

SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

BEIJING
GENEVA
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8232

WRITER'S E-MAIL ADDRESS
fberner@sidley.com

September 25, 2002

Branden S. Blum, Esq.
Senior Counselor
National Oceanic and Atmospheric Administration
United States Department of Commerce
1305 East-West Highway
Silver Spring, MD 20910

Re: Federal Consistency Appeal of Millennium
Pipeline Company, L.P. from an Objection
by the New York Department of State

Dear Mr. Blum:

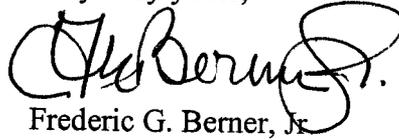
In its Initial Brief submitted to the Secretary of Commerce on August 12, 2002, Millennium Pipeline Company, L.P. ("Millennium") cited, *inter alia*, the interim order issued by the Federal Energy Regulatory Commission ("FERC") on December 19, 2001 (Exhibit 1) and the Biological Opinion issued by the National Marine Fisheries Service ("NMFS") on September 14, 2001 (Exhibit 8). Thereafter, the FERC issued a final order on September 19, 2002, and NMFS issued a supplemental Biological Opinion on September 6, 2002. Copies of those decisions are enclosed. Because the FERC and NMFS decisions reinforce the conclusions set forth in Millennium's Initial Brief and are relevant to the issues to be decided by the Secretary in this proceeding, Millennium requests that those decisions be received into the record of this proceeding as Exhibit 1A and Exhibit 8A, respectively.

Millennium understands that the New York Department of State may request an extension of the deadline for the submission of its initial brief and supporting materials until

Branden S. Blum
September 24, 2002
Page 2

October 16, 2002 in order to address the recent FERC and NMFS decisions. Millennium would have no objection to such an extension of time.

Very truly yours,



Frederic G. Berner, Jr.

Attorney for Millennium
Pipeline Company, L.P.

cc: Glen T. Breuning
William L. Sharp

FILED
OFFICE OF THE
SECRETARY 942357

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

2002 SEP 19 PM 4:46
FEDERAL ENERGY
REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Millennium Pipeline Company, L.P.

Docket Nos. CP98-150-000,
CP98-150-003,
CP98-150-004,
CP98-154-001,
CP98-154-002,
CP98-155-001,
CP98-155-002,
CP98-156-001, and
CP98-156-002

Columbia Gas Transmission
Corporation

Docket Nos. CP98-151-001 and
CP98-151-002

ORDER ISSUING CERTIFICATE,
GRANTING AND DENYING REQUESTS FOR REHEARING,
AND GRANTING AND DENYING REQUESTS FOR CLARIFICATION

(Issued September 19, 2002)

1. On December 19, 2001, the Commission issued an Interim Order authorizing Millennium Pipeline Company, L.P. (Millennium), among other things, to construct and operate a natural gas pipeline from a point in Lake Erie across the southern portion of New York to the city limits of Mount Vernon, New York.¹ The Interim Order, however, did not certificate a specific route through Mount Vernon to interconnect with Consolidated Edison Company of New York, Inc.'s (Consolidated Edison) high-pressure pipeline, but required that Millennium negotiate with elected officials and interested parties and citizens in Mount Vernon and work toward reaching an agreement on a route to an interconnect with Consolidated Edison. On May 6, 2002, after negotiating with Mount Vernon and Consolidated Edison, Millennium filed a letter with the Commission

¹Millennium Pipeline Company, L.P., 97 FERC ¶ 61,292 (2001).

Docket No. CP98-150-000, et al.

stating that it had reached a comprehensive settlement agreement regarding the route for Millennium's pipeline through Mount Vernon.

2. In this order, we will authorize Millennium's proposed route through Mount Vernon and issue a final certificate to Millennium to construct and operate its pipeline. This order finds that the Certificate Policy Statement does not apply to this proceeding. In addition, this order finds that the Interim Order, among other things, did not err (1) in holding that Millennium had demonstrated market support for its project; (2) in failing to address whether energy demand would be reduced as a consequence of the events of September 11, 2001; (3) in authorizing Millennium to construct facilities even though there are no pending applications to construct upstream facilities in Canada; and (4) in approving a negotiation process between Mount Vernon and Millennium for the route through Mount Vernon, but declining to approve a negotiation process involving other parties on other parts of Millennium's route. This order also finds that the final environmental impact statement (EIS) complied with the requirements of the National Environmental Policy Act of 1969 (NEPA), holding, among other things, that the final EIS (1) did not ignore the cumulative impacts of construction of downstream facilities; (2) adequately discussed alternatives to Millennium's project and alternatives to various route segments; (3) adequately discussed the ConEd Offset/Taconic Parkway Alternative; and (4) adequately discussed blasting in Westchester County, terrorism and security issues, dioxin and phosphorus issues, endangered and threatened species, and construction near the Catskill Aqueduct, the Briarcliff Manor Public Schools, the Indian Point Nuclear Power Plant, and the Jane E. Lytle Memorial Arboretum.

3. This order holds that the Interim Order did not err in issuing a certificate to Millennium prior to Millennium's receiving a consistency determination from New York under the Coastal Zone Management Act (CZMA). Further, this order finds that we are not required to revoke Millennium's certificate because New York objected to Millennium's consistency determination for the project.

I. Background

4. On December 22, 1997, Millennium filed an application in Docket No. CP98-150-000 proposing to construct and operate approximately 424 miles of primarily 24- and 36-inch diameter pipeline from an interconnection with facilities to be constructed by TransCanada PipeLines Limited (TransCanada) at the United States-Canada border at a point in Lake Erie through New York to a terminus in Mount Vernon. Millennium also proposed to provide open-access transportation services under Subpart G of Part 284 of the regulations, to engage in certain activities and transactions under Subpart F of Part 157, and to lease pipeline capacity to Columbia Gas Transmission Corporation

Docket No. CP98-150-000, et al.

(Columbia). Finally, Millennium requested a Presidential Permit and authorization under section 3 of the Natural Gas Act to site, construct, and operate facilities at the international border in order to import natural gas from Canada. Millennium proposed to interconnect its pipeline with Columbia, Algonquin Gas Transmission Company (Algonquin), and Tennessee Gas Pipeline Corporation (Tennessee).²

5. The last segment of Millennium's proposed system is in Westchester County, New York. In its application, Millennium proposed to construct its pipeline along the center of Consolidated Edison's electric transmission line right-of-way. On April 16, 1999, the Commission issued a draft EIS evaluating Millennium's proposals. In comments to the draft EIS, Consolidated Edison and the Public Service Commission of the State of New York (NYPSC) raised concerns about the proposed pipeline's following the center of Consolidated Edison's transmission line right-of-way. On June 28, 2000, in response to these comments, Millennium filed an amended application in Docket No CP98-150-002 that moved the proposed pipeline off Consolidated Edison's right-of-way onto State Routes 9 and 9A (the 9/9A Alternative). On March 12, 2001, the Commission issued a supplemental draft EIS that addressed, among other things, the 9/9A Alternative. In addition, the supplemental draft EIS identified another alternative, known as the ConEd Offset/State Route 100 Alternative, that would place the pipeline about 100 feet from the centerline of Consolidated Edison's electric towers. The ConEd Offset/State Route 100 Alternative would also follow the Taconic State Parkway for approximately 0.5 mile, from the intersection of the Taconic Parkway and Consolidated Edison's right-of-way at milepost 399.0A, and follow State Route 100 for approximately 1.8 miles to the intersection of State Route 100 and State Route 9A on the 9/9A Alternative at milepost 401.3.

6. On April 26, 2001, the Commission announced that it was evaluating an alternative, known as the ConEd Offset/Taconic Parkway Alternative, to the ConEd Offset/State Route 100 Alternative. Specifically, the ConEd Offset/Taconic Parkway Alternative would place the pipeline approximately 100 feet from the electric towers' conductors, rather than 100 feet from the centerline of the towers from mileposts 392.0A to 399.0A, moving the proposed pipeline approximately 30 to 40 feet from the ConEd Offset/State Route 100 Alternative. In addition, the ConEd Offset/Taconic Parkway Alternative would follow the Taconic Parkway, rather than State Route 100, from the

²In a companion application, in Docket No. CP98-151-000, Columbia proposed to abandon Line A-5 in order that Millennium's facilities could be constructed in Columbia's right-of-way and to lease capacity on Millennium's system so that Columbia could continue to provide service to its A-5 shippers.

intersection of the Parkway and Consolidated Edison's right-of-way at milepost 399.0A back to the originally proposed route near milepost 404.1. On October 4, 2001, the Commission issued a final EIS that responded to comments about the 9/9A Alternative, the ConEd Offset/State Route 100 Alternative, and the ConEd Offset/Taconic Parkway Alternative and that recommended the ConEd Offset/Taconic Parkway Alternative.

7. The Interim Order authorized Millennium's proposals and adopted the ConEd Offset/Taconic Parkway Alternative in Westchester County. The Interim Order, however, did not certificate a specific route for the Millennium pipeline through Mount Vernon because the citizens of that city raised numerous, specific concerns about pipeline construction through their community and objected to the location of Millennium's interconnection point with Consolidated Edison. Rather, the Interim Order required that Millennium negotiate with elected officials and interested parties and citizens in Mount Vernon and recommend a route to an interconnection with Consolidated Edison's line within 60 days of the date of the order, *i.e.*, by February 19, 2002.³ The Interim Order stated that, at the end of the negotiation period, the Commission would issue a final order authorizing Millennium to construct its pipeline, including a specific route to Millennium's termination point.⁴

8. On January 10, 2002, the Commission issued an order directing Consolidated Edison and KeySpan Corporation (KeySpan) to provide information on the location, size, and capacity of Consolidated Edison's facilities, as well as information on Consolidated Edison's claim that it needs to construct additional downstream facilities and information on potential alternative interconnection points in Mount Vernon with Millennium.⁵ The January 10 order held that a meaningful negotiation process in this proceeding that "can culminate in a route that to the greatest extent possible addresses the concerns of the Mount Vernon community" would be nearly impossible without this information. The January 10 order stated that "[i]f Consolidated Edison requests confidential treatment for any of the information that it submits, [the Commission] will require that any party,

³On February 20, 2002, the Director of the Office of Energy Projects (OEP) extended the negotiation period until March 5, 2002. On March 6, 2002, the Director of OEP extended the negotiation period until April 4, 2002.

⁴The Interim Order recognized that an alternative route through Mount Vernon could require additional consideration under the NEPA [42 U.S.C. § 4321, *et seq.*] and other provisions of law.

⁵Millennium Pipeline Company, 98 FERC ¶ 61,010 (2002). KeySpan was included in the order because it jointly owns some facilities with Consolidated Edison.

Docket No. CP98-150-000, et al.

including Mount Vernon, seeking to examine the information sign a non-disclosure agreement."

9. On January 15, 2002, Consolidated Edison and KeySpan filed the requested information but stated that the information "contains trade secret material, the disclosure of which would have a significant adverse effect upon [its] competitive position and the security of its system." On January 17, the Commission approved a proposed protective order and non-disclosure certificate in order to facilitate negotiations and protect the competitive positions of Consolidated Edison and KeySpan.⁶

10. On May 6, 2002, after negotiating with Consolidated Edison and Mount Vernon, Millennium filed a letter that identified a route through Mount Vernon (i.e., the Mount Vernon Variation) that would relocate the proposed pipeline from residential neighborhoods to industrial and commercial areas, that would reduce the amount of pipeline construction in Mount Vernon by 40 percent, and that would provide a mutually agreeable new point of interconnection with Consolidated Edison. Millennium's letter acknowledges that "non-jurisdictional facilities will need to be added to [Consolidated Edison's] system downstream of the delivery point" because it appears that Consolidated Edison does not have any facilities at the end point of the proposed route through Mount Vernon.

11. On May 9, 2002, the New York State Department of State (NYSDOS) issued a determination, objecting to the consistency certification for Millennium's proposed pipeline under the CZMA. The NYSDOS found that Millennium's proposals were inconsistent with New York's Coastal Management Program and the Village of Croton-on-Hudson's Local Waterfront Revitalization Program. Millennium has appealed NYSDOS' determination to the Secretary of Commerce.

12. On June 14, 2002, the Villages of Croton-on-Hudson, New York and Briarcliff Manor, New York (Villages) and the Town of Cortlandt, New York (Cortlandt) filed a joint motion, requesting that we revoke the certificate granted to Millennium in the Interim Order. On June 24, 2002, the County of Westchester, New York (Westchester) also filed a motion requesting that we revoke Millennium's certificate.

13. The Interim Order required Millennium to develop a site-specific plan for crossing the Catskill Aqueduct that would be reviewed by an independent third-party engineering contractor who would be directed by the New York City Department of Environmental

⁶Millennium Pipeline Company, 98 FERC ¶ 61,040 (2002).

Docket No. CP98-150-000, et al.

- 6 -

Protection (NYCDEP). On April 16, 2002, the NYCDEP denied permission to Millennium to conduct an on-site investigation of the Catskill Aqueduct so that Millennium could develop its final site-specific crossing plan.

14. Sixteen parties filed requests for rehearing and clarification of the Interim Order.⁷ The issues raised in the requests for rehearing and clarification, the motions to revoke the certificate, and the untimely motions to intervene are discussed below.

II. Procedural Matters

15. After the issuance of the Interim Order, the Ripley Taxpayer Alliance, the City of New York, and Paul and Nannette Wasserman filed untimely motions to intervene. When late intervention is sought after the issuance of an order disposing of the application, the prejudice to other parties and burden on the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.⁸ Here, we believe that the public interest is served by granting the late motions to intervene. Under the circumstances, we find that granting the late motions to intervene at this time will not cause any unjustified delay and disruption to the proceeding or create an undue burden on other parties or the Commission. Thus, under section 385.214 of the regulations, we will grant the requests for late intervention.

III. The Mount Vernon Variation

16. On May 24, 2002, we issued a Notice Requesting Comments (Notice) on the Mount Vernon Variation. In response to the Notice, we received six comment letters. One commenter was a business owner in Mount Vernon. The other commenters were a resident of Briarcliff Manor, New York (who wrote two letters); the County of Westchester, New York; the Town of Cortlandt, New York; and a joint letter from the Villages of Briarcliff Manor and Croton-on-Hudson, New York and the Town of Cortlandt. Except for the business owner, no other residents from Mount Vernon filed comments about the Mount Vernon Variation.

⁷The parties filing for rehearing and clarification of the Interim Order are listed in the Appendix A to this order. Mount Vernon filed requests for rehearing of the Interim Order and the January 10 order but withdrew the requests on August 5, 2002.

⁸North Baja Pipeline LLC, 99 FERC ¶ 61,028 (2002).

A. Route Description

17. The Mount Vernon Variation, an approximately 0.67 mile long route negotiated between Millennium, Mount Vernon, and other interested parties and citizens of Mount Vernon, replaces Millennium's originally proposed 1.2 mile long route in Mount Vernon.

18. Millennium's pipeline in Mount Vernon consists of two segments. The first segment includes construction in an area that was evaluated in the final EIS and is not part of the Mount Vernon Variation. This area extends from approximate milepost 421.5 near the crossing of the Bronx River, a railroad, and a truck parking area on MacQuesten Parkway south of the intersection of MacQuesten Parkway and Howard Street to a proposed meter station near the intersection of MacQuesten Parkway and Oak Street near milepost 421.8. This 0.3 mile long segment involves in-street construction along the west side of MacQuesten Parkway. Since this segment of pipeline was evaluated in the final EIS, we will not discuss it again here.

19. The Mount Vernon Variation, or second segment of pipeline in Mount Vernon, begins near milepost 421.8 and extends to the southwest along the west side of MacQuesten Parkway from Oak Street to South Street. At this point, the variation turns southeast on South Street for approximately 300 feet. Near the Metro-North Commuter Railroad Company (Metro-North) railroad crossing, the variation moves out of the road right-of-way and into a parking area along the south side of the road and northwest of the railroad. The railroad crossing would be completed as a bored crossing from this parking area to the parking area on the southeast side of the railroad, *i.e.*, about 400 feet of the variation would be constructed parallel to the South Street right-of-way beneath the parking lots, rather than under the road surface. After the bored crossing of the railroad, the variation continues southeast through the parking area to Beach Street. At Beach Street, the variation turns southwest and will be installed beneath Beach Street surface for a distance of approximately 500 feet. The variation ends at the Bronx-Mount Vernon border at a new interconnection with the high-pressure facilities of Consolidated Edison.

20. Construction of the Mount Vernon Variation requires about 2.8 acres of construction right-of-way within road rights-of-way and about 0.74 acre of workspace in the parking lots for a total of about 3.54 acres.

B. Construction

21. Millennium will construct the Mount Vernon Variation by using the in-street construction methods that were described in the final EIS.⁹ Millennium's construction workspaces will be within the road rights-of-way or parking lots.
22. Millennium's construction workspace will consist of a 35-foot-wide construction right-of-way occupying the curb to curb area along the west side of MacQuesten Parkway (a divided four-lane road) and the entire road surface of South Street and Beach Street. The construction right-of-way will leave South Street to enter parking areas on the northwest and southeast sides of the Metro-North Railroad to complete the bored crossing of the railroad. (South Street crosses over the railroad via a bridge.)
23. The sidewalk areas adjacent to the road surface will not be used for construction workspace, so that foot traffic will not be obstructed by in-street construction. During construction, Millennium will need to close portions of the roads to vehicle traffic. Typically, this will involve closing a block at a time. Parking along the closed sections of road will not be available and the street closing will result in traffic detours. The street closing and limited parking availability may affect access to some businesses and residences. Also, utilities are buried beneath the affected road surface and they may be damaged by construction activities.
24. Consistent with the requirements for the originally proposed route in Mount Vernon, we will require Millennium to construct the pipeline according to the following condition, which slightly modifies environmental condition 48 in the Interim Order. The condition adopted here reflects the change in the pipeline's location and includes business owner notification.

● Following consultation with the appropriate authorities and community representatives, and before construction, Millennium shall prepare site-specific construction and mitigation plans for construction within Mount Vernon (milepost 421.5 to Mount Vernon Variation milepost 0.67). These plans shall address construction-related issues, including:

- a. construction schedules and timing;
- b. traffic detours around construction activities;

⁹See sections 2.3.3 and 5.8.2.2 in the final EIS.

- c. resident and business notification of construction schedules;
- d. alternate parking locations for loss of parking spaces;
- e. provisions for maintenance of access to businesses and residential buildings;
- f. provisions for maintenance of construction equipment to reduce air and noise pollution; and
- g. provisions for appropriate utility repair crews and materials to be on site at all times during construction in residential/commercial areas.

If utilities to residential buildings are damaged and cannot be restored on the same day, Millennium must offer affected residents alternative housing and transportation to and from these alternative housing locations. The plans, with documentation of consultation with appropriate authorities, shall be filed with the Secretary for review and written approval by the Director of OEP before construction.

25. Also, since the Mount Vernon Variation will cross the Metro-North Railroad, Millennium will need to abide by environmental condition 50 in the Interim Order, which provides that:

- before construction across the Metro-North Railroad tracks in Westchester County, Millennium shall file the detailed plans and design drawings with the Commission, along with comments on the plans from Metro-North, for review and written approval by the Director of OEP.

26. The requirements for construction in Mount Vernon will also include those that apply project-wide, such as the complaint resolution process which will be established to address potential construction problems.¹⁰

C. Resources Not Affected

27. The Mount Vernon Variation will not affect waterbodies, wetlands, threatened or endangered species, fisheries, wildlife, or vegetation. Also, there are no known

¹⁰See environmental condition 43 in the Interim Order.

Docket No. CP98-150-000, et al.

geological hazards or resources in the vicinity of the Mount Vernon Variation. Thus, we will not address these resources further.

D. Land Use

28. The land within the construction right-of-way is used for roads and parking lots. Most of the land use along the construction right-of-way is commercial.

29. The greatest construction impacts will be caused on the roads where the construction will take place. Nevertheless, our review indicates that construction activities can be managed so as to result in only short-term, construction-related impacts on traffic, residences, and local businesses. Millennium's proposed use of sewer-line or stove-pipe construction techniques for in-street construction will reduce the required work space and minimize the impact and duration of activities. By using these specialized construction techniques, Millennium can maintain a restricted flow of traffic around work areas that generally will not require complete street closings on wider roadways such as MacQuesten Parkway. Construction activities on narrower roadways, where the existing road right-of-way is approximately 35 feet wide, will require temporary street closings and traffic detours, typically on a block-by-block basis.

30. In addition, because construction will require the use of the curb-to-curb area of the roadway for temporary work space, some on-street parking for local residents and businesses will be eliminated from the section of the street under active construction. Alternate parking will be needed in these instances during the time required for installation of the pipeline.

31. There is also a potential to affect trees along the roads where the pipeline will be installed. Millennium proposes to trench within roads, not along the side of them. Thus, construction will not require tree clearing, since all construction and associated activity will be confined to the area between the street curbing. There is, however, the potential for root disturbance. Millennium states that it will compensate for any trees lost as a direct result of the pipeline construction. In areas of ornamental or shade trees, the value for lost trees will be determined by the fair market value (planted and guaranteed) from local tree nurseries.¹¹

32. Our review of the proposed route through Mount Vernon indicates that many utilities are present in and along the streets, such water and sewer lines, and overhead

¹¹See the discussion in section 5.8.1.2 in the final EIS.

electric and telephone wires. Millennium states that utility owners will mark existing utility lines to avoid damage during third-party excavation as part of the "One-Call" system. Millennium's contractor will identify existing utilities before trench excavation during consultation with utility operators and the city. Normal construction practice calls for installing the new pipeline under the existing utility lines to maintain sufficient cover.

E. Cultural Resources

33. In May 2002, Millennium conducted a background and literature search and a pedestrian survey of the Mount Vernon Variation. As a result, Millennium recommended archaeological testing in the medians of MacQuesten Parkway and in the two vacant South and Beach Street lots prior to construction, and trench monitoring during construction along MacQuesten Parkway. The staff and the New York State Historic Preservation Officer concur with these recommendations.

34. Previously, Millennium filed a plan in the event that any unanticipated human remains or historic properties are encountered during construction. We find that this plan is acceptable.

35. In 1997 and 1998, Millennium contacted Native American groups who traditionally used the project areas in order to provide them with an opportunity to comment on the project. No comments were received for the portion of Millennium's project in Westchester County.

36. Due to the information that is missing for this and other portions of the project, and to ensure that the Commission's responsibility under section 106 of the National Historic Preservation Act and its implementing regulations are met, we have included a condition in the Interim Order requiring the completion of all cultural resources studies and staff approval before construction can begin.¹²

F. Air Quality and Noise

37. Construction of the proposed facilities could cause a temporary reduction in local ambient air quality as a result of fugitive dust and emissions generated by construction equipment. The extent of dust generated will depend on the level of construction activity and on soil composition and dryness. If proper dust suppression techniques are not employed, dry and windy weather could create a dust nuisance for nearby residents and

¹²See environmental condition 56 in the Interim Order.

businesses. The emissions for construction vehicles and equipment should have an insignificant effect on air quality of the region. However, under certain meteorological conditions, there might be high temporary concentrations of pollutants in the vicinity of construction. No significant impact on air quality will occur during operation of the proposed pipeline.

38. There will be intermittent construction noise that will vary from hour to hour at any single location depending on the equipment in use and the operations being performed. Nighttime noise levels will be unaffected, as most construction will be limited to daylight hours. The noise associated with pipeline construction is similar to the noise produced during excavation and grading at many other small construction sites, but its duration at any specific area will be relatively brief. Neighbors might hear the construction noise at times, but the overall impact will be temporary and will not be expected to be significant. All construction activities will comply with Federal, state, and local construction regulations (e.g., for the time of work and noise).

G. Route Variations

39. The Mount Vernon business owner, who filed a comment in response to the Notice, suggests that we review a route variation that would use the green space and bicycle trail along the Bronx River Parkway, rather than the MacQuesten Parkway. The commenter states that the area is about 400 feet to the west of MacQuesten Parkway and that constructing the pipeline in this location would avoid his business.

40. The Mount Vernon Variation was developed through a consultation process between Millennium, representatives of Mount Vernon, and other interested parties and citizens of Mount Vernon. These parties found the Mount Vernon Variation to be the preferable route. We did not evaluate the commenter's suggested variation, or other route variations, because the consultation process resulted in a route that is preferred by the consulting parties. We believe that Mount Vernon's representatives considered the interests of residents and business owners within the city in developing this route. Thus, we do not recommend any change to the Mount Vernon Variation.

H. Conclusion

41. The Mount Vernon Variation will move Millennium's pipeline to a more commercial part of the city away from sensitive resources such as residential neighborhoods, apartment buildings, a school, health center, hospital, churches, and fire stations. In many cases, Millennium's originally proposed route would require construction within 25 feet of these sensitive resources. The Mount Vernon Variation

will also be about 0.5 mile shorter than the original route. Thus, based on the information provided by Millennium, information developed from data requests, and comments from local governments and individual members of the public, we find that construction and operation of the Mount Vernon Variation is in the public convenience and necessity.

IV. Non-Environmental Issues

A. Certificate Policy Statement

1. Interim Order

42. The Interim Order did not apply the Certificate Policy Statement to Millennium's proposals.¹³

2. Requests for Rehearing

43. Cortlandt¹⁴ and the Town of New Castle, New York (New Castle) contend that the Interim Order erred in not applying the Certificate Policy Statement in this proceeding. Westchester contends that the Commission improperly applied the Certificate Policy Statement by relying on precedent agreements.

44. In addition, Cortlandt contends that, while Millennium filed its application prior to the issuance of the Certificate Policy Statement, Millennium significantly amended its application after the Certificate Policy Statement was issued by proposing to re-route 22 miles of pipeline in Westchester County (i.e., the 9/9A Alternative). For this reason, Cortlandt alleges that Millennium's amended application should have been subject to the requirements of the Certificate Policy Statement and that the application should have been denied.

¹³Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), order clarifying statement of policy, 90 FERC ¶ 61,128, order further clarifying statement of policy, 92 FERC ¶ 61,094 (2000).

¹⁴Not Under My Backyard filed a request for rehearing that adopted Cortlandt's rehearing request.

3. Commission Holding

45. On July 29, 1998, we issued a Notice of Proposed Rulemaking (NOPR), proposing to make changes to our policies regarding the certification of construction activities.¹⁵ On September 15, 1999, we issued our Certificate Policy Statement to provide guidance as to how we will evaluate proposals for certificating new construction. In a concurring opinion, a majority of the Commission stated that the Certificate Policy Statement would apply only to applications filed after the date the NOPR was issued, i.e., July 29, 1998.

46. Under our policy as it existed prior to the Certificate Policy Statement, an applicant was required to demonstrate that it had entered into long-term, executed contracts or binding precedent agreements (i.e., 10-year contracts or precedent agreements) for a substantial amount of the firm capacity of the proposed facilities.¹⁶ The minimum level of firm commitment that we recognized as sufficient for new on-shore facilities was 25 percent of the pipeline's proposed capacity.¹⁷

47. Under the Certificate Policy Statement, the threshold question applicable to existing pipelines proposing new construction is whether the project can proceed without subsidies from their existing customers. Normally, in the case of a new pipeline company like Millennium, this threshold requirement is met since there are no existing customers. For both new companies and existing pipelines, we also consider potential impacts of the proposed project on other pipelines in the market and those existing pipelines' captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, we will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. Only when the benefits outweigh the adverse effects on economic interests will we proceed to complete the environmental analysis where other interests are considered.

48. Millennium's application was filed prior to July 29, 1998. As we stated in the Interim Order, we believe that it would not be appropriate to apply the Certificate Policy

¹⁵Regulation of Short-Term Natural Gas Transportation Services, 63 Fed. Reg. 42,982 (August 11, 1998), FERC Statutes and Regulations, Proposed Regulations 1988-1998 ¶ 32,533 (1998).

¹⁶El Paso Natural Gas Company, 65 FERC ¶ 61,276, at p. 62,270 (1993).

¹⁷See, e.g., Ouachita River Gas Storage Co., 76 FERC ¶ 61,139 (1996); Steuben Gas Storage Co., 72 FERC ¶ 61,102 (1995).

Docket No. CP98-150-000, et al.

Statement to Millennium since Millennium had no notice, at the time it filed its application, that we would initiate a review of our then-existing criteria to evaluate certificate proposals. We believe that to apply the criteria retroactively to Millennium would be unfair and inequitable.¹⁸

49. Cortlandt alleges that Millennium should be subject to the Certificate Policy Statement because Millennium significantly amended its application after July 29, 1998, by re-routing 22 miles of line. We disagree. Millennium's application, filed prior to the issuance of the NOPR, proposed to construct approximately 424 miles of pipeline. Prior to filing its application, it was necessary for Millennium, among other things, to obtain financing for its pipeline, conduct an open season, and enter into precedent agreements with shippers for capacity on its system based on the Commission's then-existing construction policies. Millennium's amendment, filed after the NOPR was issued on July 28, 1998, moved approximately 22 miles of line in Westchester County because of concerns about constructing facilities in the center of Consolidated Edison's power line corridor. We do not believe that filing an amendment to re-route 22 miles of a 424-mile long pipeline system for environmental reasons should result in the Commission retroactively imposing the Certificate Policy Statement's criteria on Millennium. Thus, we find that the Interim Order did not err in not applying the Certificate Policy Statement here.

