**Re: Coastal Zone Management Act Federal Consistency Regulations Docket No. 030604145-3145-01-Comments of Algonquin Gas Transmission Company**

In connection with the National Oceanographic and Atmospheric Administration ("NOAA") attempt to clarify its existing regulations found at 49 CFR Parts 923 and 930,[1] Algonquin Gas Transmission Company ("Algonquin"), a natural gas company under § 2(6) of the Natural Gas Act ("NGA"), 15 USC § 717a(6) and a Delaware corporation with a principal place of business at 5400 Westheimer Court Houston, Texas 77056-5310, submits the following comments and recommendations.

**Background**

Generally, Algonquin believes that NOAA's regulations require modification to more accurately reflect that the Costal Zone Management Act of 1972, 16 USC § 1451 et seq., as amended ("CZMA") and the regulations and policies of NOAA authorized by the CZMA were not intended to upset or change in any significant degree the balance of state and federal authority to regulate waterways, submerged lands and interstate or foreign commerce under the commerce clause and other applicable clauses of the U. S. constitution. Since its inception the CZMA has been a so-called grant-in-aid statute whose principle purpose, as Algonquin understands it, has been to provide the coastal states with federal funding and other practical benefits. These benefits are intended to induce those states to effectively regulate, under state law (but consistent with pre-

[1] See 68 Fed. Reg. 34851 (June 11, 2003).

existing federal agency jurisdiction and federal law) public and private development activities that are situated within the coastal zone as that zone is defined in the CZMA. See Norfolk Southern Corporation v. Oberly, 822 F.2d 388, 394-396 (3rd Cir. 1987). See also Senate Report No. 92-753 reprinted in 1972 U.S.C.C.A.N. 4776, 4776. The CZMA was not intended to expand the scope of state regulatory authority within the coastal zone so as to substantively conflict or interfere with or encroach upon federal jurisdiction over activities within the state coastal zone that has been granted to such federal agencies under the commerce or other clauses of the U.S. constitution. 822 F.2d at 396-8.

In addition, Algonquin believes that in the case of federally regulated energy infra-structure projects such as those to be authorized by the Federal Energy Regulatory Commission ("FERC") under NGA § 7 (c) the closure of record decision period proposed by NOAA should be reduced from 270 to 120 days.

**CZMA Does Not Change the Balance of Federal and State Regulatory Authority**

The CZMA in and of itself neither preempts state activities in the coastal zone nor does it prevent federal preemption of state regulatory authority under the U.S. constitution or other federal laws. See California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 591-593 (1987). In other words, from a regulatory perspective the CZMA is neutral between complementary pre-existing fields of federal and state regulatory authority with Congress refusing in the CZMA to alter the balance between federal and state jurisdiction by increasing state regulatory authority at the expense of federal agency authority and vice versa. 480 U.S. at 593. The CZMA grants federal funding to coastal states so that those states may more effectively regulate activities within fields of regulation properly reserved to such states under the U.S. constitution but

it is not intended to extend fields of state regulation into those of federal regulation unless another federal statute, such as the Clean Water Act, 33 USC § 1251 et seq., or the Clean Air Act, 42 USC § 7401 et seq., authorizes such an extension. Thus, if a federal law such as NGA, ordinarily applies to preempt state authority over the subject matter of the NGA, the CZMA is not intended to change this from a perspective of substantive law.

As Algonquin understands it, the intended effect of the CZMA is primarily administrative and procedural, allowing NOAA to assure Congress that federal grant-in-aid funds are actually used by the states to enact state laws regulating activities within the coastal zone up to but not exceeding complementary limits of federal agency jurisdiction to regulate such activities under the commerce clause, supremacy clause and other grants of federal authority under the U.S. constitution. See 822 F.2d at 396-398, see also 16 USC §1456 (e) (1) and (2) and H.R. Rep. No. 1049, 17-18.

In addition, the CZMA gives the coastal states a further administrative inducement to accept federal funds under the CZMA by providing those states procedural leverage in negotiating with private parties whose projects required federal approvals or licenses or permits. This practical leverage is created by the state consistency concurrence requirements of 16 USC § 1456 (c)(3)(A). However, even with respect to the procedural leverage of a coastal state that arises under 16 USC § 1456 (c)(3)(A) due to a state's ability to object to a private party's consistency certification, such an objection is limited by the requirement that the objection be based on the "enforceable policies" of a state's approved program. Id.

