No._____

UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE

Mill River Pipeline, LLC
Appellant,

vs.

Massachusetts Office of
Coastal Zone Management
Respondent.

INITIAL BRIEF FOR APPEAL OF MILL RIVER PIPELINE, LLC UNDER THE COASTAL ZONE MANAGEMENT ACT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATORY MATERIALS

SECRETARY OF COMMERCE DECISIONS

STATEMENT OF CASE

The Federal Energy Regulatory Commission ("FERC" or "Commission") has conditionally authorized Mill River Pipeline, LLC ("Mill River") to construct and operate two 24-inch pipeline laterals, with a combined total length of a little more than six miles, to transport regasified liquefied natural gas ("LNG") to the interstate pipeline grid from a proposed LNG terminal in Fall River, Massachusetts developed by its affiliate, Weaver's Cove Energy, LLC ("Weaver's Cove"). The FERC found that this pipeline project is required by the public convenience and necessity, as it will bring much needed incremental natural gas supply to the New England region. Pursuant to the Coastal Zone Management Act ("CZMA" or "Act"), the FERC approval order for the pipeline facilities requires Mill River to obtain concurrence from the Massachusetts Office of Coastal Zone Management ("MCZM") with Mill River's certification that the project is consistent with the Massachusetts coastal zone management program ("MCZMP").

In addition, Mill River has sought permits from the United States Army Corps of Engineers ("USACE") for authorization to lay portions of the pipeline laterals in wetland areas that constitute waters of the United States, and to lay a segment of one of the pipeline laterals across the Taunton River (the USACE-permitted activities, together with the pipeline facilities and activities, are referred to as the "Project"). The USACE permits also require the consistency determination from MCZM.

On January 4, 2007, after years of meetings with MCZM and informational draft submissions, Mill River submitted to MCZM the requisite certification of the Project's consistency with the enforceable policies of the MCZMP for MCZM's concurrence. Mill River's consistency certification demonstrated that the pipeline and associated dredge and fill

activities will be consistent with the MCZMP's enforceable policies. On January 10, 2007, MCZM found that Mill River had submitted all of the required documentation to initiate MCZM's federal consistency review. MCZM, however, subsequently objected to the consistency certification on July 6, 2007, asserting that Mill River had failed to obtain certain final state licenses and permits that MCZM deemed necessary before it could issue its concurrence.

In accordance with the Act, MCZM's objection precludes Mill River from receiving the USACE permits and satisfying the FERC condition, unless, on this appeal, the Secretary of Commerce ("Secretary") overrides MCZM's objection. The Secretary should override MCZM's objection to the consistency certification because this energy Project is consistent with the objectives of the Act. In addition, and alternatively, the objection should be overridden because the energy Project is otherwise necessary in the interest of national security.

STATEMENT OF FACTS

1. Mill River proposes to construct and operate a 24-inch diameter, 2.5 mile-long pipeline ("Western Lateral") and a 24-inch diameter, 3.6 mile-long pipeline ("Northern Lateral") to transport regasified LNG from an LNG terminal proposed to be developed by Weaver's Cove in Fall River, Massachusetts, to the Algonquin Gas Transmission Company's ("Algonquin's") interstate pipeline system (the Mill River pipeline facilities, together with the terminal, the "LNG Project"). The pipeline routes are shown in the Figure 1-1 attached hereto. Mill River also proposes to construct two metering and regulation stations: one in the coastal zone located at the end of the Northern Lateral where it interconnects with the Algonquin pipeline system, and one

outside the coastal zone located at the interconnection point of the Western Lateral and the Algonquin system.[1]

2. In May 2005, FERC Staff, in conjunction with the United States National Marine Fisheries Service, the USACE, the United States Environmental Protection Agency ("EPA"), and the United States Coast Guard (together, "FEIS cooperating agencies"), issued a Final Environmental Impact Statement ("FEIS") for the Project pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, concluding that if the Project is constructed and operated in accordance with recommended mitigation measures, the Project would have limited adverse environmental impact. Weaver's Cove LNG Project, FEIS, Docket Nos. CP04-36-000 and CP04-41-000, at ES-14 (May 2005) (Attached at A-3). These recommendations were subsequently included as conditions to the Approval Order. *See* Approval Order, App. B.

3. On July 15, 2005, FERC approved Mill River's application for a certificate of public convenience and necessity authorizing the construction and operation of the Northern and Western Laterals, along with a concurrent application of Weaver's Cove to construct and operate the LNG terminal. *Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070 (2005) ("Approval Order") (Attached at A-4), *order on reh'g*, 114 FERC ¶ 61,058 (2006) (Attached at A-5) ("Rehearing Order"). FERC concluded that the pipeline facilities "are required by the public convenience and necessity to connect the proposed LNG facilities to the interstate pipeline system," and that the LNG Project "will promote the public interest by increasing the availability of natural gas supplies in the New England market." Approval Order at P 5.

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[1] Approximately 0.8 miles of the eastern end of the Western Lateral is located within the mapped Massachusetts coastal zone boundary. Federal Consistency Certification at 3. *See also* FEIS at 4-150.

4. FERC, in Condition No. 23 of the Approval Order, required Mill River to provide documentation of concurrence from MCZM that the Project is consistent with the MCZMP. *Id.*, App. B at Condition No. 23.

5. On March 18, 2004, Mill River filed with the USACE applications for dredge and fill permits under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for authorization to install portions of the Northern and Western Laterals and conduct associated dredge and fill activities in wetland areas that constitute waters of the United States. Mill River also applied for a permit from the USACE to lay a portion of the Western Lateral in a trench across the Taunton River, which trench is to be dredged and backfilled by Weaver's Cove under a separate USACE permit applied for by Weaver's Cove.

6. The Project activities related to the USACE permits require a consistency determination from MCZM. Because, *inter alia*, MCZM has not issued a consistency determination, the USACE has not issued its permits.