B. Public Convenience and Necessity Finding

1. Market Demand

a. Interim Order

50. The Interim Order found that Millennium had demonstrated market support for its proposal because it had submitted eight precedent agreements for 10-, 15-, and 20-year terms that subscribed 66 percent of the capacity of the pipeline. The Interim Order also held that the Commission does not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project as long as the precedent agreements are long-term and binding.

¹⁸See *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 965 (D.C. Cir. 2000) ("The new policy [*i.e.*, the Certificate Policy Statement], however, has no bearing on these proceedings because it does not apply retroactively.")

b. Requests for Rehearing

51. Cortlandt and the Villages contend that we erred in relying on the precedent agreements submitted by Millennium, alleging that most of the capacity was subscribed by affiliates of Millennium. Cortlandt points out that only 23 percent of the capacity of Millennium is subscribed by non-affiliates and that precedent agreements for 23 percent of capacity do not justify the issuance of a certificate. Cortlandt and the Villages contend that, contrary to statements in the Interim Order, the Commission does distinguish between affiliate and non-affiliate contracts. To support their position, they cite the Independence Pipeline Company proceeding.¹⁹ In Independence, Cortlandt asserts that the Commission did not issue certificates to Independence Pipeline Company (Independence) and ANR Pipeline Company (ANR) because, while Independence and ANR submitted binding precedent agreements for 68 and 72 percent of their capacity respectively, approximately 55 percent of the total capacity of their projects was subscribed by affiliates. According to Cortlandt, the Commission required Independence and ANR to execute contracts with non-affiliated shippers for 35 percent of the capacity of their projects before certificates would be issued. Cortlandt alleges that Independence recognized that there is good reason to be suspicious of precedent agreements with affiliates and that an applicant must show that 35 percent of its binding precedent agreements are with non-affiliated shippers. The Villages also note that the Independence proceeding required that Independence and ANR file executed contracts for 68 and 72 percent respectively of the capacity of their projects prior to commencing construction.

52. Westchester contends that Millennium's precedent agreements do not indicate that there is a sufficient commitment for deliveries to the Mount Vernon interconnect with Consolidated Edison to make the Westchester County portion of the pipeline economically viable. Westchester alleges that despite findings in the Interim Order that the Millennium pipeline will move gas to the New York City area, there is no information in the record that identifies these end-use customers, where they are located, and whether local distribution systems are in place to reach them. Westchester also asserts that the only identified Westchester County customer is International Business Machines Corporation (IBM), which is subscribing a mere 1,000 Dth per day of capacity. Westchester claims that since Millennium has not identified any other Westchester County customers, nor submitted any market studies supporting the possibility of other

¹⁹Independence Pipeline Company, 89 FERC ¶ 61,283 (1999), order issuing certificate, granting and denying reh'g, and denying clarification, 91 FERC ¶ 61,102, order issuing certificates, 92 FERC ¶ 61,022, reh'g denied, 92 FERC ¶ 61,268 (2000).

Westchester County customers, it is clear that there is no Westchester County need for the Millennium pipeline.

53. Westchester quotes Consolidated Edison's February 24, 1998 protest to contend that the Millennium pipeline is not needed. In that protest, Consolidated Edison stated (1) that there was substantial existing capacity in its facilities to support the construction of natural gas fired electric cogeneration facilities and (2) that there was 300,000 Dth per day of existing unused capacity in New York City and that Millennium would create another 128,000 Dth per day of excess capacity.

54. Westchester contends that the final EIS and Interim Order did not address the "events of September 11." Westchester asserts that the loss of the World Trade Center and adjoining properties will significantly reduce energy demand in New York City, contending that the World Trade Center was supplied by hydropower from the New York Port Authority, that hydropower will be made available to businesses that relocate to Manhattan, and, in turn, the hydropower will displace power that Consolidated Edison would supply.

55. Westchester contends that it was unacceptable for the Commission to issue an Interim Order in this proceeding prior to a conference that was held in New York City on January 31, 2002, to discuss the energy infrastructure in the northeast, claiming that the Commission has a duty to analyze all relevant factors before issuing a decision.

c. Commission Holding

56. Cortlandt and the Villages contend that we erred in relying on precedent agreements with affiliates as a showing of market demand. To support their position, Cortlandt and the Villages rely on the Commission's holding in the Independence proceeding.

57. Under the construction policy applicable to this proceeding, as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project.²⁰ The fact that the marketers are affiliated with the project

²⁰See, e.g., Texas Eastern Transmission Corp., 84 FERC ¶ 61,044 (1998); Maritimes & Northeast Pipeline, L.L.C., 76 FERC ¶ 61,124 (1996), order on reh'g, 80 FERC ¶ 61,136 (1997), where the Commission allowed a single signed contract with an

sponsor does not lessen the marketer's need for the new capacity or their obligation to pay for it under the terms of their contracts. In addition, in a competitive environment, the marketer still must offer its commodity at competitive prices to attract customers. Also, affiliated marketers are potentially subject to greater regulatory oversight than non-affiliates. For example, pipeline affiliates are subject to the standards of conduct concerning marketing affiliates in Part 161 of the regulations.

58. Moreover, while we do not have jurisdiction over non-jurisdictional companies affiliated with interstate pipelines, we can exert control over affiliated companies in particular circumstances where such action is necessary to accomplish our policies for the transportation of natural gas in interstate commerce. More specifically, if an affiliated company acts in concert with its pipeline affiliate in connection with the transportation of gas in interstate commerce in a manner that frustrates the Commission's effective regulation of the interstate pipeline, we may look through or disregard the separate corporate structures and treat the pipeline and affiliate as a single entity, *i.e.*, a single natural gas company. In doing so, we would regulate the affiliates' activities as if the affiliate were owned directly by an interstate pipeline.²¹

59. Cortlandt and the Villages contend that the Commission distinguished between affiliate and non-affiliate contracts in Independence. In that case, when Independence filed its application in March 1997, there was no market support for its proposed project. Independence conducted an open season for its proposal from April 2 to May 30, 1997. In a June 20, 1997 open-season status report, Independence claimed that it received requests for 750,000 Mcf per day of capacity from 11 shippers representing "all segments of the industry," and that it would submit precedent agreements once they were negotiated. In fact, Independence projected that all capacity of the proposed project would be under contract. In a July 10, 1997 answer to protests, Independence again claimed that 11 shippers, including producers, marketers, and local distribution companies, had expressed interest in the project and that it expected to complete the contracting process and file agreements in August 1997. On September 4, 1997, with no precedent agreements filed in the record, the Commission's Director of the Office of Pipeline Regulation directed that Independence provide evidence of market support by September 24, 1997, or its application would be dismissed. On September 23, 1997, Independence signed a precedent agreement with DirectLink Gas Marketing Company

²⁰(...continued)

affiliated marketer to satisfy the market showing for the entire capacity of the project. See also, Transcontinental Gas Pipe Line Corp., 81 FERC ¶ 61,104 (1997).

²¹See Arkla Gathering Services Co., 67 FERC ¶ 61,257 (1994).

(DirectLink), a newly formed affiliated marketer, that subscribed 55 percent of Independence's capacity.

60. The Independence order rejected the DirectLink precedent agreement as evidence of market support for the project. Our decision to reject the DirectLink precedent agreement was based on the circumstances in the Independence proceeding, i.e., Independence was unable to produce a single, non-affiliated precedent agreement despite the fact that it faced the imminent dismissal of its application. Instead, "virtually overnight," Independence created an affiliated marketer to subscribe capacity in its proposed project. The proffered precedent agreement was not the result of, or related to, Independence's open season. For this reason, we found that the DirectLink agreement did not constitute reliable evidence of market need to support a finding that the proposal was required by the public convenience and necessity. Thus, in order to demonstrate an actual market for their projects, we required Independence and ANR to provide evidence of long-term, executed contracts for at least 35 percent of their respective projects' capacity with non-affiliated shippers before we would issue a certificate.

61. The Independence proceeding represented a case of an applicant trying to manipulate our prior certificate policy by creating marketers at the last minute to demonstrate market demand. Thus, we imposed a requirement that Independence submit contracts showing that 35 percent of its capacity was subscribed by non-affiliates in order to demonstrate that a market existed for its major pipeline project. In contrast, when Millennium filed its application in 1997, CoEnergy Trading Company (CoEnergy) and Engage Energy America, LLC (Engage Energy), two of Millennium's affiliates, had entered into precedent agreements to subscribe 65,000 and 235,100 Dth of capacity per day, respectively, on Millennium's system. In the Interim Order issued almost four years after Millennium's application was filed, CoEnergy and Engage Energy remained as shippers on Millennium, subscribing the same amount of capacity. In this proceeding, there are no allegations that Millennium's contracts with its marketing affiliates are not reliable. Millennium's affiliates are bona fide affiliates that existed at the time that Millennium filed its application. Thus, there was no necessity in this proceeding, as there was in Independence, to require that Millennium demonstrate that it had a bona fide market demand for its project, since there is no evidence that Millennium created marketers at the last minute to demonstrate market demand.

62. The Villages note that we required that Independence and ANR file executed contracts for 68 and 72 percent, respectively, of the capacity of their projects prior to commencing construction. In that proceeding, Independence initially represented that shippers had subscribed approximately 68 percent of its capacity and ANR initially represented that shippers had subscribed approximately 72 percent of its capacity. Thus,

because our staff relied on the existence of those represented levels of contractual commitment in processing Independence's and ANR's applications, we required in accordance with our precedent that Independence and ANR file with the Commission executed contracts for capacity equal to the capacity represented in their respective applications, as supplemented, prior to commencing construction.²²

63. In this proceeding, Millennium submitted precedent agreements that subscribed approximately 66 percent of the capacity of its proposed pipeline. Our staff relied on the existence of those represented levels of contractual commitment in processing Millennium's application. Consistent with our holding in Independence and other cases, we required Millennium to file with the Commission executed contracts for 66 percent of the capacity of its proposed facilities prior to commencing construction.²³ Thus, we did not treat Millennium any different than Independence or ANR.

64. Westchester contends that the information in Millennium's precedent agreements indicates that there is not a sufficient commitment of deliveries to the Mount Vernon interconnect with Consolidated Edison, making the need for the Westchester County portion of the pipeline speculative.

65. Millennium's shippers have requested 230,550 Dth per day of service at the Mount Vernon delivery point with Consolidated Edison. Specifically, at Mount Vernon, CoEnergy Trading Company requests 32,900 Dth per day of service; Engage Energy America, LLC requests 118,900 Dth per day; Energy USA-TPC Corp. requests 59,400 Dth per day; Quantum Energy Services, Inc. requests 4,000 Dth per day; and PanCanadian Energy Services, Inc. requests 15,300 Dth per day. Thus, the Westchester County portion of the pipeline is not "speculative" as Westchester claims.

66. Westchester alleges that despite findings in the Interim Order that the Millennium pipeline will move gas to the New York City area, there is no information in the record that identifies the end-use customers.

67. As discussed above, Millennium has entered into long-term, binding precedent agreements with eight customers that subscribe 66 percent of the capacity of its proposed pipeline. Thus, we found that there was sufficient evidence in the record to demonstrate

²²See, e.g., Transcontinental Gas Pipe Line Corporation, 66 FERC ¶ 61,273, at p. 61,758 (1994); Williston Basin Interstate Pipeline Company, 64 FERC ¶ 61,311, at p. 63,351 (1993).

²³97 FERC at p. 62,318.

Docket No. CP98-150-000, et al.

market need to support a finding that the pipeline was required by the public convenience and necessity. Here, as in most cases, the majority of Millennium's precedent agreements are with gas marketers. We do not look behind the precedent agreements between marketers and shippers to ascertain the identities of the individual end users.²⁴ The marketers are in the business of providing gas to their customers and we do not believe that the marketers would subscribe capacity on a pipeline if they were not confident that the capacity could be sold to end users. Westchester has not presented any reason why we should disregard Commission precedent and look behind the precedent agreements in this case to identify the end users.

68. Since there is only one customer in the county (IBM) subscribing a small amount of capacity on Millennium (1,000 Dth per day), Westchester asserts that there is no Westchester County need for the pipeline.

69. The interstate pipeline grid crisscrosses the country connecting supply sources to end users. In the grid, gas can be transported long distances across numerous local and state jurisdictions. It is not necessary for an interstate pipeline to serve end-use customers in every jurisdiction that it crosses. If this were a requirement for making a public convenience and necessity finding, constructing interstate pipelines would be significantly hampered and a national transportation grid of pipelines could not exist. We did not err in certificating the Westchester portion of Millennium's pipeline.

70. Westchester contends that Millennium is not needed, citing to Consolidated Edison's February 24, 1998 protest which contended that there was unused capacity in New York City and that Millennium's pipeline would create more capacity.

71. Consolidated Edison no longer holds the position that Westchester quotes. On October 29, 2001, in response to an inquiry from the Commission's staff, Consolidated Edison stated that:

[Consolidated] Edison recognizes that there is a need for the construction of new interstate pipeline capacity to serve growing demand for natural gas in the New York metropolitan area. The proposed construction of new electric generation capacity in the area will substantially increase the demand for natural gas supplies in the area. Given the utilization level of existing interstate pipeline capacity to the region, new pipeline capacity must be

²⁴Certificate Policy Statement, 88 FERC ¶ 61,227, at p. 61,744 (1999); Independence Pipeline Company, 92 FERC ¶ 61,268, at p. 61,892 (2000).

developed. [Consolidated] Edison supports the construction of new interstate pipeline capacity.

72. In addition, in a motion to intervene and comments filed on January 18, 2001, in an Iroquois Gas Transmission System, L.P. case,²⁵ Consolidated Edison stated that:

The demand for gas in the residential and commercial market sectors in the New York City area continues to grow. The time is now to build new capacity to meet these projected requirements. No new pipeline capacity has been built into the New York City area since the 1991 in-service date of the original Iroquois facilities. . . .

In addition, new pipeline capacity is needed to satisfy the increasing demands for gas by owners of existing electric powerplants in New York City and to meet the projected fuel requirements of the electric powerplants proposed to be built to meet the increasing demands for electricity in New York City in the coming years.²⁶

73. Westchester claims that the final EIS and Interim Order failed to address the "events of September 11" because the loss of the World Trade Center and adjoining properties will significantly reduce energy demand in New York City.

74. As stated, Millennium entered into eight precedent agreements for 66 percent of the capacity of its proposed system. Since September 11, none of Millennium's shippers have terminated their precedent agreements. In addition, Eugene McGrath, Chairman, CEO, and President of Consolidated Edison testified at the Northeast Energy Infrastructure Conference in New York City on January 31, 2002 that:

There is approximately 6,000 megawatts of new generation proposed for New York City. When we lost the [World Trade Center] Towers last year, we lost about 90 megawatts of load. Our peak last summer was just over 12,200 megawatts. We expect our peak this summer to be about the same, 12,200 megawatts.

Last summer [2001] was particularly hot and when we predict our peak for next summer, we base it on normal temperature. If we have the kind of

²⁵95 FERC ¶ 61,335, order on reh'g and issuing certificate, 97 FERC ¶ 61,379 (2001) (the Eastchester project).

²⁶Consolidated Edison's motion at 2-3.

weather we had last August next summer, we could be 3[00] or 400 megawatts above that.²⁷

75. We do not think that the evidence shows a loss of energy demand in New York City as a result of September 11. Thus, we conclude that the final EIS and Interim Order did not err by failing to address September 11.

76. Finally, Westchester claims that the Commission erred in issuing the Interim Order prior to the Northeast Energy Infrastructure Conference on January 31, 2002.

77. We convened the infrastructure conference to discuss the adequacy of the electric, natural gas, and hydropower infrastructure in the northeast.²⁸ The goal of the conference was to identify present infrastructure conditions, needs, investment and other barriers to expansion, and environmental and landowner concerns.²⁹ The conference was not intended to deal with issues pending in individually docketed cases before the Commission. As stated above and in the Interim Order, the record in this case demonstrates that Millennium's facilities are needed. Millennium has entered into long-term, binding precedent agreements for 66 percent of the capacity of its proposed facilities. The infrastructure conference should not, and did not, have an impact on our finding of market support for Millennium's proposals. We did not err in issuing the Interim Order prior to the infrastructure conference.

2. Market Studies

a. Interim Order

78. The Interim Order noted that studies made by government, industry, and private organizations forecast an increasing demand for natural gas, particularly for electric generation, in the northeast United States and the need for increased pipeline capacity to meet that demand.

²⁷Transcript at 147.

²⁸Notice of Technical Conference and Agenda, Docket No. AD02-6-000, January 8, 2002.

²⁹Id.

b. Requests for Rehearing

79. Westchester contends that the Commission has not fulfilled its obligation in deciding whether there is a need for the project and has instead relied on the findings of the NYPSC.

80. Cortlandt contends that the Commission erred in relying on the 1999 Staff Analysis of Natural Gas Consumption because the document is "rife with conjecture" and full of variables, rather than concrete data.³⁰ Cortlandt asserts that this study, at best, provides only a generalized view of demand in the region and does not support any demand for the Millennium project. In addition, Cortlandt contends that the Commission erred in relying on the NYPSC's July 26, 2000 letter, which bases its conclusion that New York City needs more gas on an unprecedented peak in demand during the summer of 1999.

81. Cortlandt also contends that taking the NYPSC's projection at face value does not evidence an unmet demand for the Millennium volumes. According to Cortlandt, the Navigant Study used in the Eastchester project found that New York would need only 340,000 Dth per day of new capacity in 2001-2003 and that the New York City region would need only 270,000 Dth per day. Cortlandt asserts that the Eastchester project alone will deliver this new capacity and yet the Commission approved Millennium as well as five other projects for the region.

c. Commission Response

82. In certifying Millennium, we relied, among other things, on market growth data that forecast significant demand for natural gas in the New York City area. Several parties take issue with the studies cited and they contend that the use of studies is not determinative of the need for the project.

83. The Interim Order did not rely solely on market studies in finding a need for Millennium's project. Rather, the Interim Order found that Millennium had demonstrated market support for its project because it had customers that subscribed 66 percent of the capacity of the project. Nevertheless, we find that current forecasts continue to project the need for additional infrastructure to meet growing energy demands in this area. For example, the Energy Information Administration's (EIA) "Annual Energy Outlook 2002"

³⁰"Staff Analysis of Natural Gas Consumption and Pipeline Capacity in New England and the Mid-Atlantic States," December 1999.

projects that commercial, industrial, and residential gas consumption in the northeast will increase by 11 percent between 2001 and 2006, and 26.4 percent between 2001 and 2020. The EIA projects that demand for natural gas for electric generation in the northeast will increase by 36.6 percent and 121 percent, respectively, over those two time periods.

84. Similarly, in its March 27, 2002 Power Alert II, the New York Independent System Operator (NYISO) projects that New York State will need an additional 7,100 MW of electric generation capacity by 2005. This study projects that 2,000 to 3,000 MW must be located in New York City, which it describes as a "load pocket" – a region whose energy needs cannot be satisfied by imported electricity due to limited transmission capabilities. In addition, New York's Draft 2002 State Energy Plan forecasts that demand for natural gas in the state will increase by 73.4 percent between 2000 and 2021 and that demand for electricity will increase 16.5 percent during the same time frame. We believe that the industry trend is toward gas-fired electric generation. We see no change in this trend and expect that the growing electricity needs of New York City will be met in this manner. While it remains to be seen how accurate these forecasts will actually be, there is no doubt that this region continues its population and economic growth and needs additional pipeline capacity.

85. It is also clear that the existing interstate natural gas pipeline capacity in the northeast region, particularly in the vicinity of New York City, has been used at high load factors during peak use months.³¹ The increasing demand for natural gas to feed industrial growth, as well as new and planned gas-fired electric power generators, continues to place a large burden on the local natural gas infrastructure. Thus, we believe that there is ample evidence that the New York City area will need additional pipeline capacity in both the short and long term and that the market for natural gas fired electric generation will continue to grow and will support the additional infrastructure Millennium will add.

3. Turn-Back Capacity

86. Cortlandt contends that the Commission failed to consider turn-back capacity as a viable alternative to Millennium's proposals.

87. In general, we question the true availability of turn-back capacity to meet demand in the New York City area. In a recent study of gas demand in New England and the mid-

³¹See the EIA's "Natural Gas Transportation – Infrastructure Issues and Operational Trends," (Table 3), October 2001.

Atlantic states, our staff concluded that all current industry studies "agree that all customer groups [in the northeast] will maintain current consumption,"³² which leads us to believe that there will continue to be a demand for the current existing capacity.

88. Traditionally, local distribution companies (LDCs) held a large portion of a pipeline's capacity. In light of unbundling changes at the state level, LDCs are now reluctant to enter into long-term transmission contracts due to the uncertainties involved in retail unbundling. While the LDCs' customers may not be contracting for that capacity, the need for that capacity exists, as demonstrated by the fact that the pipelines that serve the northeast are running at high load factors and that the existing capacity was insufficient to meet existing demand. Other factors, including (1) the potential for natural gas growth in electric generation; (2) the rising cost of oil; and (3) the fuel-switching abilities of large industrial end users all add to the reasonable probability that the existence of turn-back capacity is too speculative to be a viable alternative for Millennium's proposals.

89. Further, we note that the use of turn-back capacity would provide only a partial, short-term alternative to Millennium's proposals. Reliance on turn-back capacity does not address the need for additional capacity to support the predicted long-term growth in natural gas demand. Thus, we conclude that turn-back capacity would not be a viable alternative to Millennium's proposed pipeline.

C. Lack of Upstream Facilities in Canada

1. Background

90. Millennium proposed to interconnect its pipeline at the United States-Canada border with facilities to be constructed by TransCanada. In 2001, TransCanada withdrew its application with Canada's National Energy Board (NEB) to construct facilities. The Interim Order required that Millennium not commence construction of its facilities until TransCanada receives all necessary NEB approvals.

91. The Villages and Cortlandt contend that we should revoke Millennium's certificate because TransCanada is not pursuing the authorizations necessary to construct facilities in Canada.

³²"Staff Analysis of Natural Gas Consumption and Pipeline Capacity in New England and the Mid-Atlantic States," December 1999.

94. Westchester asserts that it will oppose any effort by Millennium to acquire any right-of-way through County property via eminent domain and that it will not voluntarily yield any property interests in its lands to Millennium. Westchester states that if Millennium attempts to assert eminent domain authority against the County it will initiate court proceedings on such issues as whether Congress is empowered to delegate eminent domain authority to private corporations; whether Congress is empowered to delegate eminent domain authority under its authority to regulate interstate commerce; if Congress has such authority, whether the Natural Gas Act authorized eminent domain authority against state and municipal properties; and, if Millennium can invoke eminent domain authority, whether the use of eminent domain is precluded by the County's dedication of the public property to be acquired to public use that would be materially affected by the pipeline. If these issues are not resolved in Millennium's favor, Westchester states that the process of establishing the value of the property taken will be protracted and complicated.

93. Westchester asserts that it is a property owner and that the Millennium pipeline will cross county parks, trails, sewer and water properties, roads, and bridges. Westchester states that it is "doubtful" that the Natural Gas Act grants a private corporation the right of eminent domain to obtain superiority over prior, conflicting public uses. Westchester cites *Kern River Gas Transmission Co. v. Clark County, Nevada*, 757 F.Supp. 1110 (D. Nev. 1990) and *United States v. Carmack*, 329 U.S. 230 (1946).

1. Request for Rehearing

D. Eminent Domain

92. We see no reason to revoke Millennium's certificate. Millennium cannot begin construction until TransCanada receives the necessary NEB approvals. This condition protects landowners against the potential disturbance of their property until the NEB's approvals are obtained and there is assurance that the project will go forward. The fact that TransCanada has not obtained the approvals in the nine months since the Interim Order was issued is not determinative of our decision here.

2. Commission Holding

2. Commission Holding

95. Section 7(h) of the Natural Gas Act provides, in part, that:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property for compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located or in the State courts. The practice or procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or procedure in the courts of the State where the property is situated.

96. Section 7(h) provides that when a certificate is issued by the Commission under section 7(c) of the Natural Gas Act, the right of eminent domain is granted. Thus, if we find that a proposed project is in the public convenience and necessity, the pipeline has the right to acquire the property for that project by eminent domain.³³ The federal regulatory scheme could not function if state law was allowed to prohibit takings by eminent domain for gas facilities.³⁴ State law regarding the taking of property for public use is preempted by the Natural Gas Act, even when a private company exercises the federal government's power of eminent domain.³⁵

³³E.g., *Vector Pipeline L.P.*, 87 FERC ¶ 61,225, at p. 61,903 (1999); *Portland Natural Gas Transportation System*, 76 FERC ¶ 61,123, at p. 61,654-55 (1996).

³⁴*Tennessee Gas Pipeline Co. v. Massachusetts Bay Transportation Authority*, 2 F.Supp.2d 106 (D. Mass. 1998); *USG Pipeline Co. v. 1.74 Acres in Marion County, Tennessee*, 1 F.Supp.2d 816 (E.D. Tennessee 1998); *Colorado Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 747 F.Supp. 401 (N.D. Ohio 1990).

³⁵*Colorado Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 747 F.Supp. 401, 404 (N.D. Ohio 1990). ("[T]he landowners' remedies with respect of the taking of his property by the United States Government or by a private corporation authorized to exercise the power of eminent domain are controlled and limited by federal substantive law.")

97. While the issuance of a certificate bestows the right of eminent domain to pipeline companies, it is only to be used where the pipeline company cannot acquire the necessary land through a negotiated easement or where the landowner and the company cannot agree on the compensation to be paid for the land. The rules and procedures that govern the use of eminent domain are determined by the courts in the state where the property is located. In cases where the monetary claim by the landowner exceeds \$3,000 for the land acquisition, the condemnation proceedings may be handled by the District Court of the United States for the district in which the property is located.

98. Westchester cites Kern River as support for its claim that it is doubtful that the Natural Gas Act allows private corporations to exercise eminent domain over property already devoted to a public use, such as roads, parks, or trails. In the Kern River case, the Commission issued a certificate to Kern River Gas Transmission Company to construct and operate a natural gas pipeline in a one-mile-wide corridor from Wyoming to Southern California. The certificate specified that Kern River could not depart from the corridor without obtaining additional approvals from the Commission. Kern River brought an eminent domain action against Clarke County, Nevada because, among other things, Clarke County asserted that the Natural Gas Act did not give Kern River the power to condemn land already dedicated to public use.

99. Westchester cites that portion of the Kern River decision that states that:

If . . . a condemner to whom the power of eminent domain has been delegated, such as a municipality or a private corporation, seeks to exercise the power with respect to property already devoted to public use, the general rule is that where the proposed use will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied, unless the legislature has authorized the acquisition either expressly or by necessary implication.³⁶

100. Westchester, however, fails to address the rest of the case. After the quote cited by Westchester, the Court in Kern River summarized the positions of the parties including Clarke County's assertion that Kern River's use of the public property "will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction,"

³⁶Kern River, 757 F.Supp. at 1117.

examined the "practice and procedure" language in section 7(h), and looked to Nevada state law and state court decisions. The Court concluded that:

In light of the supremacy of federal law, this court declines to attempt to balance the differing public uses. It is manifestly unlikely that Congress would have created the substantive right of eminent domain clearly addressed in the Natural Gas Act, only to have that right held hostage to various state substantive schemes. . . . Under a broad interpretation of [the "practice and procedure" language in section 7(h)], a state could conceivably eliminate all eminent domain proceedings by use of state statutes. Such an usurpation of a federal substantive right would violate the supremacy clause of the [United States] Constitution.³⁷

101. Clearly, the Kern River case does not support Westchester's position. Rather, Kern River affirms that a certificate issued by the Commission confers the right of eminent domain on the pipeline company, allowing the company to acquire any property, public or private, necessary to build the project, if an easement cannot be negotiated.

102. In the Carmack case, also cited by Westchester, the United States initiated a proceeding to condemn a one and one-half acre site for use as a post office and a customhouse in the City of Cape Girardeau, Missouri. The United States condemned the property under the Condemnation Act of 1888 and the Public Buildings Act of 1926. Originally, the property was conveyed in trust to Cape Girardeau in 1807 to use for a public purpose. Among other things, the property was used as a park and a building on the property contained the courthouse and city hall. An heir to the trustor objected to the condemnation proceedings by the United States Government.

103. The Supreme Court stated that since the Constitution and the laws made pursuant to the Constitution are the supreme law of the land, it is appropriate to recognize that "the power of eminent domain, when exercised by Congress within its Constitutional powers, is equally supreme."³⁸ As to the facts presented in the Carmack case, the Court held that "the principle of federal supremacy . . . argues against . . . a subordination of the decisions of federal representatives to those of individual grantors or local officials as the means of carrying out an admittedly federal government function," such as establishing post

³⁷Id. at 1118.

³⁸Carmack, 329 U.S. at 240.

offices.³⁹ Because Federal officials had acted in good faith in selecting the site, the Court held that the United States had the authority under the Public Buildings Act to select the site that it did. Thus, the Supreme Court granted the United States a preliminary judgment of condemnation.

