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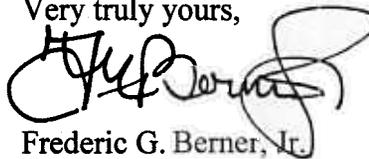
The Honorable Donald L. Evans
Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Appeal of Millennium Pipeline Company,
L.P. from the Objection of the State
of New York, Department of State, to
the Millennium Pipeline Project

Dear Secretary Evans:

Enclosed on behalf of Millennium Pipeline Company, L.P. ("Millennium") in accordance with the procedural schedule established by the National Oceanic and Atmospheric Administration is Millennium's Final Brief in support of the referenced appeal to the Secretary under the Coastal Zone Management Act.

Very truly yours,



Frederic G. Berner, Jr.

Attorney for Millennium
Pipeline Company, L.P.

cc: Glen T. Bruening, Esq.
William L. Short, Esq.

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Millennium Pipeline Company, L.P.,
Appellant,)
v.)
State of New York, Department of State,)
Respondent.)

**FINAL BRIEF OF MILLENNIUM PIPELINE COMPANY, L.P.
ON APPEAL FROM THE OBJECTION OF
THE STATE OF NEW YORK, DEPARTMENT OF STATE,
TO THE MILLENNIUM PIPELINE PROJECT**

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April 21, 2003

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Pursuant to Section 307(c)(3)(A) of the Coastal Zone Management Act (the “CZMA”) and the procedural schedule established by the National Oceanic and Atmospheric Administration (“NOAA”), Millennium Pipeline Company, L.P. (“Millennium”) submits its final brief in support of its request that the Secretary of Commerce (the “Secretary”) override the May 9, 2002 objection of the State of New York, Department of State (“NYSDOS”), to Millennium’s consistency certification for the Millennium Pipeline Project. Millennium also requests that the Secretary promptly close the record in this proceeding¹ and proceed to issue a final decision as soon as practicable.

Millennium’s positions on the issues raised by this appeal have been presented at length in its Initial Brief (filed on August 12, 2002) and in its Reply Brief (filed on March 14,

¹ 15 C.F.R. § 930.130(a).

2003) and thus need not be repeated at this time. Instead, Millennium will respond in this final, surreptitiously brief to the positions that have recently been advanced by the NYSDOS in its Reply Brief.²

PRELIMINARY STATEMENT

From beginning to end, the NYSDOS's Reply Brief is replete with contentions that reflect an appalling disregard for the truth. While an identification of all of those misrepresentations would serve little or no purpose, Millennium must emphasize at the outset that blatant misstatements characterize the NYSDOS's position on virtually every major issue in dispute:

The Issue Presented. The very first sentence in the NYSDOS Reply Brief erroneously claims that the issue to be decided by the Secretary is whether "Millennium's project to construct a natural gas pipeline along the proposed route is inconsistent with New York's Coastal Management Program (CMP)."³ That is not the issue in this case. Rather, the fundamental issue under the CZMA is whether the Millennium Project's national benefits outweigh its coastal effects. If so, the Secretary should -- and must -- override the NYSDOS's objection and permit the Project to proceed in accordance with the orders issued by the Federal Energy Regulatory Commission ("FERC").

The Untimeliness Of The NYSDOS's Objection. The NYSDOS issued its objection to the Project on May 9, 2002, long after the CZMA review period expired. The NYSDOS contends, erroneously, that its objection was issued in a timely manner because

² "Reply Brief and Supporting Information and Data of the New York Department of State," dated April 4, 2003. Citations herein are to the formally-filed version of the NYSDOS's Reply Brief, not to the electronic version of that brief, which reflects a significantly different pagination. The NYSDOS's Reply Brief was untimely filed on April 7, 2003, three days after NOAA's deadline, without any explanation or justification, evidencing the same disregard for deadlines that characterized the NYSDOS's untimely May 9, 2002 objection to the Project. *See* pages 5-8, *infra*.

³ NYSDOS Reply Br. at 5.

Millennium agreed that any “project changes” would extend the review period.⁴ Millennium simply **never** agreed to any such extension, however, nor can any such agreement be imputed to Millennium on the basis of its subsequent actions or inaction.

The Project’s National Benefits. Chairman Wood and the Staff of the FERC, the Federal agency created by Congress to determine whether proposed interstate gas pipeline projects are in the public interest, have advised the Secretary that the Millennium Project’s economic and environmental benefits will be “incalculable.”⁵ Secretary of Energy Spencer Abraham and the Department of Energy (“DOE”) have urged the Secretary to reach that same conclusion,⁶ which is supported by compelling record evidence.⁷ Because the Project’s significant national benefits have thus been conclusively established, the NYSDOS’s claim that “[t]he Millennium Pipeline does not further any of the objectives of the CZMA in a significant or substantial [sic] manner”⁸ is about as credible as the Iraqi Minister of Information.

The Project’s Coastal Effects. The NYSDOS asks the Secretary to reject the FERC’s determination that the Project’s coastal impacts will be “minimal and temporary, contending that “FERC does not have or even claim to have expertise or authority in coastal resource matters .”⁹ Here, again, the NYSDOS’s representations are plainly false. Congress vested the FERC with exclusive jurisdiction to decide the propriety of proposed interstate pipeline routes through coastal areas, through inland areas, and through all other areas of the United States, and the FERC has conclusively determined in this case that the Millennium Project’s impacts will be “minimal and temporary.” The NYSDOS’s contrary conclusion is not only entitled to little or no weight, but also has no factual basis.

⁴ NYSDOS Reply Br. at 27.

⁵ “Comments of the Federal Energy Regulatory Commission Staff on Millennium’s CZMA Appeal to the Secretary of Commerce,” dated November 15, 2002 (“FERC Staff Comments”), at 2.

⁶ Letter from Secretary of Energy Spencer Abraham to the Secretary, dated December 2, 2002, at

⁷ See Millennium Initial Br. at 19-37; Millennium Reply Br. at 12-30.

⁸ NYSDOS Reply Br. at 39.

⁹ NYSDOS Reply Br. at 7.

Putative “Alternatives”. The NYSDOS’s *post hoc* pipedream that “[t]here are numerous reasonable alternatives available but Millennium chooses not to pursue them”¹⁰ is outrageous. The FERC conducted an “exhaustive review of alternative routes for this project,”¹¹ particularly with respect to the Hudson River crossing, and unequivocally concluded that “there is no reasonable alternative available which would permit the Millennium Project to be constructed consistent with the enforceable policies of New York’s Coastal Management Plan.”¹² Quite obviously, this expert opinion of the Federal agency that has been entrusted with interstate pipeline routing decisions is far more credible than the conjecture of a state agency that knows little or nothing about pipeline construction and even less about pipeline routing. The NYSDOS has been advised and knows full well that Millennium would never choose to pursue any of the foolish “alternatives” hypothesized by the NYSDOS, none of which is either available or reasonable.

