

No. _____

**UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE**

**Mill River Pipeline, LLC
Appellant,**

vs.

**Massachusetts Office of
Coastal Zone Management
Respondent.**

**REPLY BRIEF FOR APPEAL OF MILL RIVER PIPELINE, LLC
UNDER THE COASTAL ZONE MANAGEMENT ACT**

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ARGUMENT

I. Clarification of Facts

Mill River Pipeline, LLC (“Mill River”) set forth the facts underlying this appeal in its Principal Brief (“MR Br.”) and seeks here only to correct certain inaccuracies in the brief of the Massachusetts Office of Coastal Zone Management (“MCZM”):

First, MCZM argues that Mill River is trying to improperly “bypass” federal consistency review or “jeopardize the integrity” of the Coastal Zone Management Act (“CZMA”) by pursuing the appeal. MCZM Br. at 1, 10, 17-18. To the contrary, on January 10, 2007, MCZM found that Mill River had submitted the requisite materials to commence federal consistency review. *See* MR Br. App. at A-6. Mill River has a statutory right to a consistency determination within six months of the commencement of federal consistency review, 16 U.S.C. § 1456(c)(3)(A), after which Mill River has a statutory right to appeal an objection to the Secretary of Commerce (“Secretary”) for override. *Id.* While MCZM may disapprove of the statutory scheme of the CZMA, *see* MCZM Br. at 17-20, Mill River is not jeopardizing the integrity of the CZMA by pursuing its statutory rights.

Second, MCZM argues that Mill River requested a stay of the six-month review period and then refused to agree to one. MCZM Br. at 8. Mill River was initially receptive to a stay in order to secure the state permits that MCZM claimed were necessary for it to issue a concurrence. However, when the Massachusetts Department of Environmental Protection (“MADEP”), after advising Mill River and MCZM that the issuance of the permits was imminent, abruptly stopped processing state permits indefinitely, *see* MR Br. App. at A-8, the reason for a stay evaporated.

Third, throughout its brief, MCZM confuses and improperly addresses together the different activities under review in the separate consistency appeals of Mill River and

Weaver's Cove Energy, LLC¹ ("Weaver's Cove"), requiring Mill River to determine for itself which of MCZM's assertions apply to it. For example, MCZM improperly considers *Weaver's Cove's* proposed vessel transit activities to be before the Secretary in *Mill River's* appeal. *See, e.g.,* MCZM Br. at 12, 13, 27-28. The only activities under review in this appeal are those federally-permitted activities proposed *by Mill River* that triggered federal consistency review and were objected to by MCZM — the activities resulting in the discharge of fill material permitted by the U.S. Army Corps of Engineers ("USACE") being undertaken in conjunction with the construction and operation of natural gas pipeline facilities authorized by the Federal Energy Regulatory Commission ("FERC") (the "Project").² This is underscored by the scope of review set forth by both the CZMA regulatory scheme and the Secretary's prior decisions. *See, e.g.,* 16 U.S.C. § 1456(c)(3)(A) (Secretary reviews federally licensed or permitted activity objected to by the state); 15 C.F.R. §§ 930.120-122 (same); *Decision and Findings in the Consistency Appeal of the Korea Drilling Co., Ltd.* (Jan. 19, 1989), at 4-5 ("The activity that the [federal] agency is authorized to license or permit [when the Secretary sustains an appeal] is the one that the State coastal management agency reviewed for consistency.").

While *Weaver's Cove* is seeking a Letter of Recommendation ("LOR") from the U.S. Coast Guard ("USCG") for a vessel transit plan for LNG tankers that will deliver LNG to

¹ While Weaver's Cove is an affiliate of Mill River and will supply natural gas to Mill River's customers for transportation on Mill River's proposed pipeline, Weaver's Cove and Mill River are separate entities and have applied individually for the various permits required for their respective projects, including approvals for the activities under review in their respective consistency appeals before the Secretary.

