

River's Motion. In the alternative, if the Secretary grants Fall River's Motion, Appellants request that the Secretary issue a scheduling order permitting Appellants to file reply briefs in these proceedings pursuant to 15 C.F.R. § 930.127(e)(3).

I. The Secretary Should Deny The Motion

The Secretary should deny the Motion because (a) it is untimely according to the procedural orders issued in this proceeding and standard appellate practice; (b) granting the Motion would negatively impact this proceeding and unduly prejudice appellants; and (c) by its own admission, Fall River is seeking permission to file an *amicus* brief that raises issues not addressed by the parties to this proceeding.

A. The Motion Is Untimely

The Secretary should deny the Motion because it is untimely. While the October 25, 2007 letter issued by the National Oceanic and Atmospheric Administration ("NOAA") in this proceeding ("NOAA Letter") stated that Fall River could file a motion for leave to file an *amicus* brief,¹ it expressly conditioned this grant of permission to Fall River on the timeliness of Fall River's filing: "Because the Secretary must close the decision record in this appeal (absent a

¹ The authority for allowing for the filing of an *amicus* brief in a consistency appeal involving an energy project is not apparent because the Secretarial decisions cited in the NOAA Letter in which the Secretary permitted *amicus* participation are all decisions that pre-date the Energy Policy Act of 2005, Pub. L. No. 109-58, 19 Stat. 594 (2005) ("EPAAct 2005"). Recent changes to NOAA's Coastal Zone Management Act ("CZMA") regulations made necessary by EPAAct 2005 limit the Secretary's appellate review to the consolidated record, and exempt energy projects from the public comment period. See 15 C.F.R. §§ 930.127(c)(3), .127(i)(1) & .128(b). The result of these changes is that "to have their views included in the consolidated record, interested parties should submit comments on energy projects [during the lead Federal permitting agency's comment period and the state CZMA review process], *including comments* related to . . . *potential appeals to the Secretary.*" NOAA Coastal Zone Management Act Final Rule, 71 Fed. Reg. 788, 800 (emphasis added). See also Response of Weaver's Cove Energy, LLC Opposing Fall River's Motion to Intervene at 5-8 (Sept. 24, 2007) (discussing the changes). Accordingly, *amicus* participation should be limited to comments made to the lead Federal permitting agency and in the state CZMA process.

stay) on or before March 4, 2008, any motion for leave to file an *amicus* brief *must occur well in advance of this date* to allow for review and a decision.” NOAA Letter at 4 (emphasis added). Yet, the Motion was filed over three months after the NOAA Letter, over two months from the date Appellants filed their reply briefs, and only sixteen business days before the close of the record. This hardly amounts to filing “well in advance,” and accordingly, the Motion should be denied. Moreover, in the Motion, Fall River fails to show any good cause why it is filing for leave to submit an *amicus* brief so late in these proceedings. *See Marbled Murrelet v. Babbitt* 83 F.3d 1060, 1062, n. 1 (9th Cir. 1996) (stating the requirement that the movant must demonstrate good cause why its late *amicus* filing should be accepted). *See also Mitchell v. Griffin Television, L.L.C.*, 60 P.3d 1058, 1068 (Ok. Civ. App. Div. 2002) (denying a motion for leave to file an *amicus* brief after “after the normal briefing cycle set for the party to be supported” for failure to “show the requisite extraordinary cause”). Therefore, because the Motion is untimely, and Fall River offers no good cause for why it is filing at this late stage, the Motion should be denied.

B. Granting The Motion Would Negatively Impact This Proceeding and Unduly Prejudice Appellants

While the failure of Fall River to comply with the instructions in the NOAA Letter is a independently sufficient ground for denying the Motion, the Motion should also be denied because permitting such a late *amicus* filing would negatively impact this proceeding. First, as recognized by the NOAA Letter, late filing constrains the Secretary’s ability to review the Motion and render a decision. *See id.* This is especially true given that this proceeding is bound by statutory deadlines for the close of the record and the issuance of a decision by the Secretary. *See* 16 U.S.C. §§ 1465 (b) & (c).

Second, Fall River's late filing unduly prejudices the rights of the Appellants. Fall River has filed a copy of a brief along with its Motion which, by Fall River's own admission, "addresses several reasons . . . Secretarial override should be denied *beyond* those already asserted in MCZM's brief." Motion at 4 (emphasis added). According to the principles of standard appellate procedure, which underlie the rules that NOAA has constructed for the consistency appeals process, NOAA Coastal Zone Management Act Final Rule, 71 Fed. Reg. 788, 799 (Jan. 5, 2006), an *amicus* brief should be filed so that "[t]he opposing party will have sufficient time to review arguments made by the *amicus* and address them in the party's responsive pleading." FEDERAL RULES OF APPELLATE PROCEDURE 29(e) & related Advisory Committee Notes (2008). Here, since Appellants' filed their reply briefs on November 26, 2007, the belated timing of Fall River's submission of its Motion does not allow for such adequate review and response. Moreover, the timing of the Motion is prejudicial to Appellants because, by waiting for over *three months* to see how this proceeding would play out before filing the Motion, Fall River is attempting to have the last word after having the benefit of reviewing all of the parties' briefing, particularly Appellants' reply briefs.

