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October 16, 2002

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1305 East-West Highway, Room 6111
Silver Spring, Maryland 20910

RE: Federal Consistency Appeal by Millennium Pipeline Company From an
Objection by the New York Department of State

Dear Ms. Holt:

Pursuant to the July 12, 2002 and September 26, 2002 letters from Karl D. Gleaves, Esq.
in this matter, please find enclosed the initial brief of the New York Department of State.

An additional copy is being forwarded to you, Millennium, the City of New York, Village
of Croton-on-Hudson, and the Town of Cortlandt.

Thank you for your assistance.

Sincerely,

Glen Bruening
General Counsel

Enclosure

cc: Frederic G. Berner, Jr., Esq.
Mark P. McIntyre, Esq.
Neil L. Levy, Esq.
Daniel Riesel, Esq.

**UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

**Federal Consistency Appeal
by Millennium Pipeline Company
From an Objection by the
New York Department of State**

**Initial Brief and
Supporting Information and Data
of the New York Department of State**

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October 16, 2002

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PRELIMINARY STATEMENT

On May 9, 2002, the New York State Department of State (DOS or Department) issued an objection to the consistency certification for the Millennium Pipeline project proposed by the Millennium Pipeline Company, L.P. Pursuant to the Federal Coastal Zone Management Act (CZMA; 16 USC §§ 1451 et seq.) and Federal implementing regulations (15 CFR Part 930 (2000)), DOS determined that the project, as currently proposed, was not consistent with the New York State Coastal Management Program, for three reasons. First, the proposed pipeline route would excavate 2.1 miles of Hudson River bottom in one of the most significant coastal fish and wildlife habitats in the northeastern United States. Second, the route crosses the fragile Bryn Mawr Siphon of the Catskill Aqueduct which supplies 40% of the daily drinking water supply for nearly 9 million people within and outside the City of New York. Third, the proposed pipeline route traverses the well-field of the Village of Croton-on-Hudson's primary domestic water supply.

The objection is the result of poor siting and planning for the proposed pipeline route. It most surely is not about the desirability of new supplies of natural gas, as the State endorses that objective and has worked hard to ensure that adequate capacity continues to exist in the State. Indeed, there are numerous pipeline projects in various stages of development, and DOS has previously found properly sited projects consistent with the New York Coastal Management Program. DOS continues to provide assistance to companies and other members of the public interested in pipeline projects and the role of the State's Coastal Management Program. Moreover, there are a number of reasonable, available and feasible alternatives that would

accomplish the goals of the project in a manner consistent with the State program.

Millennium has appealed the DOS objection to the United States Secretary of Commerce. Millennium requests the Secretary to override the State's consistency objection on a procedural ground, relating to timing of the objection, as well as on the substantive grounds set forth in Federal regulations. The Department of State respectfully submits its initial brief in this matter and requests the Secretary to reject Millennium's appeal in its entirety.

Appellant is not entitled to relief on the procedural ground because DOS and Millennium entered into an agreement to extend the six-month review period, within which the DOS objection was timely made. Appellant is also not entitled to relief on the substantive grounds because the project is neither consistent with the objectives or purposes of the CZMA, nor necessary in the interest of national security.

ARGUMENT

I.

THE DOS OBJECTION WAS TIMELY BECAUSE IT WAS RENDERED WITHIN THE TIME PERIOD AGREED UPON BY DOS AND MILLENNIUM

The six-month review period for this project commenced on March 12, 2001, and was extended by agreement between DOS and Millennium. That agreement provided for an additional 60 days, but also contemplated additional time to address changes to the project, which was still evolving at that time. A further significant project change requiring additional review by DOS and the Federal agencies was introduced by Millennium. DOS issued its objection on May 9, 2002, only 16 days following receipt of the necessary information from

Millennium.¹ Therefore, the DOS objection should be sustained as timely, and Millennium's appeal on the basis that the objection was untimely should be rejected.

A.
The Six-month Review Period
Commenced on March 12, 2001

Pursuant to NOAA regulations, the State agency must concur with or object to a consistency certification at the earliest practicable time, and concurrence will be "conclusively presumed" if not made "within six months following commencement of State agency review." 15 C.F.R. § 930.62(a). Such regulations also provide that:

...State agency review of an applicant's consistency certification begins at the time the State agency receives a copy of the consistency certification, and the information and data required pursuant to § 930.58.

15 C.F.R. § 930.60(a)(emphasis added). The necessary data and information to be supplied by the applicant includes a copy of the application to the Federal agency, a detailed description of the proposed project, a brief assessment of the probable coastal zone effects of the action and its associated facilities, and a set of findings indicating that the action is consistent with the coastal management program. 15 C.F.R. § 930.58(a)(1). A state agency may also require the submission of such data and information as is specified in its coastal management program. 15 C.F.R. § 930.58(a)(2). Failure to provide the necessary data and information will delay commencement of review. 15 C.F.R. § 930.60(a)(1).

The New York Coastal Management Program contains an informational requirement for

¹Exhibit 1. Letter from George R. Stafford, Director, Division of Coastal Resources, DOS to Thomas S. West (May 9, 2002).

activities requiring federal agency authorizations. It states:

...whenever possible, the Department of State will base its consistency determination on documents normally required for compliance with Federal regulations or approval. Generally, these will include environmental impact statements, and assessments, applications for Federal permits and licenses, Federal grant applications, and supporting information.

NOAA, State of New York Coastal Management Program and Final Environmental Impact Statement, at II-9-13 (August 1982)(emphasis added). Therefore, the Department of State ordinarily commences consistency review upon receipt of the final environmental impact statement (FEIS) when one is prepared by or for a federal agency.²

Nevertheless, the Department exercised its discretion to commence consistency review earlier than usual for the Millennium project, and Millennium did not object. Indeed, on April 5, 2001, DOS notified Millennium that DOS commenced consistency review “upon receipt of the Supplemental Draft Environmental Impact Statement (SDEIS) 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.”³

DOS received the SDEIS on March 12, 2001.⁴ Therefore, the six-month review period commenced on March 12, 2001, pursuant to 15 C.F.R. § 930.62. DOS’s discretion to commence

²Exhibit 2. Letter from Joseph A. Uravitch, Chief, Coastal Programs Division, NOAA to William L. Sharp, Principal Attorney, DOS, at 4 (May 17, 2000): “The State of New York has consistently interpreted this section to mean that applicable Final EISs are ‘necessary data and information...’”

³Exhibit 3 (emphasis added). Letter from William F. Barton, Assistant Director, Division of Coastal Resources, DOS to Thomas S. West (April 5, 2001).

⁴Id.

its review earlier than upon receipt of the FEIS is consistent with the requirement for a concurrence or objection at “the earliest practicable time” pursuant to 15 C.F.R. § 930.62. Such discretion has also been recognized by NOAA.⁵ In its brief, Millennium concedes that “Millennium in this appeal will not challenge the timeliness of the NYSDOS’ objection on this ground...”⁶

B.
DOS and Millennium Agreed
To Extend the Six-month Review Period

Following commencement of the consistency review, Millennium significantly changed the route of its pipeline in the coastal area, raising significant new concerns. For example, the New York Attorney General expressed concern over the changes and their potential for adverse

⁵Letter from John A. Knauss, Undersecretary for Oceans and Atmosphere, NOAA to Jeffrey R. Benoit, Director, Coastal Zone Management, Massachusetts Executive Office of Environmental Affairs (January 24, 1992) (Consistency Appeal of Eugene J. Dean). In that case, the State of Massachusetts commenced its consistency review of an applicant’s consistency certification to fill 36,000 square feet of wetlands prior to receipt of a final decision on a Massachusetts Environmental Protections Act (MEPA) permit. Undersecretary for Oceans and Atmosphere John A. Knauss ruled that, “...despite the lack of MEPA review the State was able to assess the consistency of the Appellant’s proposed project.” Dean at 2.

⁶Initial Brief of Millennium Pipeline Company, L.P, Federal Consistency Appeal by Millennium Pipeline Company From an Objection by the New York Department of State at 13 (August 12, 2002). Earlier in its brief (at 11), Millennium purports to argue that the six-month review period commenced on November 20, 1998 when it submitted its bare consistency certification. Apparently recognizing the spurious nature of its argument, Millennium concedes that “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’” (citations omitted).

environmental impact on the New York City water supply that serves nearly 9 million people both within and without the city.⁷ It became apparent to DOS that the SDEIS did not address all relevant coastal concerns, as had been anticipated. Moreover, the SDEIS was deficient in addressing alternatives to the destruction of significant coastal habitat. So extensive were the route modifications following commencement of review that, on July 26, 2001, Millennium submitted an amended consistency certification and analysis detailing its new Con Ed Offset/Taconic Parkway route. The environmental aspects of this new route required a new, thorough analysis. A major revision of the SDEIS data was undertaken for the FEIS, which was not expected to be issued until October 2001

Just days before the September 13 expiration of the six-month review period, and following discussions with DOS that its activity would be found inconsistent with the CMP for lack of information, Millennium requested DOS to extend the six-month review period to avoid an objection to Millennium's consistency determination at that time. In a draft letter to DOS, Millennium proposed that:

DOS will use its best efforts to determine consistency of the referenced project promptly (30 to 60 days) following issuance of the Final Environmental Impact Statement for the project by the Federal Energy Regulatory Commission.⁸

⁷Exhibit 4. Comments of the New York Attorney General Concerning Adverse Environmental Impacts of the "ConEd Offset/Taconic Alternative" Pipeline Route on the New York City Drinking Water Watershed", submitted in the application of Millennium Pipeline Company, L.P. to the Federal Energy Regulatory Commission (Sept. 4, 2001).

⁸Exhibit 5. Draft letter from Thomas S. West to William Barton (September 10, 2001). Millennium incorrectly states that DOS requested the extension of the six month period. (Millennium's Initial Brief at pp. 9, 11 and 14.) DOS was fully prepared to render an objection within the six month period.

The flexibility inherent in that proposal merely reflects the fact that the project was still evolving. On September 12, 2001, Millennium sent DOS a signed extension proposal with even more flexibility in that it provided only that:

DOS will determine consistency of the referenced project after issuance of the Final Environmental Impact Statement for the project by the Federal Energy Regulatory Commission.⁹

This request was made by Millennium in anticipation of the imminent release of the FERC FEIS containing new routes and other matters of coastal concern. In light of these significant changes, and in an effort to avoid an objection, it is no wonder that Millennium proposed an extension of the six-month review period without a specific time frame. Having received the benefit of that extension, Millennium should not now be allowed to disavow it.

The DOS reply accepting the extension of the six-month review period was sent that same day. Concerned about the potential for project changes anticipated in the FEIS, and the need for a thorough evaluation, DOS accepted the extension of the six-month review period and provided that

The Department of State acknowledges the receipt of your letter dated September 12, 2001 and agrees to extend the time period for its review of the above referenced project for consistency with the New York State Coastal Management Program. The Department expects to complete its consistency review within 30 to 60 days after receipt of the Final Environmental Impact Statement on the proposed project, barring any significant pipeline routing or other project changes that may have effects upon the coastal zone of New York State. (Emphasis added.)¹⁰

⁹Exhibit 6. Letter from Thomas S. West to William Barton (September 12, 2001).

¹⁰Exhibit 7. Letter from William F. Barton, Assistant Director, Division of Coastal Resources, DOS to Thomas S. West (September 12, 2001).

NOAA regulations authorize DOS and Millennium to extend the six-month period of review. Specifically, 15 C.F.R. § 930.60(a)(3) provides that: “State agencies and applicants (and persons under subpart E of this part) may mutually agree to stay the consistency time clock or extend the six-month review period.” The exchange of letters between Millennium and DOS demonstrate clearly that DOS and Millennium mutually agreed to extend the six-month review period.¹¹

The DOS letter of September 12, 2001 accepting the extension of the six-month review period attempted to balance the need for flexibility with the need for a more definite time frame. Thus, DOS set an expectation of 30 to 60 days after the FEIS in which it expected to complete its review, with the recognition that significant changes in the project or FEIS could necessitate the need for additional time. Although conceding the agreement, Millennium now attempts an after-the-fact revision to it. Millennium now claims that the agreement did not contemplate the potential for time beyond the 30 to 60-day period.¹² Millennium’s position ignores both the terms of the extension and the context within which the extension was made. Because the agreement was deliberately flexible for the benefit of Millennium in light of expected project changes, Millennium should not be allowed to disregard it. Moreover, NOAA regulations specifically provide that:

A Federal agency shall not presume State agency concurrence with an activity where such an agreement exists or where a State agency's review

¹¹Millennium concedes that there was an agreement. Initial Brief of Millennium Pipeline Company, L.P. at 14.

¹²Initial Brief of Millennium Pipeline Company, L.P. at 16-17. Millennium argues that DOS sought to unilaterally stop the consistency time clock. It is clear from the record, however, that Millennium is instead trying to unilaterally revise its agreement.

period, under paragraph (a)(1)(i) of this section, has not begun.

15 C.F.R. § 930.60(a)(3). Therefore, effect should be given to the entire agreement as set forth in the DOS letter of September 12, 2002.

C.

**DOS Did Not Exceed the Review Period
Under the Agreement Because
Significant Project Changes Were Identified**

DOS received the FEIS on October 5, 2001. In keeping with its part of the agreement to extend the six-month review period, DOS notified David Boergers, Secretary of the Federal Energy Regulatory Commission (FERC), that “the Department expects to expeditiously complete its review of the FEIS and notify FERC, the Corps of Engineers and the Millennium Pipeline Company of its consistency decision.”¹³

However, on October 11, 2001, Millennium submitted to the Corps of Engineers a draft of the Millennium Pipeline Environmental Compliance Management Program that contained new project information related to underwater “blasting” in the Hudson River. Unfortunately, Millennium failed to notify DOS of its revised plans. Rather, DOS learned of Millennium’s plans for blasting indirectly from the Army Corps of Engineers on November 27, 2001. After learning of the new development DOS immediately attempted to obtain further information from the Corps, but none was available.

In its brief, Millennium attempts to downplay the significance of this development, and

¹³Exhibit 8. Letter from William F. Barton to David Boergers, Secretary, FERC (October 11, 2001).

claims that its new blasting plans did not constitute a project change under the agreement.¹⁴

Millennium also claims that the potential need for blasting was mentioned in an early FERC data request. Contrary to Millennium's assertions, the involved Federal agencies and DOS quickly recognized the significance of the change and, particularly, the fact that no environmental review had been conducted on the blasting plans. In particular, the plans Millennium filed with the Corps of Engineers and FERC, upon which the consistency review was predicated, did not specify blasting in Haverstraw Bay. Moreover, the environmental impact statement prepared for this project failed to contain a description or analysis of blasting in the sensitive State-designated Haverstraw Bay Significant Coastal Fish and Wildlife Habitat (SCFWH).

Because Millennium was not forthcoming with details, the Corps of Engineers was compelled to write Millennium requesting information and, in so doing, stated

On October 11, 2001, we received your submittal of the second draft of the Millennium Pipeline Environmental Compliance Management Program for review. In the transmittal sheet forwarding the plan to this office, you confirmed that in order to install the proposed pipeline you would now need to include blasting the eastern-most 400 feet of the Hudson River crossing. In light of this new project information, and because there is no information in the Final Environmental Impact Statement describing blasting in the Hudson River, we are requesting that the following information be provided within 30 days of the date of this letter:

- 1) A complete description of the proposed blasting plan;
- 2) The need for the blasting;
- 3) The locations and results of any borings that were taken which confirm the need for blasting;
- 4) A detailed description of the possible alternatives to blasting;
- 5) An assessment of water quality impacts that may result from the blasting;
- 6) An assessment of potential impacts to fish and wildlife; and
- 7) The time of year when you propose to undertake this blasting.

¹⁴Initial Brief of Millennium Pipeline Company, L.P. at 17.

Since this information affects the processing of your application we recommend that you provide a copy of this information to ... Department of State.¹⁵

Similarly, FERC determined that blasting constituted a change in the project requiring additional consideration, and provided in its Interim Order that:

Since Millennium's notification to the COE that it may have to blast in the Hudson River is new information, Millennium will have to re-enter into consultation with the NYSDEC and the NMFS. ... The potential blasting will also affect the ongoing permitting process for the COE (section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act) and the New York State Department of State (NYSDOS).¹⁶

Subsequently, the National Marine Fisheries Service (NMFS) advised FERC of Millennium's project change and the significant lack of adequate information:

[Millennium] now proposes to fracture the rock [in Haverstraw Bay] with blasting techniques and to remove consolidated material by mechanical means to obtain the necessary cover depth in this pipeline reach....we note that for the Haverstraw Bay Hudson River crossing the technique was not mentioned or discussed in the FERC final environmental impact statement (FEIS), the biological assessment used in the Endangered Species Act (ESA) Section 7 consultation, and the essential fish habitat (EFH) assessment. Nor are assessments for blasting and related activities analyzed and evaluated. In that this new project description modifies the project description, it needs to be given sufficient consideration in these documents.¹⁷

Consistent with its agreement with Millennium regarding the six-month review period, DOS likewise notified Millennium that it had become aware of the change in plans regarding

¹⁵Exhibit 9. Letter from George Nieves, Chief, Western Permits Section, USACOE to Richard E. Hall, Jr. (December 11, 2001).

¹⁶Millennium Pipeline Company, L.P., Interim Order, 97 FERC ¶ 61,292 at 62,332 (December 19, 2001).

¹⁷Exhibit 10. Letter from Patricia A. Kurkul, Regional Administrator, NMFS to Magalie Roman Salas, Secretary, FERC (February 15, 2002).

blasting in the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, and requested the necessary information that had been requested by the Federal agencies in order to complete its consistency review.¹⁸ DOS further advised Millennium that the change was the kind of change that would require additional review time as contemplated by the agreement to extend the six-month review period, that blasting may have adverse effects on the sensitive coastal environment, and that absent the necessary information, DOS must find the proposed pipeline inconsistent.¹⁹

Blasting in Haverstraw Bay is a project change that would have effects upon the coastal zone of New York State. Millennium alone made the project change and therefore triggered the need for additional review by DOS pursuant to its agreement regarding the six-month review period. Indeed, it was exactly for this type of situation that the Department agreed to the conditional review time in its September 12, 2001 letter. Millennium's attempt to minimize this issue is disingenuous and not supported by the record.

D.
The DOS Objection Was Made
At the Earliest Practicable Time
After Receipt of the Necessary Information

The DOS request for the additional information, supported by the Federal agencies, was entirely appropriate, as was the DOS position that additional time would be needed to review it. Specific information was needed pertaining to Millennium's blasting and mitigation plans, the

¹⁸Exhibit 11. Letter from William F. Barton to Thomas S. West (December 14, 2001).

¹⁹Id.

potential impacts of various agents including shock waves, noise, disturbance and other discharges, and environmental analyses of expected impacts on this particular habitat (characterized by extensive and productive shallow areas). Millennium retained complete control over the blasting information and the timing of its submission to the Federal agencies and DOS.

While Millennium maintained that the blasting information did not constitute a project change (triggering additional review time beyond the 60 days), contrary to the position of all the regulatory agencies²⁰, it continued to act consistent with an agreement to extend the six-month review time. Millennium even argued that blasting might actually constitute a minor benefit over full trenching.²¹ In so doing, Millennium underscores the need for a thorough review

Subsequently, in its letter to DOS of March 14, 2002, Millennium urged DOS to ignore the need for a blasting plan and conclude its consistency review, but provided that

Millennium, nevertheless, recognizes that the possible need for a limited amount of blasting in the Hudson River was not addressed until recently in Millennium's submissions to DOS, regrets that oversight, and renews its commitment to provide DOS with full and complete information on all aspects of the Millennium Project that are subject to review by DOS. ...Millennium recognizes that the DOS must ultimately decide the consistency of the Millennium Project with the CMP policies... Millennium respectfully requests that the DOS promptly complete its review of the Millennium Project and conclude that the Project is consistent with all applicable CMP policies.²²

²⁰Exhibit 10. For example, on March 8, 2002, DOS received copies of correspondence to FERC from the National Marine Fisheries Service indicating that project review had been reinitiated due to the potential effect of blasting in Haverstraw Bay on federally endangered species and essential fish habitats. NMFS requested coordination with FERC to analyze the potential effects.

