DECISION AND FINDINGS
BY THE
U.S. SECRETARY OF COMMERCE
IN THE
CONSISTENCY APPEAL OF
MILLENNIUM PIPELINE COMPANY, L.P.
FROM AN OBJECTION BY THE
STATE OF NEW YORK

December 12, 2003

DECISION

I - INTRODUCTION

A - Background

This appeal is taken from an objection by the New York Department of State (State or New York) to a proposal to construct and operate a natural gas pipeline which would stretch approximately 420 miles, from a point along the United States - Canada border in Lake Erie to a terminus outside of New York City. The project would transport U.S. and Canadian natural gas to markets in the eastern United States, including New York, Pennsylvania, and New Jersey.[1] The project sponsor, the Millennium Pipeline Company, L.P.[2] (Millennium or Appellant), states that the pipeline's capacity would be 700,000 decatherms per day.

New York reviewed Millennium's project pursuant to section 307(c)(3)(a) of the Coastal Zone Management Act (CZMA or Act),[3] 16 U.S.C. §1456(c)(3)(a), and the implementing regulations of the Department of Commerce (Department) at 15 C.F.R. Part 930, Subpart D.[4] The initial stage of New York's CZMA review was triggered in November 1998, when the appellant submitted materials about the proposed pipeline for consideration by New York.[5]

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[1] Millennium Pipeline Project Final Environmental Impact Statement (FEIS), October 2001, at ES-1.

[2] Millennium is a limited partnership consisting of a general partner (Millennium Pipeline Management Company, L.L.C.) and four limited partners: Columbia Gas Transmission Corp., TransCanada PipeLines USA Ltd., Westcoast Energy (U.S.) Ltd., and MCNIC Millennium Company. *See* 97 FERC ¶ 61,292, at 62,308 (Dec. 19, 2001).

[3] The CZMA provides states having federally approved coastal management programs with the opportunity to review projects requiring federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. §1456(c)(3)(A). *See* subsections II-A and III-A (Statutory and Regulatory Framework) *infra* for a more complete discussion of the CZMA requirements relevant to this appeal.

[4] Except where otherwise noted, all references to the CZMA implementing regulations of the National Oceanic and Atmospheric Administration (NOAA) are to the regulations in effect at the time the six-month review period began in 2001. These regulations can be found in the current (2003) version of Title 15 of the Code of Federal Regulations.

[5] A state has six months after receiving certain materials from an applicant to review the project and issue its decision. 16 U.S.C. § 1456(c)(3)(A). NOAA's CZMA regulations provide that the six-month review period begins at the time the state receives a copy of: (1) a consistency certification; and (2) information concerning the project as described in NOAA's CZMA

On March 12, 2001, New York determined that it had sufficient information to evaluate all relevant coastal concerns related to the then-current route of the pipeline project, thereby commencing a six-month time clock for its decision. *See* 15 C.F.R. § 930.60, 62. On the last day of the six-month period, the parties sought to extend the deadline, consistent with NOAA's CZMA regulations. The length of the extension is an issue raised in this appeal.

On May 9, 2002, New York objected to Millennium's project, finding that construction impacts associated with those portions of the pipeline crossing the Hudson River and approaching New York City were inconsistent with the State's coastal management program.[6] Millennium timely filed a notice of appeal with the Department of Commerce, asking the Secretary to override New York's objection on both procedural and substantive grounds. Specifically, as a threshold procedural matter, Millennium raised the timing of New York's objection, asserting that the State's decision failed to comply with the regulatory time frame.[7] In the event the Secretary failed to find for Millennium on this issue, Millennium requested an override of New York's objection on the two substantive grounds provided in the CZMA.[8]

For the reasons explained below, New York's objection is found to have been raised in a timely manner and neither of the CZMA's two grounds for overriding a state's objection is found to have been satisfied. Therefore, pursuant to the CZMA, neither the Federal Energy Regulatory Commission (FERC) nor the U.S. Army Corps of Engineers (the Corps) may issue relevant

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regulations. 15 C.F.R. § 930.60(a); *see also* 15 C.F.R. § 930.58(a). The State determined the review period did not begin in 1998, noting that information submitted by Millennium at that time failed to fulfill the information requirements contained in NOAA's regulations. *See* Letter from Gary J. Haight, New York Department of State, to Richard E. Hall, Jr., Columbia Gas Transmission Corp., Jan. 28, 1999, at 1. Millennium did not challenge this determination in follow-up submissions. *See, e.g.,* Letter from Richard E. Hall, Jr., Millennium Permitting Manager, to Gary J. Haight, New York Department of State, Feb. 26, 1999; *see also* Letter from Richard E. Hall, Jr., Millennium Permitting Manager, to Steven C. Resler, New York Department of State, Oct. 26, 1999.

[6] *See* Letter from George R. Stafford, New York Department of State, to Thomas S. West, LeBoeuf, Lamb, Greene & MacRae, L.L.P. (representing Millennium), May 9, 2002.

[7] 15 C.F.R. § 930.129(b) provides that the Secretary shall override a state's objection that fails to comply with the Act and applicable regulations. At issue here is the requirement that New York object "within six months following commencement of [its] review." 15 C.F.R. § 930.62.

[8] The CZMA provides that the Secretary may override a state's objection by finding that: (1) the project "is consistent with the objectives" of the CZMA; or (2) the project is "necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A). These statutory grounds are further delineated in NOAA's CZMA regulations. *See* 15 C.F.R. § 930.121, 122.

permits to allow Millennium's project to proceed as proposed. 16 U.S.C. § 1456(c)(3)(A), 15 C.F.R. §§ 930.64, 930.130(e).

II - THRESHOLD PROCEDURAL ISSUE

A - Statutory and Regulatory Framework

The Coastal Zone Management Act and NOAA's implementing regulations provide the framework pursuant to which the timeliness of New York's objection to Millennium's project must be considered. First, the CZMA requires applicants seeking federal permits for projects that affect coastal resources to certify to the state(s) in question that the proposed project complies with each state's coastal management program.[9]

Second, a state has six months to concur with, or object to, a project certification. 15 C.F.R. §§ 930.60, 62. This period begins when a state determines that it has received necessary data and information about the project. If a state objects to a proposed project, no permit may issue unless the Secretary, either upon appeal by the applicant or on his own initiative, "overrides" the state's objection. 16 U.S.C. § 1456(c)(3)(A).[10] An override of the state's objection allows the federal license and permitting process to proceed.

Third, if a state fails to issue its consistency decision within six months from the start of the review period, the state's concurrence with the certification is conclusively presumed.[11] 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.62(a). In that case, the state has waived any opportunity to lodge a CZMA consistency objection, and the applicant may proceed with its efforts to obtain necessary federal permits.

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[9] The CZMA states that applicants "for a required Federal license or permit to conduct an activity . . . affecting any land or water use or natural resource of the coastal zone" of a state having a coastal management program approved by the Department of Commerce must certify "that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. § 930.57. New York has a coastal management program that has been approved by NOAA.

[10] An objection raised by a state under the CZMA to a proposed project has the effect of precluding federal agencies from issuing licenses or permits for the project in question. A CZMA appeal generally asks the Secretary to override the state's objection in order to allow the federal license and permitting process to proceed. The statutory grounds for an override are set forth at 16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. §§ 930.63(e), 120, 121, 122.

[11] As discussed in the following paragraph, the six-month period can be stayed or extended by mutual agreement, thereby giving the state a longer period of time to reach a consistency determination.

Fourth, NOAA's regulations provide that a state and applicant "may mutually agree" to stay the consistency time clock or extend the six-month review period. An agreement for this purpose must "be in writing and . . . provided to the Federal agency."[12] 15 C.F.R. § 930.60(a)(3). The regulation does not limit such an agreement to a specified duration or require that it specify an end date. This regulatory provision provides additional flexibility to the consistency review process if, and only if, the applicant and the state mutually agree. For example, such an agreement could allow the state to receive and consider materials it identified after the start of the six-month time clock as necessary to determine consistency.[13] A state cannot unilaterally alter the six-month review period. Only a stay or extension to which an *applicant has agreed* can affect the six-month review. *See* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124, 77147 (Dec. 8, 2000).

Finally, after the start of the six-month review period, if a state decides that it lacks sufficient information to determine whether a project is consistent with the state coastal management program, and the parties do not agree to a stay/extension, it may object to the project based upon the failure to receive information necessary to determine consistency.[14] 15 C.F.R. § 930.63(a),

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[12] The term "Federal agency" refers to the agency from whom the project operator is seeking a permit. 15 C.F.R. § 930.11(j); *see also* 15 C.F.R. § 930.51(a). In this case, Millennium is seeking permits from FERC and the Corps.

[13] A state may receive and review materials after the start of the six-month review period for a variety of different reasons. For example, a project may change to accommodate license or permit conditions developed by other federal agencies or to address issues raised by local communities affected by the proposal. Although a state is not required to begin its review until after having received "necessary data and information" as described in NOAA's CZMA regulations (*see* 15 C.F.R. § 930.58; *see also* 15 C.F.R. § 930.60), the regulations do *not* guarantee that a state will have all information concerning the final version of a project at the time the review period commences. In the event a project changes after the review period has started or the state otherwise finds that it lacks information needed to evaluate a project, the state may request additional information. 15 C.F.R. § 930.60(b). Given the limited period of time available to receive and review information after the start of the six-month time clock, NOAA's CZMA regulations also allow the state to: (1) reach an agreement with the applicant to stay or extend the review period, 15 C.F.R. § 930.60(a)(3); or (2) object to the project based on insufficient information, 15 C.F.R. § 930.63(c).

[14] Before objecting to a project on the basis of insufficient information, the state must provide the applicant with a written request for the necessary information. 15 C.F.R. § 930.63(c).

(c).[15] This objection is distinct from one in which the state has sufficient information to evaluate whether the project is consistent with the state's coastal management program. If the state objects on either ground, the applicant may then appeal to the Secretary of Commerce.

B - Factual Background

The actions taken by New York and Millennium in connection with the State's consistency review of Millennium's proposed pipeline are determinative to a finding on the State's timeliness in making its objection. A summary of the chronology and significant facts is set forth below.

1. New York advised Millennium that the State's CZMA *review of the project ". . . began on March 12, 2001*."[16] Letter from William F. Barton, New York Department of State, to Thomas S. West, LeBoeuf, Lamb, Greene & MacRae (representing Millennium), Apr. 5, 2001, at 1 (emphasis added). A caveat in New York's letter stated that ". . . should Millennium's project be significantly changed . . . a *new* consistency review may be necessary." *Id.* at 1-2 (emphasis added).

2. On April 17, 2001, Millennium responded to New York's April 5, 2001 letter, and explicitly concurred with New York's understanding regarding significant changes to the pipeline. ("[Millennium's] request for final decision-making is subject to the understanding stated in [New York's] letter . . . 'that should Millennium's project be significantly changed. . . a new consistency review may be necessary.' *Millennium concurs with that procedure*.") Letter from Thomas S. West to William F. Barton, Apr. 17, 2001, at 2 (emphasis added). In the same letter, Millennium informed New York about a change in the pipeline route in northern Westchester County, New York.[17]

3. On September 10, 2001 (two days before the end of the six-month review period), Millennium sent an e-mail[18] to New York proposing draft language for an extension of the

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[15] In an effort to avoid an objection on the grounds of insufficient information, the parties may agree to extend/stay the review deadline. A state, however, is not required to seek such an extension before objecting for lack of information.