² *See* Letter from MCZM to Mill River (July 6, 2007) (MR Br. App. at A-2) ("MCZM Objection") (objecting to activities related to FERC authorization and USACE permits only). Ironically, by earlier letter to Weaver's Cove, MCZM stated that "since Federal Energy Regulatory Commission authorization is not a Listed Activity, we will not perform a review of that action." Letter from MCZM to Weaver's Cove (Apr. 24, 2006) (Attached in Mill River Supplemental Appendix at SA-1).

its terminal, that separately permitted activity proposed by a different entity is not part of the permitted activities on appeal here.³ *See, e.g.*, 33 C.F.R. Part 127. *See also* FEIS at 1-13 (recognizing that only Weaver’s Cove must obtain USCG approval) (MR Br. App. at A-3). Moreover, vessel transits are not even under review in *Weaver’s Cove’s* appeal because an LOR is not a listed activity, *see* 301 Mass. Code Regs. 21.07 (listing activities subject to Massachusetts federal consistency review), and MCZM did not seek National Oceanic and Atmospheric Administration (“NOAA”) approval to review it as an unlisted activity. Therefore, contrary to MCZM’s assertions, vessel transit activities cannot be under review in this appeal. *See Decision and Findings in the Consistency Appeal of Long Island Lighting Co.* (Feb. 26, 1988), at 10 (stating that “[t]he CZMA consistency review net is simply not broad enough to encompass a related project when that project is not separately subject to consistency review”).

II. Mill River Has Demonstrated That The Project Is Consistent With The Objectives Of The CZMA

For purposes of demonstrating that the Project is consistent with the objectives of the CZMA, Mill River established in its Principal Brief that (1) the Project promotes the national interest in a significant and substantial manner (“Element 1”); (2) the national interest promoted by the Project outweighs any adverse coastal effects (“Element 2”); and (3) MCZM has not proposed an alternative to the Project consistent with the state’s coastal zone management program (“Element 3”). MCZM has marshaled no evidence to the contrary.

³ Notably, FERC only discusses vessel transit issues in its authorization for the Project pursuant to its role as the lead National Environmental Policy Act agency, and in relation to Weaver’s Cove, *see Weaver’s Cove Energy, LLC*, 112 FERC ¶ 61,070 at P 9 (2005) (“Approval Order”) (MR Br. App. at A-4); the USCG, not FERC, approves a vessel transit plan for tankers that will deliver LNG to Weaver’s Cove’s proposed terminal. *See* 15 U.S.C. § 717b(e)(1); Federal Environmental Impact Statement (“FEIS”) at 1-12 to 1-13 (MR Br. App. at A-3) (describing USCG’s role).

A. Element 1: Mill River Has Demonstrated That The Project Furthers The National Interest In A Significant And Substantial Manner

As demonstrated in Mill River's Principal Brief by a preponderance of the evidence, the Project furthers the national interest articulated by the CZMA in a significant and substantial manner because it will be a major coastal-dependent energy facility and, separately, will develop the coastal zone to provide such a facility. *See* MR Br. at 7-13. MCZM does not contest this substantive analysis regarding how the Project furthers the national interest. Instead, MCZM only argues that the Project, together with Weaver's Cove's proposed LNG import facilities, may not become "operational" because of a preliminary determination by the USCG as to a specific LNG vessel transit plan currently proposed by Weaver's Cove. This preliminary determination, in MCZM's estimation, diminishes both the Project's and the Weaver's Cove's proposal's furtherance of the national interest. *See* MCZM Br. at 12. MCZM's analysis completely avoids the substance of Mill River's Principal Brief.

1. The Secretary May Issue A Decision On The Merits In This Appeal Regardless Of Ongoing Review By Other Agencies

MCZM misapprehends the nature of the instant appeal. The Secretary's review is not a final sign-off on the Project after all other approvals have been issued for both the Project *and* Weaver's Cove's proposal, such that the Secretary is reviewing a project that can be "operational" if the Secretary overrides the state's objection. This is apparent from the CZMA statutory scheme, which contemplates that the Secretary's decision will precede those of other permitting agencies, *see, e.g.*, 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.130(e)(1), and from the Secretary's precedents, *see, e.g., Decision and Findings in the Consistency Appeal of Jessie W. Taylor* (Dec. 28, 1998), at 17 (because of the Secretary's override, "the [USACE] may issue the permit for the activity."). Accordingly, the Secretary is fully empowered to make a decision in the instant appeal by analyzing the benefits and impacts the Project would have once

constructed and operating as proposed, regardless of ongoing review by other permitting agencies of Weaver's Cove's proposal. Therefore, MCZM's assertion that the preliminary USCG determination should preclude an override by the Secretary in this appeal is at odds with how the CZMA appeals process works.