²¹Exhibit 12. Letter from Thomas S. West to William F. Barton (January 25, 2002).

²²Exhibit 13. Letter from Thomas S. West to George Stafford (March 14, 2002).

Thus even at this date, Millennium continued to seek the benefit of the agreement to extend the six-month period, that is, the avoidance of an objection for lack of necessary information.

However, it was not until April 23, 2002 that Millennium provided to the DOS the Blasting and Mitigation Plan and the Impact Assessment and Mitigation Plan for blasting on the Millennium Pipeline in Haverstraw Bay. DOS rendered its decision on May 9, 2002, a mere 16 calendar days after receiving the plans.

While Millennium now argues that DOS sought to unilaterally “restart” the consistency time clock with its request for blasting information, it is clear that DOS was simply acting in accordance with the agreement it had with Millennium to extend the six-month review period. Indeed, Millennium was the primary beneficiary of the extension agreement. Millennium should not now be allowed to disavow that agreement after Millennium alone triggered the need for necessary information by introducing a major project change that had not been evaluated in the environmental impact statement or Millennium’s consistency certification. While the project change was identified during the 30 to 60-day period set forth in the agreement, no substantive information was provided by Millennium to allow the change to be considered by DOS until April 23, 2002. DOS then made its decision 16 days later. Moreover, Millennium was aware that, had it not been for its agreement with Millennium, DOS would have determined the project inconsistent for lack of necessary information.

Because DOS and Millennium mutually agreed to extend the six-month review period, and DOS acted within the scope of the agreement in requesting necessary information on blasting, and DOS issued its objection to Millennium’s consistency certification within 16 days

of receipt of the necessary information, the DOS objection to consistency should be sustained as timely, and Millennium's request that consistency be conclusively presumed should be rejected.

**II.
ALTERNATIVELY, THE SIX-MONTH REVIEW PERIOD
EXPIRES ON OCTOBER 23, 2002 AND THEREFORE
THE DOS OBJECTION WAS TIMELY**

If the Secretary finds that the six-month review period did not commence on March 12, 2001, or that DOS and Millennium did not have an agreement to extend such period, thereby allowing DOS to render its objection on May 9, 2002 in a timely manner (Argument I above), then the Secretary should find the six-month review period to have commenced on April 23, 2002, with the DOS receipt of the blasting information. The detonation of explosives in the sensitive Haverstraw Bay Significant Coastal Fish and Wildlife Habitat alone would be sufficient to require a new, full consistency review. Since blasting was not part of the project until April 23, 2002, DOS could not review it for consistency. Accordingly, the six-month review period would expire on October 23, 2002.

Nevertheless, DOS issued its objection on May 9, 2002, within 16 days of receiving the necessary information, well in advance of October 23, 2002. Therefore, the DOS objection was issued in a timely manner and the Millennium appeal on this point should be rejected.

**III.
ALTERNATIVELY, THE MILLENNIUM PROJECT
WAS FOUND INCONSISTENT ON DECEMBER 14, 2001
AND THE APPEAL BY MILLENNIUM IS NOW UNTIMELY**

While Millennium concedes that it and DOS had an agreement to extend the six-month

review period, Millennium maintains that blasting did not trigger the need for additional time as contemplated by the agreement. Nevertheless, Millennium argues in the alternative that:

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.²³

If the Secretary finds that the six-month review period did not commence on March 12, 2001 or that DOS and Millennium did not have an agreement to extend such period, thereby allowing DOS to render its objection on May 9, 2002 in a timely manner (Argument I above), and if the Secretary does not alternatively find the DOS objection to be timely because it was rendered prior to October 23, 2002 (Argument II above), then the Secretary should dismiss the Millennium appeal as untimely. Under these circumstances, DOS would concur with Millennium that the six-month review period should be deemed to have commenced on October 5, 2001 with the DOS receipt of the FEIS. Under those circumstances, the Secretary should find that DOS objected to consistency on December 14, 2001, as stated in the letter from William Barton to Thomas West.²⁴ Clearly DOS would have objected to the project had there been no agreement on the six-month review period.

Pursuant to 15 C.F.R. § 930.125, a notice of appeal of a State objections must be filed within 30 days of receipt of a State agency objection. Thus the 30-day appeal period expired long before Millennium filed its notice of appeal on June 7, 2002. Consequently, in the alternative, Millennium's appeal should be dismissed as untimely.

²³Initial Brief of Millennium Pipeline Company, L.P. at 18.

²⁴See Exhibit 11

IV
ALTERNATIVELY, MILLENNIUM WITHDREW
ITS CONSISTENCY CERTIFICATION ON MAY 9, 2002

If the Secretary finds that the six-month review period did not commence on March 12, 2001 or that DOS and Millennium did not have an agreement to extend such period, thereby allowing DOS to render its objection on May 9, 2002 in a timely manner (Argument I above), and if the Secretary does not alternatively find the DOS objection to be timely because it was rendered prior to October 23, 2002 (Argument II above), and if the Secretary does not dismiss the Millennium appeal as untimely (Argument III above), then the Secretary should find that Millennium withdrew its consistency certification on May 9, 2002.

Millennium's brief suggests a variety of alternative arguments regarding the commencement of the six-month review period. While the DOS actions to date have been consistent with its agreement with Millennium, Millennium seems eager to abandon that agreement in its brief. Upon receiving unofficial notice that an objection letter would be issued that day, Millennium delivered a letter to DOS on May 9, 2002, purporting to unilaterally terminate any agreement regarding the extension of the six-month review period.²⁵ This unilateral action by Millennium to terminate its agreement with DOS should be treated as a withdrawal of Millennium's consistency certification. Accordingly, Millennium's appeal should be dismissed.

²⁵Exhibit 14. Letter from Thomas S. West to George Stafford (May 9, 2002).

V
**MILLENNIUM IS ESTOPPED FROM ASSERTING
THAT ANY APPLICABLE SIX-MONTH REVIEW
PERIOD HAS EXPIRED**

In March of 2001, DOS received a copy of the SDEIS, a copy of Millennium's "supplemental submission" and the letter from Millennium dated March 23, 2001. Significantly, none of these items discussed blasting in Haverstraw Bay. Indeed, the March 23, 2001 letter extolled the proposed lay barge construction technique as a "low-impact technology," and represented that

. . . the construction through Haverstraw Bay will cause no permanent or long-term loss, destruction or impairment of habitat. There will be no permanent or biologically consequential change in substrate"²⁶

The letter concluded with a request for DOS concurrence regarding consistency; immediately preceding this request was the following representation:

. . . DOS now has all information it needs to proceed with its decision-making concerning the Millennium Project,²⁷

The DOS letter dated April 5, 2001²⁸ referred to the SDEIS, the "supplemental submission" and Millennium's March 23, 2001 letter. DOS clearly relied on those items, and the statements and representations made in those items, when DOS indicated in its April 5, 2001 letter that it had started its review. Clearly, DOS was justified in believing, at that point, that

²⁶ Exhibit 15, Thomas S. West, Esq. letter dated March 23, 2001 to William F. Barton, at 2 and 4 (emphasis in original).

²⁷ Id. at 8.

²⁸ Exhibit 3

blasting was not a component of this project.²⁹

The elements of equitable estoppel are:

(1) words or conduct by the party to be estopped which amounts to a misrepresentation or concealment of material facts;

(2) that party's intention that the other party will act upon this conduct; and

(3) actual or constructive knowledge of the real facts by the party to be estopped.³⁰

The elements of equitable estoppel are clearly established in this case. The materials submitted to DOS in March of 2001 can only be read as indicating that blasting was not a component of this project; Millennium intended (and, indeed, affirmatively requested) DOS to act upon Millennium's words (i.e., Millennium intended, and requested, DOS to commence review); and Millennium knew or should have known that blasting was to be a component of this project, and Millennium knew or should have known that DOS did not have all necessary data and information.

Millennium should not be permitted to evade its obligation under NOAA regulations³¹ to provide all necessary data and information to the State agency. Millennium should not now be

²⁹ Millennium cites a 1999 submission that identifies the Hudson River as a site of "potential" blasting. Clearly, a vague reference to "potential" blasting would fail to satisfy the applicant's obligation, under 15 CFR Section 930.58(a), to furnish all necessary data and information, including "a detailed description of the proposed activity" and "comprehensive data and information sufficient to support the applicant's consistency certification." In any event, any inference that might otherwise be drawn from the vague reference in the 1999 submission is clearly negated by the absence of any discussion of blasting in the March 2001 documents, and by the affirmative statements and representations contained in the March 2001 documents.

³⁰ 57 New York Jurisprudence 2d, Estoppel, Ratification and Wavier, Section 8 (citations omitted).

³¹ 15 CFR Section 930.58(a).

rewarded for its failure to include information regarding blasting in its March, 2001 submissions, and DOS should not now be penalized for the spirit of cooperation evidenced by its agreeing to undertake review at that time. Any such agreement on the part of DOS (and the triggering of any resulting review period) was based on its reasonable assumption, based on Millennium's representations, that DOS then had all necessary data and information. Under the circumstances, Millennium is equitably estopped from asserting, as it now does, that the review period commenced (and, indeed, that the review period terminated) before Millennium provided all necessary data and information regarding all aspects of the project, including blasting.

Even if the review period did commence on March 12, 2001, that review period was extended by agreement on September 12, 2001. Millennium is estopped from now asserting that the introduction of the blasting component of this project was not a project change that continued the extension agreed to on September 12. At all times prior to May 9, 2002 (the date on which DOS issued its objection), Millennium acted in a manner consistent with the continuation of the applicable review period. For example:

- In its letter to DOS dated January 25, 2002,³² Millennium acknowledged Millennium's failure to address blasting in its consistency filings, stated Millennium's "commitment to providing the DOS with full and complete information on all aspects of the Millennium Project that are subject to review by the DOS" (emphasis added) and concluded with an offer to meet and discuss issues ". . . in an effort to complete the Consistency Review process as soon as possible . . ." ³³
- In its letter to DOS dated March 14, 2002,³⁴ Millennium acknowledged that DOS advised

³²Exhibit 12.

³³In this letter, Millennium asserted the possibility that blasting might result in a "minor benefit" (Exhibit 12, paragraph 5, at page 4).

³⁴Exhibit 13.

Millennium that the DOS consistency decision may await receipt by DOS of Millennium's blasting plan, urged DOS to consider issuing its decision prior to receipt of the blasting plan, and concluded with ". . . Millennium respectfully requests that DOS promptly complete its review of the Millennium Project"

- By letter dated April 23, 2002, Millennium submitted the blasting plan and other documents to DOS. In its cover letter,³⁵ Millennium indicated that the submission was made ". . . so that there can be no question that the DOS now has all necessary information to complete its review and render a decision regarding this project." The letter concluded with a request that DOS "complete its review of the Millennium Project"

Thus, Millennium was consistently urging DOS to continue the review process. DOS justifiably believed that the review process was continuing (and indeed it was). DOS personnel expended a great deal of time and effort in continuing to review this project, including review of the new information regarding blasting as provided, on an on-going basis, by Millennium. Millennium now takes the position that the resulting decision should "count" only if Millennium was satisfied with the decision. Having consistently urged DOS to continue its review, Millennium is now equitably estopped from asserting that the resulting decision was not timely.³⁶

Nor should Millennium be permitted to rely on DOS's receipt of the FEIS as an event that begins or resumes any applicable review period. The FEIS contains no assessment of blasting. By providing the FEIS to DOS, Millennium still did not satisfy its obligation to furnish DOS with all necessary data and information. Indeed, even after it received the FEIS, DOS continued to be justified in its belief that blasting was not a component of this project. Clearly, DOS's

³⁵Exhibit 16. Letter from Thomas S. West to William F. Barton (April 23, 2002)

³⁶In its brief, Millennium asserts a number of dates as purported deadlines for the DOS decision. The latest of these purported deadlines is April 6, 2002 (six months after receipt by DOS of the FEIS). Yet even after this date, Millennium was continuing to submit information to DOS and continuing to urge DOS to continue the review process. See, e.g., the April 23, 2002 letter (Exhibit 16).

commitment to review the FEIS on an expedited basis, as evidenced by DOS's letter dated October 11, 2001,³⁷ was based on this continuing and justifiable belief.³⁸

DOS had no reason to believe that blasting might be a component of this project until late November of 2001, when it saw a reference to blasting in a transmittal from the Corps of Engineers.³⁹ Clearly, this third party indication that blasting may be a component of the project did not satisfy Millennium's obligation to furnish DOS with all necessary data and information. Yet, incredibly, Millennium now appears to assert that DOS's receipt of the Corps' letter should be used not as an event that triggers review of the blasting mentioned in that letter, but as an event that precludes such review. Indeed, it appears that Millennium now asserts, as one of its many alternative theories, (1) that DOS's receipt of the Corps' letter mentioning blasting satisfies Millennium's obligation to prove all necessary data and information, and (2) that this information should somehow relate back to the date on which DOS received the FEIS (a document which contained no discussion of blasting and, as discussed above, justified DOS's continued belief that blasting was not a component of this project), and (3) that DOS's review period expired six months after the date on which the FEIS was received. Any such assertion by Millennium is

³⁷Exhibit 8.

³⁸The May 17, 2000 letter from NOAA to DOS Principal Attorney William L. Sharp (Exhibit 2) cannot be read for the proposition that receipt of the FEIS would be the final event that would trigger commencement of the review period. That letter was written before DOS was made aware of the blasting component of this project. In the normal course of events, the presence of an important factor such as blasting would be disclosed by the applicant before the FEIS is issued, and would be discussed in the FEIS. Read in the context of this case, the letter must be read as confirming that the FEIS was a document that must be received prior to commencement of review.

³⁹Significantly, even at this late date, Millennium had failed to furnish information regarding blasting to DOS.

patently without merit, and should be rejected.

In fact, it should be stressed that DOS issued its objection on May 9, 2002, which is less than six months after the date (November 27, 2001) on which DOS received the Corps' letter that mentioned blasting. Therefore, even if delivery of this letter to DOS could be construed as satisfying Millennium's obligation to furnish DOS with all necessary data and information (and it does not), and assuming *arguendo* that Millennium finally satisfied all of its obligations under 15 CFR Section 930.58(a) on that date, the six month review period began no earlier than that date, and the May 9, 2002 objection is clearly timely.

For these reasons, Millennium should be estopped from asserting that any six-month review period has expired.

**VI.
DOS PROPERLY CONSIDERED THE POTENTIAL IMPACT
OF THE PIPELINE TO THE BRYN MAWR SIPHON
BECAUSE THE ENTIRE PIPELINE ROUTE, AS IT AFFECTS
THE COASTAL AREA, IS SUBJECT TO REVIEW
AND, MORE PARTICULARLY, BECAUSE AN IMPACT TO THE SIPHON
MAY IMPACT OTHER AREAS IN THE COASTAL ZONE**

Millennium claims that in its consistency decision, DOS improperly considered the impacts of constructing the pipeline in extremely close proximity to the Bryn Mawr Siphon because the Siphon is outside the Coastal Area. As is clearly demonstrated below, DOS acted properly and within its jurisdiction to consider the coastal affects of the pipeline on an integral component of a public water supply system serving New York City and other communities, within New York's Coastal Area.

State Authority to Review Actions Outside the Coastal Area

The 1990 amendments to the CZMA authorize a coastal state to review for consistency with its Coastal Management Program federal activities occurring outside of the State's coastal area, when those activities would "affect" land or water uses or natural resources in the reviewing coastal state. Section 1456(c)(3)(A) of the CZMA states, in pertinent part:

After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency 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.

Each state with an approved program is authorized to review federal agency actions within or affecting the state's coastal area for consistency with its Coastal Management Program. No federal agency activities are categorically exempt from this requirement. In determining whether federal agency activities "affect" the coastal zone of states with approved management programs, the term "affect" is construed broadly. The term includes "direct effects which are caused by that activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or further removed in distance, but are still reasonably foreseeable." (Conference Report, Cong. Record, Sept. 26, 1990, H.8076) Any federal agency action "in or outside" of the coastal zone may be an activity that affects the coastal zone. (16 USC 1456(c)(3)). A state can review for consistency a federal agency activity which is located landward of the coastal zone if it affects the coastal zone.

The proposed Millennium pipeline, a "listed" activity, is routed to enter and exit the New York Coastal Area as it crosses the State. The pipeline and all its elements are designed and

constructed to operate as a single, indivisible unit. Because those components of the project in the coastal area are fully dependent upon those portions of it outside of the coastal area, every component related to the activity or which it is dependent upon, or is necessary for the activity to be conducted in the coastal area, is subject to consistency review with the CMP, without DOS having to request approval from OCRM to review those elements of the activity outside of the coastal area. Those portions of the pipeline which affect land or water uses or natural resources of the Coastal Area are subject to consistency with the CMP. Likewise all of its integrated facilities, including those outside of the coastal area and affecting coastal uses and resources, are subject to review by the State for consistency with the CMP.

Coastal Affects of Constructing the Pipeline

While the Bryn Mawr Siphon is located outside of New York's Coastal Area, it forms an integral part of the infrastructure which runs through and supplies water to New York City and many other communities in the Coastal Area. Thus, any activity affecting the Siphon would have affects on the land and water resources of New York's Coastal Area.

Millennium proposes construction of the pipeline within two feet of the Bryn Mawr Siphon, a particularly fragile point and critical juncture in the aqueduct which conveys 40% of the potable drinking water to New York City. The water supply system serves nearly 9 million people and supports significant economic development activities in the region.

In its November 6, 2001 letter to FERC, the City of New York stated that "[I]f the siphon pipes were subjected to deformation from a blast or soil displacement, it would cause fracturing

of the rivets and a separation of the plates.”⁴⁰ It went on to state that “[S]ince the siphon is not designed to be self-supporting, the siphon sections would pull apart resulting in complete failure. Additionally, if the pipe were subjected to fire from escaping gas as has occurred elsewhere, the allowable shear would be weakened thereby causing pipe failure.” The result of such a failure would be, in the words of New York City, “catastrophic,” with an immediate release of one million gallons of water and a total volume of between 10 and 20 million gallons. This volume of rushing water would erode the footings of electric transmission lines and wash out portions of the Sprain Brook Parkway.

In an April 26, 2002 letter to FERC, New York City states that the U.S. Army Corps of Engineers conducted a security assessment of the proposed pipeline and its proximity to the Bryn Mawr Siphon which led “the Corps to concur with DEP’s conclusion that the pipeline would pose risks to the Aqueduct that could not be entirely eliminated through design modifications.”

Conclusion

The Millennium Pipeline forms one continuous facility as it weaves in and outside the state’s Coastal Area and its routing is subject to one FERC authorization. The location and construction of the pipeline have both direct and indirect affects on New York State’s Coastal Area and are subject to DOS review. DOS may review any portion of pipeline for its direct or indirect affects on the State’s Coastal Area. Given the enormous consequences of a construction accident or subsequent failure and explosion of the pipeline on the significant social, economic and natural resources of New York’s Coastal Area, DOS properly considered the proposed

⁴⁰Exhibit 17. Letter from Michael A. Prinicipe, Ph.D. to David Boergers. (November 6, 2001)

pipeline route for its impacts on the New York City water supply at the Bryn Mawr Siphon and determined that its location in the vicinity of the Bryn Mawr Siphon is not consistent with the CMP or with the New York City Local Waterfront Revitalization Program.

VII.