ARGUMENT

It cannot be overemphasized that this appeal does not pit Millennium’s views against the NYSDOS’s views, as the NYSDOS’s Reply Brief repeatedly suggests. Instead, this appeal to the Secretary pits the FERC’s reasoned conclusions, based upon a voluminous and comprehensive record, against the NYSDOS’s unsubstantiated “opinions” and “concerns.” The Secretary should find that the expert judgments of the FERC and the DOE regarding this proposed interstate pipeline project have not been trumped by the NYSDOS’s insular, unsupported claims.

¹⁰ *Id.* at 10.

¹¹ FERC Chairman Comments at 1

¹² FERC Staff Comments at 4-5.

I.

THE SECRETARY SHOULD DISMISS THE NYSDOS'S OBJECTION AS UNTIMELY

The NYSDOS's lengthy arguments on the timeliness issue seem designed more to engender confusion and complexities than to provide any enlightenment.¹³ In fact, this threshold procedural issue is simple and straightforward.

Millennium's September 12, 2001 letter to the NYSDOS confirmed that Millennium and the NYSDOS "had mutually agreed to extend the time for the NYSDOS to issue a decision."¹⁴ Millennium and the NYSDOS further agree that the CZMA review period thereafter commenced on November 5, 2001, when the NYSDOS received the FERC's FEIS, and that the NYSDOS subsequently issued its objection on May 9, 2002. Because the NYSDOS failed to issue a decision before the review period expired -- at the very latest, on April 5, 2002, six months after the review period commenced -- the NYSDOS's objection was untimely and should accordingly be dismissed.

The NYSDOS continues to argue that its objection was timely issued on the theory that (1) language set forth by the NYSDOS in its subsequent September 12, 2001 letter to Millennium (Millennium Exhibit 28) should be construed as an agreement by Millennium that the CZMA review period would automatically be extended in the case of "any significant pipeline routing or other project changes that may have effects upon the coastal zone of New York State," and (2) Millennium's submission to the NYSDOS of additional information regarding the potential need for blasting along a 200-foot portion of the pipeline route near the eastern shore of the Hudson River was a "project change" within the ambit of that language and thus automatically triggered a further extension of the CZMA review period. Those contentions are unfounded.

¹³ See NYSDOS Reply Br. at 12-39.

¹⁴ Millennium Exhibit 27 at 1.

A “mutual agreement” of Millennium and the NYSDOS was necessary for any extension of the CZMA review period,¹⁵ and the NYSDOS thus had no power to “unilaterally stop, stay, or otherwise alter the review period without [Millennium’s] agreement.”¹⁶ Here, there is utterly no evidence that Millennium agreed to any extension of the review period in the event of “significant pipeline routing or other project changes,” as the NYSDOS suggested in its September 12, 2001 letter. Apparently conceding that fact, the NYSDOS argues that Millennium’s agreement to that language can be inferred from its failure to expressly object to that language or from its prior concurrence with a so-called “similar “concept.”¹⁷ In the alternative, the NYSDOS argues that Millennium was “equitably estopped” from asserting that the NYSDOS decision was untimely because Millennium “consistently urged DOS to render its decision”¹⁸

Contrary to the NYSDOS’s feigned *post hoc* rationale, Millennium’s failure to expressly object to the NYSDOS’s unsolicited “project changes” language is hardly evidence of Millennium’s agreement to that language, particularly since any extension of the CZMA review period required the parties’ “mutual agreement” under the CZMA regulations. Nor can Millennium’s prior concurrence with a decidedly different and much narrower proposition -- that a new review period might be required if the Project were “significantly changed as a result of the federal environmental review process” (NYSDOS Exhibit 33) -- be regarded as evidence of Millennium’s subsequent agreement to permit the NYSDOS to extend the review period willy-nilly in the event of anything that the NYSDOS declared to be a “project change.” As for the NYSDOS’s alternative “estoppel” or “waiver” argument, Millennium did not in any way forfeit its right to challenge the timeliness of the NYSDOS’s decision under NOAA’s regulations by continuing to seek a favorable decision from the NYSDOS after the statutory review period had expired.

¹⁵ 15 C.F.R. § 930.60(a)(3).

¹⁶ Preamble to NOAA’s Regulations, 65 Fed. Reg. 77124, 77147 (December 8, 2000).

¹⁷ NYSDOS Reply Br. at 15.

¹⁸ *Id.* at 31.

Even assuming, *arguendo*, that the NYSDOS could somehow confer upon itself the unilateral right to extend the CZMA review period by virtue of the “project change” language that it set forth in its September 12, 2001 letter to Millennium, the possible need for a very limited amount of blasting near the eastern shore of the Hudson River did not in any way constitute a “project change” that would have permitted the NYSDOS to extend the review period. Indeed, the NYSDOS for the most part concedes that the possible need for blasting was not a “project change” but rather simply “new information,” which does not operate to extend the CZMA review period under Section 930.60(b) of NOAA’s regulations.¹⁹

Finally, there is no basis for the NYSDOS’s ridiculous claim that it issued its decision “at the earliest practicable time.” NYSDOS Reply Br. at 21. The NYSDOS took more than 41 months to issue its decision. That unconscionable delay conflicted with the CZMA’s requirement to accord “priority consideration” to the siting of major energy facilities like the Millennium Project,²⁰ contravened the CZMA’s goal of “ensur[ing] expedited governmental decision making for the management of coastal resources,”²¹ and frustrated the CZMA regulations’ objective to “minimize . . . delay”²² Because the NYSDOS ultimately issued its decision after the statutory review period had expired, its concurrence with Millennium’s consistency certification must be conclusively presumed.

¹⁹ In support of its contention that the “new information” constituted a “project change,” the NYSDOS notes that NMFS’s Northeast Regional Administrator characterized a January 23, 2002 letter she received from Millennium’s counsel as stating that Millennium’s “construction plans for the Hudson River have changed.” NYSDOS Reply Br. at 18-19, *citing* NYSDOS Exhibit 10. In fact, however, the Millennium letter to which she referred (Millennium Exhibit 79) made no such statement or any other statement that could conceivably be so interpreted.

²⁰ 16 U.S.C. § 1451(2)(D).

²¹ *Id.* § 1452(2)(G).

²² 15 C.F.R. § 930.1.

II.