[16] Letter from William F. Barton to Thomas S. West, Apr. 5, 2001, at 1. The State began its consistency review of the Millennium Pipeline project upon receiving the Supplemental Draft Environmental Impact Statement (SDEIS) prepared for the project by the FERC. *Id.*

[17] The change involved a new segment of the pipeline referred to as the ConEd Offset/Taconic Parkway Alternative.

[18] Although the document lacks typical address and routing information, New York states it received the draft language from Millennium as an e-mail. Reply Brief and Supporting Information and Data of the New York Department of State, Apr. 4, 2003 (New York Reply

six-month review deadline. E-mail from Thomas S. West to William F. Barton, Sept. 10, 2001. The e-mail included a provision that New York "will use its best efforts to determine consistency . . . promptly (within 30 to 60 days) following issuance of the Final Environmental Impact Statement for the project." *Id.* at 1.

4. On September 12, 2001, Millennium sent a letter to New York to confirm that the parties "pursuant to 15 C.F.R. 930.60(a)(3), mutually agreed to extend the time for [the State] to render a decision . . . ." Letter from Thomas S. West to William F. Barton, Sept. 12, 2001, at 1. Millennium's letter: (a) proposed that NY will "*determine consistency . . . after issuance of the [FEIS] . . . .*"; and (b) asked New York to respond indicating its assent to the extension of time. *Id.* at 1-2.

5. On September 12, 2001, New York responded by "agree[ing] to extend the time period for its review of [Millennium's] project . . . ." Letter from William F. Barton to Thomas S. West, Sept. 12, 2001. In addition, New York's letter indicated that:
   - "[the State] expects to complete its . . . review within 30 to 60 days after the receipt of the Final Environmental Impact Statement . . . .."; and
   - ". . . any significant pipeline routing or other project changes . . . " would be cause for exceeding the 30 to 60 day time frame by which New York intended to complete its review. *Id.*[19]

6. On October 5, 2001, New York received a copy of the FEIS and recommenced its review of Millennium's project.[20] *See* Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 1; *see also* Letter from William F. Barton to David Boergers, FERC, Oct. 11, 2001.

7. On or about November 27, 2001, New York became aware, from information received from the U.S. Army Corps of Engineers, that Millennium might conduct blasting in a portion of the Hudson River. Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 1; *see also* New York Reply Brief at 16 and Initial Brief and Supporting Information and Data of the New York Department of State, Oct. 16, 2002 (New York Initial Brief), at 9.

8. On December 14, 2001, New York wrote to Millennium advising that the State "ha[d] not completed its review" because of project changes involving underwater blasting in the

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Brief), at 15.

[19] For convenience, the term "caveat" is used *infra* to refer to this clause from New York's letter. The specific text of the caveat is "barring any significant pipeline routing or other project changes that may have effects upon the coastal zone of New York State." Letter from William F. Barton to Thomas S. West, Sept. 12, 2001.

[20] Sixty days from the date of New York's receipt of the FEIS is December 4, 2001.

Hudson River.[21] New York's letter also:

- requested Millennium to provide New York with information about the proposed blasting including "a complete description of the proposed blasting plan" and "an assessment of potential impacts to fish and wildlife;" and
- stated that "[w]ithout this information, [New York] must find the proposed pipeline project inconsistent [with the enforceable policies of New York's coastal management program] for lack of necessary data and information."

Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 1-2.

9. On January 25, 2002, Millennium responded to New York's letter by forwarding information about possible blasting activity in the Hudson River. Letter from Thomas S. West to William F. Barton, Jan. 25, 2002. Millennium's letter also:
    - recognized that the possibility for blasting in a limited area of the Hudson River was not addressed in its earlier CZMA filings with New York;
    - expressed interest in discussing blasting issues "in an effort to complete the . . . [r]eview process as soon as possible . . . ."; and
    - stated that "Millennium does not believe that the possibility for blasting [in the Hudson River] . . . is a project change . . . . Accordingly, Millennium reserves all of its rights concerning the timeliness of [New York's] review."

    Id. at 1-2, 6.

10. On February 22, 2002, Millennium wrote to New York as a follow-up to a meeting with State officials at which Millennium had provided additional information about blasting. Millennium's letter also:
    - suggested that the State had ongoing concerns regarding the potential blasting;
    - indicated the company looked forward to receiving New York's decision soon; and
    - "reserve[d] all rights concerning the timeliness of [New York's] review."

    Letter from Thomas S. West to George Stafford, Feb. 22, 2002 at 1-2.

11. On March 14, 2002, Millennium wrote to New York and provided information addressing blasting issues raised by an entity interested in the State's CZMA review (the Village of Croton-on-Hudson, located in Westchester County, New York). Letter from Thomas S. West to George Stafford, Mar. 14, 2002. In addition to requesting that New York promptly complete its review, Millennium's letter also:
    - asserted that there was no reason for the State to await receipt of a blasting plan before completing its review;
    - renewed its commitment to provide New York with full and complete information;
    - recognized that the possible need for blasting was not addressed until recently in Millennium's submissions to New York; and

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[21] The potential blasting was proposed to occur in Haverstraw Bay. New York Reply Brief at 27; Letter from Thomas S. West to William F. Barton, Jan. 25, 2002, at 4. (Haverstraw Bay is located in the Hudson River just north of Ossining, New York.)

- stated that its "willingness to submit further information [was] subject to its reservation of rights concerning the timing of [New York's] review . . . ."

Id. at 2, 6.

12. On April 23, 2002, Millennium responded to New York's earlier request and provided a site specific blasting plan and separate blasting impact assessment for the pipeline's proposed Hudson River crossing. *See* letter from Thomas S. West to George Stafford, Apr. 23, 2002.

13. On May 9, 2002, Millennium advised New York that ". . . we have no choice but to declare [New York] beyond the deadlines required by [NOAA's CZMA regulations]. Accordingly, consistency is presumed as a matter of law." Letter from Thomas S. West to George Stafford, May 9, 2002, at 1. The letter set forth a number of reasons why Millennium believed that New York had exceeded the six-month review period. Millennium's letter also stated that:
    - Millennium's submission of additional information about blasting did not extend the review period; and
    - to the extent that New York made a contrary interpretation, the letter provided notice that any such extension so interpreted "is terminated immediately."

    Id. at 2-3.

14. Also on May 9, 2002, New York issued its CZMA objection to Millennium's proposed pipeline project.

C - Discussion

1. Preliminary Issue - Parties' Reliance on 2001 Regulations

Although not raised by the parties as an issue, we first clarify a possible point of confusion regarding the parties' use of the "new" CZMA regulations to extend the State's six-month review period. The relevant NOAA regulations implementing the federal consistency requirements of the Coastal Zone Management Act are found in Part 930 of Title 15 of the Code of Federal Regulations. However, Part 930 was revised, effective January 8, 2001. *See* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124 (Dec. 8, 2000). The 2001 (i.e., "new") regulations contain specific language allowing agreements to stay or extend the six-month review period. *See* 15 C.F.R. § 930.60(a)(3). NOAA's regulations in effect prior to 2001 were silent on this point.[22]

Millennium initiated proceedings with the State of New York in November 1998, by filing a

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[22] It is unnecessary to make a finding regarding the issue of whether agreements to stay or extend the six-month review period were permissible under the regulations in effect prior to January 8, 2001.

consistency certification pursuant to the "old" regulations then in effect.[23] However, the parties relied on the new regulations when they sought to enter an agreement to extend the State's six-month review period.[24] Applying the new regulations to proceedings that predate their existence may raise the spectre of retroactive application.[25]

The parties' reliance on the new regulations concerning agreements to extend the review period is not problematic under the facts in this appeal. The parties proposed and concluded the agreement in question after the new regulations took effect. The parties did not seek to apply the regulations to a previously existing agreement. Further, judicial precedent allows for the application of agency rules promulgated during the course of a proceeding in which the regulation imposed only an additional procedural requirement that did not infringe on the substantive rights of the parties. *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969); *see also Landgraf v. USI Film Prod.* 511 U.S. 244, 275 (1994) ("[C]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."). The regulation allowing agreements to extend the review period is procedural in nature. It does not alter or affect any of the elements New York considered in determining whether Millennium's proposed pipeline is consistent with the State's coastal management program. Consequently, the parties properly looked to and relied on the new regulations for guidance on agreements to extend the six-month review period.

2. Agreement to Extend the Review Period

(a) Terms Agreed to by the Parties

The six-month period for New York to review and issue a CZMA decision for the Millennium project began on March 12, 2001. New York's deadline was September 12, 2001. On

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[23] Millennium's certification was required to indicate that the pipeline project complied with New York State's Coastal Management Program and would be constructed and operated in a manner consistent with the program. 15 C.F.R. § 930.57 (1998). Millennium also filed with the State of Pennsylvania a certification regarding a portion of the pipeline crossing Lake Erie and its consistency with Pennsylvania's federally-approved coastal management program. On April 6, 2000, Pennsylvania concurred in Millennium's certification. FEIS at 2-34.

[24] Millennium's letter of September 12, 2001 stated that the parties were acting pursuant to the new regulations. Letter from Thomas S. West to William F. Barton, Sept. 12, 2001, at 1.

[25] There is a strong presumption against the retroactive application of regulations. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (stating "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"); *see also MCI Telecomm. Corp. v. GTE Northwest*, 41 F. Supp. 2d 1157, 1164-66 (D. Or. 1999); *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 218 (D. Me. 1996).

September 12, 2001, in reliance on NOAA's CZMA regulations, the parties exchanged letters to extend the deadline until after New York received the FEIS for the pipeline project. New York received the FEIS on October 5, 2001 and issued its objection to Millennium's project on May 9, 2002. The timeliness of New York's objection depends on whether the parties agreed on September 12, 2001 to extend the six-month review period, and if so, the terms comprising the agreement. In the interpretation of the parties' actions pursuant to a provision of NOAA's CZMA regulations requiring mutual agreement (15 C.F.R. § 930.60(a)(3)), principles of contract law provide a helpful paradigm for consideration.

An "agreement" is essentially a "manifestation of mutual assent;" the term can also be used as a synonym for contract. *See* Barron's Law Dictionary; 1 Williston on Contracts § 1:3 (4th ed. 1991). Generally, the requirements for an informal contract (i.e., one based on the substance of the transaction rather than form) are: (1) two or more parties with capacity; (2) lawful subject matter; (3) consideration; and (4) mutual assent.

