

#### IV. Ground II – Upholding The NYSDOS Decision Will Not Result In Any Significant Impairment Of National Security Interests.

Millennium also argues that the Secretary should override the NYSDOS Decision and approve the Millennium pipeline because it is “necessary in the interest of national security.”<sup>144</sup> Millennium offers two arguments in support of its claim. First, Millennium states that the “[n]ation’s energy security, which is a key component of our national security, would be significantly impaired if the Secretary did not permit the Project to proceed.”<sup>145</sup> Second, Millennium claims that “the Project can provide a degree of energy security that is an important element of our national security in light of the terrorist threats that the Nation now faces in the wake of September 11’s tragic events.”<sup>146</sup>

At the outset, it is important to note that, in the entire history of the CZMA, the Secretary has *never* overridden a State objection to an energy-related project (or any project for that matter) on the basis that it was “necessary in the interest of national security.”<sup>147</sup> The Ground II

---

<sup>144</sup> Millennium Initial Brief at 107.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 107-109.

<sup>147</sup> A complete listing of the cases includes: *Union Oil Co. of Cal.*, 1984 NOAA Lexis 16 (Nov. 9, 1984) (found energy project not necessary in interest of national security, but overrode state agency decision on other ground); *Exxon (SRU) (Santa Rosa)*, 1984 NOAA Lexis 15 (Nov. 14, 1984) (upheld state agency decision, also found that energy project not necessary in interest of national security); *Gulf Oil Corp.*, 1985 NOAA Lexis 1 (Mar. 13, 1985) (found energy project not necessary in interest of national security, but overrode state agency decision on other ground); *Amoco Prod. Co.*, 1990 NOAA Lexis 49 (July 20, 1990) (found energy project not necessary in interest of national security, but overrode state agency decision on other ground); *Chevron U.S.A. Inc.*, 1990 NOAA Lexis 47 (Oct. 29, 1990) (upheld state agency decision, also found that energy project not necessary in interest of national security); *Asociacion de Propietarios de Los Indios*, 1992 NOAA Lexis 52 (Feb. 19, 1992) (upheld state agency decision, also found that construction-related project not necessary in interest of national security); *Mobil Exploration & Producing U.S. Inc. (Pulley Ridge)*, 1993 NOAA Lexis 4 (Jan. 7, 1993) (upheld state agency decision, also found that energy project not necessary in interest of national security); *Union Exploration Partners, Ltd. (Union Pulley Ridge)*, 1993 NOAA Lexis 3 (Jan. 7, 1993) (upheld state agency decision, also found that energy project not necessary in interest of national security); *Chevron (Destin Dome-Exploration)*, 1993 NOAA Lexis 2 (Jan. 8, 1993) (found energy project not necessary in interest of national security, but overrode state agency decision on other ground); *Virginia Elec. and Power Co. (Lake* (Continued...)

“hurdle” is clearly a high one; as the Secretary has noted, “[t]he regulation establishing the criteria for an override based on Ground II sets up a very difficult test.”<sup>148</sup> These regulations provide: “[a] federal license or permit activity . . . is ‘necessary in the interest of national security’ if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed.”<sup>149</sup> Thus, even projects directly related to defense or military operations could conceivably fail to meet this test; national security interests must be *significantly impaired* if the proposed project was not approved.

Clearly, Millennium’s pipeline does not meet this burden. First, the project has no relationship to national defense or military operations; it is a purely civilian, for-profit enterprise. That the project is energy-related is irrelevant; of the 15 energy-related CZMA appeals in the past, none have ever been found to be necessary in the interest of national security. And notably, all of these past decisions involved proposals to actually *develop* oil and gas resources in the U.S. that were located within the coastal zone. In contrast, Millennium’s proposed pipeline would do nothing more than move existing supplies of natural gas from Canada to other North American destinations. Therefore, any possible “energy security” claims Millennium might make are far

---

*Gaston*), 1994 NOAA Lexis 31 (May 19, 1994) (found water project not necessary in interest of national security, but overrode state agency decision on other ground); *Mobil Oil Exploration & Producing Southeast, Inc. (Mobil Manteo Drilling Discharge)*, 1994 NOAA Lexis 34 (Sept. 2, 1994) (upheld state agency decision, also found that energy project not necessary in interest of national security); *Mobil Oil Exploration & Producing Southeast, Inc. (Mobil Manteo POE)*, 1994 NOAA Lexis 33 (Sept. 2, 1994) (upheld state agency decision, also found that energy project not necessary in interest of national security); *Mobil Exploration & Producing U.S. Inc. (Mobil Pensacola)*, 1995 NOAA Lexis 37 (June 20, 1995) (found energy project not necessary in interest of national security, but overrode state agency decision on other ground); and *Vieques Marine Laboratories*, 1996 NOAA Lexis 19 (May 28, 1996) (upheld state agency decision, also found that shrimp farm project not necessary in interest of national security).