THE SECRETARY SHOULD OVERRIDE THE NYSDOS'S OBJECTION ON CZMA GROUND 1: THE MILLENNIUM PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE CZMA

The Secretary must override the NYSDOS's objection under CZMA "Ground 1" if the Millennium Project "is consistent with the objectives" of the CZMA. Millennium has satisfied that standard by showing (1) that the Project "furthers the national interest," as articulated in CZMA Sections 302 and 303, "in a significant or substantial manner"; (2) that the "national interest furthered" by the Project outweighs its adverse coastal effects; and (3) that "[t]here is no reasonable alternative available" ²³ As explained below, the NYSDOS's contrary contentions are frivolous.

A. The Millennium Project Will Further A Number Of The National Objectives Set Forth In CZMA Sections 302 And 303 In A Significant And Substantial Manner

To satisfy the first element of the "Ground 1" standard, Millennium must show that the Millennium Project would further one of the objectives set forth in CZMA Sections 302 and 303 in a significant or substantial manner. In fact, however, Millennium has shown that the Project will promote at least four important CZMA objectives in both a significant and substantial manner. The NYSDOS's contrary contentions ignore applicable CZMA pronouncements and the record evidence:

- NOAA expressly stated in the preamble to the present CZMA regulations that "[a]n example of an activity that significantly or substantially furthers the national interest [articulated in CZMA Sections 302 and 303] is the siting of energy facilities."²⁴ In neither of its briefs to the Secretary has the NYSDOS even mentioned that determination by NOAA, much

²³ 15 C.F.R. § 930.121; *see* Millennium Initial Br. at 19-107; Millennium Reply Br. at 12-125.

ss explained why the Secretary should not give effect to NOAA’s determination and find that the siting of the Millennium Project would further the national interest.

- Section 303(2)(D) of the CZMA accords “priority consideration” to “coastal-dependent uses,” as the NYSDOS has conceded.²⁵ The Millennium Project obviously requires a coastal location, since its FERC-approved route traverses the coastal zone of Lake Erie and the coastal zone of the Hudson River to reach the markets in the coastal zone of New York City that the Project will serve. The NYSDOS’s assertion that “such routing does not transform Millennium’s pipeline into a coastal-dependent use”²⁶ is, to say the least, unfathomable.

- The Millennium Project will also promote the CZMA objective of energy self-sufficiency, as both the FERC and the DOE have emphatically concluded.²⁷ Apparently ignoring those expert determinations, the NYSDOS reiterates its simple-minded -- and erroneous -- opinion that “because the natural gas is imported from a foreign source, the Millennium Pipeline does not further the national interest of the United States in energy self-sufficiency.”²⁸ Clearly, however, our national energy policy promotes the integration of North American energy markets and the expansion of the present cross-border transportation infrastructure to permit a more efficient matching of North American supply with demand.²⁹ Moreover, the North American Free Trade Agreement promotes the energy self-sufficiency of North America, not just the United States, and provides the U.S. with “assured access to Canadian energy supplies to meet its

²⁴ Preamble to NOAA’s Regulations, 65 Fed. Reg. 77124, 77150 (December 8, 2000).

²⁵ NYSDOS Initial Br. at 31.

²⁶ NYSDOS Reply Br. at 44.

²⁷ See Millennium Reply Br. at 25.

²⁸ NYSDOS Reply Br. at 56.

²⁹ See “National Energy Policy,” Report of the National Energy Policy Development Group (May 2001), at 8-9.

imported energy requirements.”³⁰ It is ironic indeed that the NYSDOS would question the security of Canadian gas supplies for New York markets when New York State is more dependent on imports of Canadian natural gas than any other state and has long supported cross-border pipelines to meet its energy needs.

- The Millennium Project will also promote the CZMA objective of ‘compatible economic development’ in the coastal zone.³¹ The NYSDOS’s attempted rebuttal -- that “[t]he Millennium project is of no greater consequence to the promotion of economic development in the region than any other pipeline”³² -- not only begs the question, but is flatly untrue. As the FERC has found, the Millennium Project is necessary “to insure the timely development of an adequate energy infrastructure, particularly in large employment and population centers such as New York City.”³³

- Finally, Millennium has shown that the Project will, on balance, benefit the environment of the coastal zone by (a) substantially reducing air emissions, (b) improving water quality, (c) protecting fishery resources, and (d) reducing barge traffic -- benefits that will promote the CZMA goal of preserving, protecting, and enhancing the resources of the coastal zone.³⁴ In its Reply Brief, the NYSDOS only challenges Millennium’s assertion that air emissions will be reduced, claiming that “there is not credible evidence that Millennium gas will actually substitute for other fuels” and characterizing Millennium’s estimate of emissions

³⁰ United States-Canada Free Trade Agreement Implementation Act of 1988, House Energy and Commerce Committee Report, H.R. Rep. No. 100-816, Part 7, 100th Cong., 2d Sess., at 7 (1988).

³¹ 16 U.S.C. § 1452(2).

³² NYSDOS Reply Br. at 56.

³³ Millennium Exhibit 1 at 62,308.

³⁴ See Millennium Initial Br. at 32-37; Millennium Reply Br. at 28-30.

reductions as “fictional.”³⁵ These assertions reflect the NYSDOS’s failure to comprehend that natural gas supplied by the Millennium Project will necessarily either be substituted for oil or coal in existing homes and powerplants or will be used in lieu of those fuels in new residences and generating stations; in either case, clean-burning natural gas will displace either or both of those more polluting fuels, resulting in an actual, significant improvement in the coastal zone’s air quality.

B. The National Interests Furthered By The Millennium Project Far Outweigh Any Adverse Coastal Effects

To override the NYSDOS’s decision on CZMA Ground 1, the Secretary must find, secondly, that “[t]he national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively.”³⁶ Here again, Millennium has shown that the record evidence compels a finding by the Secretary that the Project’s national benefits far outweigh any adverse effects on New York’s coastal zone.³⁷ As the FERC has advised the Secretary in no uncertain terms, the Project’s “contribution to the national interest is incalculable in terms of economic benefit achieved and environmental consequences avoided” over the next 50 to 100 years, whereas “[t]he impacts of the project on New York’s coastal zone, on the other hand, will be primarily transient and limited to the time during which construction would occur, typically a period of days or weeks.”³⁸

1. The Millennium Project Will Further Important National Interests

The FERC and the DOE have both concluded, on the basis of the record before the FERC and our national energy policy, that the Millennium Project’s delivery of natural gas to

³⁵ NYSDOS Reply Br. at 57.

³⁶ 15 C.F.R. § 930.121(b).

³⁷ See Millennium Initial Br. at 22-96; Millennium Reply Br. at 13-80.

