

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

MILL RIVER PIPELINE, LLC,)
)
<i>Appellant,</i>)
)
v.)
)
MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,)
)
<i>Respondent.</i>)

**RESPONSE OF MILL RIVER PIPELINE, LLC OPPOSING FALL RIVER'S
MOTION FOR LEAVE TO INTERVENE**

I. INTRODUCTION

Mill River Pipeline, LLC (“Mill River”)¹ and its affiliate Weaver’s Cove Energy (“Weaver’s Cove”), LLC filed their respective Notices of Appeal in the referenced proceeding on August 27, 2007 pursuant to the Section 307(c)(3)(A) of the Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1456(c)(3)(A) and 15 C.F.R. §§ 930.120-131. The City of Fall River, Massachusetts (“Fall River”) filed a motion for leave to intervene (“Motion”) and supporting memorandum of law (“Fall River’s Memorandum) in the referenced proceeding on September 6, 2007. Mill River requests that the Secretary of Commerce (“Secretary”) deny the Motion for the

¹ For the purposes of this Response, the term “Project” refers to: (a) Mill River’s proposal to construct and operate two lateral pipelines to transport regasified LNG from Weaver’s Cove’s proposed LNG import terminal to interconnections with Algonquin Gas Transmission Co.’s pipeline system, which was approved by the Federal Energy Regulatory Commission (“FERC”) on July 15, 2005 in *Weaver’s Cove Energy, LLC, et al.*, 112 FERC ¶ 61,070 (2005), and (b) those activities related to the installation of the lateral pipelines for which Mill River filed applications for dredge and fill permits with the United States Army Corps of Engineers under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344. This Project is the activity on review by the Secretary of Commerce (“Secretary”) in the referenced proceeding.

following reasons:

The Motion should be denied pursuant to Section 555(b) of the Administrative Procedure Act (“APA”). 5 U.S.C. § 555(b). Section 555(b) provides in relevant part:

So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.

Id.

While this provision establishes the right of interested persons to participate in administrative proceedings, it explicitly limits the exercise of this right only to those circumstances when “the orderly conduct of public business permits” such participation. *See Nichols v. Bd. of Trustees of the Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 897 (D.C. Cir. 1987) (An interested person only has a right to intervene “if his participation in the administrative process dovetail[s] with ‘the orderly conduct of public business.’”); *Easton Utils. Comm’n v. Atomic Energy Comm’n*, 424 F.2d 847, 852 (D.C. Cir. 1970) (“We do not believe that the affirmative grant of a right to appear is blindly absolute, without regard to . . . [whether] ‘the orderly conduct of public business permits.’”). For the following reasons, the Secretary should find that Fall River’s participation in the instant consistency appeal would be in direct conflict with the “orderly conduct of public business,” and therefore should deny the Motion.

II. ARGUMENT

The Motion should be denied because Fall River’s intervention in Mill River’s consistency appeal would disrupt the “orderly conduct of public business” in the appeal. 5 U.S.C. § 555(b). This statutory limitation has been interpreted to “permit[] denials of requests for leave to intervene [in agency proceedings] when, for example, other parties to the proceeding

adequately represent the would-be intervenor's viewpoint or intervention would broaden unduly the issues considered, obstruct or overburden the proceedings, or fail to assist the agency's decisionmaking." *Nichols*, 835 F.2d at 897. The Motion should be denied because each of these considerations militates against permitting Fall River to participate in this proceeding.

A. Fall River Is Already Adequately Represented In This Proceeding By The Massachusetts Office of Coastal Zone Management

The Motion should be denied because another party to this proceeding, the Massachusetts Office of Coastal Zone Management ("MCZM"), adequately represents Fall River's interest. *Id.* Under the doctrine of *parens patriae*², "a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all of its citizens" including the interests of the "subdivision[s] of that state." *Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). In this proceeding, MCZM represents the interests of Massachusetts, including the subdivision of Fall River. MCZM is the state agency charged with representing the interests of Massachusetts in its coastal zone and enforcing the state's CZMA program and policies, both of which involve the sovereign interests of Massachusetts in its coastal resources and the CZMA regime. *See* Massachusetts Coastal Zone Management Plan at 6 (2002). Accordingly, Fall River's Motion should be denied because Fall River's interests are already properly and adequately represented by MCZM.

