UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE

Weaver's Cove Energy, LLC	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. _____**
	)	
Massachusetts Office of Coastal Zone Management	)	
	)	
Respondent.	)	

and

Mill River Pipeline, LLC	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. _____**
	)	
Massachusetts Office of Coastal Zone Management	)	
	)	
Respondent.	)	

JOINT MEMORANDUM OF WEAVER'S COVE ENERGY, LLC AND MILL RIVER PIPELINE, LLC IN OPPOSITION TO RESPONDENT'S MOTIONS TO ENLARGE TIME

On September 26, 2007, Respondent Massachusetts Office of Coastal Zone Management ("MCZM") filed nearly identical motions requesting that the Secretary of Commerce ("Secretary") extend the time period set for filing its briefs in the referenced proceedings.[1] Appellants Weaver's Cove Energy, LLC ("Weaver's Cove Energy") and Mill River Pipeline,

[1] Herein, MCZM's motions are referred to jointly because they are nearly identical, and accordingly, the page citations to them are the same.

LLC ("Mill River") (together, "Weaver's Cove") hereby jointly notify the Secretary of their opposition at this time to those premature and unsupported requests for additional time made in these Motions. Four weeks prior to the due date of MCZM's briefs, it is difficult to understand how the due date creates "an undue burden on the Commonwealth [of Massachusetts]." Motions ¶ 10. Furthermore, Weaver's Cove writes to protest the Motions' irrelevant and unwarranted mischaracterization of Weaver's Cove's conduct in this case.

I. MCZM'S MOTIONS TO EXTEND THE DEADLINE ARE PREMATURE

At the outset, Weaver's Cove wishes to emphasize that it does *not* oppose MCZM's requests simply for the sake of opposing them. However, given the unique circumstances of this type of proceeding, including the statutory deadline controlling the Secretary's decision, 16 U.S.C. § 1465(c), Weaver's Cove submits that an extension at this stage in these cases — particularly one of such length — is unwarranted.

The regulations provide that the deadline for a brief may be moved back "for good cause." 15 C.F.R. § 930.127(g). No such cause exists in this case. As MCZM unhesitatingly notes in its Motions, its briefs are not due until October 24, 2007. In requesting an extension almost a full month in advance of that deadline, MCZM fails to identify any actual cause for delay, let alone good cause. MCZM's hypothetical future burden certainly falls short of the standard recently applied by NOAA's Assistant General Counsel: "The deadlines . . . will not be continued absent *compelling* reasons."[2]

A. MCZM raises the purely hypothetical possibility that, due to the pendency of another proceeding involving Weaver's Cove Energy and the Commonwealth of Massachusetts (represented there as here by the same counsel) in the U.S. Court of Appeals for the D.C. Circuit, the Commonwealth of Massachusetts *may* find its resources stretched in the next several weeks.

[2] Letter from NOAA Assistant General Counsel for Ocean Services to Weaver's Cove Counsel Kiely and MCZM Acting Director Carlisle at 2 (Sept. 5, 2007) (emphasis added).

Motions ¶ 9. But nowhere does MCZM state that the Commonwealth of Massachusetts *cannot in fact* employ legal resources adequate to comply with the current deadlines. Thus, MCZM's suggestion of the possibility of burden in upcoming weeks, standing alone, fails to offer the Secretary "good cause" for delaying these proceedings.

Instead of granting MCZM's premature and unsupported requests to delay the filing of MCZM's briefs (and thereby reduce the time available to the Secretary to review the briefs and decide the appeals, *see* 16 U.S.C. § 1465(c)), Weaver's Cove respectfully requests that the Secretary take the more prudent course of denying the Motions without prejudice to *subsequent* MCZM motions, nearer the deadline, for an extension based on a compelling showing of an *actual* undue burden upon MCZM (should such a burden ever actually materialize). Weaver's Cove proposed that course of action to MCZM before either Motion was filed, *see* Motions ¶ 11, and it reiterates it here[3]. As counsel for Weaver's Cove indicated by telephone to MCZM's counsel, Weaver's Cove does not wish to preclude a request by MCZM, *closer* to the due date, for a proper (*i.e.,* supported) request for an extension. As the Secretary has demonstrated already in these proceedings, he is fully capable of acting quickly on procedural motions.

B. MCZM complains of the burden imposed by the consolidated records for the appeals that are "exceptionally large." Motions ¶ 5. But MCZM strains credulity to suggest that its counsel is seeing the record for the first time.

