

**THE VILLAGE OF CROTON-ON-HUDSON,
NEW YORK'S**

**COMMENTS ON THE CONSISTENCY OF THE
MILLENNIUM PIPELINE PROJECT
WITH THE VILLAGE'S
LOCAL WATERFRONT REVITALIZATION PROGRAM**

Filed with the

**NEW YORK STATE DEPARTMENT OF STATE
DIVISION OF COASTAL RESOURCES**

June 25, 2001

THE VILLAGE OF CROTON-ON-HUDSON, NEW YORK'S

**COMMENTS ON THE CONSISTENCY OF THE
MILLENNIUM PIPELINE PROJECT
WITH THE VILLAGE'S**

LOCAL WATERFRONT REVITALIZATION PROGRAM (LWRP)

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TAB 1

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

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Neil L. Levy
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June 23, 2001

VIA OVERNIGHT DELIVERY

Mr. Steven C. Resler
Supervisor of Consistency Review and Analysis
New York Coastal Management Program
New York State Department of State
41 State Street
Albany, NY 12231-0001

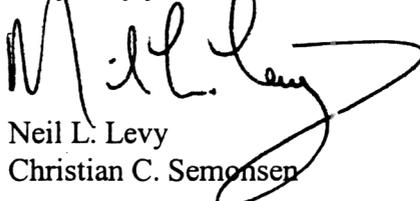
Re: Millennium Pipeline Project, Project No. F-2001-0246

Dear Mr. Resler:

In accordance with the time frame set forth by the New York State Department of State ("NYS DOS") for the filing of comments regarding the consistency of the proposed Millennium Pipeline Project with the Village of Croton-on-Hudson's ("Village") Local Waterfront Revitalization Program ("LWRP"), enclosed please find an original and two (2) copies of the Village's comments in the captioned matter.

The Village thanks the NYSDOS for the opportunity to comment on the consistency of the proposed Millennium Pipeline Project with the Village's LWRP. Any comments or questions with respect to the Village's submission may be addressed to either of the undersigned.

Very truly yours,



Neil L. Levy
Christian C. Semonsen

Counsel for The Village of Croton-on-Hudson, New York

Enclosures

Chicago

London

Los Angeles

New York

TAB 2

RESOLUTION OF THE VILLAGE BOARD OF TRUSTEES
CONCERNING THE CONSISTENCY OF THE MILLENNIUM PIPELINE PROJECT
WITH THE VILLAGE LWRP

On motion of Trustee Wiegman, seconded by Trustee Grant, the following Resolution was unanimously adopted by the Board of Trustees of the Village of Croton-on-Hudson, New York, this day of June 21, 2001.

WHEREAS, it is the intention of the Village Board of Trustees that the manmade and natural resources of the unique coastal area of the Village of Croton-on-Hudson be utilized in a way that minimizes adverse impacts to wildlife and the natural environment, diminution of open public space and scenic beauty, and impairment of water quality and water supply; and

WHEREAS, the Village Board of Trustees has adopted Local Law No. 2 of 1992, the Local Waterfront Revitalization Program (LWRP), which has been approved by the Secretary of State pursuant to the Waterfront Revitalization of Coastal Resources and Inland Waterways Act of the State of New York (Article 42 of the Executive Law) and the federal Coastal Zone Management Act (CZMA), which requires that all federally-permitted activities demonstrate consistency with the policies set forth in the LWRP; and

WHEREAS, the Village Board of Trustees is deeply concerned about the potential impacts of the proposed Millennium Pipeline Project on the environment and natural resources of the Coastal Zone, of which the entire Village of Croton-on-Hudson is part; and

WHEREAS, the Village Board of Trustees has retained technical experts (O'Brien & Gere Engineers, Inc.) to evaluate the potential impacts of the proposed Millennium Pipeline Project on the Coastal Zone and the Village; and

WHEREAS, the Village Board of Trustees has reviewed the Findings of the Village's Waterfront Advisory Committee (WAC) regarding the consistency of the proposed Millennium Pipeline Project with the LWRP, and has reviewed the Report evaluating the impacts of the Millennium Pipeline Project prepared by O'Brien & Gere Engineers, Inc.

NOW THEREFORE BE IT RESOLVED:

The Village Board of Trustees concurs with the Findings of the WAC, and for the reasons set forth therein and in the O'Brien & Gere Report, hereby finds that the proposed Millennium Pipeline Project is not consistent with the LWRP.

2. The Village Board of Trustees recommends that the New York State Department of State (NYSDOS) Division of Coastal Resources deny the Millennium Pipeline Project's consistency certification on the basis that the Project is not consistent with the Village's LWRP or with the State Coastal Management Program.

06/21/01

Certified Copy

6/22/01

Date

Marlene Kusch

Deputy Village Clerk/Village Clerk

TAB 3

RESOLUTION OF THE WATERFRONT ADVISORY COMMITTEE
CONCERNING THE CONSISTENCY OF THE MILLENNIUM PIPELINE PROJECT
WITH THE VILLAGE LWRP

On motion of Committee Member Ann Gallelli, seconded by Committee Member Leo Wiegman, the following Resolution was unanimously adopted by the Waterfront Advisory Committee ("Committee") of the Village of Croton-on-Hudson, New York, this day of June 21, 2001.

WHEREAS, it is the intention of the Committee that the man-made and natural resources of the unique coastal area of the Village of Croton-on-Hudson be utilized in a way that minimizes adverse impacts to wildlife and the natural environment, diminution of open public space and scenic beauty, and impairment of water quality and water supply; and

WHEREAS, the Village of Croton-on-Hudson has adopted Local Law No. 2 of 1992, the Local Waterfront Revitalization Program (LWRP), which has been approved by the Secretary of State pursuant to the Waterfront Revitalization of Coastal Resources and Inland Waterways Act of the State of New York (Article 42 of the Executive Law) and the federal Coastal Zone Management Act (CZMA), which requires that all federally-permitted activities demonstrate consistency with the policies set forth in the LWRP, and which designated the Committee as the entity tasked with reviewing proposed actions and determining their consistency with the LWRP; and

WHEREAS, the Committee is deeply concerned about the potential impacts of the proposed Millennium Pipeline Project on the environment and natural resources of the Coastal Zone, of which the entire Village of Croton-on-Hudson is part; and

WHEREAS, the Committee has reviewed the Report of the technical experts retained by the Village (O'Brien & Gere Engineers, Inc.) regarding the impacts of the proposed Millennium Pipeline Project on the Village; and

WHEREAS, the Committee has prepared the attached Findings regarding the consistency of the proposed Millennium Pipeline Project with the LWRP.

NOW THEREFORE BE IT RESOLVED:

1. The Committee hereby adopts the attached Findings, which, for the reasons set forth therein and in the O'Brien & Gere Report, determine that the proposed Millennium Pipeline Project is not consistent with the LWRP; and
2. The Committee recommends that the Village Board of Trustees concur with the Committee's Findings and transmit the same to the New York State Department of State (NYSDOS) Division of Coastal Resources with the recommendation that NYSDOS deny the Millennium Pipeline Project's consistency certification on the basis that the Project is not consistent with the Village's LWRP and/or with the State's Coastal Management Program.

06/21/01

Certified Copy

6/22/01 Date

Margaret Kersh
Deputy Village Clerk/Village Clerk

TAB 4

**The Findings of the Waterfront Advisory Committee (WAC)
Regarding the Consistency of the Millennium Pipeline Project with
the Village of Croton-on-Hudson's Local Waterfront Revitalization Program (LWRP)**

June 22, 2001

I. Introduction

A. Purpose and Background

The purpose of this document ("Findings") is to set forth the findings of Waterfront Advisory Committee ("WAC") of the Village of Croton-on-Hudson, New York ("Village") with regard to the consistency of the Millennium Pipeline Project ("Pipeline") with the Village's Local Waterfront Revitalization Program ("LWRP"). These Findings are also intended to form the basis of recommendations to the New York State Department of State ("NYS DOS") Division of Coastal Resources and Waterfront Revitalization as it conducts its review of the consistency of the Pipeline with the New York State Coastal Management Program ("CMP") and the Village's LWRP. The WAC is the Village entity charged with reviewing the consistency of proposed actions with the LWRP and preparing findings and recommendations to the Village Board of Trustees. As part of this process, the Village retained an environmental engineering firm (O'Brien & Gere Engineers, Inc.) to conduct an evaluation of the potential impacts of the Pipeline on the Village. The report by O'Brien & Gere Engineers, Inc. ("OBG Report") is provided as an attachment to these Findings.

