

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

Millennium Pipeline Company, L.P.,)
)
Appellant,)
)
v.)
)
State of New York, Department of State,)
)
Respondent.)

**REPLY BRIEF OF MILLENNIUM PIPELINE COMPANY, L.P.
ON APPEAL FROM THE OBJECTION OF
THE STATE OF NEW YORK, DEPARTMENT OF STATE,
TO THE MILLENNIUM PIPELINE PROJECT**

Pursuant to Section 307(c)(3)(A) of the Coastal Zone Management Act (the “CZMA”) and the procedural schedule established by the National Oceanic and Atmospheric Administration (“NOAA”), Millennium Pipeline Company, L.P. (“Millennium”) submits its reply brief in support of its appeal to the Secretary of Commerce (“the Secretary”) from the May 9, 2002 objection of the State of New York, Department of State (“NYSDOS”), to Millennium’s consistency certification for the proposed Millennium Pipeline Project.

PRELIMINARY STATEMENT

Congress established the CZMA appeals process to permit the Secretary “to ensure that projects which do significantly or substantially further the national interest in the

CZMA's objectives, and where the national interest outweighs impacts to coastal uses and resources, may be federally approved."¹ In this case, the chairman and staff of the Federal Energy Regulatory Commission ("FERC"), the Federal agency created by Congress to evaluate proposed interstate gas pipeline projects, have advised the Secretary that the Millennium Pipeline Project's contribution to the national interest will be "**incalculable**" in terms of its economic and environmental benefits,² and Secretary of Energy Spencer Abraham and the Department of Energy ("DOE") have urged the Secretary to concur in that conclusion.³ Because the record evidence in this proceeding overwhelmingly supports that very same conclusion, the Secretary should override the NYSDOS's objection and permit the Project to proceed in accordance with Federal authorizations and environmental requirements.

With all due respect, the arguments of the NYSDOS and others that oppose Millennium's appeal are unpersuasive. To begin with, the record shows that the Project will clearly serve the national interest and the objectives of the CZMA, as the FERC and the DOE have stressed in their comments to the Secretary. The NYSDOS's contrary conclusions are based on an unduly restrictive interpretation of the CZMA and a narrow, parochial view of the Project's benefits. Moreover, the record evidence shows that any adverse effects on the coastal zone will be temporary and minimal and that the Project will on balance benefit the coastal zone's environment for decades to come.

In a last-ditch effort to defeat the Millennium Project, the NYSDOS and its supporters have advanced a myriad of so-called "alternative" pipeline routes north and south of

¹ Preamble to the CZMA Regulations, 65 Fed. Reg. 77124, 77150 (December 8, 2000).

² "Comments of the Federal Energy Regulatory Commission Staff on Millennium's CZMA Appeal to the Secretary of Commerce" dated November 15, 2002 ("FERC Staff Comments"), at 2 (emphasis added).

the Hudson River pipeline crossing that has been approved by the FERC. All of these routes were either specifically or generally considered by the FERC and Millennium and rejected as infeasible years ago, and they remain equally infeasible today. The Hudson River crossing approved by the FERC is not only feasible and reasonable, but will be undertaken with the best available technology and stiff environmental requirements that will ensure that coastal zone impacts will be temporary and minimal.

ARGUMENT

As a threshold procedural matter, the Secretary should dismiss the NYSDOS's objection as untimely. The NYSDOS issued its objection on May 9, 2002, more than a month after the maximum statutory six-month review period ended on April 5, 2002. That review period began on October 5, 2001, pursuant to an agreement between Millennium and the NYSDOS, when the NYSDOS received the FERC's Final Environmental Impact Statement ("FEIS"). During the ensuing six-month review period that ended on April 5, 2002, the NYSDOS did not issue an objection to Millennium's consistency certification, did not stop the consistency time clock by entering into a further extension agreement with Millennium, and could not otherwise stop the clock under NOAA's governing regulations. The clock ultimately ran out on April 5, 2002, without any NYSDOS decision. In these circumstances, the CZMA and NOAA's regulations require that the NYSDOS's concurrence with Millennium's consistency certification must be conclusively presumed, and Millennium's appeal should thus be dismissed as moot.

