

No. \_\_\_\_\_

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**UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF COMMERCE**

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

**vs.**

**Massachusetts Office of  
Coastal Zone Management  
Respondent.**

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**JOINT INITIAL SUPPLEMENTAL BRIEF FOR APPEAL  
OF WEAVER'S COVE ENERGY, LLC AND MILL RIVER PIPELINE, LLC  
UNDER THE COASTAL ZONE MANAGEMENT ACT**

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## INTRODUCTION

The National Oceanic and Atmospheric Administration (“NOAA”), by letter order dated February 22, 2008, has invited Weaver’s Cove Energy, LLC (“Weaver’s Cove”) and Mill River Pipeline, LLC (“Mill River,” and together with Weaver’s Cove, the “Appellants”) to submit a brief advancing all arguments relating to any documents and information admitted to the record to date. Set forth below are Weaver’s Cove’s and Mill River’s arguments pertaining to (a) the Letter of Recommendation (“LOR”) issued by the United States Coast Guard (“USCG”) on October 24, 2007, and the Response to Request for Reconsideration of the Captain of the Port, Southeastern New England (“Reconsideration Response”) issued December 7, 2007; (b) the *amicus* brief of the City of Fall River, Massachusetts (“Fall River”); (c) comment letters submitted to NOAA by the Federal Energy Regulatory Commission (“FERC”), the Department of Energy (“DOE”), two U.S. Congressman and a non-governmental organization; and (d) five (5) letters from the Massachusetts Department of Environmental Protection (“MADEP”) addressing Weaver’s Cove’s and Mill River’s applications for water quality permits and waterways licenses. In sum, none of these additional materials undermines or otherwise rebuts the conclusion set forth in Appellants’ respective Principal Briefs and Reply Briefs that the objection of the Massachusetts Office of Coastal Zone Management (“MCZM”) to Appellants’ proposed activities should be overridden. And, in the case of the comment letters from FERC and the DOE, the federal expert agencies for energy projects, they strongly support the conclusions of Appellants in this proceeding.

### **I. The Letter Of Recommendation Is Of No Relevance To Weaver’s Cove’s Appeal**

By letter dated January 2, 2008, NOAA admitted into the record the LOR issued by the USCG on October 24, 2007 which addresses the suitability of the waterway for the transit

of liquefied natural gas (“LNG”) vessels of the size and frequency proposed by Weaver’s Cove. On February 22, 2008, NOAA admitted into the record the Reconsideration Response of the Captain of the Port, Southeastern New England.<sup>1</sup> Although all information and materials received by the Secretary in an appeal are incorporated into the administrative record, “such information is considered [by the Secretary] *only* as it is relevant to the statutory and regulatory criteria for deciding consistency appeals.” *Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc.* (Oct. 29, 1990) (“*Chevron*”), at ii (emphasis added). *See also Decision and Findings in the Consistency Appeal of Roger W. Fuller* (Oct. 2, 1992), at 5. In the instant case, while the LOR has been incorporated into the consolidated record, it is not “relevant to the statutory and regulatory criteria for deciding” these appeals. This is because the vessel transit activities that are the subject of the LOR are, as discussed below, not activities on review in these appeals.<sup>2</sup> At most, the vessel transit activities underlying the need for an LOR *may* be taken into account in the consideration of cumulative impacts under Element 2. Specifically, under Element 2, the Secretary should at most only consider the underlying vessel transit activities as an “other activity” that is likely to occur in the coastal zone in the future, and whose effects on

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<sup>1</sup> The Reconsideration Response issued by the Captain of the Port affirms the LOR, and thus the arguments made herein that apply to the LOR apply equally to the Reconsideration Response. However, neither the LOR nor the Reconsideration Response constitutes final agency action, and both are subject to two additional levels of appeal within the USCG, *see* 33 C.F.R. § 127.015. On January 11, 2008, Weaver’s Cove exercised its right to avail itself of the next level of USCG review pursuant to the USCG regulations, and filed an appeal of the LOR and the Reconsideration Response with the USCG Commander, First Coast Guard District. *See* Joint Request of Appellants For Supplementation of the Consolidated Record (filed with the Secretary contemporaneously with this Joint Initial Supplemental Brief on March 14, 2008 ). Weaver’s Cove will continue to work with the USCG to obtain its approval for the specific plan reviewed in the LOR and the Reconsideration Response. Weaver’s Cove will also file a revised vessel transit plan which will be subject to a new LOR review by the USCG.

<sup>2</sup> All of the arguments made in this Section I are equally applicable to Mill River’s appeal and are hereby adopted by Mill River, with the exception of the discussion in Section I.C.1 of certain environmental impacts that pertain only to the Weaver’s Cove Project. *See* note 7, *infra*.

the natural coastal resources of the coastal zone may be considered along with the effects of the objected-to activity when evaluating the cumulative adverse effects of the objected-to activity. Even then, as demonstrated below in Section I.C.1., there will be no cumulatively significant effects when the impacts of the “project” before the Secretary on the natural resources of the coastal zone are evaluated together with those of LNG vessel operations.

**A. The LOR Is Simply Not Within The Scope Of These Appeals**

The activities under review in these appeals are those federally-permitted activities proposed by Weaver’s Cove that triggered consistency review and were objected to by MCZM — the dredge and fill activities to be permitted by the U.S. Army Corps of Engineers (“USACE”) and undertaken in conjunction with the siting, construction and operation of LNG terminal facilities authorized by FERC (the “Weaver’s Cove Project”).<sup>3</sup> This is underscored by the limited scope of review set forth by both the Coastal Zone Management Act (“CZMA”) regulatory scheme and the Secretary’s prior decisions. *See, e.g.*, 16 U.S.C. § 1456(c)(3)(A) (Secretary reviews federally permitted activity objected to by the state); 15 C.F.R. §§ 930.120-122 (same); *Decision and Findings in the Consistency Appeal of The Korea Drilling Co.* (Jan. 19, 1989), at 4-5 (“The activity that the [federal] agency is authorized to license or permit [after override] is the one that the [state] reviewed for consistency.”)

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<sup>3</sup> *See* Letter from MCZM to Weaver’s Cove (July 6, 2007) (together, with Letter from MCZM to Mill River (July 6, 2007), “MCZM Objection”) (WCE Br. App. at A-2; MR Br. App. at A-2) (objecting to activities related to FERC authorization and USACE permits only).

In the case of Mill River, the activities under review in this appeal are those federally-permitted activities proposed by Mill River that triggered consistency review and were objected to by MCZM — the activities resulting in the discharge of fill material permitted by the USACE being undertaken in conjunction with the construction and operation of natural gas pipeline facilities authorized by FERC (the “Mill River Project,” and together with the Weaver’s Cove Project, the “Projects”). *See* Letter from MCZM to Weaver’s Cove (July 6, 2007) (MR Br. App. at A-2) (objecting to activities related to FERC authorization and USACE permits only).

While Weaver's Cove is seeking the LOR from the USCG for a vessel transit plan for LNG tankers that will deliver LNG to the terminal, this is a distinctly separately permitted activity from the permitted activities that are subject to the consistency certification on appeal here.<sup>4</sup> *See, e.g.,* 33 C.F.R. Part 127. *See also* FEIS at 1-13 (recognizing that Weaver's Cove must obtain USCG approval). The vessel transit activities under review by the USCG were *not* before MCZM because an LOR is not listed as an activity subject to state consistency review in Massachusetts' regulations, *see* 301 Mass. Code Regs. 21.07 (listing activities subject to Massachusetts federal consistency review), and MCZM did not seek NOAA approval to review it as an unlisted activity. *See* MCZM Objection (objecting to FERC- and USACE- permitted activities only). The Secretary's review is limited to those federally-permitted activities properly reviewable and objected to by the state. *See Decision and Findings in the Consistency Appeal of Long Island Lighting Co.* (Feb. 26, 1988) ("*LILCO*"), at 10 (stating that "[t]he CZMA consistency review net is simply not broad enough to encompass a related project when that project is not separately subject to consistency review"). *See also Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc.* (June 20, 1995) ("*Mobil Pensacola*"), at 10. Therefore, because the vessel transit activities are not federally-permitted activities properly reviewable by and objected to by the state, they are not eligible for review by the Secretary in this appeal.

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<sup>4</sup> Notably, FERC only discusses vessel transit issues in its authorization for the Project pursuant to its role as the lead agency under the National Environmental Policy Act, *see Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070 at P 9 (2005) (WCE Br. App. at A-3). It is the USCG, not FERC, that approves a vessel transit plan for tankers that will deliver LNG to the proposed terminal. *See* 15 U.S.C. § 717b(e)(1); Final Environmental Impact Statement at 1-12 to 1-13 ("*FEIS*") (WCE Br. App. at A-5) (describing USCG's role).