7. In order to obtain the consistency determination, on January 4, 2007, Mill River submitted to MCZM a certification of the Project's consistency with the MCZMP, together with all required information ("Federal Consistency Certification," attached at A-1). This information included copies of federal permit applications and a copy of the final "Secretarial Certificate" from the Massachusetts Executive Office of Environmental Affairs indicating that no further review was required under the Massachusetts Environmental Policy Act ("MEPA").

8. On January 10, 2007, Mill River received a letter from MCZM stating that Mill River had submitted the required documents for initiating a consistency review, and that the state's review had commenced as of January 9, 2007. (Attached at A-6).

9. Between January 4, 2007 and July 6, 2007, Mill River responded to all of MCZM's written requests for additional information.

10. As part of the overall permitting process for the Project, Mill River also had pending before the Massachusetts Department of the Environment ("MADEP") applications for a number of environmental permits. On April 6, 2007, MCZM notified Weaver's Cove that "CZM's Federal Consistency Certification decision is contingent on prior receipt of all necessary state licenses, permits and certifications." (Attached at A-7).

11. On June 4, 2007, MADEP abruptly and unilaterally stayed the processing of all remaining MADEP environmental permits, (attached at A-8), only a few weeks after it had advised Mill River that all remaining permits would be issued by the end of June.

12. On July 6, 2007, MCZM objected to Mill River's consistency certification, alleging that Mill River failed to obtain applicable state licenses and permits "necessary to CZM's federal consistency review." (Attached at A-2). Mill River was precluded from providing MCZM with the requested state licenses and permits because MADEP decided that it would cease processing any of these permits.[2]

13. The appeals process under the Act is an important component of the CZMA formula to balance State-Federal-private interests. The Secretary's consideration of the national interest in the CZMA objectives is a 'check' on the State's authority to block projects affecting State coastal uses or resources." Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 822 (Jan. 5, 2006).

[2] MADEP's refusal to process the licenses and permits before it should not impede the Secretary's review of this appeal or his ability to override MCZM's objection. If MADEP's refusal were permitted to impede this appeal, no project facing state or local opposition would ever be able to move forward.

SUMMARY OF ARGUMENT

MCZM's objection should be overridden because the Project is consistent with the objectives of the Act. The Project is an energy-related activity that furthers the national interest in a significant and substantial manner by helping meet the future energy needs of the New England region. The Project's contribution to the national interest outweighs the limited coastal impacts, and there is no reasonable alternative to the Project. In addition, the Project's contribution to national security is an alternative ground on which MCZM's objection should be overridden. By diversifying energy supply, the LNG Project is necessary in the interest of national security. The Secretary should, therefore, override MCZM's objection, which will allow the USACE and FERC to proceed with issuing and/or finalizing the necessary permits and authorizations and thereby allow Mill River to proceed with development of this much-needed incremental gas supply and energy infrastructure project.

ARGUMENT

I. THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE COASTAL ZONE MANAGEMENT ACT

The Secretary should override MCZM's objection on the ground that the Project is consistent with the objectives of the Act. 16 U.S.C. § 1456(c)(3)(A). As part of a major FERC-approved LNG import project which is coastal-dependent because it will be located in the coastal zone and will rely on deliveries of LNG by ship as its source of supply, the Project is consistent with the objectives of the Act.

Under the regulations administering the CZMA, an activity will be considered consistent with the objectives of the Act if each of the following is satisfied: (a) the activity furthers the national interest as articulated in Section 302 or 303 of the CZMA in a significant or substantial manner ("Element 1"); (b) the national interest furthered by the activity outweighs the

activity's adverse coastal effects, when those effects are considered separately or cumulatively ("Element 2"); and (c) there is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's coastal zone management program ("Element 3"). 15 C.F.R. § 930.121. As demonstrated below, the Project readily satisfies each of these three elements.

A. Element 1 — The Project Furthers the National Interest in a Significant and Substantial Manner

The Project promotes the national interest articulated in Section 303 of the Act in a significant and substantial manner for two reasons, each of which is independently sufficient for the Secretary to find that the Project satisfies Element 1. First, the Project will significantly and substantially further the national interest in siting major coastal-dependent energy facilities. *See* 16 U.S.C. § 1452(2)(D) (declaring that it is national policy for states to give "priority consideration. . . to coastal-dependent uses and orderly processes for siting major facilities related to. . . energy."). Second, the Project will further the national interest in a significant and substantial manner by developing the resources of the coastal zone to provide transportation for significant volumes of new natural gas supply to: (a) meet growing demand in the New England area; (b) enhance energy supply reliability for the New England region; and (c) promote price competition in the natural gas market. *See* 16 U.S.C. § 1452(1) (declaring that it is national policy to "*develop* . . . the resources of the Nation's coastal zone" (emphasis added)). As explained below, the furtherance of each of these national interests by the Project is both substantial and significant because of the scope, magnitude and importance of the Project and its benefits. With respect to satisfying Element 1, because Congress has broadly defined the

national interest in the coastal zone in Sections 302 and 303 of the Act, this first element of the consistency standard "normally will be satisfied on appeal."[3]

1. The Project Furthers the National Interest in Siting Major Coastal-Dependent Energy Facilities.

One of the objectives of the Act is to give "priority consideration . . . to coastal-dependent uses and orderly processes for siting major facilities related to . . . energy." 16 U.S.C. § 1452(2)(D). The Project promotes this objective because it will be a major, coastal-dependent energy facility.

The Act defines "energy facilities" as "any equipment or facility which is or will be used primarily in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource." 16 U.S.C. § 1453(6). The Project qualifies as a "facilit[y] related to . . . energy" because it will provide significant energy supply to New England through the "transportation of" natural gas. The Project facilities are also "major" because of their value and capacity. *See Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C.* (May 5, 2004), at 8 ("*Islander East*"), *set aside on other grounds*, *Connecticut v. U.S. Dep't of Commerce*, No. 3:04cv1271, 2007 WL 2349894 (D. Conn. Aug. 15, 2007).[4] The Project facilities will cost an estimated $50 million to construct, and will have the capacity to transport about 800 million cubic feet per day

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[3] *See Decision and Findings in the Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc.* (Sept. 2, 1994), at 13 ("*Mobil Southeast*"); *Decision and Findings in the Consistency Appeal of Amoco Production Company* (July 20, 1990), at 14 ("*Amoco*").

