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August 25, 2003

David Kaiser  
Federal Consistency Coordinator  
Coastal Programs Division  
Office of Ocean and Coastal Resource Management  
NOAA  
1305 East-West Highway, 11th Floor  
Silver Spring, MD 20910

Re: Coastal Zone Management Act Federal Consistency Regulations  
Docket No. 030604145-3145-01 – Comments of Islander East Pipeline  
Company, LLC

Dear Mr. Kaiser:

Pursuant to the proposed rule issued in the referenced proceeding on June 11, 2003,<sup>1</sup> Islander East Pipeline Company, L.L.C (“Islander East”) submits the following comments on the National Oceanic and Atmospheric Administration’s (“NOAA”) proposal to revise the Federal Consistency regulations promulgated under the Coastal Zone Management Act of 1972 (“CZMA”).

## **I. BACKGROUND**

Islander East proposes to construct and operate an interstate natural gas pipeline that will extend from a location near North Haven, Connecticut, cross Long Island Sound and terminate near Brookhaven, New York on Long Island. Islander East is subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC”) and received a FERC certificate of public convenience and necessity authorizing the proposed project, based on FERC’s findings that the pipeline was environmentally

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<sup>1</sup> 68 Fed. Reg. 34851 (June 11, 2003).

acceptable and critically needed in order to ensure the security and reliability of natural gas service to Long Island.<sup>2</sup>

Because its pipeline will cross Long Island Sound, it was necessary for Islander East to go through Federal Consistency reviews by the states of New York and Connecticut to determine the consistency of the project with those states' Coastal Zone Management Plans ("CZMP"). New York completed its review and issued a consistency determination in a timely manner. Connecticut, by contrast, did not offer any feedback on Islander East's application for a consistency determination, but, on October 15, 2002, issued an objection to Islander East's certification. In November 2002, Islander East appealed the objection to the Secretary of Commerce. While the appeal was pending, Islander East met with and attempted to address Connecticut's stated concerns. During those discussions, Islander East agreed to modifications to its FERC-approved construction techniques which will increase project construction costs by approximately \$8 million. In March of 2003, at the state's request, Islander East agreed to a stay of the appeal and, ultimately, a remand back to the state for formal consideration of the new construction techniques. In response, the state issued a second objection to Islander East's consistency certification on July 29, 2003. Islander East reinstated its appeal to the Secretary on August 1, 2003.

Islander East found the Connecticut process extremely frustrating in part because Connecticut, although it did not provide any feedback on Islander East's filings, did issue written requests for additional information relating to matters outside the scope of state CZMP review, such as pipeline routing, an area which is committed to the exclusive jurisdiction of the FERC. This direct contrast to the approach taken by the state of New York is a graphic illustration of the ability of the states to politicize and manipulate the Federal Consistency review process to achieve objectives which are completely unrelated to the CZMA. Connecticut's objectives here were made explicit by the Connecticut Attorney General, who issued a press release explaining that the state's action was part of a campaign to "vigorously and vociferously fight this short-sighted, self-serving project" which he declared to be an "environmental nightmare" and a "potential disaster," notwithstanding the modified construction techniques that

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<sup>2</sup> *Islander East Pipeline Company, L.L.C., preliminary determination*, 97 FERC ¶ 61,363 (2001), *order issuing certificate*, 100 FERC ¶ 61,276 (2002), *reh'g*, 102 FERC ¶ 61,054 (2003).

had been discussed with the state.<sup>3</sup> Thus, Islander East's pipeline project, which FERC has found to be environmentally acceptable and required to ensure reliable and secure gas service, has been significantly delayed, in part due to the lack of predictable and transparent procedures for the Federal Consistency review by state agencies.

As clearly demonstrated by the Islander East experience, the existing Federal Consistency review program provides the states with sufficient leverage to effectively "regulate" federally licensed natural gas pipelines through the Federal Consistency review process. This is clearly inappropriate in the context of state review of FERC-certificated projects. FERC, acting as the lead agency for a multitude of other cooperating agencies who provide input on their areas of special expertise, is responsible for determining whether interstate pipelines are required by the public convenience and necessity and, if so, how and where they should be sited. In doing so, FERC undertakes an extensive review process, including exhaustive environmental reviews as required by the National Environmental Policy Act ("NEPA"). FERC reviews and balances all environmental (including air quality, land-based and water-related) issues and non-environmental (including the need for energy and the security and reliability of the energy delivery system) matters. The states should not be permitted – nor was it ever Congress' intent to permit states – to use the Federal Consistency review process to essentially second guess FERC on such matters or to elevate coastal resource issues to a level which effectively supersedes all non-coastal considerations. To the extent that they do so, the Department of Commerce, in the CZM appeals process, must make the hard calls required to break regulatory log jams that prevent or delay the construction of critically needed energy infrastructure projects. Islander East generally supports NOAA's proposed changes because they may lessen the opportunity for states to use the Federal Consistency review process to insert themselves in matters beyond their jurisdiction and/or inordinately delay federally-approved activities.

