

**Catskill Mountainkeeper  
Natural Resources Defense Council  
Riverkeeper  
Scenic Hudson  
Sierra Club Atlantic Chapter**

March 25, 2016

Hon. Joanne M. Mahoney  
Chair  
New York Thruway Authority  
200 Southern Blvd.  
P.O. Box 189  
Albany, NY 12201-0189

Hon. Basil Seggos  
Acting Commissioner  
Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-1011

**Re: Review of Application by Pilgrim Transportation Corporation for Proposed  
Petroleum Pipelines**

Dear Chair Mahoney and Acting Commissioner Seggos:

We write to you today regarding your review of the proposal outlined in the use and occupancy permit application submitted by Pilgrim Transportation of New York, Inc. (“Pilgrim”),<sup>1</sup> dated August 7, 2015 (the “Application”), for the construction of two parallel petroleum pipelines stretching from Albany, New York, to Linden, New Jersey.<sup>2</sup>

Because Pilgrim is unlikely to secure multiple necessary municipal approvals for the project, and because it has failed to submit other necessary applications in contravention of the state’s policy and procedures regarding the uniform and coordinated review of environmental permitting, the Department of Environmental Conservation (“DEC”) and the Thruway Authority (the “Authority”) are deprived of the information necessary to conduct the appropriate review. Consequently, we formally request that you conserve agency and public resources by suspending review of the Application or asking that it be withdrawn until Pilgrim credibly demonstrates its ability to obtain such approvals and submits the additional necessary applications.

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<sup>1</sup> Pilgrim Transportation of New York, Inc. is a New York pipeline corporation and a subsidiary of Pilgrim Pipeline Holdings, LLC, a New Jersey corporation.

<sup>2</sup> As an initial matter, the undersigned organizations recognize that there is an ongoing lead agency dispute with respect to the environmental review process for the proposal, and do not suggest or imply by sending this letter that this dispute has been resolved.

The undersigned organizations—Catskill Mountainkeeper, the Natural Resources Defense Council, Riverkeeper, Scenic Hudson, and the Sierra Club Atlantic Chapter—offer the following information in support of our request:

### *The Pilgrim Proposal*

Pilgrim’s proposal is to build two new 20-inch diameter 169.89 mile-long pipelines in a single ditch about six feet deep and six feet wide, along with five “laterals” of varying lengths, (collectively, the “Pipelines”) running from the Global Terminal in the Port of Albany, New York, to refineries and marine terminals in and around Linden, New Jersey. As currently planned, one line would bring crude oil south from Albany, while the other would bring refined products back northward, with each line capable of transporting approximately 200,000 barrels per day.<sup>3</sup>

As a Type 1 action under the State Environmental Quality Review Act (“SEQRA”),<sup>4</sup> the Pipelines’ potential for significant adverse environmental impacts is presumed, and indeed, almost certain. As proposed, the Pipelines would cross surface waters 257 times (including two crossings of the Hudson River) and wetlands 296 times, and construction of the lines would require the clearing of a 100 foot-wide right of way (“ROW”) and the disturbance of upwards of 1,000 acres of forested and vegetated lands.<sup>5</sup> After construction, the Pipelines would require between a 10 and 50 foot cleared ROW and would be pressurized by four continuously operating pump stations, illuminated at night by 20-foot-high LED lights.<sup>6</sup>

While roughly 79% of the mainline route in New York is proposed to run within the Interstate 87 ROW, about 24 miles of the mainline lie outside of the ROW, running across 168 properties.<sup>7</sup> These figures also do not include the nearly 14 miles of additional laterals and the additional acreage required for the construction of 4 pump stations, 7 temporary contractor/pipe yards, and “numerous” access roads, 35 of which will become permanent.<sup>8</sup> In New Jersey, where only a small fraction of the mainline would be located within highway ROWs, the bulk of the remaining 50 plus miles of line would cut through the heart of suburban villages and towns.<sup>9</sup>

Although the Pipelines will require several dozen permits or approvals, including multiple permits from DEC, to date, Pilgrim has not applied for any federal permits or state permits in either state, with the exception of the Application.

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<sup>3</sup> Pilgrim, *Draft Environmental Impact Statement: Volume I*, ES-1 (Aug. 2015) [hereinafter “Proposed DEIS”], available at <http://pilgrimpipeline.com/wp-content/uploads/2015/pdf/Pilgrim-Pipeline-Project-DEIS.pdf>.

