

**DECISION AND FINDINGS  
BY THE  
U.S. SECRETARY OF COMMERCE  
IN THE  
CONSISTENCY APPEAL OF  
MILLENNIUM PIPELINE COMPANY, L.P.  
FROM AN OBJECTION BY THE  
STATE OF NEW YORK**

## DECISION

### I - INTRODUCTION

#### A - Background

This appeal is taken from an objection by the New York Department of State (State or New York) to a proposal to construct and operate a natural gas pipeline which would stretch approximately 420 miles, from a point along the United States - Canada border in Lake Erie to a terminus outside of New York City. The project would transport U.S. and Canadian natural gas to markets in the eastern United States, including New York, Pennsylvania, and New Jersey.<sup>1</sup> The project sponsor, the Millennium Pipeline Company, L.P.<sup>2</sup> (Millennium or Appellant), states that the pipeline's capacity would be 700,000 decatherms per day.

New York reviewed Millennium's project pursuant to section 307(c)(3)(a) of the Coastal Zone Management Act (CZMA or Act),<sup>3</sup> 16 U.S.C. §1456(c)(3)(a), and the implementing regulations of the Department of Commerce (Department) at 15 C.F.R. Part 930, Subpart D.<sup>4</sup> The initial stage of New York's CZMA review was triggered in November 1998, when the appellant submitted materials about the proposed pipeline for consideration by New York.<sup>5</sup>

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<sup>1</sup> Millennium Pipeline Project Final Environmental Impact Statement (FEIS), October 2001, at ES-1.

<sup>2</sup> Millennium is a limited partnership consisting of a general partner (Millennium Pipeline Management Company, L.L.C.) and four limited partners: Columbia Gas Transmission Corp., TransCanada PipeLines USA Ltd., Westcoast Energy (U.S.) Ltd., and MCNIC Millennium Company. See 97 FERC ¶ 61,292, at 62,308 (Dec. 19, 2001).

<sup>3</sup> The CZMA provides states having federally approved coastal management programs with the opportunity to review projects requiring federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. §1456(c)(3)(A). See subsections II-A and III-A (Statutory and Regulatory Framework) *infra* for a more complete discussion of the CZMA requirements relevant to this appeal.

<sup>4</sup> Except where otherwise noted, all references to the CZMA implementing regulations of the National Oceanic and Atmospheric Administration (NOAA) are to the regulations in effect at the time the six-month review period began in 2001. These regulations can be found in the current (2003) version of Title 15 of the Code of Federal Regulations.

<sup>5</sup> A state has six months after receiving certain materials from an applicant to review the project and issue its decision. 16 U.S.C. § 1456(c)(3)(A). NOAA's CZMA regulations provide that the six-month review period begins at the time the state receives a copy of: (1) a consistency certification; and (2) information concerning the project as described in NOAA's CZMA

On March 12, 2001, New York determined that it had sufficient information to evaluate all relevant coastal concerns related to the then-current route of the pipeline project, thereby commencing a six-month time clock for its decision. *See* 15 C.F.R. § 930.60, 62. On the last day of the six-month period, the parties sought to extend the deadline, consistent with NOAA's CZMA regulations. The length of the extension is an issue raised in this appeal.

On May 9, 2002, New York objected to Millennium's project, finding that construction impacts associated with those portions of the pipeline crossing the Hudson River and approaching New York City were inconsistent with the State's coastal management program.<sup>6</sup> Millennium timely filed a notice of appeal with the Department of Commerce, asking the Secretary to override New York's objection on both procedural and substantive grounds. Specifically, as a threshold procedural matter, Millennium raised the timing of New York's objection, asserting that the State's decision failed to comply with the regulatory time frame.<sup>7</sup> In the event the Secretary failed to find for Millennium on this issue, Millennium requested an override of New York's objection on the two substantive grounds provided in the CZMA.<sup>8</sup>

For the reasons explained below, New York's objection is found to have been raised in a timely manner and neither of the CZMA's two grounds for overriding a state's objection is found to have been satisfied. Therefore, pursuant to the CZMA, neither the Federal Energy Regulatory Commission (FERC) nor the U.S. Army Corps of Engineers (the Corps) may issue relevant

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regulations. 15 C.F.R. § 930.60(a); *see also* 15 C.F.R. § 930.58(a). The State determined the review period did not begin in 1998, noting that information submitted by Millennium at that time failed to fulfill the information requirements contained in NOAA's regulations. *See* Letter from Gary J. Haight, New York Department of State, to Richard E. Hall, Jr., Columbia Gas Transmission Corp., Jan. 28, 1999, at 1. Millennium did not challenge this determination in follow-up submissions. *See, e.g.*, Letter from Richard E. Hall, Jr., Millennium Permitting Manager, to Gary J. Haight, New York Department of State, Feb. 26, 1999; *see also* Letter from Richard E. Hall, Jr., Millennium Permitting Manager, to Steven C. Resler, New York Department of State, Oct. 26, 1999.

<sup>6</sup> *See* Letter from George R. Stafford, New York Department of State, to Thomas S. West, LeBoeuf, Lamb, Greene & MacRae, L.L.P. (representing Millennium), May 9, 2002.

<sup>7</sup> 15 C.F.R. § 930.129(b) provides that the Secretary shall override a state's objection that fails to comply with the Act and applicable regulations. At issue here is the requirement that New York object "within six months following commencement of [its] review." 15 C.F.R. § 930.62.

<sup>8</sup> The CZMA provides that the Secretary may override a state's objection by finding that: (1) the project "is consistent with the objectives" of the CZMA; or (2) the project is "necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A). These statutory grounds are further delineated in NOAA's CZMA regulations. *See* 15 C.F.R. § 930.121, 122.

permits to allow Millennium's project to proceed as proposed. 16 U.S.C. § 1456(c)(3)(A), 15 C.F.R. §§ 930.64, 930.130(e).