B. Legal Framework

The federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-1465, states that "any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide . . . a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456(c)(3)(A). Furthermore, the CZMA requires that "[n]o license or permit shall be granted by the Federal Agency until the state or its designated agency has concurred with the applicant's certification." *Id.* This requirement is codified in the Federal Energy Regulatory Commission's ("FERC") regulations which require energy facilities, including natural gas pipelines, in coastal zone management areas to obtain a consistency determination from the state's coastal zone management program. 18 C.F.R. § 380.12(j)(7) (2000).

The statute implementing the CZMA in the State of New York is the Waterfront Revitalization of Coastal Resources and Inland Waterways Act, N.Y. Exec. Law §§ 910-923 (McKinney 1996) ("Act"). Pursuant to this Act, the State has adopted a Coastal Management Program ("CMP"), which is the approved program containing the enforceable policies for CZMA purposes in the State of New York. The NYSDOS Division of Coastal Resources and

Waterfront Revitalization is the designated State agency in charge of administering this Program in New York.

The Act provides that "any local government . . . which has any portion of its jurisdiction contiguous to the state's coastal waters and which desires to participate may submit a waterfront revitalization program." N.Y. Exec. Law § 915(1). The Act also requires that, once the state has approved a local government's program, proposed actions "shall be consistent to the maximum extent practicable with the local plan." N.Y. Exec. Law § 915(8). Pursuant to this provision, the Village adopted its LWRP on March 16, 1992, which was subsequently approved by the NYSDOS on June 15, 1992.¹ The LWRP sets forth the enforceable policies that are to be used when reviewing proposed actions that would occur within the Village boundary or would affect resources within the boundary. Importantly, the coastal zone, as defined by the NYSDOS and described in the LWRP, includes the entire Village. *See* LWRP, at I-3.

Millennium Pipeline Company, L.P. ("Millennium") proposes to construct a new 442-mile underground pipeline system of 36-inch and 24-inch diameter pipe to transport natural gas from an interconnection in Lake Erie on the Canadian border to Mount Vernon, New York. The Pipeline, as proposed, would cross the Hudson River at Haverstraw Bay, pass through portions of the Village, cross the Croton River, and exit the Village boundary at the high-water mark on the east shore of the Croton River. Pipeline construction activities taking place outside of the Village boundaries, both in Haverstraw Bay and along the Consolidated Edison Company of New York, Inc. ("ConEd") right-of-way, will also affect resources within the Village. Therefore, Millennium must demonstrate that the Project is both consistent with the CMP and, for activities that occur within or that may affect the Village, consistent with the Village's LWRP as well.

C. Sufficiency of Information and Timing of Review

Numerous and substantial changes have been and continue to be made to the proposed Pipeline's route through New York, but the coastal and environmental impacts of many of these changes have not been fully assessed. The FERC's April 1999 Draft Environmental Impact Statement ("DEIS") reviewed a proposed route passing along the center of the ConEd right-of-way (the "Original Proposed Route"). The FERC's Supplemental Draft Environmental Impact Statement ("SDEIS"), dated March 2001, described a route passing through the Village along Routes 9 and 9A ("9/9A Proposal"). The WAC has also reviewed Millennium's March 2001 New York State Coastal Zone Consistency Determination prepared by Lawler, Matusky & Skelly Engineers, L.L.P. ("Millennium Report"), which purportedly addresses the consistency of the Pipeline with the CMP and the Village's LWRP. The WAC notes that this Report discusses only the 9/9A Proposal. Subsequently, the FERC announced in April 2001 that the Public

¹ *See* Letter from Gail S. Shaffer, NYSDOS, to Robert W. Elliot, Mayor, Village of Croton-on-Hudson, New York (June 15, 1992).

Service Commission of the State of New York ("PSC") and Millennium had agreed on, and that FERC would be considering, a new route, the ConEd Offset/Taconic Alternative. This new route affects different portions of the coastal zone than any previously considered route, and raises different environmental and coastal zone consistency concerns that have never been addressed by Millennium.

Nonetheless, because the NYSDOS agreed (for reasons that are unclear to the WAC) to begin its consistency review process early, starting on the date the FERC issued the SDEIS rather than the date of issuance of the Final Environmental Impact Statement, the WAC has been compelled to conduct its review and prepare findings on a Pipeline route for which very little public documentation and no Millennium consistency report exist. As there is not sufficient information for the WAC to conduct a full consistency review of this new route, the WAC recommends that NYSDOS require Millennium to prepare a revised report that discusses the consistency of the ConEd Offset/Taconic Alternative with the CMP and the Village's LWRP. Although the WAC has prepared here its consistency findings based on currently available information, it reserves the right to submit supplemental findings at a later date.

Finally, the WAC would like to comment on the quality of information that Millennium has provided to date. The WAC notes with dismay that the OBG Report identifies numerous errors and glaring omissions throughout the Millennium Report, which it describes as "more self-serving than scientific" and even "disingenuous." For example, the OBG Report states that Millennium's complete failure to mention over 750,000 pre-existing and publicly-available data points on known PCB contamination in the sediments of the lower Hudson River, including Haverstraw Bay, "represents a gross oversight which on its own justifies a complete reconsideration of the pipeline crossing of the Hudson." OBG Report, at 5. These and many other problems pointed out in the OBG Report raise serious questions about the veracity and credibility of information provided in the Millennium Report.

II. LWRP Consistency Findings

1. CZMA and LWRP Policies on Siting of "Major Energy Facilities"

Findings

The WAC finds that nothing in the CZMA or LWRP Policy 27 on the siting of "major energy facilities" requires NYSDOS to overlook consistency concerns and "fast track" the siting of this Pipeline in the coastal zone. The Pipeline is not a "coastal-dependent use" and has no inherent need to be located in the coastal zone. Millennium also proposes to install the Pipeline in ecologically significant portions of the coastal zone where no previous commercial or industrial development exists, rather than in existing development corridors. Public needs for energy could be adequately served through other routes or system alternatives that do not present the same coastal and environmental impacts.

Discussion

Millennium has asserted in the Millennium Report and in correspondence to NYSDOS that a "favorable CMP determination [by NYSDOS] is compelled by the federal directive that major energy facilities, such as the Millennium Project, be given priority consideration."² The WAC does not dispute that the Pipeline is a major energy facility, but Millennium's conclusion that its energy facility status somehow predetermines NYSDOS' consistency review or entitles it to preferential treatment is simply not supported by the language of the CZMA. A brief review of the actual language of the CZMA is needed to place Millennium's misleading assertions into context. The only provision of the CZMA that discusses "priority consideration" in relation to energy facilities is found in the statute's declaration of policy, which states as follows:

The Congress finds and declares that it is the national policy -

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;
(2) 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 -

(A) the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

* * *

(D) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists....

16 U.S.C. § 1452. Read in context, this declaration of policy is hardly a ringing mandate for state agencies to "fast track" pipelines and gloss over environmental concerns. To the contrary, this provision requires, first and foremost, that "priority consideration [be] given to *coastal-dependent uses*" (which natural gas pipelines most certainly are not), and "orderly processes for siting major facilities" including not only energy, but other coastal-dependent uses such as fisheries, ports, and recreation, among others. *Id.* Notably, this provision concludes by emphasizing "the location, to the maximum extent practicable, of new commercial and industrial developments *in or adjacent to areas where such development already exists.*" *Id.* Millennium's natural gas transmission line is not a coastal-dependent use and is proposed to be installed in portions of the coastal zone where no such development currently exists, including the Haverstraw Bay and the Croton River.

² Letter from Thomas S. West to William F. Barton, NYSDOS, at 7 (Mar. 23, 2001).

What the CZMA does require is that coastal states, in formulating their coastal management programs, include in them certain elements, one of which is an orderly process for reviewing energy facilities proposed to be located in, or that might affect, the coastal zone. See 16 U.S.C. §§ 1452(2)(I), 1455(d)(2)(H). The LWRP satisfies this requirement by containing LWRP Policy 27, which sets forth the factors to be taken into account in making decisions regarding proposed energy facilities. Far from abdicating environmental concerns in favor of energy facility development, LWRP Policy 27 explains that the "proposed siting of other major energy facilities within the coastal zone boundary could have a potentially significant impact on many other important values pertaining to the coastal area," and specifically requires that such projects be assessed for consistency with other LWRP policies. LWRP, at III-38.

