



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

AUG 20 2002

Mr. Daniel Riesel
Sive, Paget & Riesel
460 Park Avenue
New York, New York 10022

Re: Consistency Appeal of Millennium Pipeline Company, L.P.,
to the U.S. Secretary of Commerce pursuant to the Coastal
Zone Management Act, 16 U.S.C. § 1456 - Request to Intervene

Thank you for your letter of July 11, 2002, to Karl D. Gleaves,
Assistant General Counsel for Ocean Services, on behalf of the
Town of Cortlandt (Town) requesting status as a "party
co-defendant" or "intervenor."

On July 19, and July 22, 2002, comments were received on the
Town's request from Millennium Pipeline Company, L.P., (Appellant
or Millennium) and the New York Department of State (New York)
respectively. For reasons explained below, the Town is granted
the opportunity to file a brief and supplemental information in
the above-captioned consistency appeal as an amicus or friend of
the Secretary. The Town may file its brief in accordance with
the initial briefing schedule for this appeal, in addition to
comments it may submit during the public comment period. The
Town is not granted status as a "party co-defendant" or
"intervenor" in this matter.

Discussion

The Town seeks to participate in the above-captioned consistency
appeal as a party co-defendant or intervenor in a manner
recognizing "full participation" in all appeal proceedings,
including procedural teleconferences among the parties. The Town
argues that the granting of such "party co-defendant" status, or
"intervenor" status, is consistent with NOAA's practice in the
Consistency Appeal of Virginia Electric and Power Company
(1994) (VEPCO appeal). Both the facts and the procedure in the
VEPCO appeal were different than those in this case.

In the VEPCO appeal, the appellant acted on behalf of the City of
Virginia Beach (City) which was the entity to whom the appellant



VEPCO had granted an easement for construction of pipelines for a municipal water project over its lands abutting Lake Gaston. In order to complete the easement transaction sought by the City, VEPCO was required to obtain the permission of the Federal Energy Regulatory Commission (FERC) which licensed VEPCO's operation of the hydroelectric facility at Lake Gaston. VEPCO sought the permission "on behalf of" the City. The City and VEPCO submitted a joint consistency certification to FERC and a joint Notice of Appeal to the Secretary of Commerce after North Carolina's objection.¹ Throughout the appeal, VEPCO "acted on behalf of" the City which was the intended beneficiary of the FERC approval and at all times during the appeal, the real party in interest. In granting the City "applicant-intervenor" status, NOAA relied on the City's status as the beneficiary of VEPCO's permit application and the real party in interest.² In addition, VEPCO represented that it "intends to remain neutral" in the "dispute" between North Carolina and Virginia.³ NOAA concluded that VEPCO had no real interest in the issuance of the FERC license for its own use or benefit.⁴ NOAA stated that the critical factor in allowing the City to participate as if it were an appellant was the potential that VEPCO may not adequately represent the interests of the City in the appeal.⁵ In a CZMA consistency appeal, NOAA has never granted "intervenor" or "party" status to any entity other than an applicant, or the applicant acting jointly with the beneficiary or as real party in interest of the Federal license or permit application. The Town is neither an applicant nor a beneficiary of an application for license or permit.

¹ Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company from an Objection by the North Carolina Department of the Environment, Health and Natural Resources, May 19, 1994, 1-6.

²See, VEPCO Adm Rec 80, Letter of Ray Kammer, Deputy Under Secretary for Oceans and Atmosphere, to Arnold H. Quint, dated April 3, 1992.

³Id at 6

⁴Id at 4.

⁵Id at 6.

The Town argues that it meets the prudential standing requirements of Article III of the U.S. Constitution. However, the Town overlooks the fact that this is an administrative appeal process, not litigation in the Federal courts. The cases cited by the Town, *Secretary of the Interior v. California*, 464 U.S. 313, 316 (1984) and *Knaust v. City of Kingston*, 978 F. Supp. 86, 94 n.7 (ND.NY 1997) do not apply to the Town's standing in Millennium's consistency appeal. Both cases suggest, in dicta, that organizations with resource conservation objectives may be within the zone of interest protected by the procedural requirements of the CZMA. Even the dicta in the cases cited by the Town did not suggest that any entity other than the designated state coastal management agency had standing to substantively enforce the policies of a state coastal management program. Only the designated state agency may enforce the policies of its coastal management program. 15 CFR 930.6 (2000).

In addition, it is NOAA's longstanding view that the CZMA does not provide a basis for standing to any entity other than the state agency charged with the implementation of the statute, in this case, the New York Department of State. City of Sausalito v. O'Neill, 2002 WL 1460218, 2002 U.S. Dist. LEXIS 12322, No. C-01-01819 EDL (N.D.CA July 3, 2002) at 13; Serrano Lopez v. Cooper, 193 F.Supp.2d 424, 434, 2002 U.S. Dist. LEXIS 6901, (D.P.R. 2002); City of Lincoln City v. USDOJ and Confederated Tribes of Siletz Indians of Oregon, 2001 U.S. Dist. LEXIS 9865, Civil No. 99-330-AS (D.OR April 23, 2001)10-14. The Administrative Procedures Act, 5 USC 551 et seq., provides a remedy for appellants who were unsuccessful before the Secretary of Commerce.

In recognition of the fact that Millennium's pipeline project would enter the Town's jurisdiction as it exited the Hudson River, adjacent to Haverstraw Bay, and travel through the center of the community, the Town is granted the opportunity to act as a "friend of the Secretary" or *amicus* in this proceeding and may file a brief and supplementary data and information concurrently or no later than seven days following the filing of the brief of the party the Town supports. The granting of *amicus* status is analogous to NOAA's decision to allow the North Slope Borough and Alaska Eskimo Whaling Commission to "participate by filing briefs on the issues germane to" the Consistency Appeal of Amoco Production Company (1990).⁶ The Amoco consistency appeal

⁶ See, Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska, July 20, 1990, at ii.

involved issues of the fall bowhead whale migration which were of vital cultural and economic interest to the North Slope Borough and Alaska Eskimo Whaling Commission.⁷ In Amoco, as in this appeal, the unique perspectives and access to information of the requesting parties warranted additional opportunities to contribute information to the administrative record and participate as an *amicus* to the Secretary.

The initial briefing schedule has been set by the Assistant General Counsel for Ocean Services directing that Millennium's brief be filed no later than Monday, August 12, 2002, and New York's brief be filed no later than Monday, September 30, 2002. The Town may also file comments during the public comment period if it so chooses, as it would be entitled to do so were it not acting in an *amicus* capacity. If it chooses, the Town may seek subsequent permission to file a reply brief as an *amicus* when the time is appropriate. Since it is not a party, the Town will not participate in conferences among the parties or be copied on future communications among the parties. The Town's access to the administrative record as compiled will be the same as all members of the public. This office intends to have a website available which will post all of the documents entered into the record. The website should facilitate the participation of the Town in this consistency appeal.

If you have any questions concerning this decision or other aspects of this consistency appeal, please contact Assistant General Counsel for Ocean Services, Karl D. Gleaves, 301-713-2967, extension 204.

Sincerely,



James R. Walpole
General Counsel

cc: Frederic Berner
Sidley Austin Brown & Wood

Glen T. Bruening, General Counsel
New York Department of State

⁷ Id.