<sup>4</sup> See Letter from Robert Megna, Executive Director of the Thruway Authority, to Marc Gerstman, Acting Commissioner of the Department of Environmental Conservation, dated Nov. 16, 2015, and available at: [http://www.dec.ny.gov/docs/administration\\_pdf/pilgrimthruwayltr15.pdf](http://www.dec.ny.gov/docs/administration_pdf/pilgrimthruwayltr15.pdf).

<sup>5</sup> *Id.* at ES-9, ES-11.

<sup>6</sup> *Id.* at 2-13.

<sup>7</sup> See *Id.* at ES-3, 1-13.

<sup>8</sup> *Id.* at ES-3, 1-7.

<sup>9</sup> See *Id.*, Figure ES-1 at ES-2.

*Pilgrim Will Likely Fail to Secure Necessary Municipal Approvals for the Pipelines from Communities That Now Overwhelmingly Oppose Their Construction*

Like many recent proposed oil and gas infrastructure projects in the region, the Pipelines have faced considerable public backlash as well as organized opposition at the municipal level. Unlike many of those projects, however, the Pipelines are uniquely vulnerable to local actions as the statute governing the construction of petroleum pipelines in New York—the Transportation Corporations Law (“Transcorp Law”)—conditions Pilgrim’s authority to build and operate the lines on first obtaining certain individual and municipal approvals.

With its origins in the late nineteenth century, the Transcorp Law allows certain types of businesses to incorporate—such as, for example, “gas and electric corporations,” “telegraph corporations,” or “ferry corporations”—in order to transport persons or goods within the State of New York. *See* Transcorp Law § 2. Apart from general operational authority, one of the most significant powers granted by the Transcorp Law is the ability to use eminent domain in order to construct necessary transportation infrastructure.

These powers, however, are not provided without constraints. Because minimal effort or documentation is required to incorporate, *see, e.g.*, Transcorp Law § 3, the law provides other checks to prevent the unrestricted exercise of power. One of the most significant checks, found throughout the law, is the obligation that transportation corporations obtain the consent from the local legislature (e.g., a town board) in order to operate within a given municipality. *See, e.g.*, Transcorp Law §§ 3(b)(3); 11(1); 27; 41; 71; 86; 87; 89; 107; 116; 122(1). As the Court of Appeals explained, “the legal effect of th[is] consent” is generally “to create a franchise.” *Ghee v. N. Union Gas Co.*, 158 N.Y. 510, 513 (1898). Municipalities have the “right to grant or withhold consent,” and without consent, the corporation may not occupy local land for its business purposes. *See People ex rel. W. Side Elec. Co. v. Consol. Tel. & Elec. Subway Co.*, 187 N.Y. 58, 65 (1907). Depending on the type of corporation, other approvals may also apply, such as permission from landowners to use private property.

Although many of the types of infrastructure specified in the Transcorp Law are now primarily regulated by other statutes, petroleum pipelines are not. For this reason, Pilgrim acknowledges in its Application that it is “a pipeline corporation organized and existing under the [Transcorp Law].”<sup>10</sup> What the Application and the accompanying proposed Draft Environmental Impact Statement (“Proposed DEIS”) fail to mention, however, is that the conditions placed upon the authority of pipeline corporations to condemn land and construct infrastructure are among the strictest in the Transcorp Law. *See Iroquois Gas Corp. v. Jurek*, 30 A.D.2d 83, 87 (2d Dep’t 1968) (The “power to condemn as a pipe line corporation is much more severely circumscribed than . . . a gas corporation.”).

Article 7 of the Transcorp Law (“Article 7”) governs the authority of pipeline corporations, and the limits it imposes range from constraints waivable by individuals or governments to unqualified prohibitions. For example, the restriction that a pipeline corporation “shall not locate

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<sup>10</sup> Pilgrim, *Application of Pilgrim Transportation of New York, Inc. for a Longitudinal Use and Occupancy Permit for the Pilgrim Pipeline Project* (Aug. 2015), available at <http://pilgrimpipeline.com/wp-content/uploads/2015/pdf/Use-and-Occupancy-Permit-Application-8-7-15.pdf>.

its route or construct any line of pipe under any building, dooryard, lawn, garden, or orchard” may be waived by the owner of that property, while the prohibition against longitudinal occupancy of railroad property is absolute. *Compare* Transcorp Law § 83 *with* § 84.