[4] *Islander East* remains authoritative with respect to Element 1. The court in *Connecticut v. U.S. Dep't of Commerce* found that "the Secretary's Decision shows that he considered the proper standards concerning this [first] element . . . and then made a reasoned determination that the factor had been satisfied. As a result, his decision regarding element one was not arbitrary and capricious." 2007 WL 2349894, at *9.

("MMcf/d") of natural gas, *see* Approval Order at P 13, or about 15%[5] of the New England region's peak day natural gas requirements, to Algonquin's pipeline system from Weaver's Cove's proposed LNG terminal. *Cf. Islander East* at 8 (finding that an energy facility was "major" because of its estimated cost of $180 million and capacity to provide approximately 250 MMcf/d of natural gas, sufficient to heat 600,000 homes).

Finally, the Project is a coastal-dependent use because the pipelines "must be located in the coastal zone to deliver natural gas" from the LNG terminal to downstream pipelines. *Id.* at 9 (holding that a pipeline is a coastal-dependent use when its "location in or near the coastal zone is required to achieve the primary goal of the project in question"). *See also Decision and Findings in the Consistency Appeal of the Southern Pacific Transportation Co.* (Sept. 24, 1985), at 3 (holding that a facility partially located in the coastal zone was consistent with the objectives of the Act). Further, the Project is a coastal-dependent use because it will rely on deliveries of LNG by ship. As a coastal-dependent, major energy facility, the siting of the Project furthers the national interest articulated in Section 303 of the Act.[6]

2. The Project Furthers the National Interest in the Development of the Coastal Zone.

The Project also furthers the national interest articulated in Section 303 of the Act in "develop[ing] . . . the resources of the Nation's coastal zone." 16 U.S.C. § 1452(1). The

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[5] This figure is calculated assuming a peak daily sendout for the Project of 800 MMcf/d, and an estimated peak day sendout in New England in 2010 of between 4.8 and 5.5 billion cubic feet. See The Power Planning Committee of the New England Governors' Conference, Inc., *Meeting New England's Future Gas Demands: Nine Scenarios and Their Impacts*, A Report to the New England Governors, ("Governors' Report") (Mar. 1, 2005), at Table 3-4 (Attached at A-9).

[6] The dredge and fill activities proposed by Mill River "are directly associated with and further its proposed" siting of coastal-dependent energy facilities. *See Mobil Southeast* at 13. The dredging activities therefore also satisfy this element of the consistency standard "even if they only indirectly further" this objective of the CZMA. *Id.* at 13-15.

Project promotes this objective because it is a proposal for the utilization of coastal resources for economic and industrial development. *See Decision and Findings in the Consistency Appeal of Davis Heniford* (May 21, 1992), at 6 (stating that "it is clear that commercial development is one of the recognized competing uses of the coastal zone"). The Project also constitutes development of a portion of the coastal zone because, through the modification of a limited part of the coastal zone, the Project will "allow its use for a particular purpose that was previously not available" — namely the transportation of imported natural gas to meet growing regional demand. *See Islander East* at 6.

3. The Project Furthers the National Interest in a Significant and Substantial Manner.

The Project furthers the national interest, in both the siting of major coastal-dependent energy facilities and the development of the coastal zone, in a significant and substantial manner. A project furthers the national interest in a *substantial* manner if it "contribut[es] to the achievement of a CZMA objective to a degree that has a value or impact on a national scale." *Id.* at 6 n.26. *See also* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000) ("2000 Final Rule"). A project furthers the national interest in a *significant* manner if it "provid[es] a valuable or important contribution to a national interest [identified in the CZMA] without necessarily being large in scale or having a large impact on the national economy." *Islander East* at 6 n.26. Accordingly, to determine whether a project significantly or substantially furthers the national interest, the 2000 Final Rule instructs appellants to consider the following factors: (a) the degree to which the activity furthers the national interest, *i.e.* its substantiality; (b) the nature or importance of the national interest furthered as articulated in the CZMA, *i.e.* its significance; and (c) the extent to which the activity is coastal-dependent. 2000 Final Rule at 77,150.

The Project significantly and substantially furthers the national interest in both the siting of major coastal-dependent energy facilities and the development of the coastal zone because, as discussed above, it qualifies as a major coastal-dependent energy facility under the CZMA. Major coastal-dependent energy facilities "typically fulfill the requirement" of "significance or substantiality" by their very nature. *Islander East* at 5 (referencing the 2000 Final Rule at 77,150). According to the 2000 Final Rule, the siting of energy facilities is an example of "an activity that significantly or substantially furthers the national interest" because such energy facilities "are coastal dependent industries with economic implications beyond the immediate locality in which they are located." 2000 Final Rule at 77,150. In *Islander East*, the Secretary found that because a pipeline facility met the definition of "energy facilities" and was "also coastal-dependent," it "further[ed] the national interest in a significant and substantial manner." *See Islander East* at 5-6. The same is true of the Project.

The Project also significantly and substantially furthers the national interest because of the magnitude of its size, its scope, and its importance measured by economic value and delivery capacity. As noted above, the Project facilities will cost an estimated $50 million to construct, and will have the peak day capacity (*i.e.* 800 MMcf/d) to transport enough natural gas to heat over one million homes. *See Islander East* at 5 n.19, 8-9 (finding that an energy project's value of $180 million, and its delivery capacity of about 250 MMcf/d of natural gas significantly and substantially furthers the national interest). Moreover, the Project is significant because it will facilitate the delivery of a new source of clean-burning fuel that will have environmental benefits beyond the immediate location of the Project. *See* FEIS at 4-311. *See also Islander East* at 5.