³ Letter from Secretary of Energy Spencer Abraham to the Secretary, dated December 2, 2002.

If the Secretary does not dismiss the NYSDOS's objection as untimely, then Millennium requests the Secretary to override the NYSDOS's objection on either or both of the two substantive grounds set forth in the CZMA (16 U.S.C. § 1456(c)(3)(A)):

- First, the Secretary should find that Millennium Project "is consistent with the objectives" of the CZMA because the Project's national benefits far outweigh any temporary, localized coastal effects.
- Second, the Secretary should find that the Millennium Project is "vital in the interest of national security" because it will provide essential energy infrastructure, contingency protection, and reliability benefits that advance and support homeland security initiatives.

Both of these two determinative conclusions are endorsed by FERC Chairman Pat Wood, III, by the FERC Staff, by Secretary of Energy Spencer Abraham, and by the DOE -- the Federal officials and agencies that have been entrusted with the responsibility in the first instance to determine whether the National energy benefits and National security benefits of a proposed energy project like the Millennium Pipeline Project should permit the project to proceed, notwithstanding state and local concerns. Moreover, the overwhelming record evidence presented to the Secretary in this proceeding supports those two conclusions.

Giving due consideration to the record evidence and the views of the responsible Federal energy agencies, the Secretary should override the NYSDOS's objection to the Millennium Project. The opposing arguments of the NYSDOS and its supporters⁴ rest on insular and biased views of the Project's benefits, unsubstantiated environmental "concerns," and sheer sophistry.

⁴ The NYSDOS supporters whose arguments will be addressed in this brief include Westchester County, New York ("Westchester County"), the City of New York ("New York City"), the Villages of Croton-on-Hudson and Briarcliff Manor, New York ("Villages"), the Town of Cortlandt, New York ("Cortlandt"), and Riverkeeper, Inc. ("Riverkeeper").

I.

**THE SECRETARY SHOULD DISMISS
THE NYSDOS'S OBJECTION AS UNTIMELY**

The NYSDOS's concurrence with Millennium's consistency certification must be "conclusively presumed" under NOAA's regulations if the NYSDOS's objection was not issued "within six months following commencement of the state agency review." 15 C.F.R.

§ 930.62(a). In this case, the NYSDOS and Millennium agreed that the state agency review would commence on October 5, 2001, when the NYSDOS received the FERC's FEIS.

Millennium Exhibits 27, 28.

Because the state agency review period commenced on October 5, 2001, the review period ended either (1) on December 4, 2001, 60 days after the review period commenced,⁵ or (2) **at the very latest**, on April 5, 2002, six months after the review period commenced. The NYSDOS's objection was not issued until May 9, 2002, however, after both the 60-day review period and the six-month review period had ended. The NYSDOS's concurrence with Millennium's consistency certification must therefore be conclusively

⁵ The NYSDOS stated that it expected 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 that may have effects upon the coastal zone of New York State" (Millennium Exhibit 28 (emphasis added)), and no "significant pipeline routing or other project changes" were made during that 30-60 day period. The NYSDOS also concedes that the parties' "agreement provided for an additional **60 days**" (NYSDOS Br. at 2 (emphasis added)), "that there was a **30 to 60-day period** set forth in the agreement" (*id.* at 14 (emphasis added)), and that Millennium's draft letter agreement confirmed the parties' intent that there would be a **30-60 day review period**. *Id.* at 6; NYSDOS Exhibit 5. Even if the Secretary were to conclude for some reason that the parties did not agree to a 60-day review period, the CZMA and NOAA's regulations establish a maximum six-month review period that expired more than a month before the NYSDOS's objection was issued.

presumed under the CZMA and NOAA's regulations, and Millennium's appeal should accordingly be dismissed as moot.⁶