104. Westchester cites a footnote in the Carmack decision which states that:

In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. . . . A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases, the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.⁴⁰

105. We do not think the language from the footnote in the Carmack case supports Westchester. In essence, the cited footnote states that statutes which grant to others the power of eminent domain "do not include sovereign powers greater than those expressed or necessarily implied." Here, if Millennium and Westchester cannot agree on the compensation to be paid for the land, Millennium will not exercise a right of eminent domain greater than those expressed or necessarily implied in the Natural Gas Act. Millennium will only exercise the right statutorily granted to it to condemn property for a pipeline found by the Commission to be in the public convenience and necessity.

106. For these reasons, we find that Westchester's assertions are not persuasive. Under the Natural Gas Act, Millennium can exercise the right of eminent domain over County property that is already devoted to a public use, if Millennium and Westchester cannot agree on the compensation to be paid for the land.

³⁹Id. at 242.

⁴⁰Carmack, 329 U.S. at 243 n.13.

E. Lack of Opportunity to Negotiate Millennium's Route

1. Requests for Rehearing

107. The Briarcliff Manor Public Schools, the Town of Mount Pleasant, New York (Mount Pleasant), New Castle, and Mr. David Kahn contend that the Commission erred in not affording the residents of communities other than Mount Vernon the opportunity to negotiate the pipeline route. New Castle asserts that the Commission has given extraordinary weight to Mount Vernon's concerns without due regard to other similarly situated municipalities in Westchester County whose residents will be subjected to the significant adverse impacts of the pipeline.

2. Commission Holding

108. New Castle opposes the ConEd Offset/Taconic Parkway Alternative and wants the opportunity to negotiate a new route with Millennium. Likewise, the Briarcliff Public Schools, Mount Pleasant, and Mr. Kahn oppose that portion of the ConEd Offset/Taconic Parkway Alternative that places the pipeline on the west side of the Taconic State Parkway near the Briarcliff Public Schools and request that they be given additional time to negotiate a new route. In approving the ConEd Offset/Taconic Parkway Alternative, the Interim Order and final EIS imposed numerous environmental conditions that mitigate to the greatest extent possible the impacts associated with construction along this alternative. In addition, as will be further discussed below,⁴¹ in regard to the Briarcliff Public Schools, the NYPSC and Millennium entered into a Memorandum of Understanding and a supplemental Memorandum of Understanding that subjected Millennium's pipeline near the schools to additional safety measures beyond those contained in the Department of Transportation's (DOT) safety regulations, including increased pipe wall thickness, more stringent pipe durability criteria, higher pressure testing requirements, and more frequent smart pig surveys. Also, the NYPSC determined that the west side of the Taconic State Parkway is the better location based on electric service reliability issues when the pipeline is in operation. The Interim Order and final EIS concluded that safety issues were adequately addressed near the schools.

109. Millennium's originally proposed route through Mount Vernon to a connection with Consolidated Edison traversed heavily populated city streets in residential and commercial neighborhoods. Specifically, the proposed route was within approximately 50 feet of scores of homes, high rise apartments, businesses, two fire stations, the Mount

⁴¹See section VI.V., infra.

Vernon Hospital, a neighborhood health center, a recreation center, and the Greater Centennial African Methodist Episcopal Zion Church. The Hamilton Elementary School was approximately 15 feet from the pipeline.

110. The Interim Order provided Mount Vernon with an opportunity to negotiate with Millennium about the route through the city, because we believe that construction in Mount Vernon presents a different situation than construction along the ConEd Offset/Taconic Parkway Alternative or near the Briarcliff Public School. We deferred deciding on a final route through Mount Vernon because we recognized that, unlike construction along the ConEd Offset/Taconic Parkway Alternative, construction on city streets in densely populated neighborhoods in Mount Vernon in close proximity to residential and commercial areas will be highly disruptive, and, in our view, considerably more so than construction on other parts of the pipeline route. Recognizing that whatever route the pipeline follows through Mount Vernon will cause significant disruption to its citizens, the Interim Order provided Mount Vernon with an opportunity to negotiate with Millennium to delineate a route through the city that in their opinion would cause less harm and disruption to their community. We conclude that the Interim Order did not treat Mount Vernon in a preferential manner.

F. Rate Issues

1. Interim Order

111. In its application, Millennium proposed a capital structure of 65 percent debt and 35 percent equity, with a 14 percent return on equity and a 7.5 percent cost of debt, resulting in an overall rate of return of 9.78 percent. Millennium choose this capital structure because it serves to lower the overall cost of capital and rates and was similar to the capital structure and returns approved by the Commission in Alliance,⁴² Portland,⁴³ and Maritimes.⁴⁴ Further, Millennium proposed project financing to obtain the non-recourse debt, with the project partners contributing the equity component of the capital structure.

⁴²Alliance Pipeline L.P. (Alliance), 80 FERC ¶ 61,149 (1997); order on reh'g and issuing certificates, 84 FERC ¶ 61,239 (1998), reh'g denied, 85 FERC ¶ 61,331 (1998).

⁴³Portland Natural Gas Transmission System (Portland), 76 FERC ¶ 61,123 (1996).

⁴⁴Maritimes and Northeast Pipeline L.L.C. (Maritimes), 80 FERC ¶ 61,136, order on reh'g, 81 FERC ¶ 61,166 (1997).

112. Although Millennium proposed a capital structure of 65 percent debt and 35 percent equity, the Interim Order found that Millennium would not execute any financing agreements until after the Commission authorized the project. Thus, the Interim Order determined that the actual capital structure was unknown. The Interim Order also determined that Millennium proposed a capital structure consisting of five to ten percent more equity than the capital structures approved in Alliance, Portland, and Maritimes, with no justification for the increase. Thus, consistent with the rulings in Alliance, Portland, and Maritimes, the Interim Order approved Millennium's proposed return on equity of 14 percent, but required Millennium to design its rates on a capital structure of 75 percent debt and 25 percent equity, resulting in an overall rate of return of 9.13 percent, or 0.65 percent lower than that proposed by Millennium.

113. The Interim Order also found that Millennium did not propose to allocate any costs to interruptible services and that, consistent with Commission precedent, Millennium was required to either allocate costs to its interruptible services and recalculate its rates or revise its tariff to credit 100 percent of the ITS revenues net of variable costs to its firm recourse rate shippers.⁴⁵

2. Request for Rehearing

114. Millennium contends that its proposed capital structure of 65 percent debt and 35 percent equity should be approved or, at the very least, the Commission should approve some reduction of the 75 percent debt component to be more consistent with present credit standards.⁴⁶ Millennium disputes the Commission's finding that it failed to justify the proposed capital structure of 65 percent debt and 35 percent equity, contending that it filed a detailed debt capacity model which is often used in project financing and which Millennium used to determine its proposed capital structure. Millennium asserts that the debt capacity model calculates the maximum debt level that a project-financed entity like Millennium can carry while maintaining the minimum cash flow coverage ratio required by lenders, based upon accepted financial planning parameters and assumptions that are

⁴⁵See, e.g., Horizon Pipeline Company, L.L.C., 92 FERC ¶ 61,205 (2000); Independence Pipeline Company, 89 FERC ¶ 61,283 (1999); and Maritimes, 80 FERC ¶ 61,136 (1997).

⁴⁶Millennium cites Vector Pipeline, L.P., 85 FERC ¶ 61,083, at 61,303 (1998), where the Commission approved a 70/30 debt/equity capital structure for a new pipeline project.

set forth in recognized treaties on the subject.⁴⁷ Millennium contends that its debt capacity model demonstrates that the debt component of its capital structure could not exceed 65.5 percent, taking into consideration the present value of the cash flow expected to be available for debt service, loan repayment period and draw down schedules, and all other relevant factors.

115. Millennium also contends that apart from the empirical evidence to support its proposed capital structure, present financial market conditions lend further support to the slightly lower debt component. Millennium contends that the current investment environment has become increasingly uncertain and has been characterized by the downgrading of credit ratings for a number of energy companies. Millennium points out that widespread debt reduction efforts have been made by many energy companies to reduce leverage and that, based on these current capital market conditions, its proposed 65/35 capital structure is prudent and justified. Millennium indicates that some reduction of the 75 percent debt component would be more consistent with present credit standards determined in Vector, in which the Commission approved a capital structure of 70 percent debt and 30 percent equity.

116. Millennium also requests that the Commission clarify that it has allocated an appropriate level of the estimated cost of service to its interruptible services and need not revise its tariff to credit 100 percent of its Rate Schedule ITS revenues, net of variable costs, to its firm recourse rate shippers. Millennium contends that it proposed from the very beginning of this proceeding to allocate costs to its interruptible services. Millennium states that the application⁴⁸ provided evidence that it allocated a total of \$2,000,000 in its cost of service to Rate Schedules ITS and PAL, assigning \$1,750,000 to ITS, reflecting an estimated ITS throughput of 3,269,195 Dth, and an allocation of \$250,000 to PAL, reflecting an estimated PAL volume of 2,500,000 Dth.

3. Commission Holding

117. In authorizing project financed proposals similar to Millennium's, we have approved capital structures ranging from 75 to 70 percent debt and 25 to 30 percent

⁴⁷Millennium cites John F. Finnerty, *Project Financing: Asset-Based Financial Engineering* (John Wiley & Sons 1996) at 91-109.

⁴⁸See Exhibits N and P to the original certificate application filed on December 22, 1997.

equity.⁴⁹ Consistent with those rulings, we found that Millennium's proposed capital structure, reflecting five to ten percent more equity than other projects, should be reduced to 75 percent debt and 25 percent equity. We based our decision to revise the proposed capital structure of 65 percent debt and 35 percent equity on Millennium's failure to justify the equity increase and the fact that Millennium will not execute financing arrangements until after the certificate was issued, making the exact debt/equity ratio unknown.⁵⁰

118. On rehearing, Millennium argues that its debt capacity model provides adequate justification for its proposed capital structure and further points out that the current financial market conditions and the downgrading of credit ratings of a number of energy companies justifies a higher equity component. Nevertheless, we find that Millennium has failed to justify an increase in the equity ratio above the range authorized in recent major natural gas construction projects. Millennium has not presented any evidence why its project is more risky than Alliance, Vector, Portland, or Cross Bay that would warrant a higher equity ratio than the range we have recently authorized. However, recognizing that the current investment environment for energy companies is more uncertain now than at the time of Millennium's initial filing, we will adjust Millennium's equity ratio to the higher end of the range approved in recent projects, resulting in a 70/30 debt/equity capital structure, which will reduce Millennium's debt responsibility. Our finding here is consistent with two recent orders on major certificate projects that authorized a return on equity of 14 percent similar to that granted Millennium and a 70/30 debt/equity ratio.⁵¹ Thus, we will authorize Millennium to design its recourse rates based on a capital structure of 70 percent debt and 30 percent equity. We will require Millennium to file revised rates based upon the 70/30, debt/equity ratio at least 60 days prior to commencing service.

⁴⁹See, e.g., Alliance; Vector; Portland; and Maritimes. See also Cross Bay Pipeline Company, L.L.C., et al., 97 FERC ¶ 61,165 (2001); Buccaneer Gas Pipeline Company, L.L.C., 91 FERC ¶ 61,117 (2000).

⁵⁰In its May 14, 1998 response to Staff's data request at Section B - Rates, Question No. 1, Millennium indicated that financing agreements will be executed following the issuance of satisfactory Commission authorization and execution of firm transportation agreements. Millennium has not updated this information.

⁵¹Islander East Pipeline Company, L.L.C. and Algonquin Gas Transmission Company, 97 FERC ¶ 61,363, at pp. 62,693-94 (2001) and Georgia Strait Crossing Pipeline LP, 98 FERC ¶ 61,271, at p. 62,050 (2002).

Docket No. CP98-150-000, et al.

119. Millennium is correct regarding its allocation of an appropriate level of the estimated cost of service to its interruptible service. By allocating a total of \$2,000,000 to Rate Schedule ITS and PAL services, Millennium is properly assigning costs to interruptible services in calculating its rates. Thus, we find that Millennium is not required to revise its tariff to credit 100 percent of the ITS revenues, net of variable costs, to its firm recourse rate shippers.⁵²

V. Millennium's Request for Clarification

A. Interim Order

120. The Interim Order held that Millennium will become a natural gas company subject to the Commission's jurisdiction upon issuance of a certificate in this proceeding.

B. Request for Clarification

121. Millennium contends that it should not be considered a natural gas company until it engages in the transportation of natural gas following the completion of construction of its facilities. Millennium notes that the Interim Order could be interpreted to subject it now to all of the requirements of the Natural Gas Act and the Commission's regulations, including reporting and record keeping requirements, because the Interim Order issued it a certificate.

122. Millennium states that it intends to comply with the terms and conditions of the final certificate that it accepts. Millennium also does not contest the fact that, prior to completion of its entire system, Millennium's operation of Columbia's facilities, after they have been abandoned and replaced, to serve Columbia's A-5 shippers will render Millennium subject to the Commission's jurisdiction as a natural gas company.

C. Commission Holding

123. Section 2(6) of the Natural Gas Act defines a "natural gas company," in part, as a "person engaged in the transportation of natural gas in interstate commerce" In addition, section 7(c)(1) of the Natural Gas Act provides, in part, that:

⁵²On February 19, 2002, Millennium filed revised tariff sheets in accordance with the requirements of the Interim Order. We are reviewing Millennium's revised tariff sheets and will issue an order on the tariff at a later date.

No natural gas company or person which will be a natural gas company upon completion of any proposed construction or extension, shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . unless there is in force with respect to such natural gas company a certificate of public convenience and necessity

124. We will grant Millennium's request for clarification. Section 2(6) implies that a person must be engaged in the transportation of natural gas in interstate commerce to be a natural gas company. Section 7(c)(1) implies that to be a new natural gas company, a person must complete any proposed construction. Here, Millennium has not engaged in any transportation in interstate commerce and has not completed the construction of its facilities. Thus, we find that Millennium is not a natural gas company under the Natural Gas Act at this time.

VI. Environmental Issues

A. Failure to Discuss Need in the Final EIS

1. Requests for Rehearing

125. Westchester contends that the final EIS violated NEPA by failing to discuss the need for Millennium's project. Westchester also contends that the final EIS improperly bifurcated the issue of need from the environmental impact of the proposed project by stating that the issue of need is a matter of regulatory policy while, at the same time, assuming that there is a need for the project. Thus, Westchester concludes that the final EIS is deficient.

2. Commission Holding

126. Contrary to Westchester's allegations, section 1.1 of the final EIS discussed the purpose and need of Millennium's project. Specifically, the final EIS stated that the purpose of the Millennium pipeline was to provide up to 700,000 Dth of transportation capacity per day. In addition, the final EIS stated that Millennium had entered into precedent agreements with eight shippers for 464,150 Dth of capacity per day, or 66 percent of Millennium's capacity.

127. The Interim Order added to the discussion of the need for the proposed project, finding (1) that the precedent agreements for 66 percent of Millennium's capacity demonstrate market support for the project; (2) that there is a need for increased pipeline capacity in the northeast; (3) that Millennium will provide another pipeline to transport

Canadian gas supplies; (4) that Millennium will promote the growth of competitive gas markets; (5) that Millennium will increase the reliability of the region's infrastructure; and (6) that Millennium's proposals will foster the development of more North American energy supplies.

128. The Council of Environmental Quality's (CEQ) regulations provide that the EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."⁵³ The CEQ's regulations also provide that "[a]ny environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork."⁵⁴ We believe that the final EIS adequately discussed the need for Millennium's project. Nevertheless, even assuming for the sake of argument that the final EIS' discussion was deficient, the Interim Order addressed the issue of need in detail as permitted by the CEQ's regulations.⁵⁵ For these reasons, we conclude that the final EIS is not deficient nor does the final EIS improperly bifurcate the issue of need between two documents.

B. Cumulative Impacts and Segmentation

1. Requests for Rehearing

129. Cortlandt and Westchester contend that the final EIS erred by failing to discuss the cumulative impacts of construction of related downstream facilities by Consolidated Edison and IBM. Cortlandt and Westchester assert that the Interim Order recognized that Consolidated Edison will need to add infrastructure in order to deliver Millennium's gas to New York City markets. They contend that the final EIS omitted any discussion of the impacts of the added infrastructure, pointing out that the Interim Order admitted that it has insufficient information to analyze the impacts.

130. Cortlandt contends that the record shows that Consolidated Edison needs to construct at least nine miles of 24-inch diameter line. Cortlandt asserts that when information relevant to reasonably foreseeable significant adverse impact is essential to a reasoned choice among alternatives and the overall costs of obtaining the relevant information is not exorbitant, the Commission shall include the information in the EIS.

⁵³40 C.F.R. § 1502.13 (2001).

⁵⁴40 C.F.R. § 1506.4 (2001).

⁵⁵See *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1117 n.7 (D.C. Cir. 1992).

Cortlandt states that neither the Commission nor Millennium advanced any argument that obtaining the missing information would have been costly. Cortlandt concludes that NEPA mandates that the Commission provide in the final EIS quantified or detailed information about impacts before a certificate is issued, i.e., that it take a "hard look" at Consolidated Edison's facilities. Finally, Cortlandt points out that the January 10 order required Consolidated Edison and KeySpan to provide information about their facilities or "a meaningful negotiation process" for the route through Mount Vernon would be nearly impossible. If this missing information is vital, Cortlandt contends that there could not have been a meaningful environmental analysis.

131. Westchester claims that the Commission failed to evaluate potential construction by Consolidated Edison and IBM in an impermissible attempt to divide the pipeline project into segments so that each segment may satisfy NEPA standards. Westchester asserts that the Commission should have examined the Millennium project as a whole without segmentation.

2. Commission Holding

132. Various entities contend that the Commission improperly segmented its NEPA analysis by failing to examine the expansion of Consolidated Edison's facilities that may be required to deliver to consumers the natural gas introduced into its system by Millennium. Westchester contends that the Commission's failure to examine the environmental impacts of a proposed lateral to provide service to IBM facilities in Westchester County also constitutes impermissible segmentation for NEPA purposes.

133. Although we are sympathetic to these concerns, this argument must fail because no decision whose environmental impacts could be evaluated has been made at this time with regard to expansion of Consolidated Edison's system. Simply put, no conclusions have been reached with regard to the location, size, or nature of any expansion that might be required to Consolidated Edison's system. Until such decisions are made, there is nothing the Commission can analyze.⁵⁶

⁵⁶Cortlandt relies on the regulations implementing NEPA, 40 C.F.R. § 1502.22, to contend that when information relevant to reasonably foreseeable adverse impacts is essential to a reasoned choice among alternatives and the overall cost of obtaining it are not exorbitant, the agency shall include the information in the EIS. This argument misses the point. We are not lacking in technical or scientific information, nor is it a matter of the cost necessary to obtain such information. Rather, the decision whether to build

(continued...)

134. We understand the frustration with this inability to examine the environmental impacts of whatever expansion may be required of the Consolidated Edison facilities in the future to accommodate natural gas supplies delivered by Millennium. There are reasons why this is so, however.

135. It frequently happens when the Commission authorizes the construction of a new interstate natural gas pipeline, or the expansion of an existing natural gas pipeline, that local distribution systems along the route must be expanded to deliver the additional natural gas supplies that become available. Sometimes these expansions take place in the same time-frame as the authorization issued by the Commission. In other cases, the expansions take place in following years as demand materializes, or as there are shifts in demand. Often, the expansions take place piecemeal over an expanded period of time.

136. All other issues aside, the nature of such expansions makes it difficult for the Commission to consider their environmental impact when issuing a certificate. This problem is exacerbated by the fact that Congress, in passing the Natural Gas Act, divided responsibility for the nation's natural gas infrastructure between federal and state entities. It gave the Commission, a federal agency, jurisdiction over interstate natural gas facilities. The individual states, on the other hand, were granted jurisdiction over local distribution facilities. As a consequence of this bifurcation, we do not have jurisdiction over local facilities, such as those owned by Consolidated Edison, and thus have no control over when, where, or how they are built or operated.

137. Furthermore, there are often practical difficulties that limit the potential analysis of facilities over which the Commission does not have jurisdiction. In the instant case, for example, Millennium has been a number of years completing the steps necessary to obtain the authorization that is being issued at this time. In turn, before the approval granted today can be acted upon by beginning construction, a number of other significant events must take place -- for instance, Millennium must obtain the appropriate CZMA clearance from New York; likewise, approval must be granted by Canada's NEB for construction of the upstream facilities that will deliver gas into Millennium -- all of which are likely to take many months, if not years, to finalize. Assuming that such approvals are obtained without the need to modify the authorization granted today, actual construction of Millennium is expected to take between 18 months and two years.

⁵⁶(...continued)

facilities, where to build them, and the nature of the facilities, has simply not yet been made and, therefore, cannot be analyzed at this time.

138. Under these circumstances, it is not unexpected or untoward that plans for expansion of the Consolidated Edison facilities have not materialized to a degree that their environmental impacts can be analyzed by the Commission, assuming that it would otherwise be appropriate to do so under the Commission's test for determining whether the environmental impacts of non-jurisdictional facilities should be examined. The practical reality of large projects such as Millennium is that they take considerable time and effort to develop. Perhaps, more importantly, their development is subject to many significant variables whose outcome cannot be predetermined. The natural consequence of this is that some aspects of a project, particularly those not under the direct control of the project proponent, may remain in the early stages of planning even as other portions of the project become a reality. If every aspect of a project were required to be finalized before any part of the project could move forward, it would be very difficult, if not impossible, to construct such projects.

139. This reality is underscored by the fact that neither Millennium, nor the Commission, exercise any jurisdiction or control over Consolidated Edison. Consolidated Edison is subject to the jurisdiction of New York and local jurisdictions in the planning, environmental review, and construction of facilities. Those decisions have not been made at this time and, thus, their environmental impact cannot be evaluated by the Commission.

140. We note that while Consolidated Edison does not have a specific route it is considering, it has stated that it would construct its pipeline using in-street construction methods and therefore does not expect there to be significant environmental impacts.⁵⁷ We believe that in-street construction by Consolidated Edison would have impacts similar to those described in the final EIS for in-street construction for Millennium. As stated there, in-street construction results in road closures which affect traffic, parking, and residential and business access. It may also affect, damage, or disrupt buried utilities. Construction of Consolidated Edison's facilities would occur under Title 16 of the New York Official Compilation of Codes, Rules and Regulations Part 255. Street openings and material storage permits are regulated by the New York City Department of Transportation. Consolidated Edison would need to file a letter of intent and report of specifications about its construction project with the NYPSC.

141. With regard to the proposed lateral to provide service to the IBM facilities, we disagree with Westchester's assertion that the Commission has not analyzed the lateral.

⁵⁷Consolidated Edison has stated generally that it would need to construct about eight miles of up to 36-inch diameter pipeline with a maximum operating pressure of 350 psig.

Docket No. CP98-150-000, et al.

142. Millennium will construct a two-inch diameter, low-pressure lateral to serve IBM. The lateral will begin near milepost 6.4 of the ConEd Offset/Taconic Parkway Alternative and will be approximately 2.2 miles long. Approximately 0.7 miles of this total length will be on IBM's property. All construction will be on IBM's property or within Consolidated Edison's or the New York Department of Transportation's utility or road properties, respectively. From the interconnection with the Millennium mainline, the lateral will proceed about 300 feet along a Consolidated Edison powerline right-of-way and will then be installed along the southeast side of State Route 134 and the east side of the Taconic Parkway. All of this construction will be within the Consolidated Edison and highway rights-of-way. The lateral will turn eastward from the Taconic Parkway and enter the IBM property before reaching a residential area and Still Lake. There are no residences, schools, cemeteries, or parks within 100 feet of the pipeline. Two minor (less than 10 feet wide) waterbodies and one wetland will be crossed. Construction of the IBM lateral will not result in any significant adverse environmental impacts.

C. Site-Specific Construction, Mitigation, and Restoration Plans

1. Requests for Rehearing

143. The Villages and New Castle contend that the Interim Order erred in allowing Millennium to obtain review and approval at a later date through informal procedures from the Director of OEP of specific construction, mitigation, and restoration plans that do not provide for notice, review, and comment by affected local interests and governments. The Villages and New Castle assert that relegating nearly every controversial environmental and routing issue to the discretion of Millennium and the Director of OEP is not reasonable. Specifically, the Villages cite environmental conditions 1 (allows Millennium and the Director of OEP to change construction methods and mitigation measures reviewed in the NEPA process), 6 (allows Millennium and the Director of OEP to decide how Millennium's subcontractors will implement environmental measures), and 23, 27, and 34 (leaves to Millennium and the Director of OEP to work out contingency and alternate crossing plans for each waterbody crossing). New Castle cites environmental conditions 62 (site-specific mitigation plans for residential properties along the ConEd Offset portion of the ConEd Offset/Taconic Parkway Alternative), 63 (mitigation plans for restoration of the right-of-way), and 66 (site-specific plan between approximate mileposts 10.5 and 11 of the ConEd Offset/Taconic Parkway Alternative). The Villages and New Castle conclude that the Interim Order must be revised so that all significant modifications are disclosed and subject to public review and that Millennium be required to complete the various contingency plans and site specific plans in the environmental conditions portion of the Interim Order prior to the Commission issuing a final certificate.

2. Commission Holding

144. The environmental conditions that the parties object to are similar to conditions contained in numerous Commission orders.⁵⁸ These conditions delegating certain details of construction to the Director of OEP for review and approval are not designed to allow significant departures from the project as certificated. Rather, they are designed to allow the applicant to respond to engineering and construction issues that typically arise in the field and that frequently are not apparent during pre-construction surveying and review. All letters by the Director of OEP approving construction procedures in accordance with the cited conditions are filed in the docket for these proceedings and become part of the public record. The petitioners' demand that every detail of construction and implementation be reviewed and approved by the Commission prior to certification is an unnecessary and unreasonable burden that would preclude the timely construction of most major projects.

D. Alternatives to Millennium's Project

1. Requests for Rehearing

145. Mount Pleasant, the Briarcliff Public Schools, and Mr. Kahn contend that the Interim Order and the final EIS failed to consider reasonable system alternatives to Millennium's proposals. Similarly, on rehearing and in its request that Millennium's certificate be rescinded, Westchester contends that the Commission failed to address all possible system alternatives. Riverkeeper, Inc. contends that the draft EIS failed to:

⁵⁸Examples of conditions identical to condition 1 can be found in East Tennessee Natural Gas Company, 97 FERC ¶ 61,361 (2001) and Transcontinental Gas Pipe Line Corporation, 97 FERC ¶ 61,094 (2001). Examples of conditions identical to condition 6 can be found in Colorado Interstate Gas Company, 98 FERC ¶ 61,070 (2002) and East Tennessee Natural Gas Company, 97 FERC ¶ 61,032 (2001). Examples of conditions similar to condition 23 can be found in Independence Pipeline Company (Independence), 89 FERC ¶ 61,283 (1999) (condition 29) and Maritimes, 80 FERC ¶ 61,136 (1997) (condition 20). Examples of conditions similar to condition 27 can be found in Alliance, 84 FERC ¶ 61,239 (1998) (condition 19). Examples of conditions similar to condition 34 can be found in Alliance (condition 47) and Maritimes (condition 22). Examples of conditions similar to conditions 62, 63, and 66 can be found in Vector, 87 FERC ¶ 61,225 (1999) (condition 17) and Independence (condition 63).

Docket No. CP98-150-000, et al.

adequately consider reasonable alternatives and that the final EIS is based on an incomplete draft EIS and is not lawful under NEPA.⁵⁹

146. Westchester also contends that the final EIS discussed a variety of project system alternatives, but that much of this discussion is new to the final EIS and was not contained in the draft or supplemental EISs.

147. Cortlandt contends that the final EIS is "dishonest" in comparing the 32.8 miles of construction for Iroquois Gas Transmission System L.P.'s (Iroquois) Eastchester project to the 31.7 miles of construction in Westchester County for Millennium.⁶⁰ Cortlandt asserts that the final EIS should have compared the 32.8 miles of construction for the Eastchester project to the more than 400 miles of construction for Millennium, i.e., Cortlandt objects to the fact that the Interim Order did not analyze the Eastchester project as a single pipeline alternative to Millennium.

148. In a comment letter filed on February 28, 2002, the United States Department of the Interior, Fish and Wildlife Service (FWS) expressed concern about the need for the Millennium pipeline due to the proximity of the Eastchester project.

149. Finally, Cortlandt contends that Transcontinental Gas Pipe Line Corporation's (Transco) MarketLink project is an alternative to Millennium, since it serves the New York and New Jersey markets.⁶¹ Cortlandt contends that by relying on the MarketLink facilities, together with upstream interconnects with Columbia, Algonquin, and Tennessee, Millennium could serve the New York City market while avoiding construction across the Hudson River through Westchester County to reach Mount Vernon. Cortlandt also asserts that MarketLink would avoid the upgrade needed on Consolidated Edison's system at the proposed interconnection in Mount Vernon.

⁵⁹Riverkeeper states that it is a not-for-profit organization dedicated to the protection and conservation of the Hudson River and its watershed.

⁶⁰Iroquois Gas Transmission System, L.P. (Eastchester project), 95 FERC ¶ 61,335, order on reh'g and issuing certificate, 97 FERC ¶ 61,379 (2001).