Two of these elements – capacity of the parties and lawfulness of the subject matter – are clearly satisfied and not at issue in this appeal. The third element – consideration – requires that something be given in return for the promise (i.e., that a promise was made as part of a bargained for exchange). *See* Restatement (Second) of Contracts (Restatement) § 71(1) (1981). Here, the parties agreed to extend the period of time available for New York to conduct a consistency review of Millennium's pipeline project.[26] Millennium agreed to delay exercising rights that would otherwise have come into existence when the State concluded its review – namely, the right to proceed with obtaining federal permits for its project or (if New York objected to the project) to initiate an appeal to the Secretary of Commerce. Similarly, New York implicitly agreed not to object immediately to Millennium's project for reasons of insufficient information and to consider the Final Environmental Impact Statement in its consistency review. These commitments by the parties constitute sufficient consideration for an agreement.

The fourth element – mutual assent – is essential to the formation of an informal contract, and must be manifested by one party to the other. It requires an outward expression of assent sufficient to form a contract – with promises moving from the promisor to the promisee. Assent may be expressed in actions or in words, so that an agreement may exist even though one of the promises is inferred from conduct. *See* Restatement § 19(1).

As an initial matter, the exchange of letters between the parties on September 12, 2001 (regarding the proposed extension of the review deadline) suggests that the parties intended to

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[26] *See* Millennium's September 12, 2001 letter (confirming that Millennium and New York mutually agree to extend the time period for the State's decision) and New York's reply of the same date (agreeing to extend the time period for reviewing Millennium's project).

reach agreement. The record indicates that Millennium initiated the written exchange[27] on September 12, 2001 to extend the review period, and thus, for purposes of this analysis, is assumed to be the promisor.[28]

On its face, New York's reply agreed to extend the deadline.[29] However, the additional terms included in New York's reply[30] raise a question as to whether the reply constituted an acceptance that provided the assent necessary to form an agreement. Under the common law "mirror image rule," an acceptance must be identical with the terms of an offer to result in a binding contract. It cannot be conditional or introduce new or additional terms. *Maddox v. N. Natural Gas Co.*, 259 F. Supp. 781, 783 (W.D. Okla.1966); *see also* 2 Williston on Contracts (Williston) §§ 6:11 & 6:13 (4th ed. 1991).

The Restatement of Contracts is more flexible than Williston and its precedents. The Restatement provides that a "definite and seasonable expression of acceptance" can still be effective even if it requests a change or addition to the terms of an offer, so long as it does not depend on assent to the change.[31] *See* Restatement § 59 cmt. a & § 61; 2 Williston § 6:16 ("So long as it is clear that the offeree is *positively* and *unequivocally accepting* the offer, regardless of

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[27] It is unclear whether Millennium acted at New York's request. Millennium asserts that it agreed to New York's request. *See* Reply Brief of Millennium Pipeline Company, L.P., Mar. 14, 2003 (Millennium Reply Brief), at 10; Initial Brief of Millennium Pipeline Company, L.P., Aug. 12, 2002 (Millennium Initial Brief), at 9. Similarly, "for the record," New York reiterated "that, in fact, Millennium *did* request the extension." New York Reply Brief at 15, ftnt. 12 (emphasis in original). In any event, as noted by New York, "what is important is that the parties agreed to alter the review period . . . ." *Id.*

[28] I make no definitive finding as to whether Millennium undertook this action at the request of New York. It is noted that Millennium asserts it first received New York's request to extend the review period on September 12, 2001. *See* Millennium Initial Brief at 9. However, the record indicates that Millennium forwarded a draft of the agreement to New York on September 10, 2001.

[29] *See* Letter from William F. Barton to Thomas S. West, Sept. 12, 2001 (in which New York acknowledged receipt of Millennium's letter and agreed to extend the time period for the consistency review).

[30] As noted *supra*, in addition to "agree[ing] to extend the time period for. . . review" New York also stated that it "expects to complete its consistency review within 30 to 60 days after the receipt of the Final Environmental Impact Statement. . . barring any significant . . . project changes. . . ." *Id.*

[31] A reply to an offer which purports to accept it but that is conditioned on the offeror's assent to additional terms would be considered a counter-offer. Restatement § 59.

whether the request is granted or not, a contract is formed." (emphasis added)). Accordingly, courts sometimes interpret a variation in terms as a "mere suggestion," which the original offeror can accept or reject, and find the offeree's reply to be an acceptance of the offeror's terms along with a further offer to modify the agreement. *See Conn. Gen. Life Ins. Co. v. Chicago Title and Trust Co.*, 714 F.2d 48, 51 (7th Cir. 1983); Farnsworth on Contracts (Farnsworth) § 3.21 (2nd ed. 2001); Restatement § 59 cmt. a.

Applying these principles, I conclude that New York's reply was an acceptance with a request to further modify the agreement because the key issue motivating New York to act centered on the need to extend the deadline beyond September 12, 2001.[32] Failure to reach agreement with Millennium concerning this basic issue would render the additional terms proposed by New York meaningless.[33] Because the language of New York's letter accepting Millennium's proposal to allow the State's consistency determination to be made after issuance of the FEIS is definite and unequivocal, the acceptance was effective, and an agreement was formed at this point to extend the review period until after the issuance of the FEIS.

Next, the additional terms proposed by New York's letter (i.e., "[New York] expects to complete its consistency review within 30 to 60 days after the receipt of the [FEIS] . . . barring any significant pipeline routing or other project changes . . . .") must be considered. The initial question is whether these terms are part of the agreement reached between the parties. Three issues must be addressed: (1) whether Millennium provided adequate consideration for the additional terms suggested by New York; (2) whether Millennium agreed to the additional terms; and (3) whether the parties reached mutual assent regarding the meaning of the terms. The answers to these questions make clear the terms are not part of the agreement to extend the six-month review period.

(1) Consideration: As noted *supra*, consideration is required for the creation of an enforceable agreement.[34] Absent consideration, New York's additional terms must be considered

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[32] The parties appeared interested in extending the review period to allow New York to consider information in the FEIS regarding a change in the pipeline route in northern Westchester County, New York (referred to as the ConEd Offset/Taconic Parkway Alternative) and impacts of the project to coastal resources. *See* New York Initial Brief at 5-7 (noting that a major revision of the SDEIS was undertaken for the FEIS and that the FEIS was not expected to be issued until October 2001). New York Reply Brief at 15; *see also* Millennium Initial Brief at 14.

[33] Alternatively, if New York's reply was found to be a counter-offer, for reasons explained *infra,* no agreement to extend the review period would have been reached. This result would be inconsistent with the preference to sustain an agreement where possible.

[34] Consideration refers to something of value given (by Millennium) in return for a performance or a promise of performance by another (New York), for the purpose of forming an agreement. To constitute consideration, a performance or a return promise must be bargained for

gratuitous.[35] According to the Restatement, consideration involves a performance or return promise that is "bargained for."[36] *See* Restatement § 71(1). In this appeal, Millennium provided no consideration for the additional terms suggested by New York. Millennium neither undertook an action nor made a promise – that was sought by New York – in response to New York's clarifications regarding the review period. Lacking consideration, the additional terms proposed by New York are not enforceable and, therefore, are not a part of the agreement reached by the parties to extend the review period.[37]

(2) Agreement - Additional Terms: Generally, an outward expression of assent (by Millennium) would be necessary in order to conclude that New York's additional terms became part of the agreement.[38] In limited circumstances, which do not appear to be satisfied in this case, silence

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by the parties. See Barron's Law Dictionary 92 (3rd ed. 1991); Restatement § 71(1).

[35] A gratuitous promise – one for which no consideration has been received in exchange – would be unenforceable, unless there was some alternative basis for enforceability. *See* Farnsworth § 2.5; *see also* Farnsworth § 2.2 ("Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration."). Although a limited number of exceptions to this rule exist, none are applicable here. *See* Restatement §§ 82-84; Williston §§ 8:1-8:43. In arguing that New York's objection was untimely (i.e., that it occurred after the end of the review period, as extended by the parties' mutual agreement), Millennium is asking the Secretary of Commerce to "enforce" the additional terms proposed by New York.

[36] The term "bargain" encompasses the concept that Millennium undertook some action or made a promise that was sought by New York in exchange for New York's language that would eliminate some of the uncertainty concerning the limits of the extension. *See* Restatement § 71(2).

[37] In lieu of consideration, New York's additional terms could, nevertheless, be considered a part of the parties' agreement if there was a foreseeable and detrimental change in Millennium's position resulting from its reliance on the additional terms. According to the Restatement, for example, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement § 90. (This doctrine is sometimes termed promissory estoppel, or, alternatively, detrimental reliance. *See id.* at cmt. a; Williston §§ 8:4, 8:5; Barron's Law Dictionary 379, 407-08 (3rd ed. 1991).) However, the record does not indicate that, because of New York's proposed terms, Millennium changed its position in a way that caused it to incur significant damage, loss or other adverse consequence.

[38] *See* Farnsworth § 3.14 ("As a general rule, a promise will not be inferred from the offeree's mere inaction.")

may constitute acquiescence.[39] For example, prior dealings between the parties could be a basis for concluding that Millennium agreed to the proposed terms, unless New York received notice to the contrary.

However, the appeal record suggests the opposite – that, in the two instances where language was proposed to alter the length of the State's review period, Millennium's practice was to provide or seek explicit confirmation of assent to the proposed language. In one instance (Millennium's proposal to extend the six-month review period), New York was requested to "*respond indicating [its] assent . . . .*"[40] In the other (New York's statement that, under certain circumstances, it might restart the six-month review period), Millennium confirmed, in writing, that it "concur[red] with [the] procedure" proposed by New York.[41]

In contrast, no evidence suggests that Millennium expressly agreed to New York's additional terms. In fact, Millennium forcefully argues there was no agreement, at least with respect to one of the two terms suggested by New York.[42] Clearly, Millennium's silence should be interpreted in the same manner for both terms. In the absence of Millennium's approval, mutual assent does not exist. Therefore, New York's additional terms cannot be found to have been incorporated into the agreement extending the length of the review period. 15 C.F.R. §930.60(a)(3).

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[39] *See* Restatement § 69(1). Silence may constitute acquiescence where: (1) the offeree takes the benefit of offered services after a reasonable opportunity to reject them; (2) the offeror has stated that assent may be manifested by silence or inaction; and/or (3) because of previous dealings, it is reasonable that the offeree should notify the offeror if acceptance is not intended. As discussed *infra*, the record suggests that a manifestation of assent was required in order to confirm acceptance.

[40] Letter from Thomas S. West to William Barton, Sept. 12, 2001, at 2 (emphasis added).

[41] On April 5, 2001, New York advised Millennium that a new CZMA review (which would restart the six-month time clock) may be necessary if the pipeline project were significantly changed. On April 17, 2001, Millennium agreed to this condition stating "[Millennium's] request for final decision-making is subject to the understanding stated in your letter . . . 'that should Millennium's project be significantly changed as a result of the federal environmental review process, a new consistency review may be necessary.' *Millennium concurs with that procedure*." Letter from Thomas S. West to William F. Barton, Apr. 17, 2001, at 2 (emphasis added).

[42] Millennium states: (1) there is "utterly no evidence that [it] agreed to any extension of the review period in the event of 'significant pipeline routing or other project changes'. . . ."; and (2) its "failure to expressly object . . . is hardly evidence of Millennium's agreement to that language . . . ." Final Brief of Millennium Pipeline Company, Apr. 21, 2003 (Millennium Surreply Brief), at 6.