³⁸ FERC Staff Comments at 4.

a heavily-populated region for an extended period of time will produce significant economic and environmental benefits. The NYSDOS's stubborn refusal to accept or even address those authoritative conclusions is painfully obvious in its reply brief:

- While the NYSDOS now grudgingly accepts the fact that the FERC's "informed judgment" in regulating the Nation's gas supply "are [sic] entitled to great weight," it faults what it calls "Millennium's attempts to confer upon FERC the 'sole responsibility' and 'exclusive jurisdiction' for determining whether a proposed interstate pipeline furthers the national interest as defined in 16 USC 1451 and 1452 [*i.e.*, the CZMA]." ³⁹ But Millennium has never asserted that the FERC is empowered to make decisions under the CZMA; plainly, only the Secretary has that authority. Because the FERC does have "exclusive jurisdiction" and "sole responsibility" to decide interstate pipeline matters under the NGA, ⁴⁰ however, the FERC's orders approving the Millennium Project should be accorded great weight by the Secretary.

- In comparison, the NYSDOS has been essentially oblivious to the Millennium Project's national benefits. Even though "[t]he CZMA requires states to adequately consider the national interest in the siting of energy facilities in the coastal zone" ⁴¹ and NOAA's regulations similarly required the NYSDOS to "indicate the consideration given any national or interstate energy plans or programs which are applicable to or affect a state's coastal zone," ⁴² the NYSDOS's objection to the Millennium Project contained **not one word** regarding the national interests in siting the Millennium Project in a small portion of the coastal zone. Less than a year later, however, the NYSDOS now lays claim to great expertise regarding the national benefits of

³⁹ NYSDOS Reply Br. at 16, citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

⁴⁰ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988).

⁴¹ 67 Fed. Reg. 44407 (July 2, 2002).

⁴² 15 C.F.R. § 923.52.

the Project, which it characterizes as “marginal,”⁴³ and asks the Secretary to accept its judgment on that score in lieu of the conclusions of the FERC and the DOE. For obvious reasons, the Secretary should decline that offer and rely on the expert determinations of the FERC and the DOE.

- Apart from the expertise of the FERC and the DOE regarding national energy interests and the lack of any apparent expertise of the NYSDOS with respect to such matters, the NYSDOS displays a naively optimistic and shortsighted view of New York’s energy situation that represents the very antithesis of sound energy policy. Since the supplies of natural gas and electricity to New York last winter were “adequate” in the NYSDOS’s opinion and no energy crisis seems imminent,⁴⁴ the NYSDOS adopts a Pollyanna, “what-me-worry” attitude that there is no need for the Millennium Project. Thankfully, the FERC and the DOE evaluate the Project from a more careful, long-term perspective, recognizing the spiraling energy prices that New Yorkers experienced this past winter and the region’s long-term need for additional gas pipeline capacity to meet increasing demand and temper price volatility in the future.⁴⁵ In Millennium’s view, the NYSDOS’s myopic, short-term energy viewpoint shows why Congress delegated interstate pipeline decisions to the FERC and why the contrary views of state agencies, often reflecting short-term, political considerations, should not be permitted to trump the FERC’s reasoned decisions.

⁴³ NYSDOS Reply Br. at 11.

⁴⁴ *Id.* at 49-50.

⁴⁵ The New York Public Service Commission has similarly stated that “the need for new pipeline capacity into New York City is critical.” Millennium Exhibit 37 at 2.

2. **The Millennium Project's Adverse Coastal Effects Will Be Minimal And Temporary**

Scientific Bases for Impact Assessments. The NYSDOS states that it disagrees with Millennium's conclusion that the Project's impact on Haverstraw Bay will be minimal and temporary and "can only speculate as to how Millennium arrived at this conclusion."⁴⁶

Absolutely no speculation is required. Millennium reasonably relied on the FERC's voluminous FEIS,⁴⁷ the comprehensive and conservative site-specific study of environmental impacts conducted by LMS Engineers,⁴⁸ and the FERC's expert conclusions, none of which have been refuted or, for that matter, even acknowledged by the NYSDOS.⁴⁹ In comparison, the NYSDOS's exaggerated concerns have been properly rejected by the FERC and should likewise be summarily rejected by the Secretary.

FERC's Environmental Expertise. The NYSDOS states that Millennium's reliance on the FERC's environmental conclusions "is entirely misplaced" because "FERC does not have or even claim to have expertise or authority in coastal resource matters"⁵⁰ That assertion is also wrong. As both the lead Federal agency under NEPA and the sole Federal agency with authority for interstate gas pipelines under the NGA, the FERC has the expertise, authority, and responsibility to decide all matters regarding a proposed interstate gas pipeline, including its environmental impacts in the coastal zone and elsewhere.⁵¹ While the NYSDOS

⁴⁶ *Id.* at 63.

⁴⁷ Millennium Exhibit 2.

⁴⁸ Millennium Exhibit 11.

⁴⁹ The NYSDOS also falsely claims that Millennium portrayed the Project's impact on Haverstraw Bay as "minimal and temporary" in its reply brief "for the first time" (NYSDOS Reply Br. at 63), but Millennium has in fact taken that precise position from the outset of this proceeding. *See* Millennium Initial Br. at 37.

⁵⁰ NYSDOS Reply Br. at 7.

⁵¹ The NYSDOS's contrary conclusion is based on a quotation out of context from *Mountain Rhythm Resources v. FERC*, 302 F.3d 958, 964 (9th Cir. 2002) (NYSDOS Reply Br. at 7 n.2), where the court upheld the FERC's decision to accept the NOAA-approved coastal zone boundaries but never suggested that the FERC lacked the expertise to determine the environmental impacts of energy projects subject to its jurisdiction.

insinuates that the FERC never even considered the Millennium Project's coastal zone impacts,⁵² the FERC in fact advised the Secretary that it specifically evaluated "the impacts to New York's coastal zone at issue here,"⁵³ and the record evidence wholly substantiates that representation.⁵⁴

Contrary to the NYSDOS's further contentions, the "concerns" expressed by NMFS, FWS, and the Corps with respect to Millennium's proposed Hudson River crossing do not carry greater weight than the FERC's findings and conclusions under NEPA and the NGA. With respect to the Project-related matters within their actual jurisdiction, NMFS's scientific analysis of the Project's impacts on Haverstraw Bay supports its no-jeopardy Biological Opinion, while FWS similarly concluded that there would be no adverse effects on endangered species.⁵⁵ The other concerns voiced by NMFS, FWS, and the Corps have all been fully considered by the FERC and largely reflect an understandable but unrealistic hope that an alternative route could be found to avoid Haverstraw Bay.⁵⁶ The NYSDOS also consistently ignores the fact that New York's principal environmental agency, the New York Department of Environmental Conservation ("NYSDEC"), carefully reviewed the proposed Hudson River

⁵² NYSDOS Reply Br. at 45.

⁵³ FERC Staff Comments at 3.