A subdivision of a state may overcome the presumption of adequate representation established for this proceeding by the doctrine of *parens patriae*, but the burden is high: a "minimal showing" that the state's representation of its subdivision is not adequate will

² This doctrine applies to the consistency appeal at issue because the Secretary is acting in a judicial capacity. *See Exxon Corp. v. Fischer*, 807 F.2d 842, 845-46 (9th Cir. 1987) (applying the judicial doctrine of preclusion to the Secretary's consistency appeal decision because "the Secretary was acting in a judicial capacity.").

not suffice. *Higginson*, 631 F.2d at 740. Instead, the subdivision must “*demonstrate* that its interest is in fact different from that of the state and that that interest will not be represented by the state.” *Id.* (emphasis added). Fall River does not meet the high burden imposed by the doctrine of *parens patriae* because it does not articulate how its interests are any different from MCZM’s interests. Fall River merely alleges that its interests in this proceeding are in “protecting the coastal zone” and in the “harm caused . . . by the Project and the related impacts to the coastal zone surrounding the city.” Fall River’s Memorandum at 6, 7-8. However, these are the same as MCZM’s interests. As Fall River acknowledges, MCZM was obligated under the CZMA “to conduct Federal Consistency Review to determine whether the Project is consistent with the enforceable policies of the Massachusetts Coastal Zone Management Plan.” *Id.* at 3. Further, with respect to a project seeking approval under the CZMA, MCZM has the obligation to consider project impacts on the coastal zone and to protect the resources of the coastal zone. *See* Massachusetts Coastal Zone Management Plan at 3, 6. Therefore, because by its own admission its claimed interests are *the very same* as MCZM’s, and because MCZM has an obligation to represent those interests, Fall River’s Motion should be rejected.

Finally, in its Motion, Fall River cites to two consistency appeal decisions of the Secretary to support its assertion that its interest in Mill River’s appeal is strong enough that the Secretary should permit it to intervene. However, both of these decisions are not relevant here. In the *Decision and Findings in the Consistency Appeal of the Virginia Electric Power Co.* (May 19, 1994) (“*VEPCO Decision*”), the City of Virginia Beach was granted intervenor status, but there, unlike here, Virginia Beach was the proponent of the activity under review by the Secretary. *VEPCO Decision* at 2, 4 & note 5*. Virginia Electric Power Co. was the principal appellant in the case only because it had to apply for the FERC authorization for the activity on

behalf of Virginia Beach, which triggered consistency review. *Id.* at 2, 4. Further, *the activity under review was not an energy project under the CZMA regulations*, and thus, to the extent the *VEPCO Decision* sets any precedent with respect to intervention, it is inapplicable given the recent changes to the regulations governing the instant appeal arising under the Energy Policy Act of 2005, Pub. L. No. 109-58, 19 Stat. 594 (2005) (“EPAAct 2005”), that are discussed in Section II-B, *infra*.

The *Decision and Findings in the Consistency Appeal of Amoco Production Co.* (July 20, 1990) (“*Amoco Decision*”) also does not support Fall River’s intervention. In that case, the North Slope Borough *was invited* by the Under Secretary for Oceans and Atmosphere to file a brief. *Amoco Decision* at 2-3. To the best of Mill River’s belief, no such invitation to Fall River has been extended by the Secretary or his delegatee in this case. Further, *the activity under review was not an energy project under the CZMA regulations*, and thus, to the extent the *Amoco Decision* sets any precedent with respect to intervention, it is likewise inapplicable given the recent changes to the regulations governing the instant appeal that are discussed in Section II-B, *infra*.

B. Fall River’s Intervention Would Overburden And Obstruct This Proceeding

Fall River’s intervention would overburden and obstruct the instant appeal proceeding because allowing Fall River to participate would be contrary to the rules for public participation in consistency appeals of energy projects promulgated by the National Oceanic and Atmospheric Administration (“NOAA”).³ Specifically, the NOAA regulations implementing the CZMA were recently amended to exclude energy projects from the public comment procedures

³ The Project plainly is an “energy project” under the regulations because it involves the siting, construction and operation of a facility designed to transport natural gas and is subject to review by Massachusetts pursuant to the relevant regulations. *See* 15 C.F.R. § 930.123(c) (defining “energy project”).

that apply to other projects on consistency appeal. 15 C.F.R. § 930.128(b) (stating that “[e]xcept in the case of appeals involving energy projects, the Secretary shall provide a 30-day period for the public and interested Federal agencies to comment on the appeal” (emphasis added)).

