KIRKLAND & ELLIS
PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

Neil L. Levy
To Call Writer Directly:
(202) 879-5116
neil_levy@dc.kirkland.com

Facsimile:
202 879-5200

June 21, 2002

Karl Gleaves
Assistant General Counsel for Ocean Services
1305 East-West Highway
SSMC 4, Room 6111
Silver Spring, MD 20910

Re: Procedural Requests of the Village of Croton-on-Hudson with Respect to the Appeal of Millennium Pipeline Company, L.P. from the New York State Department of State CZMA Objection

Dear Mr. Gleaves:

On behalf of the Village of Croton-on-Hudson, New York ("Village"), we are writing with regard to the June 7, 2002 appeal of the Millennium Pipeline Company, L.P. ("Millennium") to the Secretary of Commerce ("Secretary") from the May 9, 2002 objection by the New York State Department of State ("NYSDOS")[1] pursuant to the Coastal Zone Management Act ("CZMA").[2] For the reasons set forth below, the Village respectfully requests that the Secretary: (a) recognize the Village as a party co-defendant, intervenor, or special participant in this proceeding in light of the Village's unique position with respect to, and particularized knowledge of, matters arising in the appeal; (b) provide for full due process, including opportunities for public comment, on all procedural and substantive aspects of the appeal; and (c) hold a public hearing on the appeal in Croton-on-Hudson, New York, as the most appropriate local area concerned.

1. Recognize The Village of Croton-on-Hudson As A Party Co-Defendant Or Intervenor In This Proceeding.

The Village requests the Secretary to recognize the Village in this proceeding as a party co-defendant or intervenor, or to accord the Village special participant status or other such recognition as the Secretary deems appropriate to allow the Village to fully participate in all

---

1 Letter From George R. Stafford, NYSDOS, to Thomas S. West, LeBoeuf, Lamb, *et al.* (representing Millennium), dated May 9, 2002 (hereinafter, "NYSDOS Decision").

2 16 U.S.C.§§ 1451-1465 (2002).

appeal proceedings. Providing such status to the Village is consistent with past practice of the Secretary[3] and appropriate in light of the Village's unique position with respect to, and particularized knowledge of, the factual and legal issues on appeal. The Village is a political subdivision of the State of New York, and is located entirely within the State's designated coastal zone for CZMA purposes. The Village adopted a Local Waterfront Revitalization Program ("LWRP") in 1992[4] and enacted a variety of Village laws that serve as the "enforceable policies"[5] designed to implement the CZMA at the local level. It was the Village's LWRP and a number of Village laws that formed the basis of many of the inconsistencies identified by NYSDOS in its objection to the Millennium project. The NYSDOS Decision specifically cites the Village's LWRP and local laws in its objections with respect to the proposed pipeline's impacts on the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, the Village's well field and water supply, the Jane E. Lytle Memorial Arboretum, and the Croton River.[6] Never before has a state objection subject to appeal before the Secretary cited so extensively to inconsistencies arising under an LWRP.

Because the Village is the governmental entity primarily responsible for the implementation of and interpretation of issues arising under the LWRP and the enforceable policies of Village law, it is appropriate for the Village to be provided an opportunity to fully participate in the proceedings and submit briefs on such issues. In addition, studies and other data and information prepared by the Village or in the Village's possession formed the basis of the NYSDOS findings and may be critical to the Secretary's assessment of adverse impacts in the appeal. The Secretary's adverse impacts assessment will involve a detailed review of the pipeline's effects on coastal resources in the Village; not only are the Jane E. Lytle Memorial Arboretum, the Village well field, and the Croton River publicly-owned resources located within the Village, but roughly one-half the surface area of the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat also lies within the Village's administrative boundaries.

---

3 U.S. Dept. of Commerce, Virginia Elec. and Power Co., 1994 NOAA LEXIS 31 at *26 ("During the course of this appeal, the City was granted the status of intervenor. . . . the City and VEPCO joined in submitting briefs for this appeal....").

4 The Village's LWRP was approved by NYSDOS and become part of the State's federally approved Coastal Management Program on June 15, 1992. *See* Letter from Gail S. Shaffer, NYSDOS, to Robert W. Elliot, Mayor, Village of Croton-on-Hudson, New York, dated June 15, 1992.

5 *See* CZMA §§ 304(6a), 307(c)(3)(A), 16 U.S.C. §§ 1453(6a), 1456(c)(3)(A) ("any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide . . . a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program").

6 NYSDOS Decision at 3.

In sum, the Village has particularized knowledge of, and is uniquely positioned to comment authoritatively upon, the various factual and legal matters that will arise on appeal. It is therefore imperative that the Village have full access to the entire proceeding in this appeal, including any threshold procedural determinations, and be given the opportunity to participate in conferences among the parties, submit briefs to the Secretary, respond to issues concerning the interpretation or application of the LWRP and Village law, and consult with co-defendants while maintaining the privilege of confidential communications. As such, the Village requests recognition as a party or special participant in this proceeding, or other such status as the Secretary deems appropriate. The Village also requests that the Secretary provide the Village with information on the schedule for the submission of briefs and supporting materials and ensure that the Village is copied on all future communications to and among the parties in this proceeding.