MILLENNIUM'S APPEAL SHOULD BE DISMISSED BECAUSE THE PROJECT IS NOT CONSISTENT WITH THE OBJECTIVES OR PURPOSES OF THE ACT

Notwithstanding a State's objection to a consistency determination on the grounds that the project is inconsistent with the State's Coastal Management Program, the Coastal Zone Management Act provides the U.S. Secretary of Commerce with the authority to override the State's objection if the Secretary finds that the project is either "consistent with the objectives or purposes of the Act or is necessary in the interest of national security." 16 U.S.C. § 1456 (c)(3). The burden of proof is on the appellant to show that the activity satisfies these requirements.⁴¹

In order to find that a project is "consistent with the objectives and purposes of the Act" the Secretary must find that the action satisfies each of the following three requirements (or elements) of 15 CFR 930.121:

- (a) The activity furthers the national interest as articulated in § 302 [16 USC 1451] or 303 [16 USC 1452] of the Act, in a significant or

⁴¹15 CFR 920.130. See also In the Consistency Appeal of Korea Drilling Company, Ltd. from an Objection by the California Coastal Commission. U.S. Secretary of Commerce. (January 19, 1989).

substantial manner.

(b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.

(c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal.

The appeal cannot be sustained if the appellant does not demonstrate that each of the three requirements is satisfied. A State's determination that the project is inconsistent with the State's Coastal Management Program is presumed valid for purposes of appeal.⁴² The CZMA does not give the Secretary the authority to review the correctness of a State's consistency determination; rather such determinations are subject to judicial review. Instead, the Secretary is authorized to determine whether federal license or permit processes for a proposed project should be allowed to go forward despite a State consistency objection because the project is consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interest of national security.

A.
**The Millennium Pipeline Does Not Further
any of the Objectives of the CZMA
in a Significant or Substantial Manner**

To satisfy the first element, the activity must be shown to further one or more of the

⁴²In the Consistency Appeal of Southern Pacific Transportation Company to an objection from the California Coastal Commission, U.S. Secretary of Commerce, at 4-5 (September 24, 1985).

competing objectives or purposes contained in 16 USC §§ 1451 and 1452, which may be generally stated as follows:

To preserve, protect and where possible, restore or enhance the resources of the coastal zone;⁴³

To develop the resources of the coastal zone;⁴⁴

To encourage and assist the states to exercise their full authority over the lands and water in the coastal zone, giving consideration to the need to protect as well as to develop coastal resources, in recognition by the Congress that state action is the "key" to more effective protection and use of the resources of the coastal zone.

In several consistency appeal decisions, the Secretary has stated that, because Congress has broadly defined the national interest in coastal zone management to include both protection and development of coastal resources, this first element will normally be found to be satisfied on appeal. Thus, the Secretary has determined that oil and gas exploration and development,⁴⁵

⁴³See 16 USC 1451 (a) - (g), (I), (k)-(m); 16 USC 1452 (1)

⁴⁴16 USC 1451 (a), (b); 16 USC 1452 (1)

⁴⁵Decision and Findings in the Consistency Appeal of Gulf Oil Corp., U.S. Secretary of Commerce (December 23, 1985), p.4; Decision of the Secretary of Commerce in the Matter of the Appeal by Exxon Corp., U.S.A. to a Consistency Objection by the California Coastal Commission, (Exxon Santa Ynez Decision), U.S. Secretary of Commerce (February 18, 1984).

commercial marina construction,⁴⁶ rehabilitation of a railroad bridge,⁴⁷ construction of a shopping center on wetlands⁴⁸ and maintenance dredging of waterways⁴⁹ all serve the national interest in development of coastal resources.

Millennium claims that its project will further four objectives of the CZMA, which it lists: “siting of major energy transportation facility; enhancing the Nation’s energy self-sufficiency; promoting compatible economic development; and protecting coastal resources.”

1. Siting of Major Energy Transportation Facilities

Contrary to Millennium’s assertions, the CZMA does not accord preferential treatment to major energy facilities. Natural gas pipelines, as energy transmission facilities, are entitled to no greater consideration in their routing than the protection and preservation of ecologically important natural resources or other appropriate land and water uses in the nation’s coastal zone.

The CZMA’s “Congressional declaration of policy” in 16 USC § 1452 only requires states to consider and, where appropriate, inclusion of policies for siting major energy facilities. However, nothing in the statute establishes a policy preference for major energy facilities over other national policies, only priority for “orderly processes for siting major facilities related to energy .” That statute provides:

⁴⁶Decision of the Secretary of Commerce in the Consistency Appeal of Ford S. Worthy Jr. to an Objection from North Carolina, U.S. Secretary of Commerce (May 9, 1984)

⁴⁷Decision of the Secretary of Commerce in the Consistency Appeal of Southern Pacific Transportation Company, (Sept. 24, 1985).

⁴⁸Decision and Findings in the Consistency Appeal of Davis Heniford from an Objection by the South Carolina Coastal Council, U.S. Secretary of Commerce (May 21, 1992).

⁴⁹Decision and Findings of the Secretary of Commerce in the Consistency Appeal of Long Island Lighting Company from an Objection by the New York Department of State. (Shoreham Nuclear Power Station), U.S. Secretary of Commerce (February 26, 1988), pp. 10-12.

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

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for--

(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.” (Emphasis added.)

Properly read, priority consideration is accorded to "coastal-dependent" industry and land uses within the coastal zone.⁵⁰ The Millennium pipeline is not a coastal-dependent use and by its nature, does not require a coastal location. By contrast, the declaration of policies simply seeks to assure "orderly processes" for the siting of major energy facilities. States participating in the coastal program must plan for energy facility siting in their coastal management programs.

This statutory section must be read in conjunction with 16 U.S.C.A. § 1455(d), entitled "Mandatory adoption of state management program for coastal zone". This section requires that before approving a management program submitted by a coastal state, the Secretary shall find the following:

(2) The management program includes each of the following required program elements:

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

⁵⁰Decision and Findings in the Consistency Appeal of Davis Heniford from an Objection by the South Carolina Coastal Council, U.S. Secretary of Commerce (May 21, 1992) p. 11; 16 USC 1452(2)(D)

(8) The management program provides for **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. In the case of energy facilities, the Secretary shall find that the State has given **consideration** to any applicable national or interstate energy plan or program. (Emphasis added.)

It is not a requirement that the state program expressly "accommodate" energy interests.

In the program approval regulations published on January 9, 1975 (40 Fed.Reg. 1683), NOAA stated that

A management program which integrates . . . the siting of facilities meeting requirements which are of greater than local concern into the determination of uses and areas of Statewide concern will meet the requirements of Section 306(c)(8).

Accordingly, NOAA regulations require a planning process and consideration by states of the national interest involved in the planning for and siting facilities. The regulations do not require the states to categorically accept specific types of facilities.⁵¹

Specifically, 15 C.F.R. § 923.15(b) provides that:

. . . The requirement should not be construed as compelling the States to propose a program which accommodates certain types of facilities, but to assure that such national concerns are included at an early stage in the State's planning activities and that such facilities not be arbitrarily excluded or unreasonably restricted in the management program without good and sufficient reasons. . . . No separate national interest "test" need be applied and submitted other than evidence that the listed national interest facilities have been considered in a manner similar to all other uses, and that appropriate consultation with the Federal agencies listed has been conducted."

New York's approved Coastal Management Program contains an energy facility

⁵¹15 C.F.R. §§ 923.13, 923.15, and 923.52; American Petroleum Institute v. Knecht, 456 F. Supp. 889, 919 (C.D. Cal. 1978), aff'd, 609 F.2d 1306 (9th Cir. 1979).

siting policy, Policy 27.⁵² Its objective is to ensure that decisions on the siting and construction of major energy facilities in the coastal area will be based on public energy needs, compatibility of such facilities with the environment, and the facility's need for a shorefront location. The New York Coastal Management Program assigns no greater priority to siting such facilities than it does to any other non-coastal dependent use nor does it provide that siting these facilities outweighs other critical coastal resource management concerns. Energy facilities are evaluated in the context of other coastal values, including their impacts on coastal resources of special concern, such as New York State's designated Significant Coastal Fish and Wildlife Habitats. DOS, following the orderly processes and policies of the CMP, determined that the Millennium Pipeline, as proposed, would not be compatible with the unique ecological conditions in the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat and should not be sited at that particular shorefront location.

Millennium strains and misapplies the Congressional declaration of policy in 16 USC § 1452 and the clear intent of NOAA's regulations to claim that as an energy transportation facility, the pipeline is in the national interest by its mere existence and is accorded a priority over other vital coastal policy objectives. The project must be balanced against other equally

⁵²Policy 27: Decisions on the Siting and Construction of Major Energy Facilities in the Coastal Area Will Be Based on Public Energy Needs, Compatibility of Such Facilities with the Environment, and the Facility's Need for a Shorefront Location. In the Explanation of Policy, the emphasis is on determining the public need for energy through preparation of the State Energy Plan. The 2002 State Energy Plan fully describes New York's current energy situation and projects the region's foreseeable energy needs and supplies. The State Energy Plan will be further examined at length in the discussion of Element 2.

important national goals and objectives advanced by the CZMA

Millennium presents another argument that misrepresents the clear intent of Congress in the CZMA in order to support its contention that the pipeline is an energy facility in the national interest. This astonishing argument is that the national interest under the CZMA can be determined by FERC under the Natural Gas Act.⁵³ In arguing that its project furthers the “national interest”, Millennium takes out of context the Secretary’s statement made in the Decision and Finding in the Consistency Appeal of Mobil Exploration and Processing Inc. (June 20, 1995). Millennium paraphrased as follows: “ Because our national interests are not static,” the Secretary has stressed, the national interest in a project must also be determined by “examining Federal laws and policy statements from the President and Federal agencies, and reviewing plans, reports and studies issued by the Federal agencies.”⁵⁴ Using this partial quote, Millennium proffers an argument that the Natural Gas Act, being a federal law, defines the national interest in coastal zone matters. Taking the argument further, it states that the regulation of the Nation’s gas supply has been entrusted to the FERC’s “informed judgment.” It concludes that “[w]ith 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.’”⁵⁵ By bootstrapping an argument that effectively says that the national interest under the CZMA for pipelines is determined by FERC, Millennium is able to reach the only seemingly “logical” conclusion: “In

⁵³See Millennium brief pp. 22 to 25.

⁵⁴Millennium Brief pp. 22 and 23

⁵⁵Id at 23

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 projects and the most efficacious route.”⁵⁶

The Secretary’s actual statement in the Mobil appeal was:

The national interests to be balanced in Element Two are limited to those recognized in or defined by the objectives and purposes of the CZMA. See Korea Drilling Decision at 16. Because our national interests are not static, however, the Secretary has noted that there are several ways to determine the national interest in a proposed project, including seeking the views of Federal agencies, examining Federal laws and policy statements from the President and Federal agencies, and reviewing plans, reports and studies issued by the Federal agencies. See Unocal Pulley Ridge Decision at 15.⁵⁷ (Emphasis added.)

In the Mobil appeal, which involved a plan of exploration for oil and gas, the Commerce Secretary did not substitute any other federal statute for the consideration of the national interest under the CZMA. Nor did the Secretary defer to any other federal agency the task of identifying the relevant national interests. Rather the Secretary took the views of other federal agencies into account.

To accept the argument that Millennium cobbles together would render the CZMA objectives and purposes superfluous. Instead of limiting the national interests to those recognized in 16 USC §§ 1451 and 1452, Millennium alleges that any other federal law can be substituted to define those interests. This is not what the Secretary intended in the Mobil appeal, as a reading of that decision shows. Millennium’s attempt to use a different federal statute and

⁵⁶Id. At 25.

⁵⁷Mobil Oil, p. 39.

another federal agency to determine the national interest should be entirely rejected as undermining the intent of the CZMA.

2. Enhancing the Nation's Energy Self-sufficiency

Millennium argues that its project will “contribute to the National goal of energy self-sufficiency.”

Energy self-sufficiency is achieved through development of domestic sources of natural gas so the Nation is not dependent on foreign supplies and suppliers. The gas to be transported by the Millennium Pipeline is from Canada, not from a domestic source. Therefore, because the natural gas is from a foreign source, it is impossible for the Millennium Pipeline to further the national interest of the United States in energy self-sufficiency.

The federal government clearly understands the difference between foreign and domestic energy sources in attaining energy self-sufficiency. The Commerce Secretary stated in the consistency appeal of Mobil Exploration and Processing:⁵⁸

Energy self-sufficiency through oil and gas production is a recognized goal of the CZMA (section 302(j)). Moreover, of those Federal agencies that commented on the issue of the national interest in Mobil's proposed activity, **most expressed support for domestic energy production.**” (Emphasis added.)

The natural gas to be transported by the Millennium Pipeline is a foreign energy source over which the United States has no control. Whatever the current excellent status of bilateral international affairs, Canada is a foreign nation.⁵⁹ The national interests of the United States and

⁵⁸Decision and Finding in the Consistency Appeal of Mobil Exploration and Processing Inc., June 20, 1995 p. 39, emphasis added.

⁵⁹The Coastal Zone Management Act defines “coastal zone” as the combination of “coastal waters...and adjacent shorelands...strongly influenced by each other....The zone extends, in Great Lakes waters, **to the international boundary between the United States and Canada**

Canada are not identical.⁶⁰ If Millennium was constructed, the Canadian government may one day decide, in its own national self interest, not to renew Millennium's purchase contracts in favor of another bidder or it may refuse to issue or reissue gas transport permits. In fact, in the 1970's, the Canadian National Energy Board placed a complete prohibition on the exportation of natural gas from the western provinces to the United States.⁶¹

There is currently controversy concerning natural gas on the Canadian side of the international border. In July 2002, the Hon. Bernard Lord, Premier of New Brunswick, petitioned the Canadian National Energy Board to give the province access to off-shore natural gas resources. In a letter to the Board, entitled "National Energy Board must assure gas for 'Canada, too,'" Premier Lord said:

In July 2001, the Council of Atlantic Premiers issued a communiqué which discussed the importance of our region's energy sector in transforming our economy, and stated that '...domestic energy needs are the first priority.'

." 16 USC § 1453 (1) (Emphasis added.)

⁶⁰For example, there is controversy concerning energy production in Lake Erie. Canada presently produces significant quantities of natural gas under the Canadian portions of Lake Erie. Fifty-five per cent of natural gas production in the province of Ontario is derived from wells beneath Lake Erie. (National Energy Board of Canada, 2002) The United States interest in tourism in Lake Erie is directly in conflict with such Canadian actions. In a letter to Ohio Governor Bob Taft, U.S. Senator George V. Voinovich strongly opposed oil and gas drilling in Lake Erie.

Also, according to U.S. Rep. Chris Redfern, "Lake Erie generates \$1.5 billion annually as a result of individuals spending money in our area on tourism. I don't want residents of southern Ohio, Kentucky, Pennsylvania or neighboring states deciding whether or not to take a family vacation [on Lake Erie] to think, 'Well, there's oil drilling going on.' It doesn't make a whole lot of sense economically to take that risk." On April 16, 2001, Congressman Redfern, U.S. Rep. Dennis Kucinich and Ohio Rep. Bryan Flannery joined together in declaring Lake Erie off limits to oil and gas drillers.

⁶¹Weinberg, "Boundary Waters of New York and Ontario", 1 Sea Grant Law Journal 255, 299 (1976)

At the August 2001 Annual Premier's Conference in Victoria, it was stated in the communiqué on energy, as part of the discussion on the North American energy situation, that Premiers 'stressed that any international discussions must help to ensure security of supply for Canadian consumers and the domestic market.' ”

A “Canadians First” policy would assist Canada but not ensure a continuing supply of natural gas to the United States.

Millennium’s argument of enhancing energy self-sufficiency is flawed and without merit. It, therefore, does not meet this national objective.

3. Promoting Compatible Economic Development in the Coastal Zone

Millennium argues that its project will promote compatible economic development in the Coastal Zone by “providing the energy infrastructure necessary to meet increasing demands for natural gas in the region.”

The 2002 New York State Energy Plan notes that “[T]he demand for natural gas is expected to expand significantly,” and that “[M]ore pipeline capacity will be needed to meet the increased demand.” The Energy Plan also notes that there are a total of 11 natural gas projects, including Millennium, that have been proposed to serve the New York metropolitan region. Since not all of the natural gas from all of the projects is necessarily needed, competition will result in some projects not being built. The Millennium project is of no greater consequence to the promotion of economic development in the region than any other pipeline. Indeed, the Energy Plan states on page 3-177 that: “[I]f no post-2003 pipeline expansion projects are built, the existing gas and oil systems will be adequate to meet all generation scenarios.” The analysis upon which that conclusion is based did not consider the Millennium Pipeline in developing estimates of the volumes of gas to be delivered to the New York City area.

The Millennium Pipeline is not necessary to promote compatible economic development

in New York's Coastal Area. The natural gas it would supply is not necessary to meet the region's energy generation requirements. Therefore, the Millennium Pipeline does not meet this national CZMA objective.

4. Protecting Coastal Resources

Millennium contends that its project will "benefit the coastal zone by substantially reducing air emissions, improving water quality, protecting fisheries resources and decreasing oil/coal barge traffic..."

As noted above, Millennium's project is not the only natural gas pipeline proposed to serve the New York City area and further, there is sufficient natural gas to meet the needs of the region. Thus, while using natural gas to generate electricity would reduce emissions, Millennium's project is not critical to meeting that objective.

Millennium contends that its pipeline will also improve water quality and protect fisheries because NOx emissions will be reduced as a result of burning gas and fewer fish will be entrained in cooling pipes. As stated above, Millennium is not unique. Natural gas projects are proposed, some of which will not be built due to competition and/or due to greater environmental harm they may cause. Any natural gas, not just Millennium's, which is used to replace dirtier coal burning electric generating plants, may improve air quality. Millennium, however, fails to raise the significant adverse environmental impact that the construction of the pipeline will have on the State-designated Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. To construct the pipeline, Millennium will trench and blast within the habitat, and will directly destroy 20 acres of the Significant Habitat and will adversely affect more than 108 acres.

Rejecting Millennium's incredulous argument that its project protects coastal resources

becomes even more important given FERC's Order approving the pipeline route. On September 19, 2002, FERC issued an Order granting a final certificate to Millennium Pipeline to construct and operate its natural gas pipeline.⁶² FERC's Order attempts to resolve all outstanding environmental questions about the project's potential impacts. So certain was FERC about the seemingly insignificant adverse impacts of the Millennium Project that it issued the final Certificate, even though the FEIS did not contain any analysis of blasting in Haverstraw Bay. FERC issued the certificate although other federal agencies having regulatory approvals over the Millennium project expressed "substantial concerns" about the pipeline routing just days before FERC rendered its final decision.

In a letter dated August 13, 2002, the US Army Corps District Engineer advised Millennium's Acting Facilities Manager that

I also have substantial concerns about the environmental impacts of the proposed Hudson River crossing, similar in nature to those expressed by DOS. As a result, I must consider whether a permit authorizing the proposed project might compromise the public interest.

I note in their letter that DOS has outlined specific project alternatives which, if implemented, might permit the activity to be conducted in a manner consistent with the CZMA, and might then support a decision by this agency to permit construction. These alternative include terminating the pipeline at Bowline Point in Rockland County (which would avoid the necessity to cross the Hudson River); routing the Hudson River crossing north and outside of Haverstraw Bay; or using

⁶²Millennium Pipeline Company, L.P. 100 FERC ¶ 61,277, Docket Nos. CP98-151-001 and CP98-151-002 Order Issuing Certificate, Granting and Denying Requests for Rehearing, and Granting and Denying Requests for Clarification Corporation (CP98-151-002)(Issued September 19, 2002). (hereafter "FERC Order"). The FERC Order, among other things: (1) denied the motion of Castle and Village of Croton for a rehearing of the Interim Order based on new evidence, (2) approved the Millennium's revised pipeline route through Mount Vernon and (3) found adequate the Final Environmental Impact Statement's treatment of blasting in Westchester County, endangered and threatened species, construction near the Catskill Aqueduct and Indian Point Nuclear Power Plant and the Arboretum.

excess capacity in the existing Algonquin pipeline to supply gas to points east of the Hudson River. Implementation of any of these alternatives would largely address my concerns. I am also aware that implementation of these alternatives might address objections received by the Corps of Engineers from other agencies, including the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

In making any decision to issue a DA permit as requested by Millennium, I must determine that a permit would not be contrary to the public interest, and I must weigh carefully expressions of the public interest as defined by those providing comment, including state and federal government agencies. For that reason I encourage you to keep me advised of possible project modifications Millennium may be considering, to meet its needs to furnish gas supplies to downstate New York, while protecting resources that have been identified as important.⁶³

Thus, the Army Corps of Engineers, one of the two federal permitting agencies for this pipeline, has substantial concerns about the environmental impacts of Millennium's selected route. The District Engineer recommends that they pursue one of several alternatives suggested in DOS's consistency objection.

