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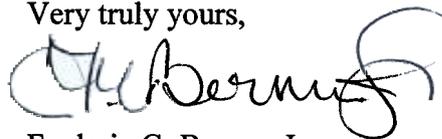
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Re: Appeal of Millennium Pipeline Company,
L.P. from the Objection of the State
of New York, Department of State, to
the Millennium Pipeline Project

Dear Mr. Gleaves:

Enclosed on behalf of Millennium Pipeline Company, L.P. ("Millennium"), in accordance with NOAA's regulations (15 C.F.R. § 930.127(b)), is Millennium's Initial Brief in support of the referenced appeal.

Very truly yours,



Frederic G. Berner, Jr.

Attorney for Millennium
Pipeline Company, L.P.

cc: Glen T. Bruening, Esq.
Mary G. Holt, Esq.

Enclosure

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entrusted by Congress with plenary jurisdiction over proposed interstate gas pipeline projects. On December 19, 2001, the FERC issued a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act (“NGA”), 15 U.S.C. § 717f, which authorizes Millennium to construct the Millennium Pipeline Project. *Millennium Pipeline Company, L.P.*, 97 FERC ¶ 61,292 (2001). The FERC Order, which is Exhibit to this Brief, also issued a Presidential Permit that authorizes Millennium to construct, operate, and maintain its pipeline facilities at the International Border (Exhibit 1, at 62,345) and grants Millennium the right to acquire right-of-way along the pipeline’s route through the exercise of the right of eminent domain, if necessary.

Second, the FERC approved the Millennium Pipeline Project under the authority of two broad Congressional mandates – the NGA and the National Environmental Policy Act (“NEPA”) -- which required the FERC to carefully balance the national benefits of the Project and its environmental impacts, including its effects on the coastal zone. The FERC ultimately concluded that the national benefits of the Project were “clear and significant” (Exhibit 1, at 62,321):

“Market demand projections in the region lend support to the need for this project. Specifically, studies conducted by government, industry, and private organizations, including the EIA, Gas Research Institute, Interstate Natural Gas Association of America, and the Cambridge Energy Research Associates, forecast increasing demand for natural gas in the northeastern United States (particularly for electric generation) and the need for increased pipeline capacity to meet that demand.⁵⁶

⁵⁶ See ‘Staff Analysis of Natural Gas Consumption and Pipeline Capacity in New England and the Mid-Atlantic States,’ December 1999. In addition, on July 27, 2000, the [New York Public Service Commission (“NYPSC”)] filed comments in support of Millennium’s proposal, stating that the need for new pipeline capacity into New York

City is critical because existing capacity is constrained. The NYPSC states that New York City needs 300 MW of in-city electric generation immediately and 200 MW each year thereafter to meet expected demand. The NYPSC also states that this new generation must be within city limits because of transmission constraints and must be almost exclusively gas-fired because of environmental guidelines.”

The FERC also concluded that the Project would have other major regional benefits

(*id.*):

“The project will also diversify the range of gas supplies available to the northeast. Millennium will provide another pipeline for shippers to transport Canadian gas supplies to the region, and Millennium’s interconnects with Columbia, Algonquin, and Tennessee will provide access to gas supplies from domestic supply areas as well. The addition of a new pipeline in the region, with access to multiple supply areas, will expand shippers’ options, promoting the growth of competitive markets for natural gas and potentially contributing to lower and more stable natural gas prices over the long term. The project will also increase the overall reliability of the region’s infrastructure and offer an additional source of outage protection. In addition, the pipeline capacity created by Millennium’s proposals should foster the development of more North American energy supplies. Finally, the project will allow for a greater measure of energy independence, especially to the extent new gas supplies delivered to the region by Millennium displace overseas energy supplies.”

In contrast, the FERC found in its Final Environmental Impact Statement (“FEIS”) that the Project would have only limited adverse environmental impacts. Exhibit 2, Volume 1, at 1. Balancing the Project’s environmental impacts with the FERC’s “overriding responsibility to insure the timely development of an adequate energy infrastructure, particularly in large employment and population centers such as New York City,” the FERC concluded that the Project was in the public interest because it “will provide fuel for needed electric generation, help relieve constraints on other area pipeline systems, and accommodate anticipated long-term growth in northeastern markets.” Exhibit 1, at 62,308.

Third, the FERC's Order reflected its review of a comprehensive and voluminous record that was compiled over four years, including all of the evidence that the NYSDOS relied upon in its decision. Acting in its capacity as the lead Federal agency under NEPA and after full consultation with all responsible Federal and state agencies, the FERC exhaustively evaluated the Millennium Project's coastal zone impacts in its Draft Environmental Impact Statement ("DEIS") (Exhibit 3), its Supplemental Draft Environmental Impact Statement ("SDEIS") (Exhibit 4), its FEIS (Exhibit 2), its Biological Assessment ("BA") (Exhibit 5), its Supplemental Biological Assessment (Exhibit 6), and its Essential Fish Habitat Assessment ("EFHA") (Exhibit 7). Coastal zone effects were also scrutinized by the National Marine Fisheries Service ("NMFS") in its Biological Opinion (Exhibit 8), by the New York State Department of Environmental Conservation ("NYSDEC") in its Water Quality Certificate issued under Section 401 of the Clean Water Act (Exhibit 9), and in scores of other studies and analyses. The hundreds of parties to the FERC proceeding, including the NYSDOS and other Federal and state agencies, had innumerable opportunities to comment on the Project, including the 13 public meetings that the FERC held in communities across New York State.

In contrast with the FERC's finding that the Project will have "clear and significant" national benefits, the NYSDOS's objection to the Project (Exhibit 10) does not even mention those benefits, the national interests at stake, or the Project's status as a major energy facility, even though the NYSDOS was required by the CZMA to give adequate consideration to national interests in the siting of the Project in the coastal zone.¹ By ignoring the "clear and

¹ NOAA recently reemphasized that "[t]he CZMA requires states to adequately consider the national interest in the siting of energy facilities in the coastal zone." 67 Fed. Reg. 44407 (July 2, 2002). "In the case of energy facilities in which there is a national interest," NOAA's regulations require a state agency to "indicate the consideration given any national or interstate energy plans or programs which are applicable to or affect a state's coastal zone." 15 C.F.R. § 923.52.

significant” national benefits found by the FERC, the NYSDOS eschewed any balancing of economic and environmental interests, thus violating not only the CZMA and NOAA’s regulations, but also New York’s Coastal Management Program (the “CMP”) and the Village of Croton-on-Hudson’s Local Waterfront Revitalization Program (the “LWRP”), all of which mandate a balancing of interests and a proper consideration of major energy facilities.

Likewise, the FERC’s finding that the Project will have limited adverse environmental impacts is supported by the copious evidence set forth in the FERC’s two-volume FEIS (Exhibit 2), while the adverse coastal zone impacts alleged in the NYSDOS’s objection are supported only by selective quotations from conclusory and outdated submissions. Tellingly, the comprehensive environmental studies and analyses that Millennium presented to the NYSDOS (Exhibits 11-15) were wholly disregarded.

In providing these comparisons of the conflicting decisions of the FERC and the NYSDOS, Millennium recognizes that the validity of the NYSDOS’s decision is not at issue in this proceeding.² Nevertheless, the preponderance of the evidence that was presented to the FERC and the NYSDOS, which will be summarized in this Brief, overwhelmingly supports but one conclusion: **The Millennium Project’s national benefits far outweigh any adverse impacts on the coastal zone.** Millennium respectfully requests the Secretary to examine that evidence, reach that same conclusion, and permit the Millennium Project to proceed as proposed.

² “The Secretary does not review the judgment of the state agency.” Preamble to NOAA regulations, 65 Fed. Reg. 77124, 77149 (December 8, 2000).

BACKGROUND

The Millennium Pipeline Project will consist of 442 miles of natural gas pipeline extending from the Canadian border in Lake Erie to an interconnection with the local gas distribution facilities of Consolidated Edison Company of New York, Inc. (“ConEd”) in New York City. The fundamental purpose of the Project is to transport up to 700,000 dekatherms (“Dth”) of natural gas per day³ to various delivery points in New York State. Half of the natural gas to be transported (350,000 Dth per day) will be destined for markets in New York City, while the remainder will be delivered to markets in New York State and elsewhere in the Northeast through the existing interstate pipeline grid. The Project will be able to transport enough gas for the supply of five large electric power plants or, alternatively, 2.1 million homes. At least initially, it is expected that most of the Project’s gas supply will serve power plants, but a broad spectrum of residential, commercial, and industrial consumers will also be served.

The Project’s route across New York State (Exhibit 16) and New York’s coastal zone (Exhibit 17) reflects both pragmatic and site-specific considerations. To keep environmental impacts to a minimum, the pipeline will be installed on 220 miles of existing pipeline right-of-way across the Southern Tier of New York State that is now occupied by an interstate gas pipeline owned and operated by Columbia Gas Transmission Corporation (“Columbia”), one of the four partners that are developing the Project. While most of Columbia’s pipeline is more than 50 years old and will therefore be replaced by Millennium’s new pipeline, the Project will also incorporate portions of existing pipelines that are of recent

³ The NYSDOS’s objection states that 700,000 dekatherms of gas is “7 million cubic feet” of gas. Exhibit 10, at 1. In fact, however, 700,000 dekatherms is 700 million cubic feet of gas, or 100 times more than stated by the NYSDOS.

vintage, including two pipeline segments that now extend for 10.9 miles from Ramapo, New York to the Bowline Generating Station on the western shore of the Hudson River.⁴

The pipeline route across the Hudson River was essentially dictated by (1) the location near the western shore of the Hudson River of the existing pipeline to be incorporated into the Millennium Project, (2) site-specific environmental considerations regarding feasible Hudson River crossing locations, and (3) the New York City markets to be served. These considerations shaped the route as follows:

The eastern terminus of the 10.9 miles of existing pipeline to be incorporated into the Millennium Project is located at the Bowline Generating Station in Haverstraw, New York, just yards from the Hudson River.

The Bowline Station property contains a suitable staging area for a crossing of the river, whereas studies of other potential crossing locations for miles upstream and downstream showed no technically feasible alternatives.

The proposed landfall on the eastern shore of the Hudson River provides a suitable staging area and avoids populated areas, while other potential crossing locations upstream and downstream on the eastern shore of the river were found to be inadequate.

The proposed route through Westchester County to the pipeline's terminus permits New York City markets to be served and was approved by the FERC after careful consideration of many potential alternatives.

Given the location near the western shore of the Hudson River of the existing pipeline to be incorporated into the Millennium Project, the availability of a single feasible Hudson River crossing on both banks of the river at that point, and the Project's principal purpose of serving New York City markets, the crossing of the Hudson River, as proposed, was necessary to achieve the Project's goals. Following its completion of the pipeline route selection

⁴ The FERC's FEIS notes that Millennium will acquire 6.7 miles of Columbia's pipeline from Ramapo to Buena Vista, New York and 4.2 miles of Hudson Valley Gas Company's pipeline from Buena Vista to the Bowline Generating Station. Exhibit 2, Volume 1, at 2-4 n.c.

process, Millennium filed an application with the FERC on December 22, 1997 for authority to construct and operate the Project.

The proceeding before the NYSDOS commenced on November 20, 1998, when Millennium filed with the NYSDOS its consistency certification, a completed NYSDOS consistency form, an analysis of the Project's consistency with New York State's CMP, and a copy of the FERC application and environmental report. *See* Exhibit 18. By subsequent letters dated January 28, 1999 (Exhibit 19) and November 29, 1999 (Exhibit 20), the NYSDOS required Millennium to supply more information pursuant to Section 930.58 of NOAA's regulations, and Millennium provided the requested information by its letters dated February 26, 1999 (Exhibit 21), March 26, 1999 (Exhibit 22), October 26, 1999 (Exhibit 11), December 9, 1999 (Exhibit 12), and June 27, 2000 (Exhibit 13).

The NYSDOS took the position, however, that it would not commence its review of the Project until it had received not only the information that had been provided by Millennium, but also the FERC's DEIS. Exhibits 23 & 24. After the FERC issued its DEIS in April 1999, the NYSDOS stated that the DEIS was inadequate and that it would not commence its review of the Project under NOAA's regulations until the FERC had issued its FEIS. Exhibit 25

After the FERC issued its SDEIS, which included the consistency analysis that the NYSDOS had demanded (Exhibit 4, at 2-48 through 2-56), the NYSDOS advised Millennium that its consistency review had commenced on March 12, 2001 Exhibit 26. By this time, 27 months had elapsed since Millennium had filed its consistency certification, during which time there had been numerous meetings with, and submissions to, the NYSDOS to explain the Project.

the national interests at stake, and the many mitigation measures that were offered to minimize environmental impacts.

On the very last day of the subsequent six-month statutory review period -- September 12, 2001 -- the NYSDOS asked Millennium to agree to extend the review period in accordance with Section 930.60(a)(3) of NOAA's regulations. Millennium agreed to the proposed extension. Exhibit 27. In keeping with the representations that had been made to Millennium by the NYSDOS in connection with that agreement, the NYSDOS advised Millennium later on the same day, September 12, 2001, that it would complete its review within "30 to 60 days" after it received the FEIS. Exhibit 28.

The FEIS (Exhibit 2) was issued by the FERC on October 4, 2001 and received by the NYSDOS on October 5, 2001. The NYSDOS did not issue its decision during the subsequent 60-day period (*i.e.*, by December 4, 2001) or within six months after receiving the FEIS (*i.e.*, by April 4, 2002), nor did it request Millennium to agree to any further extension of time.

Finally, on May 9, 2002, the NYSDOS issued its decision (Exhibit 10), which concluded that the Millennium Project was not consistent in certain respects with New York's CMP. This appeal ensued.

ARGUMENT

"The threshold issue in consistency appeals is the timeliness of the state's objection . . ."⁵ The NYSDOS failed to render a prompt, timely decision, as outlined above,

⁵ Notice of Dismissal of Consistency Appeal of Jeffery Shapiro, 55 Fed. Reg. 2256 (January 23,

and instead waited for 42 months before issuing its decision. Because the NYSDOS's decision was untimely in at least two respects, its concurrence with Millennium's certification should be conclusively presumed as a matter of law and Millennium's appeal should be dismissed by the Secretary as moot.⁶

If this appeal is not dismissed on timeliness grounds, 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 Millennium Project "is consistent with the objectives" of the CZMA because its "clear and significant" national benefits far outweigh any localized coastal effects. Second, the Project is "vital in the interest of national security" because it provides essential energy infrastructure, contingency protection, and reliability benefits that advance and support homeland security objectives.

I.

THE SECRETARY SHOULD DISMISS THE NYSDOS'S OBJECTION AS UNTIMELY BECAUSE IT WAS ISSUED MORE THAN SEVEN MONTHS AFTER THE NYSDOS RECEIVED THE FINAL ENVIRONMENTAL IMPACT STATEMENT

Section 307(c)(3)(A) of the CZMA requires a state agency to render a decision "[a]t the earliest practicable time" and provides that "[i]f the state or its designated agency fails to furnish the required notification within six months after its receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed." 16 U.S.C. § 1456(c)(3)(A) (emphasis added). The CZMA's legislative history

1990).

⁶ *Id.*

confirms that “[i]f a state agency fails to grant or deny a request for certification within six months from the time that request is received, the certification requirements shall be waived.”⁷

The NYSDOS received Millennium’s consistency certification on November 20, 1998. Under the plain meaning of Section 307(c)(3)(A) of the CZMA and its legislative history, as quoted above, the NYSDOS’s failure to reach its decision within the subsequent six months, or by May 20, 1999, should have resulted in a conclusive presumption of its concurrence with the consistency certification.

NOAA’s regulations, however, may provide the NYSDOS with the latitude to issue its consistency decision “within six months following commencement of state agency review” (15 C.F.R § 930.62(a) (emphasis added)) and define the “commencement of state agency review” as that point in time when the NYSDOS had received not only the consistency certification, but also “the information and data required pursuant to § 930.58.” 15 C.F.R § 930.60(a). Millennium does not challenge those regulations in this appeal but notes that the regulations were liberally interpreted by the NYSDOS to extend the review process well beyond the period contemplated either by the CZMA or by NOAA.⁸ Clearly, the NYSDOS did not issue its decision “[a]t the earliest practicable time,” as required by the CZMA. 16 U.S.C § 1456(c)(3)(A).

Millennium provided all of the information requested by the NYSDOS in accordance with Section 930.58 of NOAA’s regulations:

⁷ S. Rep. No. 92-753, reprinted in 1972 U.S.C.C.A.N. 4776, 4793 (emphasis added).

⁸ In the preamble to its initial CZMA regulations, NOAA “strongly urge[d]” state agencies to render a prompt decision, recommended 90 days as sufficient time to issue a decision, and characterized the six-month statutory review period as an “extended process” which can “unduly

- On November 20, 1998, Millennium provided the NYSDOS with a consistency certification, a copy of its FERC application, and an evaluation of the consistency of the Project with New York's CMP. Exhibit 18.
- On February 26, 1999, Millennium supplied the NYSDOS with additional information it requested. Exhibit 21.
- On March 26, 1999, Millennium forwarded to the NYSDOS a complete set of all FERC filings that had been made. Exhibit 22.

On October 26, 1999, Millennium supplied the NYSDOS with an analysis of the consistency of the Project with all of the 44 policies of the CMP. Exhibit 11.

- On December 9, 1999 (Exhibit 12), Millennium supplied the NYSDOS with the information requested by the NYSDOS on November 29, 1999. Exhibit 20.

On June 27, 2000, Millennium submitted to the NYSDOS an additional consistency analysis. Exhibit 13.

- On July 13, 2000, Millennium supplied the NYSDOS with Millennium's amendment to its FERC certificate application and its Amended Environmental Report.

On December 8, 2000, Millennium submitted its Hudson River Sampling Program report to the NYSDOS.

- On January 24, 2001, Millennium provided the NYSDOS with copies of the FERC's BA (Exhibit 5) and EFHA (Exhibit 7).

On March 23, 2001, Millennium submitted the FERC's SDEIS (Exhibit 4) and a supplemental coastal zone consistency analysis (Exhibit 14) to the NYSDOS.

- On July 26, 2001, Millennium submitted to the NYSDOS an addendum to Millennium's consistency analysis and its response to the contentions of the Village of Croton-on-Hudson's Waterfront Advising Committee. Exhibit 15

On January 25, 2002, Millennium provided a response (Exhibit 44) to additional questions raised by the NYSDOS (Exhibit 33).

Despite having received all of the information requested from "the applicant"

(Millennium) under Section 930.58, the NYSDOS took the position that it must also receive the FERC's DEIS on the Millennium Project before commencing its review of the Project. Exhibits

and inequitably delay the issuance, denial or conditioning of a Federal license or permit to the

23 & 24. After reviewing the DEIS, the NYSDOS then decided that it would also require the FERC's FEIS, including a FERC consistency analysis, before commencing its review of the Project. Exhibit 25.

Millennium objected to the NYSDOS's position, noting that Section 930.58 required specified information to be provided to the state agency only by "the applicant" and did not require any documents to be provided by any Federal agency or permit the NYSDOS to delay its review of the Project pending the receipt of documents from a Federal agency. Here again, Millennium in this appeal will not challenge the timeliness of the NYSDOS's objection on this ground but would note that significant further delay resulted from the NYSDOS's expansive interpretation of NOAA's regulations. These delays conflicted with the CZMA's requirement to accord "priority consideration" to the siting of major energy facilities like the Millennium Project (16 U.S.C. § 1451(2)(D)), contravened the CZMA's goal of "ensur[ing] expedited governmental decision making for the management of coastal resources" (*id.* § 1452(2)(G)), and frustrated the regulations' objective to "minimize delay" (15 C.F.R. 930.1

Following the FERC's issuance of the SDEIS (which included the consistency analysis demanded by the NYSDOS) on March 12, 2001, the NYSDOS notified Millennium that its consistency review had commenced on March 12, 2001 Exhibit 28. Shortly thereafter, at the urging of the Village of Croton-on-Hudson and other Westchester County municipalities (Exhibits 29 & 30), the more inland "ConEd Offset" route through northern Westchester County was proposed as an alternative to the "Route 9/9A" route, which stretched along the banks of the Hudson River and through congested, populated areas nearby. Millennium therefore filed a

detriment of the applicant." 41 Fed. Reg. 42878, 42883 (September 28, 1976).

supplemental consistency analysis with the NYSDOS in July of 2001 to address the very small areas on the eastern edge of the Village of Croton-on-Hudson where the proposed “ConEd Offset” route would traverse the Village, more than a mile from the Hudson River.⁹ Exhibit 15

On September 12, 2001 -- the final day of the statutory six-month review period -- the NYSDOS requested and received from Millennium a written agreement executed pursuant to Section 930.60(a)(3) of NOAA’s regulations which extended the review period until after the NYSDOS had received the FERC’s FEIS. Recognizing that the new “ConEd Offset” route would be evaluated by the FERC in the soon-to-be-issued FEIS, Millennium agreed to extend the NYSDOS’s review period until after the FEIS was issued. Exhibit 27. As confirmed by the NYSDOS that same day, the mandatory review period was extended until 30 to 60 days after it received the FEIS. Exhibit 28.