LWRP Policy 27 requires that "decisions on the siting and construction of major energy facilities in the coastal area" must be based on three factors: "public energy needs, compatibility of such facilities with the environment, and the facility's need for a shorefront location." LWRP, at III-38. First, the WAC notes that the Millennium Report's response on Policy 27 focuses exclusively on how the Pipeline will service increasing public energy needs, but fails even to mention the other two factors, environmental compatibility and need for a shorefront location, saying only that Millennium "is entitled to a preference under the CZMA." Millennium Report, at 91. The WAC will address each of these three elements in turn.

With regard to public energy needs, the LWRP acknowledges, and the WAC does not dispute, the basic premise that New York State faces increasing energy demands. How best to satisfy and/or manage that demand, however, is the subject of intense and ongoing public debate. Notwithstanding Millennium's conviction that only its pipeline will satisfy this demand, we note that in recent public comments to the FERC, the U.S. Environmental Protection Agency ("EPA") specifically points out that the SDEIS "still does not consider non-construction alternatives including implementation of conservation measures, and alternative energy sources and fuels."³ The WAC concludes that whether there is a public need for energy that can only be satisfied by Millennium's proposal for a new natural gas pipeline is a question that has not been satisfactorily reviewed and documented by the FERC.

With respect to need for a coastal location, it is obvious that Millennium's proposal to build a pipeline through New York's coastal zone and across Haverstraw Bay is based purely on convenience and business objectives. Unlike other types of energy facilities, such as continental shelf production, wells or associated shipping facilities, the Pipeline has no inherent "need" to be located in the coastal zone, much less to cross through two of the most ecologically significant portions of the coastal zone, Haverstraw Bay and the Croton River. Millennium is merely seeking the most profitable means of delivering its product. LWRP Policy 2 describes certain kinds of uses the Village considers "water-dependent." LWRP, at III-5. Such water-dependent uses include those facilities which "depend on the utilization of resources found

³ Letter from Robert W. Hargrove, U.S. EPA, to David Boergers, FERC (April 27, 2001).

in coastal waters," recreational, scientific, or educational activities that "by nature require access to coastal waters," and flood/erosion protective structures. *Id.* Policy 2 includes in this list "support facilities necessary for . . . permitted water-dependent uses," but specifically requires that such uses be sited inland rather than on the shore itself. LWRP, at III-6. The WAC does not find anything in Policy 2 that would allow the siting of this Pipeline in the coastal zone. The WAC also notes that the Millennium Report's response on Policy 2 merely concedes that the Pipeline project does not involve a water-dependent use. Millennium Report, at 26.

Finally, with regard to the compatibility of this facility with the environment, the WAC's findings in this regard are discussed at length in the sections below and do not need to be repeated here. Suffice it to say that the WAC believes that the numerous and significant environmental concerns identified in these Findings and the OBG Report, coupled with the lack of any inherent need to be located in these ecologically critical portions of the coastal zone, far outweigh the demands of public energy needs -- which the WAC emphasizes could be just as easily served by any one of the many other system alternatives, *i.e.*, other market participants, or via alternative routes, which would deliver the same product without the same level of impact to the coastal zone.

3. Haverstraw Bay Crossing

Findings and Recommendations

The Village has determined that the proposed crossing of Haverstraw Bay under the Original Proposed Route, the 9/9A Proposal, and the ConEd Offset/Taconic Alternative is not consistent with LWRP Policies 7, 7A, 7B, 7F, 7G, 8, 15, 35, and 44A, and recommends that NYSDOS find the Pipeline not consistent with the LWRP and/or the CMP in this respect. The Village finds that the proposed mitigation measures would not render this proposed crossing location consistent with the LWRP or CMP. However, the Village believes that the use of an alternative crossing location that would avoid disturbing the designated Significant Coastal Fish and Wildlife Habitat portions of Haverstraw Bay could be consistent with such Plans.

Discussion

The proposed Pipeline would cross the Hudson River within Haverstraw Bay at a location immediately to the north and upstream of the Village's boundary. Although the Pipeline itself would be installed outside of the Village, construction of the Pipeline will have environmental impacts that will directly affect the Haverstraw Bay ecosystem, thereby affecting the Village in direct and indirect ways. Any impacts to fisheries or endangered species which inhabit the Bay also affect the Village. Nearly half of the total area of Haverstraw Bay is within the Village's boundary, and the large majority of the Village's waterfront is located in Haverstraw Bay. At a minimum, The WAC concludes, based on estimates in the public record, that constructing the pipeline in the Bay will result in the resuspension of contaminated sediments in a plume that will drift downstream into the Village, thus affecting water quality in

the Village. Therefore, the pipeline crossing of the Hudson must be demonstrated to be consistent not only with the CMP but the LWRP as well.

New York State has designated the Haverstraw Bay a "Significant Coastal Fish and Wildlife Habitat." This designation is not a meaningless and arbitrary label as Millennium would have us believe. Numerous scientific studies have documented the truly unique nature of the Haverstraw Bay and the critical role it plays in the Atlantic coast's ecosystem. Factors such as the Bay's wide, shallow geology (it has an average depth of 12 feet) and its tendency for much of the year to be the location of the salt gradient where fresh water and ocean water mix to give rise to a uniquely brackish environment, make Haverstraw Bay the ecological "engine" of the Hudson estuarine ecosystem. The NYSDOS habitat documentation for the Bay rates it an "irreplaceable" estuarine ecosystem and describes it as a "major spawning, nursery, and wintering area for various estuarine fish species" having "population levels unusual in the northeastern U.S." LWRP, at II-51. The Bay is home to the federally-listed endangered shortnose sturgeon, and has been designated by the National Marine Fisheries Service ("NMFS") as Essential Fish Habitat for numerous other species.

Millennium proposes to install the Pipeline directly across this part of the Hudson River, by dredging an open trench, installing the pipe, and then backfilling. Millennium attempts to downplay the extent and severity of impacts that dredging will have on the Bay, mentioning favorable but uncited studies of the "lay barge" and "environmental bucket" dredge technologies. See Millennium Report, at 18-25. Even using these technologies, however, there is no question that the Pipeline will most probably cause "takings" of endangered shortnose sturgeon and will destroy and/or significantly impair portions of the designated Significant Coastal Fish and Wildlife Habitat, including portions of the benthic communities upon which the sturgeon and other species rely. There is also no question that the dredging of the riverbed will resuspend large amounts of sediments, increase turbidity, disrupt species, and impact the scenic nature of the Bay.

The issue of contamination in Haverstraw Bay sediments, however, does not appear to be fully reflected in the public record, which has become skewed by what we believe may have been a premature Section 401 certification by the New York State Department of Environmental Conservation ("DEC") and a highly misleading depiction of sediment conditions by Millennium. The OBG Report criticizes with surprising severity what appears to be the conscious failure on Millennium's part to acknowledge the documented presence of polychlorinated biphenyls ("PCBs") throughout the lower Hudson, including the area of the

proposed Haverstraw Bay crossing.⁴ Under pressure from the NMFS, the FERC has recently conceded that dredging will result in the resuspension of contaminated sediments and will “increase bioaccumulation and decrease biological productivity of the fish and invertebrate communities present in the immediate vicinity of the proposed crossing.”⁵

LWRP Policies 7, 7A, 7B, 7E, and 44A. LWRP Policy 7 contains a set of policies that apply specifically to activities that may affect designated “Significant Coastal Fish and Wildlife Habitats” such as Haverstraw Bay, and sets forth strict rules describing how the impacts of proposed activities in such areas are to be evaluated for consistency purposes. Policy 44A contains a related supplemental requirement to protect all waterbodies and their natural habitats from pollution, siltation, or other disturbances. Most importantly, LWRP Policy 7 requires that a “habitat impairment test” be met for any activity that is subject to consistency review. LWRP at III-12. This test states that actions proposed for significant habitat areas “shall not be undertaken if such actions would: destroy the habitat; or significantly impair the viability of the habitat.” *Id.*

The LWRP defines the terms “habitat destruction” and “significant impairment” and gives examples of the types of activities that meet the definitions. With regard to habitat destruction, it explains that “[a]ny physical alteration of the habitat, through dredging, filling or bulkheading, would result in a direct loss of valuable habitat area.” LWRP at III-13. Second, “[a]ctivities in Croton River and Bay and Haverstraw Bay that would degrade water quality, increase turbidity or sedimentation . . . would result in significant impairment of the habitat.” *Id.* Notably, “reduced productivity” is specifically listed as an indicator of significant impairment. *Id.* at II-12. Based on the OBG Report and the FERC’s and Millennium’s own statements about the Pipeline, the WAC concludes that there is no question that the Haverstraw Bay crossing fails the habitat impairment test and will result in habitat destruction in the vicinity of the dredge as well as significant impairment of the larger Haverstraw Bay ecosystem.