FERC is not the last word on environment or coastal zone effects. FERC's role as lead agency under the National Environmental Policy Act is to take primary responsibility for the preparation of the EIS and to supervise the process.⁶⁴ FERC did not, in that role, gain superior environmental knowledge of the potential project impacts as compared with other federal resource and state coastal agencies. Indeed, the CZMA recognizes the key role of the states as the principal players in carrying out "more effective protection and use of land and water resources of the coastal zone."⁶⁵ New York's incorporation of the Significant Coastal Fish and Wildlife

⁶³Exhibit 18. Letter from the U.S. Army Corps District Engineer to Richard E. Hall, Jr., Millennium Acting Facilities Manager. (August 13, 2002)

⁶⁴40 CFR § 1501.5.

⁶⁵16 USC 1451 (i).

Habitats program into its federally approved Coastal Management Program and DOS's designation of Haverstraw Bay as one of the most important habitats, together with its expertise in state coastal matters, should be accorded paramount importance under the CZMA and on this appeal.

In its Preliminary Statement, Millennium contends that "FERC exhaustively evaluated the Millennium's coastal zone impacts in its DEIS, its BA its SBA and its Essential Fish Habitat Assessment."⁶⁶ This is not correct. While the FEIS addressed many environmental impacts associated with the project, FERC did not consider the entire range of coastal zone effects of the proposed actions in the Environmental Impact Statement.⁶⁷ FERC has acknowledged that it has no direct role in coastal consistency review and that "The EIS . . . is not intended to exhaustively analyze all issues arising under New York's Coastal Management Plan . . ."⁶⁸

⁶⁶Initial Brief of Millennium at 4.

⁶⁷In fact, based upon DOS's communications with Millennium's representative, Millennium submitted the coastal consistency analysis to FERC and requested that it be included verbatim into the environmental impact statement, which it was.

⁶⁸FERC Order paragraph 232, p. 69 states: "Finally, various claims are raised that our final EIS failed to consider adequately certain CZMA issues. These claims misapprehend the purpose of an EIS and the relationship between NEPA and the CZMA. The purpose of an EIS is to ensure that an agency, in reaching its decisions, will have available and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audiences that may also play a role in both the decision making process and the implementation of that decision. (See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).) The EIS prepared by Commission staff for Millennium sets forth the information necessary to achieve those purposes, including significant amounts of information and analysis relevant to the Hudson River crossing and other environmental impacts of the project on the coastal zone. **The EIS, however, is not intended to exhaustively analyze all issues arising under New York's Coastal Management Plan or other issues arising under the CZMA. Rather, those issues arise under the CZMA and are to be considered in the NYSDOS consistency determination under that statute, which was done, resulting in the May 9, 2002 objection by the NYSDOS to the consistency certification for Millennium.** Thus, we will reject these claims." (Emphasis added.)

Finally, Millennium states that its project will reduce barge traffic and reduce the volume of ash produced by coal and oil fired electric generation facilities. As stated above, Millennium natural gas is not unique. There are 11 proposed natural gas projects, not all of which will be constructed due to competition among the proposals, and because some will pose greater environmental and social harm than others. Any natural gas, not just Millennium's, if used to replace coal or oil fired electric generation facilities, may result in less ash requiring disposal. This point alone is not of such consequence that it would cause Millennium to achieve a national objective of protecting coastal resources.

The purported benefits of the Millennium project on coastal resources do not rise to the level of meeting a national objective of protecting coastal resources. In fact, the project, because of the route selected through the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, will damage and not protect coastal resources.

5. Conclusion

For all the above reasons, Millennium has failed to demonstrate that its project achieves the national objectives of the CZMA in a significant and substantial manner. There is no affirmative requirement that energy facilities, including gas pipelines, be afforded priority in the coastal area. A State must only provide an orderly process for considering the location of such facilities. New York has done this in its approved CMP. A gas pipeline in and of itself is not a project in the national interest. Millennium does not achieve the national goal of energy self-sufficiency because it is importing gas from a foreign country, not developing domestic sources. The Millennium project is not necessary to meet the energy demands of the New York City region, and thus is not a significant contributor to the economic development of the Coastal Area.

Finally, the Millennium project will impair more than 108 acres of the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat and affect Croton-on-Hudson's primary water supply, as well as 40 percent of the New York City water supply. Further, Millennium's natural gas is not unique. Of the 11 currently proposed natural gas projects, not all will be built due to competition among the proposals and due to greater environmental and social harm caused by some more than others. Any natural gas, not just Millennium's, may result in some air quality improvements, if new electric generation plants using natural gas are built to replace existing oil or coal fired facilities.

B.
**Any National Interest Furthered by the Activity
Does Not Outweigh the Activity's Adverse Coastal Effects,
When Those Effects Are Considered Separately or Cumulatively**

The second element that an appellant must prove is that "[t]he national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively."⁶⁹ This element requires that the Secretary weigh the adverse effects of the proposed activity on the land and water uses and natural resources of the coastal zone against its contribution to the national interest.⁷⁰ The NOAA regulations "ensure that the Secretary overrides a state's objection only where there is a national interest in the activity and that interest outweighs the adverse coastal effects of the activity."⁷¹

⁶⁹15 CFR 930.121(b)

⁷⁰Consistency Appeal of Ford S. Worthy Jr. at 7.

⁷¹65 F.R. at 77149 (2000).

The regulations focus on the activity's "coastal effects", consistent with the statutory recognition that all federal agency activities, including the granting of permits, may "affect land or water uses or natural resources of the coastal zone." In deciding this element of the appeal, the Secretary should consider: 1) the adverse coastal effects of the objected-to activity itself, ignoring other activities affecting the coastal zone; 2) the cumulative adverse coastal effects from the objected-to activity being performed in combination with other activities affecting the coastal zone; and 3) the proposed activity's contribution to the national interest. Adverse effects on the natural resources of the coastal zone may arise from the normal conduct of an activity either alone or in combination with other activities. Adverse effects can be direct or indirect and may arise from an unplanned event such as improper conduct of an activity or an accident.⁷²

The appellant must also identify the national interests promoted by the project. The Secretary has noted that "[t]he national interests to be balanced in element 2 are limited to those recognized in or defined by the objectives or purposes of the Act. In other words, while a proposed activity or project may further (or impede) a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, such a national interest may not be considered in the balancing."⁷³ However, all development is to be judged by the Secretary in terms of the competing uses and values of coastal lands and waters and the project's impact on natural resources.

Millennium avers that its pipeline, being a major energy facility, advances the Nation's

⁷² Decision and Findings in the Consistency Appeal of Korea Drilling Co., Ltd. from an Objection by the California Coastal Commission, U.S. Secretary of Commerce at 10 (January 19, 1989); Decision and Findings in the Consistency Appeal of Texaco, Inc. from an Objection by the California Coastal Commission, U.S. Secretary of Commerce at 6-7 (May 19, 1989).

⁷³ *Id.* at 16.

interest in energy self-sufficiency, economic development and the protection of coastal resources.⁷⁴ Because the Millennium project fails to further any of the objectives of the CZMA in a significant or substantial manner, the national interest of the project is outweighed by the adverse coastal effects. However, even assuming that the project furthers such an interest, it is outweighed by the adverse coastal effects. Instead of advancing the national interests identified in the CZMA, Millennium's project undermines those objectives by increasing this Nation's reliance on foreign sources of energy and destroying coastal resources.

In the balancing process, the Secretary must determine whether the adverse effects of the proposed project on the natural resources in the coastal zone are substantial enough to outweigh its contribution to the national interest.⁷⁵ In so doing, the Secretary should find that while the Millennium project does not further any of the national interests of the CZMA, the adverse impacts of the route chosen by Millennium are substantial.

1. The Millennium Project Will Have Substantial Adverse Impacts on the Significant Coastal Fish and Wildlife Habitat of Haverstraw Bay

The substantial body of data, concerns of key resource agencies, and policies and standards of the CMP have been ignored by Millennium.

The proposed Millennium pipeline would cross the Hudson River in the northern half of the State designated Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. Haverstraw Bay is a unique ecosystem consisting of extensive estuarine shallows. This habitat was

⁷⁴ Initial Brief of Millennium Pipeline Company at 22.

⁷⁵Decision and Findings in the Consistency Appeal of Long Island Lighting Co. From an Objection by the New York Department of State, U.S. Secretary of Commerce at 14 (February 26, 1988).

designated by the Secretary of State in November 1987, in accordance with New York's federally approved Coastal Management Program. The principal purpose for designating Haverstraw Bay as a Significant Coastal Fish and Wildlife Habitat is to protect, preserve and where practicable restore the habitat in order to maintain its viability as a habitat. Excavation to construct the proposed pipeline would result in destruction of ecologically important habitat and should not be conducted within this state designated significant area.

The Congressional Declaration of Policy at 16 USC §1452 provides 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 to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development;

(3) to encourage the preparation of **special area management plans** which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, including those areas likely to be affected by land subsidence, sea level rise, or fluctuating water levels of the Great Lakes, and improved predictability in governmental decisionmaking. (emphasis added).

The designation of special management areas, such as New York's Significant Coastal

Fish and Wildlife Habitats, presupposes that the area within the boundaries is to be distinguished from the area outside the boundaries. As Congressional Policy indicates, the reason to delineate such boundaries is to provide “increased specificity in protecting significant natural resources’ and “improved predictability in governmental decisionmaking.” By designating special management areas, New York State determined, and the Secretary concurred, that some activities and uses are not compatible with the resource value of such areas, thus necessitating management and regulatory efforts that achieve objectives for those special management areas.

Significant Coastal Fish and Wildlife Habitats were designated in the New York Coastal Management Program to ensure greater protection for important habitats. The significant habitat designations are made applicable in the consistency review process through the application of Coastal Policy 7⁷⁶ to a proposed project or action. Development activities are reviewed for their impact on designated habitats. Those actions which would significantly alter or destroy a habitat would, in most instances, be determined to be inconsistent with the CMP. As an aid to regulated community, each habitat is described in a supporting habitat narrative. The narrative provides site specific fish and wildlife documentation, as well as critical information for impact assessment. It provides an assessment of activities having potential impacts on the viability of the area as a habitat and suggests appropriate management practices for protecting the habitat.

The habitat documentation for Haverstraw Bay,⁷⁷ developed in concert with the New York State Department of Environmental Conservation, constitutes a public record of the

⁷⁶Coastal Management Program Policy 7: Significant Coastal Fish and Wildlife Habitats Will Be Protected, Preserved, and Where Practicable, Restored So as to Maintain Their Viability as Habitats.

⁷⁷Exhibit 19. NYSDOS Haverstraw Bay Coastal Fish & Wildlife Habitat Narrative (November 15, 1987).

habitat's significance and basis for its designation, provides a description and map of the area designated, and includes a summary of the habitat's important elements, functions and values, ecosystem rarity, irreplaceability, and important human uses of and associated with the designated habitat. The documentation also provides information, guidance, and direction for planning, developing, designing, and undertaking activities to ensure that they will be consistent with CMP policy relating to the protection, preservation, and restoration of designated significant coastal fish and wildlife habitats.

The DOS consistency determination for the Millennium pipeline details the adverse coastal impacts associated with crossing 2.1 miles of this habitat using the lay-barge dredging technique, with associated in-water blasting on the eastern shoreline. The decision is based on a thorough and careful application of the standards of Policy 7 and the impact assessment for the Habitat. The DOS decision points out

The Hudson River estuary is one of New York's outstanding natural resources...and vital as part of the Atlantic coastal ecosystem." (NYS DEC, 1998 Hudson River Estuary Action Plan) Haverstraw Bay is a significant part of the estuary. The habitat documentation for Haverstraw Bay states that "[d]espite various habitat disturbances, Haverstraw Bay possesses a combination of physical and biological characteristics that make it one of the most important fish and wildlife habitat in the Hudson River estuary. The regular occurrence of brackish water over extensive shallow bottom creates highly favorable if not essential conditions for biological productivity within the estuary, including submergent vegetation, phytoplankton and zooplankton, aquatic invertebrates, and many fish species. (emphasis added).⁷⁸

Haverstraw Bay is especially unique, and ecologically important, because of its relationship with the Hudson River salt front. The habitat documentation states: "During much

⁷⁸Id. at 2.

of the year, this area is the place where freshwater from the upper river mixes with salt water from the Atlantic, producing a predominantly brackish water habitat, with salinities varying from 0-10 ppt.” The salt front is a critical location in any estuarine habitat, providing an environmental boundary that influences the chemical and physical properties of the water column. It is a primary determinant of the presence or absence of species, or of certain life stages of a species. The movements of many different populations can be mapped onto the movement of the salt front. The salt front will be characterized by what is called the “edge effect” in ecology: these areas are more diverse because they support species adapted to both sides of the edge, as well as some adapted to the edge itself (*e.g.*, salt-adapted, fresh-adapted, and brackish-adapted). The salt front, and thus the Bay (and the Bay alone), plays a critical role in the life history of most aquatic species in the Hudson River.

The habitat documentation indicates that in terms of ecosystem rarity, the bay is the “most extensive area of shallow estuarine habitat in the lower Hudson River...” The documentation indicates that: shortnose sturgeon, an endangered species, regularly occur in the bay; the habitat contributes to recreational and commercial fisheries throughout the northeastern United States; the bay is a major spawning, nursery, and wintering area for various estuarine fish species (*e.g.* striped bass, American shad, white perch, Atlantic sturgeon, blue claw crab) and that their population levels are unusual in the northeastern United States. The bay also serves as a foraging area for the threatened bald eagle. The documentation further indicates that “Haverstraw Bay is a critical habitat for most estuarine-dependent fisheries originating from the Hudson River. and “...contributes directly to the production of in-river and ocean populations of food, game, and forage fish species.” Commercial and recreational fisheries throughout the

North Atlantic, therefore, "... depend on or benefit from these biological inputs from the bay."

In addition to fisheries, Haverstraw Bay provides important habitat for waterfowl and colonial waterbirds. The habitat documentation notes that "[S]ignificant numbers of waterfowl may occur in Haverstraw Bay during spring (March-April) and fall (September-November) migrations...." The U.S. Fish and Wildlife Service provides more recent information documenting these populations: "Waterfowl use is extensive during the spring and fall migration periods for feeding and resting. Small numbers of wintering waterfowl include mallard, American black duck, Canada goose, mergansers, canvasback, common goldeneye, and scaup."⁷⁹ The Hudson River corridor is part of the Atlantic Coast Joint Venture, one of nine joint venture areas in the United States, the goals of which are to "protect and manage priority wetland habitats for migration, wintering, and production of waterfowl, with special consideration to black ducks, and to benefit other wildlife in the joint venture area."⁸⁰ There are specific protection goals for the Hudson River. In terms of the species documented using Haverstraw Bay: American black duck is identified by the North American Waterfowl Management plan as a species of immediate international concern. Wading birds, particularly Great Blue Herons, feed in the shallows on the eastern shore, particularly in the fall when juvenile fish begin migrating downriver and would be abundant in this area.

The habitat documentation also indicates that Haverstraw Bay habitat is "irreplaceable". In the CMP's Significant Coastal Fish and Wildlife Habitat program, this criterion is associated with several categories. Not all designated Significant Coastal Fish and Wildlife Habitats are

⁷⁹USFWS, Significant Habitats and Habitat Complexes of the New York Bight Watershed, 1997.

⁸⁰Id.

rated “irreplaceable”.⁸¹ Since there are a number of classifications available in this system to indicate that habitat could be replaced or mitigated if disturbed, it should be recognized that the term “irreplaceable” is meaningful and disturbance of habitats thus classified will result in irreparable impacts.

The habitat documentation for Haverstraw Bay includes an impact assessment and impairment test that must be met in order to protect and preserve the habitat. The impairment test states that land and water uses or development shall not be undertaken if such actions would destroy the habitat, or significantly impair its viability. The impact assessment for the habitat describes the range and types of activities that would destroy or significantly impair the habitat, and identifies when habitat disturbances would be most detrimental, stating:

Any activity that would substantially degrade water quality, increase turbidity or sedimentation, or alter water salinities or temperatures in Haverstraw Bay would result in significant impairment of the habitat. Any physical modification of the habitat or adjacent wetlands, through

⁸¹Exhibit 19. The evaluation system uses the following categories

Replaceability ®)

Score The Habitat, the Fish and Wildlife and the Users Are:

1.2 -Irreplaceable

1.0 -Difficult to replace; or

-Uncertain of ability to replace (e.g., techniques not known or not tested); or

-Cost of replacement prohibitive

0.8 -Techniques for replacement allow reasonable likelihood for success, and

-Reasonable assurance of means for replacement; and

-Replacement site identified; or

-Will be replaced through independent processes, without active management within ten years.

0.6 -Easily replaced by well understood techniques and

-Means for replacement immediately available; and

-Replacement site identified; or

-Will be replaced through independent processes, without active management, within five years.

0.4 -Will be replaced through independent processes, without active management within two years.

dredging, filling or bulkheading, would result in a direct loss of valuable habitat area.

After reviewing and evaluating all of Millennium's submissions and FERC's FEIS, DOS concluded that the presumption of habitat impairment was not rebutted. FERC conceded in the Executive Summary of its FEIS that the project would cause adverse and unavoidable impacts in Haverstraw Bay, including direct and indirect impacts on the endangered shortnose sturgeon.

a. **The Effects on the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat Will Be Long-Term and Significant**

Millennium claims that "[T]he resource agencies charged with the direct responsibility to review impacts of the proposed Hudson River crossing responded favorably" to its proposed trenching across the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat.

DOS is the agency charged with "direct responsibility" to evaluate the coastal effects of projects in the New York State Coastal Area. At a July 26, 1999 conference call among representatives of FERC and DOS, DOS informed FERC that trenching across the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat would result in a direct loss of habitat area and would not be consistent with the CMP.⁸²

Millennium purports to have made "extraordinary commitments to protect the Hudson River." This is a specious claim that is refuted by the fact that Millennium, despite being informed in 1999 and on numerous subsequent occasions that its route across Haverstraw Bay would destroy significant coastal resources and would be inconsistent with the CMP, continued to propose trenching and blasting in a special management area.

⁸²Exhibit 20. FERC memo to file. (July 26, 1999)

Far from being “strained and arbitrary,” DOS’s decision stands on fact, a clear and consistent message to Millennium regarding the Haverstraw Bay crossing, and the well-reasoned and researched data incorporated in the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat narrative and other complementary information submitted by NMFS, FWS, the COE, and other agencies.

Millennium argues that DOS’s determination of inconsistency conflicts with and should be superseded by the Clean Water Act 401 Water Quality Certification (WQC) issued by the Department of Environmental Conservation (DEC), the state’s natural resource agency. The 401 WQC conditions respond to DEC’s concern over the effects on water quality and fisheries caused by turbidity and suspended sediments that would result from the proposed dredging and backfilling. DEC issued the 401 WQC in December 1999, well before the crossing route was finalized and before it was known that blasting was proposed in Haverstraw Bay. As indicated in the determination, DOS fully considered the 401 Water Quality Certification issued by DEC for the proposed pipeline and the conditions contained in that authorization which are applicable to the coastal area.

Additionally, the federal statutes- the Clean Water Act and the Coastal Zone Management Act- operate concurrently and while on some issues overlap, their goals are different and equally important. The 401 WQC is narrowly focused on water quality issues and does not deal with the habitat on a coast-wide basis. In rendering its decision under the 401 program, DEC was neither bound to consider nor follow the state’s habitat designation, as would be the case if DEC was issuing a statewide permit.⁸³

⁸³See New York State Executive Law Article 42.

