energy Facility off of Wallum Lake Road in Burrillville, RI and that the public comment period was open.

We therefore respectfully submit the following relevant facts and issues of concern that we have concerning the permission to construct this facility:

PROJECT PURPOSE AND NEED

The paragraph that follows under the Purpose and Need heading of the public notice is concerning because it was clearly written by Invenergy's consultants and the Army Corps of Engineers did not qualify this statement of project purpose and need by saying that this is what the applicant claims or alleges. Instead this paragraph could be interpreted as a finding by the ACOE-NED that "*the CREC would address the need for new electric capacity that has been and will be created by retirements...The CREC would improve the overall flexibility of the electric generation fleet due to its fast start in high ramp rate capabilities and would help support and compliment [sic] the addition of more renewable generation into the region.*"

It is very unfortunate that the ACOE-NED seems to have presented this need section as a finding rather than as an allegation by Invenergy. We firmly believe there is no need for CREC because of retirements, fast start, or additional renewables as explained in detail in our Post-hearing Brief, a copy of which is included with this comment letter as **Exhibit 2**.

The project Purpose and Need has been challenged by evidence submitted by expert witnesses during recent (March 2019) testimony at the RIEFSB on behalf of the Town of Burrillville¹. Invenergy responded by stating the following: "...*The purpose and need of the action proposed*

¹ Testimony of Glenn Walker, RI EFSB.

are the subject of state law and are not considerations specified in the NEPA guidelines.” However, the fact that substantial testimony was given at the RIEFSB that legitimately challenges the need for this proposed action is indicative of the controversy surrounding this action. The Department of Defense regulations *Army Analysis of Environmental Actions (AR-002)* §651.41 *Conditions requiring an EIS* specifically state that “*An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has the potential to: ... (i) Be highly controversial from an environmental standpoint.*”²

Moreover, on June 20, 2019, the RIEFSB ruled that the energy to be supplied by the proposed CREC facility is not needed and denied CREC’s application for a license to build the facility. The RIEFSB reasoned that the electricity from the proposed CREC powerplant facility isn’t needed in Rhode Island or New England, now or in the future. RIEFSB focused much of their reasoning on reports from the Independent System Operator for New England (ISO-NE) showing a robust energy landscape, declining wholesale contract prices, and a power grid that keeps older power plants in operation if needed. The evidence of the stable electric supply was reflected in the price drop for the valuable power-purchase agreements (Capacity Supply Obligations), which was driven down by an influx of renewable energy, such as offshore wind and small-scale solar, and the growth of energy-efficiency initiatives. In addition, CREC’s CSO was terminated in late 2018 by ISO-NE, and that termination was approved by the Federal Energy Regulatory Commission (“FERC”) (**Exhibit 3**). The written decision of RIEFSB finding that CREC is not needed and denying the license should be available in about 60 days or less. The transcript of the June 20, 2019, meeting of the Rhode Island Energy Facility Siting Board (EFSB) at which Invenergy’s request for a license for the Clear River Energy Center was denied because the EFSB found that the proposed facility is not needed is attached as **Exhibit 4** to this letter.

INADEQUATE MITIGATION PLAN

The mitigation plan is inadequate as it lacks sufficient detail to address the impacts of all resources impacted at the proposed CREC site. For wetland resources, the mitigation plan merely meets compensation ratios, the mitigation plan does not provide mitigation commitments for specific wildlife resources including species of federal conservation concern. For other species of conservation concern that would be adversely impacted by the proposed action, the mitigation plan lacks sufficient detail needed to determine if the loss of those species would be mitigated solely via land acquisition elsewhere in Burrillville as proposed by the mitigation plan. No comprehensive biodiversity inventories have been conducted on the proposed preservation properties so there is no way of knowing if the parcels proposed for acquisition and preservation are suitable to mitigate the adverse effects of the proposed action on the local and regional biodiversity. In fact, only the site of the proposed CREC facility and 0.8-mile CREC ROW to the Narragansett Electric Company’s transmission line has been subjected to flora and fauna inventories and those inventories are inadequate because they were

²Code of Federal Register Title 32 Subtitle A Chapter V Subchapter K Part 651 - ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS (AR 200-2) https://www.ecfr.gov/cgi-bin/text-idx?SID=23fc57625bc5e7981c8af33263139b75&mc=true&node=pt32.4.651&rgn=div5#_top

not the result of thorough and comprehensive multi-season biodiversity studies. Much less biodiversity investigation has been conducted along the eight-mile Burrillville Interconnect Project proposed for the existing Narragansett Electric Transmission line portions of which would require additional clearing to accommodate the requisite transmission line upgrades.