2. Provide Full Due Process Rights, Including Opportunities For Public Comment, For All Procedural and Substantive Matters On Appeal.

The Village requests that the Secretary provide the public and other federal, state and local authorities full due process rights, including adequate opportunities for public comment, with respect to all aspects and stages of the appeal, whether procedural or substantive. This is both required under the CZMA regulations and necessary in the interest of ensuring that all questions before the Secretary are decided on the basis of a complete and accurate record and a level of public input commensurate with the complexity and broad scope of impact of the proposed project as well as the seminal nature of the issues arising on appeal.

In its notice of appeal, Millennium alleges that the NYSDOS decision was untimely and requests the Secretary to "dismiss the appeal pursuant to 15 C.F.R. § 930.129(a)(6) on the ground that the objection of the NYDOS is not in compliance with [the CZMA]."[7] Millennium goes on to claim that "NYDOS received Millennium's certification on November 20, 1998, and the required notification was furnished on May 9, 2002, or well over three years later."[8]

As a preliminary matter, the Village is compelled to point out that not only has Millennium misread the CZMA regulations governing appeals,[9] but also that its description of the procedural history of the NYSDOS decision is grossly misleading. Although the Village reserves the right to submit a complete rebuttal to this claim at the appropriate subsequent stage

---

7 *See* Letter from Frederic G. Berner, Sidley, Austin *et al.* (representing Millennium), to Donald L. Evans, Sec. of Commerce, dated June 7, 2002, enclosure (Notice of Appeal) at 1.

8 *Id.* at 1-2.

9 The regulatory provision, "15 C.F.R. § 930.129(a)(6)," that is cited in Millennium's notice of appeal does not exist, nor do the actual provisions of Section 930.129(a) provide for "dismissals" on the basis of procedural noncompliance by state agencies.

of the proceeding, the Village would observe that Millennium has conveniently failed to mention critical facts surrounding the purported timing error including that: (a) Millennium's original filing did not contain necessary data and information for NYSDOS to start its consistency review, and subsequent pipeline route changes required Millennium to refile a revised consistency certification in March 2001 and an "Addendum" in July 2001; (b) Millennium itself expressly agreed in writing, pursuant to the new CZMA regulations at 15 C.F.R. § 930.60(a)(3), to extend the time period for NYSDOS' review until after the Federal Energy Regulatory Commission ("FERC") issued its Final Environmental Impact Statement ("FEIS"),[10] and (c) Millennium failed to disclose to NYSDOS its intent to conduct underwater blasting within the Haverstraw Bay designated habitat until *after* the release of the FEIS – a flagrant omission which Millennium itself acknowledged to be an "oversight," and which prompted FERC to order Millennium to prepare a modified Hudson River crossing plan and reopen consultations with other agencies. *Millennium did not deliver to NYSDOS the necessary additional information (the blasting plan and blasting impact assessment) for NYSDOS to complete its review until April 23, 2002.*[11] Thus, Millennium not only agreed but also, by its own acts and omissions, contributed to the resulting timing of the NYSDOS Decision. Millennium's disingenuous skewing of the record in its notice of appeal to the Secretary supports the Village's position that a full and open process of briefs and public comment for procedural as well as substantive issues in this appeal will be in the best interests of the Secretary and of the public.

The Village's understanding of the applicable CZMA regulations is that, pursuant to 15 C.F.R. § 930.129(b), the Secretary may issue a "procedural override" if he determines that the State has failed to comply with the procedural requirements of the CZMA and its implementing regulations. However, nothing in the regulations suggests that a procedural override can be issued without full compliance with the due process requirements set forth in Section 930.128. These regulations state unequivocally that "The Secretary *shall* provide timely notice of the appeal,"[12] and that "The Secretary *shall* provide an opportunity for public comment on the appeal."[13] These public notice and comment provisions are fundamental, non-discretionary public interest requirements that apply to any "appeal," regardless of the basis of its eventual disposition by the Secretary.

---

10 See Letter from Thomas S. West, LeBoeuf, Lamb, *et al.* (representing Millennium), to William Barton, NYSDOS, dated Sept. 12, 2001.

11 See Letter from Glen T. Bruening, NYSDOS, to Thomas S. West, LeBoeuf, Lamb, *et al.* (representing Millennium), dated May 24, 2002.

12 15 C.F.R. § 930.128(a) (2002) (emphasis added).

13 15 C.F.R. § 930.128(b) (2002) (emphasis added).

The regulations do provide the Secretary *discretion* to decide questions concerning procedural noncompliance by the State agencies "as a threshold matter."[14] However, in light of the mandatory public notice and comment requirements of Section 930.128, the proper interpretation of the "threshold matter" language must be that the Secretary may bifurcate the appeal into separate procedural and substantive stages, but that if the Secretary so chooses, each stage of any such bifurcated appeal must nonetheless comply with the public notice and comment requirements of Section 930.128. This interpretation is consistent with the Secretary's past practice in other similarly high-profile, contentious appeals, where the Secretary has provided non-party agencies, individuals, and the general public full due process rights including a public hearing and an open public comment period for "threshold issues" and specifically cited these public comments in its review of such threshold issues.[15]

The interests of good public policy and the sound implementation of the CZMA regulations also demand that the Secretary provide for full due process, including opportunities for other entities to comment, on both procedural and substantive issues in this case. Other agencies including FERC and the Army Corps of Engineers have been primarily in charge of the underlying federal permit processes for the Millennium project and, as such, have specialized knowledge of, and have been directly involved with, the events and circumstances related to the procedural history of the project. Without an opportunity for broader review and comment on procedural questions not only by NYSDOS but these and other relevant agencies, the record before the Secretary on appeal would be incomplete.