## II - THRESHOLD PROCEDURAL ISSUE

### A - Statutory and Regulatory Framework

The Coastal Zone Management Act and NOAA's implementing regulations provide the framework pursuant to which the timeliness of New York's objection to Millennium's project must be considered. First, the CZMA requires applicants seeking federal permits for projects that affect coastal resources to certify to the state(s) in question that the proposed project complies with each state's coastal management program.<sup>9</sup>

Second, a state has six months to concur with, or object to, a project certification. 15 C.F.R. §§ 930.60, 62. This period begins when a state determines that it has received necessary data and information about the project. If a state objects to a proposed project, no permit may issue unless the Secretary, either upon appeal by the applicant or on his own initiative, "overrides" the state's objection. 16 U.S.C. § 1456(c)(3)(A).<sup>10</sup> An override of the state's objection allows the federal license and permitting process to proceed.

Third, if a state fails to issue its consistency decision within six months from the start of the review period, the state's concurrence with the certification is conclusively presumed.<sup>11</sup> 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.62(a). In that case, the state has waived any opportunity to lodge a CZMA consistency objection, and the applicant may proceed with its efforts to obtain necessary federal permits.

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<sup>9</sup> The CZMA states that applicants "for a required Federal license or permit to conduct an activity . . . affecting any land or water use or natural resource of the coastal zone" of a state having a coastal management program approved by the Department of Commerce must certify "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." 16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. § 930.57. New York has a coastal management program that has been approved by NOAA.

<sup>10</sup> An objection raised by a state under the CZMA to a proposed project has the effect of precluding federal agencies from issuing licenses or permits for the project in question. A CZMA appeal generally asks the Secretary to override the state's objection in order to allow the federal license and permitting process to proceed. The statutory grounds for an override are set forth at 16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. §§ 930.63(e), 120, 121, 122.

<sup>11</sup> As discussed in the following paragraph, the six-month period can be stayed or extended by mutual agreement, thereby giving the state a longer period of time to reach a consistency determination.

Fourth, NOAA's regulations provide that a state and applicant "may mutually agree" to stay the consistency time clock or extend the six-month review period. An agreement for this purpose must "be in writing and . . . provided to the Federal agency."<sup>12</sup> 15 C.F.R. § 930.60(a)(3). The regulation does not limit such an agreement to a specified duration or require that it specify an end date. This regulatory provision provides additional flexibility to the consistency review process if, and only if, the applicant and the state mutually agree. For example, such an agreement could allow the state to receive and consider materials it identified after the start of the six-month time clock as necessary to determine consistency.<sup>13</sup> A state cannot unilaterally alter the six-month review period. Only a stay or extension to which an *applicant has agreed* can affect the six-month review. See Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124, 77147 (Dec. 8, 2000).

Finally, after the start of the six-month review period, if a state decides that it lacks sufficient information to determine whether a project is consistent with the state coastal management program, and the parties do not agree to a stay/extension, it may object to the project based upon the failure to receive information necessary to determine consistency.<sup>14</sup> 15 C.F.R. § 930.63(a),

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<sup>12</sup> The term "Federal agency" refers to the agency from whom the project operator is seeking a permit. 15 C.F.R. § 930.11(j); *see also* 15 C.F.R. § 930.51(a). In this case, Millennium is seeking permits from FERC and the Corps.

<sup>13</sup> A state may receive and review materials after the start of the six-month review period for a variety of different reasons. For example, a project may change to accommodate license or permit conditions developed by other federal agencies or to address issues raised by local communities affected by the proposal. Although a state is not required to begin its review until after having received "necessary data and information" as described in NOAA's CZMA regulations (*see* 15 C.F.R. § 930.58; *see also* 15 C.F.R. § 930.60), the regulations do *not* guarantee that a state will have all information concerning the final version of a project at the time the review period commences. In the event a project changes after the review period has started or the state otherwise finds that it lacks information needed to evaluate a project, the state may request additional information. 15 C.F.R. § 930.60(b). Given the limited period of time available to receive and review information after the start of the six-month time clock, NOAA's CZMA regulations also allow the state to: (1) reach an agreement with the applicant to stay or extend the review period, 15 C.F.R. § 930.60(a)(3); or (2) object to the project based on insufficient information, 15 C.F.R. § 930.63(c).

<sup>14</sup> Before objecting to a project on the basis of insufficient information, the state must provide the applicant with a written request for the necessary information. 15 C.F.R. § 930.63(c).

(c).<sup>15</sup> This objection is distinct from one in which the state has sufficient information to evaluate whether the project is consistent with the state's coastal management program. If the state objects on either ground, the applicant may then appeal to the Secretary of Commerce.

## B - Factual Background

The actions taken by New York and Millennium in connection with the State's consistency review of Millennium's proposed pipeline are determinative to a finding on the State's timeliness in making its objection. A summary of the chronology and significant facts is set forth below.

New York advised Millennium that the State's CZMA *review of the project* ". . . began on March 12, 2001."<sup>16</sup> Letter from William F. Barton, New York Department of State, to Thomas S. West, LeBoeuf, Lamb, Greene & MacRae (representing Millennium), Apr. 5, 2001, at 1 (emphasis added). A caveat in New York's letter stated that ". . . should Millennium's project be significantly changed . . . a *new* consistency review may be necessary." *Id.* at 1-2 (emphasis added).

2. On April 17, 2001, Millennium responded to New York's April 5, 2001 letter, and explicitly concurred with New York's understanding regarding significant changes to the pipeline. ("[Millennium's] request for final decision-making is subject to the understanding stated in [New York's] letter . . . 'that should Millennium's project be significantly changed. . . a new consistency review may be necessary.' *Millennium concurs with that procedure.*") Letter from Thomas S. West to William F. Barton, Apr. 17, 2001, at 2 (emphasis added). In the same letter, Millennium informed New York about a change in the pipeline route in northern Westchester County, New York.<sup>17</sup>
3. On September 10, 2001 (two days before the end of the six-month review period), Millennium sent an e-mail<sup>18</sup> to New York proposing draft language for an extension of the

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<sup>15</sup> In an effort to avoid an objection on the grounds of insufficient information, the parties may agree to extend/stay the review deadline. A state, however, is not required to seek such an extension before objecting for lack of information.