ENDANGERED SPECIES CONSULTATION

The endangered species consultation conducted for this project is insufficient for the following reasons:

First, we note that the Northern Long-eared Bat (NLEB) was identified as “*the only federally threatened or endangered species that may be within the CREC action area.*” We feel that surveys for this species were limited because they were only conducted at the site of the proposed CREC facility and not along the associated eight-mile BIP project portion.

Second, we feel that there is a good possibility that NLEB is not the only wildlife species of conservation concern under the purview of the federal government.

Given the habitats and the geographical location of the proposed action, it is possible that populations of the federally endangered Small Whorled Pogonia (*Isotria medeoloides*) may occur within the project area. This species is reported from adjacent Windham County in Connecticut³, and is reported to occur in RI and MA counties as well⁴.

Additional wildlife resources of federal conservation concern have been documented to occur on or proximal to the site including the following:

- Five (5) species identified by the United States Fish & Wildlife Service as Bird species of Conservation Concern (BCC) for Bird Conservation Region (BCR) No. 30 (New England/Mid-Atlantic Coast)⁵; and
- One (1) federal review turtle species has been reported to occur within the Clear River local watershed basin.

Other USFWS species of conservation concern including petition species and migratory birds occur within the proposed action project area and would be subjected to significant direct and indirect adverse impact.

We contend that it is premature to reach a conclusion that the proposed action is “not likely to adversely affect” a listed species or their critical habitat simply via on-line screening tools (methods relied on for the Burrillville Interconnect Project and the Applicant’s Alternatives Analysis for the CREC facility). Online database searches are just the beginning when

³ https://www.ct.gov/deep/lib/deep/endangered_species/species_listings/windhamctyspecies.pdf

⁴ Haines, 2011. *Flora Nova Angliae*. Yale University Press: New Haven.

⁵ <https://www.fws.gov/migratorybirds/pdf/grants/BirdsofConservationConcern2008.pdf>

assessing the potential presence of rare species at any given locations. State databases are woefully incomplete due to staffing, funding, property access, and personnel constraints and should never be used as the sole assessment method in place of field surveys/inventories to determine absence of rare biota.

And lastly, the Department of Defense regulations Army Analysis of Environmental Actions (AR-002) §651.41 Conditions requiring an EIS states that “*An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has the potential to:... (e) Significantly affect a federally listed threatened or endangered plant or animal species, a federal candidate species, a species proposed for federal listing, or critical habitat*”⁶.

OTHER CONCERNS OF PUBLIC INTEREST

The Amount of Conversion of Ecologically Significant Land to Industrial Usage

The amount of land proposed to be converted from ecologically significant land to industrial use warrants an EIS.

In our initial March 6, 2019 letter, we state that the proposed action would convert 67 acres of a larger 730-acre parcel of undeveloped existing forested land into industrial usage⁷. Invenergy’s consultants, ESS Group, responded to this concern in their March 22, 2019 response letter stating the following:

“Approximately 35 acres of the 67-acre project site would be cleared for project construction, which includes the construction access road and the construction staging area, both of which will be restored following construction. The industrial usage of the site will be limited to the power block area of the facility, which will encompass approximately 20 acres of the 67-acre project site.”

Among our many concerns with this response is that it addresses only direct impact of the facility and access road and does not include the forest clearing associated with the facility’s connection to the Narragansett Electric Company’s electric transmission line, the forest clearing required by the Burrillville Interconnect Project and it does not take into account the indirect effects of that forest clearing and of converting the existing forested site to industrial usage such as noise intrusions, light pollution, introduction of invasive species, and other edge effects on wildlife and ecology. Another issue of concern is the potential for increased rates of cowbird parasitism due to the creation of additional induced edge habitat and fragmentation of forest interiors.