While Millennium agreed to that 60-day extension of the review period and will not challenge in this appeal the prior delays resulting from the NYSDOS’s liberal interpretation of NOAA’s regulations, it is Millennium’s position that the September 12, 2001 agreement between Millennium and the NYSDOS pursuant to Section 930.60(a)(3) of NOAA’s regulations required the NYSDOS to issue a decision within 60 days after it received the FEIS. Because the NYSDOS failed to issue a decision within that agreed-upon consistency review period or to obtain Millennium’s agreement to a further extension of the review period, its concurrence with Millennium’s consistency certificateion (Exhibit 18) must be conclusively presumed. In the alternative, the NYSDOS was required at the very least to issue a decision within the six month

⁹ While these small areas are of no coastal significance, the entire Village has been designated as part of the coastal zone, and thus the NYSDOS was required to address those areas in its consistency analysis. *See* pages 65-66, *infra*.

statutory review period after it received the FEIS. Because the NYSDOS did not issue its decision until more than seven months after receiving the FEIS, its decision was plainly untimely.

The agreement between Millennium and the NYSDOS to extend, but limit, the consistency review period was set forth in an exchange of letters dated September 12, 2001. In its letter, Millennium stated as follows (Exhibit 29, at 1-2):

“This letter will serve to confirm that Millennium and the DOS have, pursuant to 15 C.F.R. 930.60(a)(3), mutually agreed to extend the time for the DOS to render a decision DOS will determine consistency of the referenced project after issuance of the [FEIS].

“Please respond indicating your Agency’s assent to the extension of time set forth above.”

Later on the same day, the NYSDOS responded (Exhibit 30) that it

“agrees to extend the time period for its review The Department 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 that may have effects upon the coastal zone of New York State.”

These letters evidence an agreement between Millennium and the NYSDOS that the review period would extend no more than “30 to 60 days after the receipt” of the FEIS. On October 5, 2001, the NYSDOS received the FEIS¹⁰, which, as expected, evaluated the “ConEd Offset” route and all of the mitigation measures that were adopted to minimize impacts associated with that route. Exhibit 2, Volume 1, at 6-26 *et seq.* The review period thus ended

¹⁰ In a letter to the FERC dated October 11, 2001 (Exhibit 31), the NYSDOS advised the FERC that the FEIS had been received on October 5, 2001 and that the NYSDOS “expects to expeditiously complete its review of the FEIS and to notify FERC, the Corps of Engineers, and Millennium Pipeline Company of its consistency decision” (emphasis added).

60 days later, *i.e.*, on December 4, 2001. Because the NYSDOS failed to issue its decision within that period, its concurrence with Millennium's consistency certification must be conclusively presumed under Section 930.62(a) of NOAA's regulations.

The NYSDOS has suggested that Millennium's agreement to extend the consistency review period until after the FEIS was issued somehow stayed the review period indefinitely. Exhibit 32. There is no basis for that contention. Section 930.60(a)(3) of NOAA's regulations provides that a state agency and the applicant "may mutually agree to stay the consistency time clock or extend the six-month review period" (emphasis added). Here, neither Millennium nor the NYSDOS agreed to stay the time clock. Instead, Millennium agreed "to extend the time for the DOS render a decision" (Exhibit 29), and the DOS likewise agreed "to extend the time period" (Exhibit 30). There was neither a request nor an agreement to stay the consistency time clock indefinitely.

The NYSDOS may also contend that it was entitled to extend the review period beyond the 60-day period after receiving the FEIS by virtue of language in its letter to Millennium that read: "barring any significant pipeline routing or other project changes that may have effects upon the coastal zone of New York State." According to the NYSDOS, the potential need for blasting near the eastern shore of the Hudson River crossing was a "project change" within the meaning of its letter and thus permitted it to request further information and to extend the review period until after it had received the requested information. Exhibit 33

Clearly, however, NOAA's regulations did not permit the NYSDOS to unilaterally stop the consistency time clock without Millennium's agreement. Section 930.60 of the regulations makes it clear that the consistency time clock can only be stayed or extended by a

written agreement between the state agency and the applicant. As NOAA's preamble to the CZMA regulations states in plain and unmistakable terms (65 Fed. Reg. at 773147) (emphasis added)):

“States cannot unilaterally stop, stay, or otherwise alter the review period without an applicant's agreement.”

Because Millennium only agreed to extend the review period until 30 to 60 days after the NYSDOS received the FEIS, the NYSDOS could not unilaterally stop or extend that review period without Millennium's agreement. Accordingly, the review period ended on December 4, 2001. Because the NYSDOS did not issue its decision during that period, its concurrence with Millennium's consistency certification must be conclusively presumed.

Assuming, arguendo, that the NYSDOS had the right to unilaterally stop the review period by virtue of the “project change” language that it inserted into its letter to Millennium (and it did not), the potential need for limited blasting near the eastern shore of the Hudson River was not a “project change” that would permit the NYSDOS to stop the time clock. To begin with, Millennium specifically identified the Hudson River as one of the waterbodies within possible blasting areas in a response to a FERC data request (Exhibit 34) that was filed with the NYSDOS on March 26, 1999 (*see* Exhibit 22) and never changed those plans.¹¹ The NYSDOS has stated that it only learned of the possible need for blasting on November 27, 2001 (*see* Exhibit 33), but that was within the agreed-upon 60-day review period, and thus the

¹¹ It was clear from the outset that the potential need for limited blasting in the Hudson River was not likely to have a significant adverse effect on the coastal zone. Blasting might not be required at all, would affect no more than 3% of the Hudson River crossing, and would be undertaken in accordance with the requirements of the FEIS and the NYSDEC's Water Quality Certificate. Subsequent studies have in fact confirmed that the impacts of blasting on the Hudson River, if any, will be minimal and temporary. *See* pages 49 - 54, *infra*.

NYSDOS could have requested Millennium to agree to a further extension of the review period or could have issued its decision within the 60-day period. Instead, the NYSDOS waited until after the review period had ended and then sought to unilaterally stop the consistency time clock. The statutory review period had already expired at that point in time, however, and in any event the NYSDOS had no unilateral right to stop the clock. Under NOAA's regulations, its concurrence with Millennium's consistency certificate must thus be conclusively presumed. More specifically, Section 930.60(b) of the regulations unambiguously provides that a request for information does not restart the consistency time clock:

“A state agency request for information or data in addition to that required by § 930.58 shall not extend the date of commencement of state agency review.”

Even if the Secretary decides that Millennium and the NYSDOS did not agree to a 60-day consistency review period (and they did), it is clear that the review period commenced when the FEIS was issued on October 5, 2001 and did not extend for more than the six-month period permitted by the CZMA and NOAA's regulations. This conclusion is supported by NOAA's May 17, 2000 letter to the NYSDOS, wherein NOAA advised the NYSDOS that “[p]ursuant to 15 C.F.R. § 930.60, the CZMA six-month review period for the Millennium project will begin when the New York Department of State receives the Final EIS for the Millennium project.” Exhibit 35, at 4. Nevertheless, the NYSDOS failed to issue its decision within six months after receiving the FEIS i.e., by April 5, 2002. In this second respect, the NYSDOS's decision was untimely and therefore warrants a conclusive presumption of concurrence.

Reduced to essentials, Millennium and the NYSDOS entered into a binding agreement, pursuant to Section 930.60(a)(3) of the regulations, to extend the consistency review period until 60 days after the NYSDOS received the FEIS. The NYSDOS received the FEIS on October 5, 2001, and Millennium never thereafter agreed to any extension or stay of the review period. Accordingly, the review period ended in 60 days (on December 4, 2001). Alternatively, the six-month statutory review period was applicable and expired on April 5, 2001, six months after the FEIS was issued. Since the NYSDOS failed to issue its decision within either of those periods, its concurrence must be conclusively presumed. To hold otherwise would not only permit the NYSDOS to disregard the statutory review requirement, but would also nullify the Congressional requirements that it issue its decision “[a]t the earliest practicable time” and accord “priority consideration” to the siting of a major energy facility.

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

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

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

“[3] There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the . . . [state’s coastal] management program.”

The Millennium Project is consistent with the CZMA’s objectives in each of those three respects.

A. The Millennium Project Will Further A Number Of The National Objectives Set Forth In CZMA Sections 302 And 303 In A Significant And Substantial Manner

The Millennium Project will promote at least four of the important national objectives that are set forth in CZMA Sections 302 and 303 in a significant and substantial manner. First and foremost, CZMA Section 303(2)(D) accords “priority consideration” to ‘orderly processes for siting major facilities related to energy .’ 16 U.S.C. § 1452(2)(D).¹² Thus, as NOAA stated in the preamble to its present regulations, “An example of an activity that significantly or substantially furthers the national interest is the siting of energy facilities .” 65 Fed. Reg. 77124, 77150 (December 8, 2000). Clearly, the Millennium Project is a major energy facility that will significantly and substantially further the national interest in the development of a reliable and efficient natural gas transportation network, as the FERC found in its certificate order. Exhibit 1, at 62,321. For this reason alone, the Millennium Project will significantly and substantially further the CZMA’s national objectives and thus satisfies the first element of Ground 1.

¹² *Accord*, Decision and Findings in the Consistency Appeal of Southern Transportation Company (September 24, 1985), at 19-20 (“[T]he goals of the CZMA include . . . the siting of transportation facilities.”).

Second, the Secretary has found that CZMA Section 302(j) “recognizes a national objective in achieving a greater degree of energy self-sufficiency”¹³ and has recognized that the greater use of natural gas can “help lessen the Nation’s reliance on foreign oil” and reduce the “undesirable consequences of oil import dependency .”¹⁴ The Millennium Project will promote the greater use of natural gas in the Northeast -- the U.S. region most dependent on foreign oil -- and thus will significantly contribute to the CZMA objective of energy self-sufficiency

Third, CZMA Section 303(2) recognizes the “needs for compatible economic development” in the coastal zone (16 U.S.C. § 1452(2)), and the Secretary has found that such economic development is one of the CZMA’s objectives.¹⁵ Millennium will supply huge quantities of natural gas -- the fuel of choice for electric generating plants along the Hudson River and elsewhere in or near the coastal zone -- thus facilitating “compatible economic development” in the coastal zone.¹⁶

Fourth, the Millennium Project will further “the national policy to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone.” CZMA Section 303(i), 16 U.S.C. § 1452(i). The Project will substantially reduce air

¹³ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 29, 81; *see* Decision and Findings in the Consistency Appeal of Gulf Oil Corp. (December 23, 1985), at 38.

¹⁴ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 81-82.

¹⁵ *See, e.g.*, Decision and Findings in the Consistency Appeal of Davis Heniford (May 21, 1992), at 15.

¹⁶ Decision and Findings in the Consistency Appeal of Virginia Electric & Power Co. (May 19, 1994), at 144 (“the project will contribute significantly to the national interest in part because of the extent to which it will further and support economic development in the coastal zone.”).

emissions, improve water quality, protect fishery resources, and reduce barge traffic, all of which will preserve, protect, and enhance the resources of the coastal zone. *See* pages 33-38, *infra*.

B. The National Interests Furthered By The Millennium Project Far Outweigh Any Adverse Coastal Effects

To override the NYSDOS's decision on CZMA Ground 1, the Secretary must find, secondly, that "[t]he national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively." 15 C.F.R. § 930.121(b). The national interests promoted by the Project and potential adverse effects on the coastal zone were fully evaluated in the proceeding before the FERC, and are evaluated and compared once again in the sections that follow. The evidence compels a finding by the Secretary that the Project's national interests far outweigh the parochial -- and unfounded -- claims asserted by the NYSDOS, which were properly rejected by the FERC.

1. The Millennium Project Will Further Important National Interests

The national interests to be balanced against any adverse coastal zone effects "are limited to those recognized in or defined by the objectives or purposes of the CZMA."¹⁷ As previously noted, the Millennium Project will advance stated CZMA objectives by (1) siting a major energy transportation facility, (2) enhancing the Nation's energy self-sufficiency, (3) promoting compatible economic development in the coastal zone, and (4) protecting coastal zone resources.

"Because our national interests are not static," the Secretary has stressed, the national interest in a proposed project must also be determined by "examining Federal laws and

¹⁷ Decision and Findings in the Consistency Appeal of Jessie W. Taylor (December 30 1997), at

policy statements from the President and Federal agencies, and reviewing plans, reports and studies issued by Federal agencies.”¹⁸ Accordingly, for each of the four CZMA objectives that would be advanced by the Project and are discussed below, applicable Federal laws, policies, and reports will also be examined to determine the national interests served by the Project.

a. **The Millennium Project Is A Major Energy Facility That Will Significantly And Substantially Further The National Interest**

When NOAA revised its CZMA regulations two years ago, it observed that:

An example of an activity that significantly or substantially furthers the national interest is the siting of energy facilities Such activities are coastal dependent industries with economic implications beyond the immediate locality in which they are located.¹⁹

The Millennium Project is clearly a major energy facility with “economic implications” that extend far beyond its route on a map. The Project will not only serve New York City markets, but also the U.S. Northeast region through interconnections with other interstate pipeline systems. The national interest would clearly be served through the timely development of this energy infrastructure to satisfy increasing demands for natural gas, relieve constraints on other pipeline systems, and promote the growth of competitive markets.

The national interest in developing and maintaining a reliable and efficient interstate gas pipeline system finds its fullest expression in the NGA, enacted by Congress over 65 years ago. 15 U.S.C. §§ 717 *et seq.* The fundamental purpose of the NGA is to bring the

33.

¹⁸ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 80.

¹⁹ 65 Fed. Reg. 77124, 77150 (December 8, 2000) (emphasis added).

Nation's interstate gas pipeline network under pervasive Federal control. As Section 1 of the NGA provides (15 U.S.C. § 717)

“[I]t is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”

The NGA reflects a Congressional intent to assure an adequate, reliable, and reasonably priced supply of natural gas for the entire Nation by creating a comprehensive regulatory framework under which the transportation of natural gas through interstate pipelines can be coordinated for the benefit of consumers.²⁰

As the Supreme Court has held, the regulation of the Nation's natural gas industry has been entrusted by Congress to the FERC's "informed judgment."²¹ The NGA confers upon the FERC both "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale" and exclusive authority over the "rates and facilities" of interstate gas pipelines "under a comprehensive scheme of federal regulation."²²

With respect to proposed gas pipeline projects like the Millennium Project, "Congress placed authority regarding the location of interstate pipelines . . . in the FERC, a federal body that can make choices in the interests of energy consumers nationally."²³ In determining whether and where to permit the construction of interstate gas pipelines, the FERC

²⁰ *Public Service Commission of Kentucky v. FERC*, 610 F.2d 439, 442-43 (6th Cir. 1979).

²¹ *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

²² *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988)

²³ *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571 579 (2d Cir. 1990)

is obligated to evaluate and balance all factors bearing on the public interest, utilizing its expert judgment.²⁴ In such cases, the FERC acts as the guardian of the public interest in determining whether a proposed pipeline project should be approved.²⁵

In this case, the FERC, after four years of exhaustive study and a careful balancing of all public interest factors, including coastal zone effects, exercised its exclusive jurisdiction and expert judgment by approving the construction of the Millennium Project and the most efficacious route. In reaching its decision, the FERC considered, *inter alia*, the national interests in providing an adequate pipeline network to meet the increasing demand for natural gas in the Northeast, (2) in enhancing gas supply diversity for the region, and (3) in promoting competitive markets. The Secretary should likewise consider those vital national interests, described below in detail, that would be served from the siting of a small portion of the Millennium Project in the coastal zone.

Increasing Demand for Natural Gas

In support of its determination that there is an increasing demand for natural gas in the region to be served by the Millennium Project, the FERC cited a variety of “studies conducted by government, industry, and private organizations” (Exhibit 1, at 62,321), including:

- The Energy Information Administration (“EIA”) of the U.S. Department of Energy (“DOE”);
- The Gas Research Institute (“GRI”);
- The Interstate Natural Gas Association of America (“INGAA”); and

²⁴ *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961).

²⁵ *Ecee, Inc. v. Federal Power Commission*, 526 F.2d 1270, 1275, *cert. denied*, 429 U.S. 867 (1976).

- Cambridge Energy Research Associates (“CERA”).

In addition to the DOE, GRI, INGAA, and CERA studies, the FERC noted that its staff had issued a December 1999 report, undertaken at the direction of the Appropriations Committee of the U.S. House of Representatives, regarding the potential need for natural gas in the Northeastern U.S. In that report, the FERC Staff concluded (Exhibit 36, at 15);

“All projections indicate increasing demand for natural gas in the Northeastern United States over time, and the need for increased capacity to meet that demand. This leads staff to conclude that additional pipeline construction is likely to be required in the near future to meet that demand.”

Additionally, the FERC pointed out in its certifié order that the New York Public Service Commission (“NYPSC”) had filed comments supporting the Millennium Project and stressing the need for new pipeline capacity into New York City. Exhibit 1, at 62,321 n.56. The NYPSC’s assessment bears quoting at length (Exhibit 37, at 2-3):

“[T]he need for new pipeline capacity into New York is critical. Capacity is so constrained that the market price for 5 months of firm primary point capacity into the New York City area for the coming winter has at time exceeded FERC’s maximum estimated rate for 12 months of pipeline capacity. At the same time, demand for electricity in New York City has exceeded expectations and electric rates are rising due to constrained electric supply. For instance, in 1999, New York State reached an unprecedented peak demand of 30,311 MW, not expected until 2003. Assuming a continuation of this demand and to maintain reserves at target levels, New York City needs 300 MW of in-city generation immediately and 200 MW each year thereafter. This new generation must be within city limits because of transmission constraints and must be almost exclusively gas-fired because of environmental guidelines. . . . Therefore, the NYPSC supports Millennium’s amended proposal.”

New York's need for the natural gas supply to be delivered by the Millennium Project was also stressed in other comments filed with the FERC. For example, New York's U.S. Senators, Charles E. Schumer and Hillary Rodham Clinton, advised the FERC as follows (Exhibit 38, at 1 (emphasis added)):

“We were pleased that the FERC’s recent Supplemental Draft Environmental Impact Statement (SDEIS) endorsed a reasonable route for Columbia Gas Transmission Corporation’s proposed 450-mile Millennium natural gas pipeline from Lake Erie down to New York City. We were also pleased that the New York State Public Service Commission has formally announced support for the project. As you know, New York has an enormous need for increased natural gas supply to generate electricity and heat homes and businesses, and this need will only grow in the years ahead. The Millennium Pipeline Project is a vital part of addressing this need, and its swift construction should be a priority.”

More recent Federal studies also support the need for expanded pipeline capacity to meet increasing demands for natural gas. For example, the DOE has concluded that “Government policy supports an optimistic outlook for the post-2000 pipeline expansion forecast”²⁶ because of the tremendous increase in projected gas-fired electric generation:

“Natural-gas fired electricity generation . . . is projected to grow rapidly, from a . . . 16-percent share in 2000 to a 36-percent share in 2020. Throughout the forecast, natural gas technologies are projected to capture the majority of capacity additions for electric generation Of this new capacity, it is projected that 92 percent will be combined-cycle plants or combustion turbines . . . fueled by natural gas.”²⁷

²⁶ EIA, “U.S. Natural Gas Markets: Recent Trends and Prospects for the Future” (May 2001), at 35.

²⁷ *Id.* at 32.

Federal Government policy also supports expedited review of proposed gas pipeline facilities like the Millennium Project. As the DOE has noted, “timely additions of natural gas pipeline capacity and other infrastructure present challenges that will require coordination among pipeline companies, consumers, the FERC, and state regulatory bodies.”²⁸ More specifically, President Bush has directed that “it is the policy of this Administration that executive departments and agencies shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.”²⁹

Federal government reports also confirm the need for more gas pipeline capacity into New York City. DOE has concluded that

“Pipeline capacity in the New York City area appears inadequate to meet growing market demand, as indicated by recent price spikes in the area due to several constraint points that have developed in recent years.”³⁰

New York officials have reached the same conclusion. As U.S. Senator Schumer has commented:

“Pipeline capacity is also reaching throughput limits at several strategic points on the pipeline network in the Northeast, particularly in the vicinity of New York City and Boston Adding to the increasing demand for pipeline capacity is the scheduled construction of a number of gas-fired electric power generation plants in the Northeast Region in the next few years.”³¹

²⁸ *Id.* at 3.

²⁹ Executive Order 13212 (May 18, 2001), Section 1, 66 Fed. Reg. 28357 (May 22, 2001).

³⁰ EIA, “The Northeast Heating Fuel Market: Assessment and Options” (May 2000), at 38.

³¹ Schumer and Collins, “The Perfect Storm” (April 2001) (Exhibit 39), at 4.

The present lack of adequate pipeline capacity threatens New York City's energy security. The New York Independent System Operator, a non-profit corporation established to facilitate the restructuring of New York State's electric industry, recently reported with a growing sense of alarm: "New York remains headed toward a very serious power shortage unless it acts immediately to get new supply sited and actually built within its borders."³²

In short, the record before the FERC and the NYSDOS (and now before the Secretary) shows an increasing demand for natural gas in the Northeast that would be served by the Millennium Project. On the basis of that record, the FERC found that "in order to meet the growing energy needs of the Northeast, including the New York City metropolitan area, new infrastructure is needed to bring additional natural gas supplies to market." Exhibit 1, at 62,322. The FERC then reasonably concluded that the Millennium Project "can meet the needs of the expanding market on a timely basis." *Id.*

Supply Diversity

A second national interest advanced by the siting of the Millennium Project across a portion of New York's coastal zone will be the diversification of natural gas supplies to the Northeast. As the FERC explained in its certificate order (Exhibit 1, at 62,321)

"The Project will also diversify the range of gas supplies available to the Northeast. Millennium will provide another pipeline for shippers to transport Canadian gas supplies to the region, and Millennium's interconnects with Columbia, Algonquin, and Tennessee will provide access to gas supplies from domestic supply areas as well."