After DEC issued the 401 WQC, Millennium altered its plans to perform the proposed dredging from the Spring to the period starting on September 1 and ending on November 15. In addition, the proposed Millennium project now involves blasting in Haverstraw Bay and crossing the Croton River in the Village of Croton. DEC did not consider these new elements when it rendered its 401 WQC in 1999. The 401 WQC will have to be amended to reflect the updated project design. It cannot be used to reflect on the DOS consistency determination made in May 2002.

b. The Lay-Barge Construction Technique Will Directly Destroy Significant Coastal Habitat

Millennium claims that “all regulatory agencies agree the employment of an open-water, lay-barge construction method will have the least environmental impact.” This claim is not supported by the record. The regulatory agencies continue to express serious concerns about the routing and adverse affects of the pipeline on the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat.

In his August 13, 2002 letter to Millennium, Colonel O’Dowd of the New York District, Army Corps of Engineers, states:

also have substantial concerns about the environmental impacts of the proposed Hudson River crossing, similar to those expressed by DOS...⁸⁴

The U.S. Department of the Interior, FWS, in its March 5, 2002 letter to the Corps of Engineers states:

In letters dated April 28, 2000 and May 23, 2000, the Service recommended that

⁸⁴Exhibit 18.

the Corps of Engineers deny Millennium's Section 404 Permit because the project would result in substantial and unacceptable affects to aquatic resources of national importance...⁸⁵

Millennium's characterization of the NMFS biological opinion as favorable is disingenuous. NMFS's ESA and EFA assessments which led to the NMFS biological opinions describe many of the significant adverse affects of crossing Haverstraw Bay. While the formal biological opinion was limited to specific ESA and EFA species, the assessments cannot be characterized as favorable.⁸⁶

The DOS consistency determination for the Millennium pipeline details the adverse coastal impacts associated with crossing 2.1 miles of the Haverstraw Bay habitat using the lay-barge dredging technique, with associated in-water blasting on the eastern shoreline. The proposed pipeline project involves dredging more than 200,000 cubic yards of river bottom sediments in the bay to excavate a trench in which the 24 inch gas pipeline would be placed.

The lay barge construction method would result in an open trench of about 1300 feet at any given time. The trench would be 10 to 20 feet deep and 70 to 150 feet wide, for approximately 2 miles through the northern half of Haverstraw Bay. The trench would be backfilled with the material excavated from the trench, which will be stored on barges until the material is needed for backfilling.

Except for the existing 600+/- foot wide federal navigational channel that traverses Haverstraw Bay in a north-south direction, dredging and backfilling along more than 11,000 feet

⁸⁵Exhibit 21 Letter from David A. Stilwell to Col. John B. O'Dowd (March 5, 2002)

⁸⁶Exhibit 22. Letter from Patricia A. Kurkel to Magalie Roman Salas (September 6, 2002)

of the proposed pipeline route would occur in areas that have not been previously dredged. A visual survey of the proposed pipeline route was conducted on November 13, 2000 by divers hired by Millennium. The survey did not reveal any major disturbances to the bay bottom, except for the dredged federal navigation channel and some trees and limbs sticking out of the mud in the channel. The survey generally confirmed the undisturbed nature of the bay bottom along the proposed pipeline route. (See report on Hudson River Sampling Program prepared by Lawler, Matusky & Skelly Engineers, dated December 2000)

The dredging and backfilling would result in direct, short and long term adverse effects on 17 to 20 acres of the substrate which is part of the important shallow estuarine benthic habitat in Haverstraw Bay. The FERC FEIS for the pipeline indicates on page 5-59 that the proposed dredging on any given day would affect an area ranging from 0.06 acre to 5.23 acres, and that “Periodic impacts involving about 9.18 acres would occur during backfill of the deepwater component.” The total area directly impacted by the proposed crossing would be 4,724,000 square feet (108.5 acres), which will cause a significant disturbance and changes to the habitat.

During dredging and backfilling, sediments would be suspended in the water column and carried considerable distances north and south of the trench, where they would be redeposited on the substrate. Sediments in the Bay can be characterized as silty/clay-like material which may stay in suspension longer than other types of sediments.⁸⁷ The FEIS indicates on page 5-59 that a visible plume of sediments would range from 60 feet to 90 feet in width and 35 feet to 460 feet long during dredging, and from 90 feet to 500 feet wide and 170 feet to 400 feet long during

⁸⁷Exhibit 23. Endangered Species Act-Section 7 Consultation, Biological Opinion dated September 14, 2001, p. 13 approved by Patricia A. Kurkul, Regional Administrator.

backfilling.

In its Endangered Species Act-Section 7 Consultation, Biological Opinion regarding the proposed pipeline and the Haverstraw Bay crossing, the National Marine Fisheries Service (NMFS) stated:

Numerous studies have assessed the impact of turbidity/suspended sediment on fish... Elevated levels of sediment can cause displacement, disruption of spawning migrations and foraging behavior, and mortality..

Dredging can also result in indirect effects to shortnose sturgeon by elevating levels of suspended sediment, thus altering and/or limiting distribution... Dredging will also cause the destruction of the benthic habitat and prey resources, thus altering and/or limiting foraging patterns and distribution.⁸⁸

The sedimentation resulting from the dredging and backfilling would change environmental conditions in the areas near the trench by destroying benthic organisms, and have short-term and possible long-term adverse effects on other aquatic organisms, the water column, and its chemistry in more than 108 acres of this important shallow estuarine habitat. Certain organisms in the sediment and the water column that could not leave the area would be physically destroyed. Other organisms that ordinarily rely on the substrate and water column in and adjacent to the trench would migrate from and avoid the area and not use it during the dredging and backfilling operations, and for a period of time afterwards while turbid conditions exceed turbidity levels normally tolerated by those species. This would result in temporary and long-term ecological alterations that reduce the carrying capacity of the habitat, change its community structure, reduce its productivity, and increase mortality in the habitat.

⁸⁸Id.

In its Initial Brief, Millennium points out that the Department of State determined that the maintenance dredging of the navigation channel serving the US Gypsum property in Haverstraw Bay is consistent with the policies of the Coastal Management Program. Millennium argues that the Department's decision-making between its project and the US Gypsum project is inconsistent. That assumption is not correct. The difference between the projects is stark. U.S. Gypsum will be maintenance dredging its existing navigation channel and basin areas in Haverstraw Bay. In essence, US Gypsum will be removing sediments which have been deposited since the channel was last dredged. This area has thus been extensively and repeatedly disturbed. Unlike Millennium's project, US Gypsum's activities will not involve removing sediments from undisturbed habitat areas. Most resources using the habitat occupy shallower areas where light penetration of the brackish water provide ample food source and sheltering areas. These areas generally lie outside the channel area. The Department concurred with their certification because it involved the maintenance dredging of existing dredged areas for a water-dependent use, not new dredging that would result in physical modifications to and destruction of valuable undisturbed habitat. In order to avoid and reduce other adverse effects in and to the habitat, the maintenance dredging would be conducted during the September 15 to November 15 window identified in the Department's habitat documentation for the area. Even though it is dredging in a disturbed area, US Gypsum will be using a closed clamshell ("environmental") bucket in order to reduce or eliminate sediment resuspension and dispersal. The sediment would be transported to the Historic Areas Remediation (HARS) site in the Atlantic Ocean and not, as proposed by Millennium, redeposited into the river, where it would be resuspended.

In its May 2, 2000 comments to the Buffalo District of the Corps of Engineers regarding

the proposed pipeline and the Haverstraw Bay crossing, the NMFS stated

Habitat use of the Haverstraw Bay reach of the Hudson River by species of concern is extensive and complex... Construction activities such as those proposed for the Hudson River crossing would create a direct loss of habitat for these species and subject them to increased mortality.⁸⁹

The NMFS' September 14, 2001 Section 7 Endangered Species Act Biological Opinion letter to FERC further states:

Since dredging requires the removal of material from the bottom of the bay down to a specified depth, it causes severe disruption to the benthic community. Disruption of the benthos may affect shortnose sturgeon foraging and migration behavior given that they are benthic omnivores. Dredging has also been known to cause temporary displacement, injury and/or mortality, which may also affect the ability of the Hudson River DPS [Discrete Population Segment] or recovery unit to recover; and,

Dredging operations can cause indirect impacts to shortnose sturgeon in the action area. The most notable indirect impact is the destruction of the benthic habitat and prey resources; and,

Given that dredging will likely destroy all prey resources in the action area, shortnose sturgeon foraging habitat will be reduced.⁹⁰

In the SDEIS, FERC determined that the installation of the gas pipeline beneath Haverstraw Bay, using the lay barge technique, would not have long term adverse environmental consequences. FERC, in the FEIS, contends that the proposed construction method would have temporary adverse effects on the habitat. However, NMFS and the U. S. Fish and Wildlife Service indicate that the adverse impacts on the habitat will be long term. NMFS, in its letter dated March 22, 2001, to FERC stated the following

Our primary concerns with the lay barge technique are with impacts to

⁸⁹Exhibit 24. Letter of May 2, 2000 from Patricia A. Kurkul, Regional Administrator, NMFS to Lt. Colonel Mark D. Feierstein, District Engineer, Buffalo District USACOE, p. 3.

⁹⁰Exhibit 23.

sediments and associated species. For example, our experience with other utility crossings in the Hudson River and elsewhere indicate that crossings cause benthic disturbances that take much longer than anticipated to recover, if recovery takes place at all. This is an important consideration for [Essential Fish Habitat] because the proposed dredging would constitute new work in healthy river bottom habitat. Similarly, given the normal distribution patterns of fish in the Hudson River, it is logical to assume that motile life stages will be affected during project construction. Organisms that may be smothered by the plume of material suspended during dredging should be considered in the EFH assessment.

Based on our experience with subaqueous crossings for other pipeline projects in the Hudson River region and elsewhere, we expect that project construction would physically modify and significantly impair the Haverstraw Bay habitat. This would occur to the detriment of aquatic resources, including estuarine-dependent fisheries.⁹¹

c. Impacts from Blasting Will Be Significant

Millennium attempts to downplay the adverse effects of blasting approximately 185 feet of the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat by stating that the blasting is “highly spatially- and temporally-limited.”

In support of that claim, Millennium cites a May 7, 2002 letter from NYSDEC stating that the agency has “no conceptual problems with the plans as proposed.” DEC’s letter cannot be taken as an endorsement of Millennium’s plans to destroy portions of the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat by blasting. Rather, DEC’s comments are confined to blasting as it would affect the 401 WQC, and DEC noted that Millennium will need to modify its 401 WQC so DEC can “assure that all New York State water quality standards are met.”

⁹¹Exhibit 25. Letter of March 22, 2001 from Patricia A. Kurkul, Regional Administrator, NMFS to Richard R. Hoffman, Leader, Gas Group 2, FERC, copy attached as Attachment. See also letter of April 30, 2001 from Patricia A. Kurkul, Regional Administrator NMFS, to David Boergers, Secretary, FERC, reaffirming NMFS’s environmental concerns with crossing Haverstraw Bay.

Blasting in the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat is not an insignificant action. Blasting will directly remove critical nearshore habitat which cannot be restored. The effects of blasting in the Hudson River were not considered in FERC's FEIS.⁹² In fact, DOS learned on November 27, 2001 from the Corps of Engineers, not Millennium, that Millennium planned to blast in the Hudson River.

On December 14, 2001, DOS informed Millennium that blasting in Haverstraw Bay was a project change "which may have effects on the coastal zone of New York State." In its letter, DOS requested information regarding the conduct of blasting in Haverstraw Bay, including "[A] detailed description of the possible alternatives to blasting;" and "[A]n assessment of potential impacts to fish and wildlife."

In a letter dated January 25, 2002, nearly two months after DOS learned of the blasting proposal, Millennium preliminarily outlined its proposed blasting program, including proposed mitigation measures to reduce impacts on fish. Attached to this letter was Millennium's response to the December 1 2001 data requests by the U.S. Army Corps of Engineers which described possible alternatives to blasting by noting that "...if mechanical techniques will not be totally effective, the fracturing of some rock with blasting techniques will be required to facilitate rock removal to the desired trench depth." Thus, the only alternative considered to in-water blasting was mechanical, which Millennium acknowledges may not be effective.

⁹²Exhibit 10. Letter of February 15, 2002, from Patricia A. Kurkul, Regional Administrator, NMFS to Magalie Roman Salas, FERC Secretary, p. 1; see attachment. On page 5 of its brief, Millennium says that the project will cause limited adverse environmental impacts as shown by the copious evidence set forth in FERC's 2 volume FEIS, but that document did not address blasting. As noted, all the federal environmental agencies agree that blasting could well have significant adverse environmental effects.

The U.S. Fish and Wildlife Service, in a March 5, 2002 letter to the Corps of Engineers, stated that:

The Service acknowledged that the proposed mitigation measures would reduce the potential negative impacts, but believes that additional measures are warranted. Specifically, the Service recommends that Millennium assess the possibility of installing portable cofferdams and pumping the water from the area to be trenched, removing and stockpiling unconsolidated materials, and using a rocsaw to dig the trench. After installation, the trench should be backfilled with the stockpiled sediment and the cofferdams removed.⁹³

The Service continued: “If the Haverstraw Bay crossing is permitted, Millennium should avoid blasting in Haverstraw Bay and instead do the blasting “in the dry” as described above.”

The NMFS notified FERC, in a February 15, 2002 letter, that “. it is necessary to reinstate project review as described below to address blasting and other unevaluated techniques to be used for a Hudson River crossing.” NMFS states that “[S]hock waves and pressure effects associated with blasting would introduce ecological impacts that were not anticipated or addressed in the coordination undertaken to date by our respective agencies as well as by other agencies.”⁹⁴

Focusing on impacts to the endangered shortnose sturgeon, NMFS stated that:

The presence of adults and/or juveniles in the vicinity of the proposed blasting area could result in direct injury and/or mortality.

While a study on shortnose sturgeon revealed that they also suffer from swimbladder ruptures, more common blast-induced injuries were distended intestines with gas bubbles and hemorrhage to the body wall lining (Moser, 1999). Blasting may also result in indirect effects to shortnose sturgeon by destroying benthic habitat and producing underwater noise, thus altering and/or limiting distribution and foraging patterns. Endangered shortnose sturgeon have the

⁹³Exhibit 21

⁹⁴Exhibit 10.

potential to be in the vicinity of the proposed blasting and may be adversely affected by activities and results associated with the blasting.⁹⁵

On April 23, 2002, Millennium's Counsel delivered to the Department: (1) a Blasting and Mitigation Plan for the Millennium Pipeline Project and (2) an Impact Assessment and Mitigation Plan for Blasting on the Millennium Pipeline in Haverstraw Bay . The Blasting Plan confirms that consolidated rock, primarily mica schist, would be encountered for approximately 185 feet of the easternmost portion of the Haverstraw Bay, necessitating detonation of explosives to fracture the rock.

The Blasting Plan primarily focuses on the blasting, including the proposed drill pattern, borehole size, spacing, burden and timing sequence. The second document, the "Impact Assessment and Mitigation Plan," has characterized the blasting impacts on aquatic life as "very small," based upon the localization of the detonation in shallow water. As mitigation measures, the plan indicates that a side scan sonar will be conducted to ensure there are no concentrations of fish in the immediate vicinity of the blast. If the scan confirms the presence of fish, noise generating measures will be employed. To attenuate blast pressure and prevent fish from nearing the blast site, Millennium proposes to use an air bubble curtain. The air bubble curtain is relied upon to keep the range of the blast minimized. Stemming and delays are also proposed as mitigation measures.

In its Initial Brief,⁹⁶ Millennium relies a great deal on the Supplemental Biological Assessment (BA)/EFHA prepared by FERC in July 2002, which in part concludes that the effects of blasting will be temporary and of short duration. The Supplemental BA does not state that

⁹⁵Id.

⁹⁶Millennium Initial Brief pp 51-54.

underwater blasting will not adversely affect the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. The document also concluded that “cumulative” adverse impacts would not result from the blasting. To the extent that new pipelines are not introduced into the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, blasting events might be limited to Millennium’s proposed detonations. The cumulative impact of blasting by Millennium for the Haverstraw Bay crossing would be the disturbances to shallow estuarine habitats and destruction of the shoreline profile. FERC also indicated that fish mortalities could be reduced by mitigation; however, the reduction in mortality does not address the physical changes to the habitat. The Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, possessing outstanding natural values, will be fundamentally changed. Blasting is an activity which is incompatible with this area. As earlier noted, the FEIS contained no information on blasting as blasting was not formally proposed until after it was issued. The Supplement BA/EFHA is no substitute for the analytical and open process which characterizes well-prepared environmental impact statements.

Subsequently, by letter to FERC dated September 6, 2002, NMFS proposed additional mitigation measures for disturbance to fish populations. However, even with these measures, the agency reported that adverse effects on the habitat will occur: “The revised pipeline installation requiring blasting for the easternmost 185 feet of the Haverstraw Bay crossing would adversely affect EFH primarily by disturbing natural sediment structure, by resuspending contaminants, by dispersing or destroying forage species, by altering shallow subtidal habitats, by changing the natural shoreline development, and by fracturing the bedrock formation at the east shore of

Haverstraw Bay.”⁹⁷ In a September 25, 2002 letter to NMFS,⁹⁸ FERC willingly agreed to require Millennium to perform the additional “mitigation,” without addressing the substantive conclusion of NMFS that blasting would significantly and permanently destroy the habitat.

Although the applicant characterizes the plan as “site specific” and its mitigation measures as “extensive,” neither document contains an analysis of the blasting impacts in the unique and important Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. The plan generically suggests routine mitigation measures based on studies in other waterbodies, which may or may not approximate the nationally unique habitat of Haverstraw Bay. The Mitigation Plan indeed notes that the swim-bladders of the short nosed sturgeon, among other fish, have been known to be affected by underwater detonation. The shortnose sturgeon has undergone such a dramatic population decline that it has been federally listed as a endangered species. Relying on literature from other states, the authors freely expressed their belief that the air bubble system will protect aquatic species.

The plan ignores the recommendation of U.S. Fish and Wildlife Service that the work be done, if at all, in a cofferdam.

Blasting, in addition to trenching, would result in other adverse effects in addition to those resulting from trenching alone. Mitigation techniques are proposed for adverse effects on limited types and numbers of invertebrates and fishes. However, the habitat documentation

⁹⁷Exhibit 22. Letter dated September 6, 2002 from Patricia A. Kurkul, Regional Administrator National Marine Fisheries Service (NMFS) to Magalie Roman Salas, Secretary, Federal Energy Regulatory Commission, regarding its Essential Fish Habitat (EFH) Conservation Recommendations for the Millennium Pipeline Project and recommendations pursuant the Endangered Species Act (ESA).

⁹⁸Exhibit 26. Letter dated September 25, 2002 from Lauren H. O’Donnell, Chief, Gas Branch 2, FERC to Patricia A. Kurkul, Regional Administrator, NMFS. See attachment

classifies Haverstraw Bay Significant Coastal Fish and Wildlife Habitat as “irreplaceable,” indicating that there are no methods available, at any cost or any degree of difficulty, that could mitigate valuable habitat loss in undisturbed areas of Haverstraw Bay. While the proposed methods would mitigate to varying degrees direct adverse effects on fishes during construction, they do not avoid the destruction of the shallow benthic habitat. The physical characteristics of the bay, particularly its nearshore shallows, will be directly and permanently altered, constituting an adverse effect on the habitat. The mitigation proposes to replace fractured rock and sediments in the dredged trench. However, that so-called “mitigation” serves only to return the bottom to an approximation of its former state. It does not avoid the destruction of valuable habitat in the designated Significant Coastal Fish and Wildlife Habitat.

