



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, MD 20910

THE DIRECTOR

DEC 5 2002

Mr. Brandon Blum
Senior Counselor
Office of the Assistant General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1305 East West Highway
Silver Spring, Maryland 20910

Dear Mr. Blum

I am responding to the Deputy Under Secretary for Oceans and Atmosphere's memorandum regarding a Department of Commerce administrative appeal brought by the Millennium Pipeline Company (Millennium or Appellant) pursuant to the Coastal Zone Management Act (CZMA). The appeal petitions the Secretary for an override of the State of New York's objection to Millennium's proposed natural gas pipeline. This pipeline and its appurtenances would transport Canadian natural gas to growth markets in the eastern U.S., including delivery points in Pennsylvania, New Jersey, and New York. In his memo, Mr. Gudes asks National Marine Fisheries Service (NOAA Fisheries) to provide comments on the Millennium's appeal. NOAA Fisheries is providing comments on the substantive criteria regarding consistency with the objectives of the CZMA, but is not providing comments on the procedural grounds of timing of the State's objective nor on the substantive ground of national security interest because these are not germane to NOAA Fisheries authorities.

Based on consideration of the facts as related to NOAA Fisheries' authorities and trust resources, it appears that the New York Department of State has a substantial basis for its position in this matter. A portion of the pipeline route occurs in ecologically sensitive areas of special significance designated under New York State's Coastal Management Program (NYCMP). The unique and sensitive ecological character of these areas and associated resources of special concern make protection particularly important with respect to construction of this project.

NOAA Fisheries' Comments on the Issues Being Considered in the Appeal

Millennium claims that the project is consistent with the objectives of the CZMA. For the Secretary to find for the Appellant on this ground, he must determine that the project satisfies three criteria: (1) the proposed activity furthers the national interest as articulated in section 302 or 303 of the CZMA in a significant or substantial manner; (2) the national interest furthered by the proposed activity outweighs the activity's adverse coastal effects when those effects are considered separately or cumulatively; *and* (3) no reasonable alternative is available that would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the State of New York's coastal zone management program. Below are NOAA Fisheries comments on these criteria.

Criteria One

It is not required by NOAA Fisheries under its authorities to regard the national interest implication of a project when carrying out its responsibility to conserve trust resources. However, the ecological status of Haverstraw Bay is firmly established in the national interest pursuant to its designation by the NYCMP as a Significant Coastal Fish and Wildlife Habitat,

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES



and by the U.S. Fish and Wildlife Service (USFWS) as a Significant Habitat and Habitat Complex of the New York Bight Watershed.

Criteria Two

National and regional ecological importance of Haverstraw Bay to the New York Coastal Zone takes on significant relevance and should be weighed heavily when evaluating criterion two. The Haverstraw Bay habitat is a uniquely productive portion of the Hudson Estuary that provides essential habitat values and functions for most estuarine-dependent species originating from the Hudson River and species managed under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and Endangered Species Act. Many of these species recruit to commercial and recreational populations throughout the North Atlantic. Our review of the Millennium proposal indicates that the project would create significant and long-term impacts in New York's coastal zone, including the Haverstraw Bay habitat.

The exceptional combination of Haverstraw Bay's physical, chemical, and biological characteristics make it one of the most important fish and wildlife habitats in the Hudson River estuary. Haverstraw Bay is (1) a major nursery and feeding area for a variety of anadromous and estuarine species, and (2) a vital habitat for most estuarine-dependent species originating from the Hudson River. The ecological importance of this specific river reach is exemplified by its designations by NOAA Fisheries as essential fish habitat (EFH) as per the Magnuson-Stevens Act, by the NYCMP as a Significant Coastal Fish and Wildlife Habitat¹, and by the USFWS as a Significant Habitat and Habitat Complex of the New York Bight Watershed². The distribution and location of fishery resources in the Hudson River depend on optimization of a variety of factors, including salinity, velocity of flow, temperature, stage of the tide, food sources, and other ecological considerations. Other reaches of the Hudson River do not support the same importance and intensity of ecological values and functions. As such, only certain areas like the Haverstraw Bay reach have been selected for special protection and management.