In addition, procedural questions arising in this appeal will include seminal issues regarding the interpretation of the new CZMA regulations that have never before been addressed by the Secretary. For example, in this case, the Secretary may need to resolve questions concerning the application of the new CZMA regulations at 15 C.F.R. § 930.60(a)(3) which allow the parties to mutually agree to extend or stay the six-month consistency review period. As described above, NYSDOS and Millennium did enter into such an agreement in this case.[16] As such, other coastal states and federal agencies affected by coastal consistency reviews will have an interest in reviewing and commenting upon this issue, as it has never been addressed in any previous appeal to the Secretary. Likewise, it is in the best interests of the Secretary to provide an opportunity for such comments to ensure that all relevant considerations and the positions of other coastal states are taken into account before making a precedent-setting decision.

---

14 15 C.F.R. § 930.129(b) (2002) ("The Secretary *may* make this determination as a threshold matter").

15 U.S. Dept. of Commerce, *Virginia Elec. and Power Co.*, 1994 NOAA LEXIS 31 at *26, *44.

16 Letter from Thomas S. West, LeBoeuf, Lamb, *et al.* (representing Millennium), to William Barton, NYSDOS, dated Sept. 12, 2001.

Furthermore, all affected entities such as the Village and other local governments and the affected members of the public have the right to be fully informed and to be provided an opportunity to review and comment upon matters that may prove dispositive in the Secretary's eventual disposition of this case. Particularly in a project of this size, complexity, and broad impact, it is imperative that the Secretary ensure a high standard of public involvement throughout this proceeding. In this regard, the Village notes that, to date, both U.S. Senators from the State of New York as well as a number of other Congressional and local representatives have already requested the Secretary to provide opportunities for public involvement from the outset of this proceeding.[17]

Finally, given the complexity of issues arising in this appeal, and what will most likely be an extensive and voluminous record of decision, the Village requests that, for any public comment period that is provided, the Secretary allow a period of at least 60 days for comments in order to ensure that the public has an adequate opportunity to obtain, review, and comment meaningfully on the briefs and other supporting materials in the record. The CZMA regulations require that "The public shall be afforded *no less than* 30 days to comment on the appeal."[18] Given the high-profile, high-impact nature of this case, allowing for a longer public comment period is entirely reasonable and within the scope of the Secretary's discretion.

In sum, therefore, the Village requests that the Secretary provide for full due process, including a public comment period of at least 60 days, with respect to both procedural and substantive aspects of the Millennium appeal. The Village believes that the public's due process rights can best be protected if the Secretary declines to bifurcate the appeal and reviews all matters together in one consolidated proceeding. In the alternative, should the Secretary choose to bifurcate the appeal, the Village requests that the Secretary ensure that the full due process rights of the public as set forth in Section 930.128 are provided for during each stage of such a bifurcated proceeding.

3. Hold A Public Hearing On The Appeal In Croton-on-Hudson.

Finally, in the interests of assuring broad public input and providing a forum for comments by the people who will be most directly affected by the Millennium project, the Village requests that the Secretary hold a public hearing on this appeal, and that such a hearing be held in the Village of Croton-on-Hudson. Section 930.128(e) of the CZMA regulations provides that "The Secretary may hold a public hearing in response to a request or on his own initiative," and requires that such hearings "shall be guided by the procedures described within § 930.113." Section 930.113(a) provides that such hearings are to be held "in the local area

---

17 *Schumer Calls on Commerce Dept. to Hold Hearing on Millennium Pipeline*, Sen. Charles E. Schumer Press Release (June 11, 2002); *Agency Declines Quick Hearings On Pipeline*, The Journal News (June 15, 2002).

18 15 C.F.R. § 930.128(b) (2002) (emphasis added).

concerned." As the majority of inconsistency issues identified by NYSDOS relate to the pipeline's impacts on coastal resources located directly within the Village or in its immediate vicinity, clearly the Village is the most appropriate "local area concerned" for such a hearing.

Respectfully submitted,

Neil L. Levy
Christian C. Semonsen
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 879-5000

Counsel for **The Village of Croton-on-Hudson, New York**

cc: Hon. Hillary Rodham Clinton, U.S. Senate
Hon. Charles E. Schumer, U.S. Senate
Hon. Donald L. Evans, Department of Commerce
Mr. David Kaiser, OCRM
Ms. Mary G. Holt, NOAA
Mr. Glen T. Bruening, NYSDOS
Mr. William Sharp, NYSDOS
Mr. George R. Stafford, NYSDOS