⁶ Code of Federal Register Title 32 Subtitle A Chapter V Subchapter K Part 651 - ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS (AR 200-2) https://www.ecfr.gov/cgi-bin/text-idx?SID=23fc57625bc5e7981c8af33263139b75&mc=true&node=pt32.4.651&rgn=div5#se32.4.651_123

⁷ Invenergy Thermal Development LLC’s Application to Construct the Clear River Energy Center in Burrillville, RI dated October 28, 2015.

The Interbasin Transfer of Water and Associated Impacts to the Source Resource(s)

The proposed action would result in the interbasin daily transport of significant quantities of water by 18-wheel commercial trucks. The water is needed to maintain appropriate quantities for industrial cooling. The water would be held in a two-million-gallon storage tank.

Invenergy claims that the average daily water use will be approximately 15,840 gallons per day which will be trucked into the site. They also state that there will be increased water usage on “*the hottest summer days when evaporative cooling is needed...*”. They identified their water source as the “town of Johnston RI,” but do not disclose exactly which specific resource(s) in the town (e.g., groundwater aquifer, surface water body, or watercourse source, and any wetlands those sources may sustain) would be subjected to this withdrawal.

We remain concerned with the interbasin transfer of water for which the State of Rhode Island currently has no regulations to address. Therefore, the potential impact of this water withdrawal remains undisclosed and needs to be assessed - especially for the anticipated seasonal withdrawals during “the hottest summer days” when wetlands and watercourse systems may already be stressed by drought or low flows and the additional withdrawals could result in significant cumulative adverse impact. The impact on a source watershed should be analyzed and disclosed and included in an indirect and cumulative effects analysis associated with this project.

Furthermore, Invenergy would generate a comparable amount of wastewater for which a disposal facility has not yet been identified. Therefore their claim that the wastewater could in fact be returned to “*the same river basin as the process water source*” does not amount to a sufficient indirect and cumulative effects analysis since the public does not have enough information at this time to understand the potential impacts of that disruption in the hydrologic cycle (e.g., where the discharge would occur in relation to the withdrawals).

Storage of Hazardous Materials Adjacent to Sensitive Environmental Receptors

The proposed industrial usage will involve the storage and usage of hazardous and toxic compounds in large quantities⁸ topographically and hydrologically upgradient from an aquifer protection zone. These hazardous and toxic compounds include 40,000 gallons of ammonia⁹, 2,425 pounds of hydrogen, and 2,000,000¹⁰ gallons of fuel oil.

Invenergy responded to this concern with the following:

“All hazardous material stored at the CREC facility will be managed in accordance with state and federal regulations, including the use of secondary containment and the implementation of appropriate spill prevention, control and secondary

⁸ Invenergy Thermal Development LLC’s Application to Construct the Clear River Energy Center in Burrillville, RI dated October 28, 2015.

⁹ RIDEM Preliminary Determination for a Major Source Air Permit - May 2019

¹⁰ ESS Major Source Permit Application – 5/1/2019

countermeasures. A risk management plan will be developed ... to ensure that all appropriate spill containment and monitoring systems are in place to minimize the risk of a release and the potential impact of any unlikely release of a hazardous material to the surrounding environment.”

However, we remain concerned about the storage of such chemicals adjacent to sensitive environmental receptors such as residences, drinking water aquifers, rare species, wetlands and watercourses, etc. because the risk can only be minimized and not eliminated. Storage may be in accordance with state and federal regulations but the accidental discharge, seepage, loss, release, or spillage of these chemical substances into sensitive receptor resources could still occur. It is never a good idea to store such huge quantities of toxic chemical compounds so far up in a watershed, as an uncontrolled release of the material has the potential to impact many linear feet (or even miles) of low order stream channel and in this case could eventually reach Wilson Reservoir, a surface waterbody valued for multiple ecological and socioeconomic functions and values.

