

## POINT II

### THE SECRETARY SHOULD NOT OVERRIDE THE DOS OBJECTION ON “GROUND I” BECAUSE MILLENNIUM HAS NOT MET ITS BURDEN OF DEMONSTRATING THE PIPELINE’S CONSISTENCY WITH THE OBJECTIVES OF THE CZMA

In addition to its baseless procedural challenge to the DOS Objection, Millennium appeals to have the Secretary override the Objection on the substantive ground that the Pipeline is “consistent with the objectives” of the CZMA (“Ground I”). 16 U.S.C. § 1456(c)(3)(A).

In order for the Secretary to base an override on Ground I, Millennium must prove that: (a) the Pipeline furthers the national interest as articulated in section 302 or 303 of the CZMA, in “a significant or substantial manner;” (b) the national interest furthered by the Pipeline outweighs its adverse coastal effects, when those effects are considered separately or cumulatively; and (c) no reasonable alternative is available that would permit the Pipeline to be conducted in a manner consistent with the enforceable policies of New York’s CMP. 15 C.F.R. § 930.121

Despite its attempts to pad or otherwise reinvent the Record, Millennium cannot demonstrate the satisfaction of any of these three factors – let alone all of them, as it must in order to justify an override under Ground I. As set forth below, Millennium’s inability to satisfy any of the factors stems from facts in the Record showing that: (i) the Pipeline does not further a national interest “in a significant or substantial manner;” (ii) any national interest furthered by the Pipeline does not outweigh its adverse coastal effects; (iii) the Pipeline will cause a de facto violation of the CWA and therefore violate the CZMA; and (iv) there are reasonable alternatives available that would permit the Pipeline to be developed in a manner more consistent with New York’s CMP.<sup>27</sup>

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See discussion, Point II(E), infra.

Therefore, because Millennium fails to meet the high burden required to authorize the Secretary to override the DOS Objection on Ground I, its appeal should be dismissed and the DOS Objection left to stand.

A FERC's Certificate Cannot Serve As A Basis For Demonstrating The Pipeline's Consistency With The CZMA

As an initial matter, throughout its brief Millennium attempts to bolster its Ground I argument that the Pipeline is consistent with the CZMA (and the “national interests” identified therein) by trumpeting the FERC Interim Order and Certificate. (See, e.g., Millennium Br. at 2 (claiming that FERC balanced benefits with impacts, and certificated project under NEPA and the Natural Gas Act); 3 (FERC found major regional benefits); 29 (FERC’s citation of studies indicates strong demand for natural gas); 38 (FERC “commented favorably on the revised crossing methodology”); 51, 53 (FERC reviewed blasting impacts on fish); 89 (FERC reviewed threats to water supply); 99 (FERC concluded need for project); and 105-06 (FERC considered alternative pipeline routes).) Such heavy reliance, however, is wholly misplaced because (i) the Secretary must conduct a de novo review and cannot defer to FERC’s findings, (ii) FERC violated the CZMA in issuing the Certificate, and (iii) the Town is appealing the FERC Certificate because it is arbitrary and capricious.

1. The Secretary Does Not Defer To Agency Decisions

The Secretary has made clear that a de novo standard of review is employed when considering an override petition. See, e.g., Decision and Findings in the Consistency Appeal of Amoco Production Company, July 20, 1990 (“Amoco Appeal”), at 13. As such, the Secretary has observed that, “[t]he concept of deference is inappropriate in the appeals process.” Id. Accordingly, in the Amoco Appeal, the Secretary rejected petitioner’s attempt to have the Secretary defer to a Department of the Interior decision because the CZMA appeal process

“focuses on whether the proposed activity meets the statutory and regulatory criteria for an override established in the CZMA.” *Id.* Given such explicit precedent, the Secretary similarly should refuse to defer to the FERC Certificate, and entirely reject Millennium’s heavy reliance upon it.

## 2. FERC Issued The Certificate In Violation Of The CZMA

Even if the Secretary were inclined to disregard its “no-deference” rule and defer to FERC, to do so here would be especially inappropriate because FERC issued the Certificate in violation of the CZMA. A CZMA violation cannot be used to demonstrate CZMA consistency.

FERC violated the CZMA when it issued the Certificate because it failed to wait until DOS had completed its review and made its determination of the Pipeline’s consistency with the CZMA. 16 U.S.C. § 1451 *et seq.* This violation is particularly egregious in light of the last-minute, post-FEIS “revelation” by Millennium that it would blast up to 400 feet of the Hudson River crossing before making landfall on the Town’s shores – a method that directly contradicts Millennium’s prior assurances and the existing CWA § 401 WQC incorporated in the FEIS.<sup>28</sup> FERC at least implicitly recognized this when it granted in part the Town’s and the County of Westchester’s motion for rehearing, and required Millennium to obtain from DEC a revised WQC reflecting, among other things, “the need for blasting in the Hudson River...”<sup>29</sup>

As the Secretary is aware, the CZMA grants the State of New York independent authority to review federal projects affecting the state’s coastal zone, and to determine whether a project

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<sup>28</sup> Millennium’s existing CWA § 401 WQC, which is incorporated in the FEIS, plainly states that for the Hudson River crossing, “Millennium must perform all trenching operations using a closed environmental bucket such as a Cable Arm bucket as detailed in the DDR. No other type of trenching and backfilling equipment is approved for this crossing.” (FEIS at Appendix “K;”) (emphasis added.)

FERC Sept. 19, 2002 Order at ¶ 235.

“complies with the enforceable policies of the state’s approved program and will be conducted in a manner consistent with the program.” 16 U.S.C. § 1456(c)(3)(A). The CZMA thus expressly prohibited FERC from granting the Certificate until after New York completed its review: “[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s [consistency] certification....” *Id.* As if this prohibition lacked clarity, the Court of Appeals for the Ninth Circuit recently reaffirmed the statute’s plain language:

the [CZMA] provides that if a [proposed project] is located in a state’s coastal zone, then FERC cannot issue the license unless the state’s applicable agency concurs that the proposed project is consistent with the state’s Coastal Zone Management Program.... Because the proposed projects were located in Washington’s coastal zone, FERC needed [the State] to certify that the projects were consistent with [its] Coastal Zone Management Program before FERC could consider the license applications.

Mountain Rhythm Resources, 302 F.3d at 960 (emphasis added). Because the Certificate itself springs from a violation of the CZMA, Millennium cannot properly use it to demonstrate the Pipeline’s supposed consistency with the CZMA.

### 3 The FERC Certificate Is On Appeal

Finally, Millennium should not be permitted to rely on the FERC Certificate to meet its burden on this appeal, because the Town will soon file an appeal from the FERC Certificate, demonstrating that the Commission acted in an arbitrary and capricious manner. Until the appeal of the Certificate is exhausted, the Secretary should not give any weight to its analysis and/or conclusions.