Acute and chronic effects from dredging, detonating explosives, backfilling, and other construction impacts would impair ecological values and functions. Evidence from the Hudson River collected from benthic profiling performed by LaMont-Doherty Geological Observatory for the State of New York³, indicated that other utility crossing, undertaken in the Hudson even decades ago, continued to have discernible impacts on the bottom geology and topography in the project alignments. Other projects in the Hudson where such problems have been observed have been the subject of remedial efforts that required placement of large volumes of rock and concrete mattresses to protect sections of pipe that were exposed or even undermined by natural river processes. Examples are several Central Hudson Gas and Electric crossings. These facts indicate that habitats were destroyed or significantly impaired for many years by a variety of factors including changes in the substrate, changes in local erosion or accretion rates, changes in benthic community structure that could reduce ecological productivity, a reduction in carrying capacity due to loss of prey, or similar impacts that are all related to project installation.

New York State Department of State 1987

U.S. Fish and Wildlife Service 1997

³ Roger Flood, Ph.D., Pers. Comm. 2000; Andrew Kahnle, Pers. Comm. 2000

Imposing these impacts in Haverstraw Bay would diminish the ecological and habitat value provided by the Bay and affect a variety of species of national importance. This empirical evidence suggests that if a pipeline were constructed across Haverstraw Bay, the bottom would be ecologically impaired or compromised by project installation for an unspecified but protracted period. The effects would result in three levels of impact: (1) physical alteration of the substrate in the construction areas and adjacent areas affected by demersal plumes; (2) ecological degradation due to hydration of the sediments and the nature of the redistributed sediments; and (3) spatial and temporal effects related to ecological impairments that continue until preconstruction conditions and population levels are restored. Based upon existing information of the biological importance of Haverstraw Bay, constructing a pipeline segment across Haverstraw Bay would likely affect fishery resources through a loss of a forage habitat and by water quality degradation⁴. These acute impacts would be accentuated by the long-lasting nature of this habitat disturbance.

Criteria Three

With respect to criterion three, reasonable available alternatives were not properly analyzed. Both the final and supplemental environmental impact statements prepared by the Federal Energy Regulatory Commission were insufficient in characterizing the severity of adverse impacts of the preferred alternative and in the analysis of relative habitat and ecological impacts of other alternative river crossing alignments. The State of New York and others indicate that alternative options exist. We also believe that a variety of viable options exist that would achieve Millennium's objective of increasing the amount of natural gas available for markets in Pennsylvania, New Jersey, and New York. For example, NOAA Fisheries' Northeast Regional Office advocated that a suitably-timed installation by Millennium by alignment north of Haverstraw Bay (referred to as Hudson River North - "HRN") in the general vicinity of the existing Algonquin crossing is less ecologically sensitive than Haverstraw Bay and would traverse only about 60 percent of the linear distance across the Hudson than Millennium's preferred alternative. The spatial and temporal impacts, as well as the individual and cumulative effects experienced by aquatic species and habitats, can be minimized in HRN crossing alternatives. Improved directional drilling technology, not possible in Haverstraw Bay, may be applied to an alignment north of Haverstraw, which could eliminate most, if not all, impacts related to such a crossing.

The HRN area also has existing crossings that have disturbed the benthos, so it should be possible to bed a pipe in this river reach with smaller ecological costs and without introducing new impacts in this portion of the river. While the HRN alignments may pose certain construction challenges, they represent significant reduction in impacts on aquatic resources and habitats from constructing the project in a coastal zone habitat of designated special management areas and special concern species and indicate that an HRN alternative is ecologically preferred.

New York State's initial brief and the *amicus* briefs offered in this proceeding present a variety of alternatives that could be developed by Millennium or other parties to bring natural gas into New York without creating unacceptable impacts on New York's coastal zone. To date, New York has identified eleven currently proposed natural gas projects, some of which are modifications of particular segments of Millennium's proposed route. We are familiar with many of these proposals and note that some already have secured the necessary state and federal

⁴ Wilber and Clarke 2001; Limburg et. al. 1999; Benfield and Minello 1996; Johnson and Wildish 1982.

approvals. We contend that reasonable, partial route or system alternatives that would eliminate the habitat impairments created by Millennium's project are available for consideration to bring natural gas into New York in a manner consistent with CZMA objectives.

Conclusion

NOAA Fisheries has considered Millennium's administrative appeal and has presented its views. On balance, the appeal does not appear to meet the procedural and substantive grounds set forth in the CZMA. Thank you for requesting our participation in this appeal. I am available if you should have any further questions concerning these comments.

Sincerely,



William T. Hogarth, Ph.D.
Assistant Administrator
for Fisheries

Sources Consulted

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