We note that the Department of Defense regulations Army Analysis of Environmental Actions (AR-002) **§651.41 Conditions requiring an EIS** state that “*An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has the potential to: ... (h) Involve the production, storage, transportation, use, treatment, and disposal of hazardous or toxic materials that may have significant environmental impact.*”¹¹

Air Emissions

The proposed action would result in a New Major Source of toxic air emissions in the State of Rhode Island and Providence Plantations¹² thereby requiring a Clean Air Act Title V Permit from the EPA.

ESS states that “*the facility will not be a major source of toxic air pollutants as its potential emissions of hazardous air pollutants are well below the major source thresholds.*” To provide further clarification as to the accuracy of our claim in the initial March 6th letter, and ESS’ response: the facility may not “;be a major source of hazardous air pollutants as its potential emissions of hazardous air pollutants are well below the major source thresholds, but , as ESS states: “*The facility will require a major source permit from RIDEM for its potential criteria pollutant emissions.*” Criteria pollutants can still be toxic to biota, and this potential ecotoxicity has not been assessed by the permit application.

¹¹Code of Federal Register Title 32 Subtitle A Chapter V Subchapter K Part 651 - ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS (AR 200-2) https://www.ecfr.gov/cgi-bin/text-idx?SID=23fc57625bc5e7981c8af33263139b75&mc=true&node=pt32.4.651&rgn=div5#se32.4.651_123

¹² [Invenergy Thermal Development LLC’s Application to Construct the Clear River Energy Center in Burrillville, RI dated October 28, 2015.](#)

As the Public Notice indicated, a draft major source air permit was issued by DEM on May 9th, 2019 and the public comment period for this draft permit will continue until July 15, 2019.

Other Waste Generation with Potential to Impact Waters of the United States

As we stated in our March 6, 2019 letter, the proposed action would result in the generation of a new source of stormwater and wastewater discharge¹³ and the stormwater would discharge to a Class B watercourse¹⁴. This watercourse has not been biologically evaluated downstream of the property of the proposed action (no information on the fisheries – including any federally managed species – nor on benthic invertebrate faunal community resources has been provided by the Applicant). The applicant responded with the following:

*The CREC facility will manage industrial stormwater collected at the facility to minimize impacts to local water resources as required by RIDEM. The CREC stormwater management plan has been designed in accordance with the Rhode Island Stormwater Design and Installations Manual the purpose of which is to prevent and minimize storm water runoff from introducing pollutants into local watercourses. In order to receive RIDEM approval of the stormwater management plan CREC will be required to demonstrate that **any** (emphasis added) impacts from industrial storm water runoff to local watercourses have been prevented and minimized.”*

We contend that the use of the word “any” in the last sentence cannot be verified or proven by the applicant simply by achieving compliance with the *Rhode Island Stormwater Design and Installations Manual*. The *Rhode Island Stormwater Design and Installations Manual* requires reductions for Total Suspended Solids, Total Phosphorous, and Total Nitrogen. Since there are no specific requirements or standards for all other pollutants such as, heavy metals, the various petroleum compounds, antifreeze, many of the numerous PAH compounds, and the myriad other pollutants found in industrial stormwater, one cannot make a claim that the CREC will be required to demonstrate that **any** impacts from industrial storm water runoff to local watercourses have been prevented and minimized.”

Controversy

In our original March 6, 2019 letter to the Army Corps, we state that “*The proposed action has generated substantial controversy*” and “*The controversy is of both local AND of national concern as it involves (a) destruction or adverse impact to Waters of the United States, (b) adverse impact to the habitat of a species under review for listing under Section 7 of the*

¹³ Invenergy Thermal Development LLC’s Application to Construct the Clear River Energy Center in Burrillville, RI dated October 28, 2015.

¹⁴ Stormwater Management Plan for the Clear River Energy Center Prepared for Invenergy Thermal Development LLC Prepared by HDR Engineering, Inc. March 2017

Federal Endangered Species Act, and (c) a New Major Source of emission of greenhouse gases and toxic air pollutants". Invenergy's response to both statements was as follows:

“. . . NEPA requires federal agencies to consider the potential environmental impact of their proposed actions and any reasonable alternatives before undertaking a major federal action. How much controversy and the scope of the controversy the action has generated are not considerations specified in the NEPA guidelines”.

