



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

July 17, 2002

Neil L. Levy
Christian C. Semonsen
Kirkland & Ellis
655 Fifteenth St. NW
Suite 1200
Washington, D.C. 20005

Re: Consistency Appeal of Millennium Pipeline Company, L.P.
to the U.S. Secretary of Commerce pursuant to the Coastal
Zone Management Act, 16 U.S.C. § 1456

Dear Mr. Levy:

Thank you for your letter of June 21, 2002, to Karl D. Gleaves, Assistant General Counsel for Ocean Services, on behalf of the Village of Croton-on-Hudson (Village) requesting status as a "party co-defendant" or "intervenor," requesting a public hearing, and requesting a 60 day comment period in the above captioned CZMA consistency appeal.

On July 8, and July 9, 2002, comments were received on the Village's requests from Millennium Pipeline Company, L.P. (Appellant or Millennium) and the New York Department of State (New York) respectively. For reasons explained below, your request is granted for a 60 day public comment period. Further, the Village is granted the opportunity to participate in the above-captioned consistency appeal as an *amicus* or friend of the Secretary. The Village may file briefs and supplemental information in accordance with the briefing schedule, in addition to comments it may submit during the public comment period. The Village is not allowed to be a "party co-defendant" or "intervenor" in this matter.

Request for Intervention as a Party

The Village seeks to participate in this consistency appeal as a party co-defendant or intervenor in a manner recognizing "full participation" in all appeal proceedings, including procedural teleconferences among the parties. The Village argues that the granting of such "party co-defendant" status, or "intervenor" status, is consistent with NOAA's practice in the Consistency Appeal of Virginia Electric and Power Company (1994)(VEPCO appeal).¹ Both the facts and the procedure in the VEPCO appeal were different than those in this case. The Village is not correct.

¹Letter dated June 21, 2002, from Neil L. Levy to Karl Gleaves concerning the Proposed
Requests of the Village of Croton-on-Hudson at 1-2.



In the VEPCO appeal, the appellant acted on behalf of the City of Virginia Beach (City) which was the entity to whom Virginia Electric and Power company (VEPCO) had granted an easement for construction of pipelines for a municipal water project over its lands abutting Lake Gaston. In order to complete the easement transaction sought by the City, VEPCO was required to obtain the permission of the Federal Energy Regulatory Commission (FERC) which licensed VEPCO's operation of the hydroelectric facility at Lake Gaston. VEPCO sought the permission "on behalf of" the City. The City and VEPCO submitted a joint consistency certification to FERC and a joint Notice of Appeal to the Secretary of Commerce after North Carolina's objection.² Throughout the appeal, VEPCO "acted on behalf of" the City which was the intended beneficiary of the FERC approval and at all times during the appeal, the real party in interest. In granting the City "applicant-intervenor" status, NOAA relied on the City's status as the beneficiary of VEPCO's permit application and the real party in interest.³ In addition, VEPCO represented that it "intends to remain neutral" in the "dispute" between North Carolina and Virginia.⁴ NOAA concluded that VEPCO had no real interest in the issuance of the FERC license for its own use or benefit.⁵ NOAA stated that the critical factor in allowing the City to participate as if it were an appellant was the potential that VEPCO may not adequately represent the interests of the City in the appeal.⁶ In a CZMA consistency appeal, NOAA has never granted "intervenor" or "party" status on any entity other than an applicant, or the applicant acting jointly with the beneficiary or real party in interest of the Federal license or permit application. The Village is neither an applicant nor a beneficiary of an application for license or permit.

The Village also urges it should be granted intervenor status because its Local Waterfront Revitalization Program (LWRP) formed, in part, the basis of New York's objection to Millennium's project. The Village asserts that it is the governmental entity primarily responsible for the implementation and interpretation of issues arising under the LWRP and the enforceable policies of the LWRP.⁷ For the purposes of federal law and section 307 of the CZMA, the New York Department of State is the entity responsible for implementation of New York's CZMA consistency authorities.

² Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company from an Objection by the North Carolina Department of the Environment, Health and Natural Resources, May 19, 1994, 1-6.

³ See, VEPCO Adm Rec 80, Letter of Ray Kammer, Deputy Under Secretary for Oceans and Atmosphere, to Arnold H. Quint, dated April 3, 1992.

⁴ Id. at 6.

⁵ Id at 4.

⁶ Id at 6.

⁷ Id.