**Enforceable Policy Should be Clarified**

The CZMA defines "enforceable policy" to mean "State policies which are legally binding through constitutional provisions, laws, regulations, land-use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone." 16 USC § 1453 (6a). There is no limitation in this definition, or in the contexts in which it is used, restricting its application to state constitutions or laws. Accordingly, "enforceable policies" of a coastal state as defined under the CZMA, labor under and are subject to federal constitutional and statutory limitations. The CZMA authorizes no expanded or additional state encroachment on pre-existing federal regulatory jurisdiction.

For instance, in the case of an interstate pipeline project that is to be situated within the coastal zone of a state and has been or is to be issued a certificate of public convenience and necessity under NGA § 7 (c), 15 USC § 717f(c), conditioned on compliance with 16 USC § 1456 (c)(3)(A), a state may validly object to a pipeline company's consistency certification only if that objection is based on state policies that satisfy pre-existing substantive federal constitutional standards and statutory limitations, including those arising under the commerce clause and the supremacy clause.

**Pre-existing Authority of FERC under the NGA**

Under NGA § 7 (c) FERC has been granted comprehensive regulatory authority over facilities that are used in the transportation of gas in interstate commerce. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988). That authority has always extended to the regulation of facility location and land-use and environmental matters and it preempts substantive state regulation of such matters, except to the degree that state

regulation is expressly authorized by a specific federal statute. See e.g., National Fuel Gas Supply Corporation v. Public Service Commission, 894 F. 2d 571 (2d Cir. 1989) cert. denied 497 U.S. 1004 (1990) (state location, land use and environmental regulation preempted as to interstate pipeline regulated by FERC under NGA § 7(c)), Algonquin LNG v. Ramzi Loqa, 79 F. Supp. 2d 49 (D.R.I. 2000) (municipal zoning ordinance and state building code preempted as to LNG facilities regulated by FERC under NGA § 7 (c)), Northern Natural Gas Company v. Munns, 254 F. Supp. 2d 1103 (C.D. Iowa 2003) (state location, land use and environmental regulation preempted as to pipeline facility regulated by FERC under NGA § 7(c)).

In view of the facts that (a) the CZMA was not intended to change or supersede the authority of federal agencies to regulate matters, relative to the several states, that are within their respective subject matter jurisdictions under federal law and (b) a coastal state's objection to a private developer's coastal zone consistency certification under 16 USC § 1456 (c)(3)(A) must be based on an "enforceable policy" that respects the substantive regulatory authority of FERC over facilities to be used in the transportation of natural gas in interstate commerce, Algonquin believes that additional modifications to the existing and proposed regulations of NOAA, as set forth in Recommendations (1) through (4) below, are advisable.

**Closure of Decision Record at Earlier Date in the Case of Interstate Natural Gas Pipeline Projects**.

Additionally, on occasion states have used the regulatory leverage provided by the CZMA and NOAA regulations to delay interstate energy transportation projects that are

of national importance but are of no direct economic benefit to the objecting state.[2] Potential for such delay is likely to make interstate natural gas pipeline transportation projects in coastal areas highly unattractive. Moreover, such leverage may be exerted by a state despite the fact that FERC engages (with the opportunity for full state participation and appeal), in an exhaustive review of any project that is subject to its authority under NGA § 7 (c) and is required by FERC regulations to submit to a full NGA § 7 (c) application and review process under 18 CFR Parts 157 and 380. The review that is conducted by NOAA pursuant to 15 CFR Part 930 is in large measure redundant and duplicative of the review that is conducted by FERC. Further, NOAA applies a similar, if not virtually the same, standard of review in determining whether the interstate pipeline project is "consistent with the objectives of this title" under 15 CFR § 930.121 as that which is applied by FERC in determining whether the project serves the public convenience and necessity of the nation.

To reduce the incentive for a state to invoke a procedural delay in the review of an interstate natural gas project that has been approved by FERC in an NGA § 7 (c) proceeding, Algonquin recommends in item (5) below that the period of closure of the NOAA decision record under 15 CFR Part 930 be reduced from 270 days to 120 days.

[2] E.g., the State of Connecticut is currently asserting an objection under CZMA § 306 (c)(3)(A) in what appears to be an attempt to delay or prevent Islander East Pipeline Company, L.L.C., a natural gas company under NGA § 2(6) from constructing an interstate pipeline across Long Island Sound from Connecticut to Long Island, New York. That project has been approved by FERC and would provide a second source of natural gas to Long Island, there by significantly increasing the reliability of natural gas and other energy supplies to that New York island and the Northeast in general.

**Recommendations**

As to the issues discussed above Algonquin recommends that NOAA regulations be clarified. The recommendations hereby submitted are with respect to 15 CFR Part 930 as it is proposed to be amended by NOAA.

(1) Enforceable Policy. The definition of "enforceable policy" under 15 CFR § 930.11 should be modified to insert a new penultimate sentence to the definition. That new sentence should state:

> "A state or local law, ordinance, regulation rule, order or other expression of state policy shall not be an enforceable policy for these purposes, if (without considering the consistency certification requirements of 16 USC § 1456 (c)(3)(A) and in recognition of 16 USC § 1456 (e) (1) and (2)), the state or local law, ordinance, regulation, order or other expression of state policy would otherwise legally interfere or be legally inconsistent with the jurisdiction of any federal agency under other federal law."

This change more accurately reflects Congressional intention as expressed in the language of the CZMA and in the Committee Reports that explain the purposes of that statute. It also gives a private party seeking a federal license standing in a particular case to raise before NOAA, and thereafter in the federal courts, the issue of whether an approved state management program exceeds the regulatory authority that is appropriate to a state under the CZMA.

(2) NOAA Bound by Prior Federal Determinations. A new subsection (d) should be added to the end of 15 CFR § 930.121:

> "(d) In making the determinations required by (a), (b) or (c) NOAA shall take into consideration and give conclusive weight to and be bound by any prior determination by a federal agency having authority to issue or conditionally issue a federal permit or license determining the national or public interest or convenience and necessity or the reasonableness of alternatives to the activity that is the subject of the federal permit or license in question, that such activity is in

the national or public interest or convenience and necessity and that the alternatives considered and approved by such agency are reasonable."

The foregoing modification prevents redundant federal agency review of the specified issues and the possibility of inconsistent federal agency results under 16 USC § 1456 (c)(3)(A) and such federal laws as NGA § 7(c) which may apply to the same subject matter. It also helps to prevent coastal states from suggesting alternatives under state laws that are not enforceable policies under the CZMA.

(3) Procedural Override. The procedural override of 15 CFR § 930.129 (b) should be modified by inserting the words "including the enforceable policies of the State," after the word "Act" in the first sentence of that regulation. The purpose of the change is to conform § 930.129 (b) to the clarification of comment (1) above.

(4) Further Clarification of Override. To further clarify the authority of NOAA to override a state objection under 15 CFR § 930.129 (b) the following additional modifications should be made to 15 CFR § 930.130:

(a) Add a new sentence to (d) stating: "Alternatively, the Secretary may override a State objection pursuant to § 930.129(b)".

(b) Insert the words "or the Secretary overrides a State objection pursuant to § 930.129 (b)" after the words "national security" in (e) (1).

(c) In (e)(2) change the word "either" to "any".

(5) Reduction of Period Until Closure of the Decision Record in the Case of Interstate Pipeline Projects Approved by FERC.

In 15 CFR § 930.130 the following changes should be made:

(a) In subsection (a)(1), after the words "under § 930.128(a)" insert the words "except with respect to a natural gas pipeline project that has

been specifically approved by an order of the Federal Energy Regulatory Commission issued under § 7 (c) of the Natural Gas Act and regulations at 18 CFR Parts 157 and 380, in which case said 270-day period shall be reduced to 120-days.

(b) In subsection (a)(2), after the words "beyond" insert the word "either" and after the words "270-day" insert the words "or 120-day".

Very truly yours,

Algonquin Gas Transmission Company

/s/ Richard J. Kruse
Senior Vice President
Industry Initiatives, Pricing &
Regulatory Affairs

k:\jmb1\noaa comment