## II. COMMENTS

According to the proposed rule, the rulemaking is designed to revise Federal Consistency regulations to make the administrative process from the state level through the federal agency appeal clearer, more efficient and less time consuming. Several of

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<sup>3</sup> The Attorney General's press release not only clarifies the state's political objectives, but it also makes a mockery of the FERC process in which numerous agencies, including agencies of the state of Connecticut, participated.

the proposed rules would affect interstate pipelines and appear, in general, to be improvements over current regulations, and address some of the problems Islander East has faced in obtaining the necessary approvals for its pipeline project.<sup>4</sup> Islander East's comments on the specific proposals are set forth below.

**A. Proposed Section 930.51(a)**

NOAA proposes to revise Section 930.51(a) to clarify the elements that must exist before a "federal license or permit" is subject to Federal Consistency review by a state. Islander East supports this change because it will ensure that the definition of the term "federal license or permit" is clearly and narrowly defined, and will not include activities that have no coastal effects.

**B. Proposed Section 930.51(e)**

According to NOAA, the currently-effective Section 930.51(e) was designed to ensure that all parties would have input in the determination of whether the coastal effects of a renewal or major amendment of a license or permit are substantially different from the effects of the original project. NOAA believes that the current regulation, which accords the state agency's views "deference," may have suggested that the state agency is to make this decision. The proposed rule clarifies that the determination lies with the permitting federal agency after consultation with the state and applicant. Islander East supports this improvement because it leaves the decision making relative to a federally issued license or permit with the expert federal agency that initially issued such permit or license.

**C. Proposed Sections 930.58(a) and 930.60**

In proposed Sections 930.58(a) and 930.60, NOAA, among other things, (1) sets forth the specific information an applicant for a federal license is required to submit to a state to start the six-month Federal Consistency review process; (2) prohibits a state from requiring that state or local government permits be submitted before the Federal

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<sup>4</sup> A number of the changes appear applicable only to federal agencies conducting activities that affect the coastal zone or to offshore exploration and development of oil and gas programs regulated by the Mineral Management Service under the Outer Continental Shelf Lands Act. Islander East takes no position on these changes.

Consistency review period could begin; (3) clarifies that the state's Federal Consistency review period begins when it receives a copy of the applicant's certification and the information described in (1); and (4) clarifies that a state's determination of whether the applicant's application is complete is not a substantive review, but a "checklist" review. A substantive review of the adequacy of the information submitted would be done during the six-month review period.

Islander East supports these proposed changes and clarifications because under the current regulations, there is significant uncertainty in determining when the six-month Federal Consistency review process commences because the states are free to deem an application incomplete as they seek additional data after the application is filed. This delays the running of the time clock. Under the proposed rule, the states would continue to have the ability to request the information that they need, so long as they specifically describe such information in their CZMPs, making all potential applicants aware of the requirements prior to application. Thus, the states would be precluded from delaying Federal Consistency review either before or after the six-month period begins simply because they want other information. Islander East supports the new specific information requirements because they will make the process predictable and more transparent, ultimately helping to expedite the Federal Consistency review process.

#### **D. Proposed Changes to the Appeals Process**

There are several sections of the proposed regulations (Sections 930.125, .127, .128, .129 and .130) that are designed to change the Department of Commerce appeals process to ensure that the decision record in an appeal from a state CZM objection closes within a specified number of days, unless the parties agree otherwise. Among these changes are provisions that would allow each party and the public only one opportunity to provide their arguments to the Secretary. The proposed rule would also make explicit the Secretary's practice of giving additional weight to federal agencies' comments on matters within the areas of their technical expertise. It appears that the proposed procedural changes to the agency review process will make that process more efficient and increase the likelihood of timely decisions. These changes should expedite the administrative review process at the Department of Commerce. Islander East supports these changes, particularly the proposal to explicitly state that the Secretary will give additional weight to federal agencies' comments on matters within the areas of their expertise.

In addition, Islander East strongly recommends that the current period for processing of an appeal be reduced from 270 to 120 days for natural gas infrastructure projects which have been certificated by FERC. As noted above, FERC engages in an exhaustive review process prior to issuing a certificate, which often consumes a period of one to two years. An incremental 270 day appeal period plays into the hands of states who wish to use the Federal Consistency process to delay projects which have already been found to be required by the national public convenience and necessity. Shortening that period should have no substantive effect on the states' ability to provide input on environmental and other matters relating to such projects, since states are entitled, and encouraged by FERC, to participate actively in the FERC review process.

Finally, Islander East also supports the recommendation made by other commenters that NOAA should require, as a condition for approval of a state's CZMP, that the state participate in FERC's NEPA review process for natural gas pipelines to ensure that the FERC has an opportunity to address the state's concerns as part of that process.

Should you have any questions concerning these comments, please contact the undersigned.

August 25, 2003

Respectfully submitted,

/s/

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