Even if the irreplaceability of the area were disregarded, nothing has been provided by Millennium that factually demonstrates the original characteristics, functions, and values of the shallow nearshore habitat could be fully restored. This is especially important given the impact assessment and habitat impairment test in the documentation for the designated Significant Coastal Fish and Wildlife Habitat which states:

In order to protect and preserve a significant habitat, land and water uses or development shall not be undertaken if such actions would: destroy the habitat; or, significantly impair the viability of a habitat.

Habitat destruction is defined as the loss of fish or wildlife through direct physical alteration, disturbance, or pollution of a designated area or through the indirect effects of these actions on a designated area. Habitat destruction may be indicated by changes in vegetation, substrate, or hydrology...

Any physical modifications of the habitat...through dredging, filling... would result in a direct loss of valuable habitat area.

Blasting and trenching, even with mitigation measures imposed on Millennium, would have adverse affects on the Significant Coastal Fish and Wildlife Habitat of Haverstraw Bay that outweigh any project benefits to the national interest in energy. Adopting various mitigation measures does not transform the habitat destruction which would inevitably result from construction activities in Haverstraw Bay into an acceptable activity in that location.

d. Cumulative Adverse Effects

There are currently no pipelines in this area of the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. The absence of pipelines has served to advance the efforts to protect and restore its relatively undisturbed natural character and important habitat functions. The 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 the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. If constructed in a similar manner, the cumulative effects of such structures in the wetlands, mudflats, shoals, substrate and shallow open estuarine waters in Haverstraw Bay would significantly degrade the quality and integrity of the designated habitat by changing the physical, biological, and chemical parameters that the habitat and many species using it are dependent upon.

The U.S. Fish and Wildlife Service shares this concern over cumulative impacts. In its April 28, 2000 letter to the Corps, that agency stated “Cumulative impacts can result from the incremental succession of collectively significant actions taking place over a period of time. Thus, the cumulative impacts of multiple pipelines on Haverstraw Bay is a significant concern

and should be considered in the project evaluation.”⁹⁹

Many adverse effects would result from the increased dredging suspension and resuspension of sediments in shallow areas. The construction and physical presence of pipelines would interfere with the use of portions of the river by species dependent upon the area, including but not limited to, shortnose sturgeon, leading to a decline in the use of the area by the affected species and in the viability of the area as a habitat for these species.

e. Conclusion

The designated Haverstraw Bay Significant Coastal Fish and Wildlife Habitat at would be adversely affected by the dredging, backfilling, and blasting activities required for the construction of the proposed pipeline. Those effects would include mortality of aquatic organisms and destruction of valuable habitat within the bay. It is uncertain whether the habitat would successfully recover from the dredging and blasting activities. There is no disagreement that the benthic habitat in the footprint of the trench would be destroyed by the dredging activity. If blasting is necessary, it would result in the destruction of benthic habitat in the bay and may affect other aspects of the significant habitat. Up to 108 acres of benthic habitat in the vicinity of the trench may also be destroyed or impaired by the sediments that settle on the bay bottom during and after the completion of the dredging and backfilling activities. Although Millennium proposes to restore the bay bottom to within 1+/- foot of its pre-construction elevation (as required by DEC's 401 Water Quality Certification), the benthic habitat would not immediately be re-established nor has it been demonstrated that it would regain its previous functional level.

⁹⁹Exhibit 27. Letter dated April 28, 2000 from David A. Stilwell, Field Supervisor, USDOI Fish and Wildlife Service to Lt. Colonel Mark D. Feierstein, District Engineer, Buffalo District USACOE, p. 5.

The proposed project would result in an immediate destruction of a portion of the designated habitat and impair the viability of the designated Haverstraw Bay Significant Coastal Fish and Wildlife Habitat during and for an unknown period of time after construction of the pipeline in the bay. The habitat narrative specifically states that physical modifications such as dredging would destroy valuable habitat.

The proposed dredging of a trench in the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, and the deposition of the dredged materials in the trench and on the substrate adjacent to it during dredging and backfilling, in an area which has not been dredged or similarly disturbed before, would result in the immediate direct physical destruction and direct loss of habitat and result in direct adverse effects to approximately 108 acres of the habitat during and after dredging and backfilling operations. The immediate physical destruction of valuable habitat and organisms using, dependent upon, and constituting the habitat during the dredging, and afterwards as sediments are redeposited upstream and downstream of the trenched and backfilled area, does not protect the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. Related to the dredging activity is the disposal of the dredged material which is found to be contaminated or unsuitable for backfilling purposes. The FEIS does not indicate what would be done with this material. It is not known if it will be discharged at an approved disposal site or dumped in Haverstraw Bay and cause additional adverse impacts upon the habitat.

Therefore, adverse effects associated with the pipeline and the precedent setting nature of such uses in Haverstraw Bay would not be consistent with the national policy to protect and preserve the viability of important habitats.

2. **Bryn Mawr Siphon**

The proposed pipeline crosses the Catskill Aqueduct of the New York City Watershed at the Bryn Mawr Siphon and the water supply land located in the New Croton Reservoir Watershed, thereby impacting locations in the coastal area which are dependent on the water supply.

In a November 6, 2001 letter to FERC, the City of New York's Department of Environmental Protection (DEP) stated:

The pipeline would cross the Catskill Aqueduct at the critical juncture of the Bryn Mawr Siphon. Millennium proposed construction with approximately two-foot separation between the gas pipeline and the Bryn Mawr Siphon. Due to the FEIS's failure to provide any documented evidence that such a precarious design is feasible without risk to the water supply aqueduct, DEP is entirely opposed to a pipeline crossing in this area.

Any siphon failure would be catastrophic due to the resulting release of an enormous amount of water. The release would include the approximately 1 million gallons contained in the fourteen miles of pipe from the Kensico Reservoir to Hillview Reservoir plus the volume of water that would continue to flow into the aqueduct from both reservoirs until control valves could be closed.

The lengthy process to repair the siphon would include the shutdown of about 40% of the City's water and a complete shutdown of water for all the communities supplied from the aqueduct. Some of the...municipalities that could no longer receive water from the Catskill Aqueduct...include Valhalla, Hawthorne, North Tarrytown, Tarrytown, Greenburgh, Elmsford, New Rochelle, Scarsdale, Yonkers, and Mount Vernon.

The DEP has consistently maintained...that there should be no risk to the integrity of the siphon.¹⁰⁰

DEP also raised concerns about the impacts of the proposed pipeline construction and operation on the watershed lands that supply New York City's public drinking water. DEP states:

In addition to the aqueduct crossings, the recommended pipeline route would

¹⁰⁰Exhibit 17. Letter from Michael A. Principe, Ph.D. to David Boergers (November 6, 2001)

include construction activity on pristine water supply lands located in the New Croton Reservoir Watershed...the water supplied by the New Croton Reservoir, like all City reservoirs, is unfiltered before it is consumed. Therefore, watershed protection efforts are the sole practice used to ensure that water quality is maintained at the highest levels...all efforts should be taken to see that the pipeline route is rerouted to avoid this sensitive watershed land.

The proposed mitigation fails to eliminate the risks to both the water supply and the water supply infrastructure and also neglects the mitigation that would be needed in the event that no acceptable crossing at the Bryn Mawr Siphon is found.

NOAA has stated that: “Adverse effects can be direct or indirect and may arise from an unplanned event such as improper conduct of an activity or an accident”.¹⁰¹ As the pipeline would cross within two feet of the Siphon, it raises significant construction and terrorism risks to the water supply. There is concern regarding the structural integrity of the 90 year old Bryn Mawr Siphon. Construction accidents during installation of the proposed pipeline could occur. Millennium has made representations that, if constructed, the Siphon would be shielded from any blast; however, the possibility of an engineering miscalculation or accident could be disastrous. Ten (10) million gallons of water could be released if the Siphon failed or collapsed and the drinking water supply for 9 million New Yorkers could be severely jeopardized. An unplanned event such as an accident or terrorist act makes crossing this water siphon risky, at best and calamitous, at worst.

Ensuring the quality and continued flow of water to the metropolitan region is of vital economic, social, and environmental interest to the State of New York. Given the water supply system’s importance to the City of New York and other municipalities and that the proposed

¹⁰¹Decision and Findings in the Consistency Appeal of Korea Drilling Co., Ltd. from an Objection by the California Coastal Commission, U.S. Secretary of Commerce (January 19, 1989), p.10; Decision and Findings in the Consistency Appeal of Texaco, Inc. from an Objection by the California Coastal Commission, U.S. Secretary of Commerce (May 19, 1989) pp. 6-7.

routing of the pipeline poses significant risks that have not been adequately addressed by Millennium, the adverse coastal impacts of routing the pipeline in this critical water supply area are enormous and outweigh any conceivable national benefits of bringing another supply of cheap natural gas to the City. The City's water supply is irreplaceable and of greater importance.

3. Village of Croton

The New York Coastal Management Program provides that local waterfront revitalization programs (LWRPs), when federally and state approved, are special management areas. The policy behind LWRP development, like that underlying the CZMA for state programs, recognizes that municipalities are in the best position to know about conditions in their waterfront areas and to enact regulations and management measures to address local conditions. Once a LWRP for a coastal locality is incorporated into the federally approved State Coastal Management Program, federal agencies are required to be consistent with the local program.

The Village of Croton-on-Hudson LWRP was approved by the U.S. Department of Commerce in 1988. The entire Village of Croton-on-Hudson, through which the pipeline would cross, is in the New York State coastal area and is covered by the Village of Croton-on-Hudson's State and federally approved LWRP. For activities that require federal agency authorization and

land or water uses or resources in the coastal area covered by the Village's LWRP, such local program is used by DOS in its determination of consistency. The entire Village is therefore in a special management area. The Village's LWRP and its views regarding impacts on its natural and physical resources must be given full consideration by federal and state agencies

The documentation submitted by Millennium in support of its consistency certification

and the FERC FEIS indicate that the Con Ed Offset/Taconic alternative pipeline route would traverse the Village of Croton-on-Hudson's wellfield, which is the Village's primary source of domestic water supply. This wellfield is within the Croton River gorge and the coastal area.

The FEIS indicates management practices and monitoring efforts would be undertaken to help ensure the wellfield and water supply are protected. However, the management practices were not described nor evaluated in the FEIS. Thus, it could not be confirmed that these practices would achieve their intended purpose. Monitoring efforts were also not described in the FEIS.

The Village's local law prohibits all systems, facilities, and activities except public water supply and pumping and treatment facilities and controls in the Zone 1 Wellhead Protection Area. These standards are part of the implementation measures of the enforceable policies of the LWRP.

Since the pipeline would traverse Zone 1 of the Wellfield Protection Area where it is a use that is not allowed and given the absence of management practices and monitoring activities that would be undertaken to protect the Village's water supply, constructing and operating the pipeline in this area would impact the quality and quantity of surface and groundwater supplies.

Additionally, the pipeline would be constructed in and would affect watercourses and wetlands in the Village of Croton-on-Hudson that are regulated by the Village, including wetlands in and near the Jane E. Lytle Arboretum and the Croton River. The proposed pipeline will disturb wetlands and habitats by clear cutting and trenching, thus it is inconsistent with the Village's federally approved enforceable LWRP policy.

The FEIS, on pages 6-39 and 7-31, includes FERC staff recommendations that

Millennium consult with representatives of the Jane E. Lytle Memorial Arboretum regarding specific measures Millennium “. . . would implement to minimize impact on the arboretum and wetland W08CT [National Wetlands Inventory number for the forested wetland in the arboretum] . . . These measures should include a provision that the pipeline be located to avoid construction disturbance to wetland W08CT and to minimize impact on the drainage swales and streams that supply it . . . Millennium should file with the Secretary the final, site-specific plan that describes measures that would be implemented before and after construction, and includes scaled drawings identifying area that would be disturbed within the arboretum and plans for restoration plantings and reseeding within the construction work area.”

The results of any consultation with arboretum representatives and the final, site specific plan describing the implementation measures were not included in the FEIS or in the consistency documentation submitted by Millennium. Millennium has not assured the State that the design and construction of the pipeline would avoid adverse effects on the wetlands in the arboretum.

The pipeline could be routed to avoid the Village’s wellfield and the wetlands in the arboretum. Until that occurs, the pipeline can be expected to adversely affect the land and water uses and natural resources of the coastal area in a manner which does not serve the national interest.

4. Millennium’s National Interest Argument

While there is a general national interest in assuring greater degree of energy self-sufficiency, Millennium’s proposal to import foreign supplies of natural gas does not advance that goal. If there is any national interest in this particular pipeline proposal, it is not strong enough to override the deleterious effects this specific pipeline route would have on the coastal

environment and on the New York City water supply.

As Congress recognized a national interest in allowing states to plan for, manage and protect fragile coastal resources for the benefit of the entire nation - a fundamental premise and stated objective of the CZMA - consideration must be given to the State's knowledge and planning expertise, including with regard to Significant Coastal Fish and Wildlife Habitats designated in accordance with its Coastal Management Program. In formulating its coastal management program, New York conducted extensive planning and analysis in reliance on congressional mandates. When the US Department of Commerce approved the habitat designations as a component of the New York program, following review and comment by federal and state agencies, it accepted the findings of environmental sensitivity and the presumption of adverse impacts contained in the narratives. The National Marine Fisheries Service has recognized the real importance of DOS's designation of Haverstraw Bay a Significant Fish and Wildlife Habitat.¹⁰² In finding that a pipeline route which would excavate and destroy benthic habitat, the Department applied the approved coastal program, including the habitat narratives, as written, in light of the peculiar facts.

While the transportation of additional supplies of natural gas may benefit the overall energy marketplace, the route selected in crossing the Hudson and traversing through Westchester County had serious and negative drawbacks within the Coastal Area

The CZMA places the initial obligation of balancing the interests of the national coastal policies on the States, when tailoring their coastal programs. New York, as other coastal states,

¹⁰²Exhibit 28. NMFS Letter of March 10, 2000 from Stanley W. Gorski, Field Services Supervisor to Kevin P. Madden, Director, Office of Pipeline Regulation, FERC. See attachment.

crafted its enforceable coastal policies to advance the CZMA's national interests based on New York's unique coastal resources and land and water uses. The other aspect of "balancing" occurs during a consistency appeal, where the Secretary of Commerce is required to balance the competing national interests against the myriad adverse impacts to the Coastal Zone.

New York determined that the Millennium pipeline project, as proposed, contravened several state Coastal Policies, including its habitats and wetlands policies. Millennium claims that New York was required to, but failed to, "balance" various coastal policies when deciding its application. New York responds that the CZMA regulations do not require "balancing" by a State during the consistency review of a project. Such balancing takes place during program development, but not when an individual project is evaluated against the enforceable coastal policies. As such, the project was determined to be inconsistent with the enforceable policies of the New York Coastal Management Program. Contrary to Millennium's claims, there was no obligation to weigh the putative benefits of its pipeline against the destruction of ecologically sensitive habitat, based on the route proposed.

Millennium also argues that DOS's determination should have mentioned the "national benefits" of the project or the project's status as a major energy facility. However, in the absence of an appeal to the Secretary of Commerce, the state agency is required to apply its enforceable state coastal policies which are derived from and developed in conformity with the objectives and policies of the CZMA.

5. The Millennium Project is Only One of Many Similar Projects

Millennium characterizes its proposal as if it were the sole natural gas supply pipeline

available to serve the metropolitan New York market. It is not. What distinguishes the Millennium project is its insistence on excavating through and adversely impacting Haverstraw Bay habitat, threatening the New York City water supply (and those of other communities) and impairing the water supply and wetland areas in the Village of Croton.

The 2002 New York State Energy Plan¹⁰³ (Energy Plan), published in June 2002 by the State Energy Planning Board, encompasses policies designed to provide New York's citizens with fairly priced, clean, and efficient energy resources. The Energy Plan is a blueprint to inform energy decision making and help ensure that, among other things, adequate energy supplies that are critical to the State's stability are available. Section 3.5 of the Energy Plan deals with "Natural Gas Assessment."

As described on pages 3-166 to 3-168 of the plan, FERC has recently approved nine projects which will increase capacity to New York and the Northeast by 2003.

As described on pages 3-169 to 3-171, 11 projects, including Millennium, have been proposed, but not all will be built since some proposals compete with each other.

The Energy Plan uses, in part, a NYSERDA and NYISO study which focused on an analysis of the New York City metropolitan area. On page 3-177 of the Energy Plan, it states:

The study's overall findings are that:

If no post-2003 pipeline expansion projects are built, the existing gas and oil systems will be adequate to meet all generation scenarios. (Emphasis added.)

Pipeline capacity additions of between 300 MDT per day and 800 MDT per day would provide additional benefits to the electricity and natural gas systems.

¹⁰³ Exhibit29. See also www.nyserdera.org/sep.html.

If 800 MDT per day of post-2003 pipeline capacity are built into the downstate New York area, gas could meet 100 % of all generation scenario fuel needs.

If fewer pipeline expansions and/or less additional generating capacity are added, a substantial portion of the maximum potential gas demand for generation can be met. Some oil would need to be burned, but the total annual oil burn in all cases in 2005 would be less than the amount burned in 2000 and 2001.

Further, the Energy Plan, on page 3-180 states, “According to EIA’s projections [Federal Energy Information Administration], there will be adequate supplies of natural gas at all forecast levels of demand and price.”

According to the June 2002 Energy Plan, existing gas and oil systems are adequate to meet electric generation near term needs. Further, there are 11 proposed pipelines, including Millennium. Without Millennium the 10 other proposed pipelines would deliver in excess of 2855 MDT per day. If only 800 MDT per day is provided, natural gas could meet 100% of electric generation fuel needs.

Another important report, issued in July 2002, entitled The Ability to Meet Future Gas Demands from Electricity Generation in New York State¹⁰⁴ addressed “concerns about the adequacy of the New York gas delivery infrastructure for simultaneously meeting traditional gas demands and future gas demands for electric generation. These concerns have stemmed from existing delivery constraints in the downstate [NYC] region, forecasted demand growth among traditional gas consumers, and the expectation that gas demands among the electric generation

¹⁰⁴ Exhibit 30. The Report The Ability to Meet Future Gas Demands from Electricity Generation in New York State was prepared for New York State Energy Research and Development Authority (NYSERDA) and New York Independent System Operator, by Charles River Associates 200 Clarendon Street Boston, Massachusetts 02116. A copy of the Report appears as Attachment and can be accessed electronically at www.nyserda.org.

sector will grow rapidly as new gas-fired power plants are built to support increasing electric demands.”¹⁰⁵ The Report states that:

Substantial expansion of the New York pipeline infrastructure is already underway. With projects that have recently been completed or are expected to be completed by the end of 2003, a total of 465 thousand dekatherms (MDT) per day of new delivery capacity will be available into the downstate region. This additional capacity represents a 7 percent increase in delivery capacity to the State and a 16 percent increase into the downstate region, and exceeds forecasted growth in nongeneration gas demands through at least 2005.

In addition to the 465 MDT per day of expansions already being added, the Federal Energy Regulatory Commission (FERC) has provisionally approved projects that could provide a total of approximately 800 MDT per day, primarily to the downstate region.¹⁰⁶

Importantly, the Report looked at the broader natural gas distribution system from a regional perspective, including demands from New England and the mid-Atlantic State users. Using scenarios to the year 2005 but including an analysis up to the year 2010, the Report focused upon the *physical adequacy* of the New York gas delivery infrastructure for supplying the natural gas needs of both traditional gas users and electric generators, assuming liquid markets exist for both gas supplies and pipeline capacity.”

Among the principal conclusions of the Report were:

[W]ith the addition of 465 MDT per day of pipeline capacity assumed to be in place by November 2003, New York will have sufficient gas delivery capacity to supply the amounts of gas required for generation under all 2005 generation and post-2003 pipeline addition scenarios, provided the existing ability to burn oil is maintained.¹⁰⁷

¹⁰⁵ Id. at 9

¹⁰⁶ Id. at 1 - 2.