The Project also significantly and substantially furthers the national interests set forth above because of the benefits that will result from the Project. The consideration of the

benefits of the Project is relevant because "[t]he benefits of the [facility] are a direct consequence of the [coastal] modifications that comprise [the project] and therefore are appropriately considered in determining the degree to which the [p]roject furthers the national interest in coastal zone development." *Islander East* at 6. Here, the benefits — discussed below —include: (1) meeting growing demand for natural gas in New England; (2) enhanced energy reliability; and (3) price competition resulting from the introduction of new incremental natural gas supply. Additionally, "[t]he two Mill River pipeline laterals will permit connection of the Weaver's Cove LNG facilities to Algonquin's pipeline system and thus bring about the benefits of the LNG terminal facilities." Approval Order at P 55. Because of their extent, each of these benefits will "contribut[e] to [the development of the coastal zone] to a degree that has a value or impact on a national scale." *Islander East* at 6 n.26. And, given the importance of energy infrastructure and supplies, the resulting benefits are significant because they will "provid[e] a valuable or important contribution to a national interest." *Id.*

In addition, the Project will significantly and substantially further the national interest because it will help meet growing energy demand in New England. Approval Order at P 55 (stating that the Project "will serve new market demand"). *See Islander East* at 7 n.30 (finding that a project that "is needed to meet the growing demand for natural gas" in a region "furthers the national interest in a substantial manner"). The New England region's demand for natural gas is growing, in large part due to the increasing use of natural gas for electric power generation. Approval Order at P 6. The U.S. Energy Information Administration ("EIA") projects that total gas consumption in New England will increase at an annual average of 1.38% between 2004 and 2024, but that U.S. domestic gas production will grow at a slower rate than demand. *Id.* According to the Governors' Report, to ensure reliable delivery of natural gas to the New England region after 2010, there must be a substantial amount of demand reduction or

infrastructure development. *Id.* As the Approval Order recognizes, with a capacity to transport up to 800 MMcf/d of natural gas to the region, the Project serves this very purpose. *Id.* at P 13.

Additionally, the Project will significantly and substantially further the national interest because it will enhance the reliability of energy supplies in New England by transporting natural gas from a new source, Weaver's Cove's LNG terminal, to Algonquin's pipeline system. *Id.* at PP 51, 55. *See also Islander East* at 5 (discussing energy supply reliability as a benefit that furthers the national interest). Because increased reliability of energy supply will have a "scope, magnitude and importance beyond [the Project's] location in [the vicinity of Fall River, Massachusetts]," it is "both substantial and significant." *See id.* at 5.

Finally, the Project significantly and substantially furthers the national interest because of the positive market effects expected to result from the Project. LNG imported through the LNG Project is anticipated to moderate energy prices through increased competition, and Mill River is an essential component in delivering these imports to the New England market. Therefore, Mill River also furthers the national interest substantially and significantly because it will "provid[e] greater access to gas supply sources . . . and promot[e] price competition." *Id.* at 5. The Secretary and FERC have recognized that a natural gas project that will enhance price competition furthers the national interest. *See id.*; *Hackberry LNG Terminal, LLC*, 101 FERC ¶ 61,294 (2002) (attached at A-10) (holding that new LNG import terminals providing competitive sources of natural gas serve "[t]he public interest . . . through encouraging gas-on-gas competition by introducing new imported supplies of natural gas which will be accessible to all willing purchasers"). *See also* Approval Order at P 50.

B. Element 2 — The National Interests Furthered by the Project Outweigh Any Putative Adverse Coastal Effects

The national benefits of the Project outweigh the Project's limited adverse impacts to the Massachusetts coastal zone,[7] whether considered separately or cumulatively. 15 C.F.R. § 930.121(b). To the extent that there are adverse coastal effects resulting from the construction or operation of the Project, the extensive environmental record developed by the FERC, and the other FEIS cooperating agencies, and through the state's MEPA and other permitting review processes, shows that these effects will tend to be both insignificant and of very short duration.[8] In addition, Mill River will eliminate or mitigate potential adverse effects as required by the conditions of the Approval Order, which were based on recommendations set forth in the FEIS.[9] Because the adverse effects of the Project on the coastal zone are temporary, minimal or mitigatable, these adverse effects do not outweigh the considerable national interests promoted by the Project, discussed in Section I-A, *supra*.

In its order approving the Project, FERC found that "the proposed action can be constructed and operated in an environmentally acceptable manner." Approval Order at P 105.

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[7] The entire Northern Lateral and the first 0.8 miles of the Western Lateral (mileposts 0.0 to 0.8) are in the Massachusetts coastal zone. *See supra* note 1.

[8] The record for review in this appeal is fundamentally different from the record on review in *Islander East* and *Connecticut v. U.S. Dep't of Commerce*. Here, unlike in those proceedings, the federal or state agencies reviewing the Project have *not* provided *any* scientific studies or other evidence disputing the environmental analysis and conclusions set forth by the FEIS and in the submissions of Mill River before these federal and state agencies.

[9] *See* Approval Order, App. B. Once such conditions are included in a permit, the Secretary can rely on the implementation of these recommendations in his analysis. *See Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (observing that the efficacy of mitigation measures is assured where they are included as mandatory conditions in the issued permits). *See also Decision and Findings in the Consistency Appeal of The Korea Drilling Company, Ltd.* (Jan. 19, 1989), at 5 ("*Korea Drilling*") (stating that the Secretary will rely on commitments of project proponent on appeal in analyzing project effects).

The underlying FEIS explained that the Project will have "limited adverse environmental impact" on the coastal zone, in part, because (i) Mill River would implement the FERC Upland Erosion Control, Revegetation, and Maintenance Plan ("FERC Plan") and the FERC Wetland and Waterbody Construction and Mitigation Procedures ("FERC Procedures")[10] to mitigate impacts on soils, wetlands, and waterbodies from construction and operation of the pipeline facilities, and (ii) the majority of the Northern and Western Lateral routes would either overlap or be adjacent to existing pipeline or other linear rights-of-way ("ROWs"). FEIS at ES-14 to ES-15. Furthermore, both of the pipeline lateral routes "would minimize the length of pipeline needed to interconnect with the Algonquin system," FEIS at 3-51, thereby limiting the effects on the natural resources of the coastal zone.