⁵⁴ See, e.g., Millennium Exhibit 4 at 2-48 through 2-56. The FERC's statement that it did not "exhaustively analyze" all CMP issues or all CZMA issues (Millennium Exhibit 1A at 62,166, quoted at NYSDOS Reply Br. at 45 n.78) does not mean that it did not fully analyze all coastal zone impact issues, for it was required to analyze all of those issues by both NEPA and the NGA.

⁵⁵ The NYSDOS erroneously states that the Federal agency opinions finding that endangered species would not be jeopardized "are not found in the record." NYSDOS Reply Br. at 88. See Millennium Exhibits 8 and 8A.

⁵⁶ The FWS's principal concern -- pipeline leaks or ruptures in the Hudson River (NYSDOS Exhibit 42 at 2) -- is absurd. The FERC concluded that a leak or rupture was extremely unlikely (Millennium Exhibit 2, Vol. 1, at 5-162 to 5-175), and Millennium's pipeline will be monitored continuously, on a 24/7 basis, to detect any pressure drop that might indicate a leak or failure (*id.* at 0-4). Even in the remote event of a pipeline failure, the potential impacts to aquatic organisms envisioned by the FWS would not occur. While the FWS cites evidence (Patin, 1999) that methane intoxication from a major gas well blowout in the Sea of Asov adversely affected fish directly exposed to the flowing gas for four or five days, Millennium would close the shutdown valves on both sides of the river to terminate the flow of gas within a few minutes after any leak or failure, and thus the volume of gas released into the river would be miniscule by comparison.

crossing and, in conjunction with Millennium, developed acceptable construction and operation plans which allowed the NYSDEC to issue its Water Quality Certificate for the Project.

- **Magnitude of Coastal Impacts.** The NYSDOS's attempt to paint the Millennium Project as wreaking havoc, or causing "incalculable" impacts, on the coastal zone is totally devoid of substance. While the record already amply documents the lack of significant adverse impact from the Project⁵⁷ the NYSDOS has presented new and different (but unverified) allegations in its Reply Brief, and thus Millennium is submitting with this Final Brief affidavits from its team of experts to address the NYSDOS's new allegations and provide a scientific confirmation that the FERC approved route will not significantly impair the functioning or vitality of any ecosystem, including Haverstraw Bay.⁵⁸

The NYSDOS asserts that the Millennium Project will result in, *inter alia*, physical and hydrologic changes to Haverstraw Bay, widespread "population-level" effects on fisheries, and other irreparable ecosystemwide harm to the habitat.⁵⁹ However, as is detailed in the Metzger Affidavit, there is no cogent scientific basis for these claims, and the NYSDOS has provided nothing substantive to support its conclusions. Moreover, the NYSDOS consistently overstates the Project's impacts. To note just one example among many, the NYSDOS contends that the Project will "destroy at least 108 areas [sic]" of Haverstraw Bay,⁶⁰ when in fact the

⁵⁷ See Millennium Initial Br. at 37-94; Millennium Reply Br. at 30-78.

⁵⁸ See Affidavit of Susan Metzger, Ph.D. ("Metzger Aff.") (addressing Haverstraw Bay and Arboretum issues) (Millennium Exhibit 80); Affidavit of Thomas Pease, Ph.D. ("Pease Aff.") (addressing Village of Croton-on-Hudson's Wellfield issues and Croton Gorge issues) (Millennium Exhibit 81); Affidavit of Charles M. Russell, P.E. ("Russell Aff.") (addressing Catskill Aqueduct/Bryn Mawr Siphon issues) (Millennium Exhibit 82); and Affidavit of Timothy McGuire ("McGuire Aff.") (addressing horizontal directional drilling issues) (Millennium Exhibit 83).

⁵⁹ NYSDOS Reply Br. at 6.

⁶⁰ NYSDOS Reply Br. at 6 (emphasis added); *see id.* at 71, 87.

Project will only affect 108 acres of the riverbottom (out of more than 7,000 acres). In fact, most of that area will be affected only indirectly, and all of the affected area will be restored within a year.⁶¹

The NYSDOS's criticism of Millennium's lay-barge construction method also bear mentioning in two respects. First, its discussion of Millennium's proposal displays a fundamental misunderstanding of the construction methodology.⁶² Second, its attack on the use of a closed bucket is nothing short of perplexing. Significantly, every other dredging project that the NYSDOS has recently approved (including those in Haverstraw Bay) has been required to employ a closed bucket. The NYSDOS fails to acknowledge this inconsistency, let alone explain why it denigrates Millennium for employing the very same technology, in the very same environmental setting, that the NYSDOS has mandated for other dredging projects. The NYSDOS also fails to mention that in virtually every meeting regarding the Millennium Project, the NYSDOS never objected to and in fact commended Millennium's proposal to use a closed bucket.

Indeed, the legal standard that the NYSDOS is misguidedly attempting to apply (and have the Secretary adopt on this appeal) is an unachievable "zero risk/zero impact" standard. This is apparent in, *inter alia*, the NYSDOS's discussion of blasting, as well as its lengthy discussion of the habitat impairment test and the Bay's "irreplaceable" rating.⁶³ Indisputably, this "no impact" standard concocted by the NYSDOS for this particular Project is legally baseless and, most certainly, does not govern this appeal.

Internal inconsistencies also undermine the NYSDOS's claims. The NYSDOS's articulation respecting the habitat impairment test and the irreplaceable rating of Haverstraw Bay is a prime example. The entire Haverstraw Bay designated habitat is rated as "irreplaceable."

⁶¹ See generally Millennium Exhibit 80.

⁶² See *id.*

⁶³ See, e.g., NYSDOS Reply Br. (stating "[w]hile the proposed methods would mitigate to varying degrees direct adverse effects on fishes during construction, they do not avoid the destruction of the shallow benthic habitat.").

Additionally, the very same habitat impairment test applies to all portions of the designated habitat. Thus, the obvious question is: how can dredging projects that are more invasive and contain no benthic restoration measures (such as U.S. Gypsum's maintenance dredging) be approved, but not the Millennium Project? Since the entire Haverstraw Bay habitat holds the same rating, if (as NYSDOS argues) that rating precludes the Millennium Project, it should also have precluded maintenance dredging by U.S. Gypsum and the periodic dredging of the navigational channel that traverses Haverstraw Bay by the Corps. If, as the NYSDOS argues, the Millennium Project impairs the habitat impairment because some benthic organisms in the trench path will be affected or the benthos will not be "immediately" restored, then the dredging projects of U.S. Gypsum and the Corps likewise impair the habitat, since they indisputably affected benthic organisms and drastically altered the benthos for the long-term. It is particularly ironic that the NYSDOS approved these dredging projects, which resulted in habitat "destruction" (*i.e.*, permanent habitat alteration with no benthic restoration), but not the Millennium Project, which entails only spatially localized, short-term and very temporary physical alteration (and hence, no "destruction"). There is no way for the NYSDOS to square these disparate results.