Importantly, under Article 7, municipalities occupy a central role in determining if and how pipeline corporations will operate within local boundaries. Pipeline corporations must seek the approval of the relevant local government to use “lands owned by any county, city or town,” including where the line would cross any “public highway.” Transcorp Law § 87, 89. Corporations seeking to build pipelines in villages or cities face even greater hurdles, as the Transcorp Law specifies that:

No pipe line shall be constructed into or through any incorporated village or city in this state, unless authorized by a resolution prescribing the route, manner of construction and terms upon which granted, adopted at a regular meeting of the board of trustees of the village or the legislative body of the city *by a two-thirds vote thereof*. . .

Transcorp Law § 87 (emphasis added).

Although silent about these required individual and municipal approvals in its application materials, Pilgrim is well aware of the limitations that presently control its ability to construct the proposed Pipelines. Indeed, in the alternatives analysis of the Proposed DEIS, Pilgrim frankly acknowledges that a “Rail Corridor Alternative” to the current proposed path “was determined to be infeasible in light of Transportation Corporation Law provisions which appear to prohibit the longitudinal occupation by pipelines of existing rail ROW.”<sup>11</sup> This admitted legal impossibility of locating the Pipelines within a rail ROW, however, is equaled by the unmentioned near practical impossibility of its proposal to route the Pipelines through a number municipalities now openly hostile to their construction.

Since the proposal for the Pipelines became public in 2014, 22 New York municipalities have passed resolutions opposing the project (most of them within the Pipelines route), and with several others presently considering similar legislation.<sup>12</sup> Importantly, of the nine incorporated villages and cities where the proposed path for the Pipelines leaves the Interstate 87 ROW—Albany, Harriman, Hillburn, Kingston, Newburgh, Rensselaer, Ravena, Tuxedo Park, and Woodbury—four have passed opposition resolutions. Even assuming Pilgrim could obtain the permissions for the use of local lands, roads, and private property<sup>13</sup> elsewhere along the route, it defies reason that it will be able to secure the required supermajority support from several municipalities that have now formally opposed its project.

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<sup>11</sup> Proposed DEIS at 1-14.

<sup>12</sup> The New York municipalities that have passed resolutions opposing the Pipelines are: Cornwall, Cornwall on Hudson, Esopus, Gardiner, Harriman, Kingston, Marbletown, Newburgh (City), Newburgh (Town), New Paltz (Town), New Paltz (Village), New Windsor, Plattekill, Red Hook, Rhinebeck, Rochester, Rosendale, Saugerties, Tuxedo, Tuxedo Park, Wawarsing, Woodstock.

<sup>13</sup> Notably, Pilgrim identifies that the mainline and the Roseton Product Lateral will cross through orchards in the New Paltz area, “thereby permanently affecting” them through tree cutting and the placement of the permanent ROW. Proposed DEIS at 4-99. As mentioned, the Transcorp Law forbids the use of eminent domain for pipeline construction through orchards without permission of the orchard owner, yet Pilgrim does not identify that it has obtained, or even sought, these permissions.

In New Jersey, Pilgrim’s plans for the Pipelines look even less viable, as nearly every inch of the proposed line there runs through an antagonistic municipality. To date, 38 New Jersey municipalities have passed resolutions against the project<sup>14</sup> and 11 New Jersey municipalities have gone even further, passing ordinances designed either to restrict or exclude the proposed Pipelines from within their local borders.<sup>15</sup> These local efforts are matched at the state level, with both houses of the New Jersey legislature having also passed resolutions opposing the Pipelines.<sup>16</sup>

*The Application Contains Insufficient Information to Allow for Adequate Review*

Due to the near practical impossibility that the Pipelines will be able to run along their presently proposed route, the Application and supporting materials are largely speculative and fail to provide the information necessary to enable appropriate review of the project under SEQRA or the standards governing approval of utility longitudinal use and occupancy permits.

As you know, SEQRA requires earnest examination of any significant adverse environmental impacts that may derive from a proposed action. See Env’tl. Conserv. Law (“E.C.L.”) § 8-0109. In order to “identify ‘the relevant areas of environmental concern’ and take a ‘hard look’ at them,” *Merson v. McNally*, 90 N.Y.2d 742, 751 (1997) (quoting *Chem. Specialties Mfrs. Ass’n v. Jorling*, 85 N.Y.2d 382, 397 (1995)), the reviewing agency must examine, among other things, the “setting” and “geographic scope” of the environmental impacts likely to result. 6 N.Y.C.R.R. § 617.7(c)(3)(i), (v). Where an environmental impact statement is prepared, it must contain a “description of the proposed action and its environmental setting,” which, in turn, provides the foundation for the required assessment of the relevant impacts, potential alternatives, and appropriate mitigation. See E.C.L. § 8-0109(1), (2); 6 N.Y.C.R.R. § 617.11(d).