We contend that the mere existence of controversy is specified in the NEPA regulations as a consideration for requiring an EIS. Section 1506.6(c) of the CEQ NEPA Implementing Regulations refers to “substantial environmental controversy”. The NEPA Regulations also provides provisions for referral to CEQ based upon “controversy”¹⁵.

What has added to the controversy is that the Rhode Island Department of Environmental Management suspects, and we concur, that the proposed action to build the Clear River Energy Center has been segmented from the proposed action of the Burrillville Interconnect Project (BIP) either intentionally or as a result of the state's RIEFSB docketing and review process. By way of the Applicant's own admission, one project necessitates the other. Although, despite's ESS' response to this contention that “*the two projects are the subject of the same application to the Army Corps of Engineers,*” the level of analysis of the two projects is incongruent, and the fact remains that the EFSB has only held a hearing addressing the proposed CREC power generation facility.

And finally, we note that the Department of Defense regulations Army Analysis of Environmental Actions (AR-002) **§651.41 Conditions requiring an EIS** state that “*An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has the potential to: ... (i) Be highly controversial from an environmental standpoint*”¹⁶.

Biodiversity Conservation and Adverse Impact to Species of State and Federal Conservation Concern.

As we noted in our March 6, 2019 letter, Invenergy's consultants have revealed that the proposed action poses the risk of direct adverse impacts via the loss or degradation of habitat to:

- Forty-two (42) species of state or regional conservation concern including – at a minimum – seventeen (17) RI state-listed species¹⁷;

¹⁵ NEPA Implementing Regulations Section 1504.3(c)(2)(i)

¹⁶ Code of Federal Register Title 32 Subtitle A Chapter V Subchapter K Part 651 - ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS (AR 200-2) https://www.ecfr.gov/cgi-bin/text-idx?SID=23fc57625bc5e7981c8af33263139b75&mc=true&node=pt32.4.651&rgn=div5#se32.4.651_123

¹⁷ Invenergy Biological Inventory Report Clear River Energy Center Burrillville, Rhode Island Prepared by ESS Group, Inc. Aug. 2, 2017

- Five (5) species identified by the United States Fish & Wildlife Service as Bird species of Conservation Concern (BCC) for Bird Conservation Region (BCR) No. 30 (New England/Mid-Atlantic Coast)¹⁸; and
- One (1) federal review turtle species.

Invenergy's response to the above was that the impacts to wildlife would be assessed via the permit programs (RIDEM Inland Wetland Application, and the Clean Water Act Section 404 permit program, and the RIEFSB review). We feel this is inadequate given the potential magnitude and scale of the potential adverse impact to these receptors. We would like to emphasize that there is variation in conservation priorities between state and federal agency goals for biodiversity conservation. State priorities may not necessarily address the same federal conservation priorities.

Mr. Jason Osenkowski, Deputy Chief of Wildlife at Rhode Island Department of Environmental Management, provided extensive testimony in March 2019 on the significant adverse impacts that the proposed facility would have on the state's biodiversity, and the state's wildlife conservation goals (as documented in Rhode Island's Wildlife Action Plan which was approved by the USFWS). A summary of Mr. Osenkowski's testimony is as follows:

- Forest clearing and the resulting fragmentation of this critical wildlife corridor would negatively impact the free and continuous movement of both wildlife and plants in the vicinity and would inhibit DEM's ability to enhance landscape resiliency and mitigate the loss of biodiversity.
- Fragmentation of the forest by the proposed plant would produce negative impacts upon fish and wildlife that cannot be mitigated. (tr. 3/26/19, at 49) as the project would be a "detriment to the continuity of that habitat and the species that rely on that continuity". Mr. Osenkowski also testified that "once you fragment that landscape, you can't really mitigate for that . . ." (tr. 3/26/19, at 76, emphasis added). (See also tr. 3/26/19, at 168).
- DEM's original Advisory Opinion (Board Exh. 1A), explains that ". . . wildlife rely on habitat connectivity to find scarce resources, preserve gene flow, and locate alternatives to lost habitat." (at 10).
- Mr. Osenkowski also testified as to the value that the existing landscape connectivity currently has to sustaining wildlife populations in that area by stating "Habitat connectivity is critically important to wildlife . . . It's imperative." (tr. 3/26/19, at 12).
- The facility would bring stressors to wildlife in the forms of added noise and light pollution and potential changes to the air and water.
- The location of the facility adjacent to substantial state holdings of conservation land would not be consistent with the conservation priorities that underlie the state's conservation plans. (tr. 3/26/19, at 53).