⁴ PCB contamination of the Hudson River is well-known and has resulted in the banning of fishing and shell fishing in the Hudson for a number of species known to contain dangerously high levels of PCBs. The OBG Report points out Millennium’s complete omission of any reference to the large numbers of publicly available data points on PCB in the Hudson River, including the lower Hudson and Haverstraw Bay areas. *See* OBG Report, at 5. Instead, Millennium took a few new samples of its own (which were non-detect for PCBs), but has not released any information on the analytical protocol that would allow for a third-party evaluation of the validity of the results. The OBG Report concludes, “Millennium’s evaluation of the crossing of the Hudson River at Haverstraw Bay is disingenuous at best,” and “a gross oversight . . . which justifies a complete reconsideration of the pipeline crossing of the Hudson.”

⁵ Letter from David P. Boergers, FERC, to Chris Mantzaris, NMFS (June 1, 2001).

In support of its position, Millennium cites various past examples of other Hudson River dredging operations that NYSDOS found consistent with the CMP.⁶ However, all of these cases are factually distinguishable from Millennium's proposal in significant ways. First, in U.S. Gypsum, Project No. F-2000-0284, NYSDOS issued a consistency determination for U.S. Gypsum to re-dredge a "spur" channel linking the Hudson River's main navigation channel to the U.S. Gypsum plant located on the west shore of Haverstraw Bay. In that decision, NYSDOS made it clear that the purpose of the dredging was to maintain a pre-existing channel serving a "long-established" facility located on the Hudson shoreline. Maintaining a channel to serve a coastally-dependent facility that has been in existence since prior to the enactment of the CZMA is very different than dredging an entirely new part of the Bay for a new development that has no inherent need to be located on the coast. This distinction is fully consistent with the CZMA's declaration of policy, described above, that gives priority to the location of activities in previously developed portions of the coastal zone. The U.S. Gypsum decision also noted that dredging an existing deep channel on the west side of Haverstraw Bay would have less impacts on endangered shortnose sturgeon, which tend to inhabit the shallower, less disturbed portions of the Bay along the eastern shore. The Pipeline is distinguishable in that it would trench through previously untouched shallow parts of Haverstraw Bay, including the more ecologically sensitive portions along the eastern shore.

The Central Hudson Gas & Electric case, Project No. F-00-396, similarly relied on by Millennium, involved the maintenance of a pre-existing pipeline by "armoring" or laying stones and riprap around it to prevent damage from anchor drag. Here again, NYSDOS indicated that the purpose was for maintenance of a previously developed pipeline. This project was also located not in Haverstraw Bay, but in a deepwater channel of the Hudson, where the work would be conducted on the deep riverbed; all spawning and other sensitive activity was anticipated to take place in the shallower portions of the water column. Also the project did not involve any dredging of the riverbed. The Bell Atlantic case, Project No. F-99-838, is also factually very different from the Pipeline. There, NYSDOS approved the installation of a 3-inch diameter fiber optic cable by laying the cable on the river bottom. There too, the cable was being installed in a previously developed part of a deepwater channel, not in Haverstraw Bay, and was to replace a much larger cable that pre-dated the CZMA. The cable was intended to provide telecommunications infrastructure to West Point, which is located on the shoreline of the Hudson.

In sum, none of these cases support Millennium's argument that the Pipeline is consistent with the CMP. In fact, the WAC knows of no projects of this nature and scale, going through this part of Haverstraw Bay, that have ever been approved as consistent with the CMP in the State of New York. The WAC therefore finds that the proposed crossing of Haverstraw Bay is not consistent with Policies 7, 7A, 7B, 7F, 7G, and 44A.

⁶ Letter from Thomas S. West, LeBoeuf, Lamb (representing Millennium) to William F. Barton, NYSDOS (March 23, 2001).

LWRP Policy 8. Policy 8 requires the protection of fish and wildlife in the coastal area "from the introduction of hazardous wastes and other pollutants which bio-accumulate in the food chain or which cause significant sublethal or lethal effect on those resources." LWRP, at III-14. As described above and in the OBG Report, there is a large body of public data points collected from throughout the Hudson River estuary on PCB contamination in riverbed sediments. Millennium's own data (which the WAC thinks may be suspect for the reasons described in the OBG Report) indicates at least the presence of elevated levels of various heavy metals, the dredging and resuspension of which the FERC has concluded will "increase bioaccumulation and decrease biological productivity of the fish and invertebrate communities within the immediate vicinity of the proposed crossing."⁷ The WAC therefore finds that the proposed crossing of Haverstraw Bay is not consistent with Policy 8.

LWRP Policies 9, 10. Policies 9 and 10 concern expanding opportunities for recreational use of, and access to, fish and wildlife resources as well as development of commercial fisheries. Policy 9 indicates that such "recreational opportunities . . . depend on . . . upgrading of water quality classifications." LWRP at III-16. Policy 10 notes that DEC has banned commercial fishing except for certain species "based on elevated levels of Polychlorinated Biphenyls (PCB) found in coastal water." LWRP, at III-17. The presence of such contaminants in the River has had devastating and long-lasting effects on recreational and commercial fishing. It is significant that the NYSDOS habitat rating form describes the Haverstraw Bay by stating that "[t]he area contributes to recreational fishing and commercial fisheries throughout the northeastern U.S." LWRP, at II-51. Therefore, the WAC finds that any Pipeline dredging activities in Haverstraw Bay that would cause the resuspension of contaminated sediments, increased bio-accumulation of toxic contaminants, degradation of fish habitat, or otherwise contribute to the decline of this important recreational fishing and commercial fisheries resource is not consistent with Policies 9 or 10.

LWRP Policies 15, 35. These Policies concern dredging and disposal of dredge spoil in coastal waters. These policies explain that dredging in the coastal zone must be permitted by DEC and the U.S. Army Corps of Engineers. Any dredging that is to be permitted, however, must "be accomplished in a manner so as not to . . . cause degradation of water quality." LWRP at III-21. Also, the adverse effects of any permitted dredging must be "minimized through careful design and timing of the dredging operation and proper siting of the dredge spoil disposal site." LWRP at III-43. Notably, on these latter two points, the EPA pointed out in its public comments to the FERC that (1) the optimum time to conduct a crossing of Haverstraw Bay has still not been determined and is subject to further consultations between the various agencies (the WAC believes that, based on the OBG Report, no such "optimum" time exists when a crossing of the Bay would be able to avoid serious impacts), and (2) that Millennium has still not identified a disposal method or site for dredged material that is found to

⁷ Letter from David P. Boergers, FERC, to Chris Mantzaris, NMFS (June 1, 2001).

be contaminated and unsuitable for use as backfill.⁸ Therefore, the WAC concludes that, at this time, Millennium has not yet demonstrated that the crossing of Haverstraw Bay can be accomplished in a manner consistent with Policies 15 and 35.

In sum, the WAC finds that the proposed crossing of Haverstraw Bay is not consistent with the policies of the LWRP. However, as discussed at length in the OBG Report, the WAC believes that there are alternative routes across the Hudson River that would avoid Haverstraw Bay, preferably those to the south of the Bay, which would not be inconsistent with such policies.

4. The Village Wellfield and Water Supply

Findings and Recommendations

The Village has determined that the proposed crossing of the Village's wellfield in the Croton River gorge ("Wellfield"), under both the ConEd Offset/Taconic Alternative and the Original Proposed Route, is not consistent with LWRP Policies 18, 38 and 39, and recommends that NYDOS find the proposed Pipeline not consistent with the LWRP and/or the CMP in this respect. The Village finds that Millennium's proposed mitigation measures would not render this proposed route consistent with such policies, and the Village therefore believes that only the use of an alternative route that avoids the crossing of the Wellfield altogether would be appropriate.