⁶¹89 FERC ¶ 61,283 (1999), order issuing certificate, 91 FERC ¶ 61,102 (2000), order amending certificate, 93 FERC ¶ 61,241, reh'g denied, 94 FERC ¶ 61,128, clarification denied, 95 FERC ¶ 61,116 (2001).

2. Commission Holding

150. The draft, supplemental draft, and final EISs evaluated system alternatives developed by the Commission's staff and alternatives filed by commenters.⁶² Specifically, the final EIS evaluated 15 system alternatives – the Iroquois Pipeline System Alternative, the Tennessee Pipeline System Alternative, the Texas Eastern and Algonquin Pipeline System Alternative, the Canadian Niagara Spur System Alternative, the U.S. Niagara Spur System Alternative, Tennessee's Niagara Spur System Alternative, National Fuel's U.S. Niagara Spur System Alternative, the Vector-Millennium System Alternative, the ANR/Independence/Texas Eastern System Alternative, the Leidy Interconnection System Alternative, the Algonquin/Iroquois Pipeline System Alternative, the Crossroads Project Alternative, the CNG/Tennessee Atlantic Advantage Project, the Stagecoach Project, and the ANR/Independence/National Fuel Leidy System Alternative.⁶³ The draft, supplemental draft, and final EISs evaluated alternatives by using varying combinations of existing pipeline systems or proposed expansions of existing systems. The EIS' objective in reviewing the alternatives was to identify and evaluate system alternatives to avoid or reduce the potential impact associated with the construction and operation of the proposed facilities, while allowing for the stated objective of the project to be met. The final EIS concluded that the 15 system alternatives were not reasonable or practical for several reasons, including the potential for at least equal or greater environmental impact, construction constraints, and the fact that the cost differential associated with modifying certain existing proposals would affect the likelihood of those modifications ever being proposed.

151. The Court of Appeals for the District of Columbia Circuit stated that:

NEPA's requirements are essentially procedural; as long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment. Nevertheless, the court should ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to

⁶²The alternatives were evaluated in sections 3 and 6 of the draft, supplemental draft, and final EISs.

⁶³See section 3.2 in the final EIS.

Docket No. CP98-150-000, et al.

enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision.⁶⁴

In this proceeding, we find that the final EIS meets the primary goal of NEPA by providing a full and fair discussion of significant environmental impacts that would inform decision makers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.

152. Westchester's contention that much of the discussion about system alternatives is new to the final EIS is not correct. All of the system alternatives discussed in the final EIS were previously included in the draft or supplemental draft EISs. The public had an opportunity to comment on all of these system alternatives.

153. Cortlandt objects to the fact that the Interim Order did not analyze the Eastchester project as a single pipeline alternative to Millennium's project. The final EIS considered Iroquois' Eastchester project as a part of its analysis of the Algonquin/Iroquois Pipeline System Alternative.⁶⁵ The analysis of the Algonquin/Iroquois System Alternative included the transportation of gas remaining after Millennium delivered gas for its shippers west of the Hudson River (at Ramapo, New York), via the systems of Algonquin and Iroquois. The analysis of the Algonquin/Iroquois System Alternative included the gas to be transported by Iroquois in the Eastchester project and the gas to be transported by Millennium, not just the gas to be transported by one pipeline, since both projects are needed and the projects are not competitive. Thus, the final EIS evaluated the gas that would be delivered to Mount Vernon by Millennium, plus the gas Iroquois would deliver on its Eastchester project. Contrary to Cortlandt's claims and the FWS' concerns, the Eastchester project cannot stand alone as an alternative to Millennium, since upstream pipeline capacity would have to be built to get the combined volumes of Millennium and Iroquois into the Eastchester projects' facilities.

154. Also, Cortlandt is not correct when it asserts that the final EIS compared the 32.8 miles of construction for the Eastchester project to the 31.7 miles of construction for Millennium in Westchester County. In section 3.2.7, the final EIS stated that the Algonquin/Iroquois System Alternative would require approximately six miles of looping upstream from Algonquin's Stony Point compressor station in Rockland County, New York; approximately 22.1 miles of looping downstream from the Stony Point compressor

⁶⁴National Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988) (quotations and citations omitted).

⁶⁵See section 3.2.7 in the final EIS.

station and across the Hudson River in Rockland, Westchester, and Putnam Counties, New York; approximately 7.8 miles of looping downstream from Algonquin's Southeast compressor station in Putnam County, New York and Fairfield County, Connecticut; and additional compressor facilities on Algonquin's system; plus the construction of the Eastchester project and additional compressor facilities on Iroquois. In sum, the final EIS compared approximately 35.9 miles of mainline pipeline construction in New York and Connecticut on Algonquin's system, plus construction of the Eastchester project (for a total of approximately 68.7 miles of mainline pipeline construction) to Millennium's proposed construction in Westchester County. The final EIS concluded that the Algonquin/Iroquois System Alternative would have a greater impact than Millennium and was not a reasonable alternative to Millennium. We concur with this conclusion.

155. The final EIS discussed using system alternatives on Transco's MarketLink project.⁶⁶ The final EIS found that these alternatives were not reasonable due to the amount of additional pipeline construction that would be required on various existing pipeline systems. Further, Cortlandt provides no information to indicate that Consolidated Edison would not need to construct downstream pipeline facilities on its system if a Transco System Alternative were used to deliver gas to Mount Vernon. We find that the final EIS did not err in determining that the MarketLink project was not a reasonable alternative.

E. Failure to Examine the ConEd Offset/Taconic Parkway Alternative in a Supplemental EIS

1. Requests for Rehearing

156. The Villages, New Castle, and Riverkeeper contend that the Commission violated NEPA by failing to prepare and release in draft for public review and comment a second supplemental EIS that described and evaluated the environmental consequences of the ConEd Offset/Taconic Parkway Alternative. Specifically, the Villages assert that only four days before comments were due on the supplemental draft EIS analyzing the 9/9A Alternative and the ConEd Offset/State Route 100 Alternative, the Commission announced for the first time in a notice issued on April 26, 2001 that it was considering the ConEd Offset/Taconic Parkway Alternative and that comments on this alternative were due within 30 days. The Villages assert that the ConEd Offset/Taconic Parkway Alternative was a new alternative that substantially changed the proposed route. To support their position, the Villages cite Dubois v. USDA, 102 F.3d 1273, 1292 (1st Cir.

⁶⁶See sections 3.2.5 and 3.2.5.4 in the final EIS.

Docket No. CP98-150-000, et al.

1996) and Association Concerned About Tomorrow, Inc. v. Dole, 610 F.Supp. 1101 (N.D. Tex. 1985). The Villages also contend that the April 26 notice did not identify the resources or properties that would be affected, did not include any description or evaluation of the alternative's environmental impacts, and did not offer any comparison of the new alternative with prior proposals. In addition, by waiting until the final EIS to release its only environmental assessment of the ConEd Offset/Taconic Parkway Alternative, the Villages contend that the Commission did not give the parties an opportunity to propose construction conditions, mitigation measures, or enhancements. Since there was no evaluation of the ConEd Offset/Taconic Parkway Alternative until the final EIS, the Villages assert that the public was barred from any formally recognized opportunity to review and comment on the Commission's environmental assessment of the route. For these reasons, the Villages assert that the Interim Order must be reversed so that a new supplemental draft EIS can be presented to interested parties for meaningful review and comment.

2. Commission Holding

157. The CEQ's regulations require that an agency shall prepare a supplemental EIS if, after issuing its latest draft EIS, there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts.⁶⁷ An agency's decision on whether to supplement an EIS is based on a rule of reason.⁶⁸

158. The Villages assert that there was a substantial change in the pipeline route in the ConEd Offset/Taconic Parkway Alternative and that the Commission should have prepared a supplemental EIS. In its original application filed in 1997, Millennium proposed to construct the pipeline in the center of Consolidated Edison's electric transmission right-of-way. We examined Millennium's proposed route in the draft EIS. The supplemental draft EIS examined the ConEd Offset/State Route 100 Alternative, which moved the proposed pipeline so that it would be constructed 100 feet from the center line of the electric towers and would follow the Taconic Parkway and State Route 100. Under the ConEd Offset/Taconic Parkway Alternative examined and adopted in the final EIS, Millennium's pipeline would be located 100 feet from the electric towers' conductors and would follow the Taconic Parkway.

⁶⁷40 C.F.R. § 1502.9(c)(1)(I) and (ii). See also Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989); Sierra Club v. Slater, 120 F.3d 623 (6th Cir. 1997).

⁶⁸E.g., Village of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991); Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988).

159. The ConEd Offset/Taconic Parkway Alternative is 13.3 miles long. The ConEd Offset portion of this alternative is 7.6 miles long and is within 200 feet of the route proposed in Millennium's original application and 30 to 40 feet from the ConEd Offset/State Route 100 Alternative that were examined in the draft and supplemental draft EISs, respectively. The Taconic Parkway portion of the ConEd Offset/Taconic Parkway Alternative is 5.7 miles long. Most of the Taconic Parkway portion of the alternative is within 800 to 1,000 feet of State Route 100. The State Route 100 route and Consolidated Edison's right-of-way were examined in the draft and supplemental draft EISs.

160. As demonstrated above, the entire length of the ConEd Offset/Taconic Parkway Alternative is close to other routes evaluated in the draft and supplemental draft EISs. Thus, due to the proximity of the ConEd Offset/Taconic Parkway Alternative to other routes that have been evaluated, we believe that there was no substantial change to the route and that it was reasonable not to prepare a second supplemental EIS.

161. The Villages cite the Dubois and Dole cases to assert that a supplemental EIS must be prepared when there is a substantial change to the proposed route. In Dubois, Loon Corp., which owned the Loon Mountain Ski Area, applied to the United States Forest Service for an amendment to its special use permit to allow expansion of its facilities in the White Mountain National Forest in New Hampshire. The Forest Service prepared draft, supplemental draft, and revised draft EISs that examined five alternatives to meet the demand for skiing at Loon Mountain. In the final EIS, the Forest Service adopted another alternative, known as "Alternative 6." The plaintiffs contended that a supplemental EIS should have been prepared because Alternative 6 was a new alternative, constituting a substantial change that was relevant to environmental concerns. The Forest Service contended that Alternative 6 was merely a scaled down version of a previously discussed alternative. The court concluded that a supplemental EIS should have been prepared since there were substantial changes. Specifically, the court found that Alternative 6 constituted a different configuration of activities and locations, not merely a reduced version of a previously considered alternative; that Alternative 6 contemplated expansion in the current permit area, while the prior alternative proposed expansion on land not within the current permit area; and that Alternative 6 envisioned a ski lodge, trails, access roads, and lifts on land that the prior alternatives had left as a woodland buffer.

162. Here, as discussed above, the ConEd Offset/Taconic Parkway Alternative closely follows alternatives evaluated in the draft and supplemental draft EISs. Because of the proximity of the ConEd Offset/Taconic Parkway Alternative to the other examined alternatives, the ConEd Offset/Taconic Parkway Alternative does not constitute a substantial change to the project. Thus, we find that the Dubois case is distinguishable.

163. Dole involved a federally funded highway route through Grand Prairie, Texas. The Federal Highway Administration (FHWA) published a final EIS in 1971. Due to continuing controversy surrounding the proposed highway, a segment of the highway right-of-way was shifted from a residential area into a park after the final EIS was published. The FHWA re-evaluated the highway project in 1984 and concluded that the changes in the project were minimal and that no significant impacts were identified that required the development and processing of a supplemental EIS. The court, however, determined that "a change in alignment of a road so as to traverse public parkland has been held to be a per se criterion for supplementation."⁶⁹

164. In Dole, the proposed highway was moved into public parkland and the court held that a supplemental EIS needed to be prepared for that specific reason. The Taconic Parkway portion of the ConEd Offset/Taconic Parkway Alternative does not cross any public parkland. The ConEd Offset portion of this alternative crosses the Teatown Lake Reservation but the Teatown Lake Reservation was previously evaluated in the draft and supplemental draft EISs. Thus, we find that Dole simply does not apply here.

165. Further, on April 26, 2001, we issued a notice to all affected landowners, owners of abutting properties, and all parties to the proceeding that we intended to evaluate an additional route alternative, i.e., the ConEd Offset/Taconic Parkway Alternative. The April 26 notice provided that affected parties could file late motions to intervene or could submit comments on the new ConEd Offset/Taconic Parkway Alternative within 30 days. In fact, we continued to accept comments until the final EIS was issued on October 4, 2001 and the final EIS addressed the comments.⁷⁰ Comments on the final EIS were addressed in the Interim Order. In addition, from June 4 to 6, 2001, the Commission conducted a noticed site visit of the ConEd Offset/Taconic Parkway Alternative. Thus, we believe that we have met our obligations under NEPA to address the environmental impact of the ConEd Offset/Taconic Parkway Alternative and to allow public comment on it. We do not believe that a supplement to the supplemental draft EIS and a subsequent comment period would introduce new concerns that have not already been identified.

⁶⁹Dole, 610 F.Supp. at 1113.

⁷⁰We received several hundred letters commenting on the ConEd Offset/Taconic Parkway Alternative.

F. Lack of Definitive Route

166. Mount Pleasant and the Briarcliff Public Schools complain that the Commission issued an order certifying Millennium and allowed rehearing of that order to run without selecting a definitive route for the project, thereby depriving those concerned of an opportunity to object to the portion of the route yet to be finalized.

167. Mount Pleasant and the Briarcliff Public Schools presumably are referring to the process established in the Interim Order for the selection of a route through Mount Vernon. The Interim Order provided that the Commission would issue a final order authorizing construction of Millennium, including a specific route through Mount Vernon, once that route was selected. The Interim Order also stated that an alternative route through Mount Vernon might require additional consideration under NEPA and other provisions of law.

168. As discussed above, the Mount Vernon Variation has been considered pursuant to NEPA and other relevant provisions of law. Those potentially affected by the Mount Vernon Variation have been afforded full opportunity to comment; that opportunity to comment has been consistent with the public's opportunity to comment on other portions of the Millennium project. This includes the right to seek rehearing of the instant order. For these reasons, the contentions of Mount Pleasant and the Briarcliff Public Schools are rejected.

G. The Haverstraw Bay Crossing**1. Interim Order**

169. The Interim Order approved Millennium's proposed crossing of the Hudson River at Haverstraw Bay north of the Village of Croton-on-Hudson.

2. Requests for Rehearing and Commission Holding

170. The Villages contend that the final EIS underestimated the importance of Haverstraw Bay and the severity of impacts to the designated Significant Coastal Fish and Wildlife Habitat. For example, the Villages contend that the conclusions in the final EIS are based on misinformation provided by Millennium about polychlorinated biphenyls (PCBs).

171. The final EIS evaluated the impacts to crossing the Hudson River.⁷¹ The final EIS did not underestimate these impacts. The New York State Department of Conservation (NYSDEC) reviewed Millennium's PCB sampling when it issued its section 401 Water Quality Certificate for the crossing of the Hudson River.⁷² NYSDEC recommended sampling at two additional locations and Millennium agreed to do so.

172. The Villages contend that the final EIS is inadequate since it overuses the surface area of direct impact as a short-hand, but inaccurate, proxy for ecological impacts. The Villages assert that the final EIS failed to appreciate the role Haverstraw Bay plays in the Hudson River estuary and overlooked the cumulative ripple effects that even minor disturbances can have across a much larger segment of the ecosystem.

173. We believe that the surface area of direct impact is a valid way to describe the impact area and the relative amount of resources that will be affected by a project. The Biological Assessment discussed the issues raised by the Villages and was incorporated by reference into the final EIS. For this reason, all of the information in the Biological Assessment was not repeated in the final EIS. We note that the final EIS discussed project impacts on various resources.

174. The Villages contend that the National Marine Fisheries Service (NMFS), in a letter filed on April 4, 2001, indicated that the Commission should, among other things, investigate alternatives to the Haverstraw Bay alignment and should minimize the adverse effects of Millennium's proposals. The Villages note that NMFS did a complete "about face" by issuing an Incidental Take Statement under the Endangered Species Act in spite of its April 4, 2001 criticisms of Millennium's proposals. Since NMFS failed to explain in the Incidental Take Statement the basis for its position change, the Villages assert that the earlier NMFS comments remain valid.

175. The Villages are not correct in asserting that NMFS expressed a critical opinion about Millennium's proposals in the April 4, 2001 letter. That letter merely requested information from the Commission. On June 1, 2001, our staff responded to NMFS' information request. That response addressed the issues raised by NMFS and was used by NMFS in developing its Incidental Take Statement. NMFS did not express its position regarding Millennium's project until it issued the Incidental Take Statement.

⁷¹See sections 4.3.4, 4.4.1, 4.6.1, 5.3.4, 5.4.1, and 5.6 in the final EIS and the Biological Assessment for the Millennium project.

⁷²See Appendix K in the final EIS.

176. The Villages contend that there is no time period when Haverstraw Bay can be crossed without causing significant impacts. The Villages assert that documentation provided by Croton-on-Hudson showed that a December, January, and February construction time period would have less impact on spawning and developing biota, except at sites used by species for overwintering. Since both activities occur in Haverstraw Bay, the Villages conclude that there is no time period when the crossing could be conducted without serious impacts to fish and wildlife. Riverkeeper also contends that there is no "safe" time to construct the pipeline across Haverstraw Bay.

177. The final EIS, Biological Assessment, and Essential Fish Habitat Assessment addressed the construction time period issue. The appropriate agencies evaluated this issue and concluded that a September 1 through November 15 construction time period would have the least impact when considering all of the uses of the habitat. This time period was approved in the Interim Order. The Villages have provided no information here that would convince us to disturb our findings.

H. Alternatives to the Haverstraw Bay Crossing

1. The Route 117/Clarkstown Alternative

178. The Villages contend that the Commission violated NEPA by failing to consider the Route 117/Clarkstown Alternative crossing, which would avoid Haverstraw Bay.⁷³

179. The final EIS evaluated the Route 117/Clarkstown Alternative in section 3.6, concluding that this alternative was not reasonable because a directional drill under railroad tracks and into the Hudson River, even if feasible, would require release of drilling fluids onto the river bottom. The final EIS also determined that installing the pipeline along the winding Hook Mountain Bike Trail would require cutting back cliffs and trees on the west side of the trail to provide working space for equipment to excavate the trench, maneuver pipe into position, and backfill the trench. Further, the final EIS determined that installing the pipeline within the Palisades Interstate Park system would require clearing trees that would have a significant impact on the views of the Hudson River. We concur with the final EIS' conclusion that the Route 117/Clarkstown Alternative was not reasonable.

⁷³The Route 117/Clarkstown Alternative is 8.5 miles south of Haverstraw Bay.

Docket No. CP98-150-000, et al.

2. The Hudson River South/Tappan Zee Bridge Alternative

180. The Villages contend that the Commission's assessment of the Hudson River South/Tappan Zee Bridge Alternative (Tappan Zee Bridge Alternative) was inadequate and ignored the fact that Haverstraw Bay, and not the Tappan Zee alternative location, is in a designated significant habitat area under New York's Coastal Zone Management Plan.⁷⁴ The Villages contend that the final EIS incorrectly focused on the essential fish habitat designation of both areas and the 0.6 mile longer crossing length of the alternative.

181. Haverstraw Bay is within the NMFS' designated essential fish habitat and is in an area used by the shortnose sturgeon. However, the Tappan Zee Bridge Alternative is also within the NMFS' designated essential fish habitat and the alternative is within the area used by the federally endangered shortnose sturgeon. Because of the impacts to the shortnose sturgeon, the NMFS recommended a specific construction timing window from September 1 to November 15 for completion of the Hudson River crossing.⁷⁵ In order to complete the crossing within this 2 ½ month window, Millennium would need to employ two construction crews operating ten hours per day to complete the 2.1-mile-long crossing of the Hudson River at Haverstraw Bay. For the 2.7-mile-long crossing near the Tappan Zee Bridge, construction would be expected to take about 3.2 months to complete using two construction crews operating ten hours per day. This exceeds the recommended time period for construction. Thus, the final EIS' consideration of the crossing length, essential fish habitat, and the federally endangered shortnose sturgeon was not misplaced.

182. The Villages and Riverkeeper assert that the Tappan Zee Bridge Alternative is superior to Millennium's proposed 9/9A Alternative because it would reduce the length of construction within road ways by eight miles.

183. Millennium's proposed 9/9A Alternative would require 8.8 miles of construction within road ways and no construction adjacent to road ways. The ConEd Offset/Taconic Parkway Alternative, recommended in the final EIS and adopted in the Interim Order, reduced the length of construction within and adjacent to road ways to approximately 5.5 miles. The Tappan Zee Bridge Alternative would require 0.8 mile of construction within road ways and approximately 11.9 miles of construction adjacent to road ways. In sum,

⁷⁴The Tappan Zee Bridge Alternative is 11.3 miles south of Haverstraw Bay.

⁷⁵See section 5.3.4 in the final EIS.

the Tappan Zee Bridge Alternative would require 12.7 miles of construction within and adjacent to road ways, as opposed to 8.8 miles of construction under Millennium's proposals and 5.5 miles under the ConEd Offset/Taconic Parkway Alternative.⁷⁶ Thus, we agree with the final EIS in finding that the Tappan Zee Bridge Alternative does not reduce construction within and adjacent to road ways.

184. The Villages and Riverkeeper assert that the final EIS was concerned about the costs to Millennium of construction staging and location difficulties with the Tappan Zee Bridge Alternative. The Villages are mistaken. The cost of staging to Millennium did not play a role in the final EIS' determination.

185. Riverkeeper asserts that there is nothing in the supplemental draft EIS to suggest that staging areas for the Tappan Zee Bridge Alternative are not available. The Villages maintain that the final EIS was silent about how much land Millennium requires for staging. The Villages also refer to the "old General Motors Plant," that was identified as a possible staging area, and contend that the final EIS arbitrarily rejected this location. The Villages question why Millennium should not have been required to restore the General Motors Plant "brownfield" site for some productive further use.

186. The final EIS was not silent about Millennium's workspace requirements. The final EIS stated that Millennium would need 19.8 acres of workspace on the west side and about one acre of workspace on the east side for staging the crossing of the Hudson River.⁷⁷ The workspace for Millennium's approved Haverstraw Bay crossing on the west side of the river is in an industrial site with sufficient space that would not affect recreational or residential resources. Under the Tappan Zee Bridge Alternative, staging areas would be located in Memorial Park in South Nyack on the west side of the Hudson River and Lucee Park in Tarrytown on the east side of the Hudson River. The available area for staging within Memorial Park and Lucee Park is about 2.5 acres for each park. Thus, there is not sufficient space at Lucee or Memorial Parks to meet Millennium's staging requirements. In addition, the workspaces at both Parks would affect recreational and residential resources. Further, in the case of Lucee Park, additional space would be required to complete a bored crossing of the rail yard adjacent to the park.

187. The "old General Motors Plant" is on the east side of the Hudson River north of the eastern landing of the Tappan Zee Bridge Alternative. It is an abandoned industrial

⁷⁶See table 6.1.2-1 in the final EIS.

⁷⁷The larger workspace on the west side of the river is needed for pipe storage and other construction related activities associated with the river crossing.

Docket No. CP98-150-000, et al.

plant that consists of an area covered by a concrete foundation which has trenches that may have been part of the plant operations. While at first glance this may present a reasonable place to stage the crossing since it is an abandoned industrial site, using the General Motors Plant for staging would require more in-street construction through residential areas and it would be longer than the Tappan Zee Bridge Alternative. The final EIS evaluated the Tappan Zee Bridge Alternative as an alternative to Millennium's proposed Hudson River crossing because it was a more direct, shorter route. The final EIS did not evaluate a route through the old General Motors Plant because it was longer than the Tappan Zee Bridge Alternative and impacted more residential areas.

188. In conclusion, the final EIS rejected the Tappan Zee Bridge Alternative because:

The Tappan Zee Bridge Alternative would be extremely difficult to construct and would result in significant impact on the Palisades Parkway, I-287, the parks in Nyack and Tarrytown, and dense residential and commercial development in both Rockland and Westchester Counties, particularly near the Hudson River where in-street construction would be needed.⁷⁸

189. The requests for rehearing have not presented us with any reasons to disturb that conclusion here. Thus, we concur with the final EIS that the Tappan Zee Bridge Alternative is not superior to Millennium's route.

3. Northern Alternative Routes

190. Riverkeeper asserts that the Commission has not given adequate consideration to its comments about a Hudson River crossing to the north of the approved route near the Indian Point Nuclear Generating Station. Riverkeeper avers that the draft EIS dismissed two alternative crossings in this region, in part, as impractical points for directional drilling and because the crossings would require the negotiation of new rights-of-way. Riverkeeper asserts that no negative environmental impacts are associated with the alternative crossings north of the approved route, especially in light of Millennium's proposed blasting at Haverstraw Bay.

191. Initially, we note that only one Hudson River crossing to the north of the approved crossing was identified in any environmental document, not two as claimed by

⁷⁸See section 6.1.2 in the final EIS.

Riverkeeper. This location is adjacent to two existing Algonquin pipelines that cross the Hudson River near the Indian Point Nuclear Generating Station. The final EIS evaluated two alternative routes, known as the Hudson River North/Algonquin Alternatives in detail in Rockland County west of the Hudson River and evaluated one route on the east side of the Hudson River.⁷⁹ The final EIS did not state that the two alternatives west of the Hudson River would be undesirable because they would require negotiation of a new right-of-way. The final EIS merely indicated that approximately three miles of construction would be required along a new right-of-way, meaning that the alternative route would be in an area where there are no road or utility corridors.

192. The final EIS concluded that a directional drill would not be feasible at the single identified Hudson River crossing because of its length. Nevertheless, the final EIS did not reject this alternative simply because of concerns about directional drilling or the need for a new right-of-way west of the river. The final EIS rejected the Hudson River North/Algonquin Alternatives because of the negative impacts on existing utility infrastructure, which includes the nuclear facility; negative impacts on Algonquin's pipeline and aboveground facilities and roadways; steep topography; inadequate areas for staging; greater impacts on residential areas; impacts on parklands; longer pipeline lengths; the need for a new utility right-of-way corridor; and greater land requirements. We find that the final EIS was adequate and did not err in rejecting the Hudson River North/Algonquin Alternatives.

I. Alternatives to the Interconnect with Consolidated Edison in Mount Vernon

1. Requests for Rehearing

193. Cortlandt contends that it is not necessary for Millennium to interconnect with Consolidated Edison in Mount Vernon and that the Interim Order and final EIS erred by failing to consider alternatives. Cortlandt and Westchester also cite Millennium's statement that Millennium's shippers can use upstream interconnects with Columbia, Algonquin, and Tennessee to move gas downstream.

194. Westchester contends that the Commission has a duty to investigate all alternatives, including the use of non-Westchester means of delivering the gas. Westchester also contends that Consolidated Edison has made no commitment to construct the interconnect with Millennium and that Millennium's gas could reach

⁷⁹See section 6.1.1 in the final EIS.

Docket No. CP98-150-000, et al.

Consolidated Edison's facilities without construction in Westchester County. Westchester notes Consolidated Edison's statement that Mount Vernon need not be the site of any interconnection.

195. Finally, Westchester contends that there is no analysis of the effect on Consolidated Edison's rates if Consolidated Edison constructed additional facilities to interconnect with Millennium and no analysis of the financial effect on Millennium if Millennium has to pay an additional \$50 to \$100 million that Consolidated Edison has estimated its additional facilities would cost. Westchester also contends that none of the shippers have committed to paying for the construction of any additional Consolidated Edison facilities.

2. Commission Holding

196. The final EIS considered various alternatives to the proposed construction in Westchester County. These alternatives used varying combinations of existing facilities and/or proposed expansions of existing system facilities to minimize the overall environmental impact of the project. For example, the ANR/Independence/National Fuel system alternative would require a total of over 183 miles of pipeline loop and over 127,000 horsepower of compression to replace the eastern 148 mile portion of Millennium's proposed project. The final EIS found that this proposal would also exceed the cost of the related Millennium facilities by over \$152 million. The final EIS rejected this proposed alternative on both environmental and economic grounds.

197. The final EIS also considered suggestions that would involve using Tennessee's or Transco's existing systems as alternatives to the eastern portion of Millennium's project. The final EIS rejected using Tennessee's system as a viable alternative because of the long distance between compressor stations, the length of haul, and the relatively small diameter of Tennessee's mainline. The final EIS concluded that Tennessee would need to construct substantial facilities, including new compressor station(s) and extensive pipeline looping.

198. In evaluating the use of Transco's system, the final EIS found that the Commission's staff would have to develop a route through four different interstate pipelines in order to deliver Millennium's gas to Consolidated Edison. To accomplish delivery via Transco: (1) Millennium would have to transport gas to the proposed interconnect with Algonquin at Ramapo; (2) Algonquin would have to transport gas via backhaul from Ramapo to an upstream interconnect with Tennessee; (3) Tennessee would have to transport gas on its 24-inch diameter mainline to its interconnect with Transco in New Jersey; and (4) Transco would have to transport the gas, possibly by a combination

of forward haul and backhaul, to Consolidated Edison. Under this alternative, Transco would also need to construct additional facilities. Because of the possible operational problems that might exist by requiring two or more interstate pipelines to design an backhaul and to add facilities to accommodate Millennium's requirements, the final EIS did not consider this alternative feasible.