³² New York Independent System Operator, "Power Alert II: New York's Persisting Energy Crisis" (March 27, 2002).

The increased diversity of supply will not only permit more reliable gas service to the Northeast, but should also “foster the development of more North American energy supplies,” as the FERC noted. *Id.* In both of these respects, the Project would advance important national interests.

Benefits of Competition

The Millennium Project would also further national interests in realizing the benefits of competition. As the FERC stated (*id.*):

“The addition of a new pipeline in the region, with access to multiple supply areas, will expand shippers’ options, promoting the growth of competitive markets for natural gas and potentially contributing to lower and more stable natural gas prices over the long term.”

According to the DOE, “Natural gas is now perceived as a abundant, reliable resource that is expected to fuel an increasing share of domestic energy consumption well into the future.”³³ By enhancing cost-competitive access to gas supplies in the Northeast, the Project should produce lower energy costs for homeowners, business, and industry. To permit robust inter-fuel competition, as well as gas-on-gas competition, the Project should be permitted to proceed.

b. The Millennium Project Will Contribute To The National Goal Of Energy Self-Sufficiency

As previously noted, the Secretary has found that CZMA Section 302(j) “recognizes a national objective in achieving a greater degree of energy self-sufficiency” and has recognized that the greater use of natural gas can “help lessen the Nation’s reliance on foreign

oil” and reduce the “undesirable consequences of oil import dependency .” Page 21, *supra*. In this regard, the Millennium Project will promote the greater use of natural gas in the Northeast, the U.S. region most dependent on foreign oil, and thus will further the national goal of energy self-sufficiency. The FERC confirmed this conclusion in its certificate order (Exhibit 1, at 62,321):

“[T]he Project will allow for a greater measure of energy independence, especially to the extent new gas supplies delivered to the region by Millennium displace overseas energy supplies.”

A greater degree of energy self-sufficiency will not only limit the Nation’s dependence on foreign oil, thus contributing to the national security (*see* pages 107-109, *infra*), but will also have other beneficial effects. Thus, for example, construction of the Millennium Project will promote the development of significant employment opportunities: More than 4,000 union construction workers will be employed to install the pipeline. In addition, the Project will foster increased domestic economic activity, higher tax revenues, and an improved balance of payments. In all of these respects, the Project will significantly further and support the national interest in attaining greater energy self-sufficiency. As the Secretary has properly concluded: “To the extent that demand for gas displaces demand for imported oil, the undesirable consequences of oil import dependency would be reduced.”³⁴

³³ EIA, “Annual Energy Outlook 2001” (December 2000), at 29.

³⁴ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 82.

**c. The Millennium Project Will Promote
Compatible Economic Development
In The Coastal Zone**

CZMA Section 303(2) recognizes the “needs for compatible economic development” in the coastal zone (16 U.S.C. § 1452 (2)), and the Secretary has found that such economic development is one of the CZMA’s objectives.³⁵ In this case, Millennium will be supplying huge volumes of natural gas, the fuel of choice for electric generation plants along the Hudson River and at other locations in or near the coastal zone in the New York City area. The Project will thus facilitate “compatible economic development” in the coastal zone by providing the energy infrastructure necessary to meet increasing demands for natural gas in the region while at the same time advancing clean air objectives and improving air and water quality in the coastal

As the FERC decided in its certificate order (Exhibit 1, at 62,308), the Millennium Project is necessary “to insure the timely development of an adequate energy infrastructure, particularly in large employment and population centers such as New York City.” In this additional, significant respect, the Project will further and support important national interests recognized in the CZMA.³⁶

**d. The Millennium Project Will Serve To Protect
And Enhance Coastal Zone Resources**

A principal objective of the CZMA is to preserve and protect the coastal zone.³⁷ In past CZMA appeals, proposed projects were found to have only adverse effects on the coastal zone. In this case, in clear contrast, the Millennium Pipeline Project would benefit the coastal

³⁵ See, e.g., Decision and Findings in the Consistency Appeal of Davis Hemford (May 21, 1992), at 15.

³⁶ See Decision and Findings in the Consistency Appeal of Virginia Electric and Power Co. (May 19, 1994), at 14.

³⁷ 16 U.S.C. § 1452(I); Decision and Findings in the Consistency Appeal of Vieques Marine Laboratories (May 28, 1996), at 55.

zone by substantially reducing air emissions, improving water quality, protecting fisheries resources, and decreasing oil/coal barge traffic through waterways in the coastal zone. While the NYSDOS ignored these environmental benefits to the coastal zone in its objection, the Secretary should give proper weight to these benefits in his decision. As we shall show, these environmental benefits are significant. Indeed, while the Millennium Project will admittedly have some localized impacts during construction -- a period that will not last for more than a few months at any location in the coastal zone -- the operation of the Project will benefit the coastal zone's environment for decades, thus producing positive net benefits.

Air Emissions Reductions

In recent years there has been a developing consensus supporting improved air quality through the reduction of smokestack emissions from electric generation plants. This is especially true in the Northeastern U.S., where there are both elevated levels of air emissions and a growing demand for electricity that has been accelerated by the digital economy.

A major source of air pollution in the Northeast continues to be the combustion of oil and coal to fire electric generation plants. These plants produce high levels of

- nitrogen oxides (NO_x), which contribute to smog, tropospheric ozone, and acid rain,
- sulfur dioxide (SO₂), also a major air pollutant and precursor of acid rain, and
- carbon dioxide (CO₂), a significant contributor to the greenhouse effect and a suspected cause of global warming.³⁸

³⁸ Oil- and coal-fired electric generation plants also produce many other air pollutants, including carbon monoxide and particulate matter, which has received heightened attention as a source of respiratory ailments.

The Environmental Protection Agency has estimated that electric generation plants produce 70% of the Nation's total SO₂ emissions and one-third of all NO_x emissions. (USEPA, 1996).

In the 1990 Clean Air Act Amendments (42 U.S.C. § 7511c(a)), Congress classified the entire Northeast as an ozone transport region, recognizing that ground-level ozone had become a regional problem requiring coordinated efforts to curb ozone-producing emissions, especially NO_x and SO₂. More recently, the greater New York City metropolitan area has been designated as severe non-attainment for ozone.

The combustion of natural gas results in virtually no atmospheric emissions of SO₂ or small particulate matter, and far lower emissions of NO_x, CO₂, carbon monoxide, and reactive hydrocarbons than the combustion of coal or oil. As a result, natural gas has become the energy source of choice for new electric generation plants in the Northeast and elsewhere across the Nation. In addition, the substitution of natural gas for coal or oil in existing power plants, either through complete retrofitting or selective reburn applications, will drastically cut pollution levels. The Secretary has therefore found that the "substitution of natural gas for coal or oil combustion will contribute to resolution of national air quality concerns."³⁹ New Yorkers have similarly concluded that the addition of new gas-fired power plants will result in "significant environmental improvements, including reduction in sulfur and nitrogen emissions and decreased water use."⁴⁰

³⁹ Decision and Findings in the Consistency Appeal of Mobil Exploration Producing U.S. Inc. (June 20, 1995), at 82.

⁴⁰ New York Independent System Operator, "Power Alert II: New York's Persisting Energy Crisis" (March 27, 2002).

The Millennium Project will therefore result in significant reductions in air emissions levels in the Northeast, especially in New York City. Thus, for example, the use of the gas supplies provided by Millennium to generate electricity in the Northeast from combined cycle combustion turbines in substitution for or in lieu of coal and oil will reduce:

NO_x emissions by more than 90% (compared with oil) or 95% (compared with coal), amounting to annual reductions of more than 53 million pounds (compared with oil) or 83 million pounds (compared with coal) and total reductions of 2.6 billion pounds (compared with oil) or 5.4 billion pounds (compared with coal) over the 50-year life of the pipeline;

- SO₂ emissions by 99% compared with both oil and coal, producing annual reductions of 174 million pounds (compared with oil) or 435 million pounds (compared with coal) and total reductions of 8.7 billion pounds (compared with oil) or 21.7 billion pounds (compared with coal) over the life of the project; and
- particulate emissions by 92% (compared with oil) or 99.7% (compared with coal) producing annual reductions of 20 million pounds (compared with oil) or 701 million pounds (compared with oil) and total reductions of one billion pounds (compared with oil) or 35 billion pounds (compared with coal) over the life of the project.⁴¹

The magnitude of these air emissions reductions cannot be overstated. In comparison, for example, New York Governor Pataki has recently issued an executive order requiring power plants to reduce SO₂ emissions by 130,000 tons annually and NO_x emissions by 20,000 tons annually. By itself, the use of natural gas supplied by the Millennium Project would achieve emissions reductions that would exceed those target levels.

Not only would the Millennium Project contribute to the broad national interest by improving air quality in the Northeast, but it would also promote CZMA objectives by enhancing air quality in the coastal zone. At present, many of the oil- and coal-fired power plants in the

⁴¹ Of course, the Project could be economically expanded through the addition of compression and looping, in which case the benefits could be even greater.

New York City area are located in or near the coastal zone and thus contribute to air pollution along the Hudson River estuary, in New York City harbor areas, around Long Island Sound, and across the Atlantic beaches. The use of the Project's natural gas supplies in substitution for or in lieu of coal and oil could significantly improve the coastal zone's air quality and thus protect its resources.

Water Quality and Fisheries Resources

The use of the Millennium Project's natural gas supplies in lieu of coal or oil for power generation could also improve water quality and benefit aquatic life in New York's coastal zone. In the first place, gas-fired power plants release less NO_x to the atmosphere, thus reducing both acid rain and eutrophication (*i.e.*, nutrient loading), which adversely affects aquatic ecosystems in coastal zone waterbodies, including Long Island Sound.

Of equal importance, gas-fired power plants use and discharge much less water for cooling, thus protecting fisheries resources. The cooling water intake structures of steam-electric power plants kill millions of fish each year that either become impinged on the plants' intake screens or pass through the screens and into the plant. Moreover, discharges of the plants' heated water back to waterbodies produce a thermal pollution that can kill fish outright, block fish migrations, and cause the growth of nuisance species.

Other Environmental Benefits

Construction of the Millennium Project should also benefit the waterways of the coastal zone by reducing the barge traffic that delivers oil and coal to existing power plants. The use of natural gas in lieu of oil and coal will thus reduce traffic on the Hudson River, along the

New York City waterfront, and in Long Island Sound, as well as the associated air emissions and water quality impacts of such barges. Moreover, by reducing the number of oil barges in transit and bulk oil storage facilities on the shoreline, the Project will also reduce the potential for oil spills and related environmental impacts.

It should also be noted that the combustion of coal and oil in the generation of electricity creates a significant solid waste disposal problem -- the large volumes of ash that are collected in the scrubbers of the powerplants' exhaust stacks. This environmental problem is effectively eliminated in the case of gas-fired facilities, which do not require scrubbers or other add-on pollution controls.

2. The Millennium Project's Individual And Cumulative Adverse Coastal Effects Will Be Minimal And Temporary

Contrary to the unsubstantiated opinions of the NYSDOS, the evidence demonstrates that the Project's potential individual and cumulative adverse coastal effects are, at worst, both minimal and temporary. Thus, the Project will not jeopardize or significantly impair any component of the ecosystem of the Hudson River crossing at Haverstraw Bay, the Jane E. Lytle Memorial Arboretum ("Arboretum") located in the Village of Croton-on-Hudson ("Village"), or the Village's well field ("Wellfield"). The Project's proposed crossings of the New Croton Watershed and the Catskill Aqueduct are not in the coastal zone and, in any event, the Project will have only a de minimis effect on those resources.

a. The Project's Effects On Haverstraw Bay Will Be Temporary And Insignificant

Very early on in the environmental review process for the Millennium Project, it became apparent that the reviewing agencies would require the utmost in mitigation measures for

the proposed crossing of the Hudson River. Millennium responded by developing an innovative lay-barge crossing technique to ensure that (1) construction-related impacts would be temporary and short-lived; (2) there would be no significant adverse impacts to habitat; and (3) the pipeline route across the Hudson River would be quickly restored to pre-construction conditions.⁴²

The resource agencies charged with the direct responsibility to review impacts of the proposed Hudson River crossing responded favorably. The NYSDEC issued a favorable Section 401 Water Quality Certification in December of 1999 (“WQC”) (Exhibit 9), and the NMFS issued a favorable Biological Opinion in 2001 (“NMFS Opinion”) (Exhibit 8). The FERC also commented favorably on the revised crossing methodology in both the SDEIS and the FEIS for the Project.

Notwithstanding Millennium's extraordinary commitments to protect the Hudson River, the NYSDOS concluded that the potential impacts to the Hudson River were unacceptable. The NYSDOS based its conclusion upon a strained and arbitrary interpretation of a habitat designation for that section of the Hudson River, as well as outdated comments from other resource agencies. However, the evidence demonstrates that the Project's effects on Haverstraw Bay will be minimal and temporary.

Discussed, in turn, below are (1) the lay-barge construction technology to be utilized, which is the best available methodology for minimizing environmental impact, (2) the

⁴² In recognition of the extreme importance of the Hudson River crossing to the Project (a necessity to deliver much needed gas to the Metropolitan New York City area), Millennium assembled a team of interdisciplinary professionals having significant knowledge of, and experience with, Hudson River issues. Lawler Matusky and Skelly Engineers, LLP (“LMS”) were retained on the basis of their decades of experience with dredging and biological assessments in the lower Hudson River. LMS assisted Millennium in designing a state-of-the-art crossing plan to minimize impacts and the duration of impacts on the Hudson River.

low-level effects of the crossing on the functional and designated habitats with only temporary, localized impacts to water quality and fish resources, and (3) the absence of any significant adverse effect from the limited blasting that any potentially be required.

(1) The Staged, Open-Water Lay-Barge Construction Technique Maximally Limits Adverse Effects To Aquatic Resources

As all the regulatory agencies agree, the employment of an open-water, lay-barge construction method across Haverstraw Bay will have the least ecosystem impact. Initially, Millennium proposed conventional dredging techniques similar to those recently approved by the NYSDOS for U.S. Gypsum Company's maintenance dredging of more than 100,000 cubic yards of material in the Haverstraw Bay significant habitat.⁴³ See Exhibit 40; FEIS (Exhibit 2, Volume 1), at 5-54; NMFS Opinion (Exhibit 8), at 8 (discussing *U.S. Gypsum*). However, in response to various agencies' concerns about the far greater adverse environmental impact resulting from conventional dredging, Millennium committed to (1) use an open-water, lay-barge construction technique, (2) perform the construction in a sequential manner, and (3) return the benthos to its original contours. See WQC (Exhibit 9).

More specifically, the innovative lay-barge construction technique involves excavating a trench (with a maximum of 1300 feet of trench open at any time) and stockpiling excavated river sediment in barges rather than on the river bottom. The pipe is then placed in the trench from a barge (*i.e.*, the lay-barge) that follows the dredging operation, after which

⁴³ Although the excavation techniques originally proposed by Millennium are similar to the techniques used by U.S. Gypsum, even Millennium's original proposal involved less impacts. From the outset, Millennium proposed to restore the bottom to its original contours with the same sediment. In contrast, the U.S. Gypsum project permanently altered the bottom contours for navigation and disposed of the excavated sediment in the Atlantic Ocean.

backfilling begins from the barges in which the sediment is stored. This results in the trench not being open for more than a two-week period at any given location. Construction of the entire 2.1 mile Haverstraw Bay crossing is anticipated to be completed in approximately 2.5 months. Moreover, to further minimize construction effects, closed-bucket (as opposed to the originally proposed open-bucket) dredges have been incorporated into the methodology to reduce turbidity/total suspended solids, and best management practices also will be employed where necessary. Additionally, Millennium committed to perform the construction during the period from September 1 through November 15, the time window agreed to by all resource agencies as proper for maximally minimizing effects on sensitive aquatic resources. Millennium also agreed to a comprehensive program to monitor the operation and make adjustments, if necessary. As Millennium's conservative modeling demonstrates, the combination of (1) using the low-impact excavation /backfilling technology, with a closed-bucket dredge, (2) timing the construction to avoid critical periods for aquatic biota (*e.g.*, the endangered shortnose sturgeon, striped bass, and species with designated essential fish habitat), and (3) sequencing the construction, significantly reduces impacts and renders any resulting effects insignificant to the functional viability of the Haverstraw Bay ecosystem. *See generally*, LMS Study (Exhibit 14), at 2-5 & 33-46; *see also* NMFS Opinion (Exhibit 8), at 13 & 17 (stating that (1) “[g]iven Millennium proposed to use a closed bucket dredge, sediment loss during withdrawal will be reduced,” thus reducing suspended sediment concentration; and (2) “[b]ased on the time of year the project is to be completed and the type of dredge equipment being employed, NMFS believes that the incidental take of shortnose sturgeon will be minimal.”).

Notably, the extensive sampling performed, studies conducted, and data collected by LMS attest to the lack of any significant impact on the Haverstraw Bay ecosystem. *See*

generally LMS Study (Exhibit 14), at 2-5 & 27-46. Thus, LMS found that “the low-impact excavation/backfilling technology, the timing of construction, and the staged nature of the construction will limit impacts to the physical habitat and biota” and that “impacts to the ecosystem as a whole will be minimal.” *Id.* at 3. LMS summarized the impacts as follows: “[T]he construction activities will result in only temporary, localized disturbances of the habitat -- i.e., temporary loss of habitat and benthic organisms in creating the trench, minor sediment deposition in undisturbed benthic habitat adjacent to the trench, and short term increase in turbidity in the water column. There will be no change in substrate type, water quality, or other physical/chemical characteristics; and no appreciable loss of, or damage to, biota in terms of overall populations in the benthos and water column. Hence, compliance with the CMP is assured.” *Id.* at 5.

The FERC repeatedly confirmed the highly conservative, low-impact nature of Millennium's construction methodology. The FERC's FEIS, EFHA, and BA all concluded that there is no alternative construction technique that could minimize ecosystem impacts to any greater degree. *See* FEIS (Exhibit 2), § 5.3.4, at 5-54 to 5-62; EFHA (Exhibit 7), at 8-16, 20-24; BA (Exhibit 5), at 3-3 to 3-6. Thus, the FERC found that the proposed construction methodology (1) “represents a significant reduction in impact when compared to conventional dredging” (Exhibit 7, at 8) and (2) is the “‘best available’ method with the least overall impact on [Essential Fish Habitat] in Haverstraw Bay.” *Id.* at 21. Additionally, the FERC found that Millennium's modeling of impacts was “reasonable” and “appropriately conservative for a sensitive habitat such as Haverstraw Bay.” *Id.* at 12; Exhibit 5, at 3-5. Thus, the FERC concluded that with the mitigative measures and conditions to which Millennium committed, “there would be no substantial adverse impact (individual or cumulative) on

[Essential Fish Habitat] in Haverstraw Bay.” EFHA, at 24; see also id. at 13; 14-15, 16; FEIS (Volume 1), at 5-58 to 5-60 & 5-62; BA, at 3-7 (“there would be no long-term or cumulative effects on [the shortnose sturgeon]”); *Id.* at 4-1 (there would be no adverse effect on the other listed species). Likewise, after an extremely thorough analysis of Millennium's proposal, NMFS also concluded that the Project “is not likely to jeopardize the continued existence of listed species under NMFS' jurisdiction.” Exhibit 8, at (cover letter), 17-18.⁴⁴

**(2) Impacts To Haverstraw Bay Will Be
Temporary And Spatially Limited,
Resulting In No Permanent, Ecologically
Significant Adverse Effects**

Millennium’s low-impact construction technology, coupled with the natural processes of Haverstraw Bay, will result in only ecologically insignificant effects on coastal resources. Impacts will be limited spatially and temporally, with no permanent loss, or significant impairment, of habitat. *See generally*, LMS Study (Exhibit 14), at 3-5, 21-26, 32-46; FEIS (Exhibit 2, Volume 1), at 5-58 to 5-71; BA (Exhibit 5), at 3-7, 3-8 & 4- ; EFHA (Exhibit 7), at 11-16 & 24; Suppl. BA/EFHA (Exhibit 6), at §§ 4.1-4.3; NMFS Opinion (Exhibit 8), at 1; 10-18.

First, the pipeline footprint will affect only a minute portion -- 0.08% -- of the “functional” habitat (which includes areas contiguous to, and functionally connected with, Haverstraw Bay). This functional habitat possesses high productivity, but low diversity, and is relatively uniform spatially. Thus, temporal impacts to a mere 0.08% of this area are ecologically

⁴⁴ The FERC, likewise, reaffirmed this conclusion in its Supplemental BA/EFHA (Exhibit 6), which considered blasting impacts. The FERC found that the limited blasting required for the Project would result in only temporary, short-lived, spatially limited impacts of no significance. Thus, the FERC's initial conclusions, set forth in the EFHA and BA, respecting the lack of any significant adverse impact to Haverstraw Bay remain valid, notwithstanding the potential need

insignificant. LMS Study (Exhibit 14), at 3. Further, only 1.5% of the Haverstraw Bay designated habitat will experience temporal effects during construction (*i.e.*, 108.5 acres out of 7,040 acres), with the actual footprint affecting only 0.2% of the designated habitat.⁴⁵ FEIS (Volume 1), at 5-60 & 5-70. Thus, effects will be limited to a minute percentage of the Haverstraw Bay ecosystem. *Id.* at 5-70.