<sup>16</sup> Letter from William F. Barton to Thomas S. West, Apr. 5, 2001, at 1. The State began its consistency review of the Millennium Pipeline project upon receiving the Supplemental Draft Environmental Impact Statement (SDEIS) prepared for the project by the FERC. *Id.*

<sup>17</sup> The change involved a new segment of the pipeline referred to as the ConEd Offset/Taconic Parkway Alternative.

<sup>18</sup> Although the document lacks typical address and routing information, New York states it received the draft language from Millennium as an e-mail. Reply Brief and Supporting Information and Data of the New York Department of State, Apr. 4, 2003 (New York Reply

six-month review deadline. E-mail from Thomas S. West to William F. Barton, Sept. 10, 2001. The e-mail included a provision that New York “will use its best efforts to determine consistency . . . promptly (within 30 to 60 days) following issuance of the Final Environmental Impact Statement for the project.” *Id.* at 1.

4. On September 12, 2001, Millennium sent a letter to New York to confirm that the parties “pursuant to 15 C.F.R. 930.60(a)(3), mutually agreed to extend the time for [the State] to render a decision . . . .” Letter from Thomas S. West to William F. Barton, Sept. 12, 2001, at 1. Millennium’s letter: (a) proposed that NY will “*determine consistency . . . after issuance of the [FEIS] . . .*”; and (b) asked New York to respond indicating its assent to the extension of time. *Id.* at 1-2.
5. On September 12, 2001, New York responded by “agree[ing] to extend the time period for its review of [Millennium’s] project . . . .” Letter from William F. Barton to Thomas S. West, Sept. 12, 2001. In addition, New York’s letter indicated that:
  - “[the State] expects to complete its . . . review within 30 to 60 days after the receipt of the Final Environmental Impact Statement . . . .”; and
  - “. . . any significant pipeline routing or other project changes . . . .” would be cause for exceeding the 30 to 60 day time frame by which New York intended to complete its review. *Id.*<sup>19</sup>
6. On October 5, 2001, New York received a copy of the FEIS and recommenced its review of Millennium’s project.<sup>20</sup> *See* Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 1; *see also* Letter from William F. Barton to David Boergers, FERC, Oct. 11, 2001.
7. On or about November 27, 2001, New York became aware, from information received from the U.S. Army Corps of Engineers, that Millennium might conduct blasting in a portion of the Hudson River. Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 1; *see also* New York Reply Brief at 16 and Initial Brief and Supporting Information and Data of the New York Department of State, Oct. 16, 2002 (New York Initial Brief), at 9.
8. On December 14, 2001, New York wrote to Millennium advising that the State “ha[d] not completed its review” because of project changes involving underwater blasting in the

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Brief), at 15.

<sup>19</sup> For convenience, the term “caveat” is used *infra* to refer to this clause from New York’s letter. The specific text of the caveat is “barring any significant pipeline routing or other project changes that may have effects upon the coastal zone of New York State.” Letter from William F. Barton to Thomas S. West, Sept. 12, 2001.

<sup>20</sup> Sixty days from the date of New York’s receipt of the FEIS is December 4, 2001

Hudson River.<sup>21</sup> New York's letter also:

- requested Millennium to provide New York with information about the proposed blasting including "a complete description of the proposed blasting plan" and "an assessment of potential impacts to fish and wildlife;" and
- stated that "[w]ithout this information, [New York] must find the proposed pipeline project inconsistent [with the enforceable policies of New York's coastal management program] for lack of necessary data and information."

Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 1-2.

9. On January 25, 2002, Millennium responded to New York's letter by forwarding information about possible blasting activity in the Hudson River. Letter from Thomas S. West to William F. Barton, Jan. 25, 2002. Millennium's letter also:

- recognized that the possibility for blasting in a limited area of the Hudson River was not addressed in its earlier CZMA filings with New York;
- expressed interest in discussing blasting issues "in an effort to complete the . . . [r]eview process as soon as possible . . ."; and
- stated that "Millennium does not believe that the possibility for blasting [in the Hudson River] . . . is a project change . . . . Accordingly, Millennium reserves all of its rights concerning the timeliness of [New York's] review."

*Id.* at 1-2, 6.

10. On February 22, 2002, Millennium wrote to New York as a follow-up to a meeting with State officials at which Millennium had provided additional information about blasting.

Millennium's letter also:

- suggested that the State had ongoing concerns regarding the potential blasting;
- indicated the company looked forward to receiving New York's decision soon; and
- "reserve[d] all rights concerning the timeliness of [New York's] review."

Letter from Thomas S. West to George Stafford, Feb. 22, 2002 at 1-2.

On March 14, 2002, Millennium wrote to New York and provided information addressing blasting issues raised by an entity interested in the State's CZMA review (the Village of Croton-on-Hudson, located in Westchester County, New York). Letter from Thomas S. West to George Stafford, Mar. 14, 2002. In addition to requesting that New York promptly complete its review, Millennium's letter also:

- asserted that there was no reason for the State to await receipt of a blasting plan before completing its review;
- renewed its commitment to provide New York with full and complete information;
- recognized that the possible need for blasting was not addressed until recently in Millennium's submissions to New York; and

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<sup>21</sup> The potential blasting was proposed to occur in Haverstraw Bay. New York Reply Brief at 27; Letter from Thomas S. West to William F. Barton, Jan. 25, 2002, at 4. (Haverstraw Bay is located in the Hudson River just north of Ossining, New York.)

- stated that its “willingness to submit further information [was] subject to its reservation of rights concerning the timing of [New York’s] review . . . .”

*Id.* at 2, 6.

12. On April 23, 2002, Millennium responded to New York’s earlier request and provided a site specific blasting plan and separate blasting impact assessment for the pipeline’s proposed Hudson River crossing. *See* letter from Thomas S. West to George Stafford, Apr. 23, 2002.

13. On May 9, 2002, Millennium advised New York that “. . . we have no choice but to declare [New York] beyond the deadlines required by [NOAA’s CZMA regulations]. Accordingly, consistency is presumed as a matter of law.” Letter from Thomas S. West to George Stafford, May 9, 2002, at 1. The letter set forth a number of reasons why Millennium believed that New York had exceeded the six-month review period. Millennium’s letter also stated that:

- Millennium’s submission of additional information about blasting did not extend the review period; and
- to the extent that New York made a contrary interpretation, the letter provided notice that any such extension so interpreted “is terminated immediately.”