Section 303 of the Act explicitly recognizes that siting the Project in an existing industrial area serves the national interest in preserving and protecting the coastal zone, stating that priority consideration should be given to "locat[ing], to the maximum extent practicable, [] new commercial and industrial developments in or adjacent to areas where such development already exists." 16 U.S.C. § 1452(2)(D). For 97% of its length, the Northern Lateral will either replace an abandoned naphtha and petroleum pipeline in an existing ROW or run adjacent to a single-track railroad. FEIS at 2-15. The Western Lateral also will follow an existing electric transmission ROW for 72% of its length. FEIS at 2-15. Siting the pipeline lateral routes in or adjacent to existing pipeline or other linear ROW is consistent with the CZMA and assures that the Project will only have a *de minimis* impact on the natural resources of the coastal zone, both during construction and in its operation. For example, the Project is not expected to significantly

[10] The FERC Plan identifies baseline mitigation measures for minimizing erosion and enhancing revegetation. The FERC Plan is attached for informational purposes at A-11A. The FERC Procedures identifies baseline mitigation measures for minimizing the extent and duration of construction-related disturbance to wetlands and waterbodies. The FERC Procedures are attached at A-11B.

affect diadromous fish populations because the waterbodies that would be affected by the Project traverse developed areas and therefore contain limited fish resources. FEIS at 4-114.

1. Adverse Effects

To the extent that the Project will result in adverse coastal effects, or negative impacts on the natural resources of the coastal zone, *see Korea Drilling Company* at 10-11, such environmental impacts of the Project were thoroughly analyzed in the FEIS, during the MEPA review process, and during the development of the record before various permitting agencies. As the record indicates, almost all of the adverse effects on natural resources associated with the pipeline facilities are temporary only, and are related to construction activities. Further, the potential impacts of the Project will not be significant because they will be avoided by design or minimized by the temporary nature of the construction activities and the implementation of mitigation measures, thus allowing the FERC and the FEIS to conclude that the Project "would have limited adverse environmental impact." Approval Order at P 112. Several of these impacts are discussed below.

Impacts on Surface Water

Impacts on surface water from the Project will be minimal, and the Project has been found to be in compliance with Massachusetts water quality standards. *See* Response to Comments on Federal Consistency Certification, Att. C (Water Quality Certification issued by MADEP) (determining that there is reasonable assurance that the Project will be conducted in a manner which will not violate applicable water quality standards at 314 Mass. Code Regs. 4.0.

Eleven streams (in addition to the Taunton River) and approximately 0.21 acres of intertidal habitat (0.18 acres of beach habitat and 0.03 acres of salt marsh habitat) will be temporarily affected by construction activities. *See* Federal Consistency Certification, App. A at 1. Mill River will use an open-cut construction technique, which will involve excavation of the

pipeline trench across the waterbody, installation of the pipeline, and backfilling of the trench without isolating flow from construction activities. FEIS at 2-33. *See also* Federal Consistency Certification, App. A (describing construction technique). Construction across the 11 intermittent streams could adversely affect surface waters, for example, inasmuch as in-stream trenching could modify aquatic habitat and increase turbidity. FEIS at 4-74. These impacts, however, would "generally be localized and short term." FEIS at 4-76.

Because most of the streams to be crossed are intermittent and have minimal to no flow during drier periods of the year, impacts can be avoided by constructing during a dry period. FEIS at 4-76. Even if the streams are flowing during construction, Mill River would, pursuant to the FERC Procedures, complete most in-stream work within 24 hours and restore stream banks after construction, resulting only in temporary impacts. For example, suspended sediment and turbidity levels would return to pre-construction levels soon after the stream crossing is completed. FEIS at 4-76. In addition, Mill River will abide by the FERC Plan and Procedures and undertake other efforts described more fully in the Federal Consistency Certification in order for Mill River to minimize and mitigate impacts on streams. *See* Federal Consistency Certification, 8-10 & App. A at 9-10.

In addition, the impacts from the construction of the Western Lateral crossing of the Taunton River (approximately 2,200 linear feet long) will be minimal, temporary and mitigated. For this crossing, Mill River will install the pipeline in an open trench to be dredged and later backfilled by Weaver's Cove (for that portion of the trench below the waters of the Taunton River) and Mill River (for that portion of the trench on the shorelines of the Taunton River). These activities will be done between November 1 and January 14 in any given year, as biological activity is at a low ebb during the early winter period. *See* Federal Consistency Certification, App. A at 6. As to impacts to the shoreline area disturbed by the crossing, Mill

River will backfill these areas with suitable excavated materials or select backfill, remove any sheet piling, and restore the banks to their pre-construction conditions. Further, following bank and beach restoration, Mill River will replant the delineated salt marsh on the western bank of the Taunton River affected by the construction of the crossing. *See id.*, App. A at 6-8.

Impacts on Groundwater

Pipeline construction activities could result in "minor, temporary" impacts to shallow groundwater resources in proximity to the proposed pipelines. FEIS at 4-61. However, because there are no protected aquifers in the Project area, these potential impacts "would be avoided or minimized" by the use of standard construction methods and measures set forth in the FERC Plan and Procedures. FEIS at 4-61. Implementation of these measures would ensure that potential impacts to groundwater "are localized to the immediate area of the disturbance and do not have a significant impact on overall groundwater quality in the area." FEIS at 4-62.