¹⁰⁷ Id. at 5 (Emphasis added)

The Report also concluded that under the pipeline scenarios in which the maximum potential gas demands could not be fully met, a substantial portion of this maximum potential amount could still be delivered, but the use of fuel oil would continue to be required to meet electric demands.”

Based on current and reliable data, the energy distribution system serving New York City and the region has an adequate supply of natural gas to meet generating needs to the year 2005 and based on certain scenarios until the year 2010. Millennium’s supply of Canadian gas was not factored into the projections under the State Energy Plan or the Final Report. It’s supply is not considered essential to serving the region’s energy needs.

In summary, more natural gas to New York is needed, but meeting that need is not dependent on any one of the 11 proposed pipelines. It is, therefore, obviously clear that the benefits of the Millennium pipeline, more gas to New York, does not outweigh the detrimental effects on the water supply of 9 million people, the principal water supply of the Village of Croton-on-Hudson, and the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat.

The Millennium Pipeline, while offering another natural gas supply to the NYC energy market, does not serve such significant and substantial interests that other important national coastal policies are overridden. Millennium’s contribution to the national interests recognized under the CZMA , if any, are minimal. It would transport natural gas from Canada to a market that presently has an adequate supply. Many other competitors have applications before FERC to serve this market.

Millennium’s project is different from its competitors because it alone proposes to place its pipeline across one of the most biologically productive and important coastal wildlife habitats

in the northeastern United States. As currently routed, the pipeline would adversely “affect land or water uses or natural resources of the coastal zone.”

If there is any national interest in this particular pipeline proposal, it is not strong enough to override the permanent effects this specific pipeline route would have on coastal habitats, the Village of Croton and on the New York City water supply.

C.

Reasonable Alternatives Are Available Which Would Permit the Project to be Consistent with the Enforceable Policies of the Coastal Management Program

To satisfy the third element, the Secretary must find that "[t]here is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal."¹⁰⁸

The CZMA regulations give a State the option, at the time it objects to the consistency certification for a proposed activity, to describe alternatives that would permit the activity to be conducted in a manner consistent with its management program. Specifically, 15 CFR 930.63(b) provides that:

The objection may describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.

In addition, 15 CFR 930.63(d) provides that:

If a State agency proposes an alternative(s) in its objection letter, the alternative(s) shall be described with sufficient specificity to allow the applicant to determine whether to, in consultation with the State agency: adopt an alternative; abandon the project; or file an appeal under subpart H. Application of the specificity requirement demands a case specific approach. More complicated activities or alternatives generally need more information than less-complicated activities or alternatives.

Moreover, a state is not precluded from identifying reasonable alternatives during appeal.¹⁰⁹

¹⁰⁸15 CFR § 930.121(d)

¹⁰⁹15 CFR §930.121(c)

These provisions of the NOAA regulations are intended to

ensure that the Secretary's findings regarding alternatives will not be restricted, but will be informed and based on the Secretary's independent administrative record for each case. In this way, both the State and appellant will be able to provide the Secretary with information on whether an alternative is reasonable and described with sufficient specificity that might not have been available when the State issued its objection.¹¹⁰

The requirement that the alternative be "available" to an appellant does not mean that the alternative does not require any other approvals by federal, state or local agencies before it may be carried out, or that conditions will not be imposed by those agencies. If, however, a state or local agency denies the permits necessary to implement the alternative or imposes unreasonable permit conditions, the alternative would not be available.¹¹¹

An alternative may involve changes—sometimes major changes—in the location or design of a proposed project to make it consistent with the State's coastal management program.¹¹² Whether an alternative will be "reasonable" depends upon its feasibility and the balancing of advantages of the alternative against its costs.¹¹³ This balancing requires the Secretary to

¹¹⁰Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 65 FR 77124, 77151 (December 8, 2000).

¹¹¹Decision of the Secretary of Commerce in the Matter of the Appeal by Exxon Company, USA, (Santa Ynez), supra, at pp. 15-16.

¹¹² In its commentary explaining 15 CRF § 930.63(d) of the new CZMA regulations, NOAA stated that it "agrees that State agencies should not be responsible for the design of a project, although States should describe alternatives with sufficient specificity to demonstrate their reasonableness. The regulations recognize this in section 930.63(d) by having the applicant determine its alternative options "in consultation with the State agency: * * *" This would allow the State agency to describe an alternative, but would still require the applicant to "design" the alternative and to consult with the State agency on whether the altered project was consistent. Then, when an applicant adopts a consistent alternative, the State would remove its objection and the Federal agency could approve the activity so long as the approval was consistent with the alternative agreed to between the State and the applicant."

¹¹³Consistency Appeal of Gulf Oil, at 22.

consider how much less adverse the alternative would be to the land and water resources of the coastal zone and the increased costs to the appellant of carrying out the alternative. ¹¹⁴

In the decision letter, DOS identified three alternatives which, if adopted by Millennium, would permit the activity to be conducted in a manner consistent with the CMP and the Village of Croton-on-Hudson LWRP. The three alternatives contained in DOS's decision letter are: terminate the proposed pipeline in the vicinity of Bowline Point in Rockland County on the west side of the Hudson River; 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 system; or use excess capacity in the existing Algonquin pipeline. There are other reasonable alternatives available that could also be consistent with the CMP.

Millennium did not properly consider all reasonable and available pipeline routes that would allow the pipeline to be located in a manner that would be consistent with and advance applicable CMP policies. Other available and reasonable alternatives include: some that were summarily dismissed in the project EIS and Millennium's consistency submissions; some that were considered but rejected after cursory review and without further investigation and analysis in the project EIS and Millennium's consistency submissions; and others not considered at all in the project EIS or Millennium's submissions to DOS.

Following DOS's decision, Millennium did not continue the process of consultation with DOS to determine whether to "adopt an alternative; abandon the project; or file an appeal under

¹¹⁴Consistency Appeal of Southern Pacific Transportation Corp., at 18-19.

subpart H” as provided for in 15 CFR 930(d). The State is not required to design Millennium’s project. This is explained on pages 77141 and 77142 in the Federal Register, Volume 65, NO. 237, dated Friday, December 8, 2000, in NOAA’s Supplementary Information regarding changes to 15 CFR 930. Given the complexity of the matter, Millennium should have consulted further with DOS to re-explore and examine alternative routes.

DOS has met and consulted with several government agencies to identify and review available alternative routes in addition to those identified in its May 9, 2002 decision. DOS met with the New York State Public Service Commission, the New York State Energy Research and Development Authority, the New York State Department of Transportation, the New York State Office of Parks, Recreation and Historic Preservation, the New York Thruway Authority and the Palisades Interstate Park Commission. The consultations focused on the availability, reasonableness, and feasibility of various potential routing alternatives and river crossings. The agencies responded to the potential alternatives from a programmatic and policy perspective, as well as from a physical, land based perspective. DOS, in conjunction with the agencies, has identified alternatives that were either not considered in the FEIS or were dismissed without a thorough evaluation of their merits as means to locate the pipeline in New York State while avoiding impacts to public water supplies and to the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat.

The results of this review identified five available alternative river crossings, nine approaches from the proposed Millennium Pipeline route to the west side of the river crossings, and five available alternative approaches from the east side of the river crossings to the proposed Millennium Pipeline route.

In addition, the review identified available alternatives around the Village of Croton-on-Hudson well field and arboretum, and an available alternative that would avoid the Bryn Mawr Siphon.

Each of the alternatives is reasonable and available. None would jeopardize the New York City water supply, the Village of Croton-on-Hudson's water supply, nor the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. All are shorter than the proposed Millennium Pipeline route. Each alternative would provide increased supplies of natural gas to New York, and could also serve consumers in Pennsylvania and New Jersey.

1. Reasonable and Available Alternative Crossings of the Hudson River and Associated Alternatives to/from the West and East Points of Each Crossing

The following five reasonable and available crossings of the Hudson River and the western approaches to the crossings and the eastern connections to Millennium's route would allow Millennium to avoid the sensitive Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, the Village of Croton-on-Hudson's well field, and New York City's water supply at the Bryn Mawr Siphon. (See Exhibit Map 1)

a. Tennessee Pipeline Right-of-Way River Crossing

The southernmost crossing alternative is along or near the Tennessee Pipeline right-of-way. This river crossing is approximately 1.3 miles long. Trenching in this part of the river during the appropriate season would not be inconsistent with the CMP. The feasibility of constructing a pipeline across the river in this area has already been demonstrated by the construction of the Tennessee Pipeline.

The Tennessee Pipeline right-of-way is adjacent to an existing open water cut or channel from the west bank of the Hudson River, extending east into the Hudson River. This cut is in

the southern edge of the Piermont Marsh Significant Coastal Fish and Wildlife Habitat, which is comprised of filled areas and wetlands. The impact assessment included in the habitat documentation for this area indicates that the elimination of marsh or shallow water areas, through dredging or filling, would result in a direct loss of valuable marshes constituting important fish and wildlife habitats. However, the impact assessment for the area also indicates that limited habitat management activities, including expansion of open water areas in the marsh, may be designed to maintain or enhance populations of certain fish or wildlife species. To avoid the destruction of valuable fish and wildlife habitats in this area or otherwise impairing the habitat, the pipeline could be trenched in this open water cut or channel during the appropriate season.

This crossing was not fully evaluated in the FERC FEIS, yet it would allow Millennium to meet its stated goals, while avoiding the Village of Croton-on-Hudson's well field and the Jane E. Lytle Arboretum and the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat.

(i) West Side of the Hudson River – Available Alternative Routes to the Crossing

There are five available routing alternatives on the west side of the river to access the Tennessee Pipeline Right-of-Way River Crossing:

(A) *Palisades-Rte. 45 to Thruway and Palisades-Thruway to Rte.340 (Map Exhibit 1)*

A route along the Palisades Interstate Parkway right-of-way would begin at Millennium's proposed crossing of the Palisades Interstate Parkway in Clarkstown east of Happy Valley. It would follow the Palisades Interstate Parkway right-of-way south to its intersection with the existing Tennessee Pipeline right-of-way and follow that right-of-way east to the west side of the

Hudson River The Tennessee Pipeline right-of-way, based on initial information, is 50 feet wide. If the Tennessee Pipeline is in the middle of the right-of-way, the Millennium Pipeline could be routed in this right-of-way with the acquisition of an additional 20 foot right-of-way along its length. The predominant character of the lands abutting the Tennessee right-of-way on the west side of the river is open space, although there are some residences around 9W, suggesting that acquisition of additional right-of-way, if needed, is feasible.

The route south along the Palisades Interstate Parkway right-of-way was not adequately considered by Millennium or in the project FEIS. In addressing a Palisades Interstate Park alternative in two paragraphs on pages 3-52 and 3-53 of the project FEIS, a route in the park was summarily dismissed “[S]ince the proposed route would follow existing utility corridors and would minimize new impact and no significant or unique environmental resources have been identified, we eliminated this alternative from further consideration

No information was provided indicating whether such a route was fully explored, or whether the Palisades Interstate Park Commission (PIPC) had been contacted or offered any comments regarding such a route. However, the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) stated in a June 18, 1999, letter to David Boergers of FERC that “[e]asement negotiations and plan development for proper environmental and operational mitigation” between OPRHP, the Palisades Interstate Park Commission, and Millennium “will take place and be approved by NYS OPRHP and PIPC...”¹¹⁵ Rather than pursuing options involving the Park and Parkway, Millennium and the project FEIS summarily dismissed them.

Using the Palisades Interstate Parkway right-of-way as an option should have been given

¹¹⁵ Exhibit 31 Letter from OPRHP to FERC at 6.

serious consideration. The New York State Department of Transportation (NYS DOT) reviewed the project FEIS and alternative routes and has indicated to DOS that: there is considerable right-of-way available along the Palisades Interstate Parkway (an average right-of-way width of 400 feet, and about 100 feet of right-of-way from the edge of pavement); using such a route is reasonable; and given the proposed terminus of the pipeline and overall issues and effects, routing the proposed pipeline along the Palisades Interstate Parkway provides one of the least problematic routes on the west side of the Hudson River.

Of all alternatives considered by Millennium and FERC and those identified by DOS, routing the pipeline along the Palisades Interstate Parkway right-of-way would appear to have the least overall significant and adverse effects on the natural and human environment. There are construction techniques that can minimize the amount of area to be disturbed and preserve trees to buffer adjacent land uses. Another opportunity is using the pipeline route as a bike path after construction of the pipeline. Disruption of traffic on roads that cross the Palisades Parkway can be eliminated by directional drilling or jack and bore construction.

This is an available, feasible, and reasonable alternative that was not adequately pursued with the appropriate agencies or evaluated in the FEIS. The area available for staging a lay barge operation meets Millennium's stated requirements.

(B) *Palisades-Rte. 45 to Thruway; Route 304-Tennessee ROW (Map Exhibit 1)*

This available and reasonable alternative would begin at Millennium's proposed crossing with the Palisades Interstate Parkway and would use the Parkway right-of-way to its intersection with the Tennessee Pipeline right-of-way at the NYS Thruway. The Millennium Pipeline would then follow the existing Tennessee Pipeline right-of-way south through the Town of Orangetown

into New Jersey and back into New York to the existing Tennessee Pipeline Hudson River crossing.

This route was not fully considered in the project FEIS. As discussed above, through acquisition of additional right-of-way, if necessary, Millennium could locate the pipeline in this existing utility corridor. It is an available, reasonable, and feasible alternative.

CSX ROW-Bowline to Rte. 303; CSX ROW-Snake Hill Road to Palisades;

Palisades-Thruway to Rte. 340 (*Map Exhibit 1*)

This route would follow the CSX right-of-way from Bowline in Haverstraw south to the Palisades Interstate Parkway, then southeasterly along the Palisades Interstate Parkway right-of-way to the Tennessee Pipeline right-of-way. As was noted above, the Palisades right-of-way has sufficient width to accommodate the pipeline. The CSX right-of-way is wide enough to accommodate four tracks, and is only occupied by two tracks. According to NYS DOT, there is more than sufficient room to construct the pipeline.

This route was not evaluated in the project FEIS, and is an available, reasonable, and feasible alternative.

Thruway-Algonquin ROW-Kakiat County Park to Palisades-Thruway Intersection;

Palisades-Thruway to Rte. 340 (*Map Exhibit 1*)

Using this route, the Millennium Pipeline would intersect with its proposed route to Bowline near Kakiat County Park. It would follow the Algonquin Pipeline right-of-way south to the New York State Thruway right-of-way. It would follow the Thruway right-of-way to its intersection with the Palisades Interstate Parkway. The route would use the Palisades Interstate Parkway right-of-way south to connect with the Tennessee Pipeline right-of-way.

The FEIS did briefly address use of the NYS Thruway right-of-way to cross the river in the vicinity of the Tappen Zee Bridge. On page 6-8 of the FEIS, use of the Thruway right-of-way in that area was dismissed because the Thruway Authority expressed concern with the possible interference of the pipeline with the reconstruction of the Tappen Zee Bridge. There is no indication that discussions were held with the Thruway Authority regarding use of its right-of-way as described in this alternative. DOS has discussed this alternative with the New York State Thruway Authority, which indicated a willingness to discuss this routing with Millennium, including opportunities for acquisition of a companion 50 foot right-of-way adjacent to the Thruway from Exit 15 to Exit 13.

This route was not considered in the project FEIS, and is an available, reasonable, and feasible alternative.

***Thruway-Algonquin ROW-Kakiat County Park to Palisades-Thruway Intersection;
Route 304-Tennessee ROW (Map Exhibit 1)***

The Millennium Pipeline would interconnect with the Algonquin Pipeline right-of-way near Kakiat County Park and follow that right-of-way south to the New York State Thruway route until it intersects with the Tennessee Pipeline at Exit 13.

As noted above, use of the Thruway right-of-way was not thoroughly considered in the project FEIS. This route is an available, reasonable, and feasible alternative. The area available for staging a lay barge operation meets Millennium's stated requirements.

b. East Side of the Hudson River – Available Alternative Routes to the Proposed Millennium Route

Tennessee Pipeline ROW to Saw Mill Parkway (Map Exhibit 1)

The Millennium Pipeline would come ashore on the east bank of the Hudson River. On the east bank, the pipeline could be directionally drilled or jacked and bored a short distance under railroad tracks upland of the river. There are several acres of open space adjacent to the railroad tracks and at Mercy College that could provide staging and work space for routing under the tracks. The upland area could be used to contain drilling fluids if directional drilling is used, and drilling fluids and related in-water effects from nearshore drilling or boring could be avoided and minimized by keeping the activities contained inside an in-water cofferdam.

The Millennium Pipeline could follow the Tennessee right-of-way or make adjustments along existing public road rights-of-way. Because the land use characteristics on the eastern side of the river are residential, open space, and institutional lands, acquisition of any needed right-of-way is feasible. Engineering solutions and construction techniques can be used to locate the pipeline along roadways, if necessary. Millennium could rejoin its proposed route at the Saw Mill River Parkway, with the exception of a route deviation to avoid the Bryn Mawr Siphon, as discussed below.

This route is an available, reasonable, and feasible alternative.

b. Route 117 River Crossing

Millennium and the project FEIS summarily dismissed a river crossing from Nyack Beach State Park to the area of Rockwood State Park and Phelps Memorial Hospital.

The FEIS on page 3-53 and 3-54 identified three reasons why a route across the Hudson River from the Nyack Beach State Park area across the river to Route 117 was

“...eliminated...from further analysis.” The final EIS states on those pages:

First, a directional drill under the railroad tracks and into the Hudson River, if it is feasible, would release drilling fluids (e.g., bentonite) onto the river bottom.

Since this crossing would still be within designated EFH habitat and would be longer than the proposed route, we identified no advantage with the alternative over the proposed route.

Second, installation of the pipeline along the winding Hook Mountain Bike Trail would require cutting back the adjacent cliffs and trees on the west side of the trail to provide enough working space for equipment to excavate the trench, maneuver the pipe into position, and backfill the trench. There is virtually no useable work space on the Hudson River side of the trail.

Third, installation of the pipeline within the Palisades Interstate Park system may not be a compatible use. It would require clearing trees along its length which would have a significant impact on the viewshed of the Hudson River. This impact may not be consistent with the CZM Plan. For these reasons, we eliminated this alternative from further analysis.

For the following reasons, none of the preceding issues, individually or together, are grounds for eliminating this route from further consideration.

First, the habitat characteristics and values and protection accorded this area of the Hudson River, which is not a State-designated Significant Coastal Fish and Wildlife Habitat, are not as high as the designated Haverstraw Bay and other Significant Coastal Fish and Wildlife Habitats. While this area is generally identified by the National Marine Fisheries Service as an Essential Fish Habitat, as is most of the Hudson River south of the Federal dam in Troy, this area does not exhibit the higher habitat value and protection accorded State-designated Significant Coastal Fish and Wildlife Habitats. Given this, in-water physical modifications of the area and some type and level of sedimentation that would meet State water quality standards is feasible. To ensure that water quality standards are met and to minimize the effects of discharges of drilling materials into the river, any drilling materials could be contained inside a nearshore coffer dam in the river, or contained inside a surface-to-bottom sediment curtain. If directional drilling is not used under the railroad tracks, the pipeline could be routed under the tracks using

conventional jacking and boring or tunneling techniques. Use of a cofferdam, sediment curtain, or other best management practices could avoid or minimize the discharge of sediments into the river.

There is an alternative to Hook Mountain Bike Trail segment that Millennium rejected which is available and feasible. This alternative was not considered in the FERC FEIS, as described below.

The third basis stated for eliminating this route is because it **may** (emphasis added) not be a compatible use with the Palisades Interstate Park system. This is disingenuous. It should have been determined whether the pipeline would or would not be a compatible use in the Palisades Interstate Park and its Parkway, not summarily dismissed based on an unfounded assumption. Other pipelines exist in the park, including the Tennessee Pipeline and the Algonquin Pipeline. Further, Millennium has proposed and FERC, in its Final Order, stipulated that the Millennium Pipeline is to pass through other portions of the Palisades Interstate Park. Both Millennium and FERC should have explored this possibility further.