The New York Department of State is the governmental entity with exclusive authority to implement and interpret the enforceable policies of New York's federally approved coastal management program. The New York Department of State is the state agency with the exclusive authority to respond to CZMA consistency determinations pursuant to section 307(c)(1) and consistency certifications under section 307(c)(3). See, 15 CFR 930.18(b). Finally, the New York Department of State is the only entity that could bring its concerns, interests and potential injuries within the zone of interests of the CZMA to challenge a Federal agency's consistency determination or other aspects of CZMA compliance. City of Sausalito v. O'Neill, 2002 WL 1460218, 2002 U.S. Dist. LEXIS 12322, No. C - 01-01819 EDL (N.D.CA July 3, 2002) at 13; Serrano Lopez v. Cooper, 193 F.Supp.2d 424,434, 2002 U.S. Dist. LEXIS 6901, (D.P.R. 2002); City of Lincoln City v. USDOJ and Confederated Tribes of Siletz Indians of Oregon, 2001 U.S. Dist. LEXIS 9865, Civil No. 99-330-AS (D.OR April 23, 2001)10-14. Only the designated state coastal management agency has standing to assert the rights conferred under the CZMA. In sum, the views of the Village do not carry the weight of a state agency charged with the implementation of New York's coastal program as approved by NOAA. While the Village's views are important, as are the views of all persons commenting on a consistency appeal, only the New York Department of State has standing under the CZMA to interpret and enforce the policies of New York's coastal zone management program.

In recognition of the Village's unique access to information which may be relevant to the development of the administrative record and helpful to the Secretary in making his decision in this consistency appeal, the Village may act as a "friend of the Secretary" or *amicus* in this proceeding and may file a brief and supplementary data and information concurrently or no later than seven days following the filing of the brief of the party the Village supports. *Amicus* status is identical to NOAA's decision to allow the North Slope Borough and Alaska Eskimo Whaling Commission to "participate by filing briefs on the issues germane to" the Consistency Appeal of Amoco Production Company (1990).⁸ The Amoco consistency appeal involved issues of the fall bowhead whale migration which were of vital cultural and economic interest to the North Slope Borough and Alaska Eskimo Whaling Commission.⁹ In Amoco, as in this appeal, the unique perspectives and access to information of the requesting parties warranted additional opportunities to contribute information to the administrative record and participate as an *amicus* to the Secretary. The Village has identified its unique access to information that may be of use to the Secretary in deciding this appeal and is therefore granted status as an *amicus* in this proceeding.

A briefing schedule has been set by the Assistant General Counsel for Ocean Services directing that Millennium's brief be filed no later than Monday, August 12, 2002, and New York's brief be

⁸ See, Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska, July 20, 1990, at ii.

⁹ *Id.*

filed no later than Monday, September 30, 2002. The Village may also file comments during the public comment period if it so chooses, as it would be entitled to do so were it not acting in an *amicus* capacity. If it chooses, the Village may seek subsequent permission to file a reply brief as an *amicus* when the time is appropriate. Since it is not a party the Village will not participate in conferences among the parties or be copied on future communications among the parties. Its access to the administrative record as compiled will be the same as all members of the public. This office intends to have a website available which will post all of the documents entered into the record. The website should facilitate the participation of the Village in this consistency appeal.

Request for 60 day Public Comment Period

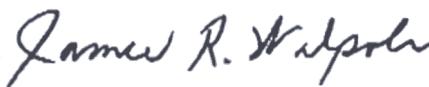
The Village has requested a 60 day public comment period because the issues presented in this appeal are unusually complex and may entail the development of a voluminous record.¹⁰ The 60 day public comment period is hereby granted and will run concurrently with the Federal agency comment period provided for in 15 CFR 930.128(c). However, if warranted, the public comment period may be extended or reopened.

Request for a Public Hearing

The Village has also requested a public hearing pursuant to 15 CFR 930.128 (e).¹¹ The decision to hold a public hearing is delegated from the Secretary to the Under Secretary for Oceans and Atmosphere. The request from the Village has been forwarded to the Under Secretary Vice Admiral Conrad C. Lautenbacher for decision.

If you have any questions concerning this decision or other aspects of this consistency appeal, please contact Karl D. Gleaves, Assistant General Counsel for Ocean Services, 301-713-2967 ext. 204.

Sincerely yours,



James R. Walpole
General Counsel

¹⁰ Letter dated June 21, 2002, from Neil L. Levy to Karl Gleaves concerning the Procedural Requests of the Village of Croton-on-Hudson at 6.

¹¹Id. at 6-7.

cc: **Frederic Berner**
Sidley Austin Brown & Wood

Glen T. Bruening, General Counsel
New York Department of State