Impacts from Hydrostatic Testing

Approximately 315,000 gallons of water would be needed to test the Western Lateral, and approximately 445,000 gallons would be needed to test the Northern Lateral. Federal Consistency Certification at 7; FEIS at 4-77. Subsequent to completion of successful hydrostatic tests on the pipeline laterals, the test water will be emptied, through a diffuser, into the Taunton River. Federal Consistency Certification at 7. No biocides will be used in the test water. *Id.* The discharge will occur over a period of several days, thereby ensuring that these discharges are consistent with federally approved state effluent limitations and water quality standards. *Id.* The water would be discharged at a rate and location that would minimize bottom disturbance and potential impacts on aquatic resources. FEIS at 4-77. To further minimize impacts associated with hydrostatic testing, discharge of the test water will be conducted in accordance with the FERC Procedures and applicable permits. *Id.*

Impacts on Wetlands

The construction of the Northern and Western Laterals would result in temporary alteration of about 2.7 acres of freshwater wetlands, 0.04 acres of coastal dune, and, as noted above, approximately 0.03 acres of salt marsh habitat in the intertidal areas. *See* Federal Consistency Certification, App. A at 1. To minimize impacts on wetlands, wetland crossings will be scheduled to avoid periods of seasonal high water elevations, and construction equipment will be limited to that which is necessary to clear and grade the ROW and install the pipeline. *See id.*, App. A at 5. In addition, to encourage faster re-vegetation of the ROW following construction, woody vegetation that is not located directly over the open trench or areas that require grading will be cut off at ground level, leaving root systems intact. *Id.* Mill River will also abide by the FERC Plan and Procedures and undertake other efforts described more fully in the Federal Consistency Certification to minimize and mitigate impacts on wetlands. *See* Federal Consistency Certification, 8-9 & App. A at 9-10. As a result, the impact on emergent wetlands is expected to be "relatively brief," with vegetation regenerating within one or two growing seasons following restoration of the ROW. FEIS at 4-86.

Impacts on Vegetation

Approximately 56.6 acres of vegetation communities will be temporarily disturbed during construction of the pipeline facilities. FEIS at 4-93. During construction, existing vegetation would be temporarily removed from within the construction ROW, pipe storage yard, and other necessary workspaces to facilitate the installation of the pipelines. FEIS at 4-92. Following construction, the portions of the construction ROW not required for pipeline operations would be seeded with grasses and allowed to revert to their previous preconstruction condition naturally. FEIS at 5-7. The impact of clearing and the amount of time required for complete recovery of vegetation to pre-disturbance levels would depend on the size and age of

pre-existing vegetation. FEIS at 4-92. The greatest impact would be in forest lands because they take longer to reestablish (FEIS at 4-92); Mill River, however, has minimized the effect of forest clearing by co-locating its pipelines along existing, previously cleared ROW. FEIS at 5-7. While there could be secondary impacts from the loss of vegetation, such as loss of wildlife habitat or erosion, the "majority of these effects would be minor and temporary and would diminish upon restoration and revegetation." FEIS at 4-93.

Approximately 33.5 of the 56.6 acres of vegetation communities utilized for construction will be necessary for pipeline operations. FEIS at 4-93. While trees and other vegetation on the meter and regulation sites also would be permanently removed, FEIS at 4-92, the permanent ROW would be restored with grasses, "and operational impacts on vegetation would be minimized by the vegetation maintenance practices specified in [FERC's] Plan and Procedures." FEIS at 5-7. The impact of the metering and regulation station for the Northern Lateral would be minimal because it would require only 0.9 acres for construction and operation, and would be located in a business park adjacent to the Algonquin pipeline ROW. FEIS at 2-12, 2-17. The metering and regulation station for the Western Lateral would be located adjacent to existing ROWs and would require only 1.4 acres for construction and operation, FEIS at 2-17, and in any event the site is located outside the coastal zone.

Impacts on Aquatic Resources

Because pipeline construction will only result in temporary impacts on streams and rivers, the impact on fish and other aquatic organisms is expected to be localized and short term. FEIS at 4-113. Pipeline construction could cause temporary increases in sedimentation and turbidity which could affect fishery resources (*e.g.* burying fish eggs or reducing oxygen uptake by fish gills). FEIS at 4-113. In-stream turbidity levels are, however, expected to decrease "rapidly" after construction activities are completed, and suspended sediment

concentrations would be expected to return to preconstruction levels soon after construction in each stream is completed. FEIS at 4-113. In order to further minimize these potential impacts, the activities related to the Taunton River crossing will only be carried out between November 1 and January 14 of any given year because, as discussed above, biological activity is at a low ebb during the early winter period. *See* Federal Consistency Certification, App. A at 6. Further, Mill River would adhere to the FERC Procedures. *Id.* For example, pursuant to the FERC Procedures, Mill River is required to complete most in-stream work within a 24 hour period. FEIS at 4-113. As a result, any adverse effects on aquatic resources from pipeline construction will be temporary and minimal.

Impacts on Soils

While soil contamination that could result from spills or leaks of fuels, lubricants, and coolant from construction equipment could adversely affect soils, these effects "would typically be minor" because of the infrequency and small volumes of spills and leaks. FEIS at 4-14. In addition, Mill River will develop for FERC review and approval a Spill, Prevention, Containment, and Countermeasure Plan that specifies clean procedures to minimize the effects of contamination in the unlikely event of a spill or leak. FEIS at 4-14. *See also* Federal Consistency Certification at 8.

2. The National Interests Furthered by the Project Outweigh the Adverse Coastal Effects

Because, as the FEIS has found and as Mill River demonstrates in its Federal Consistency Certification, the adverse effects of the Project on the coastal zone are temporary, minimal or mitigatable, these adverse effects are insufficient to outweigh the considerable national interests promoted by the Project. As explained in Section I-A, *supra*, the Project significantly and substantially furthers the national interests in: (1) coastal-dependent energy

facilities and (2) the development of the coastal zone. *See* 16 U.S.C. §§ 1452(1), 1452(2)(D). The Project, therefore, satisfies Element 2.

3. Cumulative Effects

Assessing the cumulative adverse effects associated with the Project does not alter in any way the conclusion that the national interests promoted by the Project outweigh any adverse coastal effects. Cumulative adverse effects have been defined to mean "the effects of an objected-to activity when added to the baseline of other past, present and reasonably foreseeable future activities occurring in the area of, and adjacent to, the coastal zone in which the objected-to activity is likely to contribute to adverse effects on the natural resources of the coastal zone." *Amoco* at 39 (citing *Decision and Findings in the Consistency Appeal of Gulf Oil Corporation* (Dec. 23, 1985), at 8).