As the regulations require, 15 C.F.R. § 930.127(i)(1), the record in these appeals consists of the records before the Federal Energy Regulatory Commission ("FERC") and the MCZM. 15 U.S.C. § 717n(d). MCZM is, of course, familiar with (and responsible for) the latter.

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[3] Counsel for Weaver's Cove advised counsel for MCZM that the requested one month extension would create scheduling difficulties for Weaver's Cove later in this proceeding as well as in other proceedings. Counsel undertook to discuss with his client whether a shorter extension period might be feasible, but MCZM elected to file its Motions without awaiting a response.

As for the former, MCZM's counsel is no stranger to the consolidated records of these appeals. Contrary to the Motions' suggestion (¶ 5), she did not see the FERC record that is part of the consolidated record for both appeals for the first time on September 17, 2007; rather, she spent well over one year challenging the FERC's decision on that record in the U.S. Court of Appeals for the First Circuit, where she was counsel for Petitioner Massachusetts Attorney General in a petition for review of FERC's approval of Weaver's Cove Energy's liquefied natural gas importation project and Mill River's pipeline project. *City of Fall River et al. v. FERC*, Nos. 06-1203, 06-2146 (1st Cir.). MCZM's counsel filed her brief in that case a year ago, on October 4, 2006, and the First Circuit heard arguments in those and related cases only four months ago. All parties to the present proceedings are familiar with the FERC record (which has been publicly available online since the outset of FERC's proceedings). Weaver's Cove Energy and Mill River delivered electronic copies of the consolidated record to MCZM for each appeal to comply with a regulatory formality – not to apprise MCZM of facts and evidence with which it was not already intimately familiar.

Furthermore, MCZM cannot suggest that the concurrent D.C. Circuit case referenced as support for the need for additional time somehow involves an extensive record review placing substantial strain on the resources of the MCZM; nothing could be further from the truth. The D.C. Circuit case involves only a single question of law: Does the statutory one-year period for review of a Clean Water Act permit application conclude one year after the state's receipt of the application? (Indeed, MCZM plainly misstates the case when it suggests that it involves "issues of fact." Motions ¶ 9.) It involves only a pure question of law — and that question is so straightforward that Weaver's Cove Energy's opening brief used barely more than one-third of its maximum page allotment.

The Secretary and the parties must not lose sight of the fact that these appeals are for review of MCZM's objections to consistency certifications – in which a decision will be made in each case on the facts contained in the record now before the Secretary. MCZM cannot simultaneously maintain (1) that it made rational, informed decisions on each record in June 2007, *and* (2) that it is now seeing such records for the first time in September 2007. Weaver's Cove respectfully submits that the suggestion that the requests for a delay in these proceedings on the grounds that MCZM has made a decision on records that it now needs to review again is simply not plausible or supported.

C. Finally, Weaver's Cove notes that although the Motions complain of the burden this and other matters have placed on MCZM, the Motions offer no explanation as to why the Commonwealth of Massachusetts is completely unable to assign any more than *a single attorney* to this matter. *Id.* ¶ 8. MCZM cannot carry its burden of showing "good cause" for an extension by merely asserting that the entire Commonwealth of Massachusetts can and will employ only a single attorney in these and other proceedings involving Weaver's Cove.

The regulations require that the Secretary exercise his authority in such manner as to "ensure efficiency and fairness to all parties," including Weaver's Cove. 15 C.F.R. § 930.127(e)(1). Weaver's Cove respectfully suggests that to delay the filing of MCZM's briefs, and reduce the time for the Secretary to consider the arguments contained in the parties' briefs for no reason other than the Commonwealth of Massachusetts's refusal to employ more than one attorney in these and other proceedings, is neither "efficient" nor "fair" to any of the parties.

II. MCZM'S MOTIONS MISREPRESENT WEAVER'S COVE'S ACTIONS

MCZM's Motions contain unnecessary distortions of Weaver's Cove's conduct in these proceedings. Those factual misstatements are irrelevant to the substance of the Motions, which should be denied for the reasons set forth in the preceding section. Nonetheless, since the

mischaracterizations of Weaver's Cove's conduct appear to be designed to prejudice Weaver's Cove's interests, Weaver's Cove has no choice but to set forth briefly an accurate account of the matters alluded to by MCZM.

The Motions state that on June 6, 2007, "Weaver's Cove and Mill River requested that MCZM stay its consistency review due to the fact that there were outstanding state permits that were essential for MCZM to complete its review, and on June 8, 2007, MCZM agreed and proposed to stay its review for a period of nine months." Motions ¶ 1. The MCZM then goes on to accuse Weaver's Cove of a subsequent "about-face" in deciding to file the instant appeals. *Id.* ¶ 1-2.