Discussion

The Village obtains its water from shallow wells located in the Croton River valley. This valley-fill aquifer is the primary source of municipal drinking water for the Village. It is the sole source of drinking water for approximately 6,500 persons, representing the majority of the Village population. The aquifer underlies the Croton River and extends in a narrow band along the valley bottom on either side of the River. The water table in the wells is extremely shallow, just a few feet below the ground surface. The Wellfield is currently pumped at about 1.5 million gallons per day. While the aquifer receives water from many sources, a groundwater modeling study indicates that the Croton River is the most significant source of water to the Wellfield. In other words, the aquifer and the river are in direct hydraulic communication, and pumping of the wells induces downward flow of river water through the unconsolidated sediments to the well intakes. Millennium's proposed pipeline would cross both the Croton River and the Wellfield.

LWRP Policy 38. Policy 38 expressly requires that "the quality and quantity of surface water and ground water supplies will be conserved and protected particularly where such

⁸ Letter from Robert W. Hargrove, U.S. EPA to David Boergers, FERC (April 27, 2001).

waters constitute the primary or sole source of water supply."⁹ Pursuant to this policy, and as specifically referenced in the LWRP, the Village has also enacted a Local Law for the protection of the Village's Wellfield and water supply. Local Law No. 5 of 1989. This Local Law implements the policies of the LWRP and is also consistent with New York State and federal wellhead protection regulations. The Local Law establishes three "zones" for ground water protection, "Zone 1" (Wellhead Protection Area) being the most protective zone in the vicinity of the water wells. *Id.* at § 223-17(A)(1). With respect to Zone 1, the Local Law states that "[a]ll systems, facilities and activities are prohibited except for physical pumping and treatment facilities and controls. *Id.* at § 223-22(B)(2). The area shall not be used for any purpose other than public water supply." The proposed Pipeline would pass directly through the area of the Wellfield designated as Zone 1. For this reason and as further described in detail below, the construction and presence of the Pipeline is not consistent with the policies of the LWRP and would be in direct violation of the aquifer protection laws that have been implemented by the Village pursuant to State and federal regulations.

Millennium proposes to use trench dewatering during the construction of the Pipeline and may also use water from the area for hydrostatic testing of the Pipeline. These actions would not be consistent with LWRP Policy 38 because of the shallow nature of the ground water in the area and the potential for these activities to cause a decline in water supplies. Based on hydrogeologic studies of the Wellfield, the ground water is known to be very shallow. Trench construction activities can therefore be expected to encounter the groundwater table, and could require the pumping of significant volumes of ground water. The pumping of high volumes of ground water during dewatering could cause a decline in the ground water table at the Village supply wells, unless this water is reinjected back into the aquifer. Such a decline in the groundwater table could reduce the production capacity of the supply wells. The pumping of large volumes of water during dewatering and hydrostatic testing activities could also deplete the aquifer ground water storage. This storage depletion could be especially critical during dry months when surface water flow in the Croton River is low. The magnitude of such impacts due to water withdrawals cannot be assessed without quantitative modeling of site-specific aquifer properties. Millennium has not adequately addressed these concerns, and has only made unsubstantiated "no impact" claims without even having reviewed the existing hydrogeologic studies of this area that are readily available from the Village.

Another concern is that construction of the Pipeline across the Croton River could affect the subsurface hydrogeology, thus impacting the water supply. The hydrogeologic studies of the Wellfield have documented that there is a hydraulic connection between the aquifer and the Croton River. Construction activities in the River could affect the hydraulic properties of the river bottom and the hydraulic connection between the aquifer and the river, thus impacting the Village's water supply.

⁹ LWRP Policy No. 38 at III-46; LWRP Policy No. 39 at III-47.

LWRP Policy 39. Furthermore, Millennium's proposal is not consistent with LWRP Policy 39, because the operation of construction equipment and the storage of various substances associated with the use of such equipment may contaminate the Village's water supply. Contaminant releases can occur during construction, maintenance, refueling, or equipment failure. Releases could also occur through the use of methanol for the hydrostatic testing of the pipeline. The impact of contaminant releases would be immediate and significant because the construction would take place in close proximity to the supply well, and the soils in that area are documented as being very permeable. Thus, contaminants would be expected to migrate quickly from the surface directly into the water table and into the water supply almost instantaneously, leaving little or no time to respond, remediate spills or warn residents. Millennium has provided no documentation to address the potential contamination impacts with regard to the Wellfield.

After construction, the continued presence of the pipeline in the Wellfield would present an ongoing risk to the Village's water quality. A pipeline leak would introduce contaminants into the ground water. Natural gas can dissolve in and be transported by ground water. Furthermore, hydrocarbon condensates are known to form in gas pipelines. These condensates will cause ground water contamination if a leak in the pipeline occurs. Given the high permeability of the Wellfield aquifer and the close proximity of the Village supply wells to the Pipeline, rapid migration of these contaminants to the supply wells would be expected. Any such contamination would degrade the Village's drinking water supply and could become a serious public health concern.

LWRP Policies 2, 5. The Policies discussed above relating to the protection of ground water quality and quantity demand that the Village take into consideration the water supply needs of future generations. The Village currently has the potential to expand the Wellfield to meet future drinking water needs. However, the Pipeline would cross over the immediate vicinity of the area identified in the hydrogeologic studies as appropriate for the development of additional water wells in the future. Because of restrictions on drilling in the vicinity of natural gas pipelines, the presence of the Pipeline in this area reduces the available Wellfield area the Village has for expansion, thus compromising its ability to meet future water supply needs. We note that in response to LWRP Policy 5, which concerns the impact of development on public infrastructure and services, the Millennium Report states that "[t]he placement of the pipeline . . . across the Croton River will have no influence on future developments in Croton." Millennium Report, at 61. Similarly, Millennium's response to LWRP Policy 2 states the Pipeline "will have no influence on the future siting of water-dependent uses." *Id.* For the reasons stated above, these assertions are patently untrue.

LWRP Policy 18. This Wellfield provides the sole municipal source of drinking water for the community, and is therefore a "vital economic, social and environmental interest" that must be safeguarded and cannot be compromised. LWRP, at III-23. The WAC has determined that neither mitigation measures nor rerouting the Pipeline within the Croton River gorge to avoid immediate impacts to the wellheads would render the Pipeline consistent with

these LWRP Policies. Only a route that completely avoids the Croton River aquifer's recharge area would be consistent with the LWRP in this respect.

5. **The Jane E. Lytle Memorial Arboretum.**

Findings and Recommendations

The Village has determined that the ConEd Offset/Taconic Alternative's proposed crossing of the Jane E. Lytle Memorial Arboretum ("Arboretum") is not consistent with LWRP Policies 7F, 8, 11A, 14, 19, 25A, 44 and 44A, and recommends that NYSDOS find the proposed pipeline to be not consistent with the LWRP and/or the CMP in this respect. The Village finds that Millennium's proposed mitigation measures would not render this proposed route consistent with such policies, and therefore finds that only the use of an alternative route that avoids the Arboretum entirely is appropriate.¹⁰

Discussion

The Arboretum is a 20.3-acre wildlife refuge and public educational facility located in the northern corner of the Village. The Arboretum contains a wetland of unusual diversity and ecological quality. As an intact, high-quality wetland in the midst of a rapidly urbanizing county, the Arboretum is a precious and valued resource for the residents of the Village. In December 1975, Samuel Rubin donated the 20.3-acre parcel to the Cortlandt Conservation Association ("CCA"). The deed required that the CCA use the land as a wildlife and plant sanctuary and conservation educational facility. The deed also stated that, should the CCA prove unable to comply with the deed restriction, the property would be transferred to an organization with similar goals that would honor Mr. Rubin's request. In January 1990, the CCA transferred the property, with the deed restrictions, to the Village. The Village continued to observe the deed restrictions and use the property as a wildlife sanctuary. However, the area did not have any formal name or operating structure until 1994, when the Croton Arboretum and Sanctuary, Inc. was established as a 501(c)(3) nonprofit organization that would maintain and operate the wildlife sanctuary and educational facilities under a 5-year lease (later extended to 20

