

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE

Weaver's Cove Energy, LLC)
)
 Appellant,)
)
 vs.)
)
Massachusetts Office of)
Coastal Zone Management)
)
 Respondent.)

Case No. _____

and

Mill River Pipeline, LLC)
)
 Appellant,)
)
 vs.)
)
Massachusetts Office of)
Coastal Zone Management)
)
 Respondent.)

Case No. _____

JOINT ANSWER IN OPPOSITION OF WEAVER'S COVE ENERGY, LLC
AND MILL RIVER PIPELINE, LLC IN RESPONSE TO RESPONDENT'S
MOTION TO SUPPLEMENT THE CONSOLIDATED RECORD
AND STAY THE BRIEFING PERIOD

On January 4, 2008, Respondent Massachusetts Office of Coastal Zone Management ("MCZM") filed a motion requesting that the Secretary of Commerce ("Secretary") further supplement the consolidated records in the captioned proceedings, and stay and alter a supplemental briefing schedule issued in the captioned proceedings (the "Motion"). In the

Motion, MCZM petitions the Secretary for inclusion of seven (7) documents - five (5) documents related to actions taken by the Massachusetts Department of Environmental Protection (“MADEP”) on December 14, 2007, and two (2) documents related to the administrative appeal by Weaver’s Cove Energy, LLC (“Weaver’s Cove”) of the U.S. Coast Guard’s (“USCG’s”) Letter of Recommendation (“LOR”) issued to Weaver’s Cove on October 24, 2007. In conjunction with this request to the Secretary to supplement the consolidated record, MCZM also requests on an expedited basis that the Secretary stay its January 2, 2008 order scheduling supplemental briefing on the LOR, and set a new schedule providing for combined supplemental briefing on the LOR and the seven (7) documents referenced in the Motion to commence ten (10) days after the Secretary’s ruling on the Motion.

MCZM’s Motion should be denied because it has made no demonstration that these seven (7) documents have any bearing on the issues before the Secretary in the consistency appeals of Weaver’s Cove and Mill River Pipeline, LLC (“Mill River”). With respect to the five (5) MADEP documents, MCZM argues that they should be included in the record because they represent “the current views of [MADEP] on the outstanding state authorizations that are the heart of, and necessitated, MCZM’s objections.” Motion at ¶ 13. This proffered reasoning for the requested inclusion is flawed because the Secretary does not review the propriety of the state’s objections or the “views” underlying those objections; instead “the appeals process is a *de novo* determination based on the statutory standards of the [Coastal Zone Management Act] and its implementing regulations.” *Decision and Findings in the Consistency Appeal of Chevron, U.S.A.* (Oct. 29, 1990) at 5. *See also Decision and Findings in the Consistency Appeal of Shickrey Anton* (May 21, 1991) at 3 (“*Anton Decision*”). In other words, while MADEP’s “views” may have informed MCZM’s objections, the Secretary’s precedents make clear that the

basis for the state's objection is not reviewed on appeal. *See, e.g., Anton Decision* at 3 (“The Secretary, as a matter of policy, has declined to review the substantive validity of the State objection in the appeals process.”). Therefore, the Secretary should deny the Motion with respect to the five (5) MADEP documents because MCZM has not shown a compelling basis to augment the consolidated records in these appeals with these documents and delay the LOR briefing schedule currently in place.

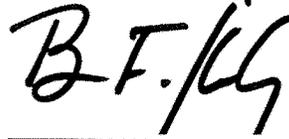
With respect to the two (2) documents related to Weaver's Cove's administrative appeal of the LOR, Weaver's Cove and Mill River reiterate that the LOR process is not relevant to the instant appeals because the LOR is not a federal activity before the Secretary for consistency review.¹ Because of their irrelevance, there is no compelling basis to augment the consolidated records in these appeals with these documents and delay the LOR briefing schedule currently in place. Additionally, Weaver's Cove and Mill River note that the LOR process is ongoing — following the decision on reconsideration of the LOR by the USCG Captain of the Port, Southeastern New England, issued December 7, 2007 (which decision is proposed to be included in the consolidated record by MCZM as Exhibit G), Weaver's Cove filed an administrative appeal of that decision on January 7, 2008 with the USCG Commander, First Coast Guard District, pursuant to 33 C.F.R. § 127.015(b). Moreover, separate and apart from this administrative appeal, Weaver's Cove has the right to file a revised request for an LOR at any time.

¹ The LOR was issued pursuant to the USCG's authority under 33 C.F.R. §§ 127.007 & 127.009, and with respect to certain activities related to waterway suitability for LNG vessel traffic. These activities are not before the Secretary in Weaver's Cove's and Mill River's consistency appeals. The only activities before the Secretary are the listed activities objected to by the state. *See Reply Brief for Appeal of Weaver's Cove Energy, LLC under the Coastal Zone Management Act*, at 1-5 (filed Nov. 26, 2007); *Reply Brief for Appeal of Mill River Pipeline, LLC under the Coastal Zone Management Act*, at 1-6 (filed Nov. 26, 2007).

For the foregoing reasons, the Motion to supplement the consolidated record and stay and alter the LOR briefing schedule set by the Secretary's January 2, 2008 order should be denied. However, if the Secretary elects to supplement the consolidated record with the MADEP documents, then as to those five (5) documents only, Weaver's Cove and Mill River separately request that the Secretary issue a scheduling order in their respective proceedings permitting the parties to submit additional briefs pursuant to 15 C.F.R. § 930.127(e)(3) on the relevance of the MADEP documents. Any such supplemental briefing should be separate and apart from and not affect those supplemental briefs on the LOR that are the subject of the Secretary's January 2, 2008 scheduling order.² Separate briefing on the MADEP documents is appropriate given the very different subject matters of the LOR and the MADEP documents. Affording clarity to the treatment of these matters should assist the Secretary in his consideration of the issues in the instant appeals and outweighs any limited impact on administrative efficiency that MCZM believes may occur, *see* Motion at Introduction and ¶ 16.

² Weaver's Cove and Mill River also request that if additional briefing is required, the Secretary ensure that each of them will have the right to reply to any brief submitted by MCZM, regardless of which of appellants and respondent may be required to submit the first supplemental brief on the MADEP documents. *See generally* CZMA Federal Consistency Regulations, 71 Fed. Reg. 788, 799 (Jan. 5, 2006) ("Since the State agency may raise issues not addressed by appellant, appellant should be able to reply since appellant bears the burden of persuasion on the appeals.").

Respectfully submitted,



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Dated: January 9, 2008

CERTIFICATE OF SERVICE

Consistent with 15 C.F.R. § 930.127, copies of this Response have been sent to the following:

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