MCZM's misleading accusation omits salient background to Weaver's Cove Energy's and Mill River's decisions to exercise their legal rights under the Coastal Zone Management Act ("CZMA"). On June 6, 2007, Weaver's Cove indeed notified MCZM by letter that the Massachusetts Department of Environmental Protection ("MassDEP") had declared, on June 4, 2007, an indefinite "stay" of all state permit reviews — a course of action that contradicted earlier representations made by MassDEP to Weaver's Cove that the permits were progressing. Weaver's Cove notified MCZM of that development because MCZM had stated earlier in an April 6, 2007 letter to Weaver's Cove that MCZM's decision would be contingent upon prior receipt of all necessary, "final" state permits by no later than June 8, 2007.[4] Thus, in its June 6 letter, Weaver's Cove notified MCZM that it had sought MassDEP's clarification of the nature of the "stay," and in anticipation of a favorable clarification from MassDEP that its stay would not be of an indefinite nature, Weaver's Cove suggested that a brief stay of MCZM's own review would be appropriate so as to allow MCZM to complete its review in as timely a fashion as possible.

[4] Although not relevant here, Weaver's Cove disputes MCZM's position as to this alleged requirement.

In its June 8, 2007 response, MCZM notified Weaver's Cove that a stay for a definite period would need to be mutually agreed upon, and to Weaver's Cove surprise it proposed a stay period of *nine months*, with the review to resume on March 8, 2008, and to be completed by April 9, 2008. As grounds for the proposed nine-month stay, MCZM cited MassDEP's stay, the U.S. Coast Guard's ongoing review of the Weaver's Cove project (which MassDEP in turn had cited as the basis for its stay), time for any administrative and adjudicatory appeals of MassDEP's authorizations to be resolved, and time for MCZM's final sign-off. MCZM's letter asked that Weaver's Cove countersign an enclosed written stay agreement if it concurred with the proposed nine-month stay.

Despite MCZM's unexpected (and disappointing) suggestion of an extended stay in its processing of the Weaver's Cove Energy and Mill River applications, Weaver's Cove fully intended to act on that proposal prior to the expiration of the CZMA's statutory six-month review period on July 8, 2007. But, before Weaver's Cove could respond to MCZM's proposal, intervening events rendered any such temporary MCZM stay a moot point. By letter dated June 27, 2007, MassDEP notified Weaver's Cove that it would not lift its indefinite stay for the remaining MassDEP permits under review for Weaver's Cove. MassDEP's decision to halt the reviews indefinitely undercut the premise of the proposed MCZM plan: with no assurance that MassDEP would complete its permit reviews during the proposed stay period of the MCZM review, there was no reason to further delay MCZM's now-seemingly-inevitable objections to Weaver's Cove's and Mill River's consistency certifications.

Consequently, by letter dated July 2, 2007, promptly following notification of MassDEP's position and recognizing the MCZM's inevitable objections, Weaver's Cove notified MCZM in good faith that Weaver's Cove was no longer in a position to agree to any stay. As expected, by letter dated July 6, 2007, MCZM notified Weaver's Cove Energy and Mill River of

its objections to their federal consistency certifications, citing Weaver's Cove Energy's and Mill River's failure to provide "final" state permits.

Weaver's Cove's decision not to agree to the proposed stay, immediately following actions taken by the MassDEP, was hardly an "about face." Rather, it was the Commonwealth's change of position that triggered subsequent events: when the Commonwealth of Massachusetts executed an "about-face" in its issuance of the permits (permits which MCZM has maintained it will require for any consistency determination), Weaver's Cove Energy and Mill River simply took actions consistent with their legal rights under the CZMA's statutory policy of promoting swift review of CZMA consistency certifications, to be concluded with the Secretary's review.

Weaver's Cove reiterates that the negotiations with MCZM regarding completion of review of the Weaver's Cove Energy and Mill River consistency certifications are immaterial to the Motions; nonetheless, it presents the foregoing discussion in order to correct MCZM's incorrect allegations. MCZM's Motions should be denied, and its disparaging comments regarding Weaver's Cove's conduct in these proceedings should be rejected as irrelevant and, in any event, inaccurate.

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Dated: October 2, 2007

CERTIFICATE OF SERVICE

I here by certify that copies of this Memorandum In Opposition To Respondent's Motions To Enlarge Time have been sent to the following:

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