B. Millennium Cannot Satisfy 15 C.F.R. § 930.121(a)  
Because The Pipeline Does Not Further A National Interest  
In A Significant Or Substantial Manner

In its bid to convince the Secretary to override the DOS Objection pursuant to 15 C.F.R. § 930.121, Millennium alleges that the Pipeline will “advance” four “national objectives:” (i) the siting of a “major energy facility;” (ii) the enhancement of the nation’s energy self-sufficiency; (iii) the promotion of compatible development in a coastal zone; and (iv) the protection of coastal-zone resources. (See, e.g., Millennium Br. at 20-22.) However, these assertions are based upon speculation instead of support in the Record, and ignore that the Pipeline must not only advance national interests generally, but do so in a “significant or substantial manner.” C.F.R. § 930.121(a).

Although The Pipeline Is A “Major Energy Facility,” It Would Not Promote The  
National Interest In A “Significant Or Substantial Manner” Given The Threat Of  
Terrorism And Lack Of Documented Supply And Demand

Millennium’s first attempt at demonstrating that the Pipeline “furthers the national interest,” is a model of circular reasoning. According to Millennium, because the Pipeline is “a major energy facility,” its construction will, ipso facto, advance the national objective as stated in 16 U.S.C. § 1452(2)(D) of “siting major facilities related to...energy.” (Millennium Br. at 20, 23.) But as the “significant or substantial” language of Section 930.121(a) makes plain, whether a proposed project is “in the national interest” involves a qualitative component; no undertaking is rendered “in the national interest” merely because it is a certain type of project. Millennium’s oversimplified characterization of “the national interest” as requiring the nation to “build a pipeline for the sake of building a pipeline,” ignores the qualitative element of Section 930.121(a) and would result in every energy-facility proposal satisfying Section 930.121(a).

Rather, the CZMA requires Millennium to demonstrate that this specific Pipeline furthers the national interest in a significant or substantial manner. For the reasons below, Millennium cannot do so. Therefore, Millennium has failed to satisfy Section 930.121(a), and an override would thus be improper.

a. The “National Interest” Is Not Static And Must Account For Terrorist Threats To Energy Infrastructure

Millennium acknowledges that, “‘our national interests are not static...’ and must be determined by ‘examining Federal laws and policy statements from the President and Federal agencies, and reviewing plans, reports and studies issued by Federal agencies.’” (Millennium Br. at 22-23 (citing Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc. (June 20, 1995), at 80). However, by simplistically arguing that the Pipeline should be built because pipelines (as “major energy facilities”) are in the “national interest,” Millennium actually ignores this admonition.

Following the September 11, 2001 terrorist attacks on New York and Washington, the nation must re-evaluate, and indeed presently is re-evaluating, its interests in light of continuing threats to critical energy infrastructure such as natural-gas pipelines. A quick survey of recent media coverage confirms that this evaluative process is well under way. (See, e.g., CNN.com, “Walker Lindh: Al Qaeda Planned More Attacks,” 10/3/2002 (“The FBI’s interrogation report says [that so-called “American-Taliban” prisoner John Walker Lindh] related that after September , one of his former al Qaeda training-camp instructors said ‘that [Osama bin Laden] said this was the first attack.... The group speculated that the second attack would involve attacking nuclear facilities, oil/gas pipe lines, or some kind of biological attack [emphasis supplied]”) (attached hereto as Exhibit “A”); Reuters News Service, “FERC mulls plan in case of attack on US pipelines,” 4/4/2002 (“Since the deadly Sept. 11 attacks on the World Trade Center

and Pentagon, some U.S. lawmakers have urged additional steps to protect key U.S. pipelines, oil refineries and nuclear power plants”) (attached hereto as Exhibit “B”); Associated Press, “Energy Industry on Alert for Attack” (“possible terrorist threat against natural gas pipelines has put the U.S. oil and gas industry on high alert. Attorney General John Ashcroft . . . said [the threat] was being taken seriously”) (attached hereto as Exhibit “C”); New York Observer, “Indian Point: Disaster Awaits,” 4/15/02 (“In a city forever stunned and horribly awakened by the terrorist attack of Sept. 11, there ought to be a new awareness of the ways in which unexpected and ‘impossible’ events can – and do – happen”) (attached hereto as Exhibit “D”).)

Accordingly, Millennium’s characterization of “the national interest” as requiring the nation to build the Pipeline for the sake of building a pipeline, ignores both the qualitative element of Section 930.121(a) and the far-more-complex realities facing this country today. Given those new realities, the Town respectfully submits that the “national interest” militates against siting a major natural-gas “target” where it could decimate the City’s critical water supply and electricity infrastructure, and have catastrophic affects on the City’s coastal zone. (See discussion, Point II(C)(2), infra.)

b. No Energy Self-Sufficiency Or Proven Demand For The Pipeline's Gas

Moreover, Millennium’s hypothesis – that the Pipeline is in the “national interest” because CZMA policy advocates the siting of major energy facilities – puts the cart before the horse. While the Pipeline obviously would qualify as a “major energy facility, common sense dictates that in order for it to serve the “national interest” (let alone serve it “in a significant or substantial manner”), the Pipeline must be a “major energy facility” that the nation actually needs. See, e.g., 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000) (clarifying National Oceanographic and Atmospheric Administration’s (“NOAA”) intent that to qualify as serving the national

interest, “the activity must be more than related to one of the category of objectives described in §§ 302 or 303 – it must contribute to the national achievement of those objectives in an important way or to a degree that has a value or impact on a national scale”). But despite Millennium’s haste to build the Pipeline, and FERC’s haste to certificate it, even a cursory review of the Record shows that the project lacks both consumer demand and product supply.

Millennium devotes significant attention to the alleged “increasing demand for natural gas.” (See Millennium Br. at 25-29.) However, while there may be an increase in generalized demand, neither Millennium nor the Record demonstrate specific demand in this region for this Pipeline.

FERC based its finding of “demand” for this Pipeline primarily on Millennium’s “precedent agreements.” (See Interim Order at 28 (“[W]e find that Millennium has sufficient market support for its proposal [because it] has submitted eight precedent agreements...”).) However, notwithstanding FERC’s skewed view, Millennium’s precedent agreements fail to demonstrate sufficient demand for the Pipeline because the vast majority of these agreements are with Millennium’s own affiliates. In fact, while Millennium’s agreements with eight shippers represent approximately 66% of the Pipeline’s capacity, that figure drops to an astonishing 23% when Millennium’s two “marketing affiliates” are discounted. In other words, virtually all of the demand for Millennium’s gas is self-created. Such minimal precedent agreements do not support a finding that this Pipeline would serve some “significant or substantial” unmet national – or even regional – interest.<sup>30</sup>

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<sup>30</sup> FERC generally recognizes 25% of a pipeline’s capacity to be a “substantial” amount. (See Interim Order at 27.)

Searching for more compelling “demand” evidence, Millennium cites studies conducted by FERC and the PSC, neither of which are reliable market indicators for the Pipeline. (Millennium Br. at 26.) For example, within its first three paragraphs, the FERC study frankly admits that, “the staff believes that the analysis of need described is subject to so many variables that the specific predictions described in this study may be highly uncertain even within more immediate time-frames.”<sup>31</sup> Further, the “immediate time-frames” to which the document refers are later defined as “the next two to three years,” a period of time that has already expired, making the “near-term” analysis presented in the document already outdated.<sup>32</sup> Similarly, while PSC’s “assessment” expresses a “critical” need for new pipeline capacity,<sup>33</sup> its conclusion is based not on any study, but on the extrapolation of a single data point: an “unprecedented peak” in electric demand in New York State sometime during the summer of 1999, and on the assumption that there will be a “continuation of this demand.”<sup>34</sup> But by definition, a single “unprecedented” event cannot determine a trend, and nothing in the Record evidences that New York has experienced a similar peak in demand during the three summers since 1999.