Likewise, the statement that this route "...would require clearing trees along its length which would have a significant impact on the viewshed of the Hudson River" and "[T]his impact **may** not be consistent with the CZM Plan" is an unfounded means of summarily dismissing a viable route also based on an unfounded assumption. First, the Palisades Interstate Parkway is a significant distance from the Hudson River. The area is not within a State-designated Scenic Area of Statewide Significance. It is presumptuous to state that the visual effect of clearing trees for a pipeline route in this area **may** not be consistent with the "...CZM Plan" without consulting with DOS, which was never done.

Routing the pipeline in this area would not be inconsistent with the CMP. The pipeline could be physically constructed in this area, drilling materials can be managed appropriately to avoid unacceptable water quality and related impairments, and the routing of the pipeline from the west and east sides of the river are feasible and available, and, as with all alternatives, should be properly evaluated with the involved agencies.

This alternative was not fully evaluated in the FEIS and is available, reasonable, and feasible.

**(i) West Side of the Hudson River – Available Alternative Route to the Crossing
*CSX ROW - Bowline to Rte. 303 (Map Exhibit 1)***

From the existing Millennium proposed route near Bowline, the pipeline could follow the CSX right-of-way south to Route 303 and Nyack State Park. The CSX right-of-way is wide enough to accommodate four tracks, and is only occupied by two tracks. According to NYS DOT, there is more than sufficient room to construct the pipeline.

This route follows the CSX right-of-way to Route 303, then north and eastward through a large tract of undeveloped land, crossing under Christian Herald Road and proceeding northeastward and then eastward following the southernmost part of Hook Mountain along the Hook Mountain State Park boundary, to the Marydell Camp/Nyack Beach State Park area.

This alternative was not evaluated in the FEIS. This is an available, reasonable, and feasible alternative.

**East Side of the Hudson River – Available Alternative Routes to the Proposed
Millennium Route**

Rte. 117 – Phelps Memorial Hospital to Saw Mill Parkway (Map Exhibit 1)

The pipeline would come ashore along the southern boundary area of Rockwood Hall State Park. There are railroad tracks near the river, and the pipeline could be routed by using jack and bore construction under railroad tracks. The pipeline could then proceed east along the boundary of the Phelps Memorial Hospital and Rockwood Hall State Park to Route 117. It would then follow the Route 117 right-of-way eastward to Millennium's proposed route, thence south along Millennium's proposed route, with the exception of a route deviation to avoid the Bryn Mawr Siphon, as discussed below.

DOS shares the opinion of NYS DOT that the right-of-way along Route 117 on the east side of the river is wider than most similar routes in the area and could accommodate a pipeline. Route 117 has another advantage of entering the Taconic State Parkway at a point where its right-of-way is wider than the more northern sections that Millennium proposes to use.

This is an available, reasonable, and feasible alternative.

(c) Lovett Power Plant River Crossing

DOS identified another crossing area which would allow Millennium to cross the river north of the Haverstraw Bay habitat. This crossing is from the Lovett Power Station on the west side of the river to a former quarry site one-half mile south of the Consolidated Edison site on the east side of Hudson River. Directional drilling would not be required in this area.

The Lovett Power Station on the west side of the river is owned and operated by Myrant Bowline, which also owns and operates the Bowline Station which Millennium would serve on the west side of the Hudson River in Haverstraw. The Lovett Power Station crossing can be accessed from Bowline at least two ways, described below, along the CSX right-of-way or along an existing electric transmission line utility right-of-way.

(i) West Side of the Hudson River – Available Alternative Routes to the Crossing

There are two routes that the pipeline could follow on the west side of the river to the Lovett facility area.

(A) CSX ROW-Bowline to Lovett (Map Exhibit 1)

Just west of the Bowline Power Plant, the Millennium Pipeline could add a pipeline extension to follow the existing CSX right-of-way north to the Lovett Power Plant which is adjacent to the CSX right-of-way. As noted above, the CSX right-of-way can accommodate four tracks and is occupied by two tracks. There is sufficient room to construct the pipeline in this right-of-way, and engineering and construction solutions can be developed to address concerns about vibration or derailment effects on the pipeline.

To cross roads or the railroad tracks upland of the Lovett facility, the pipeline could be conventionally jacked and bored or tunneled under the roads and railway to the shoreline area of the Lovett facility. The pipeline could be trenched across the river during the appropriate season. Significant open space exists at and adjacent to the Lovett facility on the west shore of the river to stage conventional trenching across the river.

This alternative was not discussed in the project FEIS. This is an available, reasonable, and feasible alternative.

(B) Electric Transmission ROW-Bowline to Lovett (Map Exhibit 1)

At Garnerville, west of the Bowline facility, Millennium could follow the existing utility right-of-way, adding a pipeline extension along that same utility right-of-way heading north along that right-of-way to its existing terminus at or adjacent to the Lovett facility. This route would also accommodate a variation that would follow the electric transmission right-of-way to

Route 9W and then follow the Route 9W public right-of-way used by the existing 12" gas line to the Lovett facility area.

To cross roads or the railroad tracks upland of the Lovett facility, the pipeline could be conventionally jacked and bored or tunneled under the roads and railway to the shoreline area of the Lovett facility. The pipeline could be trenched across the river. Significant open space exists at and adjacent to the Lovett facility on the west shore of the river to stage conventional trenching across the river.

This alternative was not discussed in the project FEIS. This is an available, reasonable, and feasible alternative.

East Side of the Hudson River – Available Alternative Routes to the Proposed Millennium Route

Electric Transmission ROW - Indian Point to Rte. 9

On the east side of the river, a landing site is available at a former quarry about one-half mile south of the Consolidated Edison right-of-way and north of Verplanck. This site, with several dozen acres of adjacent riverside and open space upland, would provide more than ample space to stage and construct a pipeline trench across the river in this area. The pipeline could be routed along the south perimeter of the quarry site and around the east side of it to the existing electric utility right-of-way in that area. That utility right-of-way is a part of the same utility right-of-way that Millennium proposes to follow in its more southerly routing. The route would proceed south following Millennium's proposed route with small deviations to avoid the Croton-on-Hudson well field and the Jane E. Lytle Arboretum and the Bryn Mawr Siphon as discussed below.

d. Electric Transmission Right-of-Way River Crossing

This river crossing would use the electric transmission corridor just south of the Algonquin Pipeline right-of-way. This crossing was not assessed in the project FEIS.

The pipeline could come ashore approximately one and one-half miles south of the LaFarge site, at the Consolidated Edison site. This area is flat and open and offers more than one-half acre of staging area for crossing the river using the lay barge technique, which Millennium's brief asserts is sufficient.

This alternative was not evaluated in the FEIS, and meets Millennium's stated staging area requirements and therefore is an available, reasonable, and feasible alternative.

(i) West Side of the Hudson River – Available Alternative Route to the Crossing

(A) *Palisades-Algonquin ROW, South Mountain to Lovett (Map Exhibit 1)*

This route alternative would intersect with Millennium's proposed route in the vicinity of South Mountain. The alternative would use the Palisades Interstate Parkway right-of-way north to the Algonquin right-of-way. It would follow the Algonquin right-of-way to Route 9W and then proceed south to the electric transmission right-of-way.

This alternative was not fully evaluated in the FEIS. This is an available, reasonable, and feasible alternative. It meets Millennium's stated staging requirements.

East Side of the Hudson River – Available Alternative Route to the Crossing

Electric Transmission ROW - Indian Point to Rte. 9

On the east side of the Hudson River, the pipeline would follow the Algonquin right-of-way, intersect with the right-of-way for the electric transmission lines near Buchanan, and follow this right-of-way to Millennium's proposed route in the Town of Cortlandt.

This alternative was not fully evaluated in the FEIS. This is an available, reasonable, and feasible alternative. It meets Millennium's stated staging requirements.

e. Algonquin Right-of-Way River Crossing

FERC evaluated two alternative crossings of the Hudson River, one north and one south of the designated Haverstraw Bay Significant Coastal Fish and Wildlife Habitat. According to the FEIS, the northern alternative is over three miles from the proposed crossing, next to the existing Algonquin natural gas pipelines. This option was rejected in the FEIS.

The Algonquin Crossing, in addition to the advantage of avoiding crossing the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, could travel adjacent to existing rights-of-way for 99% of its route, including those in and adjacent to Palisades Interstate Parkway. In addition, directional drilling would not be required, reducing the spatial requirements for equipment staging.

Millennium's Initial Brief states that for the lay barge method, which would be acceptable in this portion of the river, "approximately one-half acre is required on each bank of the river to make the shore approaches.

Contrary to Millennium's assertions, there is upland space to support conventional trenching and barge-mounted pipe-laying. On the west side of the river at Tompkins Cove where the Algonquin Pipeline crosses the Hudson River, there is a downward slope of about 30 feet to Route 9W. East of Route 9W there is a fill area of about 200 feet. There is then a drop to a shelf about 100 feet wide. Between this 100-foot wide shelf and the railroad tracks is a local road. There is one-half acre of land available landside of the tracks, which Millennium states in its brief is the minimum requirement. The tracks and road can be crossed with conventional jack

and bore construction. Therefore, contrary to Millennium's statement, the Algonquin alternative provides adequate staging area and is feasible from an engineering perspective.

Further, Millennium cites proximity to the Algonquin pig as an interference that would not permit directional drilling. There is, however, sufficient room to stage a lay barge construction operation. There is approximately 50 feet separation between the pig and a possible route for Millennium. A forty foot separation is, however, more than adequate for construction, given that Millennium proposed to construct the pipeline within a 20 foot wide area in the City of Mount Vernon. Millennium, therefore, has not demonstrated that there is insufficient area to install the pipeline in the vicinity of the pig.

On the east side of the river, Millennium states that the banks at the LaFarge site are steep and would pose staging difficulties. While the LaFarge site, proposed by Millennium as the east bank landing site, may pose some difficulties, the pipeline could be constructed up or through the river's embankment using conventional trenching, tunneling, or slope construction techniques.

In the FEIS, FERC also notes that the Algonquin Route has residential subdivisions in close proximity to the existing Consolidated Edison and Algonquin rights-of-way and that re-routing would be required to avoid these areas. Constructing the pipeline in such areas may require special construction techniques, including possibly directional drilling, but given Millennium's ability to install the pipeline within a 20 foot wide area in the City of Mount Vernon, an engineering solution is possible.

(i) West Side of the Hudson River – Available Alternative Route to the Crossing

(A) *Palisades-Algonquin ROW, South Mountain to Lovett (Map Exhibit 1)*

Unlike the Algonquin crossing routes shown on page 6-2 in the project FEIS, this

alternative would intersect with Millennium's proposed route in the vicinity of South Mountain. The alternative would use the Palisades Interstate Parkway right-of-way north to the Algonquin right-of-way. It would follow the Algonquin right-of-way to the river crossing.

This alternative was not fully evaluated in the FEIS. It is an available, reasonable, and feasible alternative.

(ii) East Side of the Hudson River – Available Alternative Route to the Crossing

On the east side of the Hudson River, the pipeline would follow the Algonquin right-of-way, intersect with the right-of-way for the electric transmission lines near Buchanan, and follow this right-of-way to Millennium's proposed route in the Town of Cortlandt.

The east side route alternative was not fully discussed in the project FEIS and is an available, reasonable, and feasible alternative.

2. Croton-on-Hudson Arboretum and Well Field Alternative (*Map Exhibit 1: Village of Croton-on-Hudson Well Field Diversion*)

As proposed, the Millennium Pipeline crosses two sensitive areas in the Village of Croton-on-Hudson: the Jane E. Lytle Arboretum and the Village well field. DOS determined in its decision that this crossing is inconsistent with the CMP and the policies of the Village's approved Local Waterfront Revitalization Program (LWRP). There is sufficient open space in the area of the Arboretum and the well field to make a small diversion from Millennium's proposed route outside of the well field to avoid impacts to these areas and ensure consistency with the Village's approved LWRP and the CMP.

This is an available, reasonable, and feasible alternative.

3. Bryn Mawr Siphon Alternative (*Map Exhibit 2*)

Millennium's proposed route comes extremely close to the sensitive Bryn Mawr Siphon,

a critical component of New York City's water supply system, as discussed above. There is an alternative to the proposed routing which would allow the pipeline to be moved away from the Siphon. Millennium could follow the existing utility corridor, as proposed, except that instead of following the Sprain Brook Parkway to the Grassy Sprain Brook Parkway where it would cross the Bryn Mawr Siphon, it could deviate from the Sprain Brook Parkway to the New York State Thruway right-of-way, avoiding the siphon, and then reconnect with the proposed Grassy Sprain Brook parkway route to the proposed terminus agreed to in Mount Vernon.

This is an available, reasonable, and feasible alternative.

4. Terminating the Pipeline at Bowline

In its decision, DOS identified terminating the pipeline at Bowline as an available alternative. In addressing DOS's alternative to terminate the pipeline at Bowline on the west side of the Hudson River, Millennium responded that the alternative was not reasonable or available because: the primary and essential purpose of the line is to serve the New York City market to address critical natural gas needs in New York City, and without the connection to New York City the pipeline would be uneconomic.

The Millennium pipeline would bring Canadian natural gas along an existing pipeline route across the State, until its terminus in Haverstraw. It would replace a 24 inch pipe in the existing Columbia Pipeline right-of-way with 36 inch pipe, thus increasing its capacity to serve new and existing customers. Three hundred ninety miles of the 420 mile long pipeline would be replaced or constructed on the west side of the Hudson River. FERC's Order points out that "the majority of Millennium's precedent agreements are with gas marketers" on the west side of the

Hudson River, already served by the Columbia Pipeline.¹¹⁶

Millennium states that FERC, in the FEIS dated October 2001, “noted that the NYSPSC had supported the project because of the need for more gas pipeline infrastructure to meet New York City’s energy requirements.” As stated above, however, the September 2002 New York State Energy Plan assessed New York’s natural gas needs. One conclusion, found on page 3-177 of the Energy Plan, stated:

If no post-2003 pipeline expansion projects are built, the existing gas and oil systems will be adequate to meet all generation scenarios.

While the Energy Plan notes that “[T]he demand for natural gas is expected to expand significantly,” and that “[M]ore pipeline capacity will be needed to meet the increased demand,” it also noted that there are a total of 11 projects, including Millennium, that have been proposed.

The Millennium pipeline is not unique and it alone is not necessary to address natural gas supply needs in New York City.

Millennium argues that without the portion of the project from Bowline on the west side of the river, across the Hudson River through Haverstraw Bay and through Westchester County to New York City, the project would not be commercially viable, because building 390 miles of pipeline to deliver 50% of the pipeline’s capacity would not permit the recovery of costs.

On page 3-1 in the FEIS, FERC notes that if Millennium were not approved, “Columbia’s aging Line A-5 would have to remain in service and possibly undergo testing and replacement.” It further notes, “[I]n all probability, the aging Line A-5 would need to be entirely replaced over

¹¹⁶ FERC Order at paragraph 67.

time, requiring continued construction along its 222-mile length. ... If the Millennium project were not constructed, Columbia stated that it would continue to monitor Line A-5 for safety and reliability, and would use additional integrity measures as necessary for the monitoring, including hydrostatic testing, smart pigging, inspection digs, and pipe replacement.” Millennium’s venture into the New York City market appears to meet a corporate financial goal of offsetting the maintenance or replacement costs for Columbia’s existing pipeline serving western New York.

The primary purpose of the pipeline is to deliver gas to customers. Millennium has focused on expansion into the New York City market, which the State Energy Plan has demonstrated will have sufficient gas supplies. While Millennium may wish to enter the New York City market, Millennium will be able to service its current customer base on the west side if it were to terminate the pipeline on the west side of the river. It would also be able to offer additional natural gas alternatives to consumers in western New York. In fact, Columbia Pipeline recently contracted to acquire an Orange and Rockland pipeline spur, which will enable it to serve the power facility at Bowline Point. Millennium has not appeared to have fully explored the potential for sale of the 350,000 dk/day that are targeted for New York City to an expanded market of western New York consumers. This is an option that would introduce new gas supplies, albeit from a foreign nation, and allow for protection of critical and sensitive natural resources, fulfilling a national coastal management objective.

This alternative was dismissed in the FEIS. This is an available, reasonable, and feasible alternative.

Alternatives Conclusion

The preceding five river crossings and nine crossing approach and connection alternatives

are reasonable, available, and feasible pipeline routes that could and should have been considered further, but were not, by Millennium and in the project FEIS. The alternative of terminating the pipeline at Bowline was dismissed. Thus, they are each available alternatives that would avoid a trenched pipeline crossing of the Haverstraw Bay Significant Coastal Fish and Wildlife Habitat, crossing of the Village of Croton-on-Hudson's domestic water supply well field protection and Arboretum in the coastal area covered by the Village's State and federally approved Local Waterfront Revitalization Program, and the proposed pipeline crossing within two feet of the City of New York's Bryn Mawr Siphon water supply infrastructure.

VIII

THE MILLENNIUM PIPELINE IS NOT NECESSARY IN THE INTEREST OF NATIONAL SECURITY

The second statutory ground for override of a state objection to a proposed activity is to find that the activity is "necessary in the interest of national security."¹¹⁷ To make this finding, the Secretary must determine that "a national defense or other national security interest would be significantly impaired if the activity were not to go forward as proposed."¹¹⁸ Additionally, the Secretary must seek and accord considerable weight to the views of the Department of Defense and other federal agencies in determining the national security interests involved in the project although the Secretary is not bound by such views. General statements from federal agencies about national security, without more specific information, will not be considered.¹¹⁹

¹¹⁷16 USC 1456(c)(3)(A),(B);(d).

¹¹⁸15 CFR 930.122 (emphasis added).

¹¹⁹ Id. See also Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of

The regulations at 15 C.F.R. § 930.122 require the Secretary to review whether national security would be significantly impaired if the activity were not permitted to proceed "as proposed". This requirement is clear that there must be a specific link between a particular project and a significant impairment of national security if the project is not allowed to proceed as proposed. In Mobil Exploration & Producing, the Secretary stated: "a decline in **domestic** production may increase the significance of an individual project to the national security. This determination will depend on the facts of each individual case."¹²⁰ (Emphasis added) There has been no evidence or identification of significant impairment to national defense or national security in Millennium's case. Given the competition by transmission companies to serve the New York City energy market, it is not likely that there will be such evidence.

Millennium cites to the Secretary's decision in Mobil Exploration & Producing for the following proposition:

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.' ¹²¹

Millennium fails to mention that its source of supply is Canadian natural gas, which is imported into the United States. Consistent with rationale of the Secretary's Mobil Exploration opinion, Millennium's project would not reduce but in fact would increase our dependence on foreign supplies of natural gas and would increase the nation's trade deficit. It would not advance our national security interests.

Alaska, U.S. Secretary of Commerce (July 20, 1990) at 56-58.

¹²⁰ Decision of the Secretary of Commerce In the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida, June 20, 1995 at 94.

¹²¹ Mobil Exploration at 81

In order to decide Ground II, the Secretary must give considerable weight to the views of the DOD and other Federal agencies. 15 C.F.R. § 930.122. The views of several Federal agencies must be solicited to identify any national defense or other national security objectives directly supported by Millennium's project, and to indicate which of the identified national defense or other national security interests would be significantly impaired if Millennium's activity were not allowed to go forward as proposed.

To date, the Secretary has not relied on national security grounds to override a state objection including those involving production of natural gas supplies.¹²² The Millennium Pipeline, which proposes importing natural gas from a foreign nation, is not the kind of activity that would qualify for such consideration.

CONCLUSION

The DOS objection was timely because it was issued within the time period agreed upon by DOS and Millennium. For this reason, and the alternative reasons argued herein, Millennium's appeal on the issue of timeliness should be rejected. In addition, DOS properly considered the potential impact to the Bryn Mawr Siphon.

Millennium's Federal consistency appeal should be dismissed on the merits because the project is neither consistent with the objectives or purposes of the CZMA, nor necessary in the interests of national security.

¹²²Id.