*Id.* at 2-3.

14. Also on May 9, 2002, New York issued its CZMA objection to Millennium’s proposed pipeline project.

## **C - Discussion**

### **1. Preliminary Issue - Parties’ Reliance on 2001 Regulations**

Although not raised by the parties as an issue, we first clarify a possible point of confusion regarding the parties’ use of the “new” CZMA regulations to extend the State’s six-month review period. The relevant NOAA regulations implementing the federal consistency requirements of the Coastal Zone Management Act are found in Part 930 of Title 15 of the Code of Federal Regulations. However, Part 930 was revised, effective January 8, 2001. *See* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124 (Dec. 8, 2000). The 2001 (i.e., “new”) regulations contain specific language allowing agreements to stay or extend the six-month review period. *See* 15 C.F.R. § 930.60(a)(3). NOAA’s regulations in effect prior to 2001 were silent on this point.<sup>22</sup>

Millennium initiated proceedings with the State of New York in November 1998, by filing a

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<sup>22</sup> It is unnecessary to make a finding regarding the issue of whether agreements to stay or extend the six-month review period were permissible under the regulations in effect prior to January 8, 2001.

consistency certification pursuant to the “old” regulations then in effect.<sup>23</sup> However, the parties relied on the new regulations when they sought to enter an agreement to extend the State’s six-month review period.<sup>24</sup> Applying the new regulations to proceedings that predate their existence may raise the spectre of retroactive application.<sup>25</sup>

The parties’ reliance on the new regulations concerning agreements to extend the review period is not problematic under the facts in this appeal. The parties proposed and concluded the agreement in question after the new regulations took effect. The parties did not seek to apply the regulations to a previously existing agreement. Further, judicial precedent allows for the application of agency rules promulgated during the course of a proceeding in which the regulation imposed only an additional procedural requirement that did not infringe on the substantive rights of the parties. *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969); *see also Landgraf v. USI Film Prod.* 511 U.S. 244, 275 (1994) (“[C]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.”). The regulation allowing agreements to extend the review period is procedural in nature. It does not alter or affect any of the elements New York considered in determining whether Millennium’s proposed pipeline is consistent with the State’s coastal management program. Consequently, the parties properly looked to and relied on the new regulations for guidance on agreements to extend the six-month review period.

## 2. Agreement to Extend the Review Period

### (a) Terms Agreed to by the Parties

The six-month period for New York to review and issue a CZMA decision for the Millennium project began on March 12, 2001. New York’s deadline was September 12, 2001. On

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<sup>23</sup> Millennium’s certification was required to indicate that the pipeline project complied with New York State’s Coastal Management Program and would be constructed and operated in a manner consistent with the program. 15 C.F.R. § 930.57 (1998). Millennium also filed with the State of Pennsylvania a certification regarding a portion of the pipeline crossing Lake Erie and its consistency with Pennsylvania’s federally-approved coastal management program. On April 6, 2000, Pennsylvania concurred in Millennium’s certification. FEIS at 2-34.

<sup>24</sup> Millennium’s letter of September 12, 2001 stated that the parties were acting pursuant to the new regulations. Letter from Thomas S. West to William F. Barton, Sept. 12, 2001, at 1.

<sup>25</sup> There is a strong presumption against the retroactive application of regulations. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (stating “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result”); *see also MCI Telecomm. Corp. v. GTE Northwest*, 41 F. Supp. 2d 1157, 1164-66 (D. Or. 1999); *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 218 (D. Me. 1996).

September 12, 2001, in reliance on NOAA's CZMA regulations, the parties exchanged letters to extend the deadline until after New York received the FEIS for the pipeline project. New York received the FEIS on October 5, 2001 and issued its objection to Millennium's project on May 9, 2002. The timeliness of New York's objection depends on whether the parties agreed on September 12, 2001 to extend the six-month review period, and if so, the terms comprising the agreement. In the interpretation of the parties' actions pursuant to a provision of NOAA's CZMA regulations requiring mutual agreement (15 C.F.R. § 930.60(a)(3)), principles of contract law provide a helpful paradigm for consideration.

An "agreement" is essentially a "manifestation of mutual assent;" the term can also be used as a synonym for contract. *See* Barron's Law Dictionary; 1 Williston on Contracts § 1:3 (4<sup>th</sup> ed. 1991). Generally, the requirements for an informal contract (i.e., one based on the substance of the transaction rather than form) are: (1) two or more parties with capacity; (2) lawful subject matter; (3) consideration; and (4) mutual assent.

Two of these elements – capacity of the parties and lawfulness of the subject matter – are clearly satisfied and not at issue in this appeal. The third element – consideration – requires that something be given in return for the promise (i.e., that a promise was made as part of a bargained for exchange). *See* Restatement (Second) of Contracts (Restatement) § 71(1) (1981). Here, the parties agreed to extend the period of time available for New York to conduct a consistency review of Millennium's pipeline project.<sup>26</sup> Millennium agreed to delay exercising rights that would otherwise have come into existence when the State concluded its review – namely, the right to proceed with obtaining federal permits for its project or (if New York objected to the project) to initiate an appeal to the Secretary of Commerce. Similarly, New York implicitly agreed not to object immediately to Millennium's project for reasons of insufficient information and to consider the Final Environmental Impact Statement in its consistency review. These commitments by the parties constitute sufficient consideration for an agreement.

The fourth element – mutual assent – is essential to the formation of an informal contract, and must be manifested by one party to the other. It requires an outward expression of assent sufficient to form a contract – with promises moving from the promisor to the promisee. Assent may be expressed in actions or in words, so that an agreement may exist even though one of the promises is inferred from conduct. *See* Restatement § 19(1).