**B. Element 1: The LOR Is Not Relevant To The Determination That The Weaver's Cove Project Furthers The National Interest**

In its Principal Brief, Weaver's Cove demonstrated, by a preponderance of the evidence in the record, that the Weaver's Cove Project furthers the national interest in a significant and substantial manner. WCE Br. at 7-14. The Weaver's Cove Project's contribution to the national interest has been underscored by multiple federal agencies in response to NOAA's request for agency comments. The DOE has commented "[w]ith regard to the first element, DOE believes that the proposed projects further the national interest by promoting energy development." Letter from David R. Hill, General Counsel, Department of Energy, to John Sullivan, General Counsel, Department of Commerce (Nov. 26, 2007), at 2 ("DOE Comment Letter") (attached as WCE Supp. Br. App. at A-1). Similarly, FERC commented to NOAA that:

[T]he project will increase overall regional infrastructure reliability and offer an additional source of outage protection to an area which is rapidly growing and where gas supply is in high demand . . . . Having conducted a wide-ranging analysis of the need for this project and its environmental impacts, the Commission concluded that the project is required in the public interest to develop the nation's energy infrastructure and to increase the reliability and security of the supply of natural gas to New England.

Letter from Mark Robinson, Director of Office of Energy Projects, FERC, to Brett Grosko, Attorney-Advisor, Office of the General Counsel for Ocean Services, NOAA (Nov. 20, 2007), at 2 ("FERC Comment Letter") (attached as WCE Supp. Br. App. at A-2).<sup>5</sup> Indeed, no Federal agency has asserted that the Project will not further the national interest.

The LOR is not relevant to and does not affect the determination that the Weaver's Cove Project furthers the national interest. As demonstrated above, the LOR and the underlying vessel transit activities are not lawfully within the scope of this appeal. *See LILCO* at 12 (rejecting state argument that a related activity outside the scope of the appeal affects the

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<sup>5</sup> The DOE Comment Letter and the FERC Comment Letter are discussed further in Section III.A, *infra*.

national interest furthered by the project). *See also Mobil Pensacola* at 10 (Element 1 analysis limited to whether the *objected-to activity* is consistent with objectives or purposes of CZMA).

**C. Element 2: The Vessel Transit Activities Necessitating An LOR Are Relevant, If At All, Only In Identifying Cumulative Adverse Effects On Natural Resources In The Coastal Zone**

The Secretary's precedents explain that Element 2:

[R]equires that the Secretary identify: 1) the adverse effects of the objected-to activity on the natural resources of the coastal zone from the activity itself, ignoring other activities affecting the coastal zone; 2) the cumulative adverse effects on the natural resources of the coastal zone from the objected-to activity being performed in combination *with other activities affecting the coastal zone*; and 3) the proposed activity's contribution to the national interest.

*Decision and Findings in the Consistency Appeal of Texaco, Inc.* (May 19, 1989) ("*Texaco*"), at 6 (emphasis added). *See also Chevron* at 24. The Secretary then determines whether the project's adverse effects on the natural resources of the coastal zone, considered separately or cumulatively, outweigh the national interest. *Id.*

As discussed above, because the LOR is not an objected-to activity on appeal, under the Secretary's precedents, the vessel transits underlying the need for an LOR cannot be relevant to points 1) and 3), above, and therefore could only be relevant, if at all, to point 2), above — for consideration as an "other activity" when evaluating the cumulative effects of the objected-to activity with other activities in the coastal zone. *See Mobil Pensacola* at 10.

**1. There Will Be No Cumulative Adverse Effects From The Objected-To Activity In Combination With Other Activities**

"Cumulative effects" have been construed in prior Secretary decisions 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.” See *Chevron* at 45 (citing *Decision and Findings in the Consistency Appeal of Gulf Oil Corporation* (Dec. 23, 1985) (“*Gulf Oil*”), at 8). Here, the vessel transits that are the subject of an LOR are “other . . . reasonably foreseeable future activities occurring in the area of . . . the coastal zone,” and therefore may be relevant only when considering the cumulative adverse effects that may possibly occur when the Weaver’s Cove Project is combined with other potential activities in the coastal zone.<sup>6</sup> See *Decision and Findings in the Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc.* (Sept. 2, 1994), at 13 (permitted activity not on appeal relevant to consideration of cumulative effects).

Weaver’s Cove provided evidence in both its Principal Brief and Reply Brief to demonstrate that any effects on the natural resources of the coastal zone from dredging operations and construction of the terminal facilities are mainly temporary. See WCE Br. at 16-23; WCE Reply Br. at 10-14. A temporary activity resulting in adverse effects that would not be present after that activity is completed would not cumulate with activities occurring in the future, but only could cumulate with activities having similar effects which are scheduled to occur during the same time period. See *Chevron* at 45; *Texaco* at 24. In the instant case, because LNG shipping operations that are the subject of an LOR approval by the USCG can only begin once dredging operations and terminal construction are completed, the temporary effects on natural resources from the objected-to dredging activity could not overlap with the effects of LNG vessel transits. For example, while dredging activities will temporarily re-suspend sediment in the water column during the time-period when dredging operations are underway, see WCE Br. at 18-19, these sediments will naturally drop out of the water column over time, and suspended

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<sup>6</sup> Although the vessel transit plan is subject to change, see note 1, *supra*, for purposes of evaluating cumulative adverse effects, the vessel transit plan reviewed in the LOR can be treated as reflecting the maximum adverse effects because the number of vessel transits is not likely to increase from the number included in the LOR.

sediment concentrations will return to background levels within a matter of days (or hours) after the cessation of dredging operations. Therefore, because dredging operations will have concluded months before the commencement of vessel transits to the LNG terminal, and correspondingly, before the occurrence of any turbidity arising from vessel operations, this effect could not possibly result in a cumulative effect to the sediment suspension effect of dredging operations. In sum, to the extent Weaver's Cove Project activities have temporary adverse effects during the construction and development phases of the Project, these adverse effects will not cumulate with adverse effects from vessel transits and therefore under Secretarial precedent are not appropriate for consideration in the Element 2 cumulative effects analysis. *See Gulf Oil* at 10 (no cumulative effects when adverse effects of objected-to activity will occur at a time when they will not contribute to other possible adverse effects from other activities in the coastal zone).

While most of the effects of the Weaver's Cove Project on natural resources of the coastal zone will be temporary, there will be some limited permanent effect on aquatic resources from the Project. For example, dredging activities may affect up to 11 acres of winter flounder spawning habitat and approximately 21 acres of quahog habitat. *See WCE Reply Br.* at 13-14 (identifying record evidence that supports this data). However, these effects, when considered in conjunction with the effects of vessel transits, will not be cumulatively significant. There will be no loss of winter flounder or quahog habitat associated with LNG ships transiting to the LNG terminal, and, accordingly, there will be no cumulative adverse effect on fisheries habitat when the loss of habitat associated with dredging is considered in conjunction with the effects of vessel transits. Furthermore, as Weaver's Cove has demonstrated in its prior briefs, *see WCE Br.* at 21-22; *WCE Reply Br.* at 13-14, the loss of fisheries habitat that may result from

dredging activities will be appropriately and effectively offset by compensatory mitigation measures.

As demonstrated above, while vessel transit activities underlying the need for an LOR, at most, may be relevant to the consideration of cumulative effects as an “other activity” occurring in the coastal zone, there will be no cumulatively significant effects when the Weaver’s Cove Project’s impacts on the natural resources of the coastal zone are evaluated together with those of LNG vessel operations.<sup>7</sup>

**2. The Minimal And Temporary Impacts Of The Objected-To Activity, Considered Separately And Cumulatively, Do Not Outweigh The Activity’s Contribution To The National Interest**

As explained in Section I.B, the submissions by DOE and FERC, and Weaver’s Cove’s prior briefs, the Weaver’s Cove Project contributes to the national interest in a significant and substantial manner. The minimal and temporary impacts of the Weaver’s Cove Project, considered separately and cumulatively, do not outweigh the Project’s contribution to the national interest, as demonstrated by Weaver’s Cove and confirmed by multiple federal agencies. *See* WCE Br. at 7-26 ; WCE Reply Br. at 3-14; FERC Comment Letter at 2. The conclusion that the Weaver’s Cove Project’s contribution to the national interest outweighs any cumulative adverse effects — assuming there were any — would not in any event be altered by considering any adverse effects from vessel transits as “reasonably foreseeable future activities.” As demonstrated above, since there will not be cumulatively significant adverse effects of the

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<sup>7</sup> This conclusion applies equally to Mill River because the temporary and minor effects on natural resources from the objected-to discharge of fill material activity related to pipeline construction, *see* MR Br. at 16-21, could not overlap with the effects of LNG vessels transiting the river. For example, any turbidity from Mill River’s discharge activities related to pipeline construction will also have concluded long before the commencement of vessel transits to the LNG terminal, *see id.* at 16-18 & 20-21 (explaining that re-suspended sediment resulting from pipeline construction will return to pre-construction levels soon after construction is completed), and therefore no cumulative impact could result.

Weaver's Cove Project when combined with "other activities," including vessel transit activities, vessel transit operations do not have any bearing on the underlying conclusion that the proposed, objected-to activity has been shown by record evidence to be in the national interest.

**D. Conclusion**

For the foregoing reasons, and the reasons set forth in Weaver's Cove's Principal Brief and Reply Brief, the inclusion of the LOR in the consolidated record does not alter the conclusion that the MCZM Objection should be overridden because the Weaver's Cove Project is consistent with the objectives of the CZMA or otherwise is necessary in the interest of national security.