The FERC and FEIS cooperating agencies undertook a comprehensive cumulative impacts analysis in the FEIS similar to the cumulative effects analysis contemplated as part of Element 2. *See* FEIS at 4-297 to 4-314. The FEIS's cumulative impacts analysis considered the impacts that result "when impacts associated with a proposed project are superimposed on, or added to, impacts associated with past, present, or reasonably foreseeable future projects within the area affected by the proposed project." FEIS at 4-297. With respect to the LNG Project,[11] the FEIS reviewed cumulative impacts on resources such as aquatic resources, upland and wetland vegetation, air quality, and noise from the LNG Project in combination with impacts from 25 other past, present and future activities. FEIS at 4-297 to 4-301. The FEIS concluded that cumulative impacts would be insignificant or minimal.

[11] The cumulative impacts discussion includes impacts from the LNG terminal and associated dredging activities proposed by Weaver's Cove, because these activities would be undertaken concurrently with the construction and operation of the pipeline facilities by Mill River.

The FEIS found that "while construction and operation of the Weaver's Cove LNG Project could contribute cumulatively to impacts on aquatic resources and water quality in the Taunton River, Mount Hope Bay, and Narragansett Bay, . . . these impacts would be relatively short-term and/or minor in comparison to those from non-point sources of pollution or from operation of [other] facilities," and that "implementation of Weaver's Cove Energy's [including Mill River's] proposed mitigation measures and [the FEIS] recommendations [] would reduce impacts of the proposed project such that, even when considered in light of past or present activities in the general project area, aquatic resources would not be adversely affected by project activities." FEIS at 4-305. As to vegetation and wildlife, the FEIS concluded that collocation of the proposed Mill River pipelines with existing rights-of-way "would be expected to minimize cumulative impacts on vegetation and wildlife." *Id.* at 4-305. The FEIS also found that the total increase in air emissions within the air basin from the LNG Project and other potential LNG projects "would not be significant in comparison to other existing air emission sources," and indeed found that "it is possible that the Weaver's Cove LNG Project could cumulatively *improve* air quality in the region by providing a competitively priced source of natural gas that could replace the more polluting forms of energy that are currently being used." *Id.* at 4-311 (emphasis added).

As shown above, in the FEIS, the Approval Order and the Federal Consistency Certification, the adverse coastal effects of the Project, both separately and cumulatively, are insignificant in magnitude, short-term in effect, or can be minimized through mitigation measures. Accordingly, they are far outweighed by the significant and substantial national benefits of the Project, as identified and discussed above in Section I-A.

C. Element 3 — There Is No Reasonable Alternative to the Project

There is no reasonable alternative available to the Project. For purposes of Element 3, MCZM "bears the burden of identifying, with sufficient specificity, an alternative that is consistent with its coastal management program." *Islander East* at 35. The "Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable polices of the management program." 15 C.F.R. § 930.121(c). Here, MCZM has not proposed any such alternative, *see* 15 C.F.R. § 930.63(b) (permitting state to include alternatives in its consistency objection), let alone one that satisfies Element 3. In any event, for the reasons set forth below, no such reasonable alternative is available.

The Secretary has determined that for an alternative to be "available," it must be one that the project proponent is able to implement, and it must achieve the primary purpose of the project. *Islander East* at 40. Here, the primary purpose of the Project, in conjunction with the Weaver's Cove terminal, is to supply natural gas to the New England market area by developing an import terminal linked to the existing natural gas pipeline system. FEIS at 1-5 to 1-6. In furtherance thereof, the primary purpose of the proposed dredge and fill activities is to facilitate the laying of the Mill River pipelines.

As noted, the MCZM has not identified any alternatives to the Project. In contrast, when preparing the FEIS for the Project, FERC, in cooperation with the USACE and the other FEIS cooperating agencies, "evaluated a number of alternatives to the Weaver's Cove LNG Project to determine if any are reasonable and environmentally preferable to the proposed action." *Id.* at 3-1. FERC considered a number of alternative natural gas infrastructure

proposals, conservation and other sources of energy, system alternatives, and pipeline routing alternatives. Since there was no reasonable alternative to the siting of the terminal at its FERC-approved location, it follows that there is no alternative to connecting the terminal to established pipeline facilities, and it likewise follows that there is no reasonable alternative route to the proposed Mill River pipeline lateral routes.[12] *Id.* at 5-18. Based on the extensive record analysis, the FEIS found no clearly preferable alternative to the proposed action, and that each alternative presented its own unique set of impacts. Approval Order at P 105.

II. THE PROJECT IS IN THE INTEREST OF NATIONAL SECURITY

Alternatively, the Secretary should override MCZM's objection on the ground that the LNG Project is necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.122. A federal license or permit activity is "necessary in the interest of national security" if "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. Under this standard, the Secretary should find that the LNG Project is necessary in the interest of national security because it will enhance domestic energy security by providing increased supplies of natural gas to the New England region and by diversifying natural gas infrastructure in the United States.

As discussed above in Section I-A-3, demand for natural gas in New England is growing. At the same time, the region relies entirely upon external sources of natural gas and has limited storage capacity to meet that growing peak period demand. Governors' Report at 4, 6 (stating that New England's LNG storage capacity can only provide ten days' worth of supply during peak demand periods). Without new natural gas supplies, "[t]he consequences of a

[12] As noted in the FEIS, Mill River agreed to adopt pipeline route variations recommended by FERC Staff. FEIS at 5-18.

shortfall in pipeline capacity or supplies . . . can be dire . . . set[ting] off an extended gas outage that would risk public safety in freezing temperatures." *Id.* at 26. The LNG Project will help prevent a looming supply shortfall by providing a new source of natural gas to meet demand and by increasing storage.