As an initial matter, the exchange of letters between the parties on September 12, 2001 (regarding the proposed extension of the review deadline) suggests that the parties intended to

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<sup>26</sup> *See* Millennium's September 12, 2001 letter (confirming that Millennium and New York mutually agree to extend the time period for the State's decision) and New York's reply of the same date (agreeing to extend the time period for reviewing Millennium's project).

reach agreement. The record indicates that Millennium initiated the written exchange<sup>27</sup> on September 12, 2001 to extend the review period, and thus, for purposes of this analysis, is assumed to be the promisor.<sup>28</sup>

On its face, New York's reply agreed to extend the deadline.<sup>29</sup> However, the additional terms included in New York's reply<sup>30</sup> raise a question as to whether the reply constituted an acceptance that provided the assent necessary to form an agreement. Under the common law "mirror image rule," an acceptance must be identical with the terms of an offer to result in a binding contract. It cannot be conditional or introduce new or additional terms. *Maddox v. N. Natural Gas Co.*, 259 F. Supp. 781, 783 (W.D. Okla.1966); *see also* 2 Williston on Contracts (Williston) §§ 6:11 & 6:13 (4<sup>th</sup> ed. 1991).

The Restatement of Contracts is more flexible than Williston and its precedents. The Restatement provides that a "definite and seasonable expression of acceptance" can still be effective even if it requests a change or addition to the terms of an offer, so long as it does not depend on assent to the change.<sup>31</sup> *See* Restatement § 59 cmt. a & § 61; 2 Williston § 6:16 ("So long as it is clear that the offeree is *positively* and *unequivocally accepting* the offer, regardless of

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<sup>27</sup> It is unclear whether Millennium acted at New York's request. Millennium asserts that it agreed to New York's request. *See* Reply Brief of Millennium Pipeline Company, L.P., Mar. 14, 2003 (Millennium Reply Brief), at 10; Initial Brief of Millennium Pipeline Company, L.P., Aug. 12, 2002 (Millennium Initial Brief), at 9. Similarly, "for the record," New York reiterated "that, in fact, Millennium *did* request the extension." New York Reply Brief at 15, ftnt. 12 (emphasis in original). In any event, as noted by New York, "what is important is that the parties agreed to alter the review period . . . ." *Id.*

<sup>28</sup> I make no definitive finding as to whether Millennium undertook this action at the request of New York. It is noted that Millennium asserts it first received New York's request to extend the review period on September 12, 2001. *See* Millennium Initial Brief at 9. However, the record indicates that Millennium forwarded a draft of the agreement to New York on September 10, 2001.

<sup>29</sup> *See* Letter from William F. Barton to Thomas S. West, Sept. 12, 2001 (in which New York acknowledged receipt of Millennium's letter and agreed to extend the time period for the consistency review).

<sup>30</sup> As noted *supra*, in addition to "agree[ing] to extend the time period for. . . review" New York also stated that it "expects to complete its consistency review within 30 to 60 days after the receipt of the Final Environmental Impact Statement. . . barring any significant . . . project changes. . . ." *Id.*

<sup>31</sup> A reply to an offer which purports to accept it but that is conditioned on the offeror's assent to additional terms would be considered a counter-offer. Restatement § 59.

whether the request is granted or not, a contract is formed.” (emphasis added)). Accordingly, courts sometimes interpret a variation in terms as a “mere suggestion,” which the original offeror can accept or reject, and find the offeree’s reply to be an acceptance of the offeror’s terms along with a further offer to modify the agreement. *See Conn. Gen. Life Ins. Co. v. Chicago Title and Trust Co.*, 714 F.2d 48, 51 (7<sup>th</sup> Cir. 1983); Farnsworth on Contracts (Farnsworth) § 3.21 (2<sup>nd</sup> ed. 2001); Restatement § 59 cmt. a.

Applying these principles, I conclude that New York’s reply was an acceptance with a request to further modify the agreement because the key issue motivating New York to act centered on the need to extend the deadline beyond September 12, 2001.<sup>32</sup> Failure to reach agreement with Millennium concerning this basic issue would render the additional terms proposed by New York meaningless.<sup>33</sup> Because the language of New York’s letter accepting Millennium’s proposal to allow the State’s consistency determination to be made after issuance of the FEIS is definite and unequivocal, the acceptance was effective, and an agreement was formed at this point to extend the review period until after the issuance of the FEIS.

Next, the additional terms proposed by New York’s letter (i.e., “[New York] expects to complete its consistency review within 30 to 60 days after the receipt of the [FEIS] . . . barring any significant pipeline routing or other project changes . . .”) must be considered. The initial question is whether these terms are part of the agreement reached between the parties. Three issues must be addressed: (1) whether Millennium provided adequate consideration for the additional terms suggested by New York; (2) whether Millennium agreed to the additional terms; and (3) whether the parties reached mutual assent regarding the meaning of the terms. The answers to these questions make clear the terms are not part of the agreement to extend the six-month review period.

(1) Consideration: As noted *supra*, consideration is required for the creation of an enforceable agreement.<sup>34</sup> Absent consideration, New York’s additional terms must be considered

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<sup>32</sup> The parties appeared interested in extending the review period to allow New York to consider information in the FEIS regarding a change in the pipeline route in northern Westchester County, New York (referred to as the ConEd Offset/Taconic Parkway Alternative) and impacts of the project to coastal resources. *See* New York Initial Brief at 5-7 (noting that a major revision of the SDEIS was undertaken for the FEIS and that the FEIS was not expected to be issued until October 2001). New York Reply Brief at 15; *see also* Millennium Initial Brief at 14.

<sup>33</sup> Alternatively, if New York’s reply was found to be a counter-offer, for reasons explained *infra*, no agreement to extend the review period would have been reached. This result would be inconsistent with the preference to sustain an agreement where possible.

<sup>34</sup> Consideration refers to something of value given (by Millennium) in return for a performance or a promise of performance by another (New York), for the purpose of forming an agreement. To constitute consideration, a performance or a return promise must be bargained for

gratuitous.<sup>35</sup> According to the Restatement, consideration involves a performance or return promise that is “bargained for.”<sup>36</sup> See Restatement § 71(1). In this appeal, Millennium provided no consideration for the additional terms suggested by New York. Millennium neither undertook an action nor made a promise – that was sought by New York – in response to New York’s clarifications regarding the review period. Lacking consideration, the additional terms proposed by New York are not enforceable and, therefore, are not a part of the agreement reached by the parties to extend the review period.<sup>37</sup>

(2) Agreement - Additional Terms: Generally, an outward expression of assent (by Millennium) would be necessary in order to conclude that New York’s additional terms became part of the agreement.<sup>38</sup> In limited circumstances, which do not appear to be satisfied in this case, silence

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by the parties. See Barron's Law Dictionary 92 (3rd ed. 1991); Restatement § 71(1).