¹⁰ A recent letter from the PSC to the FERC states that PSC "would not oppose moving the offset to 100' from the center of the towers (rather than from the nearest conductor as agreed to in the SMOU)" in the area of the Arboretum and Hessian Hills. Letter from Lawrence G. Malone, PSC, to David Boergers, FERC (June 19, 2001). This would appear to reduce, but not entirely eliminate, impacts to the Arboretum, as the PSC notes that "additional measures may have to be taken with regard to the [Arboretum]." *Id.* at n. 2. As this route change has not yet been formalized, nor have its impacts been fully delineated, the WAC focuses its comments here on the "original" ConEd Offset/Taconic Alternative but retains the right to submit revised findings at a later date.

years) with the Village. It was not until 1995, that the property was officially named the "Jane E. Lytle Memorial Arboretum."¹¹

Under the ConEd Offset Alternative, the Pipeline would cross directly through the eastern portion of the Arboretum that parallels the ConEd right-of-way. The Pipeline would be constructed using an open-trench cut, and may require blasting along some portions of the steep and rugged cliffs in the area. The OBG Report calculates that, based on information in the SDEIS, the impact to the interior forested habitat from clear-cutting would extend 300 feet from the edge of the clearcut. OBG Report, at 51. Based on these figures, the total area of impact on interior forest habitat in the Arboretum would be approximately 5 acres, representing 25% of the Arboretum's total property. *Id.*

LWRP Policies 44 and 44A. The Pipeline is not consistent with LWRP Policies 44 and 44A regarding the preservation and protection of wetlands and the benefits derived from wetlands. LWRP, at III-50. These Policies require protecting wetlands from erosion or siltation damage, minimizing disturbances to wetlands, preserving the natural habitats, and protecting against flood and pollution. *Id.* The Explanation of Policy states that the "most restrictive conditions that will result in the highest level of protection for the [wetlands] shall apply." *Id.* at III-51. Further supplementing the wetland policies of the LWRP is the Village's Local Law No. 4 of 1988, "Protection of Wetlands, Waterbodies, and Watercourses." This law defines what are protected wetlands, prohibits certain activities in or around the buffer areas of wetlands, and introduces a local permitting requirement for activities that may adversely impact such wetlands.

The Arboretum contains a large area of "wetlands" subject to the policies and protections of the LWRP and the Local Law. These documents define "wetlands" broadly to include not only federal and state designated wetlands but any other "marshes, swamps, bogs, and flats supporting aquatic and semi-aquatic vegetation. . . ." LWRP, at III-50. The Local Law extends protection to such wetlands that are "1/4 acres or more" in size, and includes "prohibited buffer zones," *i.e.*, "any adjacent surfaces within 20 feet" of a wetland. Local Law No. 4-1988, § 227-3. The LWRP explicitly prohibits actions adversely affecting wetlands, unless there is "no

¹¹ Millennium has suggested that the Arboretum should not be protected because it is not referenced by name in the LWRP. Letter from Thomas West (representing Millennium) to William Barton, NYSDOS (May 24, 2001). In fact, this entire area of wetlands in the northeast part of the Village is specifically described in the Development Constraints section of the LWRP, and is also noted as such on the LWRP's map of the Village. LWRP, at II-27 (Figure 6) and II-36. However, the Arboretum is not referenced *by name* simply because the property did not obtain its current name until 1995, after the adoption of the LWRP in 1992. Requiring such a policy document to list every known parcel of public land or resource by name would frustrate the entire purpose of the LWRP and nonsensically deny protection to new acquisitions or discoveries (such as a previously unknown archeological site) occurring after 1992.

practicable alternative," and the applicant has demonstrated that the activity "will not degrade the environment or result in any of the adverse impacts listed [in the LWRP]." LWRP, at III-51.

Based on its review of the Pipeline and the conclusions of the OBG Report, the WAC finds that the Pipeline will result in severe and irreversible degradation of the wetlands and other natural resources of the Arboretum. Most significantly, the removal of the mature forested buffer between the Arboretum and the ConEd right-of-way and the grading of this area for temporary construction workspace and permanent access, will have serious impacts on the existing hydrology, flora and fauna, and habitat critical for amphibians, birds and other species, and will also significantly impair the educational and scenic values of the Arboretum. Tree removal will disrupt runoff and stream flow, increase erosion, change downstream hydrologic conditions, and subject the wetlands to increased sunlight and wind. The Pipeline would cross several intermittent streams and one perennial stream within the Arboretum, thus disrupting the drainage patterns and reducing supply inflow to the Arboretum's wetlands. This will also cause the encroachment of invasive vegetative species such as the *Phragmites australis* (common reed), *Polygonum cuspidatum* (Japanese knotweed), *Lythrum salicaria* (purple loosestrife), and *Lonicera* (Honeysuckle). See OBG Report, at 52. Invasive vegetative species have already infested the cleared portions of the ConEd right-of-way immediately adjacent to the Arboretum, and any disturbances to the Arboretum or the forested buffer along the Arboretum creates conditions favorable for the invasion and establishment of such vegetation deeper into the Arboretum.

Wetlands Impacts have been singled out by EPA, among others, as one of the potentially most serious, but least adequately documented effects of the Pipeline overall,¹² and this applies to the Arboretum as well. To date, Millennium has failed to clearly identify the natural features of the Arboretum property, evaluate the potential impacts of the Pipeline, describe the types of erosion control and other mitigation measures or ongoing restoration monitoring that is planned. Nor has Millennium presented a comparison of methods of stream crossing technologies to determine the appropriate method to use in the Arboretum. The proposed open-cut trenching method will have a high level of direct impact on the Arboretum, and may cause releases of contaminants from pump operations, pump fuel storage and refueling operations.

LWRP Policy 19. The Pipeline is not consistent with LWRP Policy 19, which requires protecting, maintaining, and increasing the level and types of access to public water-related recreation resources. See LWRP, at III-24. It also encourages the linkage of open spaces within the Village through trails or a walkway system. Millennium's route would cross the Arboretum's trails and impair public access to and enjoyment of the facility. The Arboretum is a valued educational and recreational resource for the residents of the Village, and the policies of

¹² Letter from Robert W. Hargrove, U.S. EPA, to David Boergers, FERC, Apr. 27, 2001 ("we reiterate that the final EIS must address wetlands impacts in a much more thorough manner....").

the LWRP specifically require that access to such public facilities "shall not be reduced." LWRP, at III-25. In this respect, the Pipeline is not consistent with the policies of the LWRP.

LWRP Policy 8. The WAC finds that the Pipeline is not consistent with LWRP Policy 8, which requires protecting fish and wildlife resources from the introduction of pollutants. LWRP, at III-14. As described in the OBG Report, the construction and ongoing presence of the pipeline can result in the release of hazardous pollutants to the surrounding environment. The possible presence of residual herbicides, dioxins, and other contaminants along the ConEd right-of-way is another concern about which Millennium has provided no quantitative data to date.

LWRP Policies 7F, 11, 11A, 14, and 44. The LWRP contains various policies concerning the prevention of impacts due to erosion. For example, LWRP Policy 7F states that "construction activity of any kind must not cause a measurable increase in erosion or flooding at the site of such activity, or impact other locations." LWRP, at III-11. LWRP Policy 11A requires the use of erosion and sediment control measures in order to prevent damage to the environment. See LWRP, at III-17. The potential for erosion due to the destruction of mature forest was described above in the wetland discussion, as was Millennium's lack of an adequate mitigation plan. Policies 14 and 44A likewise require protections against erosion. LWRP, at III-20, III-50. The WAC therefore finds that the Pipeline is not consistent with these LWRP Policies concerning the effects of erosion.

LWRP Policies 25, 25A. The LWRP requires the protection and enhancement of local scenic resources by preventing the irreversible modification of geologic forms, the destruction or removal of vegetation or wetlands, or the removal of structures whenever such forms, vegetation or structures are significant to the scenic quality of an identified resource. LWRP Policy 25A, at III-36. However, as described in detail above, the permanent clearing of the protective buffer of mature trees in the sensitive habitat areas of the Arboretum and along the ConEd right-of-way, and the subsequent construction of a maintenance access in that area will permanently and irreversibly alter the scenic nature of the Arboretum and diminish its value as a wildlife viewing area and recreational resource. The WAC therefore finds the Pipeline inconsistent with Policies 25 and 25A in this respect.