2. The Secretary's Decision In *Mobil Southeast* Does Not Undermine Mill River's Element 1 Analysis

MCZM's reliance on *Decision and Findings in the Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc.* (Sept. 2, 1994) ("*Mobil Southeast*") is misplaced. That decision does not support MCZM's argument that the extent to which the Project will further the national interest is diminished due to the preliminary USCG determination. MCZM Br. at 13. *Mobil Southeast* considered whether an oil exploration project would yield any benefits once constructed and operating due to *physical, geological* factors. *Mobil Southeast* at 40. In contrast, the likelihood of whether the USCG ultimately approves a vessel transit plan for Weaver's Cove's is not the type of probability that could diminish this Project's furtherance of the national interest under *Mobil Southeast* because it is a *regulatory* approval for a related project, not a physical factor outside of the applicant's control. If MCZM's interpretation of *Mobil Southeast* were to prevail on this point, no federally-permitted activity could be approved by the Secretary because every project faces the possibility that its permits or those of a related project could be denied, amended or withdrawn, or that the governing law could change.

This appeal also differs from *Mobil Southeast* because the Project's energy benefits are not speculative as they were for the proposal in *Mobil Southeast*. Mill River will transport regasified LNG from Weaver's Cove's terminal, rather than engage in exploration entailing geological uncertainties. Further, construction of the Mill River pipeline laterals will proceed in conjunction with that of Weaver's Cove's proposal. For this reason, unlike the

proposal in *Mobil Southeast*, the Project will not result in any adverse coastal impacts without also having substantial and significant benefits that will outweigh such impacts.

3. Safety Concerns About The Project Do Not Undermine Mill River's Element 1 Analysis

MCZM argues that because “others have voiced serious concerns about the Project’s [defined by MCZM as Mill River’s and Weaver’s Cove proposals together] untenable unsafeness,” the Project does not satisfy Element 1. MCZM Br. at 13. These “concerns” do not undermine Mill River’s analysis demonstrating that the Project satisfies Element 1. Safety is not an aspect of the Secretary’s Element 1 review. *See, e.g.*, 16 U.S.C. §§ 1451-1452 (safety issues not included as part of national interest for Element 1). Nevertheless, each of the concerns raised in the sources cited by MCZM, almost all of which are related to Weaver’s Cove’s proposal only, has been fully addressed in the consolidated record (“Record”), *see, e.g.*, Approval Order at PP 80-99; FEIS at 4-230 to 4-296; Response of Weaver’s Cove, *et al.*, to Filing by Mass. Atty. Gen., *et al.* (filed before FERC June 17, 2005) (MR SA-2), and have been determined not to affect the conclusion that Mill River’s proposal is “required by the public convenience and necessity.” Approval Order at P 55. Further, construction and operation of the Mill River pipeline laterals must comply with the Department of Transportation’s pipeline safety regulations. *See* 49 C.F.R. Part 192.

B. Element 2: Mill River Has Established That The National Interest Furthered By The Project Outweighs Any Adverse Coastal Effects

1. The Secretary Has Sufficient Information To Make An Override Determination

MCZM contends that since the state objected to Mill River’s consistency certification on the basis of insufficient information, there is also insufficient information for the Secretary to override MCZM’s objection. MCZM Br. at 1, 21. MCZM is wrong. The only

“information” that MCZM contends is lacking is the issuance of certain state permits.⁴ See MCZM Br. at 18. The state agencies have sufficient information to act on these permits, but just have not done so. See Certificate on the Supplemental Final Environmental Impact Report (Jul. 28, 2006) (MR SA-3) (finding that “the state permitting agencies have *adequate information* on which to . . . *issue necessary permits for the project*” (emphasis added)). The failure of state agencies to act on permit applications does not preclude the Secretary from making an override determination on the Record pursuant to his *de novo* review. CZMA Federal Consistency Regulations, 71 Fed. Reg. 788, 822 (Jan. 5, 2006) (“Final Rule 2006”).

MCZM also argues that without the issuance of state permits, the extent of adverse effects cannot be determined because these state permits may impose conditions and mitigation measures. MCZM Br. at 15-17. However, as Mill River demonstrated, MR Br. at 16-21, mitigation measures that have been imposed on the Project — by FERC and, to the extent it has acted, by the state⁵ — already will mitigate adverse effects such that these effects will be minimal or non-existent, and thus outweighed by the national interest. Any *additional* mitigation measures or conditions that the state might impose may *further* reduce any remaining adverse coastal effects, but would not alter the conclusion that the national interest outweighs any such effects.

⁴ In the MCZM Objection, MCZM addresses Weaver’s Cove’s and Mill River’s consistency applications together, stating that there are multiple state permits outstanding that must be issued before MCZM can issue a concurrence. However, the only outstanding state authorization for Mill River is a Chapter 91 Waterways License.