<sup>35</sup> A gratuitous promise – one for which no consideration has been received in exchange – would be unenforceable, unless there was some alternative basis for enforceability. See Farnsworth § 2.5; see also Farnsworth § 2.2 (“Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration.”). Although a limited number of exceptions to this rule exist, none are applicable here. See Restatement §§ 82-84; Williston §§ 8:1-8:43. In arguing that New York’s objection was untimely (i.e., that it occurred after the end of the review period, as extended by the parties’ mutual agreement), Millennium is asking the Secretary of Commerce to “enforce” the additional terms proposed by New York.

<sup>36</sup> The term “bargain” encompasses the concept that Millennium undertook some action or made a promise that was sought by New York in exchange for New York’s language that would eliminate some of the uncertainty concerning the limits of the extension. See Restatement § 71(2).

<sup>37</sup> In lieu of consideration, New York’s additional terms could, nevertheless, be considered a part of the parties’ agreement if there was a foreseeable and detrimental change in Millennium’s position resulting from its reliance on the additional terms. According to the Restatement, for example, “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” Restatement § 90. (This doctrine is sometimes termed promissory estoppel, or, alternatively, detrimental reliance. See *id.* at cmt. a; Williston §§ 8:4, 8:5; Barron’s Law Dictionary 379, 407-08 (3<sup>rd</sup> ed. 1991).) However, the record does not indicate that, because of New York’s proposed terms, Millennium changed its position in a way that caused it to incur significant damage, loss or other adverse consequence.

<sup>38</sup> See Farnsworth § 3.14 (“As a general rule, a promise will not be inferred from the offeree’s mere inaction.”)

may constitute acquiescence.<sup>39</sup> For example, prior dealings between the parties could be a basis for concluding that Millennium agreed to the proposed terms, unless New York received notice to the contrary.

However, the appeal record suggests the opposite – that, in the two instances where language was proposed to alter the length of the State’s review period, Millennium’s practice was to provide or seek explicit confirmation of assent to the proposed language. In one instance (Millennium’s proposal to extend the six-month review period), New York was requested to “*respond indicating [its] assent . . .*”<sup>40</sup> In the other (New York’s statement that, under certain circumstances, it might restart the six-month review period), Millennium confirmed, in writing, that it “concur[red] with [the] procedure” proposed by New York.<sup>41</sup>

In contrast, no evidence suggests that Millennium expressly agreed to New York’s additional terms. In fact, Millennium forcefully argues there was no agreement, at least with respect to one of the two terms suggested by New York.<sup>42</sup> Clearly, Millennium’s silence should be interpreted in the same manner for both terms. In the absence of Millennium’s approval, mutual assent does not exist. Therefore, New York’s additional terms cannot be found to have been incorporated into the agreement extending the length of the review period. 15 C.F.R. §930.60(a)(3).

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<sup>39</sup> See Restatement § 69(1). Silence may constitute acquiescence where: (1) the offeree takes the benefit of offered services after a reasonable opportunity to reject them; (2) the offeror has stated that assent may be manifested by silence or inaction; and/or (3) because of previous dealings, it is reasonable that the offeree should notify the offeror if acceptance is not intended. As discussed *infra*, the record suggests that a manifestation of assent was required in order to confirm acceptance.

<sup>40</sup> Letter from Thomas S. West to William Barton, Sept. 12, 2001, at 2 (emphasis added).

<sup>41</sup> On April 5, 2001, New York advised Millennium that a new CZMA review (which would restart the six-month time clock) may be necessary if the pipeline project were significantly changed. On April 17, 2001, Millennium agreed to this condition stating “[Millennium’s] request for final decision-making is subject to the understanding stated in your letter . . . ‘that should Millennium’s project be significantly changed as a result of the federal environmental review process, a new consistency review may be necessary.’ *Millennium concurs with that procedure.*” Letter from Thomas S. West to William F. Barton, Apr. 17, 2001, at 2 (emphasis added).

<sup>42</sup> Millennium states: (1) there is “utterly no evidence that [it] agreed to any extension of the review period in the event of ‘significant pipeline routing or other project changes’ . . .”; and (2) its “failure to expressly object . . . is hardly evidence of Millennium’s agreement to that language . . . .” Final Brief of Millennium Pipeline Company, Apr. 21, 2003 (Millennium Surreply Brief), at 6.

(3) Agreement - Meaning of Additional Terms: The parties confirm that no “meeting of the minds” ever took place with respect to the meaning of New York’s additional terms. In such instances, if neither party knew or had reason to know of the other party’s intended meaning, there is a lack of mutual assent and the disputed term is not included in the agreement.<sup>43</sup> This result is consistent with NOAA’s regulations, which condition an extension of the six-month review period on the parties’ mutual agreement. *See* 15 C.F.R. § 930.60(a)(3).

The parties’ understandings regarding New York’s additional terms are rife with confusion. For example, the parties offer different interpretations of the phrase “expects to complete. . . within 30 to 60 days . . . .”

Millennium apparently believed the intent was to set a firm 60-day deadline for issuing the CZMA decision (after receipt of the FEIS). Millennium Initial Brief, at 15.

In contrast, New York stated that Millennium’s characterization “is patently incorrect.” New York Reply Brief, at 25. New York argues that, instead of setting a fixed date, its proposed terms afforded the State “flexibility.” New York Reply Brief at 26. In interpreting its proposed terms, New York repeatedly suggests the word “expects” conveys a likelihood, *but less than certain* probability, that the State would complete its review within 60 days after receiving the FEIS. (*See, for example*, New York Reply Brief at 23 (emphasizing the review was “expect[ed]” to be completed within 30 to 60 days), and at 25 (emphasizing the “current expectation” for completing the review within 60 days).)