The zero impact standard proffered by the NYSDOS is also internally inconsistent with its own pronouncements regarding the Millennium Project. The NYSDOS previously stated that the habitat impairment test created only a rebuttable presumption that could be rebutted by the submission of "appropriate and necessary information,"⁶⁴ which Millennium has done through the submission of detailed information concerning the innovative lay barge technique, supported by the scientific analysis of experts with decades of experience with dredging projects in the same area of the Hudson River.

Finally, the NYSDOS's criticism of Millennium's consideration of functional habitat provides yet one more example of the NYSDOS's internally inconsistent (and

⁶⁴ Millennium Exhibit 56 at 1

scientifically unfounded) arguments. The NYSDOS asserts that Millennium's consideration of functional habitat "makes no ecological sense" and is merely a means of obfuscating the magnitude of the Project's impact.⁶⁵ But the NYSDOS elsewhere recognizes the scientific reality that the subject habitats are functionally connected and interrelated.⁶⁶ In this regard, the NYSDOS quotes extensively from the FWS publication, "Significant Habitats and Habitat Complexes of the New York Bight Watershed." The specific excerpt on which the NYSDOS relies expressly notes the interconnectedness of the "entire wide, shallow section of the [Hudson] [River]" "occupying the area between Piermont March and Stony Point."⁶⁷ Accordingly, the NYSDOS's criticism is specious and internally inconsistent.

The NYSDOS continues to argue that the Millennium Project's route through the Village of Croton-on-Hudson ("Croton") would have adverse coastal zone impacts and significant environmental effects on Croton's wellfield (the "Wellfield") and the Jane E. Lytle Arboretum (the "Arboretum").⁶⁸ For the first time, the NYSDOS also contends that the Project will have adverse effects on the Croton River Gorge.⁶⁹ As is briefly summarized below, the record does not support these claims.

The Wellfield

The NYSDOS's assertions that the Wellfield will unnecessarily be placed at risk and be significantly adversely affected are false and not borne out by the record. As amply detailed in the Pease Affidavit, the small portion of the pipeline that runs through the Wellfield will not result in any measurable adverse effects on water quality, water quantity, or future expansion potential. A full explanation and technical refutation of the NYSDOS's assertions is set forth in the Pease Affidavit.⁷⁰

⁶⁵ See NYSDOS Reply Br. at 69-70.

⁶⁶ See *id.* at 66-67.

⁶⁷ See *id.* at 67.

⁶⁸ NYSDOS Reply Br. at 92-106, 107-109.

⁶⁹ *Id.* at 106-107.

⁷⁰ Millennium Exhibit 81.

Equally without merit are the NYSDOS's generalized criticisms and unsupported contentions regarding Wellfield impacts. For example, the NYSDOS persists in faulting Millennium for not having yet developed site-specific plans and relying instead on "a variety of generic protocols."⁷¹ However, the NYSDOS has failed to provide any semblance of a specific reason as to how or why it believes that the Environmental Construction Standards, SPCC Plan, FERC Plans and Procedures, and continuous, sophisticated and redundant monitoring measures to which Millennium has committed will be insufficiently protective of the Wellfield. This represents yet one more blatant inconsistency in the NYSDOS's defect-ridden rationale.

In short, the NYSDOS's claims about the risks to, and potential effects on, the Wellfield are wholly unsupported by the record.

The Croton River Gorge And Croton River & Bay Significant Habitat

The NYSDOS's newly-hatched allegations of dire impact to the Croton River Gorge and the Croton River and Croton Bay Significant Habitat⁷² are also bereft of any support and wholly unsustainable. Notably, the NYSDOS failed to mention any of these potential impacts in its consistency objection or in its initial brief in this proceeding, and thus it is perplexing, to say the least, that these claims appear for the first time in its Reply Brief. Moreover, the NYSDOS has failed to provide any support whatsoever to substantiate its broad-sweeping claims. In any event, Millennium respectfully refers the Secretary to the Pease Affidavit (Millennium Exhibit 81) for an explanation and refutation of the NYSDOS's specious allegations of impact.

The Arboretum

As in the case of the Wellfield, the NYSDOS again misguidedly resorts to faulting Millennium for failing to have finalized site-specific plans respecting construction in the Arboretum.⁷³ This attack fails for the same reasons as already articulated.⁷⁴

⁷¹ See NYSDOS Reply Br. at 96-97.

⁷² See NYSDOS Reply Br. at 106-07.

⁷³ See NYSDOS Reply Br. at 107.

⁷⁴ See page 21, *supra*.

Next, the NYSDOS highlights its consistent failure to substantiate its claims by professing what it terms “self-evident” profound impacts to the Arboretum. Thus, the NYSDOS asserts self-servingly that “mitigation measures notwithstanding, it is self-evident that [] impacts will be ecologically severe, visually dramatic, and permanent.”⁷⁵ This is a tacit admission by the NYSDOS that it has failed to substantiate these “self-evident” impacts. In any event, there is nothing “self-evident” here; what is evident -- from the record -- is that these allegations of ecologically significant effects are wholly unfounded.⁷⁶

Finally, the NYSDOS endorses Croton’s unsupportable claims of adverse impacts on scenic, recreational, and educational values of the Arboretum. As already discussed (and refuted) in prior briefs, those contentions are also belied by the record.⁷⁷

In sum, there will be no impacts of any consequence to the Arboretum.

a. The Catskill Aqueduct And The Bryn Mawr Siphon

Millennium continues to maintain, most strenuously, that the Croton Watershed/Catskill Aqueduct/Bryn Mawr Siphon portion of the pipeline route is not a legitimate consideration on this appeal.⁷⁸ While the NYSDOS persists in misrepresenting Millennium’s legal position on this issue, it has provided nothing to justify its assertion of jurisdiction over this part of the route. Notably, the NYSDOS does not contest the lack of hydraulic connection between these upland, non-coastal water resources and the natural resources of the coastal zone. This lack of connection means there can be no coastal resource effect. Thus, the NYSDOS’s attempt to apply CMP water resource provisions (*e.g.*, CMP Policy 38) to protect these purely non-coastal waters fails. Likewise, the NYSDOS has failed to identify coastal land uses that

⁷⁵ NYSDOS Reply Br. at 107.

⁷⁶ See generally Metzger Aff. (Millennium Exhibit 80).

⁷⁷ See Millennium Reply Br. at 55-58.

⁷⁸ See Millennium Reply Br. at 65-66.

would be impaired. Accordingly, there is no “coastal effect;” thus, this portion of the pipeline route is not a legitimate ground for the NYSDOS’s objection.