Put simply, a reviewing agency must know *where a project is actually going to be located* before it can conduct satisfactory review of the possible environmental harms that it will generate. In the present situation, to the unlikely extent the Pipelines can be built at all, municipal opposition will almost certainly require a dramatic rerouting of the project. Under these circumstances, the proposal presented in the Application is largely speculative, and examination of that proposal would waste valuable agency resources and fail to satisfy SEQRA.<sup>17</sup> It would also involve the participation of the public in an unnecessary and essentially academic exercise.

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<sup>14</sup> The New Jersey municipalities that have passed resolutions opposing the Pipelines are: Berkeley Heights, Bloomingdale, Caldwell, Chatham Borough, Chatham Township, Clark, Cranford, East Hanover, Edison, Fanwood, Florham Park, Kinnelon, Linden, Livingston, Madison, Mahwah, Millburn, Montville, New Providence, Oakland, Parsippany, Pequannock, Pompton Lakes, Rahway, Ramsey, Ringwood, Riverdale, Roseland, Roselle, Scotch Plains, South Orange, Wanaque, Watchung, Wayne, West Milford, West Orange, Westfield, Woodbridge.

<sup>15</sup> The New Jersey municipalities that have passed ordinances that would in some way restrict or exclude the Pipelines are: Berkeley Heights, Bloomingdale, Chatham Township, East Hanover, Madison, Mahwah, Montville, Oakland, Parsippany, Roselle, Watchung.

<sup>16</sup> A.R. 191, 216th Leg. (N.J. 2014) available at <https://legiscan.com/NJ/text/AR191/id/1055223>; S.R. 106, 216th Leg. (N.J. 2014) available at <https://legiscan.com/NJ/text/SR106/id/1249193>.

<sup>17</sup> Pilgrim may argue that local approvals cannot be obtained until after the SEQRA process is undertaken. But this would be to stand the process on its head. The required local approvals are effectively jurisdictional; without them, the pipeline cannot be built as proposed. Pilgrim should be required to provide at least some evidence that it can obtain approvals where it needs them. If it does and the SEQRA review proceeds, the localities can then make a final judgment and take action on the basis of what that review has revealed.

Similarly, the Application lacks the information necessary to enable appropriate review under the standards for review of use and occupancy permit applications. As you know, the Authority generally “discourages longitudinal use of Authority Property,” permitting it only in “special cases.”<sup>18</sup> Longitudinal occupation must also satisfy the federally required state highway “accommodation plan,”<sup>19</sup> which allows occupation for utilities only by request for an “exception.”<sup>20</sup> Exception proposals must demonstrate, among other things, conformity “with local and state planning efforts,”<sup>21</sup> echoing federal highway regulations that utility occupation of a highway ROW is not presumed to be consistent with the public interest where it “conflict[s] with . . . local laws or regulations.” 23 C.F.R. §645.205(a). Thruway guidelines also mandate consideration of “a number of factors” before approval of a use and occupancy permit, including the exact location of the utility line, the extent to which it is assembled with adjacent property, and any “known legal issues or disputes.”<sup>22</sup>

As described, in the present case, Pilgrim is unlikely to obtain permission to operate in several municipalities where its project clearly conflicts with local regulations and development plans. Pilgrim’s failure to address these conflicts in its application materials and how they affect the Pipelines’ proposed route, therefore, also denies the Authority information it requires to evaluate the Application under its own guidelines and the federally mandated accommodation plan.

These omissions are exacerbated by the fact that Pilgrim has, to date, submitted only one application from among the dozens that will be necessary at the local, state, and federal levels. Because these applications may contain additional information essential to full performance of the critical roles of involved agencies and the public in the SEQRA process, both at the scoping stage and beyond, *see* 6 N.Y.C.R.R. §§ 617.3(d), (e); 617.8(d), (e); 617.9(a), Pilgrim’s current fragmented approach deprives that process of vital information.

*The Appropriate Course of Action Is to Request Withdrawal of the Application or Suspend Review until Pilgrim Provides Sufficient Information to Enable Meaningful Review*

Although completion of the SEQRA review process may be warranted in some cases where approval is unlikely, where, as here, “it is clear that [an] application will not meet regulatory

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<sup>18</sup> The Authority, *Utility Occupancy Supplement TAP-401U*, § II.B.2 (Jan. 2010), available at <http://www.thruway.ny.gov/business/realproperty/forms/tap-401u.pdf>.