NOAA has explained the basis for this recent change to its regulations, making clear that the purpose of the change is to preclude interventions such as that proposed here by Fall River. In the Final Rule describing the change discussed above, NOAA acknowledges two rationales for this carve-out of participation at this stage of the proceeding for persons that are not the principal parties to the proceeding (*i.e.* the appellant and the state agency designated to administer the state coastal management program). First, as required by EPLA 2005, the Secretary is limited to considering only the “consolidated record maintained by the lead Federal permitting agency” on appeal of energy projects, 15 C.F.R. §§ 930.127(c)(3) & (i)(1), and thus cannot take into account public comments unless they are part of the consolidated record. *See Coastal Zone Management Act Federal Consistency Regulations*, 71 Fed. Reg. 788, 799-800 (Jan. 5, 2006) (“Final Rule”). Relatedly, NOAA has also made a determination that public participation beyond those stages of the proceedings underlying the consolidated record will hinder the ability of the Secretary to meet the time frame for review of energy projects set forth by EPLA 2005. *Id.* at 800. In the instant appeal, the consolidated record is already closed (and, as discussed in Section II-C *infra*, Fall River already had full opportunity to submit comments to be part of that record, of which it availed itself). Also, as determined by NOAA in the Final Rule, participation at this stage by a person such as Fall River would obstruct the Secretary’s ability to complete timely review of the Project. Accordingly, Fall River’s intervention in this proceeding would be precisely the kind of participation that the regulations exclude, and therefore, the Motion should be denied.

C. Fall River's Intervention Will Not Assist The Secretary In His Decisionmaking

Fall River's Motion should be denied because Fall River's intervention will be unhelpful to the Secretary in this proceeding. An agency can limit intervention in a proceeding if such intervention will result in the introduction of cumulative or redundant information for the agency's consideration. *See Koniag, Inc. v. Andrus*, 580 F.2d 601, 615-16 (D.C. Cir. 1978). Because Fall River has already submitted comments on the CZMA-related aspects of the Project that are part of the consolidated record before the Secretary, and because Fall River has had full opportunity to make its views known concerning Mill River's consistency appeal in those comments, its intervention would be cumulative, redundant and unnecessary. Therefore, the Secretary should deny Fall River's Motion on this basis as well.

In addition, an agency can limit intervention when a would-be intervenor can participate through "the administrative avenues established by other statutes and agency rules for participation." *Easton Utils. Comm'n*, 424 F.2d at 852. NOAA's Final Rule implementing the amendments to the regulations specifically recognizes the appropriate means for persons such as Fall River to participate in the consistency appeal of an energy project: the Final Rule states that "to have their views included in the consolidated record, *interested parties* should submit comments on energy projects when the lead Federal permitting agency provides such comment periods according to applicable Federal law, and through the State agency's CZMA review, *including comments related to the CZMA and potential appeals to the Secretary.*" Final Rule at 800 (emphasis added). *See Colo. River Conservation Dist. v. United States*, 593 F.2d 907, 911 (10th Cir. 1977) (stating that "it is settled that the administrative agency may determine the appropriate time" for interested parties to participate in proceedings before it).

Not only did Fall River have the opportunity before MCZM to make its views known with respect to Mill River's consistency appeal, it availed itself of that opportunity on an extensive basis. As Fall River concedes in its Motion, Fall River has been an active participant in the proceedings underlying the consolidated record. *See* Fall River's Memorandum at 8 (stating that "Fall River has provided public comments during numerous stages of review and permitting of the project"). But more importantly, as contemplated by the Final Rule, Fall River submitted comments on Mill River's federal consistency certification to MCZM on both procedural and substantive issues. *Id.* at 3.

Given that Fall River has already submitted its views to the Secretary through the consolidated record and has had the opportunity to voice its specific concerns regarding this appeal in those comments filed as part of the consolidated record, permitting its participation in Mill River's appeal would be cumulative, redundant and fail to assist the Secretary's decisionmaking. Therefore, for all of these reasons, Fall River's Motion should be denied.

