



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

FEB 3 2003

Neil L. Levy
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Re: Village of Croton-on-Hudson Request for Permission to File an *Amicus* Reply Brief in the Consistency Appeal of Millennium Pipeline Company, L.P.

Dear Mess:

This responds to your letter dated December 31, 2002, on behalf of the Village of Croton-on-Hudson (Village), requesting permission to file an *amicus* reply brief in the consistency appeal of Millennium Pipeline Company, L.P.¹ For reasons explained below, the Village's request is denied.

The Village seeks to file an *amicus* reply brief for several stated reasons summarized as follows: (a) to review and respond to comments and information received during the public comment period, including comments from federal agencies; (b) to review and provide information concerning new data and issues Millennium may submit in its reply brief; and (c) to inform the Secretary on new information concerning the Village's water supply.² The Village asserts that the basis for an earlier decision granting the Village *amicus* status to file an initial brief – the Village's unique access to information³ – warrants a similar finding for its new request.

On January 6, 2003, we received comments opposing the Village's request from Millennium Pipeline Company, L.P. (Millennium or Appellant). The New York Department of State (State or New York) did not comment on the Village's request to file an *amicus* reply brief.

¹ On January 2, 2003, the National Oceanic and Atmospheric Administration (NOAA) provided a preliminary response to the Village, advising that a decision on its petition may be issued after the close of the public comment period on January 8, 2003. See letter from Karl D. Gleaves, NOAA, U.S. Department of Commerce to Neil L. Levy and Christian C. Semonsen, Kirkland and Ellis (representing the Village), dated January 2, 2003.

² Letter from Neil L. Levy and Christian C. Semonsen, Kirkland and Ellis (representing the Village) to Karl Gleaves, NOAA, U.S. Department of Commerce, dated December 31, 2002, at 2.

³ Letter from James R. Walpole, NOAA, U.S. Department of Commerce, to Neil L. Levy and Christian C. Semonsen, Kirkland and Ellis (representing the Village) dated July 17, 2002, at 3.



Opposing the petition,⁴ Millennium argues that the Village has had numerous opportunities to comment, during both the public comment period and via an earlier filed *amicus* brief. Millennium asserts that the Village's request to respond to Appellant's reply brief is a means of bootstrapping its *amicus* status into the full rights of a party, a request previously denied by NOAA. Millennium also is concerned that, at this point, an *amicus* brief would contribute little to the proceeding and would only result in delay and redundant comments. Drawing parallels to appellate procedure, Millennium notes that the filing of a reply brief by an *amicus* is generally not permitted.

NOAA, on behalf of the Secretary, reviewed the Village's request in the light of various factors including: (1) its earlier request for *amicus* status; (2) the opportunity to file additional comments prior to the expiration of a 17-week public comment period;⁵ (3) the significance and relevance of the issues to be addressed by the *amicus* brief; and (4) the degree to which the Village's information or perspective is unique and beyond what the parties can provide. These factors are considered in the context of the practice to limit the filing of reply briefs by an *amicus*.⁶ As a general matter, absent compelling circumstances, the Secretary will not grant permission to file an *amicus* brief at this stage of a proceeding.

The grant of *amicus* status in the Coastal Zone Management Act appeals process is a wholly discretionary authority used to facilitate obtaining information for the administrative record on issues germane to an appeal. In receiving *amicus* status last June, the Village was allowed to file a brief and supplementary data and information.⁷ The Village has also had the opportunity to file comments and materials — as part of the public comment process⁸ — through January 8, 2003.⁹

⁴ See generally, letter from Frederic G. Berner, Jr., Sidley Austin Brown & Wood (representing Millennium) to Karl D. Gleaves, NOAA, U.S. Department of Commerce, dated January 6, 2003.

⁵ The public comment period extended from September 9, 2002 through December 2, 2002, and was reopened on December 4, 2002 through January 8, 2003.