The parties also express ample confusion about the other term proposed by New York in its September 12, 2001 letter (“barring any significant pipeline routing or other project changes. . . .”):

Millennium argues that it never agreed to this term, or alternatively, that a *subjective standard* (i.e., requiring Millennium’s concurrence) was intended to be used to determine whether a change to the pipeline would trigger a further extension of the State’s review period. *See, for example*, Millennium Initial Brief at 15-17.

In contrast, New York argues that an *objective standard* should be used when considering whether project changes (e.g., blasting in the Hudson River) triggered a further extension of the review period. New York asserts that Millennium agreed not only to the provision, but also to the use of this standard. *See, for example*, New York Reply Brief at 28.

Further, the record fails to suggest either party had reason to know of the other’s intended meaning. The record lacks information as to the motivation and goals of each party about the specific language proposed for extending the review period. Even with regard to basic issues

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<sup>43</sup> Restatement § 201(3); Corbin on Contracts, § 24.5, at 17 (1998).

concerning the extension, the parties disagree. For example, each suggests the extension was undertaken at the request of the other.<sup>44</sup> Also, there is a lack of elucidation concerning any communication between the parties in the days immediately before or after the extension was proposed. Consequently, the record sheds no insight into the understandings held by the parties at the time the agreement was reached. Under these circumstances, the parties' failure to agree on the meaning of New York's suggested terms provides another basis for concluding that the disputed terms are not properly considered part of the agreement.<sup>45</sup>

(b) Conclusion

In light of my earlier findings, the parties reached agreement to extend the State's six-month review period pursuant to NOAA's CZMA regulations. *See* 15 C.F.R. § 930.60(a)(3). Their agreement "extended the time for [New York] to render [its CZMA] decision . . .", and stated simply that:

[New York] will determine consistency of the referenced project after issuance of the Final Environmental Impact Statement for the [Millennium pipeline] project by the Federal Energy Regulatory Commission.<sup>46</sup>

**3. Timeliness of State's Objection**

The timeliness of the State's objection must be considered in the context of relevant events from 2001 and 2002. As noted earlier, the six-month review period began on March 12, 2001, when New York received the Supplemental Draft Environmental Impact Statement for Millennium's project and determined, consistent with NOAA's CZMA regulations, that it had all necessary data and information for evaluating Millennium's proposed pipeline.<sup>47</sup> New York's letter to

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<sup>44</sup> Although Millennium proposed the language agreed to on September 12, 2001, it is unclear whether the pipeline company acted at New York's request as Millennium asserts. *See* ftnt. 28 *supra*.

<sup>45</sup> This result is not prejudicial to the interests of either party. If New York's suggested terms are not part of the agreement, the agreement reached between the parties is defined solely by Millennium's proposed language. Clearly it is untenable for Millennium to refute its own language. In addition, Millennium's language would allow New York sufficient time to request and, if received, consider information the State believed to be necessary for determining whether Millennium's possible blasting in the Hudson River was consistent with New York's Coastal Management Program. *See infra*.

<sup>46</sup> Letter from Thomas S. West to William Barton, Sept. 12, 2001, at 1.

<sup>47</sup> Per NOAA's regulations, the review period commences on the date that information identified as necessary for the state's review is received, unless the state has chosen to begin the

Millennium providing notice of the start of the State's review also identifies this date.

On September 12, 2001, New York and Millennium agreed to extend the six-month review period. As determined *supra*, the agreed-upon extension's singular requirement was for New York to determine the consistency of Millennium's project with New York's Coastal Management Program after issuance of the FEIS.<sup>48</sup> New York received the FEIS on October 5, 2001.

On November 27, 2001, New York became aware – through “a notation in a cover sheet prepared by the [Army] Corps [of Engineers]” – that “Millennium's project had been changed” to include the possibility of blasting in the Hudson River.<sup>49</sup> New York believed this development “. . . may have effects upon the coastal zone of New York State” and therefore requested information from Millennium about the potential blasting activity.<sup>50</sup> The information requested included a complete description of Millennium's proposed blasting plan, an assessment of the potential impacts of blasting on water quality, and a similar assessment concerning potential impacts to fish and wildlife.

Millennium raises several arguments suggesting that New York's request for additional information and subsequent objection came too late, after the end of the agreed-upon extension. However, these arguments are based on Millennium's assertion that New York's review period was limited by the additional terms proposed by New York. As these terms are not part of the extension agreed to by the parties,<sup>51</sup> Millennium's arguments are not persuasive.

In response to New York's request, Millennium undertook a series of actions to provide the State with sufficient information about blasting.

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review period earlier. 15 C.F.R. § 930.60(a)(1)(ii), (2). New York confirmed that this requirement was satisfied as of March 12, 2001, when it declared that materials in its possession “[a]ppear[ed] to address all relevant coastal concerns . . .” associated with Millennium's project. Letter from William F. Barton to Thomas S. West, Apr. 5, 2001, at 1.

<sup>48</sup> The parties' agreement contained no language limiting the scope of the issues New York may review during the extension period.

<sup>49</sup> New York Reply Brief at 28. It appears the information to which the Corps referred was submitted by Millennium to the Corps on October 11, 2001. *See* Letter from George Neives, Chief - Western Permits Section, U.S. Army Corps of Engineers to Richard E. Hall, Millennium Pipeline Company, Dec. 11, 2001, at 1.

<sup>50</sup> Letter from William F. Barton to Thomas S. West, December 14, 2001, at 1-2.

<sup>51</sup> *See* section II(C)(2) *supra*.

On January 25, 2002, Millennium forwarded materials and sought further follow-up in the form of a meeting with New York officials “to discuss these issues.”<sup>52</sup>

Less than a month later (mid-February 2002), Millennium met with New York officials and provided additional information.<sup>53</sup>

On March 14, 2002, Millennium provided New York with additional information (addressing comments received by New York) concerning the potential effects of blasting.

On April 23, 2002, Millennium provided another submission to ensure that New York had “. . . all necessary information to complete its review.”<sup>54</sup> The materials are comprised of a blasting plan and separate impact assessment.