⁵ As discussed in Mill River’s Principal Brief, *see* MR Br. at 16, MADEP has evaluated the Project’s impacts on wetlands and surface water, and issued a Section 401 Water Quality Certification (“WQC”) (*see* Response to Comments on Federal Consistency Certifications, Att. C (MR Br. App at A-12) (excerpted at MR SA-4)) finding that “there is reasonable assurance the project or activity will be conducted in a manner which will not violate applicable water quality standards at 314 CMR 4.00.” WQC, at 1.

2. The Record Evidence Demonstrates With Sufficient Definiteness That Potential Adverse Effects Are Minimal, Temporary And Mitigatable

The Record demonstrates that the Project's adverse impacts would be minimal and temporary, either standing alone and/or after the institution of mitigation measures. MR Br. at 14-23. As a result, any adverse effects are clearly outweighed by the national interest. Nowhere does MCZM substantively challenge this evidence or the conclusions in Mill River's Principal Brief. Instead, MCZM merely takes issue with certain language used in Mill River's *brief*, arguing that this language (*e.g.* "majority", "would be expected") means that the Project's impacts are too indefinite for the Secretary to reach a decision. MCZM Br. at 21-23. MCZM is superficially comparing language in the brief to language used in a conclusion in *Decision and Findings in the Consistency Appeal of Islander East Pipeline Co., LLC* (May 5, 2004) ("*Islander East*"), which conclusion was found invalid in *Connecticut v. U.S. Dep't of Commerce* because it "said nothing definitive about the duration of the adverse coastal effects caused by anchor scars," 2007 WL 2349894, at *12. In other words, the *Connecticut* court found that the underlying record did not support the conclusion drawn in *Islander East*. This case, however, has a very different, more comprehensive underlying record than *Islander East*, and MCZM's attempt to draw Mill River's conclusions into question based upon word play is unavailing.

Foremost, MCZM does not recognize that the brief itself is not a technical report; it provides a summary of the *scientific evidence and data in the record* supporting the conclusion that the adverse effects of the Project do not outweigh the national interest. The Record supporting the statements in Mill River's Principal Brief demonstrates that adverse effects have been closely examined and determined with a sufficient level of definiteness. Below is a matrix identifying the data and evidence in the Record, including the FEIS which separately identifies

its own supporting studies and data,⁶ that corresponds to the statements made in Mill River’s Principal Brief that MCZM claims are “tautological and meaningless,” *see* MCZM Br. at 21-22. This evidence and data demonstrates, with *quantification* and *definiteness*, that any adverse effects are minimal and temporary or will be mitigated to that level:

Brief Quote	FEIS Cite	Supporting Data
“While there could be secondary impacts from the loss of vegetation . . . ‘the majority of these effects would be minor and temporary and would diminish upon restoration and revegetation.’” (MR Br. at 18, citing the FEIS)	FEIS at 4-92 to 4-93	WQC; Federal Consistency Certification, App. F §§ 1.2 & 6.2.3 (MR Br. App. at A-1).
“Because pipeline construction will only result in temporary impacts on streams and rivers, the impact of fish and other aquatic organisms is expected to be localized and short term.” (MR Br. at 20)	FEIS at 4-112 to 4-114	WQC; Federal Consistency Certification, App. A §§ 2.2, 3.0, 4.0; Water Quality Certification Appl., Att. A §§ 3.2, 3.3, 4.2 & 7.2.3 (MR SA-5).
“In-stream turbidity levels are however, expected to decrease ‘rapidly’ after construction activities are completed, and suspended sediment levels would be expected to return to preconstruction levels soon after construction in each stream is completed.” (MR Br. at 20-21)	FEIS at 4-112 to 4-114	WQC at Conditions 18 & 21; Federal Consistency Certification, §§ 4.1.2 & 4.2.1 and App. A §§ 2.0, 3.0 & 4.0.

The data and evidence identified here and in the Principal Brief⁷ supports the conclusion that any unavoidable adverse impacts associated with pipeline construction will not be significant because they would be spread out along the pipeline routes, individually small in extent, and temporary in duration.

⁶ For example, the FEIS cites to scientific studies by Vinkour & Shubert (1987) and Blais & Simpson (1997) that directly support the quotes in the matrix below regarding aquatic life impacts and suspended sediment levels resulting from pipeline construction. *See* FEIS at 4-112 & 4-113. Although MCZM’s brief recognizes that these quotes were based on the FEIS, *see* MCZM Br. at 23, it ignores the supporting studies discussed throughout the FEIS and elsewhere in the Record.