199. While many alternatives were evaluated, the final EIS found that it would be counterproductive to evaluate every possible routing of gas through existing facilities because this would result in a confusing array of potential alternatives. More importantly, the final EIS stated that no pipeline company filed an application to construct an alternative to Millennium.

200. Cortlandt and Westchester contend that Millennium's statements that its shippers can use upstream interconnects with Columbia, Algonquin, and Tennessee to move gas downstream renders the proposed project unnecessary. We disagree. Millennium stated that its shippers can use upstream interconnections with major interstate pipelines to deliver gas to interstate markets. However, Millennium's shippers have contracted to deliver 230,550 Dth per day to Mount Vernon. Clearly, these shippers have earmarked their gas for markets located in New York City and that gas cannot be delivered to upstream interconnections. In addition, Millennium and Mount Vernon have agreed on the route through Mount Vernon and Consolidated Edison has indicated that it needs to construct facilities to bring Millennium's gas to its existing distribution system in the South Bronx area. This is consistent with the finding in the final EIS that additional pipeline facilities are needed in Westchester County in order to deliver Millennium's shippers' contracted quantities to the New York City market.

201. Westchester expresses concern regarding the effect additional facilities may have on Consolidated Edison's rates and the financial impact such facilities may have on Millennium. First, Consolidated Edison is a non-jurisdictional company subject to regulation by New York, not the Commission. Thus, any impact related to system enhancement that Consolidated Edison undertakes is not an issue for the Commission. The proper forum for Westchester to question the effect that additional facilities may have on Consolidated Edison's rates is in a proceeding before the NYPSC. Second, Millennium's rates are based on the cost of its proposed project – not any facilities Consolidated Edison may construct. At this juncture, it is pure speculation as to who will pay or how Consolidated Edison will recover the costs associated with any additional facilities. Finally, it is not unusual for an LDC, such as Consolidated Edison, to construct

a lateral or other facilities to interconnect with a new source of supply.⁸⁰ The fact that Consolidated Edison may need to bolster its existing facilities to meet new and/or increasing demand for Millennium's gas reflects a business decision made by the parties. We will not second guess that decision here.

J. The Forsyth Road Variation

202. The Ripley Taxpayer Alliance (Taxpayer Alliance)⁸¹ contends that Millennium's approved route will be adjacent to or within Ripley's aquifer and that construction, or a catastrophic failure of the pipeline, may disrupt drinking water supplies. The Taxpayer Alliance contends that the sewer district may also be disturbed and that the pipeline will pass within several hundred feet of a school, two churches, and the downtown business district. The Taxpayer Alliance suggests that the Commission move the pipeline to the Forsyth Road Variation.

203. The final EIS addressed the issues raised in the Taxpayer Alliance's motion.⁸² The final EIS concluded that the impact of pipeline construction on aquifers and watershed areas near Ripley will be minimized because pipeline construction will require shallow excavation and because Millennium will implement its Environmental Construction Standards and its Spill Prevention, Containment, and Control Plan (SPCC Plan), as well as any spill prevention and control plan that may be required locally for construction in these areas. In addition, environmental condition 18 in the Interim Order required Millennium to identify aquifer protection districts and watersheds on its construction alignment sheets. Also, environmental condition 19 required Millennium to expand its SPCC Plan to (a) require that all construction equipment be inspected daily for leaks before working in protected areas; (b) list specific water supply, municipal, or state officials to be contacted in the event of a reportable spill; and (c) list the requirements of local or state officials concerning construction in aquifer protection areas and public water supply watersheds.

204. The final EIS noted that the project will be within approximately 0.3 mile of a school and within approximately 500 feet of two churches. The Ripley business area is approximately 0.3 mile from the project. As discussed above, the Interim Order and the

⁸⁰See, e.g., North Shore Gas Company, 83 FERC ¶ 61,149 (1998).

⁸¹The Taxpayer Alliance is a non-profit organization that addresses taxpayer issues in the Town of Ripley, New York (Ripley).

⁸²See sections 5.3.1.2 and 5.7.3 and Appendices O and P in the final EIS.

final EIS addressed pipeline safety issues.⁸³ We believe that project construction will have minimal impact on access to Ripley's business area since State Route 20 would be crossed in a manner consistent with the construction methods described in the final EIS.⁸⁴ Also, Millennium will identify sewer lines, like any other buried utilities, prior to construction and Millennium will coordinate with the appropriate utility manager to minimize construction impacts on the buried infrastructure.

205. The final EIS evaluated the Forsyth Road Variation, finding that this variation would be shorter, would take 20.9 acres less of construction right-of-way, would increase the distance between the pipeline and Ripley and the pipeline and one of the schools, and would be within 50 feet of two fewer homes. Nevertheless, the final EIS did not recommend the Forsyth Road Variation because it would require more construction under Lake Erie, would necessitate clearing most of the trees from Ripley's park, and would require construction through much steeper topography. We concur with the final EIS' conclusion and will deny the Taxpayer Alliance's request to adopt the Forsyth Road Variation.

K. The Bradley Creek Variation and the Line A-5 Variation

206. Peter Supa, Donald Lewis, and Randy Lewis live near the Town of Maine, New York, which is northwest of Binghamton in the central part of the state. Millennium's proposed pipeline crosses their property. They advocate that the pipeline route be moved. The final EIS did not recommend that the proposed route be moved, but did recommend a slight variation on the Supa's and the Lewis' property.

1. Peter Supa

a. Request for Rehearing

207. Peter Supa asserts that the impact on his water supply has not been fully addressed, contending that no engineering or environmental studies have been made for the pipeline route between mileposts 232.2 and 243.5. Mr. Supa contends that the approved route in this location would destroy his water system; a fishing pond and hunting cabin on another owner's property; and would require boring under a septic system and a road, construction on a steep side slope, hardened road crossings for logging on his and other owner's properties, blasting, and additional safety precautions for construction under power lines.

⁸³See 97 FERC at pp. 61,336-37 and section 5.12 in the final EIS.

⁸⁴See sections 2.3.2 and 2.3.3 in the final EIS.

Mr. Supa contends that better routes exist for Millennium, including the Bradley Creek Variation and routes along Columbia's existing Line A-5, the New York State Electric and Gas (NYSEG) transmission lines, and NYSEG's 12 natural gas pipelines.

208. Mr. Supa suggests several changes to environmental condition 45 in the Interim Order. He requests that condition 45 be modified to require Millennium (a) to evaluate all utility corridors in the area; (b) to prepare a report with site-specific diagrams to illustrate the flow of water to his spring and cistern; (c) to follow Line A-5 rather than the approved route; (d) to provide scale corrected drawings or orthographic photography to indicate the pipeline location between mileposts 241.1 and 242.6 along the approved route, the NYSEG pipeline, and Line A-5; (e) to conduct induced voltage studies and develop a plan to avoid accidents; (f) to provide plans to avoid the Supa water system; (g) to provide plans to possibly build the pipeline aboveground; and (h) to work with NYSEG and affected landowners and send minutes of communications and meetings, as well as attendance lists to the Commission and affected landowners.

b. Commission Holding

209. The final EIS addressed all of the issues identified by Mr. Supa associated with the approved route between mileposts 232.2 and 243.5.⁸⁵ The final EIS also evaluated alternative routes involving the Line A-5 corridor and a NYSEG pipeline (the Union Center Variations, which includes the Bradley Creek Variation), that were proposed by Mr. Supa and others.⁸⁶ The final EIS found that the Line A-5 variation would increase construction impacts on residential, wetland, and forested areas. The final EIS found that the Bradley Creek Variation would be longer and impact additional agricultural and forested areas. For these reasons, the final EIS recommended Millennium's proposed route with a minor variation, known as the Bradley Creek Road Variation, to reduce the impact on the property of Mr. Supa and his neighbors. The final EIS also included environmental condition 58 to reduce the remote possibility of any impact on Mr. Supa's water supply.⁸⁷ In addition, as discussed above, the final EIS evaluated all timely filed alternatives suggested during the scoping process and in comments on the draft and

⁸⁵See sections 5.1.1, 5.3.1.2, and 5.12 and Appendices O and P in the final EIS.

⁸⁶See section 6.3.7 in the final EIS.

⁸⁷The approved route will use a NYSEG electric transmission line right-of-way.

Docket No. CP98-150-000, et al.

supplemental draft EISs. We will not reopen the record now to examine routes along NYSEG's 12 natural gas pipelines, as suggested by Mr. Supa.⁸⁸

210. In his proposals for changes to environmental condition 45, Mr. Supa requests that Millennium prepare a report with site specific diagrams to illustrate the flow of water to his spring and cistern and prepare a plan to avoid his water supply. Environmental condition 58 of the Interim Order, however, required Millennium to prepare a report on the water supply system on the Supa property. Specifically, we required Millennium to prepare site specific diagrams as necessary to illustrate the flow of water to the spring and cistern. We also required Millennium to move the pipeline upslope away from the spring if the studies indicate the trench would intersect or capture the groundwater flowing to Mr. Supa's spring.

211. Further, environmental condition 45 required Millennium to work with the NYSEG to develop plans for safe construction and operation of the pipeline within and along the power line. In addition, Millennium agreed to construct the pipeline in a manner consistent with the DOT's requirements in 49 C.F.R. Part 192, which has provisions for cathodic protection. Thus, because Millennium must do induced voltage studies under the DOT's regulations to design its cathodic protection, we do not need to impose a requirement for additional induced voltage studies here. Also, we will not require Millennium to provide the scale corrected drawings or orthographic photography information about various pipeline routes because they are not needed. Finally, we will not reopen the record to consider Mr. Supa's proposal to construct the pipeline above-ground on his property.⁸⁹ Since many of the conditions suggested by Mr. Supa are already included in environmental condition 48 and other conditions, we will not modify environmental condition 45, as suggested by Mr. Supa.

2. Donald and Randy Lewis

a. Requests for Rehearing

212. The Lewises contend that the Commission should require Millennium to reevaluate the Bradley Creek Variation by using up-to-date information, asserting that commenters have clearly established the need to follow the NYSEG pipeline, rather than

⁸⁸Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 554-55 (1978); Friends of the River v. FERC, 720 F.2d 93, 98 n.6 (D.C. Cir. 1983).

⁸⁹Id.

Docket No. CP98-150-000, et al.

the power line through this area, and that the Commission has ignored these comments. They contend that the final EIS did not address all of the comments about the Bradley Creek Variation.

213. The Lewises assert that table 6.3.7-1 in the final EIS is incomplete because it does not include a fish pond on the Don Lewis property which would be destroyed by the pipeline, one residence (the Scone residence), a seasonal cabin, and a pet cemetery.

214. The Lewises contend that table 6.3.7-2 in the final EIS does not include the higher costs to construct portions of the project along the approved route where slick bores will be needed. Further, Randy Lewis states that he has been operating a business on his property and that hardened crossings will be required for the heavy truck traffic associated with the business. Randy Lewis states that the cost of this type of crossing has not been included in any comparison between route alternatives.

215. The Lewises maintain that page 6-83 of the final EIS, which is part of the section on the Bradley Creek Variation, is incorrect in that it did not include the land requirements for staging waterbody crossings. Further, they assert that the variation would cross only the tip of the Kodey tree farm, would not affect planted trees on the Kodey farm, and that the final EIS did not mention that Millennium's route would cross Don Lewis' apple orchard.

216. The Lewises contend that the final EIS does not mention that an explosion of the pipeline on the Randy Lewis property would cut off all access to and from the residence due to the 80 foot cliffs that surround the Lewis house on three sides. The Lewis' want a plan in place with the Union Center Fire Department and the Town of Maine that would make Millennium responsible for providing a helicopter to evacuate Randy Lewis and his family if such an event occurred.

217. The Lewises contend that their driveway runs north to south, so moving the pipeline to the north would not avoid it.

b. Commission Holding

218. The Lewises assert that some directly affected landowners have filed comments supporting the Bradley Creek Variation. However, not all of the landowners who would be affected by this variation filed letters of support. In fact, several landowners filed letters opposing this route variation. Appendix P in the final EIS, filed in response to the supplemental draft EIS, addressed all of the comments about the Bradley Creek Variation.

219. Table 6.3.7-1 in the final EIS compared the Line A-5 Variation to Millennium's approved route. The seasonal cabin was not included on the list of properties because it is not a residence and is only used occasionally. The table indicated that the approved route would be within 50 feet of one residence, while the Line A-5 Variation would be within 50 feet of 18 residences. Thus, Millennium's route avoided more residences even if the Scone residence were included in the table. We note that Millennium is required to construct the pipeline and restore the construction right-of-way in a manner consistent with its Environmental Construction Standards, including any construction across man-made ponds. For these reasons, we conclude that the final EIS did not err in not recommending the Line A-5 Variation.

220. As for the cost of using slick bores, construction cost is not an environmental issue. The final EIS stated that hardened crossings would be required at some locations where there will be heavy equipment crossings.⁹⁰ In these situations, it is up to the landowner to identify locations where hardened crossing will be needed during easement negotiations with Millennium.

221. As for the land requirements for waterbody crossings, table 6.3.7-2 indicated that the estimates for the land requirements are based on a 75-foot-wide right-of-way. The addition of about 0.1 acre to account for each waterbody crossing would add about 0.2 acre to Millennium's route and 0.1 acre to the Bradley Creek Variation. Even with this addition to Millennium's proposed route, the Bradley Creek Variation would require 7.4 acres of additional land for the construction right-of-way and about 4.3 acres more for the permanent right-of-way than Millennium's approved route. The final EIS noted that the variation would cross the Mr. Kodey's Tree Farm. Mr. Kodey filed comments in opposition to the Bradley Creek Variation, indicating that the variation would affect about 25 percent of the trees on his property, which is in contrast to the Lewis' statement that no planted trees would be affected. If the construction right-of-way affects Donald Lewis' apple orchard, Mr. Lewis will need to raise this issue during easement negotiations.

222. As for the threat of a pipeline explosion and the necessity of keeping a helicopter on call, we note that many people live close to pipelines. Millennium will construct its pipeline in accordance with the DOT's pipeline safety regulations, which have been developed to protect the public. We do not think keeping a helicopter on call is necessary.

⁹⁰See Appendices O and P in the final EIS.

223. According to the photographic alignment sheets, the construction right-of-way would initially enter Don Lewis' property along a driveway that is used for residential and business access. This portion of the driveway runs roughly northwest to southeast. Prior to crossing a waterbody, a branch of the driveway turns to the north and crosses the stream. This portion of the driveway runs north and south. The final EIS intended to avoid crossing the north-south portion of the driveway but a mistake was made in describing the driveway. Thus, we will require Millennium to move its pipeline route slightly to the south so that Millennium's route avoids crossing the north-south portion of the driveway to the Randy Lewis residence and crosses the waterbody to the south of the driveway bridge.

3. Conclusion

224. As discussed above, we concur with the recommendations in the final EIS. We will not adopt the Bradley Creek Variation or the Line A-5 Variation as requested by Mr. Supa and the Lewises.

L. Coastal Zone Management Act

225. Various entities contend that we have violated the CZMA, first by issuing an Interim Order before the NYSDOS issued a consistency determination for the project, and then by failing to revoke that authorization after the NYSDOS objected to Millennium's consistency certification. The claim has also been made that the Commission's final EIS failed to adequately address certain CZMA issues.

226. By way of background, at the time the Commission issued its Interim Order the NYSDOS had not completed its consistency review. Accordingly, the Interim Order provided that Millennium could not be constructed until it received an affirmative coastal zone determination from the NYSDOS. Thereafter, on May 9, 2002, the NYSDOS informed Millennium that it objected to its consistency certification for the project. Among other things, the NYSDOS' May 9, 2002 determination set forth several alternatives for the project which, if adopted, would permit the activity to be conducted in a manner consistent with the requirements of the CZMA. Millennium subsequently appealed this determination to the Secretary of Commerce. That appeal is still pending,

227. We disagree with claims that the Commission could not issue an authorization for Millennium until the NYSDOS completed its consistency review of Millennium, and that the Commission must revoke its authorization now that the NYSDOS has objected to Millennium's consistency certification.

228. Consistent with long-standing practice, and as authorized by section 7(e) of the Natural Gas Act, we typically issue certificates for natural gas pipelines subject to conditions that must be satisfied by an applicant or others before the grant of a certificate can be effectuated by constructing and operating the nascent project.⁹¹ This case is no different. The Commission's issuance of a certificate to Millennium is subject to a number of conditions. For instance, the order provides that Millennium may not commence construction of its facilities until TransCanada and St. Clair have received all necessary approvals from Canada's NEB to construct the upstream facilities that will supply natural gas to Millennium. It also provides, among other things, that Millennium must comply with various statutes, including the Endangered Species Act, Clean Water Act, Coastal Zone Management Act, and the National Historic Preservation Act, before construction can begin.

229. As is the case with virtually every certificate issued by the Commission that authorizes construction of facilities, the instant approval is subject to Millennium's compliance with the environmental conditions set forth in the order. In this order, environmental condition 54 provides that "[p]rior to beginning construction of any project facilities, Millennium shall file with the Secretary [of the Commission] a determination of consistency with the New York State coastal management plan." Thus, as so conditioned, Millennium cannot exercise the certificate authority granted by the Commission by constructing the project without first obtaining the necessary consistency determination from NYSDOS.

230. We have routinely issued certificates for natural gas pipeline projects subject to this condition in the past.⁹² This approach is founded on practical grounds. In spite of the best efforts of those involved, it is often impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its certificate. This happens for many reasons. For instance, section 307 of the CZMA, 16 U.S.C. § 1456(c)(3)(A), provides that "[a]t the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's consistency certification." This section further provides that "[i]f the state or its designated agency fails to furnish the requested

⁹¹Section 7(e) of the Natural Gas Act provides that "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

⁹²See, e.g., Gulfstream Natural Gas System, L.L.C., 94 FERC ¶ 61,185; Florida Gas Transmission System, 90 FERC ¶ 61,212.

notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed." In some cases, these deadlines are not met for whatever reason. The regulations implementing the CZMA take this, and other, eventualities into account by providing that "[f]ederal agencies should not delay processing applications pending receipt of a State agency's concurrence."⁹³ That is exactly what the Commission has done here in processing Millennium's application and issuing a certificate, the exercise of the authority thereunder of which is conditioned upon, among other things, issuance of a determination of consistency with New York's coastal management plan.⁹⁴

231. Only time will tell whether the Secretary of Commerce will affirm or overturn the objections of the NYSDOS to Millennium's consistency certification or whether Millennium will be required to revise its project in order to obtain a consistency determination from NYSDOS. We do not know the answer to those questions at this time. Nevertheless, until Millennium obtains the necessary approvals under the CZMA, it cannot exercise the authorization granted in this order to construct and operate its project.

232. Finally, various claims are raised that our final EIS failed to consider adequately certain CZMA issues. These claims misapprehend the purpose of an EIS and the relationship between NEPA and the CZMA. The purpose of an EIS is to ensure that an agency, in reaching its decisions, will have available and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audiences that may also play a

⁹³15 C.F.R. § 930.63(c) (2001).

⁹⁴The validity of this approach was approved under a similar statute in *City of Grapevine, Texas v. DOT*, 17 F.3d 1502 (D.C. Cir. 1994). In that case, the Federal Aviation Administration (FAA) approved a proposed runway before completion of the review process required by the National Historic Preservation Act (NHPA). To ensure compliance with the NHPA, the FAA conditioned its approval of the runway upon completion of the NHPA review. The court rejected a challenge to the validity of this approach, concluding that "because the FAA's approval of the West Runway was expressly conditioned upon completion of the § 106 process, we find here no violation of the NHPA." *Id.* at 1509. In this context, we reject the contention that New York can effectively preempt the Natural Gas Act and the regulations implementing the CZMA because it does not acquiesce to the issuing of certifications conditioned on subsequent state concurrence under the CZMA.

role in both the decision making process and the implementation of that decision.⁹⁵ The EIS prepared by Commission staff for Millennium sets forth the information necessary to achieve those purposes, including significant amounts of information and analysis relevant to the Hudson River crossing and other environmental impacts of the project on the coastal zone. The EIS, however, is not intended to exhaustively analyze all issues arising under New York's Coastal Management Plan or other issues arising under the CZMA. Rather, those issues arise under the CZMA and are to be considered in the NYSDOS consistency determination under that statute, which was done, resulting in the May 9, 2002 objection by the NYSDOS to the consistency certification for Millennium. Thus, we will reject these claims.

M. Blasting in the Hudson River

1. Background

233. After the final EIS was issued, Millennium indicated that it would need to blast in the Hudson River to construct its pipeline.

2. Requests for Rehearing

234. Cortlandt contends that the Commission erred in issuing a certificate without evaluating the impacts of blasting in the Hudson River. Cortlandt acknowledges that NYSDEC issued a section 401 Water Quality Certificate (WQC) under the Clean Water Act,⁹⁶ but contends that the Interim Order erred by not conditioning the certificate on NYSDEC's approval of an amended WQC that addresses the issue of blasting. Westchester asserts that the Commission ignored the harmful environmental impacts that will result from blasting in the Hudson River, contending that under section 401, before the Commission may issue a permit or license for a project that may adversely affect water quality, the state in which the project is located must certify that the project will not contravene state water quality standards. Westchester also states that the Commission should not allow the project to go forward without NYSDEC's section 401 review.

3. Commission Holding

235. We will grant Cortlandt's and Westchester's request for rehearing and require that Millennium file the appropriate documentation with NYSDEC to amend its WQC. In

⁹⁵See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

⁹⁶33 U.S.C. § 1251, et seq.

addition, Millennium shall not begin to construct its pipeline until NYSDEC issues an amended WQC. Specifically, we will require that:

Millennium shall file the appropriate documentation with the NYSDEC to amend its section 401 WQC issued by the NYSDEC in December 1999.

The amendment shall reflect the need for blasting in the Hudson River and any other Project changes that may require NYSDEC's review. The amended WQC shall be filed with the Secretary for review by the Director of OEP, prior to construction.

236. Westchester contends that the Commission should issue a supplemental EIS that focuses on blasting in the Hudson River. Riverkeeper asserts that the draft EIS, final EIS, and Interim Order do not appropriately consider the impacts of blasting in the Hudson River.

237. We addressed this issue in the Interim Order, stating that:

The environmental conditions [imposed on Millennium in the Interim Order] anticipate changes to construction. Environmental condition one requires that Millennium follow the construction procedures and mitigation measures described in its application and supplements and as identified in the final EIS, unless modified by this order. If it is necessary for Millennium to modify any of the procedures, measures, or conditions approved herein, Millennium must file a request to do so and must receive written approval from the Director of . . . OEP before using the modification. Section IV.A.6 of Millennium's Environmental Construction Procedures also provides that blasting will not be done in waterbody channels without prior approval from the government authorities having jurisdiction. Thus, Millennium must obtain written approval from the Commission, since blasting in the Hudson River will modify Millennium's filed Hudson River crossing procedures. Consequently, we will modify environmental condition 27 [in the final EIS] to require that Millennium file the work plan for crossing the

Hudson River with the Secretary of the Commission for review and written approval of the Director of OEP.⁹⁷

238. With these conditions in place, we do not believe that a supplemental EIS on blasting is necessary. Nevertheless, we prepared a supplemental Biological Assessment that evaluated the impact of blasting in the Hudson River. (See section VI.R., *infra*.)

N. Blasting in Westchester County

1. Interim Order

239. The Interim Order recognized that blasting would be required along most of the right-of-way on the ConEd Offset/Taconic Parkway Alternative. To identify structures that may be damaged by blasting, the Interim Order required Millennium, with the landowners approval, to conduct pre- and post-blasting inspections at residences and commercial structures and utilities within 150 feet of blasting. The Interim Order also required Millennium to employ a licensed blasting contractor.

2. Requests for Rehearing

240. Cortlandt contends that the Commission erred by relying on mitigation measures in the Interim Order as a surrogate for evaluating blasting impacts to homes and residents. According to Cortlandt, the Interim Order recognized that blasting will impact properties along the ConEd Offset/Taconic Parkway Alternative, but that the Interim Order did not discuss the scope and scale of blasting related impacts. Cortlandt asserts that this could not be done since Millennium has not conducted geotechnical studies to develop site-specific blasting plans. Cortlandt contends that the Commission's statement that blasting impacts are temporary and can be mitigated by studies and plans developed and implemented after the Interim Order is issued is irrational and refuted in the record by the expert testimony filed by Cortlandt.

241. Cortlandt also contends that the Interim Order required Millennium (with landowner approval) to identify structures that may be damaged by blasting activities and to conduct pre- and post-blasting inspections of all residential and commercial structures within 150 feet of blasting. According to Cortlandt, this requirement confirms that Millennium and the Commission failed to identify structures that may be damaged by blasting activities during the NEPA review of the proposal. Without this information,

⁹⁷97 FERC at p. 62,332.

Cortlandt asserts that any conclusion about blasting impacts is speculative, since pre- and post-blasting impacts are a means to quantify damage, not prevent or minimize damage. Cortlandt states that this requirement is in violation of 18 C.F.R. § 380.12(j)(10), which provides that an application should contain a report that describes how residential property, including stone walls, sidewalks, water supplies, and septic systems would be restored if damaged by construction.

242. Cortlandt contends that the Interim Order required Millennium to begin restoration of residential properties, trails, and roads immediately after backfilling the trench as a mitigation measure for construction along Consolidated Edison's right-of-way. Cortlandt asserts that this mitigation measure does not address the potential destruction of homes or injuries to people that Cortlandt's experts have identified as possible consequences of blasting.

243. Cortlandt contends that the Commission's requirement that Millennium employ a licensed blasting contractor merely directs Millennium to obey the law, which is not mitigation for environmental impacts. Cortlandt asserts that the Commission's reliance on Consolidated Edison's blasting requirements as mitigation is misplaced, contending that these measures are designed to protect Consolidated Edison's electric transmission lines from blasting-related damage and do nothing to protect nearby residences, septic tanks, or other facilities from possible damage due to blasting or other construction activities. Cortlandt alleges that the Interim Order does not explain what "minimal" means in terms of blast charges or in relation to what standard.

3. Commission Holding

244. The final EIS acknowledged that Millennium has not done any geotechnical studies of Consolidated Edison's right-of-way to assess blasting. However, the final EIS stated that most of the right-of-way would require blasting and that Millennium identified certain locations where blasting would be required. The final EIS also acknowledged the concerns raised in the expert testimony filed by Cortlandt.⁹⁸ For example, the testimony stated that blasting could cause rock displacement, cracking, and severe lateral rock movement; that these impacts could occur 15, 35, or more than 50 feet from blast sites; and that blasting could damage structures, septic systems, and oil tanks. The final EIS identified 59 residences between 50 and 200 feet of the construction work area. Of these, 24 residences are between 50 and 100 feet, 16 residences are between 100 and 150 feet, and 19 residences are between 150 and 200 feet of the construction work area along the

⁹⁸See section 6.2.6.1 in the final EIS.

ConEd Offset/Taconic Parkway Alternative. The final EIS identified the resources that could be damaged according to Cortlandt's expert testimony.

245. The Interim Order required Millennium to offer property owners pre- and post-blasting inspection of structures within 150 feet of the construction right-of-way in areas where blasting would occur. Cortlandt is correct in stating that the inspections do not prevent or minimize damage and that they only provide a basis to quantify any damage that might occur. We note that compensation for damages will be part of Millennium's negotiations with affected landowners and is outside the Commission's jurisdiction, but Millennium has stated that landowners will be compensated for construction related damages.

246. Contrary to Cortlandt's contentions, Millennium's filings contain procedures for restoring residential properties. Millennium's Environmental Construction Standards contain general restoration procedures, that are consistent with the staff's Upland Erosion Control, Revegetation, and Maintenance Plan. Further, the final EIS contained a description of how residential properties would be restored.⁹⁹ In addition, individual landowners and Millennium may develop additional restoration details during easement negotiations. These details may be site specific and may include seeding and landscaping specifications, for example. The easement negotiations are outside the Commission's jurisdiction. The final EIS also described procedures Millennium would use if a septic system is damaged¹⁰⁰ or if water supplies are damaged.¹⁰¹

247. Cortlandt is correct in stating that the requirement that Millennium begin restoration of residential properties, trails, and roads immediately after backfilling the trench is not specifically related to blasting. It is not intended to be, since it is a general project-wide requirement for the immediate restoration of residential properties, trails, and roads along the construction right-of-way. This requirement is in addition to the right-of-way restoration procedures in Millennium's Environmental Construction Standards¹⁰² that Millennium has stated it would employ during construction of the pipeline.

⁹⁹See sections 5.8.2 and 6.2 in the final EIS.

¹⁰⁰See section 5.8.2.2 in the final EIS.

¹⁰¹See sections 5.3 and 6.2.6 in the final EIS.

¹⁰²See Appendix E1 in the final EIS.

Docket No. CP98-150-000, et al.

248. Cortlandt contends that employing a licensed blasting contractor is merely directing Millennium to obey the law. The Interim Order required that Millennium employ a licensed blasting contractor and obtain appropriate local permits. Even though this requirement means that Millennium must comply with applicable laws, it was imposed in the Interim Order to verify that such compliance will occur. This is a project-wide requirement and it allows local permitting authority input, which can vary with the concerns and requirements of each local area.