While Millennium struggles to scrape together “evidence” of market demand, the Record plainly shows that there is no unmet demand for natural gas in New York City. As noted in the DOS Brief, the 2002 New York State Energy Plan (“Energy Plan”), published in June 2002, demonstrates that even if no additional pipeline projects are built, New York State has adequate gas supply “to meet all generation scenarios.” (DOS Brief at 38, 78-82.) When assessing New

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Staff Analysis at (emphasis added).

Id.

<sup>33</sup> PSC Letter at 2.

<sup>34</sup> Id. at 2.

York State's supply of and demand for natural gas, the Energy Plan did not account for the proposed Pipeline; given the plan's conclusion, then, the Pipeline simply is not needed to meet New York's energy needs. (Id.)

Moreover, the Record contains only one market study, dated March 15, 2000 by Navigant Consulting, Inc. for the Iroquois Eastchester Expansion (the "Navigant Study"). The Navigant Study assessed the projected requirements (through 2016) for natural gas in the New York market overall and in the "in-City" market that Millennium proposes to serve via the Mount Vernon interconnect.<sup>35</sup> After an exhaustive analysis, the Navigant Study concluded that the entire New York State market requires only 340,000 Dth/d for 2001-2003 – less than half of the 700,000 Dth/d for which Millennium contends a market currently exists.<sup>36</sup> Moreover, the study found that the Eastchester Expansion – which, along with five other new regional pipelines recently certificated by FERC<sup>37</sup> – alone provides enough supply of natural gas to meet even PSC's overstated conclusion about the amount of electric generating capacity needed in-City.<sup>38</sup>

The dearth of evidence showing demand for gas in New York City, and the alternatives raised by DOS and herein, corroborate the fact that this Pipeline is simply not needed in this region at this time. Millennium has failed to demonstrate on this Record sufficient demand such

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<sup>35</sup> Navigant Study at ES1

<sup>36</sup> Id. at 27.

<sup>37</sup> Maritimes & Northeast Phase III Extension, CP01-4, CP01-5; MarketLink, Williams Company/Transco Pipeline Corp., CP98-540; Northeast ConneXion, Tennessee Gas Pipeline Company, CP01-404; Incremental Marketing Expansion, Texas Eastern Transmission, LP and Algonquin Gas and Transmission Company, CP01-111; Dracut Expansion, Tennessee Gas Pipeline Corporation, CP01-360.

<sup>38</sup> Navigant Study at 27.

that the Pipeline could be said to serve the “national interest . . . in a significant or substantial manner.” 15 C.F.R. § 930.121(a).

c. No Proven Supply

Millennium’s failure to establish sufficient market demand in itself demonstrates that the Pipeline would not further the national interest in a significant or substantial manner, and thus prevents the Secretary from overriding the DOS Objection. However, even if there were such demand, Millennium cannot demonstrate that the Pipeline has a supply of natural gas to meet it.

Although Millennium contends that the Pipeline will provide another method for shippers to transport Canadian gas supplies to the region,<sup>39</sup> as of August 2001, Millennium’s Canadian suppliers “[withdrew their] applications to construct upstream Canadian pipeline facilities” necessary to supply the Pipeline.<sup>40</sup> Upon recognizing the absence of a legitimate supplier for the Pipeline, FERC – in another example of its “Certificate first” approach – made the Pipeline’s construction contingent on these partners (or others) re-filing their applications and receiving approval.<sup>41</sup> In the nearly one year since the Certificate’s issuance, this hypothetical “re-filing” has not occurred.

Speculation about what may happen in the future, even if made a condition of construction, does not change the fact that the Record – as it now stands – reflects a total absence of any supplier for the Pipeline. Therefore, Millennium’s argument that the Pipeline would benefit the nation by providing a more diversified supply of natural gas, is unavailing.

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<sup>39</sup> Interim Order at 38.

<sup>40</sup> See id.; see also FEIS at 1-4.

Interim Order at 38.

Accordingly, Millennium cannot establish that the Pipeline will advance the national interest in a “significant or substantial manner,” by diversifying gas supply.

2. The Pipeline Will Not Promote Compatible Economic Development In The Coastal Zone

Millennium next argues that the Pipeline will serve the national interest by fostering “compatible economic development” in the coastal zone. (Millennium Br. at 32 (citing 16 U.S.C. § 1452(2)).) However, Millennium has not identified any particular development that is reliant upon or would otherwise be promoted by the Pipeline, or proffered any study evaluating the phantom economic development that the Pipeline purportedly will yield.

Instead, as with so many of its “national interest” arguments, Millennium merely regurgitates the unsubstantiated conclusions reached by FERC’s Interim Order which, as previously discussed, was issued in plain violation of the CZMA and is being appealed. Moreover, in the event the Pipeline is damaged by accident or sabotage (as described below), the potential severe disruption to New York City’s critical electric and/or water supplies would actually result in the serious damage to existing and future development in New York’s coastal zone. (See Point II(C)(2), *infra*.)

3. The Pipeline Will Not Protect Coastal Resources

In a final attempt to demonstrate that the Pipeline will further the national interest, Millennium devotes several pages of its brief to discussion of how “the operation of the Project will benefit the coastal zone’s environment for decades.” (Millennium Br. at 32-37. This argument, which is based largely upon the Pipeline purportedly replacing older, “dirty” power plants, strains credibility for two reasons. First, the Record is devoid of any evidence demonstrating that the Pipeline will obviate harmful emissions in the coastal zone, and fails to identify a single coal- or oil-powered plant that it would displace. And second, Millennium’s

argument ignores the Pipeline’s dramatic, construction-related impacts on the coastal zone, which are discussed at length below.

In short, Millennium’s argument that the Pipeline will further a national interest in a significant or substantial manner, is premised upon circular reasoning, speculation, and claims that are unsupported by the Record. This falls far short of the proof needed to satisfy the heavy burden imposed by 15 C.F.R. § 930.121(a).

C. Millennium Cannot Satisfy 15 C.F.R. § 930.121(b) Because, Even If The Pipeline Furthers A National Interest In A Significant Or Substantial Manner, That Interest Does Not Outweigh Its Adverse Coastal Effects

Pursuant to 15 C.F.R. § 930.121(b), the Secretary may not issue an override unless the national interest furthered by the Pipeline outweighs its adverse coastal effects. Therefore, even if the Pipeline “significantly or substantially” furthers a national interest as required by 15 C.F.R. § 930.121(a), Millennium cannot meet its override burden given its failure to demonstrate that the national interest advanced by the Pipeline outweighs its adverse coastal effects. 15 C.F.R. § 930.121(a), (b). While Millennium downplays the Pipeline’s documented coastal effects at every turn, the Record establishes that such effects are not only “adverse,” but potentially catastrophic.

