

## Mark Lohbauer-Statement on Pipeline MOA

January 10, 2014

As members of the Pinelands Commission, our first and only obligation is to the Comprehensive Management Plan (CMP). In order to be sure that we are faithful to that document, it is imperative that we properly phrase the question that we are being asked to vote upon. Hundreds of people have told us why we should vote yes or no on this pipeline, and they have given us their reasons. The vast majority of reasons that we have heard simply do not apply to the CMP, and we must disregard them. For example:

- The source of the natural gas, whether from fracking or not, is irrelevant to the CMP;
- The creation of jobs in laying the pipeline, or in keeping the BL England plant open, is irrelevant to the CMP;
- The improvement or deterioration of emissions at the BL England plant is irrelevant to the CMP;
- Redundancy of gas supply to SJ Gas customers outside of the Pinelands is irrelevant to the CMP;
- Whether alternative pipeline routes outside of the Pinelands might be environmentally worse than the proposed route is irrelevant to the CMP;
- The State's Energy Policy—unless expressed as a compelling public need—is irrelevant to the CMP.

Similarly, the fact that other gas pipelines (of various sizes) have been laid in the Pinelands has no precedential value for us. Those pipelines were approved by staff only based upon a Certificate of Need, and the Pinelands Commission was never called to interpret those applications against the CMP. This application is the first time that the Commission has been asked to do this. We cannot say “it has been done before; therefore it is permissible.” We must ask ourselves what does the CMP provide?

These facts are given:

1. “Staff determined that the proposed pipeline development was not consistent with the Forest Area land use standards.” (Staff report of Jan. 2, 2014 at page 2.)
2. The CMP provides the Commission with the ability to approve applications for public development despite their inconsistency with the CMP, under either the:
  - a. waiver of strict compliance device (§7:50-4.61), or
  - b. intergovernmental memorandum of agreement device (§7:50-4.52 c2).
3. Both of these devices are discretionary to the Commission. That is, the

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Commission “may” approve applications this way; the Commission is not required to do so.

What is the appropriate question that we should vote upon to decide this application?

The staff tells us that the question should be: Should the Pinelands Commission enter into an intergovernmental memorandum of agreement (MOA) with the NJ Board of Public Utilities in order to construct the proposed natural gas pipeline? I think that this question is wrong, and will yield a flawed answer. Here are my reasons:

I respectfully disagree with staff’s rationale regarding the treatment of the NJ Board of Public Utilities as the applicant in this case. The CMP only permits the Commission to enter into Memoranda of Agreement “... with any agency of the Federal, State or local government.” Staff proposes that we do this one with the NJ Board of Public Utilities, which is an agency of State government, and qualifies for MOA.

However, under §7:50-4.52 (c) 1 and 2, the MOA will “... authorize such agency to carry out specified development activities...” The Board of Public Utilities will not be carrying out the specified development activities and we cannot authorize them to do so; rather, the public entity South Jersey Gas will be doing this.

South Jersey Gas is the real applicant, and they will be installing this pipeline for a private purpose, related to their private (not governmental) decision to re-fuel the BL England plant with natural gas that they supply. This will be a private enterprise endeavor for South Jersey Gas, not a public project. South Jersey Gas will fund its construction; not the State of New Jersey. South Jersey Gas will be liable for any problems that arise; not the State of New Jersey. By all measures, this is a private industry application, and not a government application.

In fact, the Board of Public Utilities, given their regulatory role over South Jersey Gas, would seem to have a conflict of interest that would preclude them from acting as a co-applicant of a project with an entity that they regulate. BPU’s first obligation is to the utility ratepayers of the State of New Jersey, and should not be compromised by an advocacy position regarding a project of any one regulated utility.

The fact that the Board of Public Utilities has been accepted by the Pinelands Commission in one prior application for public development, on a project that was developed by a private developer (BPU/Atlantic City Electric/Connectiv MOA-

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September 2004) in the past does not bind this Commission to extend such discretion again. We are not required to do anything that we perceive to be contrary to the intent of the CMP.

The MOA procedure was devised in the CMP as an alternate means for the Commission to allow government entities to obtain relief from our strict standards where public purposes demanded it. With all due respect to staff, that is not the case with this pipeline.

So, what then is the appropriate question for us to vote on regarding the pipeline application?