<sup>148</sup> *Chevron U.S.A. Inc.*, 1990 NOAA Lexis 47 (Oct. 29, 1990) (upheld state agency decision; also found energy project not necessary in interest of national security).

<sup>149</sup> 15 C.F.R. § 930.122 (2002).

less compelling than those of the numerous past energy project appeals the Secretary has considered, all of which failed to satisfy Ground II.

Millennium has not produced any substantive evidence or rationales for its claim that the project will contribute to national security. And as the Secretary has noted: “[g]eneral statements that a national security interest will be significantly impaired without more specific information to support these assertions do not meet the regulatory criteria.”<sup>150</sup> The Secretary has denied appeals on the basis of Ground II because the applicant relied on conclusory statements, and failed to provide actual data and evidence to support its claim.<sup>151</sup> Similarly here, Millennium has not produced any evidence or offered any serious explanation of how the national security interest would be impaired if the Secretary upheld the NYSDOS Decision.

The two past CZMA cases Millennium cites in its Initial Brief do not support Millennium’s arguments. First, Millennium misuses the case, *Mobil Exploration & Producing U.S., Inc.* (“*Mobil Pensacola*”). Millennium cites language from this case purportedly in support of its argument that natural gas projects satisfy the requirements of Ground II.<sup>152</sup> However, the

---

<sup>150</sup> See, e.g., *Chevron U.S.A. Inc.*, 1990 NOAA Lexis 47 (Oct. 29, 1990) (1984); see also *Asociacion de Proprietarios de Los Indios, Inc.*, 1992 NOAA Lexis 52 at \*27-28 (citations omitted) (Feb. 19, 1992) (“The Appellant has the burden of submitting evidence in support of its appeal. The Asociacion’s conclusory argument . . . does not assist an inquiry of how its proposed activities are necessary in the interest of national security. Because the Asociacion did not present any evidence to show that the . . . activities are necessary in the interest of national security, the Appellant has failed to carry its burden of submitting evidence in support of its appeal pursuant to Ground II. Accordingly, I find the requirements for raising Ground II have not been met.”)

<sup>151</sup> See, e.g., *Chevron U.S.A. Inc.*, 1990 NOAA Lexis 47 at \* 168-69 (Oct. 29, 1984) (Upheld the state agency’s decision; with regard to the applicant’s Ground II argument, the Secretary noted: “Neither Chevron nor any Federal agency commenting on Ground II has specifically explained how the national security interest of energy self-sufficiency or a national defense interest will be significantly impaired if [the project] is not allowed to proceed as proposed.”); *Mobil Exploration & Producing U.S. Inc. (Pulley Ridge)*, 1993 NOAA Lexis 4 (Jan. 7, 1993) (same); *Union Exploration Partners, Ltd. (Union Pulley Ridge)*, 1993 NOAA Lexis 3 (Jan. 7, 1993).

<sup>152</sup> Millennium Initial Brief at 108.

block quote cited in Millennium brief was *not* language describing the Secretary's findings in that case, but rather a description of comments filed by the *Department of Energy* in that proceeding – comments that ultimately failed to convince the Secretary. Specifically, the Secretary found in *Mobil Pensacola* that “[t]he comments in the administrative record fail to persuade me that a national defense or other national security interest will be significantly impaired if Mobil were not permitted to explore Pensacola Block 889 as proposed. . . . Therefore, based on the record before me, I now find that the requirements in Ground II have not been met.”<sup>153</sup>

Nor is Millennium's reliance on *Exxon (SRU) (Santa Rosa)* any more convincing.<sup>154</sup> In that case, the Secretary did *not* make a finding that the national interest would be significantly impaired if the energy project was prohibited. There, the Secretary did state generally that, “the production of the SYU oil and gas reserves directly supports the national defense objectives,” but declined to rule on Ground II, explaining: “However, I am delaying making any finding regarding whether these national defense or security interest would be ‘significantly impaired’ if the Appellant is not permitted to develop the SYU reserves ‘as proposed’ under Option A. . . . Because an environmental review of a potential alternative, ‘Option B,’ was pending, the Secretary did not issue findings on Ground II in that case.”<sup>155</sup>