¹⁸ <https://www.fws.gov/migratorybirds/pdf/grants/BirdsofConservationConcern2008.pdf>

- Obtaining a wetlands permit “is not going to protect the species” that are outside of jurisdictional wetlands (tr. 3/26/19, at 70); nor will a wetlands permit address forest loss and fragmentation and loss of upland habitats. (tr. 3/26/19, at 69).
- Mr. Osenkowski of DEM agreed this plant “should not be built.” (tr. 3/26/19, at 165-66).

This topic should be addressed in an EIS and the glaring data gaps (e.g., unknown status of presence or absence of listed species along a significant section of the proposed action’s project area and at the proposed “mitigation” sites) should be disclosed to the public. We feel that the presence of such a remarkable assemblage of species of conservation concern at the proposed CREC facility site suggests that significant rare species are likely to occur within the impact areas of the proposed Burrillville Interconnect Project as well, yet the biota there has not yet been inventoried in a comprehensive or comparable manner.

Conversion of forest lands at a site that supports such an assemblage of species such as that at the proposed CREC facility in and of itself, is quite remarkable, yet there is further supporting evidence that additional species of conservation concern not previously reported by the Applicant¹⁹ occur on or proximal to the site, including a federal petition species. Allowing the loss of such biodiversity is inconsistent with the goals for biodiversity conservation as identified in the State’s own Wildlife Action Plan, which has been reviewed and approved by Federal natural resource agencies. The applicant’s proposal to offset this loss via land acquisition of parcels in which biodiversity inventories have not been conducted is premature/irresponsible as it may not result in suitable mitigation of the various plant and wildlife resources, many of which are wetland-dependent. Wildlife habitat was identified by the Applicant’s consultants as one of the thirteen functions and values of the wetland and watercourse resources on site to be directly and indirectly impacted on the site. There are significant upland wildlife resources as well, some of which play an important role in the life histories of wetland dependent species.

The ACOE-NED obligation to address and support biodiversity conservation rests not only in the CWA Section 404 permit review process, but also with the NEPA process where input is solicited from Cooperating Agencies and other stakeholders who have the expertise or are qualified to assess such impact. Compliance with the Migratory Bird Treaty Act is also required. We note that the applicant’s proposed no tree-clearing window of June to July as a mitigation measure is too short to avoid impacts to all migratory bird species that likely breed on site.

Again we reference the Department of Defense regulations Army Analysis of Environmental Actions (AR-002) **§651.41 Conditions requiring an EIS** which state that “*An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has*

¹⁹ Pre-filed Testimony of Anthony J. Zemba August 7, 2017

*the potential to: ... (c) Significantly impact ... wetlands, ... or ecologically important areas, or other areas of unique or critical environmental sensitivity.*²⁰

Public Involvement

The proposed action has excluded major stakeholders (e.g., The Town of Burrillville, The Burrillville Land Trust, adjacent property abutters, civic associations, etc.) from planning meetings with the ACOE-NED regarding the Section 404 Application.

CRECs response to this concern was as follows:

“It is not customary to include stakeholders in pre- application meetings with the USACE. The purpose of the meetings is to provide project details and discuss application requirements. All interested stakeholders will have an opportunity to provide input on the CREC USACE application during the public hearing and public comment period which will be administered by the USACE”.

It may not be customary to include stakeholders in pre-application meetings with the USACE, but it most certainly is customary and required by NEPA to have meaningful public involvement in the NEPA process for proposed actions that could result in significant adverse impact to the environment such as the conversion of mature forest (especially those harboring over 40 species of state, regional, and federal conservation concern) to industrial usage.

The Council on Environmental Quality and EPA require public involvement to be “early and often” during the NEPA process, not one time during a hearing after a permit application is submitted.