<sup>19</sup> See New York Department of Transportation (“NYSDOT”), *Accommodation Plan for Longitudinal Use of Freeway Right-of-Way by Utilities* (Oct. 1995), available at <https://www.dot.ny.gov/divisions/engineering/design/dqab/dqab-repository/accommod.pdf>.

<sup>20</sup> See NYSDOT, *Accommodation of Non-Communication Utilities on New York State Freeway or Controlled Access Rights of Way*, 1 (undated), available at <http://on.ny.gov/1RhUzVk>. This document provides clarification of the Accommodation Plan referenced above, which is a federally required agreement between the Federal Highway Administration and NYSDOT. Although the Authority is not a party to this agreement, as noted in the January 9, 2013 letter from Donna K. Hintz of NYSDOT to Jaclyn A. Brillling of the New York Public Service Commission, provided at the link above, “[t]he toll portions of Interstates 87 and 90 under the jurisdiction of the New York State Thruway Authority (NYSTA) are included in this [Accommodation] Plan.”

<sup>21</sup> *Id.* at 6.

<sup>22</sup> See Thruway Authority Bureau of Management Analysis and Projects, *Manual 500-2, Section 02.1: Transaction Process Analysis*, Exhibit 2 (Feb. 2012), available at <http://www.thruway.ny.gov/business/realproperty/sop/500-2-02.1.pdf>.



standards for issuance,” the reviewing agency may exercise options that protect it from engaging in meaningless review.<sup>23</sup> Relevantly, the agency may: (1) “[e]xplain to the project sponsor how the project fails to meet standards for issuance and recommend that the application be withdrawn;” or (2) “[e]xplain to the project sponsor how the project fails to meet standards for issuance” and urge modification to comply with those standards.<sup>24</sup> Accordingly, because Pilgrim’s proposal will almost certainly fail to secure numerous statutorily required approvals, a request for withdrawal or suspension of review pending satisfactory modification is appropriate.

Even to the extent that DEC and the Authority find Pilgrim’s plans not wholly conjectural, its piecemeal approach to submission of the necessary permit applications is antithetical to SEQRA’s objective of “coordinated action” in analyzing environmental impacts and the state’s uniform procedures for review of environmental permits. *See* E.C.L. §§ 8-0103; 70-0101 (“a comprehensive project review approach shall replace separate and individual permit application reviews”). These procedures demand that where “a project requires more than one [DEC] permit, the applicant must simultaneously submit all the necessary applications” or demonstrate good cause for not doing so. 6 N.Y.C.R.R. § 621.3(a)(4); *see also* 6 N.Y.C.R.R. § 621.6 (regarding completeness of applications). They also allow DEC “at any time” to request “any additional information . . . reasonably necessary to make any findings or determinations required by law,” and failure to respond to these requests “may be grounds for permit denial.” 6 N.Y.C.R.R. § 621.14(b); E.C.L. § 70-0117(2). Because the impacts of the project “implicate [DEC]’s permitting authority pursuant to the Environmental Conservation Law,”<sup>25</sup> and the project requires several permits governed by DEC’s uniform rules, the door is open for their application. 6 N.Y.C.R.R. § 621.3(c) (“Where a project involves permits both subject and not subject to [the uniform permit rules], [DEC] reserves the right to process all such applications pursuant to [those rules].”).

In sum, where Pilgrim has not yet initiated the process of seeking approval for the dozens of permits or other permissions it will need to construct the Pipelines, and where several necessary approvals are all but certain to be rejected, Pilgrim asks DEC and the Authority to commit valuable agency resources to a hypothetical exercise, in which any public participation will also be a waste of time and money. Because review of the environmental impacts of the unviable proposal put forth by the Application benefits no one (not even Pilgrim), the undersigned organizations ask DEC and the Authority to either request that Pilgrim withdraw its Application or suspend their review until the corporation can provide credible evidence demonstrating the feasibility of the project as proposed and submits all additional necessary permits.

Thank you for your attention to this request.

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<sup>23</sup> *See* DEC, *The SEQRA Handbook: 3rd Edition*, 14-15 (2010), available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf).

<sup>24</sup> *Id.* at 15. Because construction of the Pipelines would constitute a Type I action under SEQRA, issuance of a negative declaration along with a denial of the Application would be inappropriate.

<sup>25</sup> *See* Agreement between DEC and Thruway, dated February 1, 2016, and available at: [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/plgrmfnlmoa.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/plgrmfnlmoa.pdf).

Respectfully,



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Daniel Raichel  
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Natural Resources Defense Council



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