Any Benefits Of The Pipeline Are Speculative And Conclusory

As discussed above, Millennium has not demonstrated that the Pipeline – given the threat of terrorism, the glaring demand and supply issues, and the lack of evidence that the project will diversify the gas supply, promote economic development or protect coastal resources – is in the national interest. Indeed, Millennium’s contention that the Pipeline will further the national interest in the requisite significant or substantial manner, is circular, speculative and conclusory at best. (See Point II(B)(1), supra.)

2. The Pipeline Will Cause Documented Adverse Effects In The Coastal Zone

The same cannot be said, however, for the undesirable effects that the Pipeline will cause. The Record shows that, if constructed as planned, the Pipeline will have significant adverse effects within the coastal zone, including severe and potentially-devastating impacts on (i) Haverstraw Bay, (ii) the ConEd power lines, (iii) residents living near the ConEd power lines, (iv) the Indian Point nuclear-emergency evacuation road network, (v) the New Croton Reservoir, and (vi) the City's Bryn Mawr Siphon.

a. Effects Caused By Unstudied Blasting In Haverstraw Bay

DOS has taken the position that the Pipeline and its associated blasting would have numerous adverse impacts on the critical-fisheries-designated Haverstraw Bay, including mortality of aquatic organisms and destruction of habitat. (DOS Objection at 12.) However, given the eleventh-hour revelation by Millennium of its blasting plans for Haverstraw Bay, nothing in the FEIS addresses the impacts such blasting will have on the coastal zone. This failure violates both CMP Policy 7 ("significant coastal fish and wildlife habitats will be protected...") and Policy 18 ("decisions on the siting and construction of major energy facilities in the coastal area will be based on compatibility of such facilities with the environment").<sup>42</sup> But because both DOS and the Village have thoroughly addressed this issue in their respective briefs to the Secretary, the Town respectfully refers the Secretary to the appropriate discussion in their respective briefs. (See DOS Brief at 46-70.)

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<sup>42</sup> CMP Policy 7, <http://www.dos.state.ny.us/cstl/policies/policy7.html>; CMP Policy 18, <http://www.dos.state.ny.us/cstl/policies/policy18.html>.

b. Effects Caused By Threatening the ConEd Power Lines

The Pipeline's proposed route will run directly adjacent to ConEd's power lines for some 7.6 miles along the ConEd ROW.<sup>43</sup> These power lines supply approximately 40% of the electricity for the City, which is located within the coastal zone.<sup>44</sup> Moreover, as depicted on NYS Coastal Management Program Coastal Area Maps Nos. 35 and 36 (attached hereto as Exhibit "E"), this portion of the ConEd ROW itself is located largely within the coastal zone. Numerous parties have recognized from the outset of this process that, given the Pipeline's proximity to the ConEd power lines, a catastrophic Pipeline event could significantly affect the safety of the power lines and the continued reliability of electrical power for the City. Such a result is obviously contrary to CMP Policy 18, which requires the safeguarding of "vital economic, social and environmental interests" of the state and its citizens.<sup>45</sup>

The terrorist attacks of September 2001 have caused citizens, public officials and the media to re-examine the security of critical infrastructure such as the ConEd power lines. For example, following the urging by lawmakers that additional steps be taken to protect critical pipelines, oil refineries and nuclear plants, FERC undertook an April 2002 review to ensure that its could react quickly to a new terror attack on infrastructure. (See Exhibit "B," Reuters News Service, 4/4/2002, "FERC mulls plan in case of attack on US pipelines.") Similarly, the federal government recently put the American oil and gas industry on "high alert," following the report

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<sup>43</sup> FEIS at 6-25.

Interim Order at 75.

<sup>45</sup> CMP Policy 18, <http://www.dos.state.ny.us/cstl/policies/policy18.html>.

of a possible terrorist threat against natural gas pipelines. (See Exhibit “C,” Associated Press, “Energy Industry on Alert for Attack.”)

However, FERC concedes that it never examined the potential effects of a terror attack on the power lines. (FERC Order Issuing Certificate, dated September 19, 2002 (“Final Order”), at ¶ 251.) Instead, despite its own broad review of this issue, FERC found the risk of a terror attack too difficult to evaluate and so took no measures at all to protect against such an event or to mitigate its potential impact. (*Id.* (“the likelihood of future acts of terrorism or sabotage occurring on [the Pipeline] is unpredictable...”).

But terrorism is not the only concern with the ConEd power lines; even a simple accident, construction mishap, or other event could threaten them and the City’s power supply. Originally, Millennium proposed to construct its Pipeline between the ConEd tower-line structures, generally about 50 feet from the towers’ centerlines.<sup>46</sup> ConEd and PSC immediately rejected this proposal, with PSC’s demolition expert observing that “to level the grade of this route to make it suitable for construction and to create a ditch adequate for pipeline burial in this material for a distance of at least 21 miles will require almost continuous blasting...the proposed route [is] unfit for pipeline construction.” (Affidavit of David Mack, sworn to January 19, 2000 at ¶¶ 4, 7; emphasis added.) Detailing the risk of potential disaster, another PSC expert concluded that relevant studies “show that Millennium must not be built on this right-of-way.” (Affidavit of Edward C. Schron, Jr., sworn to January 18, 2000.)

The Pipeline’s route was shifted to approximately 100 feet from the power lines – after “back-room discussions” which, as described above, resulted in the MOU – an arbitrary distance

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<sup>46</sup> Interim Order at 75.

for which there is no supporting data in the Record.<sup>47</sup> FERC effectively conceded this by acknowledging in the FEIS that no “detailed blasting plan for construction” exists for these areas.<sup>48</sup> Yet, the submissions in the Record on this point remain unchallenged: “blasting parameters and blasting specifications” must be prepared and reviewed before one can “evaluate what is a ‘safe distance’ between structures and the proposed blasts.” (Exhibit “F,” Konya Affidavit at ¶ 67. Selecting a “safe distance” for blasting without this information was “arbitrary.” Id.

Therefore, particularly given the dire ramifications of terrorism or accident at the Pipeline and the unsubstantiated nature of its supposedly “safe” distance to the ConEd power lines, the Pipeline’s potential “effects” on the ConEd power lines, and the New York City coastal zone, cannot be overstated.

c. Effects To Coastal-Zone Citizens  
Living Along The ConEd Right Of Way

The Interim Order concedes that “[b]lasting will be required along most of the construction right of way along the ConEd Offset/Taconic Parkway Alternative,”<sup>49</sup> and recognizes that impacts will occur to homes and homeowners along the ROW.<sup>50</sup> All of this blasting, and all of these potential effects, will happen within the coastal zone. (See Exhibit “E,”

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<sup>47</sup> As discussed above, the Taconic Alternative sprung “full blown” from the private negotiations between Millennium and PSC that led to the MOU. It is founded entirely upon the MOU’s requirement that Millennium maintain a 100-foot separation distance between transmission lines and the centerline of the Pipeline, so as to allow for the “safe” construction of the Taconic Alternative. Yet nowhere in the MOU – or anywhere else in the Record of this proceeding – does PSC or Millennium reveal the facts upon which the contention is based.

<sup>48</sup> Interim Order at 78; see FEIS at 6-33.

<sup>49</sup> Interim Order at 78.