Similarly here, the availability of several alternative routes demonstrates that the pipeline could still be built; therefore, upholding the NYSDOS decision would have no impact on the

---

<sup>153</sup> *Mobil Exploration & Producing U.S. Inc. (Mobil Pensacola)*, 1995 NOAA Lexis 37 at \* 98 (June 20, 1995).

<sup>154</sup> Millennium Initial Brief at 108.

<sup>155</sup> *Exxon (SRU) (Santa Rosa)*, 1984 NOAA Lexis 15 (Nov. 14, 1984).

pipeline's purported "energy security" contributions. Even if upholding the NYSDOS Objection meant that the pipeline could not be built at all, there would be no impact on national energy security interests. As described above, there are several other projects planned for the region which would add thousands of decatherms per day of additional pipeline capacity in the region -- capacity that will be more than adequate to meet demand under any growth scenario. In sum, requiring Millennium to re-route the pipeline or even preventing its construction altogether will not result in any "significant impairment" of national security.

Finally, Millennium's reference to "September 11's tragic events" as justification for building a natural gas pipeline is an unseemly attempt to take advantage of those events. Millennium offers little specific evidence for how its pipeline would alleviate concerns associated with the events of September 11<sup>th</sup>. Moreover, Millennium ignores the fact that because of the post-September 11 threats of terrorist attacks against pipelines, the proposed pipeline itself is a potential security *liability* in the areas where it would be located. Such threats have prompted the Federal Bureau of Investigation ("FBI") to issue warnings to energy industry officials of threats of terrorist attacks against natural gas pipelines,<sup>156</sup> and have spurred Congress to introduce legislation specifically designed to protect pipelines.<sup>157</sup>

---

<sup>156</sup> Atty. Gen. John Ashcroft, Press Conference (Nov. 26, 2001), transcript available at [http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11\\_26.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_26.htm) (the Attorney General confirmed that "[t]here was, maybe 10 days or close to two weeks ago, an uncorroborated report of undetermined reliability about natural gas. Frankly, those are the kinds of reports which we take seriously"). See also Karen E. Culp, *Pipelines Vulnerable, FBI Warns*, Springfield News Leader (Nov. 27, 2001), available at <http://www.springfieldnews-leader.com/terrorism/aftermath/pipelines112801.html>.

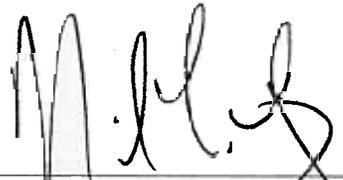
<sup>157</sup> See, e.g., "Pipeline Security and Safety Legislation," introduced in the U.S. House of Representatives on December 20, 2001, available at <http://www.house.gov/transportation/press/press2001/release167.html>. This bill was subsequently passed in the House and referred to the U.S. Senate.

In sum, Millennium has failed to show how the loss of this project will result in any “significant impairment” of national security, particularly in light of past CZMA cases where the Secretary has consistently ruled that even projects to develop domestic oil and gas supplies did not satisfy the requirements of Ground II. The Secretary must therefore reject Millennium’s request for an override based on Ground II and uphold the NYSDOS Objection.

**V. Conclusion**

Millennium has failed to establish that NYSDOS violated the procedural regulations of the CZMA, and has not demonstrated that the proposed pipeline is either consistent with objectives and purposes of the CZMA, or necessary in the interest of national security. The proposed pipeline route would have significant, long-term impacts on protected habitat zones, drinking water supplies, and other important coastal resources. There are, however, several other reasonable alternatives that would avoid these adverse impacts, while at the same time serving the purposes of the Project. As such, the Village respectfully requests the Secretary to uphold the NYSDOS Objection.

Respectfully submitted,



Neil L. Levy, Esq.  
Christian C. Semonsen, Esq.  
KIRKLAND & ELLIS  
655 Fifteenth Street, NW  
Suite 1200  
Washington, DC 20005

**Counsel for The Villages of Croton-on-  
Hudson and Briarcliff Manor,  
New York**

Dated: October 23, 2002