NOAA's regulations make it clear that, in this case, the NYSDOS's objection was not issued "within six months following commencement of state agency review." 15 C.F.R. § 930.62(a). Once the CZMA consistency timeclock commenced on October 5, 2001, the clock could not be stopped by the NYSDOS without Millennium's agreement because, as NOAA unequivocally states in its preamble to the controlling CZMA regulations, "States cannot unilaterally stop, stay, or otherwise alter the review period without an applicant's agreement." 65 Fed. Reg. 77124, 77147 (December 8, 2000). NOAA's regulations also did not permit the NYSDOS to unilaterally extend the review period by asking Millennium for more information (15 C.F.R. § 930.60(b)) or by any other means, except with Millennium's express, written agreement to extend the review period (*id.* § 930.60(a)(3)). The NYSDOS of course remained free to issue a timely decision or to obtain Millennium's written agreement to extend the review period, but it did neither. Instead, the NYSDOS's objection was issued on May 9, 2002, after the review period had ended, and it was thus plainly untimely.

In its initial brief, the NYSDOS argues that its May 9, 2002 objection was timely issued because the six-month review period that commenced on October 5, 2001 was automatically extended by virtue of a "project change" or, alternatively, by its receipt of further Project information. NYSDOS Br. at 9-15. The NYSDOS also advances three alternative arguments in an effort to validate its untimely objection -- (1) that it objected to Millennium's consistency certification in a letter dated December 14, 2001, within 60 days from the

⁶ See Notice of Dismissal of Consistency Appeal of Jeffery Shapiro, 55 Fed. Reg. 2256 (January 23, 1990).

commencement of the review period; (2) that Millennium withdrew its consistency certification in a letter dated May 9, 2002; and (3) that Millennium is equitably estopped from asserting that the CZMA review period expired before the NYSDOS's objection was issued. *Id.* at 15-23. All of these arguments are untenable.

A. The CZMA Review Period Was Not Extended

The NYSDOS first claims that its objection was timely issued because Millennium's disclosure of alleged "new project information" regarding the potential need for blasting in a small portion of the Hudson River constituted a "project change" that "triggered the need for additional review" by the NYSDOS under its September 12, 2001 agreement with Millennium. NYSDOS Br. at 9-12. However, the potential need for blasting less than 2% of the Hudson River crossing was clearly not a "project change" (*see* Millennium Initial Br. at 17), and, even if it were a "project change" for sake of argument, Millennium never agreed that any such "project change" would automatically extend the statutory review period.⁷ In short, NOAA's regulations did not permit the NYSDOS to extend the review period without Millennium's agreement, Millennium did not agree to any such extension, and thus the review period ended, at the latest, on April 5, 2002.

Similarly, there is no basis for the NYSDOS's contentions that its May 9, 2002 objection was timely (a) because it "was made at the earliest practicable time after receipt of the necessary information" (NYSDOS Br. at 12-15) or (b) because the six-month review period, if

⁷ NOAA's regulations require a mutual agreement between the applicant and the state agency to extend the review period (15 C.F.R. § 930.60(a)(3)), and Millennium's agreement (Millennium Exhibit 27) contained no agreement or even a remote suggestion that any "project change" would extend the review period. Moreover, the NYSDOS's responsive letter (Millennium Exhibit 28) unilaterally suggested only that a "project change" might extend the 60-day state agency review period that the letter contemplated -- not the maximum six-month review period.

applicable, should be deemed to commence on April 23, 2002, when Millennium provided the NYSDOS with requested information regarding the potential need for blasting the easternmost 200 feet (less than 2%) of the 2.1 mile Hudson River crossing. *Id.* at 15. NOAA's regulations provide that neither the NYSDOS's request for information from Millennium nor the NYSDOS's receipt of such information extended the review period. 65 Fed. Reg. at 77147 (December 8, 2000); 15 C.F.R. § 930.60(b).⁸

B. The NYSDOS Did Not Object to Millennium's Consistency Certification During The CZMA Review Period

In a second alternative argument, the NYSDOS claims that it objected to Millennium's consistency certification in a December 14, 2001 letter to Millennium, within 60 days from the commencement of the review period that began on October 5, 2001. NYSDOS Br. at 15-16. Even the most cursory review of that December 14, 2001 letter shows, however, that the NYSDOS registered no objection whatsoever to Millennium's consistency certification at that point in time. In fact, the NYSDOS stated in that letter that it would subsequently "notify Millennium . . . of its consistency decision" (NYSDOS Exhibit 11; Millennium Exhibit 33). Accordingly, the NYSDOS did not object to Millennium's consistency certification in that letter, contrary to the NYSDOS's assertion.