Just as those effects will be highly localized and spatially limited, they will also be limited temporally. Exhibit 14, at 3 & 33-35. Physical effects will be transient: Construction will take place in small areas, no one of which will remain open for longer than 14 days, and the substrate will be rapidly returned to its original contours and composition. *See* FEIS (Volume 1), at 5-62 (“[w]ith the revised proposed construction method, most impacts would be temporary. We note that the NYSDEC has approved the proposed project by issuing its section 401 Water Quality Certification.”); *see also* WQC (Exhibit 9), ¶ 5(P) (requiring, *inter alia*, that backfilling of the trench “must be performed accurately” and the “final riverbed elevation must be within +/- foot of the original elevation as determined by pre- and post-construction surveys”); Exhibit 14, at 3 & 33-35.

Significantly, the construction will have no effect on tidal flow, which is the primary mechanism for controlling physical habitat and water quality in Haverstraw Bay. *Id.*

for blasting.

⁴⁵ Haverstraw Bay has been designated as a significant coastal fish and wildlife habitat (NYSDOS 1987). Significant coastal fish and wildlife habitats are evaluated, designated and mapped under the authority of New York’s Waterfront Revitalization and Coastal Resources Act. The NYSDEC evaluates the significance of coastal fish and wildlife habitat (*e.g.*, ecosystem rarity, species vulnerability, human use) and recommends habitat designations to the NYSDOS for inclusion in the CMP. Haverstraw Bay qualifies as a significant fish and wildlife habitat because of the extensive shallow estuarine habitat areas; the occurrence of commercial and recreational fisheries; the use of the Bay as a nursery, feeding and/or overwintering area for marine and anadromous species; and the presence of vulnerable or sensitive species (*i.e.*,

As noted, there will be no change in the shape of the river bottom after construction, and there will be no structures remaining in the water column. *Id.* Due to the shallow estuarine environment, tidal flow, river discharge, and wind/storm events will act to smooth any irregularities in the substrate after backfilling. *Id.* While turbidity will be increased locally during construction, overall water quality will not be significantly impaired. This is demonstrated by the NYSDEC's approval of the Project in granting the § 401 Water Quality Certification. *See generally* WQC (Exhibit 9). Increased sedimentation resulting from excavation and backfilling will be confined to the vicinity of the trench, and tidal action will rapidly restore and stabilize the bottom surface. Exhibit 14, at 3 & 33-35; Exhibit 2, Volume 1, at 5-70.

Chemical effects on the substrate will be virtually non-existent since the original sediments contain very low contaminant levels and will be used to backfill the trench. The only potential chemical effect will be confined to the turbidity plume. No material will be added to, or removed from, the water or sediment during or after construction. Notably, sediment testing demonstrated very low contaminant levels and no PCBs. *See* Exhibit 14, at 4 & 37; Exhibit 2, Volume 1, at 5-70 (“[t]here would be no mechanism that could cause a significant long-term change in the . chemical parameters of Haverstraw Bay.”).

Biological impacts will also be ecologically insignificant because they will be limited to short-term loss of benthic life and temporary displacement of mobile aquatic life in the vicinity of the pipeline segment under construction. *See generally*, Exhibit 2, Volume 1 at 5-59 to 5-62, 5-69 to 5-71, 7-6 to 7-7. Mobile biota will generally avoid the work area. *Id.* at 5-70

endangered or threatened). Exhibit 14, at 27-28.

("[g]enerally, fish would avoid the disturbance created by the dredging and backfilling operations and rarely become entrapped by the bucket"). Further, construction will not affect migratory behavior, since the sequential nature of the construction will leave the vast majority of the river width available for movement at any given time. NMFS Opinion (Exhibit 8), at 14 ("[g]iven construction of the pipeline will occur in 1300 foot sections across the river, shortnose sturgeon should still be able to use migration corridors on either side of dredging/pipelaying operations.") Additionally, as found by both the NMFS and FERC, construction-related increases in the suspension of sediments in the water column, or the resuspension of potentially contaminated sediments, will have no significant impact on listed species or their habitat. Exhibit 7, at -14 (discussing sediment suspension due to Project construction and concluding that there would be only temporary, minimal effects on biota); *id.* at 14-15 (discussing sedimentation of river bottom due to construction and concluding there would be only minor, short-term effects on biota); *id.* at 15-16 (discussing the possibility of contaminated sediment resuspension, and concluding there would be only short-term effects on a small percentage of individuals within the overall population, thus resulting in "no significant impact on EFH-designated fish populations or their habitat"); NMFS Opinion (Exhibit 8), at 14 ("adult sturgeon seem to be able to withstand some degree of suspended sediments given they are frequently found in turbid waters"); *id.* at 15 ("[a]lthough shortnose sturgeon in the action area may experience a temporary increase in bioaccumulation [from resuspension of contaminated sediments], exposure will not be long term and should not affect sturgeon health").

In short, the very small area of disturbance relative to the total habitat area, the short-term nature of the disturbance, and the rapid recovery documented for this habitat from the implementation of far more disruptive dredging activities, all assure that the Project will not

significantly adversely affect biota. *See id.*, at 17-18; Exhibit 7, at 24; Exhibit 6, at §§ 4.1 & 4.2; Exhibit 2, Volume 1, at 5-70 (“[m]ost adverse effects [on fisheries] would be limited to the immediate vicinity of the dredging and the time it takes for the disturbed area to return to preconstruction conditions. . . . Because of the relatively small total area of the bay that would be affected [1.5 percent], the short length of active construction [about 1,300 feet], and the relatively short time to fabricate and install the pipe within the 1,300-foot construction work area [about 5 days in open water], impact on fisheries would be short-term and limited to the alteration of benthic invertebrate communities in the direct path of construction. However, benthic organisms have been found to recover rather rapidly from construction disturbance.”)

Indeed, empirical evidence regarding periodic channel maintenance dredging of Haverstraw Bay confirms that the viability of the Haverstraw Bay significant habitat will not be impaired by the temporary effects associated with Millennium’s proposed construction. The navigation channel in Haverstraw Bay is maintained at a depth of 32 feet through periodic removal of accumulated sediment. The channel was last dredged in 1987. NMFS Opinion (Exhibit 8), at 7-8. Extensive sampling over the last thirty years demonstrates that (1) fish and benthic communities have flourished since the navigation channel was built; and (2) important fish populations (*e.g.*, shortnose sturgeon, striped bass) have increased substantially. Given the far more disruptive nature of maintenance dredging, as compared with the sequential, lay-barge methodology at issue here, the impacts from Project construction will not impair the habitat. *See id.* at 13 (“[i]n addition to relatively rapid recovery of certain species, sturgeon have extensive foraging habitat outside of the action area. Thus, the temporary reduction in foraging habitat should not greatly affect shortnose sturgeon.”).

Notably, the resilience and, hence, rapid recovery time, of the Haverstraw Bay habitat (even from conventional dredging techniques) are due to the natural features and forces that shape this environment. Shallow estuaries, such as Haverstraw Bay, commonly experience extremes of tidal flow and natural disturbances (*e.g.*, coastal storms and river floods). *Id.* at 13 (“[t]he suspended sediment concentration in estuarine environments is particularly influenced by: tidal flow and river discharge. Haverstraw Bay is tidal and experiences a significant amount of freshwater input from the upper reaches of the Hudson River. Sediments in the Bay can generally be characterized as silty/clay-like materials which may stay in suspension longer than other types of sediments.”) Aquatic life is adapted to these severe natural fluctuations and, thus, recovers quickly. Exhibit 2, Volume 1, at 5-70 (“benthic organisms have been found to recover rather rapidly from construction disturbance” and “epi-benthic organisms would return to the trench footprint soon after backfilling”); NMFS Opinion (Exhibit 8), at 13 (because “Haverstraw Bay is tidal, it is possible that epi-benthic species may be pushed by tidal forces back into areas previously disturbed, resulting in more rapid recovery;” epi-benthic organisms are the primary prey organisms targeted by shortnose sturgeon). Accordingly, the Project will not significantly impair the vitality of any component of the Haverstraw Bay ecosystem.

Importantly, the finding of “no significant adverse impact” is repeatedly echoed by the FERC in its FEIS, BA, EFHA, Supplemental BA/EFHA. As the FERC explained

“Pipeline construction would have a temporary effect on a very small portion of the designated habitat and the total available functional habitat of Haverstraw Bay. Construction activities would occupy a very small portion of the water column and estuary bottom, and the effects would be limited to temporary disturbance and restoration of the substrate. There would be no mechanism that could cause a significant long-term change in the physical, biological or chemical parameters of Haverstraw Bay. Because no structure would remain in the water after construction, there would

be no long-term impact on the parameters that define the habitat. Food chain relationships and predator/prey relationships would not be altered because there would be no significant change in the population size of any species in the bay. The effects of pipeline construction on living resources would be a temporary reduction of benthic infauna and some epibenthos in the footprint of the trench and a temporary redistribution of epibenthos and fishes during construction. Th[is] small temporary reduction . . . would not alter feeding relationships, which are ecosystem-wide characteristics. Epibenthic organisms would return to the trench footprint soon after backfilling, providing a food source for fish that may enter the area.” Exhibit 2, Volume 1, at 5-70; *see also* Exhibit 5, at 3-8 & 4-1 ; Exhibit 7, at 13-16 & 24; Exhibit 6, at §§ 4.1, 4.2 & 4.3.

Thus, the FERC concluded that (1) “there would be no substantial adverse impact (individual or cumulative) on E[ssential] F[ish] H[abitat] in Haverstraw Bay,” Exhibit 7, at 24; (2) there would be “no long-term or cumulative effects” on the shortnose sturgeon, and no adverse effects on the remaining federally listed species, Exhibit 5, at 3-8 & 4- ; and (3) “the proposed project may adversely affect, but is not likely to jeopardize the continued existence of the shortnose sturgeon,” Exhibit 6, at §§ 4.1, 4.2, & 4.3.

Likewise, NMFS reached the same “no significant impact” conclusion, stating in its Biological Opinion:

“Based on the time of year the project is to be completed, the apparent low density of shortnose sturgeon in the action area, and the type of dredge equipment being employed, NMFS believes that the incidental take of shortnose sturgeon will be minimal. Considering the environmental baseline, the effects of the proposed action, and future cumulative effects in the action area, the proposed project is not likely to reduce the reproduction, numbers, and distribution of Hudson River DPS in a way that appreciably reduces their likelihood of survival and recovery in the wild. . . . After reviewing the current status of the species discussed herein, the environmental baseline for the action area, the effects of the proposed action and the cumulative effects, it is the NMFS’s biological opinion that [pipeline construction conducted from September 1 to November 15 in Haverstraw Bay in the Hudson

River] may adversely affect, but is not likely to jeopardize the continued existence of [listed species under NMFS's jurisdiction]" Exhibit 8, at 17-18, and cover letter at 1.⁴⁶:

Accordingly, the record demonstrates that the Project's anticipated effects on coastal resources in Haverstraw Bay are minimal and temporary, and certainly not significant enough to outweigh the compelling national interest at stake here.

**(3) Impacts From Blasting Will
Be Insignificant**

The highly spatially- and temporally-limited blasting potentially required for this Project does not at all undermine the ultimate "no significant impact" conclusion of the FERC, NMFS and the NYSDEC. *See generally* Exhibit 6 (reaffirming conclusions in initial EFHA and BA, and finding no additional impacts of significance resulting from limited blasting required for the Project); *see also* Letter from NYSDEC to R. Hall, dated May 7, 2002 (reviewing and commenting favorably on Millennium's proposed mitigation measures for limited blasting that may be required in the Hudson River and stating that "staff has no conceptual problems with the plans as proposed") (Exhibit 41).

First, some history respecting the blasting issue warrants discussion. *See generally* Exhibit 6, § 1.0. In Millennium's initial proposal, blasting was not raised explicitly as

⁴⁶ The NMFS Opinion does not address impacts from blasting, which will be addressed in a supplemental biological opinion. However, as is detailed below, the FERC thoroughly analyzed the blasting issue, finding that blasting will cause no additional impacts of significance. On this basis, the FERC explicitly reaffirmed its initial conclusion that there will be no significant adverse effects on Haverstraw Bay from the Project. Because the blasting will not result in any additional significant impacts, this implicitly validates the NMFS Opinion -- namely, that the Project's effects will be temporally and spatially limited and will not jeopardize the continued survival of listed species.

an issue in consultations with regulatory agencies.⁴⁷ As a result, the FERC's BA and EFHA and the NMFS Opinion do not address blasting impacts. Subsequently, when the potential need for limited blasting was identified as an issue of concern (*i.e.*, for the easternmost 185 feet of Haverstraw Bay),⁴⁸ consultation with the agencies was reinitiated and evaluation of blasting issues undertaken.

To facilitate that process, Millennium promptly met with the NYSDOS, responded to their seven questions regarding blasting both verbally and in writing, and provided a comprehensive assessment of blasting impacts and plans detailing the blasting proposal, including extensive avoidance and mitigation measures. Once again, Millennium called upon its team of experts to propose mitigation measures that would ensure that the impacts from any limited blasting that may be required will be no greater than the impacts associated with the dredging proposal, which had already been acted upon favorably by the NYSDEC, NMFS, and the FERC. As a cornerstone of the mitigation proposal, Millennium proposed the use of an air bubble curtain to envelop the blast area, which research by experts at the U.S. Army Corps of Engineers (the "Corps of Engineers") had demonstrated would reduce the blast-induced effects to negligible levels outside of the bubble curtain. *See generally* Blasting and Mitigation Plan, dated April 15, 2002 ("Blasting Plan") (Exhibit 45); Blasting Impact Assessment and Mitigation Plan,

⁴⁷ While blasting was not addressed explicitly in initial consultations with resource agencies, it was identified as a potentiality for Haverstraw Bay from the outset of the process, as early as April 1998. Exhibit 34. This information was provided to the FERC, the NYSDEC, the U.S. Army Corps of Engineers and other responsible federal and state regulatory agencies. Exhibit 42.

⁴⁸ Blasting in Haverstraw Bay may or may not be required for pipeline construction. Thus, blasting is only potentially required, since Millennium will, if possible, excavate by mechanical means. However, in any event, if blasting is required, at most 185 feet at the easternmost shoreline of the Haverstraw Bay crossing will be affected. *See generally*, Exhibits 41, 43, 44 (pointing out that blasting is only a possibility and will in any event be limited to less than 200 feet on the eastern shoreline).

) dated April 16, 2002 (“Blasting Assessment”) (Exhibit 46); *see also* Exhibit 47 (cover letter submitting blasting plan and blasting assessment and analyzing blasting issue); Exhibit 48, at 3 (discussing blasting); Exhibit 49 (responding to blasting concerns raised by the Village); Exhibit 50 (discussing meeting held with NYSDOS regarding blasting issue); Exhibit 51 (confirming meeting to be held with NYSDOS to discuss blasting issues); Exhibit 52 (supplementing information provided regarding blasting issue and impact on Section 401 Water Quality Certification); Exhibit 44 (supplying information requested by the NYSDOS regarding blasting); Exhibit 42, and attachment (providing responses to December 11, 2001 data requests from the Corps of Engineers); and Exhibit 43 (discussing blasting issue and providing response to the Corps of Engineers' data request).

) After thoroughly analyzing Millennium's submissions, the FERC issued a Supplemental BA/EFHA in July of 2002 (Exhibit 6), concluding that (1) any effects from blasting will be “temporary [and of] very short impact duration [over] only a very limited area;” and, therefore, (2) blasting is “not likely to add substantial cumulative adverse effects” on aquatic resources. *Id.*, §§ 4.1 & 4.2 Moreover, in the Supplemental BA/EFHA, the FERC also reaffirmed the conclusions in its initial BA and EFHA -- namely, that the Project “is not likely to jeopardize the continued existence of the shortnose sturgeon” and “would not significantly affect fish species with designated [Essential Fish Habitat].” *Id.*, §§ 4.1 & 4.2. The FERC's (1) analysis -- which fully addresses and resolves concerns initially expressed by other regulatory agencies, *id.*, § 4.3; and (2) conclusion -- that blasting produces no additional significant impact, validate the FERC’s initial “no significant impact” finding regarding construction in Haverstraw Bay. Implicitly, as well, because blasting, itself, results in no significant impacts (as found by the FERC), the conclusion in the NMFS Opinion also remains valid -- namely, that the Project “is

not likely to jeopardize the continued existence of listed species under NMFS' jurisdiction." *See id.* § 1.0 (referencing NMFS Opinion); Exhibit 8, at 1 (cover letter), 7-18.

A brief synopsis of the FERC's analysis of the blasting issue unequivocally establishes the propriety of its "no additional impact" determination and resolves the concerns initially raised by NMFS, FWS, and the NYSDOS. *See generally*, Exhibits 6, 53, & 54; NMFS. In describing Millennium's proposed blasting plan, the FERC noted that (1) only 260 cubic yards of rock along the easternmost 185 feet of the Hudson River crossing is implicated by the potential blasting; (2) all overlying sediment will be removed with an environmental bucket; (3) all sediment and rock removed with an environmental bucket or barge-mounted backhoe will be stored on shallow-draft barges so that there would be no sidecasting of spoil; (4) any blasting that is required will be performed in compliance with applicable federal, state and local regulations; (5) a maximum of 200 boreholes will be required and will be between 6 and 11 feet deep, spaced 3 to 5 feet apart; (6) charges will be set on delays, with a maximum charge per delay of 35 pounds and each borehole stemmed with 3 to 7 feet of crushed stone placed in the hole over the charge; (7) blasting may be completed in a single episode; (8) fractured rock from blasting will be removed with a barge-mounted backhoe and stored on shallow-draft barges; and (9) following pipe installation, the trench will be backfilled using spoil or fractured rock stored on the shallow-draft barges and capped with the original sediment to the approximate original elevation. Exhibit 6, § 3.0.

The FERC observed the following extensive mitigation measures proposed by Millennium to minimize blasting impacts: (1) making all reasonable attempts to complete blasting in one episode, which would limit potential impact to a single event; (2) stemming the boreholes, which decreases the amount of blast energy coming out of the drill hole, thereby

Finally, the FERC's Supplemental BA/EFHA (1) addresses and resolves the concerns which were initially raised by other federal agencies prior to submission of Millennium's Blasting Plan and Blasting Assessment, and (2) resolves or rejects the claims advanced by the NYSDOS to support its consistency objection. *See generally id.* § 4.3. The FERC's analysis:

(1) resolves the issue raised by the Corps of Engineers regarding alleged sidecasting of sediments on the river bottom, confirming that shallow water storage barges would be used and that "no excavated material is proposed to be sidecast on the river bottom;"

(2) assesses but rejects the alternative proposed by the FWS that portable cofferdams be installed and blasting done "in the dry," noting the analysis provided by Millennium and concluding that any "potential advantage [to fish respecting pressure waves] [would be] offset by other potential environmental impacts [*e.g.*, greater impact to river bottom and greater duration of construction activity in the river], and workforce safety and feasibility questions. . . . The potential advantage of using cofferdams is further offset by the fact that, as proposed, pressure wave impacts would be limited to a one-time blast, whereas installation and removal of cofferdams alone would likely require one to several weeks of in-river work. We believe Millennium's proposed mitigation would adequately address the potential impact from pressure waves generated from blasting, and therefore do not believe use of cofferdams is justified;"

(3) acknowledges, but rejects, the NYSDOS's criticism that Millennium relied on literature and studies conducted in other water bodies, stating that "we believe that use of the best available modeling to predict potential impact and identify proposed mitigation is acceptable, since conducting actual blast tests . . . would result in its own set of impacts on the Haverstraw Bay, and is unnecessary;" and

(4) rejects the NYSDOS's unsubstantiated conclusion that blasting would result in significant impacts to Haverstraw Bay.

Accordingly, the record plainly demonstrates that any limited blasting that may be necessary for the proposed Hudson River crossing will not result in impacts of any ecological significance.

**(4) The NYSDOS's Objections To The
Haverstraw Bay Crossing Are Legally
And Factually Unsupported**

The NYSDOS's consistency objection is fundamentally flawed on both the law and the facts. On the law, the NYSDOS erred by misapplying the state program. By selectively considering certain CMP policies to the exclusion of others and relying on an improper "no impact to resources" standard, the NYSDOS's erred legally by violating the fundamental balancing tenet in the CZMA and the CMP. On the facts, the NYSDOS's plain error is found in its reliance on outdated federal agency opinions (which were later superseded after further review), self-servingly selective excerpts from agency opinions (which are taken out of context and ignore the agency's ultimate "no impact" conclusion), and misreporting regarding the content of agency correspondence.

In essence, the NYSDOS's objection to the Hudson River crossing at Haverstraw Bay results from the designation of Haverstraw Bay as a "significant coastal fish and wildlife habitat" (hereinafter referred to as "significant habitat"). See Exhibit 10, at 7-14. Once an area is designated as significant habitat, Policy 7 of the CMP applies. Additionally, where, as here, dredging is proposed in significant habitat, Policy 35 is also implicated. Under state guidance documents, the NYSDOS evaluates consistency with Policy 7 by utilizing habitat rating forms and a "habitat impairment" test. The "habitat impairment" test requires that there be "no destruction of habitat, or significant impairment of the viability of the habitat." Destruction of habitat is defined as "the loss of fish or wildlife through direct physical alteration, disturbance, or pollution of a designated area through the indirect effects of these actions on a designated area. Significant impairment of viability of habitat is defined as "reduction in vital resources (*e.g.*, food, shelter, living space) or change in environmental conditions (*e.g.*, temperature, substrate,

salinity) beyond the tolerance range of an organism,” with indicators being reduced carrying capacity, changes in community structure, reduced productivity, or increased disease/mortality. Exhibit 14, at 32-33.