**II. Fall River's *Amicus* Brief Does Not Undermine Or Otherwise Rebut Appellants' Demonstration In These Appeals That The Projects Are Consistent With The Objectives Of The CZMA**

Appellants established in their respective Principal and Reply Briefs that (1) their Projects promote the national interest in a significant and substantial manner such that they satisfy Element 1; (2) the national interest promoted by each of their Projects outweighs any adverse coastal effects such that the Projects satisfy Element 2; and (3) MCZM has not proposed any alternatives to the Projects such that Appellants have satisfied Element 3. Fall River has marshaled no *evidence* to the contrary, and Appellants stand by their earlier objection to the admission of Fall River's *amicus* brief on the ground that it fails to contribute anything to the clarification of the issues in this proceeding.<sup>8</sup>

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<sup>8</sup> Appellants renew their earlier-filed objection to the admission of Fall River's *amicus* brief to the record. See Joint Response Of Appellants In Opposition to The Motion Of The City Of Fall River To File An *Amicus Curiae* Brief In Support of Respondent (filed with the Secretary February 15, 2008). Appellants maintain that allowing the late filing of Fall River's brief is both unfair and prejudicial to these proceedings because Fall River waited over three months after NOAA granted Fall River permission to seek leave to file an *amicus* brief and over two months

Instead, the vast majority of Fall River's *amicus* brief is devoted to the argument that the Secretary cannot make the findings to override the MCZM Objection — whether it be with respect to the promotion of the national interest, adverse impacts, or mitigation measures — based on the notion that Appellants have yet to satisfy the conditions in the FERC order approving the Projects, *Weaver's Cove Energy, LLC, et al.*, 112 FERC ¶ 61,070 (2005) (“Approval Order”) (WCE Br. App. at A-3). As set forth below, the Secretary's review is independent of that of FERC, and contemplates the Secretary making a determination before the conditions in the Approval Order are satisfied. Therefore, Fall River's attempts to undermine the Projects' consistency with the objectives of the CZMA by reference to the conditional nature of the Approval Order are completely besides the point and, in any event, are without merit.

Throughout its brief, Fall River also departs from the standards and criteria for the Secretary's findings under Element 1, ignores the evidence in the record, and raises “concerns” with respect to Element 2 that have already been fully addressed by the Appellants in these appeals, all in an attempt to impugn the conclusion established in Appellants' respective Principal and Reply Briefs that the Projects are consistent with the objectives of the CZMA. Fall River's efforts should not succeed.

**A. Element 1: Appellants Have Demonstrated That The Projects Significantly and Substantially Further The National Interest**

As demonstrated in Appellants' respective Principal and Reply Briefs, Appellants' proposed Projects further the national interest in a significant and substantial manner in two independent ways: (a) each Project satisfies the regulatory definition of a major coastal-dependent energy facility, and (b) each Project develops the coastal zone. *See* WCE Br. at 7-14;

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after the parties filed their reply briefs before filing its *amicus* brief. Moreover, Fall River, an avowed political opponent of the Projects, offered no good cause why it was filing its brief so late in these proceedings.

WCE Reply Br. at 3-6; MR Br. at 7-13; MR Reply Br. at 4-6. This national interest demonstration has been further validated by the comment letters from FERC and the DOE included in the record in this proceeding. *See* Section I.B *supra*.

Despite the substantial evidence demonstrating that the Projects satisfy Element 1, Fall River argues that the Projects do not promote the national interest articulated by the CZMA because the conditions in the Approval Order have yet to be satisfied, and because the Projects, in Fall River's opinion, do not constitute "development" of the coastal zone nor do they have national benefits. Fall River's contentions should be rejected because they are based on a flawed understanding of the standard, criteria and procedures for the Secretary's review, as well as the facts of these appeals.

**1. Fall River's Argument That The Projects Are Not Coastal-Dependent Energy Facilities Is Without Merit**

Fall River asserts that Appellants' Projects cannot be considered major coastal-dependent energy facilities, and thus satisfy Element 1, because "[a]bsent proof of compliance with the conditions precedent [in the Approval Order], the FERC certificate cannot be 'effectuated' to develop a major coastal-dependant energy facility." FR Br. at 11. In other words, Fall River suggests that the Projects, despite satisfying the regulatory criteria for "major coastal-dependent energy facilities", *see* WCE Br. 7-9, cannot be found in these appeals to be major coastal-dependent energy facilities for purposes of Element 1 because the conditions of the Approval Order have not yet been satisfied by the Appellants. This claim is erroneous because it is based on a mischaracterization of the nature of the Secretary's review.

Fall River's claim is untenable because it turns the CZMA on its head. By statute, a Secretarial decision on a consistency appeal precedes a fully-effectuated approval order by the relevant federal permitting agency. *See* 16 U.S.C. § 1456(c)(3)(A) ("No license or permit shall

be granted by the Federal agency . . . unless the Secretary . . . finds . . . that the activity is consistent with the objectives of [the CZMA]”). *See also* 15 C.F.R. § 930.130(e)(1). Therefore, it is always the case that the Secretary will be making a decision about whether a proposed project is a “major-coastal dependent energy facility” before an approval order for a project is fully effectuated, and not, as Fall River suggests, after the federal permitting agency has issued a final order with all conditions satisfied. The Secretary’s precedents further confirm that the statutory scheme contemplates that the Secretary will review a proposed project before it has been fully authorized by other permitting agencies. *See, e.g., Decision and Findings in the Consistency Appeal of Jessie W. Taylor* (Dec. 28, 1998), at 17 (Because of the Secretary’s override, “the [USACE] may issue the permit for the activity.”). Fall River’s suggestion that the Secretary cannot determine the Projects to be “major coastal-dependent energy facilities” until conditions in the Approval Order are fully satisfied, should be rejected as it wholly disregards this statutory scheme. Accordingly, the Secretary can and should proceed with finding that Appellants have satisfied Element 1, even though the reviews of other agencies of the Projects have not yet concluded and all of the FERC conditions in the Approval Order have not yet been satisfied.<sup>9</sup>

This conclusion is underscored by the standard of review governing these appeals. Contrary to Fall River’s contention, the Secretary does not sit as an arbiter of whether another agency’s permit conditions imposed pursuant to a different statutory mandate have been satisfied. Instead, here, with respect to Element 1, the Secretary determines on a *de novo* basis whether the Projects constitute “major coastal-dependent energy facilities.” *See, e.g., Chevron,*

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<sup>9</sup> Notably, Fall River’s contention cannot be taken seriously because it would mean that the Secretary would *never* be in a position to find that the Projects satisfy Element 1 as coastal-dependent energy facilities as many of the conditions of the Approval Order can only be satisfied *after* construction has commenced. *See, e.g.,* Condition No. 12 of the Approval Order.

at 5 (stating that “the appeals process is a *de novo* determination”). *See also* CZMA Federal Consistency Regulations, 71 Fed. Reg. 788, 822 (Jan. 5, 2006) (“NOAA 2006 Rule”) (same). The Secretary’s review is conducted under specified criteria, *see* 15 C.F.R. § 930.121, and according to an independent review schedule, *see* 15 C.F.R. § 930.130, both of which are separate and apart from those governing FERC’s review of the Projects pursuant to its mandate under the Natural Gas Act. *See* NOAA 2006 Rule at 819 (recognizing that the Secretary’s review relies on the record before the Secretary and is distinct from FERC’s review under the Natural Gas Act). Therefore, the Secretary should reject Fall River’s attempt to improperly conflate these CZMA appeals with the proceedings before FERC.

Finally, at no point does Fall River contest that Appellants have satisfied the Secretary’s regulatory criteria for “major coastal-dependent energy facilities.” The fact that FERC issued the Approval Order subject to conditions, does not alter the conclusion that the Projects are (1) major, (2) coastal-dependent, and (3) energy facilities, as further defined by the Secretary’s precedent. *See* WCE Br. at 7-9. This conclusion is consistent with and supported by *Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C.* (May 5, 2004) (“*Islander East*”), *set aside on other grounds, Connecticut v. U.S. Department of Commerce*, No. 3:04cv1271, 2007 WL 2349894 (D. Conn. Aug. 15, 2007), in which the Secretary found that a natural gas pipeline authorized by FERC through a conditional order<sup>10</sup> similar to that at issue in these appeals was a “major coastal-dependent energy facility.” *Islander East* at 4-8. Because *Islander East* recognizes that a FERC-approved project that is subject to conditions can satisfy Element 1 as a “major coastal dependent energy facility,” Fall River’s claim that a finding cannot be made here is unavailing.

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<sup>10</sup> *See Islander East Pipeline Co., L.L.C.*, 100 FERC ¶ 61,276, App. (2002) (subjecting the Islander East pipeline project to 55 environmental conditions).