C. The Brief Filed With The Motion Raises Issues Not Addressed By The Parties To This Proceeding

Finally, Fall River's Motion should be denied because issues or arguments raised by an *amicus* should be disregarded unless those issues or arguments were raised by the parties to the proceeding. *See, e.g., United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 61 n. 2 (1981) (declining to consider *amicus*'s argument "since it was not raised by either of the parties here"); *WCVB-TV v. Boston Athletic Assn*, 926 F.2d 42, 47 (1st Cir. 1991) (declining to consider *amici*'s issues because "[a]ppellants themselves . . . have not raised those questions"). By Fall River's own admission, the brief filed with the Motion "addresses several reasons . . . Secretarial

override should be denied *beyond* those already asserted in MCZM’s brief.”² Motion at 4 (emphasis added). Specifically, in the brief attached to its Motion, Fall River raises several issues not addressed by the parties in their briefs, including: (a) the relevancy of Weaver’s Cove’s lawsuit against the Department of the Interior (“DOI”) regarding whether DOI has any jurisdiction over Weaver’s Cove’s activities under the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*; (b) the relevancy of Weaver’s Cove’s litigation against the Massachusetts Department of Environmental Protection and the Rhode Island Department of Environmental Management regarding whether the statutory time frame for these agencies to act on certain of Weaver’s Cove’s applications made pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, has expired; (c) the relevancy of Weaver’s Cove having obtained a U.S. Army Corps of Engineers dredging permit pursuant to the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344; and (d) the relevancy of certain emergency response plans that Weaver’s Cove must provide to Federal Energy Regulatory Commission staff prior to commissioning of the liquefied natural gas terminal, *see Weaver’s Cove Energy, LLC, et al.*, 112 FERC ¶ 61,070, Appx. B at Nos. 61-68 (2005). Therefore, because its brief raises issues and arguments not addressed by any of the parties, the Secretary should deny Fall River’s Motion.

² To the extent that the brief attached to the Motion raises any of the same discrete legal issues raised by MCZM, such as the relevancy of the proceedings before the U.S. Coast Guard, the Motion should still be denied. Fall River is not making any unique contribution to these discrete legal issues as MCZM has or is addressing those issues on behalf of the state. *See Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208, 209 (5th Cir. 2000) (denying a motion for leave to file an *amicus* brief out of time in part because “the issue [movant] seeks to address has been adequately briefed by the [parties]”).

II. If the Secretary Grants Fall River's Motion, The Secretary Should Provide For Additional Briefing

For the foregoing reasons, the Motion should be denied. However, if the Secretary elects to grant the Motion, Weaver's Cove and Mill River separately request that the Secretary issue a scheduling order in their respective proceedings permitting Appellants to submit additional reply briefs pursuant to 15 C.F.R. § 930.127(e)(3). Permitting such reply briefing is necessary to preserve the Appellants' rights, and is consistent with fundamental precepts of fairness. NOAA recognizes as much, stating that when an opposing party raises issues not addressed by an appellant, that appellant "should be able to reply since appellant bears the burden of persuasion on the appeals." CZMA Federal Consistency Regulations, 71 Fed. Reg. 788, 799 (Jan. 5, 2006). The same principle is found in the FEDERAL RULES OF APPELLATE PROCEDURE. *See* FEDERAL RULES OF APPELLATE PROCEDURE 29(e) ("A court may grant leave for later filing, *specifying the time within which an opposing party may answer.*" (emphasis added)).

III. Conclusion

WHEREFORE, for the reasons set forth herein, Appellants request that the Secretary deny Fall River's Motion. In the alternative, if the Secretary grants Fall River's Motion, Appellants request that the Secretary issue a scheduling order permitting Appellants to file reply briefs in these proceedings pursuant to 15 C.F.R. § 930.127(e)(3).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B.F. Kiely". The signature is written in a cursive, somewhat stylized font. It is positioned above a horizontal line that spans the width of the signature area.

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CERTIFICATE OF SERVICE

Consistent with 15 C.F.R. § 930.127, copies of this Joint Response have been sent to the following:

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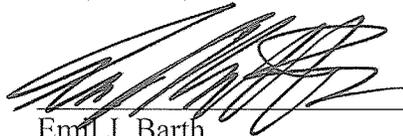
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