To comply with this standard (and as is detailed above), Millennium (1) adopted the most conservative construction techniques available to avoid adverse impacts; (2) proposed extensive mitigation techniques to rapidly ameliorate any negative effects and return the benthic substrate to its original contours; (3) provided detailed information regarding both alternative crossing locations (including that now being suggested by the NYSDOS) and construction techniques (*i.e.*, use of cofferdams, as suggested by the FWS); and (4) fully justified both its choice of methodology and the Haverstraw Bay crossing location as the least environmentally damaging option. Notably, and as also set forth above, the FERC adopted Millennium’s conclusions, stating, *inter alia*, that (1) the Project, including the proposed blasting, “would result in a temporary and short term impact and only a very limited area of impact;” (2) “there would be no substantial adverse impact (individual or cumulative) on [Essential Fish Habitat] in Haverstraw Bay”; and (3) there is “no alternative that minimizes the impacts to the natural and human environment to any greater degree.” Exhibit 6, § 4.1, 4.2 & 4.3; Exhibit 7, at 12, 13, 15, 16, 24; Exhibit 5, at 3-5. Thus, because pipeline construction in Haverstraw Bay would cause only transient, localized and temporary effects, there would be no “loss” of habitat.

Notwithstanding Millennium's authoritative showing that impacts from construction, together with appropriate avoidance and mitigation measures, would have only temporary, short-term effects, the NYSDOS found these impacts to be inconsistent with the CMP. In short, the NYSDOS determined that because the required trenching and limited blasting would destroy, for some period of time, some acreage of shallow benthic habitat and

benthic fauna, this would be inconsistent *per se* with CMP Policies 7 and 35. *See generally* Exhibit 10, at 7-14. The NYSDOS was able to reach this conclusion, however, only by selectively applying Policies 7 and 35, out-of-context from the remaining 42 coastal policies, and, moreover, applying an improper “no impact to resources” standard. On both counts, the NYSDOS violated the underlying enabling statutes.

First and foremost, it is fundamental to the CZMA (and, consequently, the CMP) that the programs thereunder accommodate both coastal development and protection of coastal resources. *See, e.g.*, CZMA § 302(a), 16 U.S.C. § 1451(a) (“[t]here is a national interest in the effective management, beneficial use, protection, and development, of the coastal zone” (emphasis added)); *id.* § 302(j), 16 U.S.C. § 1451(j) (“[t]he national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone”); *id.* §§ 302(1) & 2(D), 16 U.S.C. §§ 1452(1) & (2)(D) (“[t]he Congress finds and declares that it is the national policy to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone” and “to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs , which programs should at least provide for priority consideration being given to coastal-development uses and orderly processes for siting major facilities related to national defense, energy and transportation” (emphasis added)); *id.* §§ 306(a)(2)(H), (d)(8) & (d)(12), 16 U.S.C. §§ 1455(d)(2)(H), (d)(8) & (d)(12)(state coastal management programs must include “[a] planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone,” “adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of

facilities such as energy facilities which are of greater than local significance,” and “a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit”.

This balancing, which is mandated under the Federal and state statutes, can be accomplished only by applying the full panoply of policies that comprise the coastal program; the NYSDOS’s selective reliance on a self-serving subset of these policies was patently improper. State of New York Coastal Management Program and Final Environmental Impact Statement (August 1982) (Exhibit 55) (“CMP FEIS”), at II-1-4 (“[t]he Waterfront Revitalization and Coastal Resources Law establishes a balanced statewide approach for encouraging development in the coastal area while protecting natural resources”); *id.* at II-6-1 (“[t]he Coastal Management Program provides the basis for coordinating [different state programs] by spelling out 44 policies For the first time, all state agencies are required to advance these policies toward their logical conclusion, not allowing one policy to override another” (emphasis added)); *id.* at II-6-4 (“no policy applies to the exclusion of the others’ Indeed, under the coastal program, ‘major energy facilities’ (such as the Project) are entitled to “priority consideration,” a statutory directive that the NYSDOS ignored. 16 U.S.C. §§ 1452(2)(D), 1453(6), 1455(d)(1), 1455(d)(2)(H) & 1455(d)(8); *see also* CMP FEIS (Exhibit 55), at II-6-145, *et seq.* (requiring decisions regarding the siting and construction of major energy facilities to be based on public energy needs, compatibility with the environment, and the need for a shorefront location). By selectively applying CMP Policies 7 and 35, individually and out-of-context, to create a *per se* ban on dredging and blasting in significant habitat, the NYSDOS clearly erred.

The NYSDOS's “no impact to resources” standard and per se dredging ban in significant habitat is contradicted by the plain terms of the CMP. The plain language of CMP

Further, the result in *U.S. Gypsum Co.* (i.e., to allow conventional dredging in Haverstraw Bay on a comparatively limited record) begs the question as to how the NYSDOS could find Millennium's lower-impact proposal not to have rebutted the presumption of inconsistency with the CMP. By comparison with *U.S. Gypsum Co.*, Millennium has committed to far more extensive avoidance and mitigation measures, including (1) utilizing a construction technology of far lower impact than conventional dredging (i.e., lay-barge construction); (2) sequencing the construction to further reduce potential impacts; (3) employing best management practices; and (4) restoring the substrate to its original contours within a very short time period. Further, in comparison with *U.S. Gypsum Co.*, Millennium has provided the NYSDOS with vast quantities of information, performed historical studies of the area, as well as site-specific sampling/studies, and also engaged in extensive modeling of the Project's potential effects on the ecosystem. Thus, the disparity in result between this case and *U.S. Gypsum Co.* highlights two inescapable realities: first, that the CZMA (and, consequently, the CMP) do not, and cannot, justify the *per se* prohibition on dredging (or blasting) in significant habitat that the NYSDOS is applying here; and, second, that there is no factual justification for the NYSDOS's objection. See *U.S. Gypsum Co.*, *supra*; see also NYSDOS Consistency Concurrence (June 20, 2000) and NYSDOS Consistency Decision Record (June 16, 2000), *Central Hudson Gas & Elec. Corp.* Project No. F-00-396 (concurring in consistency certification involving the placement of heavy stones over gas and electric lines in state-designated Poughkeepsie Deepwater significant habitat); NYSDOS Comments on Pre-Construction Notification (Sept. 21, 2000) (Exhibit 57); Bell Atlantic/New York Tel., Project No. F-99-838 (finding the installation of fiber optic cable in state-designated Hudson River Miles 44-56 significant habitat not to be unqualifiedly precluded and restricting the installation period to avoid impacts on striped bass spawning and incubation) (Exhibit 58).

The lack of any factual foundation for the NYSDOS's consistency objection is further demonstrated by the NYSDOS's reliance on superseded Federal agency opinions and selective excerpts cited out-of-context. *See generally* Exhibit 10, at 8-10 & 12. For example, the NYSDOS relies heavily on NMFS's March 22, 2001 and May 2, 2001 letters to the FERC (Exhibits 59 & 60). The NYSDOS cites selected excerpts from these letters to support its contentions that the Project will cause "long-term ecological alterations that reduce carrying capacity of the habitat, change its community structure, reduce its productivity, and increase mortality in the habitat" and that the benthos will "take much longer than anticipated to recover, if recovery takes place at all." *See* Exhibit 10, at 8-10. Significantly, none of these conclusions is valid, since these letters were both superseded by the NMFS Opinion (Exhibit 8). Even more importantly, the NMFS Opinion expressly refutes the NYSDOS's contentions, for it finds that "the proposed project is not likely to reduce the reproduction, numbers, and distribution of the Hudson River [listed] species in a way that appreciably reduces their likelihood of survival and recovery in the wild" and concludes that "the proposed action may adversely affect but is not likely to jeopardize the continued existence of the Hudson River population of shortnose sturgeon." Exhibit 8, at 17-18.

To the extent that the NYSDOS does cite Federal agency submissions that are not outdated (namely, the NMFS Opinion), it improperly relies on selective, out-of-context quotations. *See* Exhibit 10, at 9 (selectively citing the NMFS Opinion to support NYSDOS's finding that dredging will significantly impair Haverstraw Bay habitat). NMFS performed a very comprehensive review of Millennium's proposal, which Millennium commends. The culmination of that review is a 24-page Biological Opinion, detailing, *inter alia*, (1) the status of species or critical habitat in the affected area; (2) the life history of, and population studies

regarding shortnose sturgeon (*i.e.*, the listed species within NMFS's jurisdiction) in the Hudson River; (3) the environmental baseline; and (4) the potential effects of the proposed action. As for potential effects, NMFS's thorough review includes a discussion, in the abstract, of the scientific literature and other documentation. In this general discussion, NMFS notes the possibility of some potential effects from trenching (be it the trenching proposed by Millennium, or any other dredging operation). It is these selective excerpts on which the NYSDOS relies to support its objection. *See, e.g.*, Exhibit 10, at 9. What the NYSDOS conveniently ignores, however, is NMFS's site-specific, proposal-specific analysis and conclusion regarding the Project: namely, that the Project presents "no threat to the continued survival" of the shortnose sturgeon.⁴⁹ *See* Exhibit 8, at 13-15 & 17 (analyzing Millennium's proposal and finding, among other things, that impacts will be of no significance due to (1) the use of a closed bucket dredge; (2) the tidal nature of Haverstraw Bay, which will result in more rapid recovery of epi-benthic fauna; (3) the short-term, sequenced nature of the construction; (4) the proper timing of the construction; and (5) the low density of sturgeon in the action area). Accordingly, the NYSDOS's out-of-context quotations do nothing more than underscore the baselessness of its findings.

Finally, the NYSDOS's misapprehensions notwithstanding, the ultimate "no significant impact" conclusion reached by the FERC and NMFS is not at all impugned by the limited blasting that may potentially be required. The NYSDOS mischaracterizes the Federal agencies' requests for the reinitiation of consultation as opinions that there will be significant blasting impacts. Exhibit 10, at 10-11 (citing FWS letter dated March 5, 2002 to the Corps of

⁴⁹ Likewise, the NYSDOS conveniently ignores the extensive factual record developed by both the FERC, the lead Federal agency under NEPA, and LMS, recognized as the leading experts on the Hudson River ecosystem. Both have found, in keeping with NMFS's conclusion, that impacts to the Haverstraw Bay ecosystem will be ecologically insignificant.

Engineers (Exhibit 61) and NMFS letter dated February 15, 2002 to the FERC (Exhibit 62). Notably, both of the cited letters were submitted prior to the development of Millennium's Blasting Plan (Exhibit 45) and Blasting Assessment (Exhibit 46); thus, while these letters express generalized concerns, neither includes any actual analysis of Millennium's site-specific proposal. Further, NMFS's letter is a request for further consultation with the FERC to consider the blasting issue, and nothing more.⁵⁰ As already discussed, the FERC carefully analyzed both Millennium's site-specific blasting plans and the generic concerns expressed by the NMFS and FWS in the above-noted correspondence. In that thorough review, the FERC concluded that there would be no additional impacts of any significance and resolved each of the agency's specific issues. Further, the FERC rejected the NYSDOS's suggested alternatives to blasting as being either without merit, unnecessary, or of no environmental benefit. *See* Exhibit 6 at § 4.3 (noting that the use of cofferdams would not yield sufficient environmental benefit to be deemed justified; stating that reliance on literature and studies conducted in other states to determine blasting impacts is an acceptable methodology; and rejecting NYSDOS's unsubstantiated contention that blasting would result in additional impacts of significance).

In sum, the NYSDOS's rampant misuse of Federal agency correspondence -- which constitutes the sole support for its consistency objection -- demonstrates the absence of any substantive factual support for its position. In short, the evidence establishes that potential adverse impacts to Haverstraw Bay will be de minimis.

⁵⁰ NMFS has not yet issued a supplemental biological opinion. *See* Exhibit 6, at § 4.

b. The Pipeline Route Through The Village Of Croton-on-Hudson Will Not Result In Significant Adverse Coastal Impacts

After proceeding from west to east across the Hudson River, the pipeline's FERC-approved route proceeds southeast through the Town of Cortlandt, New York. From there, the route continues in a southeasterly direction, barely entering two small areas on the easternmost edge of the Village of Croton-on-Hudson (the "Village") in which are located the Jane E. Lytle Arboretum ("Arboretum") and the north side of the Croton River Gorge, which includes a portion of the Village's Wellfield and the western half of the Croton River crossing. This route through the Village is the "ConEd Offset/Taconic Alternative" route that was selected and approved by the FERC as the best route through Westchester County. Exhibit 2, Volume 1, at 6-62

Significantly, although many route variations were evaluated for this segment of the pipeline, the ConEd Offset/Taconic Alternative route was both suggested, and strongly endorsed, by the Village (among other municipalities) as the preferred route through Westchester. See Exhibit 29 ("strongly urg[ing] [the NYPSC] to modify its MOU with Millennium [Exhibit 73] to make the ConEd Offset/Taconic variation a reality"); Exhibit 30 (informing the FERC that the Village's Board of Trustees had unanimously adopted a resolution "strongly urging" the NYPSC to designate the ConEd Offset/Taconic Alternative route as the preferred route); LMS Study Addendum (Exhibit 15), at 2. Ultimately, the FERC selected route this as the preferred route based on, *inter alia*, (1) local municipalities' overall preference for this route; (2) the absence of unacceptable environmental impacts from this route; (3) the absence of any clear environmental advantages of other routes; (4) the ability to co-locate two utility rights-of-way for over half the length of this routes; and (5) the stringent safety specifications agreed to

between Millennium and the NYPSC, which would allow for installation closer to powerlines, according better utilization of cleared rights-of-way, thus minimizing tree clearing in sensitive areas. Exhibit 2, Volume 1, at 6-62; *see also id.* §§ 6.2.6.1, 6.2.6.2 & 6.2.6.3.

With respect to coastal zone issues, the ConEd Offset/Taconic Alternative route has the added advantage of removing the pipeline from direct contact with Hudson River coastal resources. *Id.* at 6-42 (noting that the Village is in the coastal zone but that the ConEd Offset/Taconic Alternative route “would be on the eastern edge of these municipalities, and several miles from the Hudson River”); *see* LMS Study Addendum (Exhibit 15), Figure 1 More specifically, the two Village locations on the pipeline route are located on the easternmost reaches of the Village; thus, they are far away from the Hudson River and significant fish and wildlife habitat, although still within the Village’s borders and thus technically in the coastal zone. The Arboretum has no contact whatsoever with traditional coastal resources. The Village Wellfield in the Croton River Gorge has little connection to any coastal areas of the Village, except to supply drinking water to areas that are more typically considered coastal areas. Likewise, the Croton River crossing is of no coastal import. Although the Croton River crossing is approximately one-mile upstream of the Croton River’s designated significant fish and wildlife habitat, the use of a dry-ditch construction method during low flow conditions will eliminate the potential for any downstream effects. LMS Study Addendum (Exhibit 15), at 3; Exhibit 9 (certifying that the dry-ditch technique for the Croton River crossing will meet water quality standards). Also, these locations are upland areas where there is no visual access to or from the Hudson River. Accordingly, construction at these upland locations, remote as they are from any coastal resources, cannot possibly have a significant adverse ecological or visual impact on coastal resources.

Indeed, the only reason why these areas must be addressed at all in the coastal zone consistency analysis is because the Village has designated all areas within its boundaries as part of the coastal zone. Thus, even though those areas are more than a mile inland and have little or no hydraulic connection with (or potential to impact) coastal areas, pipeline construction in those locations must be evaluated for consistency with the Village's Local Waterfront Revitalization Plan ("LWRP"). The NYSDOS performed that analysis, finding that the pipeline route through the Arboretum and the Wellfield violated the Village's LWRP.

In fact, however, as set forth below, the evidence demonstrates that the FERC-approved route through the Village will not have any coastal impacts at all, much less any impacts of consequence to the Arboretum and the Wellfield. Moreover, the NYSDOS's objections to the route through the Village are both legally and factually unsupported.

(1) The Project Will Result In No Significant Adverse Effects On The Arboretum, Including Wetland WO8CT

The Project will result in no adverse impacts of any significance to the Arboretum. *See generally* Exhibit 2, Volume 1, at 5-85 to 5-86 & 6-38 to 6-39; Exhibit 2, Volume 2, Appendix E1 (Environmental Construction Standards), at IVB, V-VII; LMS Study Addendum (Exhibit 15), at 12, 19-20, 27-29; Exhibit 9, §§ 2G, 3A, 5C, 5D, 5F, 5M & 5R; Millennium Response to WAC Findings (Exhibit 15), at 5-6; Exhibit 63, Response to Data Request No. 2; Exhibit 64.

The sole and exclusive issue regarding the Arboretum concerns the effect of pipeline construction on wetland WO8CT, a part of which occupies most of the central portion of the Arboretum and extends northeast across the construction work area of the ConEd

Offset/Taconic Alternative route. *See* Exhibit 2, Volume 1, at 6-55 (“[c]oncerns about construction through the arboretum are primarily associated with wetland WO8CT [] and the loop trail”); Exhibit 10, at 14-15 (focusing only on wetlands issues, finding LWRP Policies 44 and 44A to be violated, and making no mention of the loop trail or any recreational issues associated therewith); Exhibit 2, Volume 1, at 6-38. With respect to that wetland, the evidence more than amply demonstrates that construction of the Project will traverse an extremely small portion of wetland WO8CT and will not impair its functioning or vitality or have any adverse impacts of consequence. Indeed, the extensive measures to which Millennium has committed will actually help improve and enhance the wetland and Arboretum property by remedying existing problems with invasive flora and protecting against any further encroachment.

Wetland WO8CT extends from at least the northern edge of the ConEd right-of-way (“ROW”) downslope into the center of the Arboretum. The portion of wetland WO8CT within the northern portion of the ConEd ROW was identified originally as wetland W8WC in field surveys conducted by Millennium in 1998. Wetland W8WC is very likely hydraulically connected with a complex of ponds in the Town of Cortlandt immediately upslope and north of the ConEd ROW. During an April 2001 survey of the southern portion of the ConEd ROW, wetland WO8CT and stream SO7CT were identified. Stream SO7CT originates as drainage from wetland W8WC and continues downslope to eventually drain into the Arboretum's wetland. Wetland WO8CT also borders the stream on both banks between the centerline of the ConEd Offset/Taconic Alternative route and the wetland that forms the core of the Arboretum. Thus, the portion of wetland WO8CT that is within the Arboretum is connected, both by wetland and by stream, to a much larger upslope area that likely extends beyond the boundaries of the Village. *See* Exhibit 15, at 27-28; Exhibit 2, Volume 1, at 6-38 to 6-39. Accordingly, from a functional

viewpoint, the wetland encompasses over 20 acres, about 10 acres of which is on Arboretum property. *Id.*; Exhibit 63, Response to Data Request No. 2(b).

The Project's potential impacts on the wetland will be de minimis. First, in order to minimize impact as much as possible to the Arboretum and wetland WO8CT, Millennium suggested to the NYPSC that it would be appropriate to shift the Project somewhat to the north, along the edge of the cleared right-of-way, while still maintaining an adequate separation between the pipeline and the ConEd electric conductors. Exhibit 15, at 12. The NYPSC agreed to the proposal in its June 19, 2001 letter to the FERC (Exhibit 65), allowing placement of the pipeline 35 feet closer to the electric conductors in the vicinity of the Arboretum. Exhibit 2, Volume, at 6-38 to 6-39; Exhibit 66. As a result of this modified alignment and construction work area, (1) only 0.23 acres of the wetland are in the Arboretum within the proposed construction work area; (2) only an extremely small part of the wetland (*i.e.*, 0.79 acres) will be affected at all by the construction; (3) most impacts will be temporary in any event (*i.e.*, only 0.27 acres will be affected during operations); and (4) only a very minute portion of wetland WO8CT will be converted from palustrine forest to emergent vegetation due to construction activities (less than the 0.11 acres that was calculated before the 35 foot shift of the centerline closer to the cleared ConEd ROW). Exhibit 63, Response to Data Request No. 2(e); Exhibit 2, Volume 1, at 6-38, Table 6.2.6.1-3; Exhibit 15, at 5 & 12.

Millennium has committed to extensive and comprehensive construction measures that will maximally limit impacts to the Arboretum and wetland WO8CT. These include (1) constructing the Arboretum crossing as a single construction entity, which should limit construction activity to a period of two weeks and earth moving activity to a period of two days; (2) limiting the width of the work space; (3) reducing tree clearing as much as possible; (4)

employing best management practices and sedimentation and erosion control measures, such as silt fences and sediment barriers on the downslope and western side of the work area within wetland WO8CT, before clearing and grading activities begin; (5) performing the stream crossing using “dry ditch” techniques; (6) employing an Environmental Inspector, who will ensure compliance with the specifications in the Environmental Construction Standards; (7) having a full-time Environmental Monitor on-site to monitor all construction activities and report to regulatory agencies respecting all wetland and stream issues; and (8) locating and documenting all swales and drainage courses prior to earth moving activities to ensure that final grading of wetlands is consistent with pre-existing grades. Exhibit 15, at 28-29; Exhibit 63, Response to Data Request No. 2(b); Exhibit 2, Volume 1, at 5-85 to 5-86, 6-38 to 6-39; Exhibit 2, Volume 2, Appendix E1; Exhibit 64, at 1-4.