249. Cortlandt contends that the Commission's reliance on Consolidated Edison's blasting requirements as mitigation is misplaced. The final EIS stated that Consolidated Edison implemented a blasting protocol that it uses whenever there is construction requiring blasting anywhere within its right-of-way. We required Millennium to use Consolidated Edison's blasting protocol and any reasonable requirements local authorities may impose. Further, the DOT stated that shockwaves generated by blasting and their effects on power lines may require additional precautions, such as special construction, operation, and maintenance procedures.¹⁰³ For this reason, the DOT recommended that Millennium work with all affected power companies along the route to develop safe blasting procedures. We believe that Millennium's use of Consolidated Edison's blasting protocol is consistent with the DOT's recommendation. The use of Consolidated Edison's blasting protocol is an effective means to mitigate construction impacts since the blasting protocol is designed to protect Consolidated Edison's electric transmission lines. The protocol's requirement to use minimally sized charges or the smallest effective charge for blasting and other measures reduces the risk of fly rock that could damage the power lines and of the blast damaging the bases of the electric towers. In protecting its power lines and towers from these types of damages, we believe that Consolidated Edison's blasting protocol also protects other resources near the blast area from similar damage.

O. Terrorism and Security

1. Requests for Rehearing

250. The Briarcliff Public Schools, Mount Pleasant, the Villages, Westchester, and Mr. Kahn contend that the final EIS and the Interim Order erred by failing to address the threat of terrorist attacks on the pipeline or the impact an attack would have on communities near the Millennium pipeline. Westchester claims that the final EIS "reflects a lack of deliberation," since the Commission and the DOT are well aware that commercial aircraft crashes have caused great damage to underground facilities. In

¹⁰³See the DOT's November 4, 1999 letter filed with the Commission.

addition, Westchester contends that the final EIS did not analyze the level of security services needed during and after construction, especially since its police force is under a "great strain" providing protection to government buildings, the water supply, the transportation system, the Indian Point Nuclear Power Plant, and lending assistance to New York City. Mount Pleasant and Mr. Kahn contend that the final EIS failed to consider how counter-terrorism measures can decrease pipeline safety and that the Interim Order erred in issuing a certificate without anti-terrorist pipeline standards in place. The Villages request that we prepare a supplemental EIS to discuss terrorism in light of the fact that the Federal Bureau of Investigation issued a warning about specific terrorist threats against natural gas pipelines. The Villages and Mr. Kahn also contend that the Commission must require in the certificate that Millennium take adequate safety and security measures to prevent and mitigate terrorist incidents.

2. Commission Holding

251. In light of the events of September 11, 2001, we recognize that pipeline operators and regulators must consider the threat of terrorism, both in approving new projects and in operating existing facilities. However, the likelihood of future acts of terrorism or sabotage occurring on Millennium's proposed pipeline, or at any of the myriad natural gas pipeline or energy facilities throughout the United States, is unpredictable given the disparate motives and abilities of terrorist groups. The continuing need to construct facilities to meet the market demand for supplies of natural gas is not diminished merely because there is a threat of terrorist acts. Moreover, the unpredictable possibility of terrorism does not support a finding that Millennium's pipeline should not be constructed. We thoroughly explored numerous alternatives to the proposed route. Even in light of the events of September 11, we find that the authorized route through Westchester County is the preferred route.¹⁰⁴

252. Increased security awareness has occurred throughout the industry and nation. Following September 11, President George W. Bush established the Office of Homeland Security with the mission of coordinating the efforts of all executive departments and agencies to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States. In cooperation with other Federal agencies and industry trade groups, we have joined in the efforts to protect the energy infrastructure by taking actions to reduce the threat of terrorism or sabotage. We believe that the concerns

¹⁰⁴Iroquois Gas Transmission, L.P., 98 FERC ¶ 61,273 (2002).

raised in this proceeding fall within the scope of these ongoing efforts to protect the more than 300,000 miles of interstate natural gas transmission pipelines.¹⁰⁵

253. Safety and security are important considerations in any Commission action. We are confident that Millennium's pipeline can be safely constructed and operated in the authorized construction corridor.

P. 100-Foot Offset

1. Background

254. The NYPSC and Millennium developed a Memorandum of Understanding (Memorandum) and supplemental Memorandum of Understanding (supplemental Memorandum) to address pipeline construction within 1,500 feet of Consolidated Edison's power line corridor. The additional design, construction, operation, and maintenance recommendations in the Memorandum and supplemental Memorandum are more rigorous than the DOT's requirements for pipeline construction. The Interim Order adopted the recommendation in the final EIS, originally proposed by the NYPSC, that Millennium construct its pipeline 100 feet from Consolidated Edison's conductors on that portion of the pipeline that follows Consolidated Edison's right-of-way.

2. Requests for Rehearing

255. Cortlandt contends that there is no data in the record to support a 100-foot offset from the outermost Consolidated Edison power line on the ConEd Offset/Taconic Parkway Alternative as being a reasonably safe distance for blasting. On the contrary, Cortlandt asserts that many submissions in the record indicate that a 100-foot offset is not safe. Cortlandt asserts that the Commission improperly relied on a "back-room deal" between Millennium and the NYPSC (the Memorandum and supplemental Memorandum) to certificate the 100-foot offset without independently verifying the information.

3. Commission Holding

256. The DOT is mandated to provide public safety under 49 U.S.C. Chapter 601. The Research and Special Programs Administration's (RSPA), Office of Pipeline Safety, administers the national regulatory program to ensure the safe transportation of natural

¹⁰⁵Id.

gas and other hazardous materials by pipeline. It develops safety regulations and other approaches to risk management that ensure safety in the design, construction, testing, operation, maintenance, and emergency response of pipeline facilities. Many of the regulations are written as performance standards that set the level of safety to be attained and allow the pipeline operator to use various technologies to achieve safety. The RSPA ensures that people and the environment are protected from the risk of pipeline incidents. This work is shared with state agency partners and others at the Federal, state, and local level. Section 5(a) of the Natural Gas Pipeline Safety Act provides for a state agency to assume all aspects of the safety program for intrastate facilities by adopting and enforcing the federal standards, while section 5(b) permits a state agency that does not qualify under section 5(a) to perform certain inspections and monitoring functions. A state may also act as the DOT's agent to inspect interstate facilities within its boundaries. The DOT, however, is responsible for enforcement action. The majority of the states have section 5(a) certifications or section 5(b) agreements, while nine states act as interstate agents.

257. The NYPSC is the designated representative of the DOT in regard to issues related to pipeline design, construction, and operation in New York. The NYPSC is the appropriate agency to develop the protocols in the Memorandum and supplemental Memorandum. These documents were filed with the Commission, are in the public record in this proceeding, and have been available for review and public comment. In the Memorandum and supplemental Memorandum, the NYPSC and Millennium agreed to more stringent pipeline design, construction, operation, and maintenance requirements than required by the DOT to protect the public, Millennium's pipeline, and Consolidated Edison's electric transmission lines.

258. We conclude that a 100-foot offset from the electric conductors will allow adequate space for clearance between the construction equipment and conductors. It will also minimize the distance between the pipeline and the towers, reducing the area that needs to be cleared for the construction right-of-way. Cortlandt has provided no information here that would convince us to modify the findings in the Interim Order and the final EIS that the 100-foot offset is adequate.

Q. Cathodic Protection

259. The DOT requires that cathodic protection be installed and placed in operation within one year after completion of pipeline construction.¹⁰⁶ The DOT, however, has identified an example of a pipeline project where significant corrosion occurred even

¹⁰⁶49 C.F.R. § 192.455(a)(2).

though appropriate facilities were installed within the one year cathodic protection window.¹⁰⁷ Thus, the DOT recommends that we impose additional requirements on Millennium where the pipeline would be constructed across, along, or within powerline rights-of-way, particularly near the heavily populated New York City metropolitan area. Specifically, the DOT recommends that Millennium be required to:

- determine the location of pipelines and rectifiers or other sources of impressed current nearby or within the right-of-way before constructing the pipeline;
- conduct a stray current survey as soon as practical after the pipeline is buried;
- initiate prompt steps to mitigate detrimental effects of stray current; and
- install and place in service the cathodic protection as soon as practical, but no later than three months after the completion of construction.

260. We believe that the DOT's additional requirements are reasonable to protect the pipeline along Consolidated Edison's electric rights-of-way in Westchester County. We also believe that the DOT's recommendation should be clarified to the extent that the meaning of the phrase "completion of construction" be interpreted not as completion of construction of the entire proposed pipeline, but as completion of construction along or within the powerline right-of-way. However, this interpretation may be refined by the DOT during the required plan development that will address the DOT's issues.

261. Thus, for all locations where Millennium's pipeline will cross or be constructed along or within Consolidated Edison's powerline rights-of-way, Millennium shall in consultation with the DOT develop a plan by which it will:

- a. determine the location of pipelines and rectifiers or other sources of impressed current nearby or within the powerline rights-of-way before constructing the pipeline;
- b. conduct a stray current survey as soon as practical after the pipeline is buried;
- c. identify and initiate prompt steps to mitigate detrimental effects of stray current; and

¹⁰⁷See the June 14, 2002 memo to the file regarding a June 7, 2002 e-mail from the DOT.

- d. install and place in service the cathodic protection as soon as practical, but no later than three months after completion of pipeline construction within a powerline right-of-way.

262. Millennium shall file the plan and any additional DOT recommendations for construction across, along, or within powerline rights-of-way with the Secretary prior to construction.

R. Endangered and Threatened Species

1. Requests for Rehearing

263. The Villages contend that Haverstraw Bay is a "designated habitat" and spawning ground for the Federally endangered shortnose sturgeon and that blasting in the sturgeon's spawning and overwintering ground will increase the potential impact on this species, including the potential for direct fish mortality. The Villages assert that the Commission can no longer conclude that the certificated crossing method minimizes the impacts to the shortnose sturgeon since Millennium indicated that blasting will be required.

264. Riverkeeper contends that the certificate is improper under the Endangered Species Act of 1973 and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) because the Biological Assessment and the Essential Fish Habitat Assessment did not consider the effect of blasting on the essential fish habitat of the shortnose sturgeon in the Hudson River. Specifically, Riverkeeper contends that the Magnuson-Stevens Act regulations require that the Federal agency issuing a license consult via an Essential Fish Habitat Assessment with the NMFS to determine if a project would "adversely affect essential fish habitat." Riverkeeper asserts that the NMFS may issue an Incidental Take Statement if the NMFS concludes that incidental impact to the species or its habitat will be mitigated, the species survival will not be jeopardized, and alternatives are not feasible. Riverkeeper maintains that the Commission has not satisfied this procedure since the NMFS' Incidental Take Statement, prepared in response to the Essential Fish Habitat Assessment, authorizes the incidental taking of a shortnose sturgeon only from the dredge-and-fill procedures, rather than blasting. Riverkeeper is also concerned that the Essential Fish Habitat Assessment did not substantially address alternatives. Finally, Riverkeeper asserts that any takings of the species not authorized by this process are in violation of the Endangered Species Act.

265. The Villages claim that the final EIS did not identify the Croton River on the list of open cut waterbodies that are known bald eagle habitats since bald eagles are known to inhabit the Croton River Gorge, including the pipeline crossing location. The Villages

contend that while the final EIS discussed the effect of turbidity on the ability of bald eagles to forage on the Hudson River, the final EIS did not address the impact of the resuspension of contaminated sediments on the bald eagle. The Villages point out that the Commission acknowledged that dredging will cause increases in bioaccumulation of toxic substances and decreases in biological productivity in Haverstraw Bay but assert that the failure to consider the direct and cumulative effects of bioaccumulation on bald eagles is a gap in the final EIS and the Interim Order. The Villages contend that the final EIS failed to characterize the bald eagles' use of the Hudson and Croton Rivers as limited to overwintering, asserting that bald eagles use these areas in the spring and fall. The Villages assert that the Commission should require construction plans for any construction work that would be conducted in areas of known bald eagle activity.

2. Commission Holding

266. Haverstraw Bay is not a spawning ground for shortnose sturgeon as stated by the Villages. The shortnose sturgeon spawns upstream of Haverstraw Bay near Coxsackie, New York. Thus, blasting to construct Millennium's pipeline will not affect shortnose sturgeon-spawning habitat or spawning activities.

267. Haverstraw Bay, however, is a summer foraging and overwintering area for the shortnose sturgeon.¹⁰⁸ Thus, we required Millennium to complete its river crossing between September 1 and November 15. This construction window was selected to minimize impacts on various aquatic species that use Haverstraw Bay, including the shortnose sturgeon.¹⁰⁹ For this reason, blasting will not occur when shortnose sturgeon are overwintering in the bay since construction activities will occur between September 1 and November 15.

268. Riverkeeper has confused the Endangered Species Act of 1973 and Magnuson-Stevens Fishery Conservation and Management Act regulatory processes. The Endangered Species Act addresses issues related to Federally threatened or endangered species. The Magnuson-Stevens Act addresses issues related to certain managed fish species that the NMFS has designated essential habitat.¹¹⁰ The NMFS does not issue

¹⁰⁸ See section 4.6.1 in the final EIS and the Biological Assessment.

¹⁰⁹ See section 5.3.4 in the final EIS and the Biological Assessment.

¹¹⁰ Haverstraw Bay is not a "designated habitat" for shortnose sturgeon under the Magnuson-Stevens Act.

Incidental Take Statements under the Magnuson-Stevens Act. Under the Endangered Species Act, the NMFS may issue a Biological Opinion and an Incidental Take Statement with certain requirements for projects that affect Federally threatened and endangered species. The NMFS did this with regard to Millennium's crossing of Haverstraw Bay and its affect on the shortnose sturgeon.

269. Riverkeeper and the Villages contend that the conclusions in NMFS' Biological Opinion and Incidental Take Statement are now void since blasting was not addressed. The Interim Order, however, required Millennium to enter into consultation with the NMFS on blasting. Thus, our staff initiated formal consultation with the NMFS under section 7 of the Endangered Species Act and the Essential Fish Habitat (EFH) section 305(b) provisions of the Magnuson-Stevens Act and prepared a supplemental Biological Assessment and a supplemental EFH Assessment for NMFS that addressed the possible need for blasting near the east side of the Hudson River.

270. The NMFS reviewed the supplemental Biological Assessment and the supplemental EFH Assessment. On September 9, 2002, the NMFS filed a letter recommending additional mitigation to avoid the potential taking of shortnose sturgeon and to protect fish with designated essential fish habitat in the Hudson River where blasting would occur. We concur with the NMFS' recommendations and will require Millennium to use the NMFS' recommendations when constructing its pipeline.¹¹¹

271. The Villages cite page 5-81 to claim that the final EIS did not include the Croton River in a list of open cut waterbody crossings where there is known bald eagle activity. The proposed crossing of the Croton River under the 9/9A Alternative would have required a horizontal directional drill, not an open cut crossing. For this reason, the Croton River crossing was not identified on a list of open cut waterbodies. Further, section 5 in the final EIS discussed the 9/9A Alternative, not the ConEd Offset/Taconic Parkway Alternative that is discussed in section 6 of the final EIS.

272. The final EIS did not characterize the area near the Hudson and Croton Rivers as only being for overwintering by bald eagles. Rather, the final EIS stated that the bald eagle is known to overwinter in this area, but that activity at the Hudson River location also includes feeding and roosting. With the exception of bald eagle activity areas identified in the final EIS and the Biological Assessment, no specific bald eagle activity

¹¹⁰(...continued)

¹¹¹The NMFS' recommendations are listed in Appendix B.

Docket No. CP98-150-000, et al.

occurs in the vicinity of the pipeline, but bald eagles are potentially present and any bald eagles found at these locations are most likely to be engaged in feeding, perching, or roosting activity.¹¹²

273. The FWS is concerned about the impact of construction activities on bald eagle overwintering or nesting areas. The FWS did not raise concerns about the bioaccumulation in bald eagles from contaminated substances that might be resuspended by the trenching operation. Based on current information on the distribution of nest sites and wintering areas and the conservation measures identified in the final EIS, the FWS agreed that the proposed project was not likely to adversely affect or jeopardize the continued existence of the bald eagle. This concurs with our staff's conclusions in the Biological Assessment.

274. The final EIS determined that Millennium's pipeline could have limited adverse effects on the bald eagle nesting and winter habitats as a result of project construction, especially where blasting is required.¹¹³ Thus, the Interim Order included environmental condition 37 which required Millennium to coordinate with the FWS and the NYSDEC to develop construction plans in bald eagle activity areas where blasting would occur. The FWS, however, recommended that Millennium develop special construction plans in the bald eagle activity area near the Mongaup River/Rio Reservoir and the Interim Order included this recommendation in environmental condition 36. The FWS did not raise concerns about the need for special construction plans in any other areas or where other types of construction related activities would occur. For this reason, we will not require Millennium to develop additional construction plans, as suggested by the Villages. Nevertheless, since bald eagle use of the areas near Millennium's pipeline may change before construction begins, environmental condition 38 required Millennium to continue to consult with the FWS and the NYSDEC to determine if any additional nest sites have been found in the vicinity of the construction area.

S. Dioxin

1. Requests for Rehearing

275. Consolidated Edison acknowledged using herbicides containing dioxin within its right-of-way. For this reason, the Villages and Cortlandt contend that the Interim Order and the final EIS did not adequately address the fact that blasting could spread dioxins via

¹¹²See section 4.4.2 in the final EIS and the Biological Assessment.

¹¹³See section 5.6.3 in the final EIS.

dust for hundreds of feet where it could be inhaled by residents adjacent to the construction right-of-way. They assert that Millennium sampled for herbicides, but not dioxins, within the right-of-way and that Croton-on-Hudson sampled for dioxin near the right-of-way but was not allowed by Consolidated Edison to sample on the right-of-way. Thus, they claim that there is no direct empirical data regarding dioxin levels along the construction right-of-way.

276. The Villages assert that Croton-on-Hudson's consultant's review of Millennium's dioxin analysis shows that Millennium's analysis is based on incorrect assumptions about the half life for dioxin. The Villages state that the half life for dioxin is 20 years, whereas Millennium used a half life of one year.

277. The Villages claim that the Interim Order's conclusion that the dioxin levels identified by Croton-on-Hudson were below regulatory guidelines for cleanup is misplaced, because the range of dioxin levels were above certain risk-based remediation goals for residential soils in Environmental Protection Agency (EPA) Regions 3 and 9. The Villages assert that some of Croton-on-Hudson's test results could be due to "spray drift" or migration of contaminants from the right-of-way and that it would not be unreasonable to expect that the concentration of dioxin within the right-of-way would be higher. The Villages assert that the final EIS speculated that the levels found by Croton-on-Hudson may represent background levels of dioxin. Even if this is true, the Villages

278. The Villages and Cortlandt contend that the Commission erred in not requiring direct and independent sampling of dioxin on the right-of-way to detect actual levels of dioxin along the right-of-way before issuing the certificate. The Villages contend that NEPA requires that when there is "incomplete information relevant to reasonably foreseeable significant adverse impacts" and that "the overall costs of obtaining it are not exorbitant" the licensing agency must include the information in the EIS. Cortlandt asserts that the Commission should issue a revised draft EIS that assesses the potential impacts of dioxin contamination based on actual data and should incorporate these results into the assessment of Millennium's pipeline.

2. Commission Holding

279. The final EIS and the Interim Order addressed the dioxin and herbicide sampling conducted by Croton-on-Hudson and Millennium and the comments responding to

Croton-on-Hudson's sampling, assumptions, and conclusions.¹¹⁴ The final EIS also addressed the fact that there was no direct sampling of the levels of dioxin that would be within the pipeline's construction right-of-way and discussed whether Millennium should conduct additional sampling.¹¹⁵

280. In regard to the comment that Millennium used an inaccurate half life for dioxin, the EPA states that the half life for dioxin ranges from less than one year to about three years at the soil surface and up to 12 years at deep or interior soils.¹¹⁶ Thus, we find that Millennium's assumption of a one year half life for dioxin is appropriate since the assumption conforms with the EPA.

281. The final EIS discussed the background value for dioxins because the analyses filed by Croton-on-Hudson and Millennium did not include this information. We believe that the background value for dioxins should be considered when evaluating the suspected additional contribution of a contaminant from a specific source. Croton-on-Hudson's consultant speculated that the concentrations of dioxins reported in its analysis of samples collected outside of Consolidated Edison's right-of-way could be the result of drift or migration of pesticides from the right-of-way. However, the herbicides evaluated (2,4-D and 2,4,5-T) and the dioxin evaluated (2,3,7,8-TCDD) are known to bind tightly to soil particles. Thus, we conclude that there would be limited migration from the application area, which was on the cleared portions of Consolidated Edison's right-of-way.

282. Further, the final EIS stated that technicians typically apply herbicides with a sprayer to individual stems. This application method minimizes the potential for the substance to drift to other areas where it is not intended or needed. Due to their physiochemical properties,¹¹⁷ the herbicides 2,4-D and 2,4,5-T have a tendency to adhere to soil and to not volatilize into the air. Both 2,4-D and 2,4,5-T are generally known to degrade due to microbial biodegradation processes or photochemical decomposition, with

¹¹⁴See section 6.2.6.1 of the final EIS.

¹¹⁵Id.

¹¹⁶National Primary Drinking Water Regulations Technical Factsheet on DIOXIN (2,3,7,8-TCDD), <http://www.epa.gov/safewater/dwh/t-soc/dioxin.html>; <http://toxnet.nlm.nih.gov> search using Hazardous Substance Data Bank.

¹¹⁷Based on a review of the sorption coefficients, Henry's Law Constants, and solubilities for these two compounds.

persistence in the soil rarely exceeding one full growing season.¹¹⁸ They also have low to moderate solubility in water and, as such, do not tend to leach and migrate with groundwater flow. "Spray drift" during herbicide application would have been limited since herbicides were not applied aerially, but were typically applied with a sprayer to individual stems as described above.

283. Table 6.2.6.1-8 and figure 6.2.6-2 in the final EIS compare on a common scale the Croton-on-Hudson samples with established risk-based screening criteria developed by regulatory policy and risk-based benchmark values. All of the regulatory values are based on long-term (i.e., 25 to 30 years) exposure to soils at the published concentrations. Since the regulatory risk-based criteria are based on long-term exposure, a much higher level of dioxin-like compounds would need to be present for the same risk for short-term exposure, such as the possible exposure during the one- to three-month-long construction period. Further, figure 6.2.6-2 in the final EIS included illustrative risk-based screening values (parts per billion [ppb] of 2,3,7,8-TCDD toxic equivalent) for other characteristic exposure scenarios: a construction worker, an adolescent trespasser, and a child recreator. The construction worker would have the lowest risk-based screening value due to the longer period of time the worker would be within the active construction work area. The surficial risk-based screening value would need to be at least 40 times greater than the highest concentration measured by Croton-on-Hudson's testing for exposure risk to construction workers. Further, since the herbicides were applied to the surface and 2,4-D, 2,3,5-T, and 2,3,7,8-TCDD tend to bind strongly to soil, they would not be likely to migrate below the first six inches of soil.¹¹⁹ Thus, the concentration of any dioxins present in the surface of the soil would be diluted by the spoil excavated for the five- to six-foot trench.

284. The final EIS addressed the possible risk associated with the spread of dioxins through the air as dust during blasting, stating that dioxins can migrate if soil is mobilized by erosion or other means during construction, including dust released by blasting. The final EIS also addressed the risk to people associated with this affect, since the risk criteria used in the EPA Region 9 values account for dermal absorption and the inhalation of particulates and volatiles of dioxin-like compounds in the soil, in addition to the intake of contaminant from incidental ingestion.

¹¹⁸See <http://toxnet.nlm.nih.gov> search using Hazardous Substance Data Bank.

¹¹⁹National Primary Drinking Water Regulations Technical Factsheet on DIOXIN (2,3,7,8-TCDD), <http://www.epa.gov/safewater/dwh/t-soc/dioxin.html>; <http://toxnet.nlm.nih.gov> search using Hazardous Substance Data Bank.

285. Although there is no method that can suppress all of the dust that will be generated during blasting, Millennium agreed to conduct routine dust suppression, particularly during initial grading activities and where there is vehicle movement along the construction right-of-way. We believe that Millennium's dust suppression activities will limit the migration of fugitive dust. In addition, we believe that additional dust suppression methods can be part of the blasting protocol used in upland areas along Consolidated Edison's right-of-way. Specifically, we will require that:

Millennium shall include in the detailed blasting plan for construction along the ConEd Offset/Taconic Parkway Alternative, which was adopted in the Interim Order, a dust suppression plan for use during blasting. Millennium shall file the blasting plan with the Secretary for review and written approval of the Director of OEP prior to construction

286. In conclusion, we do not believe that the risk from dioxin is significant, since dioxin would have to be present in concentrations that greatly exceed any sampling conducted by Croton-on-Hudson. To reach this conclusion, we considered the fact that herbicides were applied only to cleared portions of Consolidated Edison's right-of-way, dioxins tend to bind to soil and do not migrate from the application area, and most of the pipeline construction would affect portions of Consolidated Edison's right-of-way that had no herbicide application. Thus, we will not require additional dioxin sampling along the construction right-of-way.

287. Finally, Cortlandt and Not Under My Backyard (NUMB) requested permission to sample for dioxin on Consolidated Edison's right-of-way. In response, Consolidated Edison indicated that sampling would only be allowed if the Commission approved a sampling protocol. The final EIS suggested that Consolidated Edison, Cortlandt, and NUMB consult with EPA Region 2 or NYSDEC if there is continuing disagreement on the sampling protocol. The final EIS also stated that we would have no objection to the independent testing for dioxins on Consolidated Edison's right-of-way, if Cortlandt and NUMB "feel that this is necessary for peace of mind."¹²⁰ Because we do not believe that the risk from dioxin is significant, we do not believe that there is a reason for the Commission to designate a sampling protocol here.

¹²⁰ See the final EIS at p. 6-51.

T. Phosphorus**1. Request for Rehearing**

288. Cortlandt contends that the total maximum daily load (TMDL) requirements for the New Croton Reservoir were ignored in the final EIS and Interim Order. Cortlandt asserts that there are no studies in the final EIS or Interim Order that suggest that compliance with Millennium's Environmental Construction Standards would minimize phosphorus load additions to the New Croton Reservoir. Thus, Cortlandt concludes that the Commission's conclusions regarding Millennium's environmental construction standards are guesswork. Cortlandt suggests that federal TMDL criteria prohibit any additional phosphorus loading to the Reservoir no matter how minimal.

2. Commission Holding

289. The final EIS addressed the question of whether phosphorus would be conveyed to the reservoir by construction of Millennium's pipeline. Millennium's proposed construction would cross approximately 2.5 miles within the reservoir's drainage basin. Since soil-bound phosphorus is the only potential phosphorus source that would be affected by construction, strategies to eliminate phosphorus inputs to the reservoir would need to address soil or sediment migration from the construction areas. Two processes are required for this migration to occur. First, soil erosion from the construction right-of-way would need to occur. Using the *Soil Survey of Putnam and Westchester Counties, New York* published by the United States Department of Agriculture (USDA) in 1994, we examined the erosion potential of soils that would be affected by construction. Specifically, we examined the "erosion hazard," defined as the "probability that damage would occur as a result of site preparation and [tree] cutting where the soil is exposed along roads, skid trails, and fire lanes and in log-handling areas." Under the USDA's ratings, a rating of "slight" indicates that no particular prevention measures are needed under ordinary conditions, a rating of "moderate" indicates that erosion-control measures are needed for certain activities, and a rating of "severe" indicates that special precautions are needed to control erosion.

290. Based on our review, there is either a slight or no erosion hazard for approximately 89 percent of the proposed route through the reservoir watershed, a severe erosion hazard for approximately nine percent of the route, and a moderate erosion hazard for approximately two percent of the proposed route. Our review indicated that most of the soils affected by construction through the reservoir watershed would have a generally low susceptibility for erosion. Thus, we believe that the likelihood of construction activities generating quantifiable levels of soil-bound phosphorus is minimal.

Docket No. CP98-150-000, et al.

291. The second critical process involves the movement of eroded soils off the construction right-of-way and into the reservoir. This process is also unlikely to add phosphorus to the reservoir because of the erosion control measures found in Millennium's Environmental Construction Standards, our Upland and Erosion Control, Revegetation, and Maintenance Plan (Plan) and Wetland and Waterbody Construction and Mitigation Procedures (Procedures), and due to the physical separation between the construction right-of-way and the reservoir. The objective of our Plan and Procedures is not to allow any eroded sediments to leave the certificated construction route. This objective is ensured through the use of silt fencing, slope breakers, and other physical containment devices. Environmental monitors would regularly inspect active construction areas to insure that these devices are properly deployed and maintained until affected areas are stabilized by revegetation.

292. Even if the erosion control measures allowed some migration of sediments, the distance from the construction areas to the reservoir is substantial enough to conclude that sheet runoff of soil into the reservoir is not a possible sediment transport mechanism. In other words, sediment could only reach the reservoir via runoff entering watercourses, then flowing downstream through numerous potential points of deposit, including Vernay Lake, Shadow Lake, and Still Lake. Each deposit point represents a potential natural sink for sediments. We acknowledge that this description is an oversimplification of numerous complex physical processes and that all portions of a watershed eventually contribute some nutrients to the receiving waters. However, there does not appear to be a clear and direct pathway for sediments from the project area to reach the reservoir.