6. Croton River Crossing

Findings and Recommendations

The WAC has determined that all of the proposed crossings of the Croton River under the Original Proposed Route, the ConEd Offset/Taconic Alternative, and the 9/9A Proposal are not consistent with LWRP Policies 7, 7A, 7F, 7G, 8, 12, 14, 30, 44 and 44A. The WAC recommends that NYSDOS find the proposed Pipeline to be not consistent with the LWRP and/or the CMP in this respect. The WAC finds that Millennium's proposed mitigation measures would not render either proposed route consistent with such policies, and the Village

therefore believes that the use of an alternative route that avoids crossing the Croton River is appropriate.

Discussion

Under the ConEd Offset Alternative and Original Proposed Route, the proposed Pipeline would cross the Croton River at a location in the Croton River gorge and Wellfield. The crossing would be conducted by "dam and pump" trenching, and would require the clear-cutting and grading of large work staging areas on both sides of the River. Under the 9/9A Proposal, the Pipeline would cross the Croton River near the mouth of the River at Croton Point, attempting to use directional drilling.

LWRP Policies 11A, 14, 17A, 36, and 37. The use of open-cut trenching under the ConEd Offset/Taconic Alternative or Original Proposed Route to cross the Croton River, including the clearing of large workspaces on both shores, will have significant impacts not only on the immediate vicinity of the crossing but also on downstream water quality, designated significant habitat, and endangered species. A major concern regarding the open-cut crossing, which Millennium has overlooked, is the impact of a heavy rain during or after construction activities. The entire gorge, including the area proposed to be cleared for workspace, becomes completely flooded on a fairly regular basis. After a recent storm event that occurred on June 17, 2001, several WAC Members and other Village residents observed the flooding of the entire gorge area. If such a storm were to occur during operations in the gorge, the rain could flood equipment and cause the release of hazardous substances such as fuel, chemicals, and blasting materials stored in the area, contaminating the River, Bay, and the Village's aquifer. Such a storm event would also cause severe erosion in the large area on both shores that would be cleared as work areas, releasing large quantities of silt and sediment into the downstream portions of the Croton River and Bay. Post construction flooding would effectively wipe out any revegetation, tree replanting, or other restoration work. Millennium has failed to take into consideration the possible impacts of rain and flooding in this area, and has failed to develop a contingency plan that documents how operations would be managed in such an event. Due to these serious concerns, the WAC finds that the proposed crossing of the Croton River under the Original Proposed Route and the ConEd Offset/Taconic Alternative would not be adequately protective of the environment and would therefore not be consistent with LWRP Policies 11A, 14, 17A, 36, and 37.

Under the 9/9A Proposal, Millennium intends to cross the Croton River by directional drilling. The NMFS, in a March 22, 2001 letter to the FERC, stated that directional drilling would be the preferred method given the sensitive nature of the Croton River area and the potentially significant impacts associated with open trench crossings. Millennium based its "no impacts" conclusion in its discussion of the Croton River crossing under the 9/9A Proposal in large part on its planned use of directional drilling. Millennium Report, at 64. However, NMFS pointed out that directional drilling is not a cure-all, and recommended first that "a detailed survey should certify that local geology is not susceptible to fractures or instabilities that

could complicate directional drilling," and concluded that "if drilling proves problematic, an alternative corridor . . . should be investigated." The WAC believes that because this crossing would take place directly within the designated significant habitat portions of the Croton River and Bay, such a geological survey is warranted. The WAC also notes, however, that even a successful directional drilling operation would require the clearing of trees and grading of staging locations, and would cause releases of drilling mud and potentially hazardous substances from construction equipment. The WAC concludes that it therefore cannot, at this time, find the 9/9A Proposal consistent with the LWRP.

LWRP Policies 7, 7A, 7F, and 7G. The Original Proposed Route, the ConEd Offset/Taconic Alternative and the 9/9A Proposal are not consistent with the LWRP policies that require the protection and preservation of the Croton River and Bay as a designated "Significant Coastal Fish and Wildlife Habitat." With regard to the ConEd Offset/Taconic Alternative, Millennium has asserted in comments submitted to the FERC and letters to NYSDOS that the Pipeline crossing at this location does not raise any coastal issues unless it directly crosses into the designated Significant Coastal Fish and Wildlife Habitat's boundary. This argument is not supported by the requirements of the CZMA, the CMP, or the LWRP. The CZMA focuses on the ecological affects of activities, not merely their geographical location; it specifically requires a consistency determination for all activities "in *or outside of* the coastal zone, affecting any land or water use or natural resource of the coastal zone. . . ." 16 U.S.C. § 1456(c)(3) (emphasis added). More specifically, LWRP Policy 7 states unequivocally that "[o]f particular concern in the Croton River and Bay . . . are the potential effects of *upstream disturbances*, including water withdrawals, impoundments, stream bed disturbances, and effluent discharges." LWRP at III-13 (emphasis added). With regard to the 9/9A Proposal, this crossing would occur within the designated habitat; the potential impacts would therefore be more direct.

The WAC is concerned that under all of the routes, the Pipeline would have adverse impacts, including indirect and cumulative impacts, on the many endangered and other important species that inhabit this area of the Village, including the shortnose sturgeon and the bald eagle. Erosion, increased turbidity, and releases of pollutants would have direct impacts on the habitat of the endangered shortnose sturgeon in the downstream portions of the Croton River and Bay. Construction activities, including the removal of mature trees adjacent to the Croton River, would adversely impact the habitat of the bald eagle and other important terrestrial species including the Cooper's hawk, the red-shouldered hawk, the short-eared owl, and the Northern harrier. These species utilize the mature trees in the project vicinity for cover, roosting, hunting perches and feeding. The Croton River is also known by local fishermen and naturalists to be an important trout habitat. *See attached* Affidavit of Charles Kane. In addition, two rare invertebrate species of dragonfly have been identified in the Croton River gorge area by an area biologist.

The WAC points out that Millennium and the FERC have been relying on incorrect and outdated information regarding the incidence of endangered species in this area, and, as a result, have greatly underestimated the potential impacts from the Pipeline in their

documents to date. For example, with regard to the bald eagle, the SDEIS states that "the closest recent sighting (1998) was at Croton Point, about 2,400 feet downstream of the proposed crossing of the Croton River." SDEIS at 4-9, 4-10. The SDEIS also mischaracterizes the bald eagle habitation of the area as limited to overwintering. Millennium concluded that "[b]ecause the Croton Bay pipeline crossing will be constructed during the summer months, there will be no impact to bald eagles...." Millennium Report, at 63. These statements are patently incorrect and based on outdated information. In fact, the entire Croton River area is known among local bird watchers and the local chapters of the Audubon Society to be a fairly common bald eagle habitat. Also, actual sighting reports from Village residents indicate that bald eagles inhabit this area at various times throughout the year, not only in winter. Attached to these Findings is the statement of one Village resident who has observed bald eagles, including immatures, from his home located on the Croton River in the fall of 2000, and the spring of 2001. *See attached* Affidavit of Martin Smolin. The Cooper's hawk, which is recognized by the state as a species of special concern and by Westchester County as an endangered species, has also been recorded by local naturalists as nesting regularly in the Croton River gorge, the same area proposed to be crossed by the Pipeline. *See attached* Affidavit of Helene Farrey.

In sum, Millennium has not adequately evaluated the impacts of the Pipeline on protected habitat in the Croton River and Bay, and must do so based on additional up-to-date information concerning the existence of state and federally-listed endangered and threatened species in this area.

7. Village Trail System

Findings

The Village finds that that ConEd Offset/Taconic Alternative is not consistent with LWRP Policies 19, 19A, 19B, 20, and 25D with respect to its impacts on the Village's trail system. Alternative routes, such as a route that would cross the Hudson River south of Haverstraw Bay or the Original Route within the ConEd right-of-way, would avoid these impacts to the trail system.