(3) Agreement - Meaning of Additional Terms: The parties confirm that no "meeting of the minds" ever took place with respect to the meaning of New York's additional terms. In such instances, if neither party knew or had reason to know of the other party's intended meaning, there is a lack of mutual assent and the disputed term is not included in the agreement.[43] This result is consistent with NOAA's regulations, which condition an extension of the six-month review period on the parties' mutual agreement. *See* 15 C.F.R. § 930.60(a)(3).

The parties' understandings regarding New York's additional terms are rife with confusion. For example, the parties offer different interpretations of the phrase "expects to complete. . . within 30 to 60 days . . . ."

- Millennium apparently believed the intent was to set a firm 60-day deadline for issuing the CZMA decision (after receipt of the FEIS). Millennium Initial Brief, at 15.

- In contrast, New York stated that Millennium's characterization "is patently incorrect." New York Reply Brief, at 25. New York argues that, instead of setting a fixed date, its proposed terms afforded the State "flexibility." New York Reply Brief at 26. In interpreting its proposed terms, New York repeatedly suggests the word "expects" conveys a likelihood, *but less than certain* probability, that the State would complete its review within 60 days after receiving the FEIS. (*See, for example,* New York Reply Brief at 23 (emphasizing the review was "expect[ed]" to be completed within 30 to 60 days), and at 25 (emphasizing the "current expectation" for completing the review within 60 days).)

The parties also express ample confusion about the other term proposed by New York in its September 12, 2001 letter ("barring any significant pipeline routing or other project changes. . . ."):

- Millennium argues that it never agreed to this term, or alternatively, that a *subjective standard* (i.e., requiring Millennium's concurrence) was intended to be used to determine whether a change to the pipeline would trigger a further extension of the State's review period. *See, for example,* Millennium Initial Brief at 15-17.

- In contrast, New York argues that an *objective standard* should be used when considering whether project changes (e.g., blasting in the Hudson River) triggered a further extension of the review period. New York asserts that Millennium agreed not only to the provision, but also to the use of this standard. *See, for example*, New York Reply Brief at 28.

Further, the record fails to suggest either party had reason to know of the other's intended meaning. The record lacks information as to the motivation and goals of each party about the specific language proposed for extending the review period. Even with regard to basic issues

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[43] Restatement § 201(3); Corbin on Contracts, § 24.5, at 17 (1998).

concerning the extension, the parties disagree. For example, each suggests the extension was undertaken at the request of the other.[44] Also, there is a lack of elucidation concerning any communication between the parties in the days immediately before or after the extension was proposed. Consequently, the record sheds no insight into the understandings held by the parties at the time the agreement was reached. Under these circumstances, the parties' failure to agree on the meaning of New York's suggested terms provides another basis for concluding that the disputed terms are not properly considered part of the agreement.[45]

(b) Conclusion

In light of my earlier findings, the parties reached agreement to extend the State's six-month review period pursuant to NOAA's CZMA regulations. *See* 15 C.F.R. § 930.60(a)(3). Their agreement "extended the time for [New York] to render [its CZMA] decision . . . .", and stated simply that:

> [New York] will determine consistency of the referenced project after issuance of the Final Environmental Impact Statement for the [Millennium pipeline] project by the Federal Energy Regulatory Commission.[46]

3. Timeliness of State's Objection

The timeliness of the State's objection must be considered in the context of relevant events from 2001 and 2002. As noted earlier, the six-month review period began on March 12, 2001, when New York received the Supplemental Draft Environmental Impact Statement for Millennium's project and determined, consistent with NOAA's CZMA regulations, that it had all necessary data and information for evaluating Millennium's proposed pipeline.[47] New York's letter to

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[44] Although Millennium proposed the language agreed to on September 12, 2001, it is unclear whether the pipeline company acted at New York's request as Millennium asserts. *See* ftnt. 28 *supra*.

[45] This result is not prejudicial to the interests of either party. If New York's suggested terms are not part of the agreement, the agreement reached between the parties is defined solely by Millennium's proposed language. Clearly it is untenable for Millennium to refute its own language. In addition, Millennium's language would allow New York sufficient time to request and, if received, consider information the State believed to be necessary for determining whether Millennium's possible blasting in the Hudson River was consistent with New York's Coastal Management Program. *See infra.*

[46] Letter from Thomas S. West to William Barton, Sept. 12, 2001, at 1.

[47] Per NOAA's regulations, the review period commences on the date that information identified as necessary for the state's review is received, unless the state has chosen to begin the

Millennium providing notice of the start of the State's review also identifies this date.

On September 12, 2001, New York and Millennium agreed to extend the six-month review period. As determined *supra*, the agreed-upon extension's singular requirement was for New York to determine the consistency of Millennium's project with New York's Coastal Management Program after issuance of the FEIS.[48] New York received the FEIS on October 5, 2001.

On November 27, 2001, New York became aware – through "a notation in a cover sheet prepared by the [Army] Corps [of Engineers]" – that "Millennium's project had been changed" to include the possibility of blasting in the Hudson River.[49] New York believed this development ". . . may have effects upon the coastal zone of New York State" and therefore requested information from Millennium about the potential blasting activity.[50] The information requested included a complete description of Millennium's proposed blasting plan, an assessment of the potential impacts of blasting on water quality, and a similar assessment concerning potential impacts to fish and wildlife.

Millennium raises several arguments suggesting that New York's request for additional information and subsequent objection came too late, after the end of the agreed-upon extension. However, these arguments are based on Millennium's assertion that New York's review period was limited by the additional terms proposed by New York. As these terms are not part of the extension agreed to by the parties,[51] Millennium's arguments are not persuasive.

In response to New York's request, Millennium undertook a series of actions to provide the State with sufficient information about blasting.

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review period earlier. 15 C.F.R. § 930.60(a)(1)(ii), (2). New York confirmed that this requirement was satisfied as of March 12, 2001, when it declared that materials in its possession "[a]ppear[ed] to address all relevant coastal concerns . . . " associated with Millennium's project. Letter from William F. Barton to Thomas S. West, Apr. 5, 2001, at 1.

[48] The parties' agreement contained no language limiting the scope of the issues New York may review during the extension period.

[49] New York Reply Brief at 28. It appears the information to which the Corps referred was submitted by Millennium to the Corps on October 11, 2001. *See* Letter from George Neives, Chief - Western Permits Section, U.S. Army Corps of Engineers to Richard E. Hall, Millennium Pipeline Company, Dec. 11, 2001, at 1.

[50] Letter from William F. Barton to Thomas S. West, December 14, 2001, at 1-2.

[51] *See* section II(C)(2) *supra*.

- On January 25, 2002, Millennium forwarded materials and sought further follow-up in the form of a meeting with New York officials "to discuss these issues."[52]

- Less than a month later (mid-February 2002), Millennium met with New York officials and provided additional information.[53]

- On March 14, 2002, Millennium provided New York with additional information (addressing comments received by New York) concerning the potential effects of blasting.

- On April 23, 2002, Millennium provided another submission to ensure that New York had ". . . all necessary information to complete its review."[54] The materials are comprised of a blasting plan and separate impact assessment.

Millennium's actions are wholly consistent with the purpose for which the parties agreed to an extension – to allow New York to review information necessary to determine the project's consistency with the State's Coastal Management Program. Further, Millennium's repeated efforts to provide sufficient materials to New York – and avoid New York's threatened objection on grounds of insufficient information[55] – appear to be in the pipeline company's self interest. More importantly, New York's actions fall completely within the broad terms of the agreement reached by the parties. New York acted reasonably in seeking information[56] necessary for its

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[52] Letter from Thomas S. West to William F. Barton, Jan. 25, 2002, at 6.

[53] Letter from Thomas S. West to George Stafford, Feb. 22, 2002, at 1 (stating, in reference to the meeting with New York officials, "[w]e trust that the information . . . provided was informative and resolves any [CZMA] concerns that you may have regarding . . . Millennium's project. . . .")

[54] Letter from Thomas S. West to George Stafford, Apr. 23, 2002, at 1.

[55] *See* Letter from William F. Barton to Thomas S. West, Dec. 14, 2001, at 2. In addition, Millennium references a March 2002 letter from New York indicating the State did not intend to approve the project before receiving the blasting plan. Letter from Thomas S. West to George Stafford, Mar. 14, 2002, at 6 (referencing New York's letter of March 1, 2002).

[56] The record is unclear whether at the time Millennium proposed language extending the State's review period it planned to submit information to the Corps less than a month later suggesting the need for blasting in the Hudson River. Clearly, Millennium was in the best position to know whether its construction plans might change and consequently, foresee the possibility that New York would request information about blasting during the extended review period. Although Millennium provided blasting information to the Corps on October 11, 2001, New York did not learn of the plans for possible blasting until informed by the Corps on

decision and promptly issued an objection after receiving the requested materials.

Millennium may well be concerned that the review period had no specific end date. This circumstance, however, is the direct result of the language proposed by Millennium and could have been avoided had the parties instead agreed on a specific deadline.[57] In addition, the timing of New York's decision was largely dependent on Millennium's submission of information that the State considered necessary for its decision. New York issued its objection to the pipeline project just 16 days after receiving Millennium's blasting plan.

Millennium was not without recourse had it believed New York's information requests were superfluous or the State was extending its review beyond the parties' contemplation. In the first instance, Millennium could simply have stopped providing additional information.[58] In the event that Millennium believed New York was not completing its review in a timely manner, Millennium could have ended the review process, as it did on May 9, 2002.

In addition, the equitable interests in this case, specifically with regard to blasting, weigh in New York's favor. Millennium acknowledged that blasting in the Hudson River had not been addressed in its CZMA filings with New York.[59] In fact, had the review period not been

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November 27, 2001. *See supra* at 6.

[57] An agreement, pursuant to 15 C.F.R. § 930.60(a)(3), should be clear with regard to: (a) its scope or application; and (b) its length.

[58] Millennium advised New York "there is no reason to hold off. . . decision making . . . [in order to receive] a blasting plan." Letter from Thomas S. West to George Stafford, Mar. 14, 2002, at 6. However, in April 2002, Millennium provided New York with new materials "so that there can be no question that [the State] ha[d] all necessary information to complete its review. . . ." Letter from Thomas S. West to George Stafford, Apr. 23, 2002, at 1. New York must base its CZMA decision for the pipeline project on the information in its possession. The extended review period allowed New York the time to request and consider additional information. It would not, however, have allowed New York to delay a decision indefinitely if Millennium had suggested that no further information would be provided, because the State's action (i.e., its delay) would conflict with its obligation under the extension agreement – to determine the consistency of Millennium's project after issuance of the FEIS. Of course, one option available to the State in this circumstance would be to object on the grounds of insufficient information. (In previous appeals raising this issue, the adequacy of information is considered as part of the determination of whether the appellant has satisfied the statutory grounds for overriding a state's objection. *See, for example,* Decision and Findings in the Plan of Exploration Consistency Appeal of Mobil Oil Exploration and Producing Southeast, Inc., Sept. 2, 1994, at 9.)