Notwithstanding, we request a public hearing as one forum to address stakeholder concerns but note that the hearing alone would not constitute “meaningful public involvement” in accordance with NEPA.

Alternatives Analysis

A full alternatives analysis of prudent and feasible alternatives has not been conducted to date at the same level of detail as the Applicant’s preferred alternative. Invenergy contends that “*the required alternatives have been provided in the RIEFSB Application, the RIDEM Major Source Permit Application, the RIDEM Wetlands Alteration Application, and the USACE Individual Permit Application,*” and that CREC “*will provide additional information regarding its assessments of project alternatives if requested by any of the above agencies with permitting authority over the project.*” However, none of the above mentioned documents includes a detailed analysis of the species of conservation concern that occur (if any) on each of the

²⁰ Code of Federal Register Title 32 Subtitle A Chapter V Subchapter K Part 651 - ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS (AR 200-2) https://www.ecfr.gov/cgi-bin/text-idx?SID=23fc57625bc5e7981c8af33263139b75&mc=true&node=pt32.4.651&rgn=div5#se32.4.651_123

alternative sites, and the alternatives analysis relied on incomplete and outdated information available from the now defunct state Natural Heritage Program and on limited cursory site observations.

Indirect and Cumulative Effects Analysis is Required

We stated in our original letter dated March 6, 2019 that the property adjoining the site of the proposed action, the Burrillville Compressor Station, is an Algonquin Gas Transmission facility owned by Spectra Energy Partners, LP and operated by Enbridge Inc. It is a facility that is part of a geographically diverse gas transmission system that includes facilities in New York, Connecticut, and Massachusetts. It was the subject of an EIS by the Federal Energy Regulatory Commission (“FERC”) in 2015 as a result of its request to seek a Certificate of Public Convenience and Necessity (“Certificate”) from FERC to construct, abandon, install, own, operate, and maintain expansions of its existing interstate natural gas pipeline systems in New York, Connecticut, Rhode Island, and Massachusetts. Invenergy responded to this comment by saying that “...[NEPA] requires federal agencies to consider the potential environmental impact of their proposed actions and any reasonable alternatives before undertaking a major federal action. The regulatory history of nearby facilities are not considerations specified in the NEPA guidelines”. We contend that the regulatory history of nearby facilities is most definitely pertinent to and should be assessed as part of an indirect and cumulative effects analysis. The NEPA implementing regulations specifically require such an analysis and that “cumulative effects” as defined by NEPA are those that occurred from past, present, and reasonably foreseeable actions.

We also stated in our March 6, 2019 letter that precedent has been set by a previous EIS (*Ocean State Power Project, Final Environmental Impact Statement, July 1988*) that dropped a property close to the site of the proposed action for land use conversion to a power-generating facility due to (a) a poor quality, narrow, curving, 2-lane rural access road, (b) potential impact to wildlife and other natural resources, (c) the proximity and potential impact to recreational activities available at Pulaski State Park, and (d) the cost concerns of constructing a 10-mile long water pipeline for cooling water as well as a transmission line and a gas supply pipeline.²¹ Invenergy responded with a similar comment as that above, and concluded with “*Whether a proposed site has been previously considered and not selected for another project is not a consideration specified in the NEPA guidelines.*” Again, we contend that this information is most pertinent for consideration in an indirect and cumulative effects analysis, which is required by NEPA and which should address “past, present, and reasonably foreseeable effects”.²²

As analysis of these past proposed actions and their findings were not disclosed, and no discussion on the potential impacts that have occurred as a result of the existing Spectra Energy Compressor Station nor the Narragansett Electric Transmission line have been provided we have concluded that Invenergy has not conducted an adequate indirect, secondary, and

²¹ Citizen Testimony of William Eccleston to RI EFSB, February 16, 2019

²² CEQ Regulations on Implementing NEPA Section 1508.7 Cumulative Impact

cumulative effects analysis of the proposed action in accordance with the National Environmental Policy Act of 1969 (“NEPA”).