<sup>50</sup> Id. at 73.

NYS Coastal Management Program Coastal Area Maps Nos. 35 and 36. The Town's extensive comments in two affidavits from Dr. Konya, a preeminent blasting expert, specify the potentially-devastating impacts that blasting on the ConEd ROW may have on homes and homeowners within the coastal zone, including:

- creating blast vibrations or shifting in the bedrock that will damage foundations, septic systems, and underground storage tanks;
- ejecting high-velocity, razor-sharp flyrock fragments that can kill people thousands of feet from the blast zone;
- opening bedrock fractures that may: permit gas from Pipeline leaks to migrate into nearby residences and ignite; convey blast-related carbon monoxide into homes; and channel water intercepted by the Pipeline trench into basements; and

exposing residents to dioxin and other chemicals that may have been used on the right of way and may adhere to airborne rock dust that cannot be suppressed.<sup>51</sup>

Dr. Konya's opinion was never rebutted in the Record. And surely the loss of someone's home – or someone's life – cannot accord with either the CMP or the “national interest.”

CMP Policy 18 provides that “[t]o safeguard the vital economic, social and environmental interests of the State and of its citizens, proposed major actions in the coastal area must give full consideration to those interests, and to the safeguards which the State has established to protect valuable coastal resource areas.”<sup>52</sup> The Pipeline would violate CMP Policy 18 because, despite credible evidence that Millennium's blasting will cause both probable risk and concomitant significant harm to residents and property within the coastal zone, there has been no study of these impacts.

FEIS at 6-32.

CMP Policy 18, <http://www.dos.state.ny.us/cstl/policies/policy18.html>.

Moreover, the Town and the Village have repeatedly commented throughout this proceeding that Millennium had ignored the impacts from the acknowledged use of dioxin-containing pesticides within the ROW.<sup>53</sup> While Millennium sampled for residual pesticides on the ROW, it did not sample for dioxin. And while the Village sampled for dioxin near the ROW, ConEd denied the Town and the Village permission to sample for dioxin on the ROW. As a result, the Record does not contain a single empirical sample to indicate the level or location of dioxin on the ROW. This omission is particularly egregious considering the impacts to people in the coastal zone who might inhale this known-human carcinogen.

The “regulatory levels for cleanup”<sup>54</sup> of dioxin do not address the primary concern identified by the Town – the inhalation by coastal-zone residents of dioxin carried by clouds of soil and rock dust from blasting on the ROW. Dr. Konya opined that such blasting “will spread this contaminant for hundreds or thousands of feet”<sup>55</sup> where it could readily be inhaled by the residents adjacent to the Taconic Alternative route. Thus, even if the calculations performed by Millennium’s consultant and FERC are correct, and the “levels” of pesticides and dioxin are “below regulatory levels for cleanup,” there still may be significant inhalation impacts that have not been addressed or mitigated. Because these impacts may injure coastal zone residents and properties, the blasting on the ROW is inconsistent with CMP Policy 18, not to mention public

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<sup>53</sup> See Town’s Protest And Comments on the FEIS at 11; Supplement and Response to the Reply Comments of Millennium Pipeline Company, L.P. on the SDEIS and the Proposed ConEd Offset/Taconic Alternative Route at 7; Supplemental Comments of the Village of Croton-on-Hudson, New York on the Millennium Pipeline Project SDEIS at 50-53.

<sup>54</sup> Interim Order at 88.

<sup>55</sup> See Konya Aff. at ¶ 51.

safety and welfare. Certainly the “national interest” is not served by poisoning residents of the coastal zone.

d. Effects Caused By Interfering With The Indian Point Evacuation Plan

Indian Point, sited in Buchanan, New York, is located within New York’s coastal zone. Even before the terrorist attacks of September 2001, Indian Point was the subject of intense local concern. But following September 11, opposition to the reactors reached new heights, and for good reason: Indian Point is located only 30 miles from Manhattan and, in the event of a nuclear emergency, some 20 million people could be affected.<sup>56</sup>

Since September , the media has focused on the safety of nuclear plants in general, and Indian Point in particular. As an editorial in The New York Observer stated,

Even before Sept. 11, Indian Point was a Chernobyl in the making, with the worst safety record among the country’s 103 nuclear reactors. And as The New York Times’ Bob Herbert pointed out in a recent series of columns about Indian Point, American soldiers found diagrams of U.S. nuclear plants when they searched caves in Afghanistan. Mr. Herbert also noted that nuclear reactors were not built to withstand the impact of a commercial airliner, and that American Airlines Flight 11 flew over Indian Point on its way toward the World Trade Center.

(Exhibit “D,” New York Observer, 4/15/02.) Particularly in light of new terrorism concerns, has been vigorous public debate regarding the so-called Radiological Emergency Preparedness Plan (“REPP”) and the wisdom of maintaining Indian Point at all. Several citizen groups now advocate with renewed fervor to have Indian Point decommissioned, with many of them focusing on the alleged inadequacy of the REPP. According to many citizen and nonprofit groups, public officials and media outlets, the REPP and its evacuation route – located squarely within the coastal zone – are inadequate and would result in massive gridlock. (See, e.g., Fox

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<sup>56</sup> See, e.g., [http://riverkeeper.org/campaign.php/indian\\_point/the\\_facts/266](http://riverkeeper.org/campaign.php/indian_point/the_facts/266).

News Channel, “Nuclear Disaster Evacuation Plan Contested,” 4/20/02 (attached hereto as Exhibit “G”); Riverkeeper, “Flaws in the Radiological Emergency Preparedness Plan,” noting that the REPP “does not anticipate an intentional act of terrorism or sabotage,” and grossly underestimates the breadth of the evacuation zone (attached hereto as Exhibit “H”).

The Pipeline greatly exacerbates the terrorism and evacuation concerns converging around Indian Point. The Pipeline would run adjacent to and cross several roads and two major arteries – the Taconic State Parkway and Route 9 – comprising part of the Indian Point evacuation-road system.<sup>57</sup> An accident or attack during the Pipeline’s construction, or intentional sabotage thereafter, could cripple these vital components of the REPP and thereby isolate thousands of coastal-zone residents from their only escape during a nuclear emergency. The irradiation of thousands of trapped residents is quite obviously contrary to both “the national interest” and New York’s CMP Policy 18, which mandates that proposed major actions in the coastal zone give “full consideration” to the vital social interests of citizens of New York in order to safeguard those interests.<sup>58</sup>

e. Effects On The New York City Coastal Zone

The Secretary should discard Millennium’s argument that the Pipeline’s effects to New Croton Reservoir and the Bryn Mawr Siphon (both discussed below) should be ignored because those facilities lie outside the boundaries of the coastal zone. (Millennium Br. at 82. The CZMA mandates that every federal activity – be it either “within or outside the coastal zone” that affects “any land or water use or natural resource of the coastal zone,” shall be carried out in

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<sup>57</sup> See <http://www.westchestergov.com/indianpoint/planningforemerg.htm>.

<sup>58</sup> CMP Policy 18, <http://www.dos.state.ny.us/cstl/policies/policy18.html>.

a manner consistent with the state CMP, to the maximum extent practical.<sup>59</sup> 16 U.S.C. § 1456(c)(1)(A).