Even if the Aqueduct/Siphon portion of the route were considered in this appeal, the record demonstrates that the subject resources will be fully protected. This has been repeatedly documented by Millennium and the FERC.⁷⁹ Indeed, contrary to the NYSDOS’s contentions,⁸⁰ the record amply documents the safety measures to which Millennium has committed and the extraordinary nature of those measures.

Finally, the NYSDOS’s other arguments are similarly unpersuasive. The NYSDOS attempts to make much both design issues and the NYCDEP’s objection to this Project.⁸¹ However, in that regard, two points are noteworthy. First, the FERC did not merely “urge the City to recommence discussions with Millennium;” instead, it chastised the NYCDEP for being blatantly uncooperative with Millennium and “urged” the reopening of discussions under threat of losing its oversight/approval authority. Secondly, and in any event, the NYCDEP has obtained what it said it wanted -- namely, oversight of the Siphon crossing, development of a mutually acceptable plan, and pre-construction approval by (among others) the Corps (the very agency from which it sought assistance). Thus, the NYCDEP’s complaints and the asserted design concerns are, indeed, non-issues.

Finally, to the extent that the NYSDOS and/or NYCDEP contend that viable alternatives exist, that is also not the case.⁸² As is detailed in the Russell Affidavit, the Thruway alternative advanced by the NYSDOS is not feasible from a construction, operation, or maintenance perspective. It is, therefore, not an available alternative and cannot sustain the NYSDOS’s consistency objection.

Accordingly, the overwhelming record evidence shows that any adverse effects on the coastal zone will be minimal and temporary. As the FERC has advised the Secretary:

⁷⁹ *E.G.*, Millennium Initial Br. at 91-94; Millennium Reply Br. at 66-73

⁸⁰ NYSDOS Reply Br. at 114.

⁸¹ *See* NYSDOS Reply Br. at 113-17.

⁸² *Contrast* NYSDOS Reply Br. at 117-18, 169-172, *with* Russell Aff.

“The impacts of the project on New York’s coastal zone . . . will be primarily transient and limited to the time during which construction would occur, typically a period of days or weeks.”⁸³

3. The Alternatives Proposed By The NYSDOS Are Neither Available Nor Reasonable

The third, and last, finding that the Secretary must make to conclude that the Millennium Project satisfies CZMA Ground 1 is that “[t]here is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.”⁸⁴ The NYSDOS’s efforts to concoct feasible alternatives have been futile:

- While the NYSDOS devoted **just one sentence** in its objection to the Millennium Project to three purported “alternatives,”⁸⁵ it has since devoted **25 pages** in its initial brief⁸⁶ and **55 pages** in its reply brief⁸⁷ to the recitation of additional “alternatives.” This after-the-fact “discovery” of dozens of “alternatives” should be rejected for what it is -- an untimely, transparent ploy to try to create doubt and confusion where none exists.

Any doubt or confusion engendered by the NYSDOS’s confounding exposition of “alternatives” has been removed by the NYSDOS’s frank admission that its alternatives “are not ones that were suggested for the first time” but instead “were presented in the FEIS, but dismissed . . .”⁸⁸ In short, all of the NYSDOS’s “alternatives” have been squarely

⁸³ FERC Comments at 4.

⁸⁴ 15 C.F.R. § 930.121(c).

⁸⁵ Millennium Exhibit 10 at 15.

⁸⁶ NYSDOS Initial Br. at 83-107.

⁸⁷ NYSDOS Reply Br. at 118-172.

⁸⁸ NYSDOS Reply Br. at 125.

considered and flatly rejected by the FERC on the basis of the FERC's "exhaustive review of alternative routes for this project and their respective impacts . . . , focus[ing] in particular on the appropriate location for crossing the Hudson River and the impacts of the project on surrounding coastal areas, the matters which are the subject of the instant appeal to the Secretary."⁸⁹

- Astonishingly, the NYSDOS attempts to disparage the FERC's pipeline routing expertise, claiming that the FERC's "views on siting issues that affect environmental and coastal resources must be given less importance in light of the key role played by the states under the CZMA and the expertise of other federal environmental agencies."⁹⁰ To the contrary, the FERC is the recognized, preeminent federal agency with respect to pipeline routing matters, since its expertise extends beyond environmental impact assessments to the detailed knowledge of pipeline construction techniques that is essential to determine the feasibility of proposed pipeline routes.⁹¹

- The NYSDOS also denigrates the FERC-approved Hudson River crossing route on the theory that Millennium must have selected that route solely to minimize costs and thereby reap unseemly, windfall profits. NYSDOS Reply Br. at 121-25. By this logic, of course, Millennium should have jumped at the chance to construct the NYSDOS's Dobbs Ferry crossing "alternative," which, according to the "expert" that the NYSDOS has recently retained, would have saved Millennium \$10 million.⁹² But the FERC and Millennium have rejected that

⁸⁹ FERC Chairman Comments at 1.

⁹⁰ NYSDOS Reply Br. at 45.

⁹¹ The only New York agency with comparable pipeline construction expertise is the New York Public Service Commission, which supported the Millennium Project in the proceedings before the FERC and never objected to Millennium's proposed route across the Hudson River.

⁹² Villages Exhibit 2, at 19.

alternative because it is infeasible, regardless of any estimated cost savings. In short, it is feasibility, not cost, that is the issue in evaluating alternatives.

- The NYSDOS’s presentation of “alternatives” suffers not only from its woeful lack of pipeline routing expertise, but also from its highly questionable retention of an obviously biased firm, O’Brien & Gere Engineering, Inc. (“OBG”), which previously created “alternatives” to the Millennium Project out of thin air for the Village of Croton-on-Hudson in this proceeding⁹³ and whose principal “expertise” is apparently in the construction of water and sewer facilities, not larger diameter natural gas pipelines.⁹⁴ While the NYSDOS accuses Millennium of “launch[ing] an unseemly attack on the credibility of [OBG],”⁹⁵ what is really unseemly is OBG’s claim to expertise regarding gas pipeline routing issues.

The NYSDOS’s claims notwithstanding, the alternatives it proposes are no more viable now than they were before, and this conclusion is not at all changed by the newly suggested route variations. In essence, the NYSDOS has attempted to bypass all the constructability constraints of these alternatives by cavalierly calling for a combination of construction techniques and parameters that are simply unworkable: across-the-board horizontal directional drilling (“HDD”), use of narrow work rights-of-way for mile after mile, horizontal bores where there is insufficient work space, and utilization of unproven, experimental technologies.

- Additionally, the NYSDOS’s entire dissertation on alternatives is based on nothing more than abject speculation; for this reason alone, the alternatives should be rejected.

⁹³ See Villages Exhibit 2.

⁹⁴ See NYSDOS Exhibit 46.