[59] Letter from Thomas S. West to William F. Barton, Jan. 25, 2002, at 2.

previously extended, New York would not have learned of the planned blasting before reaching its decision. While not determinative, blasting information was important to the State's decision and an appropriate issue for consideration, to the extent feasible under the extension agreement. As issued, New York's objection to Millennium's project indicated that "[b]lasting, with the mitigation measures proposed by Millennium, would have adverse affects on the Significant Coastal Fish and Wildlife Habitat of Haverstraw Bay [and] [f]or this reason, . . .would not be consistent with Policy 7 of the [State Coastal Management Program] . . . ."[60]

D - Conclusion

For the reasons discussed *supra*, New York's request for information about blasting and its subsequent objection to the consistency certification for Millennium's project occurred within the time frame provided by the parties' mutual agreement entered into pursuant to 15 C.F.R. §930.60(a)(3). Consequently, New York's objection to the proposed pipeline, as issued on May 9, 2002, was timely.

III - STATUTORY GROUNDS FOR OVERRIDE

A - Statutory and Regulatory Framework

The CZMA provides states with federally approved coastal management programs the opportunity to review proposed projects requiring federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. § 1456(c)(3)(A). A timely objection raised by a state to the project precludes federal agencies from granting licenses or permits required for the project, unless the Secretary of Commerce finds that the activity is:

- "consistent with the objectives of [the CZMA]" (Ground I); *or*
- "necessary in the interest of national security" (Ground II).

16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. §§ 930.121, 122, 130(d).

In its Notice of Appeal, Millennium asserts its proposed pipeline project satisfies both Ground I and Ground II. A finding that either ground is satisfied will result in an override of the State's objection.

B - Consistent with the Objectives of the CZMA (Ground I)

A project is consistent with the objectives of the CZMA if it satisfies *each* of the following three

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[60] Letter from George R. Stafford to Thomas S. West, May 9, 2002, at 12.

requirements contained in NOAA's CZMA regulations:[61]

(1) The activity furthers the national interest as articulated in § 302 (Congressional Findings) or § 303 (Congressional Declaration of Policy) of the CZMA, in a significant or substantial manner;

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

(3) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state coastal 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.)

A negative finding for *any* of the three elements will preclude Millennium's project from being consistent with the objectives of the CZMA. For this appeal, the third element is dispositive, and therefore is the focus of the discussion concerning Ground I.

1. The Existence of a Reasonable, Available Alternative (Element 3)

Background

– Alternatives

In considering the question of whether an alternative would allow Millennium's project to proceed in a manner consistent with the New York Coastal Management Program, it is necessary to determine what constitutes an alternative. As contemplated by NOAA's regulations, an alternative consists of one or more changes to the project that would allow the project, albeit in a somewhat different form, to achieve its primary purpose in a manner consistent with the state's coastal management program.

As a state is responsible, pursuant to the CZMA, for determining the consistency of a proposed project, the state is also responsible for determining the degree to which an objectionable project must change in order to be considered "consistent" with the state coastal management program.[62]

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[61] 15 C.F.R. §930.121.

[62] Under the Coastal Zone Management Act, the state is charged with interpreting its coastal management program and applying it to a proposed activity to determine consistency. It would be incongruous with this structure for the Secretary to determine the consistency of an alternative to the proposed activity, simply because it was identified after the state had completed

Consequently, the Secretary looks to the state to describe alternatives that would allow the objectionable activity to be conducted in a manner consistent with the state's coastal management program.

In this appeal, more than 30 alterations to the project have been proposed for consideration by the Secretary. Suggested changes include those identified by the State, as well as *amici* (e.g., the Village of Croton-on-Hudson and the Town of Cortlandt) and other interested entities. However, only those changes that New York indicated are consistent with the State's Coastal Management Program can be found to satisfy Element 3. In this regard, New York states that the ". . . *alternatives it has identified* are . . . consistent with New York's Coastal Management Program."[63] Consequently, for purposes of this decision, the modifications to the project that are consistent with New York's Coastal Management Program are those described in New York's objection letter of May 9, 2002, as well as its Initial and Reply Briefs and supporting materials.

In its letter objecting to the consistency certification for Millennium's project, New York identifies three separate approaches for modifying the pipeline route, any one of which "if adopted by the applicant, would permit the activity to be conducted in a manner consistent with the [New York Coastal Management Program] . . . ."[64] The State expressed no preference among the three approaches or alternatives, one of which would require Millennium to "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

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its review of the project. Decision and Findings in the Consistency Appeal of the Korea Drilling Co., at 22-23; *see also* Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co. (VEPCO), May 19, 1994, at 38.

A state may identify changes, if any, that would permit a proposed project to be consistent with its coastal management program at the time of its objection to the project or during an appeal. In lieu of identifying changes, the state may confirm that changes proposed by other entities would allow the project to be consistent with the state coastal management program. However, once the state has identified, in some manner, an alternative that, if adopted, would allow a proposed project to be consistent with the state coastal management program, it may not add additional requirements that would necessitate further changes to the project. To allow the state to act in this manner would be prejudicial to the interests of the project applicant. The state, however, may provide clarification or specify the details of a requirement in an alternative. Finally, the state may subsequently determine that changes to the project previously identified as necessary for consistency are no longer required.

[63] New York Reply Brief at 118 (emphasis added).

[64] Letter from George R. Stafford to Thomas S. West, May 9, 2002, at 15.

delivery system."[65] Because the National Marine Fisheries Service (NMFS) and the Army Corps of Engineers, federal agencies with expertise in coastal and permitting issues raised by this appeal, provided comments supportive of a northern crossing, this alternative is considered first.[66]

-- Criteria for Evaluating Alternatives

Prior consistency appeal decisions have defined four criteria to be used by the Secretary in determining whether an alternative fulfills the requirements of Element 3. In the event such an alternative is found to exist, the Secretary will not override a state's objection on the basis of Ground I. For purposes of Element 3, an alternative is evaluated with regard to the following criteria: (1) consistency (with the state's coastal management program); (2) specificity; (3) availability; and (4) reasonableness. The burden of proof for the first two criteria rests with the state. The burden then shifts to the appellant (Millennium) to demonstrate that an alternative is either unavailable or unreasonable.[67]

As an initial matter, as noted *supra*, an alternative will satisfy Element 3 only if it allows the proposed activity to be conducted in a manner "consistent with the state's coastal management program."[68] The Secretary relies on the state to make this determination. "Sufficient specificity"

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[65] *Id.* The other approaches described in New York's objection letter are: (1) terminate the proposed pipeline in the vicinity of Bowline Point in Rockland County on the west side of the Hudson River; or (2) use excess capacity in the existing Algonquin pipeline. *Id.*

[66] *See* Letter from William T. Hogarth, NMFS, to Branden Blum, NOAA, Dec. 5, 2002, at 3 (a crossing north of Haverstraw Bay in the general vicinity of the existing Algonquin pipeline represents a significant reduction in impacts on aquatic resources and habitats, and is an ecologically preferred alternative); *see also* Letter from Patricia A. Kurkul, NMFS, to Richard R. Hoffman, FERC, Mar. 22, 2001; Letter from Patricia A. Kurkul, NMFS, to Lt. Colonel Mark D. Feierstein, District Engineer, ACOE, May 2, 2000; Letter from George Dunlop, Dept. of the Army, to Scott B. Gudes, NOAA, Nov. 21, 2002, enclosure at 2 (crossing the Hudson River north and outside of Haverstraw Bay is one alternative that would largely address concerns expressed by the Army Corps of Engineers).

[67] *See* Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co., May 19, 1994, at 39; *see also* Decision and Findings in the Consistency Appeal of the Korea Drilling Co., Jan. 19, 1989, at 23-24.

[68] An alternative satisfying Element 3 may be implemented by an appellant without need for further CZMA approval by the state, as the alternative has been determined to be consistent with the state coastal management program. However, such an alternative remains subject to all applicable permit and license requirements. Conditions or restrictions on the alternative that may be imposed by permitting and licensing authorities do not cause an alternative to become

is satisfied if an alternative is identified with enough details to permit a further evaluation of the alternative's reasonableness and availability.[69] "Availability" refers to the ability of the appellant to implement an alternative that achieves the primary or essential purpose of the project.[70] "Reasonableness" refers to the conclusion that an alternative's advantages to the resources and uses of the state's coastal zone exceed the alternative's increased costs, if any.[71]

Hudson River Crossings North of Haverstraw Bay

The alternative being considered would require the pipeline to cross the Hudson River north and outside of the designated Haverstraw Bay habitat near or adjacent to the existing Algonquin pipeline crossing.[72] The three northern crossings of the Hudson River proposed by New York occur in the general vicinity of the existing Algonquin pipeline, and, from north to south, are:

- the Algonquin Right-of-Way River Crossing[73] which would be located near the

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"unavailable" unless the permit/license is denied or the conditions are sufficiently severe to make the alternative infeasible. *See* Findings and Decision in the Matter of the Appeal by Exxon Co., U.S.A. (Santa Ynez Unit), Feb. 18, 1984, at 15-16.

Other alternatives in an appeal record *determined by the state to be consistent* may be implemented -- at the option of the appellant -- in lieu of an alternative found to be reasonable and available pursuant to Element 3, and without need for further CZMA approval by the state if the appellant's preferred alternative was proposed to avoid adverse effects to the same coastal resources or uses as the alternative for which it would substitute.

[69] *See* Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co., May 19, 1994, at 40-42.

[70] *See Id.*, Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co., May 19, 1994, at 38.

[71] *See Id.*, at 38; Decision and Findings in the Consistency Appeal of Yeamans Hall Club, Aug. 1, 1992, at 6.

[72] Letter from George R. Stafford to Thomas S. West, May 9, 2002, at 15.

[73] This route, referred to by the parties as "Route 10," comprises Segments M, N, and O on the USGS Topographic Map provided by Millennium at Exh. 78, Tab 11 (Map). *See* Pipeline Route Review, prepared by Baker Engineering NY, Inc. (Baker Engineering Report), Attachments 2 & 4. This modification intersects with Millennium's proposed route in the vicinity of South Mountain, then follows the Palisades Interstate Parkway north for approximately 4.2 miles. It would then follow an electric transmission right-of-way owned by Orange & Rockland and two parallel Algonquin pipelines until it reaches the Hudson River. The

Algonquin Natural Gas Pipeline;[74]

- the Electric Transmission Right-of-Way River Crossing[75] which would come ashore at the Consolidated Edison site on the eastern side of the Hudson River;[76] and

- the Lovett Power Plant River Crossing[77] which would enter the Hudson River near the Lovett Power Station on the western shore, and cross to a quarry one-half mile south of the Consolidated Edison site on the eastern shore.[78]

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crossing would occur adjacent to Algonquin's right-of-way. On the eastern side of the Hudson, the pipeline would follow Con Ed's electric transmission lines near Buchanan, to rejoin the FERC certificated route in the Town of Cortlandt. *See* New York Reply Brief at 160; Baker Engineering Report at 16.

[74]New York Reply Brief at 160. This appears to be the same crossing considered by FERC as part of its evaluation of "Hudson River North" Alternatives 1 and 2. *See* FEIS at 6-1 to 6-5.

[75] This route, referred to by the parties as "Route 9," comprises Map Segments M, P, and O. *See* Baker Engineering Report, Attachments 2 & 4. Similar to Route 10, this modification intersects with Millennium's proposed route in the vicinity of South Mountain, then follows the Palisades Interstate Parkway north for approximately 4.2 miles. It would then follow the electric transmission right-of-way owned by Orange & Rockland and two parallel Algonquin pipelines for approximately 4.1 miles until it reaches the Hudson River. The crossing would occur under Orange & Rockland's facilities. Like Route 10, the pipeline would then follow Con Ed's electric transmission lines near Buchanan, to rejoin the FERC certificated route in the Town of Cortlandt. *See* New York Reply Brief at 157; Baker Engineering Report at 16.

[76]New York Reply Brief at 157.

[77] New York proposed two routes that would utilize the Lovett Power Plant River Crossing. These routes, referred to by the parties as "Route 7," and "Route 8," comprise Map Segments S, R, and O, and Map Segments Q, R, and O, respectively. *See* Baker Engineering Report, Attachments 2 & 4. Route 7 would follow the CSX railroad right-of-way to the Lovett Power Generation Plant, while Route 8 would instead follow the Orange & Rockland electric transmission right-of-way to the Lovett facility. Both routes would cross the Hudson River at Lovett, landing at the LaFarge Gypsum plant. Like Routes 9 and 10, both routes would then follow Con Ed's electric transmission lines near Buchanan, to rejoin the FERC certificated route in the Town of Cortlandt. *See* New York Reply Brief at 151-54; Baker Engineering Report at 14-15.

[78] New York Reply Brief at 150.

Of the three,[79] Millennium acknowledged that the river crossing proposed in the Electric Transmission Right-of-Way option is viable.[80] Given the parties' agreement that the river crossing component of the Electric Transmission Right-of-Way option can be constructed, it is necessary to consider whether the complete route for this option (see map segments M, P and O) is reasonable and available.

– Electric Transmission Right-of-Way Alternative

As a general matter, Millennium asserted that the modification is "unconstructable and entails significant adverse impacts to the [Palisades Interstate Parkway]; thus, it is not an available or reasonable alternative."[81] Two of the three segments comprising the route (map segments M and O) are considered below. (The third segment, map segment P, is the portion of the route crossing the river discussed *supra*.)

1. **Western Shore** - from the FERC-Certificated Route to the Hudson River via the Palisades Interstate Parkway (Map Segment M) and Orange & Rockland/Algonquin Right-of-Way (Map Segment M)

Millennium and its consulting engineer indicated that construction of a portion of the proposed

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[79] Millennium suggested crossing the Hudson River at the Algonquin Right-of-Way site is not feasible and that the Lovett Power Plant crossing is "likely not feasible." *See* Baker Engineering Report at 15-16; *see also* Millennium Reply Brief at 100-105. New York, however, disputes these assertions, finding both crossings feasible, reasonable and available. *See for example*, New York Reply Brief at 150, 159.

[80] Millennium's consulting engineer described the crossing as having an "approach to the eastern shore . . . [with] adequate workspace and . . . [with good] transition from the river through the shoreline and to landfall . . . . The western approach is difficult but it can be done." Baker Engineering Report, Attachment 5, at 12; *see also* Millennium Reply Brief at 104.

Interestingly, Millennium's expert appears to contradict Millennium's own earlier findings that no appropriate crossing location existed outside of Haverstraw Bay. *See* Millennium Initial Brief at 101 (Millennium conducted an exhaustive review along a 15-mile stretch of the river with a team of experts, and "[d]espite all of this effort" found no alternative crossings to exist), and at 102-104 (Millennium evaluated, at FERC's request, two crossings north of Haverstraw Bay, and concluded there was not adequate workspace, nor was there a suitable location at other areas considered north of Haverstraw Bay).

[81] Millennium Reply Brief at 103.

segment in Rockland County (Map Segment M) is not feasible.[82] At issue is Millennium's ability to install the pipeline along a utility right-of-way that travels through a populated area with limited space for construction.[83] An existing overhead electric transmission line and two parallel underground pipelines located along the right-of-way are complicating factors.

New York, relying on its engineering expert, argued adequate room exists for installing the pipeline along the right-of-way. New York pointed out that a field review conducted by its engineers determined that, while seven relatively new homes are in close proximity to the route, the homes are set back sufficiently to allow installation of Millennium's pipeline along the edge of the right-of-way.[84]

Aside from construction feasibility issues, Millennium asserts that locating the pipeline along the Parkway would result in impacts that are "severe, profound, and permanent."[85] Construction would require the clear-cut of 33 acres of mature forest and produce visible permanent scars where rock has to be blasted and/or trenched.[86]

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[82] Baker Engineering Report, Attachment 5 at 10. However, that report indicates that construction does appear feasible for the portion of the pipeline that would run parallel to the Palisades Interstate Parkway. Baker Engineering Report, at 16.

[83] *Id.*

[84] New York stated the pipeline can be installed in a reduced width corridor (30 feet) adjacent to the homes using drag sections. As an alternative, New York's engineers also identified a variation on this route that would allow a greater distance from the homes. The variation, with the cooperation of Algonquin, would lessen the spacing between the existing and the new pipeline from 25 to 15 feet. New York Reply Brief at 158.

In response, an affidavit from Millennium's consulting engineer raised general – non site-specific – concerns regarding the use of a 30-foot construction right of way. For example, the affidavit advised that a reduced width corridor may be used only in localized areas for short distances under ideal conditions not found along the Palisades Parkway. In addition, the affidavit suggested a wider workspace is necessary for passing and efficient operations – and that adequate staging and suitable access would still be required in the near vicinity. Affidavit of Charles E. Russell, Jr., Professional Engineer, Apr. 18, 2003, at 6. Millennium does not specifically respond to the route variation identified by New York, but notes that standard industry practice calls for a minimum separation distance of 25 feet when paralleling an existing pipeline. Baker Report at 7.

[85] Millennium Reply Brief at 104; *see also* Baker Engineering Report at 16.

[86] Baker Engineering Report at 10, 16.

New York characterizes Millennium's assessment of impacts as "far-fetched," claiming it results from "exaggerated construction and siting requirements." New York argues that its consultant has demonstrated "the pipeline can be constructed in a manner that avoids or minimizes impacts . . . ."[87]

2. **Eastern Shore** - from the Hudson River to the Connection with the FERC-Certificated Route (Map Segment O)

With regard to the segment leaving the eastern shore of the Hudson River, Millennium raised two concerns. First, it identified a portion for which construction would be "extremely difficult" (involving crossings of State Route 9A and a railroad right-of-way).[88] More significantly, Millennium argued a separate stretch (crossing State Route 9) "is infeasible due to extensive rock walls close to the highway, which preclude adequate room to bore the highway."[89]

In response, the State contended the crossing of State Route 9 "is difficult, but possible."[90] This conclusion is based on evaluations by New York's engineering consultant, which considered New York State Department of Transportation State Route 9 highway right-of-way and infrastructure plans and as-built specifications.[91] New York also argued that physical constraints that make construction more difficult or require more sophisticated methodologies do not render the route "non constructable."[92]

After reviewing the information provided by New York, Millennium's consultant Baker Engineering conducted additional field visits to the area and reiterated earlier conclusions noting ". . . construction in this location is complicated by the severe grade changes that occur in a very short distance . . . a boring is not feasible . . . [and] there is insufficient room to construct the bore

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[87]New York Reply Brief at 157-58.

[88] Millennium explains that the crossings would be extremely difficult "because of a small pond, the railroad, the highway, and a steep slope." Millennium Reply Brief at 102, 104; *see also* Baker Engineering Report, at 15-16. In addition, "[s]ubsurface conditions, such as solid rock, *may* make boring and other construction activities very difficult in this area." Baker Engineering Report, at 15-16 (emphasis added).

[89] Millennium Reply Brief at 102, 104; *see also* Baker Engineering Report at 15,16.

[90] New York Reply Brief at 153; *see also* New York Exh. 52, State Route 9 Crossing, O'Brien & Gere Engineers, Inc., March 2003.

[91] New York Reply Brief at 153.

[92] *Id.*, at 154.

pits."[93]

3. Discussion

Millennium identified various construction impediments for the proposed route modification, suggesting that difficulties are so significant as to make installation of the pipeline impossible. In an earlier appeal decision also involving an energy project, the Secretary of Commerce analyzed another situation in which there were significant difficulties with an alternative. The alternative in that case was characterized as being "extremely difficult, if not impossible to secure," "time consuming" (taking potentially up to four years to complete), "expensive," and "uncertain." Nevertheless, the Secretary found the alternative to be reasonable and available. Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc. (Chevron Decision), Oct. 29, 1990, at 59.[94]

Relying on the standards used in this earlier decision, Millennium has not met the burden of demonstrating that the Electric Transmission Right-of-Way Modification is unavailable or so costly as to render it unreasonable. Similar to the situation in Chevron, Millennium has not shown, with certainty, that any of the construction difficulties identified throughout the length of this modification present obstacles that cannot be overcome through reasonable efforts. In addition, portions of Millennium's arguments are conclusory, or non site-specific and therefore

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[93] Affidavit of Charles M. Russell, Jr., P.E. (Russell Affidavit), at 16-17.

[94] Chevron proposed drilling exploratory oil and gas wells to evaluate the commercial hydrocarbon potential of a lease off the California coast. The state identified two alternatives: (1) emission offsets (a reduction of emissions elsewhere in the same air basin); and (2) on-site emission reductions (such as using a different drillship having a cleaner-burning engine than proposed by the company). Despite Chevron's concerns with offsets noted *supra*, offsets were found to be a reasonable and available alternative. (The drillship alternative was similarly found reasonable and available.)

The decision suggests: (1) a company must directly attempt to locate and secure cost information about the alternative in order to state with certainty the cost of such alternative (e.g., failure to obtain specific contracting and transportation costs precluded the company from concluding that bringing a drilling rig "around the world would be prohibitive"); (2) potential revenues from the project may be considered when evaluating the reasonableness of an alternative; (3) the views of expert federal agencies may be considered in determining the value or significance of an alternative; and (4) the degree of effort exerted by a company affects the implementation of an alternative (for Chevron, this referred to speed of implementation). Chevron Decision, Oct. 29, 1990, at 58-67.

not compelling.[95] This is particularly true with respect to Millennium's concerns regarding the limited workspace corridor in Rockland County. Millennium notes the difficulty of using a narrow construction right-of-way under less than ideal conditions along the Palisades Parkway, but presents no information on the specific conditions at the site in question along the utility right-of-way.[96] Nor did Millennium address a variation to this route identified by New York.[97]

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[95] Regarding conclusory statements, one crossing is identified as being "extremely difficult" because of a small pond, the railroad, the highway and a steep slope. Baker Engineering Report, at 15. Presumably, similar obstacles will be encountered and successfully negotiated at other points along the 420-mile pipeline route.

[96] The site at issue involves a utility right-of-way that is not located alongside the Palisades Parkway. Other examples of generalized concerns include: (1) statements indicating certain specialized construction techniques can only be used "for short distances" (with no explanation of "how short is short" or a statement that the segment in question is longer than the maximum length for which the technique can be used); and (2) a suggestion that an "adequate staging area . . . [is] required in the near vicinity" without answering whether this requirement can be accommodated at the site in question. Millennium also suggests a key concern with the use of a narrow construction corridor right-of-way is reduced efficiency of operations. This issue is not relevant to determining whether a route modification is available unless the inefficiency is of such magnitude as to make construction of the entire project financially infeasible Similarly, it affects "reasonableness" only to the extent that an increase in project costs associated with the route modification is so significant as to outweigh the benefits for the modification. Millennium has provided no specific cost information and therefore has made no showing that the modification is unavailable or unreasonable on the basis of inefficient operations. *See supra* ftnt. 84.

In addition, New York points out that Millennium will be using a 20 foot corridor to install the pipeline in the City of Mount Vernon, New York, which is 10 feet *narrower* than New York's proposed width for the site in question along the utility right-of-way. *See* New York Initial Brief at 102; New York Reply Brief at 158. Millennium has not specifically addressed this issue.

[97] New York suggested an optional modification to a portion of the route (by "following the electrical transmission lines south to the [Palisades] Parkway. . . .") to allow a greater distance from homes located near the utility right-of-way. New York Reply Brief at 158. (The modification is not required for the pipeline to reach the river, but could be used by Millennium if the overall route modification were found reasonable and available.) New York indicates Algonquin's cooperation would be needed to lessen the spacing between lines from 25 feet to 15 feet. *Id.*

Alternatives that involve agreements with third parties have been found "unavailable" in instances where no portion of the alternative could be undertaken without the agreement. *See for example,* VEPCO Decision, May 19, 1994, at 45 (a proposal to supplement the water supply of

In addition, Millennium does not refute New York's assertion that, despite difficulties noted by Millennium with the 30 foot wide right-of-way, installations in close proximity to existing utility infrastructure are "becoming more common in congested areas" and certainly are not infeasible through the use of special designs, construction safety procedures and in cooperation with co-located utilities.[98]

With regard to the segment of the Electric Transmission Right-of-Way Modification on the eastern shore of the Hudson River, feasibility centers exclusively on crossing underneath State Route 9.[99] New York's expert provided information suggesting that boring under State Route 9 is feasible. The New York State Public Service Commission, an agency recognized by Millennium as having pipeline construction expertise comparable to FERC,[100] appears to have

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the City of Virginia Beach with water from Norfolk, Virginia was unavailable because Virginia Beach could not compel Norfolk to implement the proposal.) However, in Millennium's appeal, Algonquin's concurrence is not an impediment that would make New York's modification unavailable. First, the alternate route is still feasible, even without the modification suggested by New York. Second, the need for agreement with a third party will not make an alternative unavailable if there is an established process to obtain the necessary approval. VEPCO Decision, May 19, 1994, ftnt. 308 at 126. New York suggests such a process exists within the utility industry, noting for example, that Consolidated Edison has a "practice [of] address[ing] requests for use of right-of-way on a case-by-case basis." New York Reply Brief at 154. More generally, New York notes that utilities have, in the past, allowed projects to be constructed with reduced spacing between utility infrastructure. Both the specific and general past industry practice is sufficient evidence, for purposes of the Element 3 analysis, to conclude the existence of a process sufficient to satisfy the VEPCO exception. To find otherwise would: (a) unreasonably burden a state to obtain concurrences in the limited period available for preparing its appeal briefs; (b) be unnecessary, given the lack of evidence suggesting such concurrence will not be received; (c) conflict with past appeal decisions, which do not require that an alternative be immediately available to the appellant (*see* Findings and Decision in the Matter of the Appeal by Exxon Co., U.S.A. (Santa Ynez Unit), Feb. 18, 1984, at 15-16); and
(d) potentially make alternatives for all projects unavailable.

[98] New York Reply Brief at 156. New York's consulting engineering firm advised that pipelines "have, for many years, been designed and installed with clearances of less than 25 feet where right-of-way constraints have made it necessary . . . ." New York Reply Brief at 155.

[99] Although advising that construction of other portions of this segment would be "extremely difficult," Millennium never indicated that such construction is infeasible. *See* Baker Engineering Report at 15, 16.

[100] Millennium Surreply Brief, at 24, ftnt. 91.

concurred in this assessment.[101] The FEIS also appears to corroborate the State's conclusion.[102]

Millennium's expert disagrees with New York and points out there is insufficient room to construct bore pits. A cross-section diagram provided by Millennium's expert notes a variety of "questionable construction issues." For example, it states that the bore under the highway would be "near the length limit of accurately controlling the direction of the drillhead."[103] However, segments of the route that require the use of drilling techniques that approach, but do not exceed, the limits of conventional technology do not render construction of the pipeline infeasible, although the result may be a more difficult, time-consuming, and expensive process for Millennium. Consequently, construction of the modification would still be considered available.

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[101] New York consulted with the New York State Public Service Commission and other state agencies specifically to develop feasible alternatives to the FERC-approved route. New York Initial Brief, at 86.

[102] The FEIS evaluated a crossing of the Hudson River in the vicinity of the Algonquin pipeline. Millennium indicated that the eastern segment of the FEIS' Algonquin crossing (i.e., the portion leading from the Hudson River to reconnect with Millennium's proposed route) is virtually identical to the eastern segment of the Electric Transmission Modification. Baker Report at 17 and Attachment 2 (identifying the eastern segment of the FEIS' Hudson River North Crossing as Map Segment O). *See also* Baker Engineering Report, Attachment 4 (map including route of the Electric Transmission Modification); Millennium response to FERC (OPR/DEER/ERC II) Data Request No. 9, Mar. 2, 1999 (including map highlighting proposed Algonquin crossing). The overlap for the two routes would include the area that Millennium concludes cannot be constructed. *See* Russell Affidavit at 16 (emphasis added) ("[a]ll of the alternative routes proposed by New York *and others* converge at this point [crossing State Route 9].)

In describing the eastern overland portion of the Algonquin route, the FEIS states "[b]eyond the east shore, the modification would include crossing State Route 9A (with a bridge crossing), a railroad and commercial and residential development areas." FEIS at 6-4. Significantly, the FEIS made no mention of potential problems with crossing State Route 9; nor did it suggest any portion of the route on the eastern leg was infeasible. Instead, the FEIS found that "existing utility and industrial development on both banks [of the Hudson River] and topography" would probably preclude a crossing at this site. FEIS 6-4, 6-5. However, the feasibility of the crossing for the Electric Transmission Modification is not at issue. *See supra* ftnt. 80.

[103] Russell Affidavit, Exh. "H" - Route 9 Crossing, Montrose, NY, Alternative Alignment.

Millennium provided no information concerning the cost to construct any of the alternative routes.[104] Consequently, there is no basis for concluding that the modification would be infeasible from a financial perspective. In addition, having failed to compare the cost of the FERC certificated route with the cost of the proposed modifications, including specifically the Electric Transmission Right-of-Way Modification, Millennium does not meet its burden of demonstrating that any of the modifications are unreasonable. *See* Chevron Decision, Oct. 29, 1990, at 67; *see also* Decision and Findings in the Consistency Appeal of Carlos A. Cruz Colon, Sept. 27, 1993, at 12.

The record, however, clearly indicates that a northern crossing of the Hudson River would, in comparison to Millennium's Haverstraw Bay route, produce an appreciable benefit to the resources and uses of the New York State Coastal Zone. Haverstraw Bay, designated a Significant Coastal Fish and Wildlife Habitat, is a uniquely productive portion of the Hudson Estuary and crossing north of this protected area "represents a significant reduction in impacts on aquatic resources and habitats. . . ."[105]

Three federal agencies expressed significant concerns regarding Millennium's proposed crossing.[106] The National Marine Fisheries Service (NMFS) concluded that while Millennium's appeal does not appear to satisfy the grounds set forth in the CZMA for an override of New

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[104] In its Reply Brief, New York argued that the project is expected to generate significant revenues so that any of the modifications would be feasible from a financial standpoint. New York Reply Brief, at 120 - 124. New York also stated that "[i]n terms of overall cost of the alternatives. . . each alternative is within the range of pipeline construction for lines of this length." New York Reply Brief at 121. Millennium does not provide a detailed reply to these arguments. *See also* Chevron decision *supra* ftnt. 94.

[105] Letter from William T. Hogarth, Assistant Administrator for Fisheries, National Marine Fisheries Service to Branden Blum, National Oceanic and Atmospheric Administration, Dec. 5, 2002, at 3.

[106] The National Marine Fisheries Service advised that Millennium's proposal "would create significant and long-term impacts in New York's coastal zone, including the Haverstraw Bay habitat." *Id.*, at 2. The U.S. Fish and Wildlife Service concluded that the proposed crossing at Haverstraw Bay would "contribute directly to the degradation of important fish and wildlife habitats. . . ." and recommended upholding New York's objection to the pipeline project. Letter from Mamie A. Parker, U.S. Fish and Wildlife Service to Branden Blum, NOAA, November 27, 2002, at 1, 3. The Department of the Army forwarded comments from the Army Corps of Engineers that expressed "substantial concerns about the environmental impacts of the proposed Hudson River crossing, similar in nature to those expressed by [New York]." The Corps' letter pointed out that a crossing "north and outside of Haverstraw Bay" was one of several alternatives that would largely address the agency's concerns. Letter from George Dunlop, Department of the Army to Scott B.Gudes, NOAA, Nov. 21, 2002, enclosure at 2.

York's objection, New York had identified reasonable alternatives that would eliminate the habitat impairments created by Millennium's project.[107] NMFS noted that other reaches of the Hudson River do not support the same importance and intensity of ecological values and functions as Haverstraw Bay, and noted in particular that routing the pipeline north of Haverstraw Bay would involve a less ecologically sensitive area and is "ecologically preferred." *Id.* at 3. New York made a similar conclusion, finding the Electric Transmission Right-of-Way Modification was consistent with the State Coastal Management Program, including the policy of protecting significant coastal fish and wildlife habitats. The FEIS considered two northern crossings of the Hudson River (adjacent to the existing Algonquin pipeline) but concluded neither was feasible from a construction standpoint.[108]

In sum, information contained in the appeal record indicates that crossing the Hudson River north of Haverstraw Bay at the location of the proposed Electric Transmission Right-of-Way Modification will reduce adverse impacts to one of the most important fish and wildlife habitats in the Hudson River estuary. Absent documentation relating to the actual costs of the modification, there is no basis to conclude that these costs outweigh the modification's significant environmental advantages. The modification is therefore reasonable.

New York City Drinking Water Supply and Delivery System

Catskill Aqueduct Crossing

The proposed pipeline route would pass within several feet of the 90-year old Bryn Mawr Siphon (Siphon), a high-pressure juncture in the Catskill Aqueduct (Aqueduct) located in Yonkers, New York. The Aqueduct supplies forty percent of the drinking water for New York City.[109]

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[107] Letter from William T. Hogarth to Branden Blum, Dec. 5, 2002, at 3, 5.

[108] FEIS at 6-5. The FEIS stated one of the routes could not be "reasonably" constructed because it would require significant in-street construction in congested areas, but nevertheless acknowledged the most significant advantage of a northern alternative was its avoidance of Haverstraw Bay. The FEIS did not evaluate the specific route of the Electric Transmission Right-of-Way Modification (although it does suggest the eastern portion is feasible). *(See infra* ftnt. 102.) Regarding potential impacts of the Electric Transmission Right-of-Way Modification, Millennium has suggested 33 acres of mature forest would need to be clear cut. Baker Engineering Report, at 16. New York believes that only 13 acres would be affected using a more limited construction corridor. New York Reply Brief at 157-158. While the loss of mature trees may affect coastal resources and uses, those impacts have not been described by the parties, and the record does not suggest they are likely to be significant. This conclusion is supported by New York's determination that the modification is consistent with its Coastal Management Program.

[109] *See* New York Reply Brief at 110, 113; Amicus Brief of the City of New York at 2; FEIS at 5-62. New York asserted that a rupture of the pipeline would cause a catastrophic failure

New York indicated that in order to be considered consistent with the State's coastal management program, the pipeline route must "avoid the New York City drinking water supply[110] and delivery system."[111] The State identified three alternate routes that would avoid the Bryn Mawr Siphon, but focused its comments primarily on the:

- New York State Thruway (Thruway) Modification - this route would divert from the proposed route and reconnect south and east of the Catskill Aqueduct. Specifically, it would cross under the Thruway, proceed down its west side for approximately 350 feet, and then cross back under the Thruway, avoiding the Bryn Mawr Siphon entirely.[112]

The Thruway route is approximately 650 feet long.[113] New York confirmed that this route is

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of the Siphon, leading to the immediate release of one million gallons of water and a total volume of 10 to 20 million gallons. New York Reply Brief at 111.

Millennium noted the Bryn Mawr Siphon's location outside the coastal zone and questioned whether impacts involving the Siphon are properly considered as part of this appeal. *See, e.g.*, Millennium Reply Brief at 65-66. The CZMA provides that states may review projects requiring federal licenses or permits that are located "in or outside of the coastal zone" if the project "affects any land or water use or natural resource of the coastal zone . . . ." 16 U.S.C. § 1456(c)(3)(A).

According to FERC, the FEIS indicates that a rupture of the aqueduct would result in a loss of water and water pressure and pose a threat to human health. 97 FERC ¶ 61,292 at 62,335. This loss of water would directly affect New York City, a part of which is located within the coastal zone. Therefore, New York was correct in considering the pipeline's impacts, because a failure of the Siphon would have direct impacts on the resources and uses of the coastal zone.

[110] The term "drinking water supply" appears to reference the New Croton Reservoir Watershed which is a source of water supplied to the City of New York. The State has indicated that proposed pipeline crossings north of Haverstraw Bay do not require modification when passing in the vicinity of the reservoir in order to be consistent with the coastal management program. *See for example* New York Reply Brief at 159.

[111] *See supra* ftnt. 64.

[112] New York Reply Brief at 170.

[113] *Id.* The City of New York (City), an amicus for this appeal proceeding, indicated that the Thruway modification is "a feasible crossing" which it believes poses far less risk to the Aqueduct than Millennium's proposed route. Amicus Brief of the City of New York at 9; *see also* Public Comments of the City of New York Department of Environmental Protection at 2-3.

consistent with its coastal management program.[114]

In response, Millennium has identified concerns similar to those raised for the "Eastern Shore" segment of New York's Electric Transmission Right-of-Way Modification,[115] arguing that the route modification around the Siphon is not feasible, and therefore, not available.[116]

Discussion

As discussed *supra,* Millennium has not shown, with specificity, that any of the difficulties it identified present obstacles that cannot be overcome through reasonable efforts. As an initial matter, the potential closure of multiple lanes of traffic is not relevant to the route's availability. The closures, while potentially burdensome to the public, do not appear to affect New York's coastal resources or uses. In addition, New York has determined that the route modification is consistent with the State's Coastal Management Program.

A number of Millennium's additional arguments are vague and either suggest potential difficulties that fall short of infeasibility or lack sufficient weight to satisfy its burden of proof. For example, Millennium referenced a rock "cliff" adjacent to the highway, but failed to explicitly identify the problem it presented or to respond to New York's suggestion concerning this structure.[117] Millennium points to New York's failure to provide correspondence from the New York State Public Service Commission, a recognized expert in pipeline construction matters,[118] in support of the Thruway Modification. This comment incorrectly suggests the

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[114] New York Reply Brief, at 170.

[115] *See, e.g.*, Millennium Surreply Brief at 22; *see also supra* at 28.

[116] Specifically, Millennium argues that boring would be required along approximately 600 feet of the proposed route, that boring pits would need to be located within the middle of the Thruway, and that the "net result would be the closing of multiple lanes of Thruway traffic for extended periods of time." Russell Affidavit at 18 ¶ 42. The pipeline would also need to be routed around an apartment complex and electrical towers that allegedly would prevent the pipeline from being bent sufficiently to reconnect to the proposed route. Baker Engineering Report at 23. In addition, a "rock cliff" is immediately adjacent to the Thruway at the crossing. Millennium Reply Brief at 115.

[117] Russell Affidavit at 17; New York Reply Brief at 171. Millennium's diagram of the Thruway crossing recharacterizes the "cliff" as an "outcropping." Russell Affidavit, Exh. I. New York proposed removing a portion of this rock wall to create a receiving pit. *Id.* Millennium did not explicitly respond to this suggestion.

[118] *See supra* at 31.

burden of proof on this issue rests with the State.[119] New York confirmed that the New York State Public Service Commission and other state agencies were consulted as part of the State's process of developing feasible alternatives to the proposed pipeline route,[120] providing further support for New York's determination.[121]

In sum, the information in the record does not suggest that construction of the Thruway modification will be without complication. However, the obstacles are not so severe as to suggest infeasibility. To a large degree, much of the evidence concerning feasibility is conclusory and involves the conflicting opinions of experts. In addition to the State, the New York City Department of Environmental Protection has also contradicted Millennium's conclusions, and believes the pipeline can be built along the Thruway.[122] On balance, the arguments and documents provided by Millennium do not satisfy its burden of proof to establish that the Thruway modification cannot be constructed. Consequently, this modification of Millennium's route is available.[123]

Regarding reasonableness of this modification, routing the pipeline to avoid the aqueduct will avert the potential for significant harm to the resources of New York's coastal zone in the event of rupture at the Bryn Mawr Siphon. As noted by the State, a crossing which avoids the Siphon would "safeguard the City's water supply and thus offer a significant environmental benefit."[124] Given the absence of information on additional costs to Millennium for constructing this alternate routing of the pipeline, the Thruway Modification is reasonable.

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[119] The state's burden of proof is limited to identifying an alternative with sufficient specificity and confirming that it would allow a project be conducted in a manner consistent with the state's coastal management program. *See supra* at 23.

[120] New York Initial Brief, at 86.

[121] Millennium's one-sentence declaration (listed on a diagram of the Thruway alignment) that the route exceeds pipe bending capabilities appears inconsistent with the statement of Millennium's own expert. In discussing the modified route proposed by New York, the expert refers on three separate occasions to 90 degree turns in the pipeline without any suggestion that such specifications could not be constructed. Russell Affidavit, at 18 ¶¶ 43, 44.

[122] New York Reply Brief at 170.

[123] The record contains no information as to the additional cost Millennium would incur for constructing the Thruway modification. Consequently, there is no basis for finding that the modification is infeasible from a financial perspective.

[124] New York Reply Brief at 171.

Conclusion - Element 3

Based upon the information contained in the record for this appeal, the Electric Transmission Right-of-Way Modification and the Thruway Modification are found to be an available, reasonable alternative that would allow Millennium's proposed pipeline project to be constructed and operated in a manner consistent with the State of New York's Coastal Management Program.[125]

2. Conclusion - Ground I

Millennium fails to satisfy Element 3 of Ground I. Having failed to fulfill all of the elements of Ground I, New York's objection to Millennium's proposed pipeline project cannot be overridden on the basis that the project is consistent with the objectives of the Coastal Zone Management Act. 16 U.S.C. § 1456(c)(3)(A).

C - Necessary in the Interest of National Security (Ground II)

The second statutory ground (Ground II) for an override of a state's objection to a proposed project is a finding that the activity is necessary in the interest of national security. To make this determination, a finding is required that "a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed."[126]

In deciding Ground II, considerable weight is given to the views of the Department of Defense and other federal agencies with regard to whether the proposed project directly supports national defense or other essential national security objectives.[127] However, none of the comments received from federal agencies indicate a national security interest would be significantly impaired if the pipeline were not constructed along the FERC-certified route. The Chairman of the Federal Energy Regulatory Commission advised that the project would "contribute to the region's energy security, a particularly vital national consideration at the present time."[128] The

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[125] This finding is made without prejudice to any of the other alternatives determined by New York to be consistent with the State's Coastal Management Program, which may also be reasonable and available pursuant to Element 3. However, it is not necessary to make a finding regarding these alternatives for purposes of deciding Millennium's appeal. In addition, the State is not precluded from agreeing to other changes in Millennium's proposed route, thereby allowing further modifications as required to meet the interests of the parties.

[126] 15 C.F.R. § 930.122.

[127] *Id.*

[128] Letter from Pat Wood, III, Chairman, Federal Energy Regulatory Commission, to Scott B. Gudes, NOAA, November 15, 2003, at 2.

Department of Energy (DOE) commented that, "[t]he Millennium Pipeline Project is necessary in the interest of national security" and emphasized the project's importance to meeting increased energy needs of the northern United States.[129] Comments from the Department of Defense focused on the project's environmental impacts and whether alternatives to the Haverstraw Bay crossing might exist.[130]

The standard for meeting the criteria of Ground II is clearly stated in 15 C.F.R. § 930.122 – *significant impairment* to a national defense or other national security interest if the particular project is not allowed to go forward *as proposed.* General statements that the project furthers or is important to the national interest fail to satisfy the requirements of Ground II. The record for this appeal does not contain information indicating that a specific and significant impairment of a national security interest would result if Millennium's project were not permitted to go forward as proposed. Therefore, the requirements for Ground II are not met.

IV - CONCLUSION

For the foregoing reasons, I find Millennium's proposed project does not satisfy either of the two grounds set forth in the Coastal Zone Management Act for allowing a project to proceed notwithstanding a state's objection, and I uphold New York's objection. Therefore, pursuant to the Coastal Zone Management, 16 U.S.C. §1456(c)(3)(A), federal agencies may not issue permits or licenses for the pipeline project as proposed.

Donald L. Evans
Secretary of Commerce

12 Dec 03
Date

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[129]Comments of the U.S. Department of Energy on the Federal Consistency Appeal by the Millennium Pipeline Company, L.P. from an Objection by the New York Department of State, at 1.

[130]*See* Letter from George Dunlop, Dept. of the Army, to Scott B. Gudes, NOAA, Nov. 21, 2002, and enclosure.