Millennium’s actions are wholly consistent with the purpose for which the parties agreed to an extension – to allow New York to review information necessary to determine the project’s consistency with the State’s Coastal Management Program. Further, Millennium’s repeated efforts to provide sufficient materials to New York – and avoid New York’s threatened objection on grounds of insufficient information<sup>55</sup> – appear to be in the pipeline company’s self interest. More importantly, New York’s actions fall completely within the broad terms of the agreement reached by the parties. New York acted reasonably in seeking information<sup>56</sup> necessary for its

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<sup>52</sup> Letter from Thomas S. West to William F. Barton, Jan. 25, 2002, at 6.

<sup>53</sup> Letter from Thomas S. West to George Stafford, Feb. 22, 2002, at 1 (stating, in reference to the meeting with New York officials, “[w]e trust that the information . . . provided was informative and resolves any [CZMA] concerns that you may have regarding . . . Millennium’s project. . . .”)

<sup>54</sup> Letter from Thomas S. West to George Stafford, Apr. 23, 2002, at 1

<sup>55</sup> See Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 2. In addition, Millennium references a March 2002 letter from New York indicating the State did not intend to approve the project before receiving the blasting plan. Letter from Thomas S. West to George Stafford, Mar. 14, 2002, at 6 (referencing New York’s letter of March 1, 2002).

<sup>56</sup> The record is unclear whether at the time Millennium proposed language extending the State’s review period it planned to submit information to the Corps less than a month later suggesting the need for blasting in the Hudson River. Clearly, Millennium was in the best position to know whether its construction plans might change and consequently, foresee the possibility that New York would request information about blasting during the extended review period. Although Millennium provided blasting information to the Corps on October 11, 2001, New York did not learn of the plans for possible blasting until informed by the Corps on

decision and promptly issued an objection after receiving the requested materials.

Millennium may well be concerned that the review period had no specific end date. This circumstance, however, is the direct result of the language proposed by Millennium and could have been avoided had the parties instead agreed on a specific deadline.<sup>57</sup> In addition, the timing of New York's decision was largely dependent on Millennium's submission of information that the State considered necessary for its decision. New York issued its objection to the pipeline project just 16 days after receiving Millennium's blasting plan.

Millennium was not without recourse had it believed New York's information requests were superfluous or the State was extending its review beyond the parties' contemplation. In the first instance, Millennium could simply have stopped providing additional information.<sup>58</sup> In the event that Millennium believed New York was not completing its review in a timely manner, Millennium could have ended the review process, as it did on May 9, 2002.

In addition, the equitable interests in this case, specifically with regard to blasting, weigh in New York's favor. Millennium acknowledged that blasting in the Hudson River had not been addressed in its CZMA filings with New York.<sup>59</sup> In fact, had the review period not been

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November 27, 2001. *See supra* at 6.

<sup>57</sup> An agreement, pursuant to 15 C.F.R. § 930.60(a)(3), should be clear with regard to: (a) its scope or application; and (b) its length.

<sup>58</sup> Millennium advised New York "there is no reason to hold off. . . decision making . . . [in order to receive] a blasting plan." Letter from Thomas S. West to George Stafford, Mar. 14, 2002, at 6. However, in April 2002, Millennium provided New York with new materials "so that there can be no question that [the State] ha[d] all necessary information to complete its review. . . ." Letter from Thomas S. West to George Stafford, Apr. 23, 2002, at 1. New York must base its CZMA decision for the pipeline project on the information in its possession. The extended review period allowed New York the time to request and consider additional information. It would not, however, have allowed New York to delay a decision indefinitely if Millennium had suggested that no further information would be provided, because the State's action (i.e., its delay) would conflict with its obligation under the extension agreement – to determine the consistency of Millennium's project after issuance of the FEIS. Of course, one option available to the State in this circumstance would be to object on the grounds of insufficient information. (In previous appeals raising this issue, the adequacy of information is considered as part of the determination of whether the appellant has satisfied the statutory grounds for overriding a state's objection. *See, for example*, Decision and Findings in the Plan of Exploration Consistency Appeal of Mobil Oil Exploration and Producing Southeast, Inc., Sept. 2, 1994, at 9.)

<sup>59</sup> Letter from Thomas S. West to William F. Barton, Jan. 25, 2002, at 2.

previously extended, New York would not have learned of the planned blasting before reaching its decision. While not determinative, blasting information was important to the State's decision and an appropriate issue for consideration, to the extent feasible under the extension agreement. As issued, New York's objection to Millennium's project indicated that "[b]lasting, with the mitigation measures proposed by Millennium, would have adverse affects on the Significant Coastal Fish and Wildlife Habitat of Haverstraw Bay [and] [f]or this reason, . . . would not be consistent with Policy 7 of the [State Coastal Management Program] . . . ."<sup>60</sup>

#### **D - Conclusion**

For the reasons discussed *supra*, New York's request for information about blasting and its subsequent objection to the consistency certification for Millennium's project occurred within the time frame provided by the parties' mutual agreement entered into pursuant to 15 C.F.R. §930.60(a)(3). Consequently, New York's objection to the proposed pipeline, as issued on May 9, 2002, was timely.

### **III - STATUTORY GROUNDS FOR OVERRIDE**

#### **A - Statutory and Regulatory Framework**

The CZMA provides states with federally approved coastal management programs the opportunity to review proposed projects requiring federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. § 1456(c)(3)(A). A timely objection raised by a state to the project precludes federal agencies from granting licenses or permits required for the project, unless the Secretary of Commerce finds that the activity is:

“consistent with the objectives of [the CZMA]” (Ground I); *or*

- “necessary in the interest of national security” (Ground II).
- 16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. §§ 930.121, 122, 130(d).

In its Notice of Appeal, Millennium asserts its proposed pipeline project satisfies both Ground I and Ground II. A finding that either ground is satisfied will result in an override of the State's objection.

#### **B - Consistent with the Objectives of the CZMA (Ground I)**

A project is consistent with the objectives of the CZMA if it satisfies *each* of the following three

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<sup>60</sup> Letter from George R. Stafford to Thomas S. West, May 9, 2002, at 12.