As described immediately below, both the New Croton Reservoir and the Bryn Mawr Siphon supply a large percentage of New York City's water, and stand to suffer significant adverse impacts from the Pipeline. Moreover, as set forth Point II(D), supra, the Pipeline's effects on the New Croton Reservoir will cause a de facto violation of the CWA, and provide an independent basis for the Secretary's denial of Millennium's appeal. Therefore, the Pipeline's impacts to both these facilities must be considered and consistent with New York's CMP. 15 C.F.R. § 930.11(g) (defining "effects" to include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and occur at the same time and place as the activity and are later in time or further removed in distance but are still reasonably foreseeable); H.R. No. 101-964 at 2675 (legislative history indicating clear congressional intent to interpret the word "affects" broadly, and in the substantially same way it is defined in the 15 C.F.R. § 930.11(g)); California ex rel. California Coastal Comm'n v. Norton, 150 F. Supp.2d 1046, 1052-53 (N.D. Ca. 2001) (finding that areas outside coastal zone that are affected by activities within coastal zone are included as areas foreseeably, directly or indirectly affected by such activity).

f. Effects To New York City's  
Water Supply Due To The Bryn Mawr Crossing

Millennium proposes that the Pipeline cross the City's Bryn Mawr Siphon , a component of the Aqueduct that facilitates some 40% of the City's drinking water supply. As the City has

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<sup>59</sup> Although perhaps not grammatically correct, the CZMA and its implementing regulations use "affects" and "effects" interchangeably. Compare 16 U.S.C. § 1456(c)(1)(A) and 15 C.F.R. § 930.121(b).

repeatedly warned, the Pipeline threatens the very survival of the Siphon because, among other reasons, construction of the Pipeline could damage the Siphon's integrity and lead to a complete collapse of the system.<sup>60</sup> Moreover, as discussed above, common sense dictates that the Pipeline not be sited at a location – such as the Siphon – creating an especially-attractive target for terrorism. In any event, because DOS and the City have the most knowledge of the Bryn Mawr Siphon and any impacts to it caused by the Pipeline, the Town defers to the arguments raised in their respective briefs. (See, e.g., DOS Brief at 25-27, 70-73.)

3. The Pipeline's Speculative Benefits  
Do Not Outweigh Its Documented Adverse Effects

In sum, as discussed in Point II(B), supra, Millennium proffers only circular, speculative benefits of the Pipeline rather than the “significant and substantial” ones mandated by the CZMA. 15 C.F.R. § 930.121(b). When balanced against the Pipeline's documented significant adverse effects to the coastal zone discussed above, the Pipeline's ills outweigh any alleged benefits. Because Millennium therefore cannot satisfy 15 C.F.R. § 930.121(b), the Secretary should decline to override the DOS Objection on Ground I, and dismiss this appeal

D. The Pipeline's Route Through The New Croton Reservoir Watershed Is Inconsistent With The CZMA Because It Violates The CWA

Independent of Millennium's failure to satisfy 15 C.F.R. § 930.121(b), the second element of Ground I, the Pipeline's phosphorus impacts on the New Croton Reservoir prohibit the Secretary from overriding the DOS Objection because to do so would allow Millennium to

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<sup>60</sup> DOS Objection at 4-5 (quoting November 6, 2001 letter from City of New York Department of Environmental Protection to FERC).

violate the CWA. By definition, this is inconsistent with the CZMA because the CWA serves as the CZMA's "water pollution control" requirements.

#### The New Croton Reservoir Watershed

The Certificate authorizes Millennium to construct the Pipeline on a "pristine" 2.5-mile stretch of the watershed of the City's New Croton reservoir.<sup>62</sup> The New Croton Reservoir serves as an unfiltered drinking water source for 900,000 persons on an average daily basis and is the drinking water source for over two million individuals under emergency and drought planning scenarios.<sup>63</sup> Because it is unfiltered, the New Croton Reservoir is highly sensitive to "non-point" sources of pollution: e.g. polluted runoff, nutrient loading, erosion and sedimentation that are associated with land clearing, soil disturbance, construction and excavation in wetlands and water bodies.<sup>64</sup>

#### Water Quality Standard For Phosphorus In The New Croton Reservoir

Among the pollutants generated by such activities is phosphorus, a cause of "algal growth" that results in drinking water "use impairments such as taste & odor complaints."<sup>65</sup>

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<sup>61</sup> CZMA 16 U.S.C. § 1456 (f); 65 Fed. Reg. 77124, 77151 (Dec. 8, 2000) ("any activity [under the CZMA] must comply with the requirements of the Clean Air and Water Acts").

Interim Order at 65-66.

<sup>63</sup> Comments of the New York State Attorney General Concerning Adverse Environmental Impacts of the ConEd Offset/Taconic Alternative Pipeline Route On the New York City Drinking Water Watershed ("Attorney General Comments") at 1.

<sup>64</sup> Id

<sup>65</sup> DEC, "Phase II Phosphorus Total Maximum Daily Loads For Reservoirs In The New York City Water Supply Watershed," June 2000 (the "Phase II Report") at 1. The Phase II Report can be found in its entirety on DEC's website, <http://www.dec.state.ny.us/website/dow/tmdl.html>.

Phosphorus concentrations and algal growth are also linked to the formation of trihalomethane (“THM”), which is a known human carcinogen.<sup>66</sup> Under the CWA, DEC has established an ambient water-quality standard for phosphorus that applies to all “Class AA and Class A surface waters” in the State, including the New Croton Reservoir.<sup>67</sup> That standard for phosphorus allows “none in amounts that will result in growths of algae, weeds and slimes that will impair the waters for their best usage.”<sup>68</sup>

The New Croton Reservoir does not meet this water quality standard. Indeed, because of existing phosphorus concentrations, DEC has listed the New Croton Reservoir as “water quality limited,” meaning that it currently does not meet its “best usage” as a “source water reservoir.”<sup>69</sup>

### 3 The New Croton Reservoir Phosphorus TMDL

Because DEC has identified the New Croton Reservoir as “water quality limited,” Section 303(d) of the CWA required DEC to submit for EPA approval heightened-protection criteria – called “Total Maximum Daily Load” restrictions (“TMDLs”) – which, upon

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<sup>66</sup> THMs are a byproduct of disinfecting (e.g. chlorinating) drinking water to kill algae, and according to EPA: “some people who drink water containing trihalomethanes in excess of EPA's standard over many years may experience problems with their liver, kidneys, or central nervous systems, and may have an increased risk of getting cancer.” <http://www.epa.gov/safewater/hfacts.html>. However, DEC believes that more research is required before a THM-based water quality standard can be established for the New Croton Reservoir. Phase II Report at 6.

<sup>67</sup> See 6 N.Y.C.R.R. § 703.2. A “water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards [pursuant to CWA § 303(c)] to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act).” 40 C.F.R. § 131.2.

<sup>68</sup> Id. (emphasis added).