Further, Millennium has committed to perform post-construction activity that will restore original wetland contours. Exhibit 63, Response to Data Request No. 2(b)(2); Exhibit 2, Volume 1, at 6-39; Exhibit 15, at 28. To ensure that this is properly accomplished, Millennium will have an on-site wetland specialist to restore the original hydrological patterns of wetlands to the fullest extent practicable. Exhibit 15, at 28. This measure addresses and resolves concerns regarding maintaining the drainage swale system which results in water flow into wetland WO8CT. Exhibit 2, Volume 1, at 6-39. Millennium has also committed to restoring the ROW to pre-construction grade and stabilizing it using a wetland seed mixture, as well as performing tree and shrub plantings, in consultation with Arboretum representatives, as part of its mitigation plan for the crossing of wetland WO8CT. Exhibit 63, Response to Data Request No. 2(b)(2) & (e); Exhibit 2, Volume 1, at 6-39; Exhibit 15, at 28. Finally, Millennium will implement additional mitigation, protective measures, and maintenance programs to remedy or ameliorate

already existing problems with invasive plant species and prevent any further encroachment.

Exhibit 15, at 19-20 & 29; Exhibit 2, Volume 1, at 6-39; Exhibit 63, Response to Data Request No. 2(b)(3) & (d); Exhibit 64, at 3-4 (all discussing management issues regarding *Phragmites australis*).

Accordingly, the ConEd Offset/Taconic Alternative route will result in no impacts of significance which could possibly impair the viability of wetland WO8CT or any other aspect of the Arboretum.

(2) The Project Will Result In No Significant Adverse Effects On The Village Wellfield

The de minimis effect of pipeline construction and operation on the Wellfield is clear. See Exhibit 2, Volume 1, at 6-33 to 6-36 & 7-3 to 7-4; *id.*, at § 5.3.1; LMS Study Addendum (Exhibit 15), at 25-26; Millennium Response to WAC Findings (Exhibit 15), at 4-5; see also Exhibit 2, Volume 2, Appendix E (Construction and Restoration Procedures) & Appendix E1 (Environmental Construction Standards), §§ II, V-VII.

The issues regarding the Wellfield -- all of which have been resolved by the FERC and Millennium -- concern the Village's allegations that (1) the construction and presence of the pipeline will lessen well yield; (2) the pipeline poses a threat to water quality because of potential spills during construction, the alleged presence/storage of various substances in the vicinity of the Wellfield, or leakage during operation; (3) the use of trench dewatering during construction will decrease the available water supply and lessen well yield; and (4) the presence of the pipeline will interfere with the Village's ability to expand its existing wellfield. See Exhibit 2, Volume 1, at 6-34 to 6-35, 7-3 to 7-4, & 7-15; LMS Study Addendum (Exhibit 15), at 25-26; Millennium Response to WAC Findings (Exhibit 15), at 4-5; Exhibit 9, § 5M. The evidence, however, most

decidedly demonstrates that all of these matters have been squarely addressed. The Project presents no quantifiable threat to the aquifer or the Wellfield.

The environmental setting demonstrates that there are no physical constraints to constructing the Project through the Wellfield. The Village Wellfield is located in a deep deposit of sand and gravel adjacent to the Croton River. It is bordered on one side by a road and on the other side by the Croton River. Within the Wellfield is a pumping station, three wells, and a network of pipes to route the water. There is ample space on the surface to accommodate construction activities, and there is ample room to construct the pipeline without interfering with the well system. Because of the nature of the soils and the flat terrain, this pipeline segment will be among the easiest in Westchester County and should be complete in a matter of three weeks, including the crossing of the Croton River.

Neither the construction nor the operation of the pipeline will decrease the yield of the Wellfield. The well-documented high permeability of the aquifer makes it extremely unlikely that the Village's water supply will be affected at all by the pipeline. Furthermore, as documented in the Geraghty & Miller Report,⁵¹ the greatest yield occurs from the deeper depths of the aquifer and the wells at the south end of the Wellfield, not from the shallow zone where the pipeline will be installed at the northern end of the Wellfield. LMS Study Addendum (Exhibit 15), at 25; Millennium Response to WAC Findings (Exhibit 15), at 4; *see* Exhibit 2, Volume 1, at 6-35

⁵¹ Geraghty & Miller, Inc., "Availability of Ground-Water Resources At The Croton-on-Hudson Well Field, Croton-on-Hudson, New York" (August 1988).

Second, the construction and operation of the pipeline will not impair water quality. There are already existing roads, treatment facilities, and pipelines constructed in the area of the Wellfield, and the construction of the Millennium Project will pose no threat of impact greater than that associated with maintaining the existing systems. Indeed, the potential impacts are far less. LMS Study Addendum Exhibit 15), at 25; Millennium Response to WAC Findings (Exhibit 15), at 4.

As a further protective measure, Millennium has agreed to include the Village's Wellfield Protection Zone in its Spill Prevention, Control, and Countermeasures ("SPCC") Plan. This will restrict equipment refueling within 400 feet, prohibit overnight parking of construction equipment, and require that construction and inspection vehicles be equipped with spill prevention and containment kits. Exhibit 2, Volume 1, at 6-34. Moreover, no materials are proposed to be stored in the area which could impact either the Wellfield or the aquifer. LMS Study Addendum (Exhibit 15), at 25. Construction activities and fuel storage will be closely monitored and conducted in accordance with the SPCC Plan. Millennium Response to WAC Findings (Exhibit 15), at 4.

Finally, the pipeline will be continuously monitored to detect leaks through pressure monitoring, aerial and ground reconnaissance, and automated, remote-controlled robotic devices. Pipeline leaks generally develop slowly and are easily detectable before they become serious. Moreover, natural gas rises in porous soils and dissipates into the atmosphere. Accordingly, the potential for water quality to be adversely impact by the Project is remote, at best. *See* Exhibit 2, Volume 1, at 7-4 ("[i]n response to concerns about protection of aquifers and water supply watersheds, we have recommended that aquifer protection districts be identified on the C[onstruction] A[lignment] S[heets], that equipment be checked every day for leaks

regardless of whether the equipment would be working within an aquifer protection district, and that private wells be monitored for contamination if a spill were to occur up-gradient of the capture zone of the well. These additional measures would be included in Millennium's SPCC Plan.”).

The same lack of quantifiable potential impact is true for the Project's alleged effect on water quantity. As for potential well yield impacts due to construction, Millennium's construction methodologies include techniques which will minimize the potential for trench dewatering. In the event trench dewatering is necessary, it will be temporary in nature, and the water pumped from the trench will be discharged within Zone 1 of the Wellfield. The Geraghty & Miller Report estimates that the Wellfield has the capacity to yield approximately 11 million gallons per day (over ten times the current annual demand), although the existing wells have the potential to yield only a fraction of this future capacity. Since the Wellfield has excess capacity to more than meet the Village's requirements (even with the existing wells), this demonstrates that there is no real potential for quantifiable impact of any kind to well yield during the short time period of pipeline construction through the Wellfield. LMS Study Addendum (Exhibit 15), at 25; Millennium Response to WAC Findings (Exhibit 15), at 4; Exhibit 2, Volume 1, at 6-35; Exhibit 9, § 5M.

Lastly, given the highly permeable nature of the aquifer, the pipeline will not impair the potential for the Village to expand its existing field. LMS Study Addendum (Exhibit 15), at 25-26, Exhibit 2, Volume 1, at 6-33 to 6-35 & 7-3 to 7-4. Millennium has committed to bury the pipeline with extra cover (a minimum of eight feet) to prevent possible interference with the Village's water lines. Exhibit 2, Volume 1, at 6-34. Moreover, as noted in the Geraghty & Miller Report, the aquifer is extremely permeable, as are the shallow soils, and there is no

limitation on placing a new well other than within 25 feet of the proposed pipeline. Given the detailed design drawings and location information that will be available, virtually the entire Wellfield is available for future development. LMS Study Addendum (Exhibit 15), at 25-26; Response to WAC Findings (Exhibit 15), at 5

In conclusion, there is no evidence supporting the NYSDOS's objection to the proposed crossing of the Wellfield. *See* Exhibit 2, Volume 1, at 6-34 to 6-35 & 7-4; LMS Study Addendum (Exhibit 15), at 25-26; Millennium Response to WAC Findings (Exhibit 15), at 4-5.

(3) The NYSDOS's Objections To The Route Through The Village Are Legally And Factually Unsupportable

The NYSDOS found the ConEd Offset/Taconic Alternative route to be inconsistent with the LWRP (and, hence, the CMP) due to the crossing through the Arboretum and the Village Wellfield two inland areas with no significant contact with, and only limited hydraulic connection to, any coastal resources. Specifically, the NYSDOS found that the segment through the Arboretum violated LWRP Policies 44 and 44A (protecting wetlands), and that the segment through the Wellfield violated LWRP Policies 18 (safeguarding coastal resource areas) and 38 (protecting groundwater sources). In reaching these conclusions, the NYSDOS once again failed to consider or even mention the importance of the Project as a major energy facility that is needed to supply natural gas to the U.S. Northeast and the metropolitan New York City area.

In basing its consistency objection on these LWRP Policies, the NYSDOS erred on a number of grounds. First, the NYSDOS wrongly applied the Village's other local enactments as the exclusive factors in determining LWRP consistency, thereby dispensing with

the balancing approach that should have been applied. *See generally* Exhibit 10, at 4 & 15. For example, the NYSDOS found that the pipeline route through “wetlands in or near the [] Arboretum and the Croton River” violated LWRP Policies 44 and 44A because “[t]he [Village] Code [Local Law #4, Chapter 227] does not provide for the construction of the proposed pipeline” in wetland areas. *Id.* at 14-15. The NYSDOS likewise viewed the Village's local law “identifying and protecting [its] water supply system,” as the preeminent, if not only, pertinent factor in determining compliance with LWRP Policies 18 and 38. *See id.* at 4. Thus, the NYSDOS stated: “The Village enacted a local law protecting this water supply area. The law prohibits all systems, facilities, and activities and controls in the Zone 1 Wellhead Protection Area. . . . Since the pipeline would traverse Zone where it is a use that is not allowed and given the absence of management practices . . . to protect the Village's water supply,” pipeline construction would violate LWRP Policy 38. *Id.*

While the Village's local regulation may be one relevant consideration in determining consistency with individual LWRP Policies, it is not, and cannot be, the sole criterion; nor do the Village's individual local enactments set the legal standard for determining compliance with the LWRP as a whole. First, by applying the “local approach” as the “be all and end all” of LWRP consistency, the NYSDOS ignored both (1) the balancing of competing interests (*i.e.*, resource development versus resource protection) that is essential for determining CMP (or LWRP) consistency and (2) the priority consideration that must be accorded to major energy facilities under the CZMA and the CMP.

Second, the NYSDOS’s “local approach” raises an interesting paradox respecting Federal preemption. It is beyond dispute that the wetlands permit requirement imposed by the Village Code (*i.e.*, Local Law #4, Chapter 227), if interpreted to defeat or obstruct the Project,

would be preempted under Federal law and, therefore, would not apply to the Project. *See National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571, 579 (2d Cir. 1990). Accordingly, it is internally contradictory for the NYSDOS to be able to use this local Code as the exclusive standard for determining consistency with individual LWRP Policies and defeating the Project on this basis.

Finally, in summarily finding that the Village's local enactments preclude LWRP consistency, the NYSDOS also failed to acknowledge that the ConEd Offset/Taconic Alternative route is the very route suggested and "strongly urged" by the Village. As already noted, the Village, along with other municipalities, proposed this route as an alternative to the Route 9/9A proposal. The Village advised the FERC that it and other affected communities "strongly endorse[d]" the FERC's suggestion that the NYPSC revise its MOU with Millennium (Exhibit 73) to encompass the ConEd Offset/Taconic Alternative route. The Village also stated that its Board of Trustees would "pass resolutions endorsing the FERC's proposal with the incorporation of the Taconic variation, and strongly urge that the PSCNY modify its MOU with Millennium to make the ConEd Offset/Taconic Alternative a reality, thereby avoiding further protracted legal proceedings." Exhibit 29, at 2-3. On April 5, 2001, the Village Manager informed the FERC that the Village Board of Trustees had unanimously adopted a resolution "strongly urging" the PSCNY to designate the ConEd Offset/Taconic Alternative as the preferred route. Exhibit 30. According to the Village, this resolution stated that this "alternative, running alongside, by and large, the Con Edison right-of-way and the Taconic Parkway, will not pose a threat to people and property in the significant and severe way that the Route 9 and 9A proposal will." *Id.* at 2. Accordingly, given that the Village itself proposed and repeatedly endorsed this route, it seems incongruous that the Village's local regulation precludes this route. Thus, the NYSDOS's

conclusion -- *i.e.*, that application of the subject local regulation results in the Project's construction being inconsistent with the LWRP -- is highly questionable, at best.

Even if the Village's local regulation constituted the exclusive legal standard for determining consistency with LWRP Policies 18, 38, 44 and 44A (which it is not), and even if the NYSDOS applied that local regulation properly (which it did not), the NYSDOS committed additional legal error by finding a violation based, allegedly, on insufficient information. *See* Exhibit 10, at 4 & 15. Specifically as to wetlands, the NYSDOS noted the Village Code standards for a construction permit: (1) consistency with the legislative intent of the subject Village Code; (2) the absence of any practicable alternative; and (3) a demonstration that (i) the proposed activity is not adverse to the health, safety and general welfare, (ii) the activity will not degrade or adversely impact the environment, and (iii) the applicant will suffer undue hardship if prevented from undertaking the activity. *Id.* at 15. Then, the NYSDOS observed that “[t]he results of any consultation with arboretum representatives [regarding wetland WO8CT] were not included in the final EIS or in the consistency documentation” and “the final, site specific plan describing implementation measures [to minimize impacts on wetland WO8CT] were also not provided.” Referencing these omissions, the NYSDOS concluded that “[l]acking this information, it is not possible to determine if the standards in the Village's Code will be met.” *Id.*

The NYSDOS reached the same purported “information insufficiency” conclusion respecting the Wellfield. *See* Exhibit 10, at 4. Observing that the pipeline route “would traverse the Village[]'s wellfield, which is the Village's primary source of domestic water supply,” the NYSDOS stated: “The final EIS indicates management practices and monitoring efforts would be undertaken to help ensure the wellfield and water supply is [sic] protected. However, the

management practices were not described nor evaluated in the final EIS. Thus, it cannot be confirmed that these practices would achieve their intended purpose. Monitoring efforts were also not described in the final EIS.” *Id.* On this basis, the NYSDOS concluded that LWRP Policies 18 and 38 were violated.

This alleged lack of sufficient information to render a decision is not a legitimate basis on which to find the Project violative of the LWRP. NOAA’s regulations plainly provide that, in the event the reviewing agency requires additional information to make a determination, it must inform the applicant that there is insufficient information regarding the particular matter, identify what information is required, and work with the applicant to resolve the concern 15 CFR §§ 930.56, 930.58, & 930.60

Significantly, however, the NYSDOS never suggested a lack of information regarding the Arboretum, the wetlands therein, and the ability to determine consistency with LWRP Policies 18, 38, 44 and 44A. As such, the NYSDOS’s untimely, new-found objection is legally infirm. *See* Exhibit 26 (the NYSDOS’s “review of the proposed Millennium Pipeline and the consistency certification began on March 12, 2001 upon receipt of the Supplemental Draft Environmental Impact Statement prepared by FERC, because the SDEIS and other documentation that you provided appear to address all relevant coastal concerns and it is likely that the proposed project will not be significantly changed in the FEIS”); *see also* Exhibit 67 (“[w]e very much appreciate the determination by the [NYSDOS] that it has sufficient information to address all relevant coastal concerns and has commenced its review of the Millennium Project”). Notably, the only supplemental requests for information from the NYSDOS concerned the blasting issue. *See, e.g.,* Exhibit 68. Accordingly, the NYSDOS’s objections to the ConEd Offset/Taconic Alternative route lack any legitimate legal basis.

The NYSDOS's objections also fail on the facts. First, site-specific plans have been developed to protect these resources, as demonstrated by Millennium's detailed, site-specific commitments. *See, e.g.*, Exhibit 69, Response to FERC Data Request 1(k). The fact that further consultation may occur or that these plans may be enhanced following consultation is of no consequence. Tellingly, the NYSDOS gives no indication as to how, or why, it deems compliance with Millennium's Environmental Construction Standards ("ECS"), SPCC Plan and other site-specific commitments identified above to be inadequate to protect these resources. *See* Exhibit 2, Volume 2, Appendix E (Construction and Restoration Standards) & Appendix E1 (ECS), §§ IIG, IVB, VI, V, VII; Exhibit 2, Volume 1, §§ 5.3.1, 5.7, 6-33 to 6-35, 6-37 to 6-39. Additionally, the FEIS requires that for all aspects of Project construction, site-specific plans must be submitted after final certification, but prior to construction. *See generally id.*, at 7-19 to 7-32. Under the NYSDOS's rationale then, the submitted information should have been found "insufficient" as to all aspects of the Project, including, for example, Lake Erie. *See id.*, at 7-23 to 7-24 ("[b]efore construction, Millennium shall file with the Secretary for review and written approval the finalized plan for the Lake Erie crossing and specifying the details that the plan must include). Perplexingly, the NYSDOS found no problem with evaluating the Lake Erie crossing, notwithstanding that site-specific plans still need to be submitted prior to construction. This internal inconsistency in the NYSDOS's analysis demonstrates that its "insufficiency objection" regarding the Arboretum and the Wellfield is meritless.

Secondly, the NYSDOS failed to identify a single fact-based, ecologically-adverse impact to either the Arboretum or the Wellfield that it felt would result from the Millennium Project. The sum total of the NYSDOS's reasoning regarding the Arboretum is that "[t]he proposal will disturb wetlands and habitats by clear cutting and trenching, thus it is inconsistent

with [] policy [44 and 44A].” Exhibit 10, at 15. In substance, this is the same improper “no impact at all” standard that the NYSDOS applied to Haverstraw Bay. Notably, the NYSDOS provided neither analysis nor explanation respecting the specifics applicable to the Arboretum construction and the extensive measures to which Millennium committed to ameliorate any potential impacts. For example, there is no mention, let alone analysis, of (1) the extent of acreage involved in the construction, (2) the percentage of wetland WO8CT that will be affected, (3) the impact (if any) on the vitality and functionality of the wetland due to construction or operation of the pipeline, (4) temporary versus long-term effects from construction, (5) post-construction activity that will restore original contours, and (6) additional mitigation and protective measures to which Millennium committed to remedy already existing problems with invasive species and prevent any further encroachment. All of these factors are important, indeed vital, considerations in determining consistency with LWRP Policies 44 and 44A. The NYSDOS failed to make such an assessment and, thereby, failed to substantiate its objection.

The same holds true for the Wellfield. The only reasons that the NYSDOS provided for its objection were that the Village's local law does not allow this use in the Wellfield Protection Area and that Millennium has not yet provided site-specific plans, including management and monitoring practices. Exhibit 10, at 4. The content of the Village's local law does not speak to the real issues at hand — namely, whether the extensive, site-specific measures to which Millennium has committed will adequately protect the Wellfield and the water supply, and whether, even if the potential for some impact exists, it is outweighed by the other competing interests that the CZMA and CMP also accommodate. The NYSDOS provided no analysis, explanation, or mention of the relevant evidence.

Contrary to the NYSDOS's unsubstantiated "findings," there is compelling evidence demonstrating the lack of any significant threat to the Wellfield. Specifically, the evidence establishes that (1) the high permeability of the aquifer makes it highly unlikely that the Village's water supply will be affected at all by the pipeline; (2) the Wellfield already has roads, treatment facilities, and pipelines constructed through the area; (3) the construction methods to be employed will include techniques to minimize the potential for trench dewatering; (4) any dewatering that may be needed will be temporary; (5) no materials will be stored in this area that could impact the Wellfield; (6) the pipeline will be continuously and effectively monitored for leaks; and (7) the pipeline will not impair the potential for the Village to expand its existing field, given the highly permeable nature of the aquifer. LMS Study Addendum (Exhibit 15), at 25-26, Exhibit 2, Volume 1, at 6-33 to 6-35 & 7-3 to 7-4. Thus, again, there is no evidence supporting the NYSDOS's objection to the crossing of the Wellfield. *See id.* at 6-34 to 6-35 (noting Millennium's commitment to bury its pipeline with extra cover to prevent possible interference with water lines; to include the Village's wellfield protection zone in Millennium's SPCC Plan, which would restrict equipment refueling, prohibit overnight parking of construction equipment and require vehicles be equipped with spill prevention and containment kits; and to install the pipeline when the aquifer elevation is lowest in order to minimize the potential for disruption); *id.* at 7-4 ("[i]n response to concerns about protection of aquifers and water supply watersheds, we have recommended that aquifer protection districts be identified on the C[onstruction] A[llignment] S[heets], that equipment be checked every day for leaks regardless of whether the equipment would be working within an aquifer protection district, and that private wells be monitored for contamination is a spill were to occur up gradient of the capture zone of the well. These additional measures would be included in Millennium's SPCC Plan."). Accordingly, there is no factual basis for the NYSDOS's objection.

In sum, the NYSDOS's objections regarding the ConEd Offset/Taconic Alternative route through the Village are meritless. The evidence demonstrates that Millennium has committed to ample procedures which will adequately and assuredly protect both the Arboretum (including wetland WO8CT) and the Wellfield. *See generally*, Exhibit 2, Volume at 7-15 ("we believe that construction and operation of the pipeline would not represent a long-term impact on the coastal zone or its policies").

c. **The New Croton Watershed And The Catskill Aqueduct Are Not In The Coastal Zone And, In Any Event, Will Be Adequately Protected**

After leaving the Village boundary in the center of the Croton River, the Millennium Project exits the coastal zone and proceeds inland in a southerly direction through Westchester County, never to return to the coastal zone again. Less than a mile south of the Village boundary, the Project enters the New Croton Watershed, which is the drainage basin for the Croton Reservoir. Here, the pipeline route proceeds across the westerly end of that drainage basin for about 2.5 miles, after which it exits the drainage basin entirely. After that point, the Project proceeds south for an additional 18 miles, where it traverses the Catskill Aqueduct within the Bryn Mawr Siphon section.

