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

OFFICE OF THE GENERAL COUNSEL

JAN 0 2003

Frank L. Amoroso, Esq.
Nixon Peabody LLP
990 Stewart Avenue
Garden City, NY 11530

Re: Initial Briefing Schedule for the Consistency Appeal of the Islander East Pipeline Company

Dear Mr. Amoroso:

By letter dated November 14, 2002, you filed with the Secretary of Commerce (Secretary) a notice of appeal on behalf of Islander East Pipeline Company, L.L.C. (Islander East or Appellant), pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. §§1451 et seq., and the Department of Commerce's implementing regulations, 15 C.F.R. Part 930, Subpart H. Accompanying your notice was also the appropriate application filing fee for the appeal. The appeal is taken from an objection by the Connecticut Department of Environmental Protection (State) to Islander East's consistency certification for U.S. Army Corps of Engineers and Federal Energy Regulatory Commission permits to construct and operate a natural gas pipeline. The pipeline would extend from an interconnection with an existing pipeline near North Haven, Connecticut, to a terminus on Long Island, New York, affecting the natural resources or land and water uses of Connecticut's coastal zone.

As Assistant General Counsel for Ocean Services, I have been delegated the responsibility for establishing initial and final briefing schedules for consistency appeals filed under section 307 of the CZMA. The Secretary has reserved the authority to make the findings in such appeals. See Department Organization Order 10-15 (January 26, 1996). As a follow-up to the Notice of Appeal, on December 20, 2002, Islander East and the State submitted proposed briefing schedules for consideration.

The CZMA provides that a timely objection by a state to a consistency certification precludes the concerned federal agency from issuing a license or permit for the activity unless the Secretary finds that the activity is either "consistent with the objectives" of the CZMA (Ground I) or "necessary in the interest of national security" (Ground II). Section 307(c)(3)(A).

In making a finding with respect to Ground I or Ground II, the Secretary determines whether the project satisfies the requirements of 15 C.F.R. § 930.121 or § 930.122. The Appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion under both Grounds I and II. 15 C.F.R. §130(d). Accordingly, we request that the parties brief the following issues:

1. Does the activity further the national interest as articulated in section 302 or 303 of the CZMA, in a significant or substantial manner? 15 C.F.R. §930.121(a).

2. Does the national interest furthered by the activity outweigh the activity's adverse coastal effects, when those effects are considered separately or cumulatively? 15 C.F.R. §930.121(b). For the purposes of this appeal, the national interests to be balanced are limited to those recognized in or defined by the objectives or purposes of the CZMA.

3. Is there a reasonable alternative available that would permit the activity to be conducted in a manner consistent with the enforceable policies of Connecticut's coastal zone management program? When determining whether a reasonable alternative is available, the Secretary may consider, but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other information included in the administrative record during the appeal. 15 C.F.R. §930.121(c).

If Islander East wishes to raise Ground II, it should also provide information regarding whether the project is necessary in the interest of national security. The term "necessary in the interest of national security" describes a federal license or permit activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed. 15 C.F.R. §930.122.

Islander East will have until **February 10, 2003**, to file its initial brief with supporting information and data. The brief should not address the question raised in the Notice of Appeal as to whether the State's objection to Islander East's consistency certification was made in a timely fashion. Per Mr. Amoroso's letter of December 20, 2002, Islander East has waived this issue.[1] The State will have until **March 24, 2003**, to file its initial brief with any supporting information and data. The parties should mail their briefs and any supporting information and data to Branden Blum, Senior Counselor, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of the General Counsel for Ocean Services, 1305 East-West Highway, Silver Spring, MD 20910.

We request that henceforth, the parties send copies of all correspondence and documents filed in the appeal to each other. The Department has established a website (*www.ogc.doc.gov/czma.htm*) to facilitate access to nonconfidential documents submitted for the appeal's administrative record. Therefore, there is no need to serve briefs and other nonconfidential materials on the permitting federal agencies. Additionally, we request that the State retain all nonconfidential documents sent or received in this appeal for public inspection

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[1] The relevant language states "Islander East . . . has reconsidered its position regarding the procedural issue of the untimeliness of Connecticut's objection. . . and . . . will not pursue that issue in this appeal." Letter dated December 20, 2002, from Frank L. Amoroso (representing Islander East) to Branden Blum, NOAA, concerning the Proposed Briefing Schedule, at 2.

during normal business hours. Copies of this information will also be available at the Office of the General Counsel for Ocean Services, National Oceanic and Atmospheric Administration (NOAA), at the above-listed address.

We will publish a notice during January 2003, in the Federal Register and in a local newspaper distributed in the vicinity of Connecticut's coastal zone likely to be affected by Islander East's proposed pipeline. The notice will invite public comments on issues raised in the appeal and announce that appeal materials will be available for public inspection at the offices of the State, at NOAA's offices in Silver Spring, and via the internet. We also will send letters in January to solicit the views of interested federal agencies on issues raised by the appeal. The State and Islander East will have access, via our website, to comments received for this appeal. Each party will have the opportunity to file a reply brief before the record closes.

The specific dates for comment periods will be established in January. If warranted, the comment periods may be extended or reopened. The parties will have an additional opportunity to submit recommendations for the scheduling of reply briefs after receipt of the State's initial brief. The initial schedules submitted by the parties anticipate that a public hearing on the appeal will be conducted. The Under Secretary for Oceans and Atmosphere is the official in NOAA with authority, delegated from the Secretary of Commerce, to grant such requests. Department Organizational Order 10-15, §3.01(u). Similarly, the Under Secretary, on behalf of the Secretary, may decide to hold a hearing at his own initiative. See 15 C.F.R. §930.128(e). Details concerning the scheduling of any hearing will be announced in the Federal Register.

The Department of Commerce prohibits its officials from engaging in *ex parte* contacts in connection with consistency appeals. However, the Office of Ocean and Coastal Resource Management (OCRM) is available to assist the State and Appellant with settlement negotiations. See 15 C.F.R. Part 930, Subpart G.

Sincerely,

Karl D. Gleaves
Assistant General Counsel
for Ocean Services

cc: David H. Wrinn
Assistant Attorney General
State of Connecticut

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

OFFICE OF THE GENERAL COUNSEL

JAN 10 2003

David H. Wrinn
Assistant Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141

Re: Initial Briefing Schedule for the Consistency Appeal of the Islander East Pipeline Company

Dear Mr. Wrinn:

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Sincerely,

Karl D. Gleaves
Assistant General Counsel
for Ocean Services

cc: Frank L. Amoroso
Counsel for Islander East
Pipeline Company