Discussion

The Croton Trail System was developed as a direct result of the LWRP. *See* LWRP, at IV-3. After passage of the LWRP, the Village formed the Croton Trails Committee, and in 1993, the Village developed and approved the Trailways Master Plan. Since then, the Croton Trails Committee has obtained the necessary easements for the trails, and has begun constructing the trailway system, in many cases with the help of Croton volunteers. The Highland Trail section has a scenic overlook, the highest in the Village, which provides magnificent views of the Hudson River, including both the Tappen Zee and Bear Mountain Bridges, Croton Point, and the mountains on the west side of the Hudson. The trail is heavily used at all times of the year and, with the exception of the trail spur to the scenic outlook, is

wooded. The ConEd electric transmission lines on one side and the golf course on the other are mostly obscured by the trees and bushes on both sides of the pathway. The Highland Trail section links the Village's Arboretum with the Brinton Brook Wildlife Sanctuary. Both the Arboretum and the Brinton Brook Wildlife Sanctuary have additional connecting trail systems. Millennium's ConEd Offset/Taconic Alternative would cross the Highland Trail between the Arboretum and the Brinton Brook Sanctuary.

LWRP Policies 19, 19A, 19B. Millennium's proposed pipeline is not consistent with the LWRP's public access policies which encourage the formation of a trail system and require the protection and maintenance of public access to water-related recreation resources or areas that have special value due to their physical and visual access to the Hudson River or Croton River and Bay. LWRP, at III-24. Furthermore, Millennium's proposal is not consistent with LWRP Policy 25's requirement that activities protect and enhance natural or man-made resources that contribute to the overall scenic quality of the coastal area. LWRP, at III-36.

Millennium's proposal would obliterate sections of the Highland Trail between the scenic outlook and Brinton Brook Sanctuary.¹³ It would remove extensive amounts of vegetation in the area of construction. Millennium intends to build gravel access roads that would cross and permanently scar the Highland Trail. The attached trail map has been marked to identify the area affected by the ConEd Offset/Taconic Alternative. Unless the trail can be reestablished in the same area, a crucial link in Croton's trail system will be broken. Furthermore, the loss of vegetation will negatively impact trail maintenance and enjoyment.

In addition, these networks of trails will be part of the New York State Hudson River Valley Greenway ("HRVG") trail system. The HRVG is a state-sponsored program with the stated mission to "preserve, enhance . . . natural, historic, cultural and recreational resources of the Hudson River Valley. . . ." Millennium has proposed trail crossings and the use of portions of trails for the pipeline route, but Millennium has not adequately addressed the long-term impact of the project to these trails, the nature of potential future limitations on trail uses due to the presence of the pipeline, and the apparent conflict with the established mission of the HRVG. Therefore, because the ConEd Offset/Taconic Alternative does not protect or enhance Croton's trails and walkways, and it does not address issues such as the pipeline's long-term impact on the trails, Millennium's proposal is not consistent with the LWRP.

¹³ The Pipeline's construction will also impact the trails located in the Arboretum, thus limiting public access through the Arboretum. *See* Arboretum Section, above.

8. Steep Slopes And Erosion

Findings and Recommendations

The WAC has determined that the ConEd Offset/Taconic Alternative's route through the northern section of the Village is not consistent with LWRP Policies 7F and 37B, and recommends that NYSDOS find the Pipeline not consistent with the LWRP and/or the CMP in this respect. The WAC also finds that Millennium's proposed mitigation measures would not render this proposed route consistent with such policies, and the WAC therefore believes that the use of an alternative route is necessary.

Discussion

The proposed pipeline would run through the northern sections of the Village, which is marked by rugged rock formations, hills, and steep slopes. In the SDEIS, the FERC noted the ruggedness of the terrain and stated that it would require a wider right-of-way and that constructing the Pipeline through the Village would possibly require substantial blasting along the route.¹⁴ Millennium listed eight portions of the route that it knows with certainty will require blasting because they "are too steep for the rock-trencher," and stated that "the area surrounding the Croton River . . . is also too steep for the rock-trencher." SDEIS, at 6-15.

LWRP Policies 7F, 37B. Millennium's proposal is not consistent with LWRP Policy 7F, which limits construction activities in steep slopes areas, and requires that any such construction not cause a measurable increase in erosion. LWRP, at III-11. LWRP Policy 37B also requires that any construction activity on hilltops and steep slopes minimize runoff and flooding to the maximum extent practicable. LWRP, at III-44. In addition, the Village has enacted a Steep Slopes Law, which provides that "new construction shall avoid areas that contain steep slopes . . . and existing vegetation in such areas shall not be disturbed." Local Law No. 6 of 1989. This Law was enacted in order to implement and enforce the policies set forth in the Village's LWRP.

The WAC and many private landowners located along the ConEd right-of-way are concerned that construction of the pipeline, in particular the blasting operations, may cause serious damage to water wells, residences, structures, and trails, and may destabilize the local geology and increase the risk of erosion and landslides, particularly in the rugged and steep area along the ConEd right-of-way and the Croton River gorge. Millennium states in a Response to the FERC that due to the complexity of the terrain, it "cannot determine exactly where blasting would be required," but offers to "conduct pre- and post-blast structural inspections of any

¹⁴ Millennium Response to April 16, 2001 FERC Staff Data Request (cover letter from Sidley & Austin dated May 8, 2001).

residential structures within 150 feet of the blast area." Millennium Response to FERC Staff Data Request (May 8, 2001). Such a *post hoc* approach to an activity with such potentially serious impacts is simply unacceptable. Millennium must identify these areas in advance and provide a full assessment of the impacts that blasting and other construction activities will have on the steep slopes of the Village.

9. Dioxin Contamination on ConEd Right-of-way

Between 1959 and 1979, ConEd reportedly applied an herbicide containing the two main ingredients of Agent Orange, 2,4-D and the now-banned 2,4,5-T, to control vegetation along the ConEd right-of-way, portions of which would be used for the Pipeline. ConEd continues to spray the right-of-way with herbicides containing 2,4-D. Of primary concern is the fact that 2,4,5-T is known to have contained amounts of 2,3,7,8-TCDD, or dioxin, a highly toxic chemical compound and a recognized carcinogen. This presents a risk that dioxin, 2,4,5-T or other toxic substances could be present in the soils in the right-of-way, and could be unearthed and released into the environment during pipeline construction activities, and could enter surface waters in the Arboretum.

On June 15, 2001, Millennium submitted Reply Comments to the FERC, attached to which was an affidavit by a consultant retained by Millennium to conduct an assessment of this issue.¹⁵ The affidavit explains that: (1) the consultant collected soil samples along the ConEd right-of-way, and is having them analyzed for herbicide residuals, and (2) based on certain assumptions the consultant made, the consultant calculated the total concentration of dioxin that could be possibly be present as no more than 1 part per trillion (ppt), and concluded that such levels would not present any risk. *See Id.*

First, the WAC is perplexed to learn that ConEd is running tests for herbicide residuals only, not dioxins, the contaminants with which the Village residents are most concerned. Second, the WAC has grave concerns about the validity of the calculation that forms the basis of the "no risk" conclusion proffered by Millennium's consultant. The OBG Report points out a number of serious flaws in the underlying assumptions made by the consultant in calculating the potential dioxin concentration. The most striking example is that Millennium's consultant used a 1-year half life for dioxin; in fact, scientific materials referenced by the OBG Report indicate that dioxin's actual half life is expected to be between 9 - 15 years in surface soils, and between 25 - 100 years in subsurface soils. Based on revised assumptions, including the use of a relatively conservative "average" half life of 20 years (based on a mixture of surface and subsurface soils), the OBG Report concludes that the concentration of dioxin could be as

¹⁵ Reply Comments of Millennium Pipeline Company, L.P. Regarding Environmental Issues, FERC Docket No. CP98-150-002 (June 15, 2001) ("Reply Comments"). The affidavit is attached as Attachment A.

high as 120 ppt, a concentration which is well over levels of regulatory concern. OBG Report, at 62, 63.

The Village is in the process of conducting its own sampling at locations adjacent to the ConEd right-of-way, but on Village property (on June 7, 2001, the Village requested access from ConEd to test soils within the right-of-way, but as of the date of these Findings, ConEd, not surprisingly, has not responded to the Village's request). If significant levels of dioxins are detected, the WAC believes that concerns may arise under LWRP Policies 8, 36, 37, and possibly others. Policy 8, for example, requires the protection of fish and wildlife in the coastal area "from the introduction of hazardous wastes and other pollutants which bio-accumulate in the food chain or cause significant sublethal or lethal effect on those resources." LWRP, at III-14.

III. Conclusion

For the reasons stated above and in the OBG Report, the WAC finds that the proposed Pipeline is not consistent with the Village's LWRP, and recommends that NYSDOS deny Millennium's consistency certification.