It should be: "Does the application of South Jersey Gas, supported by the NJ Board of Public Utilities, merit a Waiver of Strict Compliance with the standards of the CMP?"

This is the standard that applies to private applicants, and this is what should be required of South Jersey Gas (not the NJ Board of Public Utilities). It requires the applicant to prove that the waiver is necessary in order to avoid "extraordinary hardship," or in order to satisfy a "compelling public need."

When we are being asked to allow horizontal development through protected Forest Area that cannot show primary benefit to the Pinelands or Pinelands residents, this is the standard that we should apply. We should not allow a lesser MOA standard to be the rule. That will come back to haunt us when other horizontal development is sought through protected areas. This, above all, is the matter of greatest import to the Comprehensive Management Plan; if we allow the MOA approach in this application, there will be no practical way to impose the Waiver of Strict Compliance standard on other development thereafter.

Some staff members and Commissioners have indicated to me that this applicant would not be likely to satisfy the "Waiver of Strict Compliance Standard," and for that reason, we should allow them to apply via the less strict MOA standard. I disagree:

- No one knows for certain whether this applicant can establish "extraordinary hardship" or "compelling public need" as a basis for waiver; only the full Pinelands Commission could decide that after hearing their application. The applicant has not been asked to show this, so we have heard nothing in that regard.
- It is not appropriate for us to apply a standard based upon what we think

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the applicant *could* meet. Rather, it is for us to apply the CMP in a fair and consistent way that applicants may rely upon.

Others have expressed concern that if we require Waiver of Strict Compliance, then we lose our ability to impose a fee on the applicant for “equivalent protection,” (which is a feature of the MOA standard). I disagree with that conclusion: these standards are discretionary for the Commission; we are free in our discretion to impose whatever requirements we choose when authorizing an application that is inconsistent with the CMP. I believe that this discretion would allow us to include costs of equivalent protection under the Waiver standard, as well as the MOA standard.

So—I would vote against the MOA as presented, and instead instruct the applicant—South Jersey Gas—to revise their application to provide us with a basis upon which we could allow a Waiver of Strict Compliance.

Finally, assuming for the sake of argument that it is were appropriate to allow an MOA in this circumstance, I would question whether this MOA satisfactorily meets our requirements. Our own website states:

*The Pinelands Commission recognizes its obligation to exercise this discretionary authority very carefully and, under no circumstance can consider such an agreement unless the relief sought from CMP standards is offset by other measures that will provide at least an equivalent level of protection of the Pinelands.*

Does this MOA provide an “equivalent level of protection” here?

We have not asked for any compensation for environmental impacts to the Pinelands, and that should be a component of this MOA. However, most of the money provided in this MOA is devoted to the prevention of future development along the path of the pipeline through acquisition of private land. While I do not disagree that impacts of the pipeline construction itself, under a State highway, are likely to be minor, I believe that there will be impacts to the Pinelands from the renewed full-time operation of the BL England plant. There is no compensation in the MOA for plant emissions from BL England that will impact the Pinelands if we approve the pipeline.

A professor of Stockton College told us that fine particulates and CO<sub>2</sub> are emitted in substantial quantities by natural gas burning plants. He added that CO<sub>2</sub> is a greenhouse gas emission that is regulated by the State DEP. I noted at our last Commission meeting that the Air Modeling Report provided to us by the NJ DEP

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for the BL England plant did not address fine particulate emissions or CO<sub>2</sub>; it only addressed 3 other pollutants that would be reduced by switching from coal burning to natural gas. I asked for modeling on those 2 contaminants, but didn't get it. In the absence of that information, I think that Commissioners who believe that the MOA approach is appropriate must also accept the professor's contention that emissions from the BL England plant will hurt the Pinelands by contributing to global warming. We know that the Southern Pine Beetle's proliferation in the Pinelands is an offshoot of that warming, and that the rise in CO<sub>2</sub> emissions from this plant will support their greater proliferation. Shouldn't the MOA include an amount to help us combat further proliferation of the Southern Pine Beetle?

Let me phrase it another way: is it appropriate that this MOA provide no compensation for environmental impacts?

Finally, it is inappropriate for this MOA to ask for any funding from the applicant that is not directly related to "equivalent level of protection" for impacts of this project. The MOA includes sums for the construction of our visitor center, and to support our education projects. These are worthy causes—but they do not qualify as "equivalent protection," and should not be included in the MOA.