D. Fall River's Intervention Would Unduly Broaden The Issues In This Proceeding

Fall River's intervention seeks to unduly broaden the issues presented by the parties for consideration beyond the scope of this proceeding, and therefore its Motion should be denied on this ground as well. Fall River indicates in its Motion that its intervention in this proceeding will allow it to "address the substantial public safety concerns that Fall River has voiced through the development and review of the Project." *Id.* at 8. However, in this proceeding, the Secretary will only consider whether the Project is "consistent with the objectives or purposes of the [CZMA]," 15 C.F.R. §§ 930.120 & 930.121, or "necessary in the interest of national security." *Id.* §§ 930.120 & 930.122. No aspect of the analysis of whether

the Project is “consistent with the objectives or purposes of the [CZMA]” contemplates the consideration of public safety issues. *See, e.g.*, 16 U.S.C. §§ 1451-1452 (Sections 302 and 303 of the CZMA do not mention public safety issues posed by the activity under review as purposes or interests of the CZMA); *Decision and Findings in the Consistency Appeal of the Korea Drilling Co., Ltd.*, at 10-11 (Jan. 19, 1989) (with respect to adverse coastal effects, the Secretary will only look at impacts on natural resources in the coastal zone resulting from the activity under review); *Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C.*, at 10 (May 5, 2004) (same). Nor does an evaluation of whether the Project is “*necessary in the interest of national security*” consider the public safety issues posed by the Project. 15 C.F.R. §§ 930.120 & 930.122 (emphasis added). Therefore, the public safety concerns that Fall River wants to raise before the Secretary are outside of the scope of this proceeding.

The point that Fall River’s stated concerns are outside of the scope of this proceeding is underscored by the fact that the public safety issues related to this Project are considered by the FERC and the U.S. Department of Transportation’s Office of Pipeline Safety, which are both federal agencies with statutory mandates and the expertise to evaluate the public safety aspects of the Project. *See, e.g., Weaver’s Cove Energy, LLC, et al.*, 112 FERC ¶ 61,070; *Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted in Conjunction with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the Federal Energy Commission*, at 3 (May 2002) (identifying the statutory basis for the Office of Pipeline Safety’s jurisdiction over the public safety aspects of pipeline facilities). Therefore, because Fall River has indicated that it will seek to raise issues that are outside of the limited scope of this

proceeding, its motion should be denied because Fall River's intervention will unduly broaden the issues for consideration by the Secretary.

III. CONCLUSION

For the foregoing reasons, Mill River respectfully requests that the Secretary deny Fall River's Motion requesting leave to intervene in Mill River's consistency appeal.

Respectfully submitted,



Bruce F. Kiely
Jessica A. Fore
Emil J. Barth
Baker Botts L.L.P.
1299 Pennsylvania Avenue, NW
Washington, DC 20004
202-639-7711

ATTORNEYS FOR
MILL RIVER PIPELINE, LLC

Dated: September 24, 2007

CERTIFICATE OF SERVICE

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

Mr. Joel La Bissonniere (via courier)
Assistant General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
1305 East-West Highway
SSMC-4, Room 6111
Silver Spring, MD 20910

Ms. Carol Iancu (via first-class mail)
Assistant Attorney General, Environmental Protection Division
Massachusetts Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108

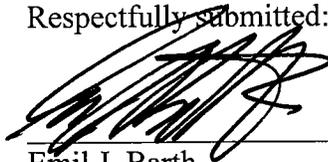
Mr. Bruce Carlisle (via first-class mail)
Acting Director, Massachusetts Office of Coastal Zone Management
251 Causeway Street, Suite 800
Boston, MA 02114-2136

Ms. Kimberly Bose (via first-class mail)
Federal Energy Regulatory Commission
888 1st Street N.E.
Washington, D.C. 20426

Ms. Karen Kirk Adams (via first-class mail)
Chief, Regulatory Branch, U.S. Army Corps of Engineers
696 Virginia Rd.
Concord, MA 01742-2751

Ralph T. Lepore, III (via first-class mail)
Holland & Knight LLP
10 St. James Avenue
Boston, MA 02116

Respectfully submitted:



Emil J. Barth
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
(202) 639-1103
Attorney for Mill River Pipeline, LLC

Dated: September 24, 2007