<sup>69</sup> Phase II Report at 6-7, Table 3. A “source water reservoir” is one that receives surface runoff and is located just prior to initial disinfection. The New Croton Reservoir is in this category. Id.

implementation, will achieve DEC's phosphorus water quality standards by limiting the amount of phosphorus allowed to enter the Reservoir annually.<sup>70</sup> In June 2000, DEC submitted its proposed "Phase II" phosphorus TMDL for the New Croton Reservoir, which EPA approved on October 16, 2000.<sup>71</sup>

The ambient water quality TMDL for phosphorus in the New Croton Reservoir is 15 parts per billion ("ppb"). To achieve that end point, the phosphorus-load allocation for New Croton Reservoir cannot exceed 8,549 kg/yr. Currently, the New Croton Reservoir receives 1,189 kg/yr of phosphorus. Thus, even taking into account point-source reductions, to achieve the 15 ppb TMDL in the New Croton Reservoir, phosphorus from nonpoint sources must be reduced by 1,356 kg/yr.<sup>72</sup>

For this reason, any nonpoint source contribution of phosphorus into the New Croton Reservoir currently violates the EPA-approved phosphorus water quality standard of "none" because any phosphorus will further "impair the waters for their best usage."<sup>73</sup> Likewise, any new contribution of phosphorus to the New Croton Reservoir – such as that contemplated by the Pipeline – necessarily violates the 15 ppb phosphorus TMDL, which requires the reduction of phosphorus load allocations.

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<sup>70</sup> A TMDL for a pollutant, such as phosphorus, is defined as "a reservoir's loading capacity for that pollutant. A TMDL is the sum of the point source wasteload allocations (WLAs) and nonpoint source load allocations (LAs) plus a margin of safety to account for the uncertainty in the relationship between the pollutant loads and the reservoir's water quality." Id.

<sup>71</sup> See [http://oaspub.epa.gov/pls/tmdl/waters\\_list.tmdl\\_report?p\\_tmdl\\_id=858](http://oaspub.epa.gov/pls/tmdl/waters_list.tmdl_report?p_tmdl_id=858).

Phase II Report at Table 4.

See 6 N.Y.C.R.R. § 703.2.

#### 4. Undisputed CWA Violations

The Record demonstrates that the Pipeline will violate the EPA-approved narrative phosphorus water quality standard and TMDL for the New Croton Reservoir. Both the Interim Order and the Final Order concede that there will be some phosphorus inputs to the New Croton Reservoir from deforesting 20 to 25 acres of its watershed to build the Pipeline.<sup>74</sup> And while FERC speculates that the impacts from phosphorus will be “insignificant,” “slight” or “minimal,” this misses the point: both the narrative water quality standard and the phosphorus TMDL that DEC adopted and EPA approved pursuant to CWA § 303(d) require the reduction of nonpoint source phosphorus into this Reservoir. Thus, any nonpoint source phosphorus contribution, however minimal, exceeds the phosphorus TMDL for the New Croton Reservoir, and thereby violates the water quality standard established under the CWA.<sup>75</sup> Though repeatedly brought to its attention, FERC has simply ignored this issue.<sup>76</sup>

#### 5. Inconsistency With The CZMA

The New Croton Reservoir is a “primary source” of the City's water supply, and a critical component of the City's water supply system.<sup>77</sup> That system serves nine million residents of the City of New York (and other municipalities) and “supports significant economic development

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<sup>74</sup> See Interim Order at 66, 68; Final Order at ¶ 293

<sup>75</sup> See 40 C.F.R. § 130.2; San Francisco BayKeeper v. Whitman, 297 F.3d 877, 880 (9th Cir. 2002)(“TMDLs are the maximum quantity of a pollutant the water body can receive on a daily basis without violating the water quality standard”).

<sup>76</sup> See Final Order at ¶ 288 (FERC recognizes that “Cortlandt suggests that federal TMDL criteria prohibit any additional phosphorus loading to the Reservoir no matter how minimal”, but does not address this issue).

<sup>77</sup> See DOS Objection at 5

activities in the region.”<sup>78</sup> The State's CMP Policy 38 requires that “the quality and quantity of surface water and groundwater supplies, will be conserved and protected, particularly where such waters constitute the primary or sole source of water supply,”<sup>79</sup> and Policy 27 directs that the siting of major energy facilities be based upon “the compatibility of such facilities with the environment,” among other factors.<sup>80</sup> Moreover, CMP Policy 18 mandates that proposed actions must give “full consideration” to and “safeguard” the “vital economic, social and environmental interests of the state and of its citizens.”<sup>81</sup> As discussed above, the Pipeline will indisputably cause and contribute to a violation of CWA water quality standards in the New Croton Reservoir, including the phosphorus TMDL. By definition, therefore, the Pipeline's route is inconsistent with the CZMA and CMP Policies 38, 27 and 18.<sup>82</sup>

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<sup>78</sup> Id.

<sup>79</sup> CMP Policy 38, <http://www.dos.state.ny.us/cstl/policies/policy38.html>.

<sup>80</sup> CMP Policy 27, <http://www.dos.state.ny.us/cstl/policies/policy27.html>.

<sup>81</sup> CMP Policy 18, <http://www.dos.state.ny.us/cstl/policies/policy18.html>.

<sup>82</sup> Before January 2001, former 15 C.F.R. § 930.121(c) required the Secretary to make a specific finding that the proposed activity would comply with the requirements of the CWA and Clean Air Act, in order to issue an override. Although the new 15 C.F.R. § 930.121 has removed this specific requirement, the Federal Register that promulgated the revised regulation makes clear that this was not a substantive change. 65 Fed. Reg. 77124, 77151 (Dec. 8, 2000). In the response to public comments, NOAA specifies that “[r]emoval of this criteria does not alter in any way the Secretary's obligation to evaluate and consider the potential adverse effects of a proposed activity on coastal air and water resources...[t]he deletion of this criterion simply removes the obligation of the Secretary to develop an administrative finding that a proposed activity will or will not meet the requirements of the Clean Air Act and Clean Water Act.” Id. As NOAA recognized, CZMA 16 U.S.C. § 1456 (f) requires States to “include water pollution control and air pollution control requirements in their [coastal] management programs and those requirements may form the basis of a State objection.” Id.

Millennium's reliance on DEC's 1999 WQC to contest this ineluctable conclusion is misplaced.<sup>83</sup> DEC did not propose the New Croton Reservoir phosphorus TMDL until six months after it issued the WQC, and EPA did not approve that TMDL (and give it the force of federal law) until October 2000 – nearly one year later.<sup>84</sup> Thus DEC could not have considered the phosphorus TMDL for the New Croton Reservoir when it issued the WQC in December 1999. FERC now has required Millennium to obtain a revised WQC from DEC for the Hudson River Crossing and any other "changes" to the Project since 1999. The phosphorus TMDL is certainly one of the "changes" that DEC must now consider.<sup>85</sup>

In sum, “[e]nsuring the quality and continued flow of water to the metropolitan region is of vital economic, social, and environmental interest to the State of New York.”<sup>86</sup> Considering that the Pipeline would violate the CWA water quality standards for the New Croton Reservoir, and “[g]iven the water supply system’s importance to the City of New York,” DOS properly found that the Pipeline, as proposed, “is not consistent with the State’s Coastal Policies 18 and 38.”<sup>87</sup> Based on this Record, the Secretary cannot override this determination.