⁶ See, e.g., Rule 29(f) of the Federal Rules of Appellate Procedure, which prohibits the filing of a reply brief by an *amicus*, even with the consent of all parties, except by the court's permission.

⁷ On October 23, 2002, the Village filed, in a timely fashion, an 82-page *amicus* brief accompanied by a feasibility evaluation of alternative routes for the pipeline prepared by an engineering firm.

⁸ Entities may provide the same information as is typically submitted by an *amicus* through the public comment process. Information submitted as a public comment, whether in the form of a legal brief or otherwise, is given equal weight to submissions from *amici*. Letter from James R. Walpole, NOAA, Department of Commerce to Justin Bloom, RiverKeeper, Inc., dated October 4, 2002, at 2. See also, letter from James R. Walpole, NOAA, Department of Commerce to Mark P. McIntyre, the City of New York, dated October 4, 2002, at 2.

⁹ On January 8, 2003, perhaps in anticipation that a decision on its petition for *amicus* status would not be reached until after the close of the public comment period, the Village submitted comments and materials primarily addressing matters involving the Village wellfield and water supply.

As an initial matter, the subjects which the Village intends to address in its reply brief appear to be relevant and of significance to the Secretary's decision. With respect to comments submitted during the public comment period, the Village offers no explanation for its decision not to respond to at least a portion of these comments prior to the close of the comment period. Comments and other materials entered into the record for this appeal have been posted regularly at a website to facilitate the participation of interested entities, such as the Village. Given the extended public comment period and the lack of a compelling justification for what amounts to a request for additional time to review and comment on the record, this portion of the Village's request is denied.

Similarly, the Village has not provided a sufficient basis to justify the submission, after the close of the public comment period, of new information and comments concerning the Village water supply. Since the Village has had an opportunity to submit information on this topic, granting *amicus* status for new information concerning the water supply would, in large measure, provide additional time for the Village to develop its submission,¹⁰ which falls outside the primary purpose of a grant of *amicus* status. Therefore, the Village's petition, with respect to providing water supply information, is denied.

The Village is also interested in responding to new data and issues first raised by Millennium at the reply brief stage of the appeal. Recognizing that the Village is not a party to this proceeding, its views "do not carry the weight of a state agency charged with the implementation of New York's coastal program as approved by NOAA."¹¹ The Village essentially appears interested in offering a defense of its earlier brief by rebutting new assertions that may be offered by Millennium. In this regard, the Village's request is more closely aligned with that of a party than an *amicus*. As noted previously, the Village's petition for intervention as a party was denied¹² and the Village should not, through indirect means, be allowed to cloak itself with such rights. In addition, it is not clear that the Village would be better positioned than the State to assist the Secretary in understanding new issues that may be raised by Millennium – to a degree that would warrant granting the Village's request. Therefore, the current request of the Village to respond to new issues that may be raised by Millennium, is denied.

For the reasons explained above, and because at this stage of the proceeding, absent compelling circumstances, a petition for filing an *amicus* brief will generally fail, your request is denied.

¹⁰ The Village's January 8, 2003 submission regarding the wellfield and water supply may make this aspect of the request moot. The Village's comments suggest that an *amicus* reply brief would be limited to "provid[ing] a comprehensive response to certain federal agency and public comments, as well to any new data that may be submitted by Millennium. . . ." Supplemental Comments of the Villages of Croton-on-Hudson and Briarcliff Manor, New York for the Consistency Appeal of Millennium Pipeline Company, L.P., dated January 8, 2003, at 1 note 1.

¹¹ Walpole letter, *supra* note 3, at 3.

¹² See generally Walpole letter, *supra* note 3.

Please be advised that this action does not reflect a judgment as to the relevance of the Village's earlier submission nor the weight it will be accorded by the Secretary in making his decision in this appeal.

Sincerely,



James R. Walpole
General Counsel

cc: Fre
Attorney for Millennium

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Gene
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