In addition, the LNG Project will diversify the nation's energy infrastructure. At present, most new LNG terminals are being sited in the Gulf of Mexico and therefore are subject to the risks of hurricane activity, including delays to LNG deliveries and damage to infrastructure which could result in the reduction of natural gas transmission to regions such as New England that depend upon such supplies. By locating its LNG infrastructure in New England, the LNG Project could help meet demand and stabilize regional and national gas markets in the event of a major disruption in the Gulf of Mexico. This beneficial impact to national security is underscored by the substantial loss of energy supply following Hurricanes Katrina and Rita. EIA, "Natural Gas Annual 2005 Summary Highlights" (Nov. 16, 2006). In response to these disasters, former Secretary of the Interior Gail A. Norton commented upon the importance of domestic energy supply diversification:

> Hurricanes Katrina and Rita clearly demonstrated we have no margin to mitigate the impacts of natural disasters on our energy supply. [W]e need to increase our energy supply and invest in our energy infrastructure . . . Diversification of our Nation's energy supply is . . . a top priority for our Nation's economic and national security.

Testimony before the Senate Committee on Energy and Natural Resources (Oct. 27, 2005). By helping to achieve this "top priority for our . . . national security," the LNG Project is thus necessary in the interest of national security.

CONCLUSION

For the foregoing reasons, Mill River respectfully asks the Secretary to find and conclude that:

One. The Project — a major coast-dependent energy facility— is consistent with the objectives and purposes of the Act, and as such, MCZM's objection should be overridden.

Two. The Project is necessary in the interest of national security, and as such, MCZM's objection should be overridden.

CONSOLIDATION

Although the applicable facts of the two projects differ since they perform different (but related) functions, require different construction techniques and are operated differently, Weaver's Cove does not object to the consolidation of the instant appeal with the concurrent appeal of Mill River to the extent that consolidation is administratively convenient for purposes of demonstrating that the overall national interest promoted by the Weaver's Cove and Mill River activities is the same.

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Dated: September 26, 2007

CERTIFICATE OF MAILING

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Figure 1-1

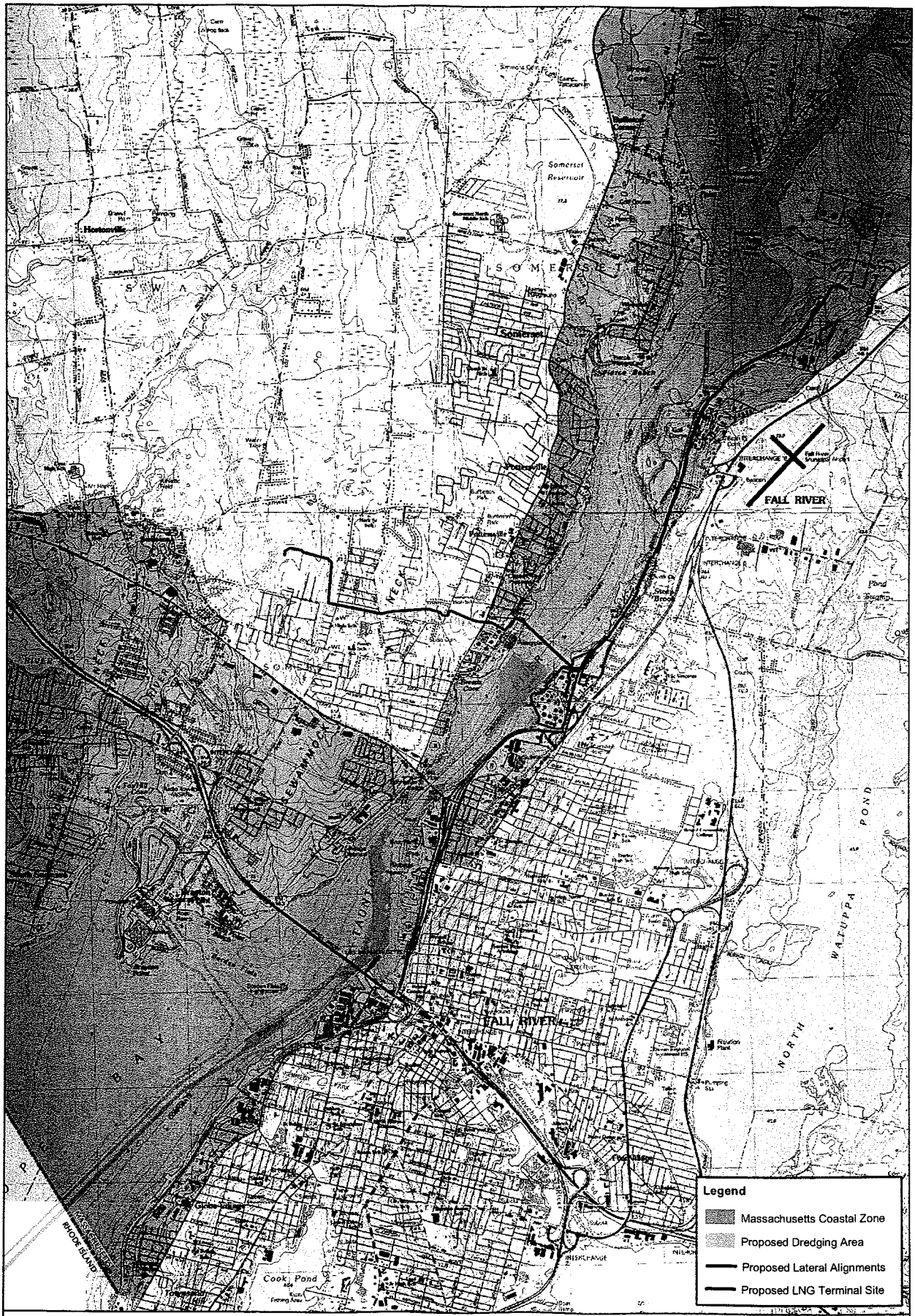

Figure 1-1
Coastal Zone Boundary

Weaver's Cove Energy, LLC
Mill River Pipeline, LLC

USGS Topographic Quadrangles, 1985

Prepared by: Epsilon Associates, Inc

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