⁹⁵ NYSDOS Reply Br. at 8.

The NYSDOS's alternatives discussion is bereft of any engineering analyses or technical/feasibility evaluations. Thus, the NYSDOS's approach amounts to nothing more than a "maybe you could try this" approach. In other words, it has failed to provide sufficient information to determine whether these alternatives are, in fact, constructable. Prime examples include its (1) nostrum HDD technology, which it advocates without any knowledge whatsoever of sediment types or feasibility at the particular locations identified; (2) horizontal bore technology, which it neglects to observe is patently infeasible due to the lack of room for a bore pit at the several locations where this technology is hypothesized; (3) directional drilling of rock by Stony Point State Park, without any specific information as to whether this could actually be accomplished; and (5) micro-tunneling, which is experimental at best.⁹⁶ All of these claims are purely speculative, with not a hint of the necessary field assessment and engineering evaluations required to determine if these are available options. Having failed to provide anything more than abject speculation, the NYSDOS has failed to meet its burden to demonstrate that these alternatives are available. Thus, the burden has not shifted to Millennium, and these proposals should be rejected accordingly.

- In any event, Millennium has demonstrated that these alternatives are not available, and that many of them result in long-term adverse environmental and social consequences that are far more extensive and significant than the short-term, localized effects that will result from the FERC-approved route. To address the suggested alternative yet again, Millennium had its team of experts at Baker Engineering NY, Inc. ("Baker") review the claims in the NYSDOS's Reply Brief, return to the field (including to examine the newly suggested route variations), and consult with another expert in the field of directional drilling, Michels

⁹⁶ See Russell Aff. (Millennium Exhibit 82), at ¶¶ 22, 24, 33, 38 & 39.

Directional Drilling (Michels”). The results of this additional analysis are set forth in the Russell Affidavit (from Baker) (Millennium Exhibit 82) and the McGuire Affidavit (from Michels) (Millennium Exhibit 83). The end result is the same as it was before, and accords with the FERC's finding: there is no available, reasonable alternative to the FERC-approved route.

III.

**THE SECRETARY SHOULD OVERRIDE THE NYSDOS'S
OBJECTION ON CZMA GROUND 2: THE MILLENNIUM
PROJECT IS NECESSARY IN THE INTERESTS OF NATIONAL SECURITY**

The Department of Energy has advised the Secretary that the Millennium Project is, from an international perspective, both “necessary in the interest of national security” and “necessary for U.S. natural gas supply security.”⁹⁷ The Project would materially strengthen U.S. national security interests by reducing U.S. vulnerability to supply disruptions, encourage the development of secure North American energy resources that would be easier to defend than foreign sources in the event of a military conflict, and increase the Nation’s secure domestic energy infrastructure.

FERC Chairman Wood has also advised the Secretary that, from a domestic standpoint, the Millennium Project is vital to our national security. In his recent April 16, 2003 letter to the Secretary, Chairman Wood reemphasized that the FERC had concluded that

“[T]he Millennium Project will increase the overall reliability of the region’s infrastructure and offer an additional source of protection from electric outages. It will diversify the range of gas supplies available to the Northeast, [and] foster development of more North American energy supplies In doing so, the project will allow for a greater measure of energy independence, especially to the extent new gas supplies delivered to the region by the Millennium Project displace alternative overseas energy supplies.”⁹⁸

⁹⁷ DOE Comments at 1, 2.

⁹⁸ Letter from FERC Chairman Pat Wood, III to Scott B. Gudes dated April 16, 2003, at 1-2; *See*

Not surprisingly, the NYSDOS has not even attempted to refute the conclusions of the DOE and the FERC, neither of which is even mentioned in the NYSDOS's Reply Brief. Instead, the NYSDOS's argument that the Secretary should not override the NYSDOS's objection to the Millennium Project on CZMA Ground 2 consists of three flimsy claims:

- First, the NYSDOS asks the Secretary to draw a negative inference from the fact that the Department of Defense has not stated that a national defense interest would be significantly impaired if the Project were not permitted to proceed. But DOE and the FERC have both stated that national security interests would be significantly impaired if the Project were not to go forward, and those conclusions amply support a CZMA Ground 2 determination. Moreover, there are Millennium permit applications pending before the Corps of Engineers, a component of the Department of Defense, and thus any DOD determinations regarding the Project would be inappropriate at this time.

- Second, the NYSDOS asks the Secretary to find that the Millennium Project “would not advance our national security interests” because it involves “importing natural gas from Canada into the United States.”⁹⁹ As previously noted, however, both our national energy policy and NAFTA promote the delivery of Canadian gas to strengthen U.S. national security interests.¹⁰⁰ Plainly, our national security is enhanced significantly by relying on secure supplies of Canadian gas in lieu of vulnerable supplies of Middle East oil.

- Finally, the NYSDOS notes that the Secretary in the past has not overridden state objections “on national security grounds.”¹⁰¹ Obviously, however, we're not living in the

also FERC Chairman Comments dated November 15, 2002, at 2.

⁹⁹ NYSDOS Reply Br. at 173.

¹⁰⁰ See page 10, *supra*.

¹⁰¹ NYSDOS Br. at 174.

past, particularly when it comes to concerns about national security, especially the security of our energy infrastructure. In these times of heightened security consciousness, Millennium respectfully submits that the Secretary should agree with the DOE and the FERC that the standards of CZMA Ground 2 have been satisfied.

CONCLUSION

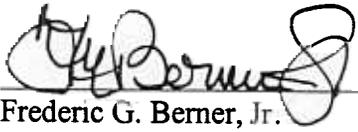
The purpose of the CZMA appeals process is to permit the Secretary “to ensure that projects which do not significantly or substantially further the national interest in the CZMA’s objectives, and where the national interest outweighs impacts to coastal uses and resources, may be federally approved.”¹⁰² This is surely such a case. The record convincingly demonstrates (1) that the Millennium Pipeline Project will significantly and substantially further the national interest in a number of important CZMA objectives and (2) that the FERC properly concluded that the Project’s “clear and significant” benefits would far outweigh its “minimal and temporary” effects on the coastal zone. As both the DOE and the FERC have also concluded, the Nation’s energy security would be significantly impaired if the Project were not permitted to proceed. Millennium therefore requests the Secretary to either dismiss the NYSDOS’s objection as untimely or to override the objection on both CZMA Ground 1 and CZMA Ground 2. A contrary decision, we respectfully submit, would undermine the legitimacy of the FERC’s

¹⁰² Preamble to NOAA’s regulations, 65 Fed. Reg. 77124, 77150 (December 8, 2000).

pipeline certificate authority and jeopardize its ability to facilitate the development of new pipeline capacity that will be urgently needed in the years ahead.

Respectfully submitted,

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