C. Millennium Did Not Withdraw Its Consistency Certificate

The NYSDOS's third alternative argument with respect to the threshold timeliness issue is that a May 9, 2002 letter from Millennium to the NYSDOS should be "treated

⁸ The opinion that Cortlandt cites (Cortlandt Br. at 13) in support of the NYSDOS's contention that a state agency's request for information extends the CZMA review period, *Mountain Rhythm Resources v. FERC*, 302 F.3d 958 (9th Cir. 2002), is wholly inapposite. In that case, the court observed that "the six-month clock had never started" (*id.* at 966), whereas in this case the six-month clock started on October 5, 2001 and could not thereafter be stopped without

as a withdrawal of Millennium’s consistency certification.” NYSDOS Br. at 17. A careful review of that letter (NYSDOS Exhibit 14) plainly shows, however, that Millennium did not withdraw its consistency certification in that letter. To the contrary, Millennium simply explained in that letter that the NYSDOS’s concurrence with Millennium’s consistency certification should be presumed under NOAA’s regulations because of the NYSDOS’s failure to complete its review in a timely manner.

D. Millennium Is Not “Equitably Estopped” From Challenging The Timeliness Of The NYSDOS’s Objection

Recognizing the inherent weakness of the hodgepodge of timeliness defenses that it has advanced and the need to invent a *post hoc* justification for its untimely objection, the NYSDOS now blames its delay in issuing a decision on Millennium. NYSDOS Br. at 18-23. The NYSDOS and its supporters advance a number of such “equitable estoppel” claims, none of which is tenable:

- The NYSDOS asserts that “having consistently urged DOS to continue its review, Millennium is now equitably estopped from asserting that the resulting decision was not timely.” NYSDOS Br. at 21 (emphasis added). In fact, however, Millennium repeatedly, persistently, and emphatically urged the NYSDOS to end its review and reserved its right to contest the timeliness of the NYSDOS’s decision.⁹

Millennium’s agreement, which was not obtained. 65 Fed. Reg. 77124, 77147 (December 8, 2000).

⁹ See Millennium Exhibit 44, Letter from T. West to W. Barton dated January 25, 2002, at 1-2 (“Your letter addresses the timing of Department of State action concerning the Millennium Project and suggests that the potential for a limited amount of blasting . . . may constitute a ‘project change.’ Millennium does not believe that the possibility for blasting in this very limited area is a project change Accordingly, Millennium reserves all of its rights concerning the timeliness of DOS review”); Millennium Exhibit 50, Letter from T. West to G. Stafford, dated

- The NYSDOS's claim that "Millennium requested DOS to extend the six-month review period" that was scheduled to end on September 12, 2001 (NYSDOS Br. at 6) is untrue. The NYSDOS asked Millennium to agree to an extension of the review period on the day before it was scheduled to expire, and Millennium in good faith agreed to that request for an extension.

- The NYSDOS's assertion that "Millennium was the primary beneficiary of the extension agreement" (NYSDOS Br. at 14) is also untrue. The NYSDOS asked Millennium to agree to an extension, Millennium accommodated that request, and thus the NYSDOS was plainly the beneficiary of that agreement. The NYSDOS's requested extension of the review period was also of questionable propriety, since the NYSDOS admits that it had already decided, more than two years before it issued its decision, to object to Millennium's consistency certification. NYSDOS Br. at 53 ("At a July 26, 1999 conference call , DOS informed FERC that trenching across Haverstraw Bay would not be consistent with the CMP.").