In sum, Fall River's argument that the Secretary cannot find that Appellants' Projects satisfy the Element 1 criteria for major coastal-dependent energy facilities because not all of the conditions in the Approval Order have yet been satisfied, is at odds with how the CZMA appeals process works. Under the CZMA, and as he has done in other cases, the Secretary is fully empowered to make a decision in the instant appeals regarding whether the Projects would significantly and substantially further the national interest if constructed and operating as proposed, regardless of ongoing review by other permitting agencies. Therefore, based upon the record evidence and the Appellants' analysis thereof in their briefs, *see* WCE Br. at 7-14; WCE Reply Br. at 3-6; MR Br. at 7-13; MR Reply Br. at 4-6, and other consolidated record materials such as the letters from FERC and the DOE, the Secretary should reject Fall River's efforts to rewrite the CZMA appeal process and find that Appellants' Projects satisfy Element 1.

**2. Fall River's Argument That The Projects Do Not Develop The Coastal Zone Is Unsupported By The Secretary's Precedent And The Facts Of These Appeals**

Appellants have demonstrated that the Projects significantly and substantially further the national interest in the development of the coastal zone, and such furtherance of this national interest constitutes an independent and sufficient ground on which the Secretary can find that the Projects satisfy Element 1. *See, e.g.*, WCE Br. at 9-14; MR Br. at 9-13. Fall River claims, however, that Appellants' proposed activities do not further the national interest in the development of the coastal zone because "Weaver's Cove is not bringing a new and different industry to Massachusetts" in developing an LNG terminal, FR Br. at 12 n.11. Fall River also claims that the proposed dredging does not further the national interest in the development of the coastal zone because "there is no need [for the proposed dredging] absent this Project" and "[t]here is no national interest implicated by [the proposed dredging] when the purpose is for the

benefit of the Project proponents.”<sup>11</sup> *Id.* at 13. Fall River’s claims fail because they are not supported by authority, precedent or the facts underlying these appeals.

Appellants need not “bring a new and different industry to Massachusetts” in order to satisfy the regulatory criteria for significantly and substantially furthering the national interest in the development of the coastal zone. In *Islander East*, the Secretary found that a proposal for a pipeline constituted “development” of the coastal zone because it “modifies the [Long Island] Sound’s bottom to allow its use for a particular purpose that was previously not available” or, alternatively stated, because it would result in the “changed use of a portion of Long Island Sound.” *Islander East* at 6. In *Connecticut v. U.S. Department of Commerce*, the court found that “development” means “commercial improvement” in the CZMA context. WL at \*6. The proper inquiry under Element 1, then, is not whether the proposed activity would be unique or novel to the state, but whether the activity will use a certain portion of the coastal zone for a “changed use” or will be a “commercial improvement.” Under this standard, Appellants’ Projects constitute “development” of the coastal zone and satisfy Element 1 because the portions of the coastal zone where Appellants propose to construct and operate the Projects are not presently used for natural gas infrastructure, and because the construction and operation of the Projects is plainly “commercial improvement.”

As to the proposed dredging, Fall River does not dispute that dredging constitutes “development” within the context of the CZMA, but claims that such development does not implicate the national interest because the dredging is necessary only to carry out Appellants’ Projects, and will only benefit Appellants. FR Br. at 13. These claims are fallacious for two reasons. First, Fall River’s interpretation of whether this proposed development furthers the

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<sup>11</sup> To the extent Fall River also argues in its brief that the LOR implicates these appeals, that argument is addressed in Section I, *supra*.

national interest is not supported by precedent. Instead, Fall River puts forth its own novel view that development can only be in the national interest for the purposes of Element 1 if the changed uses of the coastal zone proposed by the project proponent are necessitated by some reason *other than* the project. This view should be rejected as it is neither part of the criteria set forth for “development” in *Islander East*, nor is it supported by the definition endorsed in *Connecticut v. U.S. Department of Commerce*. In fact, Fall River fails to identify or otherwise provide any support for its novel interpretation. Second, the proposed dredging will in any event not just benefit Appellants. As explained in Weaver’s Cove’s Principal Brief, the dredging will facilitate the importation of natural gas via marine vessels, which will result in significant and substantial benefits to natural gas consumers and the economy. *See* WCE Br. at 10-14 (discussing, for example, how the Projects will meet growing demand for natural gas in New England).

### **3. Fall River’s Claims Concerning The Public Interest Determination In The Approval Order Are Without Merit**

Fall River also contends that “Weaver’s Cove’s and Mill River’s reliance on the FERC decision as justifying the Project’s importance to the national interest is misplaced.” FR Br. at 12. This argument is not only misleading it is also wrong. While FERC’s public interest determination in the Approval Order constitutes record evidence that the Secretary may well rely upon in determining that the Projects satisfy Element 1,<sup>12</sup> in any event Appellants do not rely on

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<sup>12</sup> *See* NOAA 2006 Rule at 819 (“FERC findings for an interstate pipeline project will undoubtedly be an important factor considered by the Secretary to determine whether a project furthers, in a significant or substantial manner, the national interest as articulated in the CZMA. . . and major energy projects . . . may likely be found to significantly or substantially further the national interest for CZMA appeal purposes.”). The conditional nature of the Approval Order does not, despite Fall River’s claims, FR. Br. at 11, affect the relevance of FERC’s positive public interest findings to the Secretary’s review for two reasons: (1) the Projects can only be built in compliance with the Approval Order, *see Weaver’s Cove Energy, LLC, et al.*, 114 FERC ¶ 61,058 at P 108 (2006) (“Rehearing Order”) (WCE Br. App. at A-4), and (2) the Secretary can assume for the purposes of his analysis that these conditions will be implemented, *see Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (observing that the efficacy of

this determination in their briefs for the conclusion that the Projects satisfy Element 1. Instead, Appellants' briefs rely on factual evidence in the record pertaining to the nature, size, scope and importance of their proposed activities in order to demonstrate how the Projects significantly and substantially further the national interest, both in major coastal-dependent energy facilities, and in the development of the coastal zone. See WCE Br. at 7-14; WCE Reply Br. at 3-6; MR Br. at 7-13; MR Reply Br. at 4-6. Such factual evidence is the type of evidence that the Secretary relies upon in a consistency review: "[The] conclusion [regarding whether Element 1 is satisfied] is made by the Secretary and relies on the factual record developed for an individual appeal." NOAA 2006 Rule at 819.

While Weaver's Cove did not rely on FERC's public interest determination in the Approval Order in its Element 1 analysis, it is nevertheless important to correct certain inaccuracies in Fall River's brief about FERC's public interest determination, because the Approval Order constitutes relevant evidence favoring Appellants' Element 1 arguments. Fall River asserts that the public interest finding in the Approval Order is "limited in impact" because FERC only concluded "that the Project is not inconsistent with the public interest." FR Br. at 12. Fall River's claim is belied by the record. As the Approval Order makes clear, FERC made an *affirmative* public interest determination with respect to Weaver's Cove's project: "[W]e find that approval of the Weaver's Cove LNG terminal facilities *will be consistent* with the public interest."<sup>13</sup> Approval Order at P 51 (emphasis added). And, for Mill River's project, a similar

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mitigation measures is assured when they are included as mandatory conditions in issued permits).

<sup>13</sup> Further undercutting Fall River's position is the fact that this FERC finding is a step further than the Natural Gas Act standard that FERC issue an approval for an LNG terminal proposal "unless it finds that the proposal 'will not be consistent with the public interest.'" Approval Order at P 48 (quoting the Natural Gas Act).

public interest determination was made: “We find . . . that the proposed pipeline laterals *are required* by the public convenience and necessity.” *Id.* at P 55 (emphasis added). Both of these findings were reiterated in FERC’s recent comment letter submitted to NOAA: “[T]he Commission concluded that the project *is required in the public interest* to develop the nation’s energy infrastructure and to increase the reliability and security of the supply of natural gas in New England.” FERC Comment Letter at 2 (emphasis added). Therefore, Fall River is also wrong on the facts concerning FERC’s approval of these Projects as being in the public interest, and these findings can be “given appropriate consideration by the Secretary” in his Element 1 review. *See* NOAA 2006 Rule at 819.

**4. Fall River’s Argument That The Projects Do Not Further The National Interest Because They Only Have Regional Benefits Is Contrary To The Secretary’s Precedents And Other CZMA Authorities**

Appellants have conclusively demonstrated that the Projects significantly *and* substantially further the national interest in both major coastal-dependent energy facilities and in development of the coastal zone because of their nature, economic value, natural gas delivery capacity, and energy reliability and market benefits. *See, e.g.*, WCE Br. at 10-14; MR Br. at 10-13. Fall River attempts to undermine this analysis by alleging that the Projects have “only limited, regional impact,” and thus do not further any national interest recognized by the CZMA in a significant and substantial manner. FR Br. at 13. This contention is meritless because it is flatly contradicted by the Secretary’s precedent and other authorities.

To find that a proposed activity satisfies Element 1, the Secretary must conclude that the activity “contribute[s] to the national achievement of [the national interest] in an important way [*i.e.* is significant] or to a degree that has a value or impact on a national scale [*i.e.* is substantial].” CZMA Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000) (“NOAA 2000 Rule”). The NOAA 2000 Rule further provides that “[a]n

example of an activity that significantly or substantially furthers the national interest is *the siting of energy facilities*” because such facilities have “economic implications *beyond the immediate locality in which they are located.*” NOAA 2000 Rule at 77,150 (emphasis added). In accordance with this standard, the Secretary found in *Islander East* that the proposed natural gas pipeline would significantly *and* substantially further the national interest because of its *regional* economic and energy benefits. *See Islander East* at 4-5. Here, as in *Islander East*, the proposed energy projects significantly and substantially further the national interest articulated in the CZMA because they too will have “economic implications beyond the immediate locality in which they are located,” as well as provide important energy benefits to a broad base of natural gas consumers in New England. *See* NOAA 2000 Rule at 77,150.

**5. Fall River’s Argument That The Secretary Cannot Find For Appellants With Respect To Element 1 Because Safety and Security Conditions In The Approval Order Have Not Yet Been Satisfied Is Unavailing**

Fall River argues that the Secretary cannot find for Appellants with respect to Element 1 because the safety and security conditions in the Approval Order have not been satisfied.<sup>14</sup> FR Br. at 10 n.7, 13-14. This argument fails for three reasons.

First, safety and security issues are not part of the Secretary’s Element 1 review under the CZMA. *See, e.g.,* 16 U.S.C. §§ 1451-1452 (safety issues not part of national interest review under Element 1). These issues instead are before other agencies such as FERC, the USCG and the Department of Transportation who have the statutory mandates and jurisdiction to review safety and security issues pertaining to LNG projects. *See* Rehearing Order at P 111 (describing the roles of the agencies with safety and security jurisdiction over the Projects).

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<sup>14</sup> Fall River also asserts that several of the Approval Order conditions “related to safety and security . . . are unlikely to ever be met.” FR Br. at 10 n.7. Fall River’s statement is wholly unsupported and speculative and therefore should be rejected.

Second, as demonstrated above in Section II.A.1, satisfaction of the conditions to the Approval Order, including those related to safety and security, is not relevant to whether Appellants have satisfied Element 1, because the Secretary's review is not predicated on Appellants possessing all necessary approvals and having satisfied all permit conditions pertaining to their proposed activities.

Third, the Secretary can be assured that the Projects will be constructed and operated safely and securely. FERC, the lead federal permitting agency for the Projects, has concluded that "if the project is constructed and operated in accordance with the conditions attached to [FERC's] approval, the Weaver's Cove project will be safe," Approval Order at P 32. This conclusion was rendered after a "[safety and security review] process [that] was the most extensive effort ever performed prior to Commission authorization of an LNG import project, and will serve as a blueprint for evaluating future proposals." Approval Order at P 3. Reliance on the conditions attached to the Approval Order for the conclusion that the Projects will be constructed and operated safely and securely is appropriate because the Projects can only be built in compliance with the Approval Order, *see* Rehearing Order at P 109, and the Secretary can assume that these conditions will be implemented, *see Nat'l Audubon Soc'y*, 132 F.3d at 17 (observing that the efficacy of mitigation measures is assured when they are included as mandatory conditions in issued permits). Moreover, there is adequate record support for the FERC's conclusion, which was developed in cooperation with the other safety and security agencies, including the USCG. *See, e.g.*, Approval Order at PP 80-99; FEIS at 4-230 to 4-296; Response of Weaver's Cove, et al. to Filing by Mass. Atty. Gen., et al., (filed with FERC June 17, 2005) (WCE SA-3).

**B. Element 2: Appellants Have Established That The National Interests Furthered By The Projects Outweigh Any Adverse Coastal Effects**

Weaver's Cove and Mill River demonstrated in their respective Principal and Reply Briefs, by a preponderance of the evidence, that any limited adverse impacts of the Projects, whether considered separately or cumulatively, will not outweigh the national interests that are furthered by the Projects. WCE Br. at 14-26; WCE Reply Br. at 6-14; MR Br. at 14-23; MR Reply Br. at 6-10. Rather than cite any evidence in the record in support of its claim that Appellants have not shown that any adverse impacts will be minimal, Fall River instead attempts to undermine the conclusion that Appellants have satisfied Element 2 by arguing again that the Approval Order is subject to certain conditions, and by falsely asserting that Appellants rely almost exclusively on the FEIS. Fall River also alleges that there are unanswered questions about water quality impacts, mitigation measures, and time-of-year dredging restrictions. As demonstrated below, none of these contentions undermines or otherwise refutes the conclusion that the national interests furthered by the Project far outweigh any limited adverse coastal effects.

**1. Fall River's Argument That Appellants Cannot Satisfy Element 2 Because Of The Conditional Nature Of The Approval Order Is Without Merit**

As a general matter, Fall River argues that "Weaver's Cove and Mill River have failed to demonstrate compliance with the required conditions [in the Approval Order] in the first instance so they may not rely upon FERC's finding that the Project can be constructed and operated in an environmentally acceptable manner." FR Br. at 21. Again, Fall River argument is based on an improper conflation of FERC's review with the independent *de novo* review to be conducted by the Secretary. The Secretary reviews whether a project's adverse impacts outweigh its furtherance of the national interest based on the factual record before the Secretary, *see, e.g.*, 15 C.F.R. §§ 930.127(i) & 930.130(d) (providing that the Secretary makes his decision

based upon the consolidated record underlying the appeals), and according to a preponderance of the evidence standard, *see, e.g., Decision and Findings in the Consistency Appeal of Chevron, U.S.A., Inc.* (Jan. 8, 1993), at 6. In this case, Weaver's Cove and Mill River have presented substantial science-based evidence, which is completely unchallenged by Fall River, to demonstrate that any adverse impacts will be temporary or limited. WCE Br. at 16-24; WCE Reply Br. at 7-14; MR Br. at 16-21; MR Reply Br. at 8-10. Moreover, the evidence in the record demonstrates that the temporary and limited impacts are far outweighed by the considerable extent to which Projects further the national interest articulated by the CZMA. Therefore, regardless of whether the conditions in the Approval Order have been satisfied, the Projects satisfy Element 2.

**2. Fall River's Contentions About The Adequacy Of Appellants' Evidence Evince An Unfamiliarity With Appellants' Briefs And The Factual Record**

Fall River claims that Appellants rely "almost exclusively on the FERC FEIS", which, according to Fall River, does not fully resolve the environmental issues with respect to dredging. FR Br. at 16. These assertions, however, evince a lack of familiarity with Appellants' briefs and the full extent of the evidence underlying the conclusion that any adverse impacts of the Projects would be minimal and temporary, either standing alone and/or after the institution of mitigation measures. The briefs filed by Appellants in these appeals demonstrate that the record evidence relied on by Weaver's Cove includes not only the FEIS, but also extensive primary scientific studies and data both underlying the FEIS and developed *subsequent* to the FEIS. This was meticulously documented in Appellants' respective Reply Briefs, WCE Reply Br. at 7-9 & chart therein; MR Reply Br. at 8-9 & chart therein. Moreover, taken together, the full extent of the record evidence cited by Appellants sharply refutes Fall River's allegation that Appellants are relying on materials that do not address "unresolved concerns" with Weaver's Cove's

dredging proposal, FR Br. at 16. As discussed in Weaver's Cove's Reply Brief, WCE Reply Br. at 10-14, and demonstrated again below with respect to specific issues related to dredging, *see* Sections II.B.4 & 5 *infra*, the development of Weaver's Cove's dredging and mitigation proposal and of the extensive scientific evidence in support thereof, continued after the issuance of the FEIS, and such proposal has fully addressed the concerns raised with respect to Weaver's Cove's dredging and mitigation plans.

**3. Contrary To Fall River's Assertion, Water Quality Certifications Are Not A Prerequisite For Finding That A Project Satisfies Element 2**

Fall River argues that Appellants cannot show that the water quality impacts from the Projects will be minimal, temporary and sufficiently mitigated, based on the allegation that the Appellants have not satisfied the FERC condition requiring Appellants to "secur[e] the necessary state water quality certifications under the federal Clean Water Act." FR Br. at 16-17. As explained above, this argument is without merit because the Secretary's role in a consistency appeal is not to determine whether another agency's permit conditions have been satisfied. *See* Section II.A.1, *supra*. Instead, the Secretary makes a *de novo* determination based on the factual record before him as to whether the national interests furthered by the proposed project outweigh the project's adverse coastal effects. *See, e.g., Chevron*, at 5 (stating that "the appeals process is a *de novo* determination"). *See also* NOAA 2006 Rule at 822 (same). In the instant appeals, there is more than a preponderance of the evidence in the record that water quality impacts will be minimal, temporary and sufficiently mitigated, thus allowing the Secretary to find that the adverse coastal effects of the Projects are outweighed by the national interests furthered by the Projects. *See, e.g.,* WCE Br. at 18-21 & sources cited therein; MR Br. at 16-18 & sources cited therein; WCE Reply Br. at 7, 9 & sources cited therein; MR Reply Br. at 7. Instead of confronting Appellants' evidence or supplying its own evidence, Fall River resorts to making

misleading and false statements about the purpose of Weaver's Cove's lawsuits filed against MADEP and the Rhode Island Department of Environmental Management ("RIDEM"), the evidentiary record as it pertains to water quality, and the standard of review in these appeals.

First, Fall River contends that Weaver's Cove sued MADEP and RIDEM "to avoid [state water quality certification] review," instead of "complet[ing] that process, and actually confirm[ing] what it claims in this appeal." FR Br. at 16. As Weaver's Cove's complaint and subsequent filings in that suit demonstrate, there was no "process to complete" because those state agencies failed to act within the statutory review period provided for by Section 401 of the Clean Water Act, and thus Weaver's Cove was entitled to rely on the protections for applicants from agency delays set forth in Section 401 of the statute by filing the suit. *See* Petitioner's Brief, *Weaver's Cove Energy, LLC v. R.I. Dep't of Env'tl. Mgmt.*, No. 07-1235 (consolidated with No. 07-1238) (D.C. Cir. June 27, 2007). More importantly, the confirmation of Appellants' arguments in this appeal comes not from other agencies as Fall River contends, but instead will come from the Secretary's *de novo* review of the factual record of these appeals. In other words, Appellants' burden in these appeals is not met by pointing to what lies within the four corners of a permit issued by another agency, but by demonstrating to the Secretary that the facts in the record support its position, which is what Appellants have done.

Next, Fall River attempts to impugn Weaver's Cove's conclusion that the water quality impacts from the Weaver's Cove Project will be minimal, temporary and sufficiently mitigated by stating that "some resource agencies seriously questioned the adequacy of the [water quality] modeling and the results generated." FR Br. at 17. However, Weaver's Cove has already fully addressed this issue in its Reply Brief by identifying evidence that confirms the

adequacy of the modeling and results. *See* WCE Reply Br. at 9 (text and chart) & sources cited therein. Nowhere in its brief does Fall River confront this record evidence with a shred of its own evidence, or show that the stated positions of these other agencies were supported by any evidence, let alone substantial evidence.

Finally, Fall River contends that “[c]ompliance with the federal Clean Water Act and Clean Air Act has always been a requirement for CZMA approval, including Secretarial overrides.” FR Br. at 17. Fall River’s claim is undercut by the very NOAA rule on which Fall River relies for its claim, which rule *eliminated* the requirement that the Secretary determine on appeal whether the proposed activity violates the Clean Water Act or Clean Air Act. *See* NOAA 2000 Rule at 77,151<sup>15</sup> While that rule recognizes that the Secretary will still evaluate any impacts the proposed activity may have on “coastal air and water resources,” and consider the opinions of the agencies charged with implementing those acts, *see* NOAA 2000 Rule at 77,151, it does not in any way alter the obligation of the Secretary to render his own decision on each element of an appeal, including Element 2, on a *de novo* basis based upon the factual record before him, regardless of conclusions drawn by other agencies. Moreover, it does not alter the conclusion drawn from the CZMA and the Secretary’s precedents that the Secretary can override a state objection before other permits for the project are issued. Thus, Fall River’s assertion that the Secretary cannot issue an override absent the project proponent obtaining the necessary Clean Water Act permits is wrong as a matter of law. And, Fall River’s position would

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<sup>15</sup> The Energy Policy Act of 2005, Pub. L. No. 109-58, 19 Stat. 594 (2005) (“EPAAct 2005”) does not change this result, and Fall River’s assertions, FR. Br. at 17-19, about EPAAct 2005 miss the point. While EPAAct 2005 preserves Clean Water Act authority, that authority is exercised in other forums pursuant to different statutory standards. The NOAA 2000 Rule recognizes as much. *See* NOAA 2000 Rule at 77,151 (stating that “an administrative finding that a proposed activity will or will not meet the requirements of the . . . Clean Water Act . . . is fulfilled by other State and Federal agencies”).

improperly serve to award the failure of state agencies to comply with the procedures of the Clean Water Act in order to preclude Secretarial review.

**4. The Existing Time-of-Year Dredging Restrictions, In Combination With Other Dredging Mitigation Measures Committed To By Weaver's Cove, Result In The National Interest Promoted By The Project Outweighing Any Adverse Effects**

Weaver's Cove established in its Principal Brief and Reply Brief that the impacts on fisheries resources from dredging will be temporary or limited, in part because of measures Weaver's Cove has adopted to minimize and mitigate impacts. *See* WCE Br. at 16-22, WCE Reply Br. at 10-14, & sources cited therein. As to time-of-year dredging restrictions, Weaver's Cove has committed to a *complete ban* on dredging between January 15 and July 31 each year. *See* WCE Reply Br. at 10-11; Approval Order, App. B; Supplemental Final Environmental Impact Report § 4.0 (WCE Br. App. at A-13). Dredging and backfilling the Taunton River crossing for the Mill River pipeline lateral will only be conducted between November 1 and January 14, when biological activity is at a low ebb. *See* Section 401 Water Quality Certification Application for Maintenance and Improvement Dredging (updated Nov. 2006), at 8 (WCE Br. App. at A-15). Moreover, Weaver's Cove has committed to a series of dredge equipment restrictions, operating restrictions and sequencing/spacing limitations to minimize the impacts of dredging on aquatic species during the dredging period. *See* WCE Reply Br. at 11. Not only has Weaver's Cove provided extensive evidence in this record to show that no further time-of-year dredging restrictions are warranted, *see* WCE Reply Br. at 11 & sources cited therein, neither Respondent nor Fall River has proffered *any* evidence to show that there will be adverse impacts on fisheries resources during the periods when dredging will take place (let alone evidence establishing that such impacts outweigh the national interest promoted by the Weaver's Cove Project).

Fall River argues that the fact that an agreement has not yet been reached with the Department of Interior (“DOI”) on time-of-year dredging restrictions is of significance to this appeal.<sup>16</sup> FR Br. at 20. Whether an additional time-of-year restriction ultimately may be imposed upon Weaver’s Cove by the DOI is *irrelevant* to the conclusion that the evidence in the record before the Secretary already demonstrates that, taking into consideration the existing time-of-year dredging restriction of January 15 through July 31, the limitation on dredging and backfilling of the Taunton River pipeline crossing to a time period between November 1 and January 14, and the additional mitigation measures to be utilized while dredging, the adverse effects of dredging will be temporary or minimal and far outweighed by the national interest promoted by the Weaver’s Cove Project. *See Decision in the Consistency Appeal of Jessie W. Taylor* (Dec. 28 1998), at 4 (recognizing that the federal permitting agency “may impose more

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<sup>16</sup> The DOI has asserted that it has jurisdiction to impose time-of-year restrictions on dredging because of its authority under the Wild and Scenic Rivers Act (“WSRA”). Weaver’s Cove has filed suit against the DOI challenging this jurisdiction because the segment of the Taunton River on which the Projects are located is not subject to study under the WSRA and, regardless, the authority for the DOI to impose protections on those portions of the Taunton River that are actually under study has lapsed. *See Complaint for Judgment and Relief Pursuant to the Declaratory Judgment Act & the Administrative Procedure, Weaver’s Cove Energy, LLC v. Dep’t of the Interior*, No. 07-1525 (D.D.C. Aug. 27, 2007). Nevertheless, Fall River’s claim that Weaver’s Cove has filed suit against the DOI “[r]ather than attempt compliance, or risk rejection,” FR Br. at 20, is flatly wrong. Despite the DOI agencies not having any jurisdiction to impose time-of-year restrictions on Weaver’s Cove under the WSRA, Weaver’s Cove nevertheless has voluntarily met and communicated with both the National Park Service and the Fish and Wildlife Service on multiple occasions in efforts to reach an agreement on time-of-year dredging restrictions. *See Joint Request of Appellants For Supplementation of the Consolidated Record* (filed with the Secretary contemporaneously with this Joint Initial Supplemental Brief on March 14, 2008). When failure to reach a final agreement on a mitigation package (which the DOI agencies, in Weaver’s Cove’s opinion, did not even have authority to impose) prevented Weaver’s Cove from proceeding with the Weaver’s Cove Project, Weaver’s Cove sought to have the courts declare that the DOI does not in fact have any Wild and Scenic Rivers Act jurisdiction over the Weaver’s Cove Project. It should be noted, however, that Weaver’s Cove remains willing to continue to work with the DOI to try to reach an agreement on workable mitigation measures.

restrictive or protective conditions [than the mitigation measures reviewed by the Secretary in overriding state objection] as it sees fit.”).

**5. The Mitigation Measures Committed To By Weaver’s Cove Result In The National Interest Promoted By The Weaver’s Cove Project Far Outweighing Any Adverse Effects**

Weaver’s Cove established in its Principal and Reply Briefs that the mitigation measures that it has committed to undertake to offset the loss of 0.56 acres of intertidal habitat, the loss of 11 acres of winter flounder spawning habitat, and the impacts to shellfish habitat, further reduce the limited impacts on the coastal zone associated with the Weaver’s Cove Project,<sup>17</sup> providing additional support for the conclusion that the national interest furthered by the Weaver’s Cove Project outweighs any adverse effects. WCE Br. at 21-22; WCE Reply Br. at 13-14. Rather than setting forth any evidence to challenge this conclusion, Fall River instead argues that Weaver’s Cove has failed to satisfy the conditions in the Approval Order regarding approval by other agencies of Weaver’s Cove’s mitigation plans. FR Br. at 19. In support of its claim, Fall River points to a summary of comments submitted by the U.S. Environmental Protection Agency (“EPA”) and the National Marine Fisheries Service (“NMFS”) to the USACE on Weaver’s Cove’s dredging application and leaps to the conclusion from this summary that the resource agencies have “rejected” Weaver’s Cove’s proposed mitigation plans because they were “inadequate.” See FR Br. at 19.

First, Fall River’s contentions rely on a false legal premise. Fall River argues, for example, that the Secretary cannot override the MCZM Objection until the conditions in the Approval Order requiring agency approval of a quahog mitigation plan *prior to dredging*, and a USACE-approved mitigation plan *prior to construction*, have been met. Whether a condition in the Approval Order has yet to be satisfied has no bearing on the fact that the uncontroverted

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<sup>17</sup> Fall River does not challenge any of the mitigation measures proposed by Mill River.

evidence before the Secretary shows that the adverse impacts associated with the Weaver's Cove Project are minimal and will be further minimized through the implementation of mitigation measures, *see* WCE Br. at 16-23; WCE Reply Br. at 10-14; MR Br. at 17-21; MR Reply Br. at 9. Fall River's claim is also wholly at odds with the Secretary's consistency review process. As explained above, the Secretary conducts his *de novo* review based on the record before him, and not on whether the conditions of another permitting agency have been satisfied. *See* Section II.A.1, *supra*.

Second, Fall River's reliance on a summary of the comments that had been submitted by certain resource agencies to the USACE misses the mark entirely. Fall River fails to advise the Secretary or consider that Weaver's Cove's filed a response to those comments.<sup>18</sup> While it cannot be discerned from Fall River's brief, the fact is that in the same document cited by Fall River, Weaver's Cove *addressed* many of the concerns identified by those resource agencies. For example, Weaver's Cove explained in its response to these comments that no fill would be placed in subtidal areas along the shoreline of the terminal site, and that compensatory mitigation would be provided to fully offset the approximately 0.56 acres of intertidal habitat impacts. Fed. Const. Cert, App. G, Responses to USACE Public Notice Comment Letters (May 17, 2006), Att. B, Table 1-2, MIT-3 (WCE SA-6). Moreover, Weaver's Cove prepared a revised

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<sup>18</sup> Fall River also ignores the fact that the comments provided by the EPA were in response to an *earlier* version of Weaver's Cove's shellfish mitigation plan which proposed financial assistance rather than the plan that was before the USACE. In this regard, Fall River fails to advise the Secretary that the previously proposed financial assistance plan was revised to a performance-based shellfish mitigation plan that would be undertaken by Weaver's Cove. Under this revised plan, Weaver's Cove would be responsible for implementing the proposed shellfish mitigation plan and demonstrating compliance with the success criteria described therein. Notably, the success criteria were developed in response to specific feedback from the resource agencies regarding how the success of Weaver's Cove shellfish mitigation plan would be measured. *See* Mitigation Plan discussed *infra* for a discussion of the performance-based shellfish mitigation plan.

mitigation plan subsequent to the issuance of the resource agency comments cited by Fall River, which mitigation plan is intended to be responsive to the concerns of these agencies. *See* “Proposed Balanced Dredging Mitigation Plan” (Oct. 25, 2006), Fed. Consist. Cert, App. F at 10 (WCE Br. App. at A-1) (describing, for example, Weaver’s Cove’s commitment to a winter flounder mitigation program instead of the “in-lieu” trust fund originally proposed) (“Mitigation Plan”). Notably, the Mitigation Plan has *not* been rejected by the EPA or NMFS.

In considering whether the Weaver’s Cove Project has satisfied Element 2 for purposes of the Secretary’s *de novo* review, the Secretary may rely on the FERC-mandated mitigation measures in the Approval Order. *See* Rehearing Order at P 109; *see also Nat’l Audubon Soc’y*, 132 F.3d at 17 (observing that the efficacy of mitigation measures is assured when they are included as mandatory conditions in issued permits). In addition, the Secretary may rely on the commitment of Weaver’s Cove to undertake the mitigation measures in the Mitigation Plan. *See Decision and Findings in the Consistency Appeal of The Korea Drilling Company, Ltd.* (Jan. 19, 1989), at 5 (stating that the Secretary will rely on commitments of project proponent on appeal in analyzing project effects). In other words, for purposes of Element 2, the “activity” or “project” being reviewed by the Secretary is the dredging activities that have been proposed by Weaver’s Cove (including the January 15 to July 31 time-of-year dredging restriction and other measures to reduce impacts during the dredging period, as described in Weaver’s Cove’s Reply Brief, WCE Reply Br. at 10-12), *in combination with* the Mitigation Plan.

Finally, the substantial evidence in the record demonstrates that the impacts of the Weaver’s Cove Project activities on intertidal habitat, as mitigated through the creation and restoration of intertidal habitat on the terminal site (adjacent to the impact area), and the impacts

of dredging, as mitigated in accordance with the Mitigation Plan, will not outweigh the furtherance of the national interest by the Weaver's Cove Project. Neither Fall River nor Respondent has pointed to *any* record evidence that contradicts the conclusion that any limited adverse impacts associated with the Project have been minimized through proposed mitigation measures, such that these potential impacts are outweighed by the furtherance of the national interest:

*Intertidal Habitat*

As Weaver's Cove explained in its Principal Brief, it has developed, in consultation with the USACE and MADEP, a mitigation plan to compensate for the loss of 0.56 acres of intertidal habitat at the terminal site that will be permanently filled by shoreline site development activities. *See* WCE Br. at 23. To mitigate impacts, Weaver's Cove will restore the area of an existing wetland that is currently degraded by common reed (*Phragmites australis*) to create approximately 0.7 acres of new salt marsh/intertidal habitat. *See* WCE Br. at 22-23; Fed. Consist. Cert., App. A at 16; Response to Comments on Federal Consistency Certification, Att. C (Water Quality Certification for Weaver's Cove Terminal Construction at 1 (Jan. 30, 2007)) (WCE Br. App. at A-14). In addition, Weaver's Cove will create approximately 0.25 acres of new subtidal habitat at the terminal site to create more open-water shallow subtidal habitat with substrate type, grain size distribution, and benthic flora and fauna comparable to that preferred by winter flounder for spawning. *Id.* Weaver's Cove will also voluntarily create approximately 0.18 acres of freshwater wetlands at the terminal site hydrologically connected to an adjacent wetland along the shore of the Taunton River. *Id.*

Fall River has not provided any evidence to demonstrate that the 0.95 acres of restored salt marsh/intertidal habitat and open-water shallow subtidal habitat, combined with the 0.18 acres of freshwater wetlands, is not appropriately compensatory for the loss of 0.56 acres of

intertidal habitat. Moreover, contrary to Fall River's claims that these mitigation measures have been rejected by the resource agencies, MADEP has concluded that it "is satisfied that adequate measures have been taken to avoid, minimize and mitigate for the wetland impacts." *See* Response to Comments on Federal Consistency Certification, Att. C (Water Quality Certification for Weaver's Cove Terminal Construction at 2).

*Winter Flounder Spawning Habitat and Shellfish Habitat*

As Weaver's Cove explained in its Reply Brief, Weaver's Cove has committed to offsetting the potential loss of 11 acres of winter flounder habitat. WCE Reply Br. at 13. *See also* Mitigation Plan at 9-10. The record evidence establishes the effectiveness of such mitigation measures, *see* WCE Reply Br. at 13-15 & sources cited therein, and neither Fall River nor Respondent has offered any evidence to suggest that the proposed mitigation measures will not minimize any adverse impacts of dredging such that they are outweighed by the national interest promoted by the Weaver's Cove Project.

Further, the record evidence demonstrates that the mitigation program for impacts to shellfish habitat will be appropriately compensatory. *See* WCE Reply Br. at 14 & sources cited therein; *see also* Mitigation Plan at 7-9. Fall River simply has provided no record evidence whatsoever to suggest that there will be any adverse impacts on shellfish habitat, let alone any such impacts that have not been mitigated.

**C. Element 3: MCZM Cannot Prevail On Element 3 Because It Has Not Met Its Burden of Identifying An Alternative That Is Consistent with the Massachusetts Coastal Zone Management Program**

MCZM cannot prevail on Element 3 because, as Fall River acknowledges, FR Br. at 22, MCZM has not met its burden "of identifying, with sufficient specificity, an alternative that is consistent with its coastal management program." *Islander East* at 35. While Fall River tries to overcome MCZM's failure to meet its burden by suggesting several possible alternatives

that Fall River believes should have been considered, FR Br. at 22, its effort fails because it is contrary to NOAA's regulations: "[t]he 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 policies of the management program." 15 C.F.R. § 930.121(c) (emphasis added). Only if MCZM "meets that burden, [does] the burden then shift[] to [Weaver's Cove and Mill River] to show that the alternative is either unavailable or unreasonable." *Islander East* at 35. Here, because MCZM has not made a finding of consistency for an alternative, MCZM (let alone Fall River) cannot prevail on Element 3. NOAA 2006 Rule at 820. *See also Decision and Findings in the Consistency Appeal of Va. Elec. & Power Co.* (May 19, 1994), at 38.

Fall River attempts to attribute the lack of identification of an alternative by MCZM to the "impatience" of Weaver's Cove. FR Br. at 22. This claim demonstrates that Fall River either ignored or is unfamiliar with the record before the Secretary and the facts of this case. As the record before the Secretary amply demonstrates, Appellants have been working diligently and cooperatively with MCZM since May of 2003, by meeting with MCZM staff, submitting informational drafts and otherwise keeping MCZM staff apprised of the status of the Projects. Consistent with MCZM's request that Appellants not file their consistency certifications until the Secretary of the Massachusetts Executive Office of Environmental Affairs issued its certificate finding that the Projects comply with the Massachusetts Environmental Policy Act ("MEPA Certificate"), Appellants voluntarily waited until January of 2007 to file their formal consistency certifications. On January 10, 2007, MCZM found that the Appellants had submitted the requisite materials necessary for MCZM to commence its consistency review.

*See* Letter from Truman Henson, Project Review Coordinator, MCZM, to Michael D. Howard, Consultant to Weaver's Cove Energy, LLC (Jan. 10, 2007) (WCE Br. App. at A-7).

Once MCZM determined that Appellants' certifications were complete, it had, under federal law, six months to make its consistency determination, after which Appellants had a statutory right to appeal to the Secretary. 16 U.S.C. § 1456(c)(3)(A). Nevertheless, when MCZM suggested a stay to extend its review, Appellants were initially receptive to the stay in order to secure the state permits to be issued by MADEP that MCZM claimed were necessary for it to issue a concurrence. However, when MADEP, MCZM's sister agency, after advising Appellants and MCZM that the issuance of the permits was imminent, abruptly stopped processing state permits *indefinitely*, *see* Letter from Arleen O'Donnell, Commissioner, Massachusetts Department of Environmental Protection, to Ted Gehrig, President and Chief Operating Officer, Weaver's Cove Energy, LLC (June 4, 2007) (WCE Br. App. at A-9), the reason for voluntarily agreeing to a stay evaporated. By any objective standard, Appellants' pursuit of their statutory right to an appeal after working cooperatively with MCZM for four years — six months of which occurred after MCZM had determined it had the materials sufficient to commence its consistency review — does not amount to "impatience."

#### **D. Conclusion**

For the foregoing reasons, and the reasons set forth in Appellants' Principal Briefs and Reply Briefs, Fall River's *amicus* brief does not undermine or otherwise rebut Appellants' demonstration made in these appeals that the Projects are consistent with the objectives of the CZMA. The MCZM Objection should therefore be overridden.

**III. The Additional Documents Included In The Record Either Support Or Do Not Alter The Conclusion That The MCZM Objection Should Be Overridden**

**A. The FERC Comment Letter and the DOE Comment Letter Underscore That The Projects Further The National In A Significant And Substantial Manner**

The FERC Comment Letter and the DOE Comment Letter provide additional support that the Projects satisfy Element 1 by furthering the national interest in a significant and substantial manner. For purposes of the Secretary's Element 1 analysis, the benefits of a project "are appropriately considered in determining the degree to which the [p]roject furthers the national interest in coastal zone development." *Islander East* at 6. As the Appellants demonstrated in their briefs, the ability of the Projects to meet growing natural gas demand and enhance the reliability of energy supplies furthers the national interest in a significant and substantial manner. *See* WCE Br. at 12-13; MR Br. 12-13. Both the FERC Comment Letter and the DOE Comment Letter confirm the numerous ways in which the Projects satisfy Element 1.

FERC notes that, "[b]ased on its review," it has concluded that:

[T]he project is in the public interest to meet the growing demand for natural gas in the New England region. The project will contribute to New England's energy security, a particularly vital national consideration at the present time in light of what we have learned from the energy infrastructure disruptions related to hurricanes Katrina and Rita. The Weaver's Cove LNG Project will also increase the diversity of available natural gas transportation options and provide access to new energy supply sources. Moreover, the project will increase overall regional infrastructure reliability and offer an additional source of outage protection to an area which is rapidly growing and where gas supply is in high demand.

FERC Comment Letter at 2.

Similarly, the DOE has commented that:

With regard to the first element, DOE believes the proposed projects further the national interest by promoting energy development. Natural gas represents about a quarter of all energy consumed in the United States . . . Giving American consumers greater access to natural gas will go a long way to helping secure our nation's energy position and to creating more stable energy environments.

DOE Comment Letter at 2.

In addition, the DOE notes several factual items that are relevant for consideration in the analysis that the Projects' furtherance of the national interests outweighs any adverse effects. Importantly, the DOE states that the LOR does not present an adverse effect for purposes of the Secretary's Element 2 analysis.

The comments of FERC and the DOE, as the federal expert agencies for energy projects, are particularly relevant to the Secretary's review, as the "Secretary gives deference to the views of interested Federal agencies when commenting in their areas of expertise." 15 C.F.R. § 930.127(e)(1).

**B. The Letter from Congressman Barney Frank and Congressman James P. McGovern Does Not Undermine Or Otherwise Rebut The Conclusion That The MCZM Objection Should Be Overridden**

By letter dated November 9, 2007, Congressmen Barney Frank and James P. McGovern submitted a comment letter to the Secretary stating their belief that "these companies should not be rewarded for their failure to comply with the law, and their outright refusal to accept an extension offered from the state." *See* Letter from Congressman Barney Frank and Congressman James P. McGovern, to The Honorable Carlos M. Gutierrez, Secretary of Commerce, Department of Commerce (Nov. 9, 2007), at 2 (attached as WCE Supp. Br. App. at A-3). These allegations of illegality on the part of Appellants are patently false. As explained above, on January 10, 2007, MCZM found that Appellants had submitted the requisite materials for MCZM to commence its consistency review. *See, e.g.*, WCE Br. App. at A-7. On July 6, 2007, MCZM objected to Appellants' consistency certifications. At that point, Appellants had a statutory *right* to appeal to the Secretary. Appellants did not agree to a voluntary extension of the MCZM review period because the state agencies on which MCZM was waiting to issue state permits had *stayed indefinitely* their review of the state permits for the Projects, *see* WCE Br.

App. at A-9, thereby nullifying any reason for an extension of the MCZM review period. At no point have Appellants, despite the unfounded claims of the Congressmen, failed to comply with the law. The attempt in this letter to portray the Appellants' exercise of statutory protections against agency delay provided for in the CZMA as being improper should be rejected.

**C. The NGO Letter Does Not Undermine Or Otherwise Rebut The Conclusion That The MCZM Objection Should Be Overridden**

The non-governmental organization (“NGO”) Coalition for Responsible Siting of LNG Facilities argues that as a result of other proposals for other natural gas projects, the Projects are “no longer critical to meeting New England’s future gas needs.” Letter from Joe Carvalho, President, Coalition for Responsible Siting of LNG Facilities, to Brett Grosko, Attorney, Office of the General Counsel for Ocean Services (December 1, 2007) (attached as WCE Supp. Br. App. at A-4). This opinion, however, is not only unqualified and unsupported, it is also incorrect. As discussed above, FERC and the DOE, which are expert agencies for energy projects, recently reaffirmed the importance of the Projects to meeting demand for natural gas, both nationally and in New England, notwithstanding these other facilities referred to by the NGO. *See, e.g.*, FERC Comment Letter at 2 (stating that “[t]he project will contribute to New England’s energy security, a particularly vital presentation at the present time . . .”). In sum, this NGO letter offers nothing of relevance to the specific legal and factual issues in these appeals that will be decided by the Secretary pursuant to the CZMA.

**D. The MADEP Documents Do Not Undermine Or Otherwise Rebut The Conclusion That The MCZM Objection Should Be Overridden**

On December 14, 2007, MADEP issued five (5) letters to Appellants: one (1) letter approving Mill River’s Water Quality Certification application for backfilling the pipeline (MADEP had previously issued a Water Quality Certificate for installation of the pipeline on January 30, 2007); one (1) letter providing Mill River with a state Chapter 91 Written

Determination; and three (3) letters identifying deficiencies in Weaver's Cove Water Quality Certification application for dredging and state Chapter 91 license applications for dredging and terminal construction. These letters do not undermine or otherwise rebut Appellants' conclusion that the Secretary should override the MCZM Objection. As explained above, the Secretary's role in a consistency appeal is not to determine whether the appellant has secured all necessary permits for its project. *See* Section II.A.1, *supra*. Instead, the Secretary makes a *de novo* determination based on the factual record before him on whether the national interest furthered by the proposed project outweighs the project's adverse coastal effects. *See, e.g., Chevron*, at 5 (stating that "the appeals process is a *de novo* determination"). *See also* NOAA 2006 Rule at 822 (same). In the instant appeals, Appellants have identified more than a preponderance of the evidence demonstrating that the national interests furthered by the Projects far outweigh any adverse coastal effects. Therefore, because these letters do not provide any factual evidence contrary to the evidence identified by Appellants in support of their appeals, they do not undermine or otherwise rebut the conclusion that the Secretary should find for Appellants.

### **CONCLUSION**

For the foregoing reasons and those stated in their Principal Briefs and Reply Briefs, Appellants respectfully request that the Secretary override the MCZM Objection.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "B.F. Kiely", written over a horizontal line.

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Dated: March 14, 2008

## CERTIFICATE OF SERVICE

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

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