293. In conclusion, after consultation with the USDA's soil survey, we conclude that erosion from the affected soils is a slight hazard over most of the 2.5-mile segment through the reservoir watershed. In addition, Millennium will employ erosion control measures along the construction right-of-way in accordance with its Environmental Construction Standards and our Plan and Procedures. Environmental monitors will inspect the devices used to control erosion during construction to insure that they are deployed correctly and operating. If these measures are unsuccessful, conveyance of soil-bound phosphorus to the reservoir would be unlikely due to the length and nature of the available pathways. Considering all of these facts, we conclude that any phosphorus contribution would be minimal, temporary, and indiscernible.

Docket No. CP98-150-000, et al.

U. Catskill Aqueduct

1. Interim Order

294. In environmental condition 28, the Interim Order required Millennium to develop a site-specific plan for crossing the Catskill Aqueduct that would be reviewed by an independent third-party engineering contractor who would be directed by the New York City Department of Environmental Protection (NYCDEP). The final crossing plan would be subject to the written approval of the Director of OEP. Millennium would not be able to construct its pipeline across the Catskill Aqueduct until its plan is approved.

2. Requests for Rehearing

295. The NYCDEP contends that the final EIS and the Interim Order should have addressed the issue of the design of the pipeline crossing of the Catskill Aqueduct at the Bryn Mawr Siphon in Yonkers, New York, rather than requiring Millennium to finalize the site-specific plan and have the Commission review the plan after the certificate is issued. The NYCDEP asserts that the Commission's review does not give it the right to approve the final aqueduct crossing. The NYCDEP believes that the Commission should require Millennium to complete the site-specific plan for the aqueduct crossing, including alternative crossing locations as needed, so that the NYCDEP can conduct an independent review of the plan to determine if it is acceptable. The Villages and Cortlandt also cite the COE's concerns about construction on the integrity of the Bryn Mawr Siphon, as well as security risks posed by the project.

3. Commission Holding

296. The final EIS and the Interim Order considered the issue of the crossing of the Catskill Aqueduct to be an engineering design issue. In environmental condition 28, we required a site-specific plan that will allow the details of the crossing to be analyzed prior to construction of the pipeline. This review includes a requirement for an independent consultant, chosen by the NYCDEP and under its direction, to conduct a technical analysis of Millennium's site-specific plan. The requirement also states that the site-specific crossing plan may include an alternative crossing location. The intent was that the NYCDEP would be a party to developing the final plan, since it would be coordinating the design review and can provide comments and suggestions for modification. Thus, the NYCDEP would contribute to the development of the final plan prior to Millennium filing the plan with the Commission, as required in the Interim Order.

297. On April 16, 2002, the NYCDEP revoked the permission it had given Millennium to conduct an on-site investigation of the Catskill Aqueduct so that Millennium could develop its final site-specific crossing plan. As a result, Millennium cannot comply with the conditions in the Interim Order. In the Interim Order, we stated that:

Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. We encourage cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction of facilities approved by this Commission.¹²¹

298. Since the NYCDEP is not engaging in a cooperative consultation process with Millennium, we will modify environmental condition 28 so that if the NYCDEP does not give permission for Millennium to conduct on-site inspections of the Aqueduct crossing area within 30 days of the date of this order, our staff will direct the third-party consultant who reviews the crossing plan. This will relieve Millennium of any obligation to get permission from NYCDEP.

299. On April 12, 2002, the COE filed a letter with the Commission, requesting that it be included in the review process of the site-specific crossing plan for the Catskill Aqueduct. We see no problem with this request. Thus, we will modify environmental condition 28 to require Millennium, prior to construction, to file for, and obtain approval of, its Catskill Aqueduct crossing plan from the Director of OEP and the COE.

VII. The Briarcliff Manor Public Schools

1. Requests for Rehearing

300. Mount Pleasant, the Briarcliff Public Schools, the Villages, and Mr. Kahn contend that the final EIS did not consider the consequences of locating a pipeline about 150 feet from the Todd Elementary School and 750 feet from the Briarcliff Middle and High Schools. As an alternative, the Villages contend that if the project were constructed on the opposite, or east side, of the Taconic State Parkway it would increase the distance

¹²¹97 FERC at p. 62,344. See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P., et al.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

from the Todd Elementary School and the 39 homes on the west side of the parkway, and would avoid a wetland. (This variation is known as the Taconic State Parkway East Variation.) The Villages note that the east side of the parkway is relatively undeveloped with only six homes near the pipeline, no schools, and one wetland. The Villages assert that there are three Consolidated Edison power line towers near the route but that the towers are at a sufficient distance to allow for safe construction of the pipeline. The Villages contend that merely relying on the DOT's safety standards, as modified by Millennium and the NYPSC in their Memorandum and supplemental Memorandum, is not an adequate response.

301. The Briarcliff Public Schools and the Villages also assert that the final EIS fails to consider a newly installed sewer line along a portion of the Taconic State Parkway that could threaten the integrity of the pipeline and pose a serious danger to the school population. The Briarcliff Public Schools and Mr. Kahn contend that the final EIS did not acknowledge safety risks resulting from the interaction of the Consolidated Edison electric corridor and the pipeline and did not acknowledge safety risks because the pipeline is located on a busy highway.

302. Mount Pleasant, the Briarcliff Public Schools, and Mr. Kahn contend that Millennium failed to notify all of the residents in the Briarcliff Manor School District about the proposed pipeline as required by NEPA.

2. Commission Holding

303. The final EIS addressed the issue of pipeline safety and the location of Millennium's pipeline along and within the right-of-way of the Taconic State Parkway near the three schools.¹²² Millennium's pipeline would be constructed in accordance with the DOT's regulations which address pipeline design, construction, operation, and maintenance requirements.¹²³ The Memorandum and supplemental Memorandum between Millennium and the NYPSC modified the DOT's regulations by subjecting the proposed pipeline to even more exacting safety measures, including increased pipe wall thickness, more stringent pipe durability criteria, higher pressure testing requirements, and more frequent smart pig surveys. The NYPSC developed the Memorandum and supplemental Memorandum based on placing the pipeline along the west side of the Taconic State Parkway. The NYPSC determined that this is the better location based on electric service reliability issues when the pipeline is in operation. The final EIS found

¹²²See section 6.2.6.1 in the final EIS.

¹²³Section 5.12 in the final EIS addressed pipeline safety.

that these measures adequately address the safety concerns associated with the proximity of the pipeline to the school and the Interim Order concurred with this finding. In addition, the Villages do not mention that the Taconic State Parkway East Variation would place the pipeline closer to the Briarcliff Manor Middle and High Schools and Pace University (these schools are on the east side of the Taconic Parkway). The Villages also provide no basis for their statement that the pipeline could be constructed safely near Consolidated Edison's electric transmission towers. Thus, the rehearing requests have not provided any new information that would persuade us to modify our findings in the Interim Order.

304. In addition, the final EIS addressed the fact that the sewer line will be near the gas pipeline.¹²⁴ For this reason, the Interim Order required that Millennium file a site-specific plan for construction near the sewer line to ensure that the installation of the pipeline will not interfere with the sewer line.

305. The final EIS addressed the issue of locating Millennium's proposed pipeline along or within Consolidated Edison's power line corridor including the ConEd Offset/Taconic Parkway Variation.¹²⁵ Since the final EIS analyzed safety issues along the entire corridor where the pipeline would be proximate to Consolidated Edison's right-of-way, the final EIS' analysis included the area near the Briarcliff schools.

306. The New York State Department of Transportation (NYSDOT) allows utility construction, including the construction of natural gas pipelines, within its highway rights-of-way, including the Taconic State Parkway. Millennium will construct its pipeline pursuant to NYSDOT's requirements for safe utility construction and operation within highway corridors.

307. In compliance with the regulations implementing NEPA, we placed notices of intent regarding Millennium's proposals in the Federal Register and mailed the notices of intent to various parties, local and state government authorities and agencies, Federal agencies, interested environmental groups, news media, and other interested parties. We were not required to notify everyone in the school district about Millennium's proposals.

¹²⁴See section 6.2.6.1 in the final EIS.

¹²⁵See section 6.2.1 in the final EIS.

W. The Indian Point Nuclear Power Plant

308. Westchester contends that the Commission failed to consider the impact of the pipeline on the evacuation plan for the Indian Point Nuclear Power Plant and that the analysis of alternatives in the final EIS does not include any discussion of the impact of construction on the evacuation route.

309. The final EIS discussed the emergency evaluation route as it relates to the 9/9A Alternative.¹²⁶ The current designated evacuation route for the Indian Point Nuclear Power Plant includes the southbound lanes of U.S. Route 9 and State Route 9A (part of the 9/9A Alternative). Our staff consulted with a Program Specialist at the Radiological Emergency Preparedness Branch of the Federal Emergency Management Agency (FEMA) about the proposed construction. FEMA stated that it will require detailed construction drawings to evaluate the impact of construction on the evacuation route and that Millennium will need to develop a contingency plan with county and local governments to minimize adverse impacts on the federally approved Radiological Emergency Preparedness Plan (FEMA, 2001). In addition, FEMA stated that any alternate routes identified in the Contingency Plan, as well as the potentially degraded capability of the established evacuation route, must be reviewed by professional traffic engineers at FEMA. FEMA's procedure will apply to any roadway that is part of the evacuation plan or any modified evacuation plan.

310. We did not receive any comments raising concerns about the use of the Taconic State Parkway in connection with the Radiological Emergency Preparedness Plan prior to issuing the Interim Order. Nevertheless, on rehearing, we will require Millennium to consult with FEMA, and appropriate New York State agencies, to prepare a Contingency Plan for roadways that are part of the Radiological Emergency Preparedness Plan evacuation routes. It is not unreasonable to assume that the evacuation routes may be modified by these agencies to adjust to changes in population near the Indian Point Nuclear Power Plant. Thus, we will require that:

Millennium shall consult with and assist FEMA, appropriate state agencies, and local governments to develop a Contingency Plan for the emergency evacuation route for the Indian Point Nuclear Power Plant where project construction may affect the evacuation route. Prior to construction, Millennium shall file the final Contingency Plan with the Secretary.

¹²⁶See section 5.8.1 in the final EIS.

Docket No. CP98-150-000, et al.

X. The Jane E. Lytle Memorial Arboretum

1. Interim Order

311. The Interim Order required Millennium to construct its pipeline approximately 35 feet closer to Consolidated Edison's power lines in the Jane E. Lytle Memorial Arboretum (Arboretum) to minimize tree clearing.¹²⁷ The Interim Order also required Millennium to prepare a site-specific plan for construction in the Arboretum.

2. Request for Rehearing

312. The Villages contend that Millennium's pipeline will have serious and irreversible impacts on the Arboretum, asserting that the pipeline will disrupt and destroy, in part, the ecological, educational, and recreational uses of the Arboretum. Specifically, the Villages assert (1) that the final EIS did not assess the impacts of these uses of the Arboretum; (2) that the pipeline will cut across and will be within the northern boundary of the Arboretum and will require forest clearing along a 50-foot-wide construction right-of-way; (3) that the final EIS and the Interim Order did not discuss the impact of the 10-foot-wide, permanent, treeless right-of-way that would be required through the Arboretum; (4) that the pipeline will have a significant impact on the aquatic habitat and wetlands within the Arboretum because it will cross one perennial and several intermittent streams that supply the wetlands in the Arboretum; (5) that clear-cutting will encourage the growth of invasive vegetative species such as *Pragmites australis*; and (6) that, at a minimum, the Commission should require a re-route to avoid all direct impacts to the Arboretum.

3. Commission Holding

313. By moving the pipeline approximately 35 feet closer to the electric towers (by measuring the offset from the centerline of the towers rather than the outermost conductor), most of the construction of Millennium's pipeline would be within Consolidated Edison's right-of-way, rather than within the Arboretum. As the Villages pointed out, the NYPSC advised the Commission that in the vicinity of the Arboretum, the risk of the closer placement of the pipeline to the power lines was acceptable for a

¹²⁷The Arboretum is a 20-acre public park, consisting of a natural wetland and forest.

Docket No. CP98-150-000, *et al.*

limited distance.¹²⁸ In addition, Millennium has proposed a 50-foot-wide construction right-of-way for construction adjacent to the Arboretum.

314. We required Millennium to develop a site-specific plan with Arboretum representatives to address their concerns, to minimize impact on the Arboretum and its wetlands, and to include their recommendations for restoration. This consultation is not only for the Arboretum property that might be directly affected, but for construction within the adjacent Consolidated Edison property since construction would affect the perennial and intermittent streams that feed the wetlands within the Arboretum. The site-specific plan for this construction should try to maximize the use of the cleared portion of Consolidated Edison's right-of-way, minimizing the need to clear trees along the outer portion of Consolidated Edison's right-of-way. This could mean a further reduction of the right-of-way width past Arboretum property.

315. For the segment of the pipeline adjacent to the Arboretum, we encourage Millennium to make every effort to develop a plan that minimizes the need to clear trees along the outer part of Consolidated Edison's right-of-way. By using the cleared portion of Consolidated Edison's right-of-way, Millennium would remove the proposed pipeline from the Arboretum's property. We believe that Millennium could construct this segment of the pipeline with a drag section. Constructing the pipeline in this manner could also reduce the land requirements, the construction right-of-way width, and the need to clear trees. Millennium's plan should also ensure that construction and restoration of the disturbed area is completed quickly.

316. It is difficult to control *Phragmites* once the weed has been established. *Phragmites* exist within Consolidated Edison's right-of-way where wetlands are open to sunlight. The plant does not exist in the Arboretum wetlands which are forested and shady. Millennium committed to the long-term removal of *Phragmites* that may spread into the Arboretum as part of its plan to control the spread of the weed. Further, by maximizing the use of the cleared Consolidated Edison right-of-way and minimizing the removal of trees outside the cleared corridor, more of the Arboretum property will remain forested and shaded. The shaded areas created by the forest cover discourage the establishment of *Phragmites*.

317. The DOT's regulations require a 10-foot-wide treeless corridor centered over the pipeline so that the ground surface over the pipeline can be visually inspected. The final

¹²⁸ See NYPSC's June 19, 2001 letter to the Commission.

EIS discussed the visual impact of having a clear right-of-way.¹²⁹ However, the corridor at this location would be adjacent and, to the greatest extent possible, within the existing cleared Consolidated Edison corridor. This will minimize the impact of the treeless corridor on the Arboretum since the corridor will be within a previously disturbed, linear utility corridor.

Y. Croton-on-Hudson's Water Supply

1. Request for Rehearing

318. The Villages contend that the Commission violated NEPA by arbitrarily dismissing its concerns about Croton-on-Hudson's wellfield and water supply. The Villages contend that the Commission treated the Croton-on-Hudson wellfield and water supply issue different than it treated the water supply issue for Peter Supa's property in upstate New York. The Villages point out that the Interim Order contained a condition (environmental condition 58) requiring a site-specific study for the Supa property, but did not require one for Croton-on-Hudson's wellfield and water supply.

2. Commission Holding

319. There are substantial and discernable differences between the drinking water supply system for Mr. Supa and the valley-fill aquifer for Croton-on-Hudson. Obviously, there is a difference in the water volume between Mr. Supa's water supply system, which consists of a spring outlet and a 1,000-gallon cistern, and an aquifer that supplies water for approximately 7,100 people. Mr. Supa's spring outlet consists of a single (or limited series) of discrete above-ground and near surface discharges of groundwater, whereas Croton-on-Hudson's aquifer consists of multiple lateral flow paths at some distance below the ground surface. The final EIS determined that the possibility of intercepting Mr. Supa's water supply was remote. However, because the Supa groundwater source is discrete and is expressed surficially, trench construction could theoretically intercept Supa's water supply. For this reason, we adopted environmental condition 58. Conversely, the valley-fill aquifer is a deeper and more diffuse feature. Thus, we do not believe that pipeline trench construction could intercept or otherwise affect the primary flow patterns within the aquifer. Furthermore, in the unlikely event that flow were intercepted, we do not think that the impact could affect the overall water supply of Croton-on-Hudson. Nevertheless, to further reduce what we consider to be an extremely unlikely outcome, we restricted the construction window to coincide with seasonal low

¹²⁹See section 5.8.6.1 in the final EIS.

flow periods and what would typically be a time of year that experiences lower ground water elevations.¹³⁰

320. The Villages' assertion that the final EIS suggested that blasting would improve the aquifer recharge is erroneous. The final EIS stated that previously sealed infiltration pathways could be opened by blasting. The final EIS did not state that this would result in an improvement to the aquifer.

Z. Wetlands

1. Request for Rehearing

321. The Villages contend that the final EIS' assessment of impacts to wetlands is inadequate and prematurely concluded that wetland impacts would be minimal. The Villages claim that the Millennium's proposals fail to comply with EPA guidelines, contending (1) that section 404 of the Clean Water Act, regarding the discharge of dredged or fill material into waters of the United States, requires a permit from the COB; (2) that the final EIS lacks a site-by-site description of the function, value, impacts, and mitigation measures necessary for each of the 673 wetlands crossed by the proposed pipeline; and (3) that Millennium does not include the required wetland restoration and mitigation plans it must develop to compensate for destroyed wetlands, as required in the EPA's section 404(b)(1) guidelines. To support its position, the Villages cite an April 27, 2001 letter from the EPA.

2. Commission Holding

322. The final EIS did not state that wetland impacts would be minimal. Rather, the final EIS indicated that Millennium's proposed and our recommended mitigation would minimize construction impacts.¹³¹

323. Millennium filed in the public record a site-by-site description of all of the wetlands to be crossed consistent with the EPA's guidelines. The final EIS did not

¹³⁰The seasonal restriction is based upon historical streamflow and rainfall data. These data suggest that extreme meteorological events, such as hurricanes, do not commonly occur during this period and that, even if an extreme event were to occur, practical constraints on construction activities would prevail during the event and its immediate aftermath.

¹³¹See section 5.7.3 in the final EIS.

include a description of each of the 673 wetlands because it would be voluminous and encyclopedic.

324. The Villages rely on an April 27, 2001 letter from the EPA to claim that Millennium did not submit the required wetland restoration and mitigation plans. The EPA, however, filed comments addressing the adequacy of the wetland information after the April 27, 2001 letter cited by the Villages. Specifically, in a December 7, 2001 letter from the EPA that comments on the final EIS, the EPA stated that it had reviewed the wetlands mitigation plan that Millennium was developing with the COE. The EPA stated that this plan "will go a long way towards addressing the [EPA's] concerns regarding the project's wetland impacts" and that if "wetlands impacts caused by the project are fully mitigated through the [COE's] section 404 process, the EPA will not object to the issuance of the 404 permit for the project."¹³²

325. Finally, the Interim Order required that Millennium obtain a section 404 permit prior to beginning construction. We believe that Millennium's compliance with the wetland mitigation plan that will be a part of its section 404 permit will adequately address wetland issues.

AA. Trail Systems

1. Requests for Rehearing

326. The Villages contend that the final EIS did not adequately address Millennium's impacts on trails in the Hudson National Golf Course. The Town of Greenburgh, New York (Greenburgh) asserts that the final EIS did not address all of its concerns regarding pipeline construction along a public bike trail that is prone to flooding. Further, Greenburgh asserts that the proposed pipeline will be constructed in an area where it plans to construct a scenic bike path.

2. Commission Holding

327. Table 6.2.6.1-9 in the final EIS identified trails and recreation areas that will be crossed by Millennium, including trails in the Hudson National Golf Course; the length of the crossings; and the amount of land within the resource areas that will be affected along the pipeline route. Section 5.8.6.2 of the final EIS and section II.G. of Millennium's

¹³²EPA's letter filed with the Commission on December 7, 2001.

Environmental Construction Standards also addressed trail crossings.¹³³ The final EIS recommended that Millennium work with the appropriate land managers to develop restoration plans for crossing the trails. These plans are typically developed and finalized during easement negotiations. The Interim Order required that Millennium file the final plans with the Secretary of the Commission.

328. Sometimes pipelines are constructed in areas that are prone to flooding. This issue was discussed in section 5.3.1.2 in the final EIS. Millennium stated that it will install the pipeline at an adequate depth in areas that are subject to erosion due to flooding and that it will design the pipe to have sufficient negative buoyancy (typically concrete coating or set-on weights) to prevent operation or maintenance concerns. Millennium can use these procedures along the section of the pipeline in Greenburgh.

329. Greenburgh can coordinate its plans for building a scenic bike path with Millennium's construction schedule. Further, if Greenburgh begins or completes construction of its bike path prior to Millennium's beginning construction, Greenburgh can develop plans for compensation or appropriate mitigation during its easement negotiations. Millennium is required to develop and file plans with the Secretary of the Commission in accordance with environmental conditions 51 (mitigation plans for construction and restoration in recreation and public interest areas) and 63 (mitigation plans for construction and restoration in recreation and public interest areas crossed by the ConEd Offset/Taconic Parkway Alternative) in the Interim Order.

BB. Issues Raised by the Town of Greenburgh

330. Greenburgh states that there is only one shut-off valve in town. Greenburgh would like at least two shut-off valves.

331. The DOT's regulations identify the separation distance between transmission line valves.¹³⁴ However, the Memorandum and supplemental Memorandum between Millennium and the NYPSC have modified, where applicable, spacing requirements between valves on the proposed Millennium pipeline.¹³⁵ Nevertheless, local jurisdictions have negotiated with pipeline companies to have additional valves placed within their towns. Greenburgh can do the same here. These new or modified locations must be

¹³³See Appendix E1 in the final EIS.

¹³⁴49 C.F.R. § 192.179. See also section 5.12 in the final EIS.

¹³⁵See Appendix G in the final EIS.

approved by the Director of OEP, consistent with environmental condition 5 of the Interim Order, since they would constitute a change to the approved facilities.

332. Greenburgh is concerned about an emergency plan for the town, stating that no one connected with the town government has been contacted about an emergency response plan, nor does it know who to contact if there is an emergency. Greenburgh states that it has not identified access points to the right-of-way if there is a need for emergency vehicles during construction or operation. Further, Greenburgh is concerned about third-party damage to the pipeline once it is constructed. Greenburgh contends that as-built drawings must be available for local authorities and the Commission, that the Commission should require the pipeline route to be clearly marked, that the Commission should require Millennium to be a part of the mandatory notification plan by which Millennium is notified of construction work near the pipeline, and that the Commission should require Millennium to participate in the New York State Underground Facilities Organization.

333. The final EIS addressed emergency plans in general.¹³⁶ The DOT's regulations require that each pipeline operator must establish an emergency plan that includes procedures to minimize hazards in natural gas pipeline emergencies.¹³⁷ Thus, Millennium must coordinate with each affected locality to develop an emergency plan prior to placing the pipeline in service. Part of that plan will include establishing and maintaining communications with local fire, police, and public officials, and coordinating emergency responses. This communication must include appropriate contacts between Millennium and the local jurisdiction.

334. Right-of-way access for emergency vehicles during construction and operation would be via the construction or permanent right-of-way and access roads such as public roads that are crossed by the pipeline. This is typical for all pipeline construction projects.

335. As-built drawings will not be available until the pipeline is constructed. They can be a part of the emergency plan developed in Greenburgh, or other jurisdictions, as long as there are appropriate limits placed on public availability of detailed facility information.

¹³⁶See sections 5.12.1 and 5.12.4 in the final EIS.

¹³⁷49 C.F.R. § 192.615.

336. As stated in the final EIS, since April 1982, pipeline operators have been required to participate in "One Call" public utility programs in populated areas to minimize unauthorized excavation activities in the vicinity of pipelines. The "One Call" program is a service used by public utilities and some private sector companies (e.g., oil pipelines and cable television) to provide pre-construction information to contractors or other maintenance workers on the location of underground pipes, cables, and culverts.¹³⁸ The "One Call" program is a more generic name for programs that may have different names in different regions, such as the New York State Underground Facilities Organization mentioned by Greenburgh. Millennium stated that it would participate in a "One Call" program.

337. Greenburgh is concerned that it has not been contacted by Millennium regarding construction impacts on roads within the town. Construction across or along roads is addressed in the final EIS.¹³⁹ Millennium will need to obtain appropriate permits for construction where the proposed pipeline will affect roads. Greenburgh can address construction rules and regulations and issues regarding traffic supervision during its permitting process.

338. Greenburgh is concerned because Millennium proposes to construct the pipeline between two buildings at a Coca Cola plant. Greenburgh states that in the future the plant operator intends to connect the two buildings with a new building.

339. This issue was identified in the final EIS.¹⁴⁰ Millennium is working with the owners of the Coca Cola property and the owner of the adjacent LCOR Asset Management L.P. and Eastview Holdings L.L.C. property concerning alternative routing. A re-route of the project on these properties would not affect other landowners and the re-route may be filed for the approval of the Director of OEP prior to construction pursuant to environmental condition 5 in the Interim Order.

CC. Comments by the FWS

340. On February 28, 2002, the FWS filed comments with the Commission, concerning updated alignment sheets for Wetland 9, which contains habitat that may be suitable for

¹³⁸ See section 5.12.2 in the final EIS.

¹³⁹ See sections 2.3 and 5.12.4 in the final EIS.

¹⁴⁰ See section 5.8.2 in the final EIS.

the bog turtle, alternatives to the Lake Erie crossing, and a compensatory wetland mitigation plan.

341. We determined that Millennium's proposed construction would have no adverse effect on the bog turtle if Millennium complied with its Environmental Construction Standards and the environmental conditions included in the Interim Order. The FWS stated that it would concur with our determination if Millennium can demonstrate that impacts to the bog turtle can be avoided in Wetland 9.¹⁴¹ Millennium has not filed the final alignment sheets at this time, but we do not expect Millennium to do so until its entire route is finalized. When the final alignment sheets are filed, however, we will coordinate our review of the alignment sheets with the FWS to ensure that the final construction plan demonstrates avoidance of the bog turtle habitat.

342. The final EIS discussed alternatives to the Lake Erie crossing.¹⁴² Any portion of the Millennium project in Canada, including the segment of the pipeline in the Canadian waters of Lake Erie, is beyond our jurisdiction. We cannot evaluate the cost and environmental impacts of the Canadian portion of the project.

343. The final EIS discussed Millennium's compensatory wetland mitigation plan.¹⁴³ As part of the COE's review and permitting process, Millennium will be required to develop a wetland mitigation plan. Millennium shall file with the Commission any restoration or mitigation plans developed during the permitting process, along with other agency (i.e., FWS) correspondence. In addition to COE's permitting requirements, Millennium has applied for and received its section 401 WQC from NYSDEC. The WQC required that Millennium restore all wetland crossing areas, except for temporary access roads, to pre-existing contours and grades within the wetland and for a distance of 100 feet from the edge of the wetland, within 48 hours of backfilling the trench.

New Castle's Requests for Clarification

A. Opportunity to Comment on Millennium's Final Route Siting

344. New Castle requests clarification, asserting (1) that affected municipalities and local governmental entities should receive copies of notices, reports, and proposed plans

¹⁴¹See the final EIS at p. 5-76.

¹⁴²See sections 3.2.4 and 3.3.1 in the final EIS.

¹⁴³See section 5.7.2 in the final EIS.

that will be filed by Millennium with the Secretary and landowners as required by various environmental conditions in the Interim Order and (2) that the Commission should consider any comments that such governmental entities may provide about these filings. New Castle contends that its request to make explicit provision for notice and comment by local governmental authorities is the most effective way to ensure that the cooperative effort with local authorities is meaningful and that local interests are protected. New Castle states that its Town Code has regulations about blasting, slope protection, clear cutting, tree preservation, and waterbody and wetland protection and that it has personnel who are competent to comment on these issues as they might relate to site-specific plans within the town. New Castle sees no reason why it should not be afforded the same rights as Mount Vernon, the Jane E. Lytle Arboretum, Teatown Lake Reservation, and other property owners who were granted a last comment on the details of the pipeline's siting pursuant to environmental conditions.

345. New Castle cites several environmental conditions that require Millennium to develop site-specific plans and that require Commission review and written approval prior to their use. Some of these conditions require Millennium to coordinate with property owners about restoration of their properties after construction is completed. Other conditions, such as environmental condition 5, were adopted in anticipation of route changes that might be needed to better protect a resource or because Millennium may negotiate route changes with affected landowners. Conditions specifically addressing consultation with representatives of the Jane E. Lytle Arboretum, the Teatown Lake Reservation, and other open-space land managers in developing the final plans for the project within these types of public resource areas are consistent with requirements placed on the sponsors of other pipeline construction projects.

346. New Castle and other interveners may comment on any filings that Millennium will make in compliance with the conditions adopted herein or in the Interim Order, including site-specific plans that are developed for properties crossed in New Castle. We will consider these comments. Millennium may consult with local authorities as it develops its required final site-specific plans. However, we see no need to require Millennium or the landowners to include local authorities in this process.

B. Opportunity to Participate in Environmental Monitoring Process

347. New Castle states that it should be able to participate in the environmental monitoring process for the project where it affects properties within New Castle's borders. Specifically, New Castle requests it be allowed to participate in any complaint and resolution proceedings involving site construction, restoration, and mitigation. New Castle contends that this request will not cause any unreasonable delay, but will ensure

Docket No. CP98-150-000, et al.

that Millennium's obligation to cooperate with local authorities is formalized by integrating affected municipalities and local governmental entities into the environmental monitoring and dispute resolution process.