The New Croton Watershed and Catskill Aqueduct portions of the pipeline route are thus over a mile from the boundaries of any designated coastal area of New York State. Nevertheless, the NYSDOS included these locations in the coastal zone consistency analysis and found that the route through these regions was inconsistent with the CMP's water resource protection provisions, specifically Policies 18 and 38. *See* Exhibit 10, at 2-6. The NYSDOS concluded that because these upland, inland regions provide a water resource to a population that

resides in the coastal zone (*i.e.*, New York City), they fall within the NYSDOS's coastal zone jurisdiction. *Id.*

Millennium respectfully maintains that the pipeline route through the New Croton Watershed and the across the Catskill Aqueduct -- being both far inland and many miles away from the coastal zone and not being capable of potentially affecting any resource that lies within the coastal zone -- does not fall within the NYSDOS's coastal zone jurisdiction. Accordingly, the NYSDOS's objection to that route should be disregarded as a matter of law. In any event, the NYSDOS never identified these locations as being pertinent to the consistency determination (as it was required to do under the governing federal regulations), and as the FERC found, the Project's potential impacts to these areas are de minimis.

**(1) The New Croton Watershed And The
Catskill Aqueduct Are Not In The Coastal
Zone**

The New Croton Watershed and the Catskill Aqueduct are far removed from (both by distance and the lack of any functional connection to) any designated coastal zone or coastal resource. As such, these locations are not within the jurisdictional reach of the NYSDOS and, therefore, are not legitimate considerations in the coastal zone consistency determination. Thus, this portion of the NYSDOS objection is *ultra vires* and must be disregarded as a matter of law. *See* Decision and Findings in the Consistency Appeal of Amoco Production Company (July 20, 1990) (stating that in consistency determinations, the only state objections that are valid are those that are based on specific elements of the federally approved state coastal management program); N.Y. Executive Law §§ 914(1) & (2).

More specifically, the pipeline route through the New Croton Watershed and across the Catskill Aqueduct in Westchester County is far inland, and remote from, any coastal location or coastal resource in New York State. Despite this fact, the NYS DOS found potential impacts to these resources to be valid considerations in its coastal zone consistency determination and grounds for finding CMP inconsistency. Moreover, the NYS DOS summarily concluded that CMP Policies 18 and 38 were violated because impacts to such groundwater resources pose a potential "risk" to the New York City water supply (*i.e.*, the water that is supplied from these inland, upland regions to the population in the downstate metropolitan area). Exhibit 10, at 5-6.

Perplexingly, the NYS DOS's misguided analysis ignores the inescapable reality that the locations at issue (and hence the water resources at issue) neither are within a coastal zone, nor have the ability to affect any coastal resource. Indeed, the sum total of the NYS DOS's justification for including these locations in its analysis is that the pipeline could affect "the water supply of New York City which is in the coastal area." Exhibit 10, at 2; *see also id.* at 3 (noting that the Catskill Aqueduct and New Croton Reservoir are "components of the New York City public water supply system;" also noting the concerns of the New York City Department of Environmental Protection ("NYCDEP") regarding alleged risks to the New York City drinking water supply); *id.* at 4 (finding these areas within the NYS DOS's jurisdiction because "[t]he proposed pipeline would . . . traverse the Catskill Aqueduct of the New York City Watershed and thereby impact locations in the coastal area which are dependent on the water supply").

Tellingly, the NYS DOS does not (because it cannot) suggest that any portion of the pipeline route through the New Croton Watershed or Catskill Aqueduct is located within a designated coastal zone or that impacts at these locations have any possibility of affecting, let

alone impairing, water resources that are located within any designated coastal zone. The only purported "connection" to the coastal zone is that water resources from these inland, upland locations are supplied to consumers who happen to reside in the coastal zone (*i.e.*, New York City). The NYSDOS's rationale thus, expands its jurisdiction to any inland location -- *i.e.*, that not located in any coastal zone or capable of affecting any coastal resources so long as that inland location provides a resource to consumers who reside in a designated coastal area. Based on this novel rationale, impacts along a project route through a dairy farm in upstate New York would be a legitimate CMP consideration, so long as the milk from the farm was supplied to consumers in a coastal area, such as New York City. This is a patently absurd, *ultra vires* extension of the NYSDOS's jurisdiction, which should not be countenanced by the Secretary.

Indeed, the plain language of New York's CMP shows that the NYSDOS's authority cannot extend that far. The language of Policy 18 is illustrative, directing that:

"to safeguard the vital economic, social and environmental interest 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 resources" (emphasis added).

Thus, CMP Policy 18 unambiguously demonstrates that what the CMP addresses are actions located "in []coastal area[s]" which affect "coastal resources." The New Croton Watershed and Catskill Aqueduct satisfy neither criterion, and the NYSDOS's application of the CMP (including Policy 18) to these regions is plainly wrong.

Were there any doubt that the CMP most certainly does not apply to these inland, upland portions of the pipeline route, it would be resoundingly resolved by the CMP's Final Environmental Impact Statement (Exhibit 55), which, ironically, the NYSDOS (and NOAA)

prepared. At the outset, the CMP FEIS describes the organization of the New York State CMP, noting that it has three major parts, the first of which "establishes the boundaries of the Coastal Area within which the Program applies." Exhibit 55, at II-1-3. In discussing state legislation pertaining to the CMP, the CMP FEIS underscores that it is only the State's coastal resources in the designated coastal zones that are within the Program's jurisdiction:

"The Waterfront Revitalization and Coastal Resources law establishes a balanced statewide approach for encouraging development in the coastal area while protecting natural coastal resources. The law establishes boundaries for the State's coastal area by adopting a map which defines the areas within which the Coastal Management Program will apply." *Id.* at II-1-4 (emphasis added).

Additionally, the CMP FEIS notes the CZMA's requirements for approving State coastal management programs. Pertinent here is the federal requirement that the designation of "the inland boundar[ies] necessary for the management program to control shorelands," be limited to those areas "which have a direct and significant impact on coastal waters." *Id.* at II-3-1; *see also id.* at I-7 (CZMA requires a state coastal management program to "determine . . . special geographic areas that are to be subject to the management program, based on the nature of identified coastal concerns" and "provide for the consideration of the national interest in the planning for and siting of facilities that meet more than local requirements" (emphasis added)). Accordingly, it could not be clearer that only actions in designated coastal zones, affecting coastal resources, fall within the jurisdictional scope of the CMP.

Specifically as to the boundaries of the New York City coastal zone,⁵² the "boundary extends 500 to 1,000 feet inland at most locations." *Id.* at II-3-6; *see also id.* at II-3-5

⁵² The only supposed "coastal connection" alleged by the NYSDOS is New York City -- *i.e.*,

(stating that the following conditions generally prevail respecting the landward boundary of New York State's Coastal Areas: [1] “[t]he inland boundary is approximately 1,000 feet from the shoreline of the mainland; [2] [i]n urbanized and other developed locations along the coast, the landward boundary is about 500 feet from the mainland's shoreline or less than 500 feet at locations where a major roadway or railway runs parallel to the shoreline . . .”). Thus, contrary to the NYSDOS’s improper application, the New York City coastal zone does not extend over a mile inland to encompass the New Croton Watershed or the Catskill Aqueduct.

Significantly, the “Alternatives” section of the CMP FEIS expressly rejects the all-encompassing “entire watershed/drainage basin application” that the NYSDOS employed here. The CMP FEIS evaluates alternatives as part of the statutory mandate under Article 8 of the Environmental Conservation Law of the State of New York (“SEQRA”). *See* Exhibit 55, § 3. In so doing, the section entitled “State Alternatives To The Proposed Action” discusses (but rejects) alternatives to the 500-foot to 1000-foot inland boundary provision that the state actually adopted in its Program. *See id.*, at III-12. Thus, the CMP FEIS explains:

“a. Boundaries

In order to have an effective coastal management program, the boundaries of the coastal area must be clearly defined. The Federal Coastal Zone Management Act requires the boundaries to extend inland ‘only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters.’ Within this requirement, the boundaries could be drawn broadly or narrowly.

since the water from the New Croton Watershed and Catskill Aqueduct is supplied to New York City, and New York City is a “location . . . in the coastal area.” *See* Exhibit 10, at 4; *id.* at 2 (“the pipeline affects the water supply of New York City which is in the coastal area”). Accordingly, the discussion here is limited to the New York City coastal zone as defined and designated in the New York State CMP.

An expansive boundary, such as one that included all of the watersheds draining into the State's coastal areas, could include virtually all uses affecting coastal waters, but would do so at the expense of having to control many uses which have little or no effect on coastal waters.

An expansive boundary would thus be an inefficient means of providing management of coastal resources and could require substantial administrative support.” *Id.*, at III-12 (emphasis added).

This portion of the CMP FEIS could not more clearly demonstrate the fatal legal flaws in the NYSDOS’s assessment of the Project. This alternatives analysis demonstrates: (1) generally, that only designated coastal areas are subject to regulation under the CMP; and (2) particularly, that whole watersheds and entire drainage basins are not included in those designated coastal areas, even if they do in fact drain into coastal waters. Accordingly, because the New Croton Watershed and Catskill Aqueduct are inland regions which do not fall within the boundaries of any coastal zone (or affect the waters of any coastal zone), the NYSDOS lacks jurisdiction to object to this portion of the Project.

In sum, the NYSDOS’s exceedingly strained, improper application of the CMP (1) eviscerates the specific boundary limitations that establish, and thus are dispositive of, the geographic extent of the CMP’s jurisdiction; (2) contravenes the fundamental objectives and tenets of the CZMA and CMP – namely, to protect “coastal resources” in designated “coastal areas;” and (3) improperly utilizes a boundary-setting alternative that is expressly considered and rejected in the CMP FEIS. Because it is indisputable that the water resources of the Catskill Aqueduct and New Croton Watershed are outside the CMP’s jurisdictional limits (*i.e.*, in that they are neither located in a “coastal zone,” nor have the potential to affect any coastal resources), the NYSDOS’s objections based thereon exceed its authority under the statutory program and, consequently, must be disregarded.

Finally, in maintaining that the NYSDOS has no jurisdiction to consider impacts to the Catskill Aqueduct and New Croton Watershed, Millennium does not mean to imply that these resources should be ignored in the NEPA/EIS process. To the contrary, Millennium has consistently acknowledged that these are legitimate concerns to be addressed in the FERC's environmental review of the Project. Importantly, however, as reflected in the FEIS and FERC's certificate order, concerns regarding the New Croton Watershed, the Catskill Aqueduct, and protection of the New York City drinking water supply have been considered in detail in the very comprehensive environmental impact review that the Project has undergone. *See generally* Exhibit 2, Volume 1, at § 5.3.5, at 5-62 to 5-65; Exhibit 2, Volume 2, Appendix O, at 0-100 through 0-104; Exhibit 1, at 62,333-36. Throughout that process, Millennium has been, and remains, cooperative with regulatory agencies and eager to resolve their concerns. Notably, although the FERC found Millennium's initial proposals to be adequately protective of the subject drinking water supply, and although the NYSDEC issued the § 401 WQC for the Project Millennium chose to engage in a continued dialogue with the New York State Attorney General ("NYSAG") and the NYCDEP. To resolve issues of concern, Millennium has already committed to extensive protective measures, which go well beyond what the FERC and NYSDEC found to be acceptable. Moreover, Millennium remains willing to work with regulatory agencies and the NYSAG to resolve any outstanding matters. *See id.* Thus, potential impacts from this segment of the pipeline route are being addressed, and will be resolved, as part of the NEPA/EIS process; however, these matters are not valid considerations in the coastal zone consistency determination. Accordingly, on this appeal, the NYSDOS's objection in this regard must be disregarded as a matter of law. *See Amoco Production Company, supra.*

**(2) In Any Event, The New Croton
Watershed And The Catskill Aqueduct
Will Be Adequately Protected**

To the extent that the Project's potential impact on the New Croton Watershed and Catskill Aqueduct is relevant in this appeal, the objections voiced by the NYSDOS are without merit. First, the NYSDOS failed to fulfill its responsibility of identifying the New Croton Watershed and the Catskill Aqueduct as being relevant to the coastal zone consistency determination. *See* 15 C.F.R. §§ 930.56, 930.58 & 930.60. The governing regulations require the NYSDOS to (1) identify issues and areas of concern; (2) specify the applicable CMP Policies; (3) request from the applicant the information necessary to make the CMP determination; and (4) assist the applicant in resolving outstanding issues. 15 C.F.R. §§ 930.56, 930.58 & 930.60. Here, the NYSDOS took none of these actions regarding the New Croton Watershed and Catskill Aqueduct portions of the pipeline route. The NYSDOS's failure to raise these issues in the coastal zone consistency process is reflected in (1) the absence of any submissions from Millennium to the NYSDOS regarding these portions of the pipeline route; (2) the absence of any information requests or other correspondence from the NYSDOS to Millennium regarding these segments of the Project; and (3) the organization of the FERC's certificate order, which analyzes the New Croton Watershed/Catskill Aqueduct segments of the Project separately and distinctly from the coastal zone consistency discussion. *Compare* Exhibit , at 62,333-36 (discussing New Croton Watershed and Catskill Aqueduct in Sections "G" and "H," respectively), *with id.* at 62,336 (discussing coastal zone consistency in Section "I" and noting only the Lake Erie and Hudson River areas as being "within the coastal zone of New York" and, hence, being implicated in the coastal zone consistency analysis); *see also* Exhibit 68 (supplemental information requests from the NYSDOS pertaining exclusively to blasting). Having failed to abide by the governing federal regulatory requirements, the NYSDOS cannot

assert these matters for the first time in its consistency objection. Accordingly, the NYSDOS's new-found objections regarding the New Croton Watershed and Catskill Aqueduct should be disregarded.

Even if the NYSDOS's regulatory violations were not fatal to its objection (which they are), the evidence shows that the pipeline presents no unmitigable adverse impacts of any significance to these resources (or the New York City water supply). As to both the New Croton Watershed and the Catskill Aqueduct, Millennium provided the FERC with detailed submissions addressing issues of concern and committing to extensive protective measures to ensure the integrity of the water resources. As is briefly summarized below, the FERC found Millennium's proposed measures to be acceptable and adequately protective of the resources at issue, and concluded that there would be no quantifiable adverse impacts of significance that would impede Project approval.

The New Croton Watershed

As Millennium's submissions demonstrate, and as the FERC found, the 2.5 miles of pipeline construction through the New Croton Watershed poses no threat of significance to water resources. *See generally*, Exhibit 1, at 62, 333-34; Exhibit 70.

Construction will be more than a mile from the Croton Reservoir, and the intervening waterbodies will adequately trap sediment and runoff from the pipeline construction activities. In addition, Millennium committed to extensive measures to protect all waterbodies from any direct or indirect construction-related impacts to stormwater. In reviewing Millennium's proposals for this Watershed crossing, the FERC concluded in its certificate order that "Millennium's Environmental Construction Standards [would] minimize construction impact

on waterbodies by limiting the time to complete crossings and requiring restoration of the waterbody, its bank, and 50 foot buffers within 24 hours of backfilling”.and that “proper maintenance of erosion controls should minimize surface runoff during storms.” Exhibit 1, at 62,334. These findings by the FERC are consistent with the NYSDEC's Section 401 Water Quality Certificate (Exhibit 9). The FERC also found that Millennium's commitment to hire independent environmental inspectors and monitors and include this section of the Project route in its SPCC Plan “should address the NYCDEP's concerns.” *Id.*

Thus, as the FERC found, Millennium's proposal is adequately protective of the New Croton Watershed, the Croton Reservoir, and, consequently, the New York City water supply. Accordingly, there is no factual basis for a finding of significant adverse impact.

The Catskill Aqueduct

The same conclusion holds true for the Catskill Aqueduct -- namely, as the FERC found, (1) Millennium's submissions adequately address and resolve concerns regarding the Catskill Aqueduct; (2) there is no evidence suggesting that the Project poses a reasonable potential for significant, unavoidable or unmitigable adverse impact; and (3) thus, there is no impediment to Project approval. *See generally id.* at 62,334-36; Exhibit 2, Volume 1, at, § 5.3.5, at 5-62 to 5-65; *id.*, at ES-4, 7-7 to 7-8, & 7-24 (¶ 28) Exhibit 4, § 2.2.5, at 2-44 to 2-47 Exhibits 71 & 72.

To address concerns regarding the potential for Aqueduct failure due to pipeline construction and operation, Millennium committed, from the outset, to extraordinary pipeline safety measures. *See* Exhibit 2, Volume 1, at 5-62 to 5-65; Exhibits 73 & 74 (committing to extra

pipe thickness and extremely protective monitoring requirements). As set forth in the FEIS,

Millennium agreed to protect the Aqueduct by:

- constructing a steel-reinforced concrete barrier between the pipeline and the Aqueduct that would be designed to withstand the maximum pressure that would be experienced in the remote event of a pipeline rupture;

installing supporting concrete columns extending to bedrock to ensure that downward forces resulting from the rupture would be transmitted to, and absorbed by, the bedrock, so that no such forces would be exerted on the Aqueduct;

installing heavy wall, high tensile steel pipe at the crossing with a design safety factor above that required by the U.S. Department of Transportation, the Federal agency responsible for the safety of interstate gas pipelines; and

using a telemetry system to continuously monitor the pipeline crossing for any changes in pressure.

Additionally, Millennium agreed to employ other safeguards to protect against pipeline rupture during operations. Thus, Millennium will (1) protect the pipeline with a state-of-the-art cathodic protection system, (2) further ensure pipeline integrity through the use of permanent launchers and receivers with intelligent "pipeline pigs" to check for interior corrosion or other changes in pipeline condition, and (3) perform periodic patrols in the vicinity of the crossing to prevent any encroachment. Exhibit 2, Volume 1, at 5-64. To maximize the protection of the Aqueduct during construction, Millennium also committed to (1) follow all of the NYCDEP's blasting guidelines; (2) perform no blasting within 150 feet of the crossing site; (3) adhere to the 10-ton load limit requested by the NYCDEP; and (4) notify the NYCDEP in advance of construction activities and allow it to monitor the construction activities. *Id.* at 5-65.

Based on these commitments, the FERC conditionally approved the proposed crossing of the Catskill Aqueduct. In its certificate order, the FERC confirmed that an engineering solution to the Catskill Aqueduct crossing in the Bryn Mawr Siphon section was

feasible and should be pursued through on-site investigations, and rejected claims of catastrophic pipeline failure as too “speculative to attempt to quantify these impacts.” *See* Exhibit 1, at 62,334.. Thus, the FERC found that the Project posed no quantifiable threat of significance to the Catskill Aqueduct.

d. There Will Be No Cumulative Adverse Coastal Effects

NOAA’s regulations require not only the assessment of potential adverse coastal effects that has been provided in the preceding sections of this Brief, but also a consideration of “cumulative adverse coastal effects.” 15 C.F.R. § 930.121(b). To determine any cumulative effects, the Secretary reviews “the effects of an objected to activity when added to the baseline of other past, present, and reasonably foreseeable future activities occurring in the area of, and adjacent to, the coastal zone in which the objected to activity is likely to contribute adverse effects on the natural resources of the coastal zone.”⁵³

In its objection, the NYSDOS has stated that “[t]he construction of a pipeline in this area would be precedent setting and could lead to similar proposals to construct other pipelines across inappropriate areas in Haverstraw Bay.” Exhibit 10, at 12. This contention should be dismissed as sheer speculation. There is no evidence that the Millennium Project would set such a precedent, for no other pipeline projects across Haverstraw Bay have been proposed or are reasonably foreseeable.⁵⁴ In this regard, it must be emphasized that the Millennium Project only proposes to cross Haverstraw Bay because of a unique situation where

⁵³ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 52-53.

⁵⁴ *See* Decision and Findings in the Consistency Appeal of Vieques Marine Laboratories (May 28, 1996), at 54.

(1) the existing pipeline that will be incorporated into the Millennium Project terminates just yards from the western bank of Haverstraw Bay and (2) an exhaustive review has shown that there are no available alternative crossing locations. No other interstate pipelines or proposed pipelines are located in such close proximity to Haverstraw Bay, and thus the possibility that any future crossing of Haverstraw Bay might be required is remote.

**3. On Balance, The National Interests
Furthered By The Millennium Project Far
Outweigh Any Adverse Coastal**

To override the NYSDOS's decision, the Secretary must find, by a preponderance of the evidence, that the Millennium Project will not cause adverse effects on the coastal zone substantial enough to outweigh its contributions to the national interest.⁵⁵ In this case, the weight of the evidence is solidly on one side of the scale.