⁷ As discussed in the Principal Brief, Mill River has eliminated or mitigated potential adverse impacts by, for example, co-locating segments of the pipeline laterals along existing rights-of-way, defining the limits of construction work areas, and through the employment of construction techniques that comply with FERC Procedures. *See* MR Br. at 14-21.

Equally unavailing is MCZM's suggestion that the "logic" of *Connecticut v. Department of Commerce* is applicable to the conclusions advanced by Mill River in the instant proceeding. The *Connecticut* conclusion from which MCZM derives this "logic" dealt with consideration of only *minimum* adverse effects (e.g., recovery of shellfish beds would take "at least 3 to 5 years") which provided "just a floor, not a ceiling" on adverse effects. 2007 WL 2349894, at *12. In that case, the court held that reliance on the floor did not support the conclusion that adverse effects associated with the Islander East project would be temporary. In the instant case, the Record provides data and evidence on both the *extent* and *duration* of impacts which demonstrate that such impacts are minimal and temporary. See, e.g., FEIS 4-93, Table 4.5-2 (quantifying extent of acreage impacts from construction); Second Supplemental Draft Environmental Impact Report, App. 2-1 (affected salt marshes and coastal dunes will be immediately restored) (MR SA-6). See also WQC, Conditions 21 (affected streams will be restored within 24 hours) and 28 (wetlands vegetation will be re-established within two growing seasons). In fact, MCZM fails to identify where Mill River has relied only on a "floor" for purposes of quantifying adverse effects. There is sufficient quantification of adverse effects to establish that the national interest promoted by the Project outweighs any such adverse effects.

C. Element 3: There Are No Reasonable Alternatives To The Project

MCZM misapprehends Element 3. MCZM "bears the burden of identifying, with sufficient specificity, an alternative that is consistent with its coastal management program." *Islander East* at 35. If MCZM "meets that burden, the burden then shifts to [the project proponent] to show that the alternative is either unavailable or unreasonable." *Islander East* at 35. Here, MCZM has completely failed to identify any alternative that is consistent with its coastal management program. As NOAA has explained, "[i]f a State cannot make a finding of consistency for an alternative on appeal, then the State would not prevail on [] element [3]."

Final Rule 2006 at 820. *See also Decision and Findings in the Consistency Appeal of Va. Elec. & Power Co.* (May 19, 1994), at 38. Because MCZM has not identified an alternative that is consistent with its coastal management program, MCZM cannot prevail on Element 3.

MCZM's consideration of LNG import projects is inapposite. MCZM Br. at 25. These are not "alternatives" under NOAA's regulations: "As contemplated by NOAA's regulations, an alternative consists of one or more changes to the project that would allow the project, albeit in a somewhat different form, to achieve its primary purpose in a manner consistent with the state's coastal management program." *Decision and Findings in the Consistency Appeal of Millennium Pipeline Co.* (Dec. 12, 2003), at 21. Unrelated projects of a wholly different character have nothing to do with whether Mill River's proposed activity, with one or more changes, can be conducted in a manner consistent with MCZM's coastal management program.

III. Mill River Has Demonstrated That The Project Is Necessary In The Interest of National Security

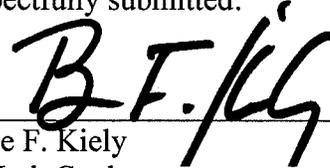
MCZM's reply to Mill River's national security analysis, MR Br. at 25-26, merely discusses Weaver's Cove activities at issue in the LOR process before the USCG, which, as explained above, are not under review in this appeal and with which Mill River is not involved.⁸ MCZM Br. at 25-30. Moreover, MCZM's contention that these separate activities cause the Project that is under review to "impair national security," *id.* at 28, is not supported by the Record.

⁸ Further, neither the preliminary assessment, nor the USCG Commandant's speech and USCG report that MCZM cites, MCZM Br. at 27-30, offers any assessment about whether the Project under review here is in the interest of national security.

CONCLUSION

For the foregoing reasons and those stated in its Principal Brief, Mill River respectfully requests that the Secretary override the MCZM Objection.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "B.F. Kiely", written over a horizontal line.

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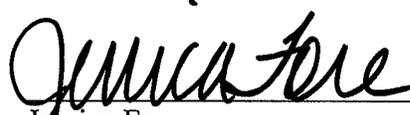
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