348. We will have third-party contract personnel and Commission staff monitoring the construction of Millennium's pipeline and restoration of disturbed areas. Third-party contract inspectors, who will be directed by and report to Commission staff, will be on-site full time during construction and restoration to monitor the environmental requirements in this order and the Interim Order. Other Federal and state agencies will also have inspectors on-site who will monitor the impact of the project on resources within their jurisdictions. New Castle may have its own inspectors for construction within the town's borders. It is not uncommon, for example, for towns to have their own inspectors on hand where pipeline projects cross roads or town parks. They usually coordinate with our inspectors or the pipeline's inspectors and should report potential problems or particular concerns to the inspectors, other Commission staff, or use the dispute resolution process. Thus, it is not necessary to clarify the environmental conditions as requested by New Castle.

C. Number of Environmental Inspectors

349. New Castle contends that Millennium should have more environmental inspectors than required in the Interim Order in order to insure adequate oversight monitoring. New Castle asserts that the number of inspectors should be determined by the number of sites on which Millennium is working.

350. Environmental condition 7 in the Interim Order provided that Millennium shall "employ a team (i.e., two or more, or as may be established by the Director of OEP) of environmental inspectors per construction spread." In environmental condition 7, we anticipated that there may be times and areas where more than two inspectors may be needed. The need for inspectors varies throughout the construction process. For example, fewer inspectors may be needed during the early days of a project when there are fewer areas affected by construction, compared with later days when there might be construction or restoration activities along most of the spread. Thus, the Director of OEP may require Millennium to employ more inspectors, if necessary. Since environmental condition 7 established that the Director of OEP has the authority to require additional inspectors, we do not believe that further clarification is needed.

D. Notification When Stop-Work Orders Issued

351. New Castle requests that the Interim Order be clarified so that it will be notified any time the NYPSC issues a stop-work order to Millennium. New Castle contends that the Commission should also be notified.

352. Millennium is required to notify the Commission whenever it receives any notice of noncompliance identified by other Federal, state, or local agencies on the same day that such agency notifies Millennium. This would include notification of any stop-work order that might be issued by the NYPSC. We do not think that it is unreasonable for a town or local government to receive this notification. Thus, we will clarify that any town or other local government that would like to receive this notification may request it and the Commission will require Millennium to send the requesting authorities such notification. Since New Castle has expressed a particular interest in any stop-work orders that the NYPSC might issue, New Castle should consider making a similar request for notification to the NYPSC.

E. Third-Party Construction Compliance Monitors

353. New Castle contends that we should require Millennium to hire third-party construction monitors similar to third-party environmental compliance monitors.

354. The engineering specifications for construction of Millennium's pipeline are under the jurisdiction of the DOT. The NYPSC has been delegated the authority to oversee this aspect of the Millennium's project. Thus, we do not have jurisdiction to impose this requirement.

F. Measurement Scale

355. Environmental condition 5 requires alignment sheets with a scale that is not smaller than one inch to 6,000 feet (1:6000). New Castle contends that environmental condition 5 should be clarified to require a larger scale to ensure more precision.

356. We will not require Millennium to provide maps, sheets, and photographs at a larger scale. If it is determined that filed maps, sheets, and photographs do not provide the level of detail needed for analysis, we will instruct Millennium to file more appropriately scaled materials.

IX. Conclusion

357. Millennium has demonstrated a market by entering into long-term, binding, precedent agreements for two-thirds of project's capacity. Millennium's pipeline will meet the growing energy needs of the northeast, including New York City, where new infrastructure is needed to bring natural gas supplies to market. Millennium will also provide another pipeline for shippers to transport Canadian gas supplies to the region and Millennium's interconnects with other pipelines will provide access to domestic supply areas as well. While there will be locally significant environmental impacts associated with the construction of Millennium's pipeline, especially from the Hudson River into Westchester County, most of the impacts are short term, occurring only during the period of actual construction, and can be mitigated extensively through the environmental conditions adopted herein and in the Interim Order. In addition, Millennium, Mount Vernon, and other interested parties and citizens in Mount Vernon have negotiated and found a route through Mount Vernon that avoids the construction of pipeline facilities close to residential neighborhoods, apartments buildings, churches, fire stations, a school, health center, and hospital. Thus, we find that Millennium's proposals are in the public convenience and necessity.

The Commission orders:

(A) A certificate of public convenience and necessity is issued under section 7(c) of the Natural Gas Act authorizing Millennium to construct and operate its pipeline through Mount Vernon along the originally proposed corridor from mileposts 421.5 to 421.8, as more fully described in Millennium's application as amended and supplemented, and along the Mount Vernon Variation from milepost 421.8 to the Mount Vernon-Bronx border, as more fully described in this order.

(B) The requests for rehearing are granted and denied, as indicated in the body of this order.

(C) The requests for clarification are granted and denied, as indicated in the body of this order.

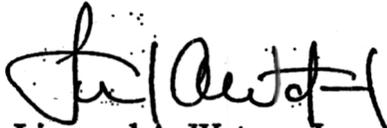
(D) The requests by the Villages, Cortlandt, and Westchester that Millennium's certificate be rescinded are denied.

Docket No. CP98-150-000, et al.

(E) The untimely motions to intervene by the Taxpayer Alliance, Paul and Nannette Wasserman, and the City of New York are granted.

By the Commission.

(SEAL)



Linwood A. Watson, Jr.,
Deputy Secretary.

Appendix A**Requests for Rehearing and Clarification of the Interim Order**

Briarcliff Manor Public Schools
County of Westchester, New York
Kahn, David
Lewis, Donald E.
Lewis, Randy
Millennium Pipeline Company, L.P.
Mount Vernon Oversight and Review Coalition
New York City Department of Environmental Protection
Not Under My Backyard
Riverkeeper, Inc.
Supa, Peter
Town of Cortlandt, New York
Town of Greenburgh, New York
Town of Mount Pleasant, New York
Town of New Castle, New York
Village of Croton-on-Hudson, New York and Village of Briarcliff Manor, New York
(joint motion)

Appendix B

The NMFS recommends the following mitigation measures to avoid the potential taking of shortnose sturgeon:

- Pre- and post blast monitoring for shortnose sturgeon shall be conducted under the supervision of a NMFS approved observer with the use of side-scan sonar.
- Side-scan sonar should be used 20 minutes before the blast to detect the presence of schools of fish in the vicinity of blasting. The surveillance zone will be approximately circular with a radius of about 500 feet extending outward the entire length of the trench.
- Scare charges should be used shortly before blasting is undertaken. Each individual scare charge shall not exceed a TNT-equivalent weight of 0.1 pound. The detonation of the first charge will be at 45 seconds prior to blasting and the second scare charge should be detonated 30 seconds prior to blasting. Side-scan sonar should be used following the detonation of scare charges to ensure that schools of fish have moved out of the vicinity of blasting. If monitoring indicates fish are still present in the area, blasting activities should be delayed.
- Blasting will be confined to a single episode, rather than multiple blast events. Detonation of explosives will be separated by a minimum of a 25 millisecond time lag and one to two drill holes will be set per time delay. Minimizing the number of holes detonated per time delay will minimize the total pressure generated from the blast, given that the maximum overpressure produced will be related to the size of the charge per delay rather than the summation of all charges.
- All blast holes will be stemmed to suppress the upward escape of blast pressure from the drill hole. Stemming will be three to seven feet thick, depending on the depth of the drill hole, and will use graded, clean crushed stone that is 3/8 inch or 1/4 inch.
- The minimum charge necessary should be used per delay and a maximum charge weight of 35 pounds will be used per delay. Blasting pressure should be monitored.
- Blasting should be conducted within the originally agreed upon construction window of September 1 to November 15.

Under section 305(b)(4)(A) of the Magnuson-Stevenson Act and Part IV, Paragraph 3(b), of the Clean Water Act Memorandum of Agreement between NMFS and COE, the NMFS recommends that Millennium use the following conservation measures to protect fish with designated essential fish habitat in the Hudson River where blasting would occur:

- The I-Blast model should be repeated to determine if the bubble curtain perimeter needs revision in order to provide the additional one percent mortality protection for all size classes of out migrating alosids, an important forage species for many species for which EFH has been designated in the Hudson River estuary and beyond:

- In the event that a school of fish is present in the blasting zone and remains undeterred by noise-generating devices, blasting must be delayed until the fish move outside of the calculated impact area. The decision to proceed must be approved immediately in advance by the independent environmental monitor or designated personnel from the involved state or federal regulatory agencies.

- Provide the NMFS with an actual blasting plan as soon as it is developed by the contractor for final agency review. This plan should be designed to achieve the necessary fracturing in one episode and in a manner to minimize the resulting physical and biological impacts. The NMFS requests that its staff be given a minimum of 48 hours notice prior to any detonation taking place so that agency observers may be deployed if it is determined necessary or desirable upon review of the final plan.

- All fish kills and habitat damage that exceed the very limited area of impact characterized in the supplemental EFH assessment must be compensated based on suitable replacement values or formulas.

FILED
OFFICE OF THE SECRETARY

02 SEP 10 PM 1:20

FEDERAL ENERGY
REGULATORY COMMISSION

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
One Blackburn Drive
Gloucester, MA 01930-2298

SEP - 6 2002

Ms. Magalie Roman Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

In Reply To:

OEP/DEER/Gas Branch 2
Millennium Pipeline Company, L.P.
Docket Nos. CP98-150-000 et al., and
Columbia Gas Transmission Company,
Docket No. CP98-151-000

ORIGINAL

Dear Secretary Salas:

This letter pertains to the National Marine Fisheries Service's (NMFS) ongoing consultations with the Federal Energy Regulatory Commission (FERC) pursuant to Section 7 of the Endangered Species Act (ESA) of 1973, as amended, and Essential Fish Habitat (EFH) Section 305 (b) provisions of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), on a portion of the proposed Millennium Pipeline Project. Our comments conveyed in this letter reply to FERC's reinitiation of a Section 7 consultation for which you have prepared a supplemental biological assessment, and to EFH consultation for which you have prepared a supplemental EFH assessment. Both assessments address an additional project component of underwater blasting that will occur in a portion of the Haverstraw Bay Hudson River crossing alternative. Included in this correspondence are conservation recommendations to address incremental impacts associated with this newly introduced construction activity in accordance with our authorities mentioned above to protect living marine resources and habitat.

Revised Construction Plan

Project revisions discussed in FERC's supplemental assessments address the effects of underwater blasting within a segment of the pipeline corridor from the eastern shore to a point 185 feet offshore in Haverstraw Bay. Millennium has confirmed that consolidated rock will be encountered along an area 185 feet in length at the eastern most portion of the proposed route and has estimated that 260 cubic yards of rock will be removed to achieve the necessary trench depth. Millennium will initially attempt to remove the rock using an environmental dredge or barge mounted excavator. The FERC assessments indicate that blasting would not be undertaken until efforts to remove rock employing the above mechanical methods fail. Millennium expects that at least some of the consolidated material can be handled by mechanical means. FERC has determined that the operations of blasting and subsequent removal of rock material would not



destroy or affect the benthic community beyond the footprint discussed in the initial assessments, nor would the proposed construction schedule be altered by these activities.

Prior to blasting, soft material (referred to as overburden) would be removed as described above and stored in shallow water barges. Sidecasting would be prohibited. Turbidity impacts would be mediated by the use of the environmental bucket to remove sediment prior to excavation of rock with an open-bucket backhoe. The setback distance for removing rock and overburden would be determined in the field, depending on actual site conditions; however, the construction plan assures that the setback would not exceed the project corridor described in the original biological and EFH assessments for this crossing.

If possible, the blasting is to be accomplished by a single episode, with a maximum of 200 boreholes set 6-11 feet deep and spaced 3-5 feet apart. Charges would be set on delays with 1-2 holes and a maximum charge of 35 pounds per delay. Each bore would be stemmed with 3-7 feet of crushed stone placed in the borehole over the charges. Notwithstanding, the Vibra-Tech attachment indicates that more than one blasting episode may be necessary due to barge access limitations. To enhance the mitigation of blasting impacts, attempts to detect fish schools would be made prior to detonation, and noise-generating devices would be used to discourage fish from approaching the blast area. An air bubble curtain would be installed within the 96 hour 1% mortality distance based on the Coastline Environmental Service's I-Blast model (assuming a 35 pound high explosive charge and fish weighing between 0.25 and 15 pounds).

The pipe would be installed and the excavated trench will be backfilled to original elevations with the stockpiled rock and sediment consistent with activities proposed for the remainder of the Hudson River crossing. It would not be possible to restore the benthic habitat fully in the blasted area since the fractured bedrock could not be returned to its pre-construction condition.

NMFS Endangered Species Act Comments

On January 17, 2001, FERC submitted a biological assessment (BA) and requested initiation of formal consultation pursuant to section 7 of the ESA on the portion of the Millennium Pipeline Project proposed to traverse Haverstraw Bay in the Hudson River, New York. On April 4, 2001, NMFS requested additional information to supplement the BA. The information requested by NMFS was discussed in greater detail in a conference call on May 18, 2001. FERC submitted additional information to NMFS in a letter dated June 1, 2001. On June 7, 2001, the applicant, Millennium Pipeline Company (Millennium), visited NMFS' Northeast Regional Office and presented information on their project application. While this meeting did provide additional clarification and details on the project components, no new information was provided and NMFS concluded that June 1, 2001, was the date of initiation of formal consultation.

On June 15, 2001, NMFS informed FERC that all of the information necessary for a formal section 7 consultation and biological opinion (BO) had been received and reminded FERC not to make any irreversible or irretrievable commitment of resources that would prevent NMFS or FERC from implementing any reasonable and prudent alternatives to avoid jeopardizing shortnose sturgeon.

On September 14, 2001, NMFS issued a BO on the impacts of FERC's issuance of a permit for the proposed dredging and pipelaying portion of the Millennium Pipeline Project on endangered shortnose sturgeon. Following the conclusion of the formal consultation, NMFS was informed in a letter dated January 23, 2002, from Sidley Austin Brown and Wood that blasting may be required to complete the pipeline installation. Information indicating that blasting may be necessary during pipeline construction was not included in the initiation package (i.e., the biological assessment or Supplemental Draft Environmental Impact Statement). Therefore, an analysis on the effects of blasting on endangered shortnose sturgeon was not included in NMFS' BO. Pursuant to section 7 of the ESA, reinitiation of consultation is required if project plans are modified in a way that causes an effect to the listed species not previously considered in preparation of the BO.

In a letter dated July 3, 2002, FERC requested reinitiation of formal consultation on the blasting portion of the Millennium Pipeline Project. In this letter, FERC enclosed a supplemental BA and two blasting mitigation plans prepared by Vibra-Tech Engineers, Inc. and Lawler, Matusky, and Skelly Engineers LLP. NMFS has reviewed the supplemental BA and blasting mitigation plans and offers the following comments on the effects of blasting on endangered shortnose sturgeon.

Endangered shortnose sturgeon occur in the Hudson River from approximately New York City to the Troy Dam. Both adults and juveniles have been found to use Haverstraw Bay for summer foraging and/or overwintering. From late fall to early spring adult shortnose sturgeon overwinter in dense aggregations. Reproductive activity the following spring determines overwintering behavior; non-spawning adults aggregate in and/or near Haverstraw Bay, while spawning adults concentrate near Kingston. Most juveniles occupy the broad region of Haverstraw Bay by late fall and early winter (Buckley and Kynard 1985, Dovel et al. 1992, Bain et al. 1998). Therefore, both adult and juvenile shortnose sturgeon have the potential to be in the area during blasting and may be adversely affected.

A number of studies have examined the effect of underwater blasting on fish and have concluded that blasting does have an adverse impact. Results from previous blasting studies conducted on 13 species of fish revealed that swimbladder rupture and hemorrhaging in the pericardial and coelomic cavities were common injuries (Wiley et al., 1981). While shortnose sturgeon were not the focus of these studies, the results can be used to predict the impact of blasting on shortnose sturgeon given there are certain factors that influence both the magnitude of the blast and the explosion pressure wave. Teleki and Chamberlain found that the magnitude of the blasting effect on fish is dependent upon several physical and biological characteristics. Physical components include detonation velocity, density of material to be blasted, and charge weight. Fish shape, swimbladder development, and location of the fish in the water column represent influential biological characteristics. The explosion pressure wave and resultant fish kill is influenced by the interaction of additional physical components including the composition of the explosive, water depth, and bottom composition (Teleki and Chamberlain, 1978).

In order to assess the impacts of blasting on shortnose sturgeon, in December of 1998 and January of 1999 test blasting was conducted in Wilmington Harbor. The results of this study demonstrated that while shortnose sturgeon do suffer from swimbladder ruptures, more common

were distended intestines with gas bubbles inside and hemorrhage to the body wall lining. Necropsies were only performed on approximately 70 shortnose sturgeon that were 35 feet from the blast; the group located 70 feet from the blast were externally examined. It was later concluded that the external examinations were insufficient in identifying all blast related injuries given that necropsies performed later revealed serious internal damage. While it is evident that shortnose sturgeon can withstand a certain degree of blasting at certain distances from detonation, it is also apparent that blasting does have the potential to cause serious injury (Moser, 1999).

A list of measures to minimize the impact of blasting on shortnose sturgeon have been incorporated into the project application, following a series of correspondence between NMFS and FERC (i.e., letters February 15, 2002, July 3 2002, e-mail July 25, 2002, and August 1, 2002). NMFS has reviewed these measures and incorporated additional recommendations in order to avoid the potential take of shortnose sturgeon:

- Pre- and post blast monitoring for shortnose sturgeon shall be conducted under the supervision of a NMFS approved observer with the use of side-scan sonar.
- Side-scan sonar should be used 20 minutes before the blast to detect the presence of schools of fish in the vicinity of blasting. The surveillance zone will be approximately circular with a radius of about 500 feet extending outward the entire length of the trench. Scare charges should be used shortly before blasting is undertaken. Each individual scare charge shall not exceed a TNT-equivalent weight of 0.1 lb. The detonation of the first charge will be at 45 seconds prior to blasting and the second scare charge should be detonated 30 seconds prior to blasting. Side-scan sonar should be used following the detonation of scare charges to ensure that schools of fish have moved out of the vicinity of blasting. If monitoring indicates fish are still present in the area, blasting activities should be delayed.
- Blasting will be confined to a single episode, rather than multiple blast events. Detonation of explosives will be separated by a minimum of a 25 millisecond time lag and 1-2 drill holes will be set per time delay. Minimizing the number of holes detonated per time delay will minimize the total pressure generated from the blast, given that the maximum overpressure produced will be related to the size of the charge per delay rather than the summation of all charges. All blast holes will be stemmed to suppress the upward escape of blast pressure from the drill hole. Stemming will be 3-7 feet thick, depending on the depth of the drill hole, and will use graded, clean crushed stone that is 3/8" or 1/4." The minimum charge necessary should be used per delay and a maximum charge weight of 35 lbs will be used per delay. Blasting pressure should be monitored.
- Blasting should be conducted within the originally agreed upon construction window of September 1-November 15.

NMFS has concluded that if Millennium finds that blasting is required to complete the pipeline construction along the 185 feet easternmost portion of the crossing, it is not likely to adversely affect the endangered shortnose sturgeon, provided that recommended measures discussed above are used to reduce the potential for take. Provided these measures are used, no further

consultation is required. However, if any of these measures are not employed, then it is our determination that this portion of the proposed project may affect the endangered shortnose sturgeon, and reinitiation of formal consultation under the ESA will be required.

The above determination has been made using the best available scientific and commercial information. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in this biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. In instances where the amount or extent of incidental take is exceeded, section 7 consultation must be reinitiated immediately.

NMFS Magnuson-Stevens Act, Essential Fish Habitat Comments

In January, 2001, FERC submitted an EFH assessment and request for consultation pursuant to the MSA. The assessment would be for construction activities proposed in Haverstraw Bay in the Hudson River, New York. On March 22, 2001, NMFS responded to FERC's EFH assessment with 1) a summary of concerns related to the ecological effects that would be incurred by constructing the proposed river crossing, and 2) EFH conservation recommendations pursuant to Section 305(b)(4)(A) of the MSA. Subsequently, NMFS was informed that blasting may be required in a portion of Haverstraw Bay to complete project installation. Information describing the proposed blasting and its impacts on the Haverstraw Bay habitat was not included in the initial EFH assessment or supplemental draft environmental impact statement. NMFS received FERC's supplemental EFH assessment on July 8, 2002. This assessment included attachments produced by Vibra-Tech Engineers, Inc. and Lawler, Matusky, and Skelly Engineers.

This supplemental EFH assessment was prepared by FERC to evaluate the impacts that would result from underwater blasting in a portion of the Haverstraw Bay alignment alternative, which was not considered in the original EFH assessment. Supplemental consultation is necessary since the original EFH assessment was submitted because the applicant has determined that mechanical means alone would not likely succeed in establishing the trench necessary for the pipe to complete a portion of the proposed river crossing. NMFS has reviewed the supplemental EFH assessment and offers the following comments and conservation recommendations pursuant to Section 305(b)(4)(A) of the MSA and Part IV, Paragraph 3(b) of the Clean Water Act MOA between NMFS and the Army Corps of Engineers (ACOE).

The supplemental EFH assessment and attachments indicate that the underwater blasting would be confined to the easternmost 185 feet of the proposed Haverstraw Bay crossing. The assessment includes a general blasting plan and proposed mitigative measures as referred to in the Revised Blasting Plan section of this letter. We offer the following comments and recommendations on the supplemental EFH assessment pursuant to the MSA. These comments and recommendations address incremental impacts associated with the addition of a blasting

component for construction of the project through the Haverstraw Bay alignment alternative. The conservation recommendations issued for this action complement those already on record for the ongoing EFH consultation as stated in our letter to FERC on March 22, 2001, and under consideration by FERC .

Project details discussed in FERC's supplemental EFH assessment address the effects of underwater blasting within a segment of the pipeline corridor from the eastern shore to a point 185 feet offshore in Haverstraw Bay. The assessment includes discussion of EFH impacts from the blasting and subsequent removal of rock material; effects on the original project footprint established in the initial assessment and on the original proposed construction schedule; management of rock and sediment spoils; and blasting procedures and protocols. Mitigation methods are also discussed (see Revised Project Description). We understand from this discussion that overlying soft material on the bay bottom would be removed as described in the initial EFH assessment and stored in shallow draft barges, and sidecasting would be prohibited. Further, setback distance for removing the rock and soft sediment, although determined in the field, would be within the limits of the setback project corridor described in the original EFH assessment for this crossing. Moreover, blasting would occur only when mechanical methods fail, and the project schedule would not be affected.

We note that Millennium proposes to accomplish the blasting in a single episode, but the Vibra-Tech attachment indicates that more than one episode may be necessary due to barge access limitations. The EFH assessment acknowledges that the cumulative effects of multiple blasts would exceed the effect of the planned, single blasting episode. Further, it would not be possible to restore the benthic habitat fully since the fractured bedrock could not be returned to its pre-construction condition. The supplemental EFH assessment acknowledges that some unavoidable changes would accrue to EFH where bedrock areas would be permanently disturbed.

Regarding the application of the mitigative measures using noise-generating fish deterrent and an air bubble curtain, we have concern about the I-Blast model inputs. The air bubble curtain would be installed within the 96 hour 1% mortality distance based on the Coastline Environmental Service's I-Blast model (assuming a 35 pound high explosive charge and fish weighing between 0.25 and 15 pounds). We agree that the acoustic deterrents may discourage these fish from nearing the immediate blasting zone and that a properly designed bubble curtain would attenuate wave pressures created by the subaqueous blasting. However, we believe that assumptions used in the I-blast model do not account for potential impacts on outmigrating alosids, which will be smaller than 0.25 pounds, and that the present air curtain design will not provide protection for these fish. In this regard, the I-Blast model should be rerun to ensure that it will account for protection of alosids smaller than 0.25 pounds.

As indicated in the initial EFH assessment for this project, EFH is present in Haverstraw Bay for six species regulated under the MSA for the blasting component under review: red hake (*Urophycis chuss*), winter flounder (*Pseudopleuronectes americanus*), windowpane (*Scophthalmus aquosus*), bluefish (*Pomatomus saltatrix*), Atlantic butterfish (*Peprilus triacanthus*), and fluke (*Paralichthys dentatus*). The revised pipeline installation requiring blasting for the easternmost 185 feet of the Haverstraw Bay crossing would adversely affect EFH

primarily by disturbing natural sediment structure, by resuspending contaminants, by dispersing or destroying forage species, by altering shallow subtidal habitats, by changing the natural shoreline development, and by fracturing the bedrock formation at the east shore of Haverstraw Bay. NMFS recommends pursuant to Section 305(b)(4)(A) of the MSA and Part IV, Paragraph 3(b) of the Clean Water Act MOA between NMFS and the ACOE the following conservation recommendations:

- **The I-Blast model should be repeated to determine if the bubble curtain perimeter needs revision in order to provide the additional 1% mortality protection for all size classes of outmigrating alosids, an important forage species for many species for which EFH has been designated in the Hudson River estuary and beyond.**
In the event that a school of fish is present in the blasting zone and remains undeterred by noise-generating devices, blasting must be delayed until the fish move outside of the calculated impact area. The decision to proceed must be approved immediately in advance by the independent environmental monitor or designated personnel from the involved state or federal regulatory agencies.
- **Provide NMFS with an actual blasting plan as soon as it is developed by the contractor for final agency review. This plan should be designed to achieve the necessary fracturing in one episode and in a manner to minimize the resulting physical and biological impacts. We also request that our staff be given a minimum of 48 hours notice prior to any detonation taking place so agency observers may be deployed if it is determined necessary or desirable upon review of the final plan.**
All fish kills and habitat damage that exceed the very limited area of impact characterized in the supplemental EFH assessment must be compensated based on suitable replacement values or formulas.

Section 305(b)(4)(B) of the MSA requires the involved federal authorizing and funding agencies to provide NMFS with a detailed written response to these EFH conservation recommendations, including a description of measures adopted by FERC and ACOE for avoiding, mitigating, or offsetting the impact of the project on EFH. In the case of a response that is inconsistent with NMFS' recommendations, FERC and/or the ACOE must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects pursuant to 50 CFR 600.920(k).

If new information becomes available or the project is revised in such a manner that affects the basis for the above EFH conservation recommendations, the EFH consultation must be reinitiated pursuant to 50 CFR 600.920(l).

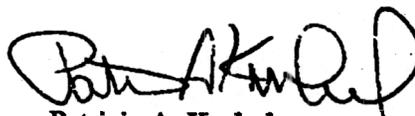
Conclusions

We offer the above recommendations in response to a change in scope for this project. We recommend that FERC and the ACOE (as appropriate) require that the project proponents revise their proposed blasting plan to avoid and minimize negative impacts on living marine resources and habitats in accordance with Section 7 and EFH conservation recommendations. We continue

to maintain our recommendations issued on the overall project proposal as presented in previous correspondence to the FERC Secretary and to the ACOE and look forward to your response to EFH conservation recommendations issued on March 22, 2001, and existing ESA matters.

If you have questions concerning these comments or consultation requirements, please contact Jessica Anthony at 978-281-9254 for ESA matters, and Diane Rusanowsky at 203-882-6504 for EFH matters. I look forward to continued cooperation with FERC through in this consultation process.

Sincerely,



Patricia A. Kurkul
Regional Administrator

cc: USACE - Buffalo, New York, Albany Field Office
USFWS - Cortland
NYSDEC - Albany
NYSDOS - Cortland
NMFS - Anthony, Mantzaris, K. Conant, Colligan, Colosi, Gorski, Rusanowsky,
Hogarth, Kurkul
GCNE - Williams
ACOE - Heidi Firstencel
FERC - Jeff Shenot/Gas Branch 2, PJ-11.2

File Code: 1514-05 (A) FERC - Millennium Pipeline Project (blasting)

Literature Cited

Bain, M.B., D.L. Peterson, K.K. Arend. 1998. Population Status of Shortnose Sturgeon in the Hudson River. Final Report to the National Marine Fisheries Service. October 1998, 51pp.

Buckley, J., and B. Kynard. 1985. Habitat use and behavior of pre-spawning and spawning shortnose sturgeon, *Acipenser brevirostrum*, in the Connecticut River. North American Sturgeons. Pages 111-117.

Dovel, W.L., A.W. Pekovitch, and T.J. Berggren. 1992. Biology of the shortnose sturgeon (*Acipenser brevirostrum* Leseur, 1818) in the Hudson River estuary, New York. Pages 187-216 in C.L. Smith (editor), Estuarine research in the 1980s. State Univ. New York Press, Albany, New York.

Moser, M. 1999. Cape Fear River Blast Mitigation Test: Results of Caged Fish Necropsies. Final Report to CZR Inc., 4709 College Acres Drive, Wilmington, NC 28403.

Teleki, G.C. and A.J. Chamberlain. 1978. Acute effects of underwater construction blasting on fishes in Long Point Bay, Lake Erie. J. Fish. Res. Board Can., Vol 35: 1191-1198.

Wiley, M.L., J.B. Gaspin, and J.F. Goertner. 1981. Effects of Underwater Explosions on Fish with a Dynamical model to Predict Fishkill. Vol 6(2): 223-284.