SUMMARY

In summation, the approval by permit of wetland impacts via the Section 404 process of the CWA would constitute a major federal action and is, therefore, subject to compliance with NEPA. Since the proposed action does not qualify for a Department of Defense Categorical Exclusion²³ under NEPA, the impacts must be addressed via either an Environmental Assessment or an Environmental Impact Statement. Strong evidence has been presented during the RIEFSB hearing regarding the CREC facility that demonstrates that adverse impacts to natural resources in both the upland and wetland environments are significant and cannot be mitigated by merely replacing the lost acreage of wetland cover types either on-site or off-site. Other facts presented above point to the conclusion that a Finding of No Significant Impact, which is one of possible outcomes of the EA process under NEPA, is not substantively possible for this project and an EIS is necessary.

Therefore, my client, the Town of Burrillville (the municipality in which the proposed action would occur), abutting land owners, and other local, state, and regional stakeholders remain of the opinion that the proposed action should be assessed by the EIS process under NEPA in order to achieve NEPA compliance. An EIS is necessary to understand the adverse impacts resulting from the project and their significance. This information will aid decision-makers and inform the public, thus fulfilling one of the intents of NEPA. Only an EIS is sufficient to address the adverse impacts of the proposed project.

Furthermore, the RI EFSB process, which is considering the construction of the proposed CREC facility and the required 8.5-mile Burrillville Interconnect Project separately, constitutes improper segmentation of the proposed action. Accordingly, the Town reiterates its request that the ACOE-NED not review the Applicant’s Section 404 application to impact wetlands until NEPA compliance has been achieved. **The Town specifically requests that the ACOE-NED comply with Department of the Army regulations and require the Applicant to prepare an EIS to address the anticipated adverse impacts that the CREC facility and associated Burrillville Interconnect Project would have on the various resources of the natural and built environments and their respective natural, cultural, and socioeconomic resources/receptors.**

Moreover, as set forth above, on June 20, 2019, the RIEFSB ruled that the proposed CREC facility is not needed. The RIEFSB reasoned that the electricity from the proposed CREC powerplant facility isn’t needed in Rhode Island or New England, now or in the future.

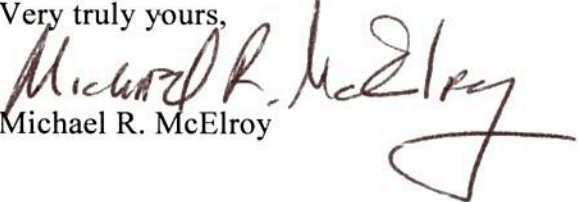
In consideration of the submittal of a CWA Section 404 Wetlands Application to ACOE-NED, we also request that a Public Hearing be held so that the various stakeholders are

²³ Code of Federal Register Title 32 Subtitle A Chapter V Subchapter K Part 651 - ENVIRONMENTAL ANALYSIS OF ARMY ACTIONS (AR 200-2) Appendix B to Subpart D—Categorical Exclusions

allowed to publicly voice their concerns and have their concerns addressed by the applicant and federal natural resource protection agency professionals directly. The intense interest of the community in regard to this proposed action has been demonstrated by the hundreds of people who have attended previous public comment hearings of the Planning Board, the Zoning Board, and the Energy Facility Siting Board.

The EIS should address all adverse effects imposed by the proposed Clear River Energy Center together with the Burrillville Interconnect Project. In addition to the disclosure of all the adverse environmental impacts to the town, state, and regional ecology one could expect from the proposed action, the EIS should also assess and disclose findings of cultural resource assessments which should (a) include appropriate Native American consultation, (b) provide meaningful public participation, (c) address socioeconomic concerns, and (d) address the direct, indirect, secondary, and cumulative effects of the proposed action in sufficient detail to determine whether or not the project would cause unacceptable harm to the environment.

Very truly yours,


Michael R. McElroy

MRMc/tmg

cc: ACOE-NED public affairs officer (cenae-pa@usace.army.mil)

EXHIBIT 1 – Letter dated March 6, 2019

EXHIBIT 2 – RIEFSB Post-hearing Brief

EXHIBIT 3 – FERC Approval of ISO-NE’s termination of CREC’s CSO

**EXHIBIT 4 Transcript of the June 20, 2019, meeting of the EFSB at
which Invenergy's request for a license for the Clear
River Energy Center was denied.**