The Project's coastal zone impacts will be minimal and temporary. The evidence shows that Millennium's proposed lay-barge crossing of the Hudson River is the best available method for minimizing environmental impacts, that there will be no significant adverse effects to endangered species or essential fish habitat, and that the habitat will be rapidly restored to pre-construction conditions as a result of the limited impacts and the natural features and forces that shape this environment. Even more clearly, the pipeline route through the Village of Croton-on-Hudson will have minimal impacts that can be effectively mitigated. Finally, the NYSDOS's professed concerns with the impact of pipeline construction on the New Croton Watershed and the Catskill Aqueduct are unfounded, for neither the Watershed nor the Aqueduct are in the coastal zone and, in any event, both of them will be adequately protected

In comparison, the Project's contributions to the national interest will be "clear and significant," as the FERC found. The national interest would clearly be served through the timely development of this important energy infrastructure to satisfy increasing demands for natural gas, relieve constraints on other pipeline systems, and promote the growth of competitive markets. In addition, the Project will enhance the Nation's energy self-sufficiency, permit economic development of the coastal zone that is compatible with clean air objectives, and protect coastal zone resources. Indeed, when clean air impacts and water quality improvements associated with the use of Millennium's natural gas supply in the generation of electricity are considered, the Project promises on balance to benefit the environment and resources of the coastal zone.

In the final analysis, the relative significance of the national and local interests to be weighed is clear. The Millennium Project will not cause any significant adverse effects on the coastal zone, and the minimal, temporary impacts of pipeline construction will be far outweighed by the Project's contribution to the national interest, as the FERC found. The Secretary should therefore override the NYSDOS's objection and permit the Millennium Project to proceed as proposed.

C. There Is No Reasonable Alternative Available That Would Permit The Millennium Project To Be Conducted In A Manner Consistent With The State's Coastal Management Program

The third, and last, finding that the Secretary must make to conclude that the Millennium Project is "consistent with the objectives" of the CZMA and thus satisfies Ground 1 is that "[t]here is no reasonable alternative available which would permit the activity to be

⁵⁵ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc.

conducted in a manner consistent with the enforceable policies of the management program.” 15 C.F.R. § 930.121(c). The Secretary’s CZMA decisions generally require the state agency to identify any “available” and “reasonable” alternatives in its objection,⁵⁶ to assert that any identified “available” and “reasonable” alternatives are also consistent with the state’s coastal management program,⁵⁷ and to describe those alternatives with specificity.⁵⁸ If the state agency describes “alternative” and “available” alternatives that are consistent with the coastal management program with sufficient specificity, then the burden shifts to the appellant to show that those alternatives are unavailable or unreasonable.⁵⁹

The NYSDOS’s objection to the Millennium Project identified three alleged alternatives that were asserted to be consistent with New York’s coastal management program. The NYSDOS described those alternatives in the following terms (Exhibit 10, at 15):

“ . . . [1] terminate the proposed pipeline in the vicinity of Bowline Point in Rockland County on the west side of the Hudson River; [2] route the Hudson River crossing of the pipeline north and outside of the designated Haverstraw Bay habitat, near or adjacent to the existing Algonquin pipeline crossing of the Hudson River, and consider existing pipeline rights-of-way that avoid the New York City drinking water supply and delivery systems; or [3] use excess capacity in the existing Algonquin pipeline.”

Each of these proposed alternatives was advanced in the proceeding before the FERC, thoroughly examined, and rejected as infeasible. For the reasons set forth below, Millennium requests the Secretary to reach the same conclusion.

(June 20, 1995), at 85.

⁵⁶ Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 85).

⁵⁷ Decision and Findings in the Consistency Appeal of Virginia Electric & Power Co. (May 19, 1994), at 161.

**1 The NYSDOS’s Proposed Termination Of The
Project On The West Side Of The Hudson River
Is Not An Available Alternative**

The first alternative suggested by the NYSDOS is to terminate the Project on the west side of the Hudson River, thereby avoiding the proposed crossings of the Hudson River, the New Croton Reservoir Watershed, and the Catskill Aqueduct. This proposed alternative is not “available” under applicable CZMA precedent and thus cannot sustain the NYSDOS’s objection.

An alternative proposed by a state agency must be “available” in two respects to merit consideration under the CZMA. As the Secretary has stated:

“For a proposed alternative to be ‘available,’ [1] the proponent of the proposed project must be able to implement the alternative and [2] the alternative must achieve the primary or essential purpose of the project.”⁶⁰

It would of course be physically possible for Millennium to terminate the Project on the west side of the Hudson River, and thus the first alternative proposed by the NYSDOS is ‘available” in that theoretical respect. However, the Project’s essential purpose is to serve New York City markets, and that fundamental purpose could not be achieved if the Project were terminated on the western shore of the Hudson River. Accordingly, this proposed alternative is not “available” for CZMA purposes.

From the outset, the principal purpose of the Millennium Project has always been to serve critical natural gas requirements in New York City. Indeed, Millennium proposes to

⁵⁸ *Id.* at 162.

⁵⁹ *Id.*

⁶⁰ Decision and Findings in the Consistency Appeal of Virginia Electric & Power Co. (May 19,

transport half of its pipeline's capacity a distance of 420 miles from the Canadian border to the pipeline's terminus to serve New York City markets. Without the portion of the Project from Bowline Point across the Hudson River and through Westchester County to New York City, the Project would plainly be uneconomic: Building 90% of the pipeline (390 miles) to deliver 50% of the pipeline's capacity would not even permit the recovery of costs and thus would never be seriously considered. Nor is there any reasonable or environmentally preferable alternative means of transporting the gas from Bowline Point to New York City, as the FERC concluded.

In its FEIS, the FERC stated that suggestions to terminate the Project at Bowline raised an issue of the "need for the pipeline to extend through Westchester County" that would be decided later in its order on the merits of the Project (Exhibit 2, Volume 1, at 6-8). In that subsequent order, the FERC concluded that a need for the entire Project, including the portion across the Hudson River and through Westchester County to serve New York City markets, had been demonstrated. Among other things, the FERC noted that the NYPSC had supported the Project because of the need for more gas pipeline infrastructure to meet New York City's energy requirements (Exhibit 1, at 62,321 n.56):

"[T]he need for new pipeline capacity into New York City is critical because existing capacity is constrained. The NYPSC states that New York City needs 300 MW of in-city electric generation immediately and 200 MW each year thereafter to meet expected demand. The NYPSC also states that this new generation must be within city limits because of transmission constraints and must be almost exclusively gas-fired because of environmental guidelines."

1994), at 160.

The FERC ultimately determined that the Millennium Project was necessary to meet that critical need for new pipeline capacity into New York City (*id.* at 62,322):

“Accordingly, we find that in order to meet the growing energy needs of the northeast, including the New York City metropolitan area, new infrastructure is needed to bring additional natural gas supplies to market. . . . We conclude that Millennium's proposals are viable from an economic and environmental standpoint and can meet the needs of the expanding market on a timely basis. . . . Thus, we find that Millennium's proposals are in the public convenience and necessity.”

In short, the FERC considered the alternative of terminating the Project at Bowline and concluded that the entire Project, including the eastern portion from Bowline to New York City, was necessary and in the public interest. *Id.* at 62,308. To be commercially viable and to meet the critical power generation requirements projected by the FERC and the NYPSC, the Millennium Project must directly serve New York City markets, as proposed. The termination of the Project on the western shore of the Hudson River, as proposed by the NYSDOS, would not permit the Project to achieve its fundamental purpose and thus is not an “available” alternative for CZMA purposes.

2. The NYSDOS’s Proposed Route Revisions Do Not Constitute An Available Alternative

The second alternative proposed in the NYSDOS’s objection is for Millennium to alter its FERC-approved route to avoid a crossing of Haverstraw Bay and the Catskill Aqueduct. More specifically, the NYSDOS suggests that Millennium should, first, “route the Hudson River crossing of the pipeline north and outside of the designated Haverstraw Bay habitat, near or adjacent to the existing Algonquin pipeline crossing of the Hudson River” and then, second,

“consider existing pipeline rights-of-way that avoid the New York City drinking water supply and delivery system.” Exhibit 10, at 15

As we shall show, however, neither a route north of Haverstraw Bay (referred to as the “Hudson River North Alternative” in the FEIS) nor the suggested downstream route to New York City is an “available” alternative.

Hudson River North Alternative

An alternative route north of Haverstraw Bay, as suggested by the NYSDOS, has been under investigation by Millennium and the FERC since 1997. Notwithstanding a “lengthy and intensive study” (Exhibit 1, at 62,308), the FERC ultimately concluded that no alternatives were “reasonable or practical.” *Id.* at 62,343. In particular, the route identified by the FERC as the “Hudson River North Alternative” -- the route alternative proposed by the NYSDOS -- was found to be technically infeasible and thus clearly not available.

In initially planning its pipeline route, Millennium recognized the sensitivity of any crossing of the Hudson River and therefore investigated crossing locations upstream and downstream where a directionally-drilled crossing might conceivably be feasible or where environmental impacts otherwise could be reduced. In the spring of 1997, Millennium assembled a team of construction, engineering, and environmental experts to study potential Hudson River crossing locations. These studies included an exhaustive review of topographic maps and aerial photography and dozens of site visits along a 15-mile stretch of the river from Stony Point, New York down to the vicinity of the Tappan Zee Bridge. Despite all of this effort, no alternatives to the Haverstraw Bay crossing location were identified because there was a lack of an adequate on-shore staging area on both banks of the river at all other locations.

Any pipeline crossing of a large river like the Hudson requires, first and foremost, adequate on-shore staging areas on both banks. These staging areas are necessary to store and position equipment, pipe, and excavated material. The necessary size and configuration of the staging areas vary, depending on the crossing method selected.

- For a directionally-drilled crossing, approximately one level acre is required on each bank for the entry and exit holes and the setup of the equipment to complete the drilling and reaming. The entry and exit holes must be located to ensure sufficient depth of cover so that the drilling fluids, which are under pressure during the drilling operation, do not reach the surface. Depending on site-specific topography and geology, the holes may thus need to be located a significant distance from the river bank. Additionally, a strip of land at least 50 feet wide and at least as long as the distance between the entry and exit holes is required on the “pipe stringing” side. This staging area must be as straight as possible and in line with the crossing; bends in the staging area must be gradual and must not exceed the free stress radius of the welded pipe string, which is about 2,000 feet for the 24-inch pipeline proposed by Millennium. This lengthy staging area is necessary to fabricate one long pipe string, which is pulled into the entry hole after the proper reamed diameter is achieved for the entire crossing.

A conventional open-cut, bottom-pull river crossing requires a large staging area on one bank of the river and a smaller area on the other side. Unlike a directionally drilled crossing, the pipe string need not be one continuous piece, but the pipe pull can be accomplished more readily if the welded sections are at least 1,000 feet long. The required pipe staging area for such a crossing is approximately six level acres on one bank of the river (preferably 1,100 feet long and 240 feet wide), while approximately one-half acre of level ground is required on the other bank for the winch side of the pull.

- A lay-barge crossing like that proposed by Millennium for the Hudson River requires much less bank disturbance, since most of the staging and work areas are on barges in the river. Nevertheless, an area of approximately one-half acre is required on each bank of the river to make the shore approaches.

Early in 1999, the FERC asked Millennium to review and evaluate two potential alternative routes across the Hudson River north of the proposed crossing. “Alternative 1” would commence in Harriman State Park and cross the Hudson River north of Tomkins Cove, New

York. "Alternative 2" would deviate from the "Alternative 1" route west of the river but would cross the river at the same location north of Tomkins Cove.

Millennium then conducted thorough field reviews of both of these routes, evaluated the associated environmental, engineering, and economic effects, and submitted its findings to the FERC on March 15, 1999. With respect to "Alternative 1," Millennium concluded that it would not provide sufficient workspace on either the western or eastern shore of the river for staging a crossing of the Hudson River. Millennium concluded that "Alternative 2" was significantly inferior to "Alternative 1" because it would cross a number of built-up residential subdivisions, requiring the condemnation of numerous houses, and posed the same intractable river crossing problems. Exhibit 75

Later, during a publicly-noticed site inspection of the alternative Hudson River crossing routes held on November 30, 1999, the FERC Staff requested Millennium to conduct additional field work and analyses of potential alternative routes. Millennium's additional studies of "Alternative 1" revealed, once again, that there would not be adequate workspace for staging a river crossing using any crossing method. Exhibit 76.

The NYSDOS's proposed crossing location for the Hudson River North Alternative -- between Route 202/9W and the west bank of the Hudson River -- is in an extremely congested area. In addition to at least two existing pipelines and associated aboveground facilities at that location, there are a powerline, possibly a water line, a railroad, and an access road, all on a steep bench. Workspace is not available at this location to stage any crossing. Other areas north of Haverstraw Bay along the west bank were also considered as alternative crossing locations, but a suitable location could not be found in light of the existing

residences, industrial facilities such as the Lovett Power Generating Facility, quarries, railroads in close proximity to the river's edge, parklands (Stony Point and Harriman State Park), roads, and utilities.

On the eastern shore of the river, the Hudson River North Alternative would pass between the Indian Point Nuclear Generating Station and the LaFarge Gypsum plant. Here again, there is insufficient area for Millennium to stage any crossing in this area or adjacent to the existing Algonquin facilities. At the river's edge, which is steep and rock-faced, existing mainline valves and a launcher/receiver block any approach from the river side and use all the limited space that is available. To the north, there is insufficient space between the Algonquin facilities and the Indian Point Station to stage a crossing. To the south, a steep rock cliff, an intermittent stream, and associated wetlands fill the short distance between the Algonquin facilities and the gypsum plant. Permanent ship moorings for barge traffic are also located in the river at the mouth of the stream. Further south, a small area near where the overhead electrical lines come onshore could not be used as a staging area because of the steep bank, and immediately east is an active, open water quarry which would prevent pipeline construction. Still further south, residential and commercial structures immediately adjacent to the shoreline would not permit the staging of a crossing.

Following a complete evaluation of the Hudson River North Alternative 1, as described above and in Section 6.0 of the FEIS, the FERC concluded as follows (Exhibit 2, Volume 2, Appendix P, at 56 (emphasis added)):

"The Hudson River North Alternatives are **not feasible** because of existing utility and industrial development on both banks of the river at the alternate crossing location and the lack of other viable staging areas in the vicinity Without a feasible crossing

location, these alternatives cannot be used.”

Elsewhere in the FEIS, the FERC explained in detail that the Hudson River North Alternative 1 is not feasible from a construction standpoint. Exhibit 2, Volume 1, at 6-4, 6-5. Since the Hudson River North Alternative 1 is “not feasible” and “cannot be used,” it is plainly not “available” for CZMA purposes.

Downstream Routes to New York City

In addition to proposing the Hudson River North Alternative, the NYSDOS suggests that Millennium “consider existing pipeline rights-of-way that avoid the New York City drinking water supply and delivery system” (Exhibit 10, at 15) -- *i.e.*, avoid the crossings of the New Croton Reservoir Watershed and the Catskill Aqueduct. This proposed alternative is also not worthy of serious consideration.

In the first place, the NYSDOS has failed to identify the “existing pipeline rights-of-way” to which it refers or to explain why such a hypothetical route to Millennium’s New York City markets would be feasible. As the Secretary has stated in analogous circumstances: “[A]lternatives must be described with specificity; vague descriptions do not suffice.”⁶¹

Perhaps the NYSDOS intended to propose the development of a so-called “one-pipe” alternative that would avoid a Hudson River crossing. In the DEIS, the SDEIS, and the FEIS, the FERC repeatedly and thoroughly explored an array of such potential alternatives, including the Eastchester Expansion System Alternative, the Algonquin/Iroquois Pipeline System

⁶¹ Decision and Findings in the Consistency Appeal of Virginia Electric & Power Co. (May 19, 1994), at 162; *see* Decisions and Findings in the Consistency Appeal of Texaco, Inc. (May 19, 1989), at 81.

Alternative, and the use of the existing Tennessee or Transco pipeline systems. In each case, however, the FERC found that the alternatives would either have far greater environmental impacts or could not feasibly be implemented. Exhibit 2, Volume 1, §§ 3.2.7 and 3.2.8. Millennium submits that these reasoned findings by the lead Federal agency that is responsible for making interstate pipeline routing decisions are entitled to deference, particularly when the NYSDOS has failed to describe its suggested alternative route with specificity. As the FERC ultimately concluded, “[W]e have examined numerous alternatives, including use of existing systems (along with enhancements) and found none to be superior to Millennium’s proposal.” Exhibit 1, at 62,320-21

3. The NYSDOS’s Proposed Use Of Excess Capacity In The Existing Algonquin Pipeline Is Not An Available Alternative

The NYSDOS’s last suggested alternative is for Millennium to “use excess capacity in the existing Algonquin pipeline” that crosses the Hudson River north of Haverstraw Bay (Exhibit 10, at 15), thus theoretically eliminating the need for a Hudson River crossing. This proposed alternative is also not available and thus provides no basis for sustaining the NYSDOS’s objection to the Project.

Most significantly, there is no evidence at all that there is any “excess capacity in the existing Algonquin pipeline.” In fact, a recent review of Algonquin’s “LINK” Customer Interaction System showed that there was no unsubscribed capacity available at all across the Hudson River (*i.e.*, between Algonquin’s Stony Point and Southeast stations). Exhibit 77. Other interstate pipelines in the Northeast are also running at close to capacity. Indeed, that is one of the chief reasons why the Millennium Project has been proposed. As the FERC found in its

certificate order (Exhibit 1, at 62,308), the Millennium Project will “help relieve constraints on other area pipeline systems.

Moreover, the Algonquin pipeline is incapable of delivering 350,000 Dth of gas per day to New York City markets, since the pipeline never comes within 25 miles of the city. Nor does Algonquin interconnect with any interstate pipeline that has the excess firm capacity to deliver such quantities of gas to New York City markets. Again, the Millennium Project has been proposed to achieve that objective, which cannot be met by any existing pipeline.

In short, the NYSDOS’s suggested use of capacity in the Algonquin pipeline to serve New York City markets is simply not an available alternative. There is no evidence that any excess capacity in the Algonquin pipeline exists or that Algonquin could ever deliver the necessary gas volumes to such markets.

III.

THE SECRETARY SHOULD OVERRIDE THE NYSDOS’S OBJECTION ON CZMA GROUND 2: THE MILLENNIUM PROJECT IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY

A proposed project is “necessary in the interest of national security” and thus satisfies CZMA Ground 2 if a national security interest would be “significantly impaired” in the event that the project were not permitted to proceed. 15 C.F.R. § 930.122. In this case, a failure to permit the Millennium Project to proceed would significantly impair national security interests in at least two respects and thus satisfies the requirements of CZMA Ground 2

First, from an international perspective, the Nation’s energy security, which is a key component of our national security, would be significantly impaired if the Secretary did not permit the Project to proceed. As the Secretary has recognized

“Greater use of natural gas can help lessen the Nation’s reliance on foreign oil, reduce the nation’s trade deficit, boost the U.S. gross national product, and as a result of these, strengthen our national security interests.”⁶²

As events in the Middle East over the past several decades have demonstrated all too clearly, the Nation’s reliance upon energy supplies from insecure sources can significantly compromise both our national defense and our national security.

The Secretary has recognized the national security ramifications of major energy projects in past CZMA decisions. The Secretary has held, for example, that the development of proven oil and gas reserves of 300-400 million barrels of oil and 600-700 billion cubic feet of gas was necessary in the interest of national security.⁶³ In this case, the Millennium Project would deliver more than 700 billion cubic feet of gas in just the first three years of operations and more than six times that amount in the first 20 years of operations. Since gas pipelines typically operate for at least 50 years, the Project’s ability to supply huge energy requirements is manifest. The Project would thus play a major role in reducing U.S. vulnerability to supply disruptions, encourage the development of secure North American energy resources that would be easier to defend than foreign sources in the event of a military conflict, and increase the Nation’s secure domestic energy assets. In each of these regards, the Project would materially strengthen our national security interests.

Second, from a domestic perspective, the Project can provide a degree of energy security that is an important element of our national security in light of the terrorist threats that

⁶² Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. (June 20, 1995), at 81 (emphasis added).

⁶³ Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A. (February 18, 1984), at 26.

the Nation now faces in the wake of September ’s tragic events. As the FERC noted: “The project will also increase the overall reliability of the region’s infrastructure and offer an additional source of outage protection.” Exhibit 1, at 62,321 (emphasis added). Similarly, the New York Public Service Commission advised the FERC that “Millennium will be an additional pipeline to the New York City metropolitan area, which would provide an alternative in the event an existing pipeline fails.” By providing such contingency protection and promoting a greater degree of interconnectivity and redundancy in the Northeast’s gas pipeline grid, thus enhancing its ability to reroute gas shipments in crisis situations, the Project would improve the reliability of the energy infrastructure serving New York City and other major metropolitan areas in the Northeast. These contributions to the national security are significant and would be impaired if the Secretary did not permit the Project to proceed.

CONCLUSION

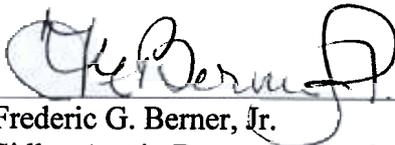
The purpose of the CZMA appeals process is to permit the Secretary “to ensure that projects which do significantly or substantially further the national interest in the CZMA’s objectives, and where the national interest outweighs impacts to coastal uses and resources, may be federally approved.”⁶⁴ This is such a case. The Millennium Project will significantly and substantially further the national interest in the CZMA’s objectives, and adverse impacts to coastal uses and resources will be minimal and temporary. In addition, the Project is necessary in the interest of national security from both international and domestic perspectives. Millennium therefore respectfully requests the Secretary to either dismiss the NYSDOS’s objection as untimely or override the objection in order to permit the Project to proceed as proposed. A

⁶⁴ Preamble to NOAA’s regulations, 65 Fed. Reg. 77124, 77150 (December 8, 2000).

contrary decision, we respectfully submit, would have a chilling effect on the natural gas industry and would jeopardize the FERC's ability to promote the addition of new pipeline capacity that will be urgently needed in the years ahead.

Respectfully submitted,

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