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<sup>83</sup> Millennium Br. at 89.

<sup>84</sup> See [http://oaspub.epa.gov/pls/tmdl/waters\\_list.tmdl\\_report?p\\_tmdl\\_id=858](http://oaspub.epa.gov/pls/tmdl/waters_list.tmdl_report?p_tmdl_id=858).

<sup>85</sup> See WQC General Condition 4 (The Department reserves the right to modify, suspend or revoke this permit [when]... (d)... applicable law or regulation have materially changed since the permit was issued”).

<sup>86</sup> DOS Objection at 5.

<sup>87</sup> Whether the New Croton Reservoir is located in the coastal zone makes no difference; the CZMA's statutory terms mandate that a federal activity which takes place outside of the coastal zone but affects the coastal zone must be consistent with the CZMA and State CMPs. See discussion at Point II(C)(2)(e), *supra*; CZMA 16 U.S.C. § 1456 (c)(1)(A) (“Each federal activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent with” the CZMA and the State’s CMP) (emphasis added).

E. Millennium Cannot Satisfy 15 C.F.R. § 930.121(c)  
Because There Are Reasonable Alternatives To The Pipeline That  
Would Permit The Identical Interests To Be Served In A Manner  
That Is Consistent With The State's Coastal Management Program

Finally, in order to prevail in its bid under Ground to have the DOS Objection overridden, Millennium must show that no reasonable alternative is available that would permit the Pipeline to be conducted in a manner consistent with the enforceable policies of New York's CMP. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.121(c). Because it cannot meet this burden, the Secretary should dismiss Millennium's appeal.

The DOS Brief thoroughly analyzes alternatives to the Pipeline that were studied and formulated by DOS and other state agencies and authorities, such as the PSC, the New York State ("NYS") Energy Research and Development Authority, the NYS Department of Transportation, the NYS Office of Parks, Recreation and Historic Preservation, the New York Thruway Authority and the Palisades Interstate Park Commission. (See DOS Brief at 86.) As explained by DOS, the product of these extensive consultations was the identification of five available river crossings, nine alternative approaches from the proposed Pipeline route to the west side of the Hudson River crossings, and five alternative approaches from the east side of the river crossings to the proposed Pipeline route. (Id.) Given the expertise of these State agencies and other officials, and the comprehensive nature of their work product, the Town defers to the DOS Brief, and submits that these routes warrant propose consideration under NEPA.

In addition to those raised in the DOS Brief, the Town has previously raised another alternative. As recognized by the FEIS, the Iroquois Eastchester Expansion meets the basic goal of the Pipeline "to provide expanded gas service to the region."<sup>88</sup> FERC certificated the

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<sup>88</sup> FEIS at 3-

Eastchester Expansion on December 19, 2001, the same day it authorized the Pipeline. The Eastchester Expansion serves the same New York City service area as the Pipeline, and will be in service by 2003.<sup>89</sup> It involves construction of a total 32.8 miles of 24” pipeline, 30.7 miles of which will be constructed under the Long Island Sound.<sup>90</sup> No part of the Eastchester Expansion would be located in Westchester County.<sup>91</sup>

The FEIS states that the Eastchester Expansion “could serve the New York City area providing similar pipeline capacity” as the Millennium Pipeline – 230,000 Dth/d versus 350,000 Dth/d at Mount Vernon.<sup>92</sup> However, without making any detailed comparison of the Eastchester Expansion project’s impacts, the FEIS improperly rejected this modestly reduced-scale alternative on the sole grounds that it would require “32.8 miles of pipeline, compared with the 31.7 miles of pipeline in Westchester County” proposed by Millennium. (Id.)

But the FEIS’ comparing 32.8 miles versus 31.7 miles is misleading. To service ConEd, the Eastchester project would require only 32.8 miles of pipeline expansion in total. In comparison, to service ConEd, the Millennium project would require more than 400 miles of construction in total.<sup>93</sup> The Eastchester project would require no construction in Westchester

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<sup>89</sup> Id. at 3-38.

<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> Id. at 3-39.

<sup>93</sup> FERC’s response to this argument – that the required Eastchester upgrades would have a greater impact than the Pipeline’s route through Westchester County – missed the Town’s point entirely. (See Final Order at ¶ 154.) If the object of the Pipeline is, as Millennium contends, to serve the New York City market, the FEIS should have considered as an alternative the Eastchester Expansion, which already will service that very same market. The critical difference, of course, is that while Millennium needs to build a 400-plus mile-long Pipeline to  
(...continued)

County, and would cross only two miles of onshore city-streets. In comparison, the Millennium Pipeline would be blasted through parks, nature preserves, streams, wetlands and the New York City Watershed while crossing 32 miles of Westchester County.

Despite FERC's rejection of it, the Record demonstrates that the Eastchester Expansion project serves as a reasonable alternatives to the Pipeline, either standing alone or in conjunction with a certificate to construct the Pipeline up to its Ramapo interconnect.<sup>94</sup> The Record fails to support Millennium's claim that this alternative is not economically viable.<sup>95</sup> Indeed, as ConEd has noted, "there is reason to believe that the contrary is true."<sup>96</sup>

Finally, Tennessee Gas Pipeline's Northeast ConneXion Project would serve as an alternative to Millennium, by providing up to 500,000 Dth/d of natural gas to New York City by November 2004. Unlike Millennium, however, virtually all of the Northeast ConneXion project would be constructed through upgrading Tennessee's already-existing pipeline network or in its existing pipeline corridor. Further distinct from Millennium, this project also would provide new domestic long-haul and market-area storage capacity rather than relying on the speculative cooperation of Canadian entities for a supply source. And contrary to Millennium's self-created

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(..continued)

supply end-users in the City, Eastchester already can do so with only the 32.8-mile expansion project.

<sup>94</sup> As previously discussed, the FEIS agreed that the Eastchester Expansion "could serve the New York City area providing similar pipeline capacity" as the Pipeline. Millennium would deliver about half of its total Pipeline capacity to the proposed Mount Vernon interconnect for distribution in New York City. (See Motion To Intervene And Protest Of Consolidated Edison Company Of New York, Inc., dated July 26, 2000 ("ConEd Protest") at 12.) The other half of Millennium's Pipeline capacity could be delivered at Ramapo, on the west side of the Hudson River, and would serve the Bowline power plants.

<sup>95</sup> June 28, 2000 Amendment to Application at 2

<sup>96</sup> ConEd Protest at 13.

'marketing affiliates," there is a genuine New York City end-user for this supply: the ConEd System located at 134<sup>th</sup> Street in Manhattan. Most importantly, the Northeast ConneXion comes nowhere close to the Indian Point evacuation network, the ConEd power lines, the New Croton Reservoir or the Bryn Mawr Siphon, and would cross the Hudson River, far below the critical-fisheries habitat of Haverstraw Bay. (See Northeast ConneXion description, attached hereto as Exhibit "I.") These factors make the Northeast ConneXion Project more consistent with the CZMA and New York's CMP than Millennium, while providing more certain benefits.

Accordingly, because reasonable alternatives to the Pipeline exist, Millennium fails to satisfy the third element of its Ground I argument, and its appeal should be dismissed.