- While the NYSDOS further claims that "Millennium seems eager to **abandon** that [September 12, 2001 extension] agreement in its brief" (NYSDOS Br. at 17 (emphasis added)), exactly the opposite is true. Millennium seeks to **enforce** the September 12, 2001 agreement with the NYSDOS, which required the NYSDOS to complete its review, at the very latest, within six months of its receipt of the FEIS (*i.e.*, by April 5, 2002).

February 22, 2002, at 2 ("We understand from our meeting that the DOS now has all the information that it needs regarding the Millennium Project to make its decision regarding the consistency of the Millennium Project with the CMP. We look forward to receiving a decision from the DOS soon and, in accordance with prior correspondence, reserve all rights concerning the timeliness of DOS review."); Millennium Exhibit 49, Letter from T. West to G. Stafford dated March 14, 2002, at 2, n.1 ("Millennium's willingness to submit further information is subject to its reservation of rights concerning the timing of DOS review as is set forth in prior correspondence and submissions concerning the Millennium Project.").

- Also devoid of merit is the NYSDOS's allegation that Millennium "concealed" the potential need for blasting near the eastern shore of the Hudson River to induce the NYSDOS to commence its review and should thus now be "equitably estopped from asserting . . . that the review period commenced . . ." NYSDOS Br. at 20; *see* Westchester County Br. at 10. Millennium specifically identified the Hudson River as one of the waterbodies within possible blasting areas in its response to a FERC data request in 1998 (Millennium Exhibit 34), that blasting information was filed with the NYSDOS on March 26, 1999 (*see* Millennium Exhibit 22), and those plans were never changed. Even if the NYSDOS only learned of the possible need for blasting on November 27, 2001 (*see* Millennium Exhibit 33), the six-month review period extended until April 5, 2002, providing the NYSDOS with sufficient time to take that information into account and to issue a timely decision. The NYSDOS's failure to do so cannot legitimately be blamed on Millennium.

- The NYSDOS also argues that Millennium should be estopped from asserting that the six-month review period ended on April 5, 2002 because, thereafter, "Millennium was continuing to submit information to DOS and continuing to urge DOS to continue the review process." NYSDOS Br. at 21 n. 36. Even after the review period had ended, however, Millennium was obviously entitled to continue to seek a favorable decision from the NYSDOS, even if that decision were untimely, to avoid the lengthy and expensive CZMA appeal process that it now confronts.

- Finally, there is utterly no basis for Croton's unconscionable accusation that Millennium has exhibited a "deep-rooted disregard for the entire CZMA review process and its substantive requirements." Villages Br. at 2. Millennium submitted a voluminous amount of data and information to the NYSDOS in support of its consistency certification over a four-year

period (*see* Millennium Initial Br. at 12); provided the NYSDOS with an extensive and comprehensive consistency study of all relevant coastal zone issues (Millennium Exhibit 14); corresponded with and met with the NYSDOS staff frequently; and otherwise did everything possible to comply in good faith with all relevant requirements. Millennium has shown only the highest regard for the CZMA review process, and Croton’s allegation to the contrary is both untrue and unprofessional.

II.

THE SECRETARY SHOULD OVERRIDE THE NYSDOS’S OBJECTION ON CZMA GROUND 1: THE MILLENNIUM PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE CZMA

The CZMA provides that a state agency’s objection to a proposed activity will be overridden if the Secretary finds either “that the activity is consistent with the objectives” of the CZMA (so-called “Ground 1”) or, alternatively, that the activity “is otherwise necessary in the interest of national security” (so-called “Ground 2”). 16 U.S.C. § 1456(c)(3)(A). The Millennium Project satisfies the standards of both Ground 1 and Ground 2, and thus the Secretary should override the NYSDOS’s objection.

To show that the Millennium Project satisfies Ground 1 because it “is consistent with the objectives of [the Act],” Millennium must demonstrate that (15 C.F.R. § 930.121):

“The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner.

“The national interest furthered by the activity outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively.