

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE**

**Broadwater Energy LLC and Broadwater Pipeline LLC,
Appellants,**

vs.

**New York Secretary of State Lorraine Cortés-Vázquez,
Respondent.**

MOTION TO SUPPLEMENT THE DECISION RECORD

Pursuant to 15 C.F.R. § 930.127(i)(4) and 15 C.F.R. § 930.130(a)(2), New York State Department of State (NYSDOS) requests the US Secretary of Commerce to supplement the decision record with twelve (12) documents, identified below. These documents should be included in the decision record because they serve as “clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency” and thus qualify as “supplemental information” under 15 C.F.R. § 930.127(i)(4). 15 C.F.R. § 930.130(a)(2)(ii)(B).

Under the Coastal Zone Management Act, the initial record used by the Secretary for the appeal is the consolidated record maintained by the lead Federal permitting agency; in this case, the Federal Energy Regulatory Commission (FERC) is the lead permitting agency. 16 U.S.C. § 1466. The consistency regulations give the Secretary broad authority to determine the content of the appeal decision record. 15 C.F.R. § 930.127(e)(1). For energy project appeals, supplemental information may be admitted to the decision record where it is clarifying information relating to the information in the consolidated record. 15 C.F.R. 930.127(i)(4) and 930.130(a)(2)(ii)(B).

Supplemental Documents

NYSDOS respectfully requests the Secretary to accept in the decision record the following documents:

Document 1: NYSDOS Consistency Decision (dated April 10, 2008)

As required by 15 C.F.R. 930.127(c)(2), "The appellant must prepare and file an appendix with its brief containing: . . . (2) The State agency's objection." At the time it submitted its principal (initial) brief, Broadwater did not provide the US Secretary of Commerce with a copy of NYSDOS's consistency objection. Instead, Broadwater placed the NYSDOS consistency objection in the Consolidated Record under the titles: "New York State Department notifies FERC of their federal coastal consistency objection to the Broadwater Project" [BW033829 - BW033892] and "Request for Intervenor Status and for Rehearing of New York State Department of State" [BW033724-BW033808]. NYSDOS's objection letter explains the many reasons that serve as the basis for this appeal and should be readily available to the Secretary and all parties on this appeal.

Document 2: Letter of Recommendation (LOR), from Daniel A. Ronan, Captain of the Port Sector Long Island Sound, United States Coast Guard to Mr. James A. Thompson Jr. (dated June 25, 2008)

Document 3: United States Coast Guard (USCG) Record of Decision (dated Jun. 27, 2008)

Documents 2 (LOR) and 3 (USCG Record of Decision) should be included in the decision record because they provide clarifying information relating to documents included in the Consolidated Record. The LOR relies on the Coast Guard Sector Long Island Sound's Waterways Suitability Report (WSR), which is included in the decision record. See FEIS, Appendix C [BW29353-29557]. The LOR "reflect[s] the USCG's most recent assessment" of waterway's suitability for the Project. See, Letter order authored by Jane C. Luxton, General Counsel, National Oceanic and Atmospheric Administration, January 2, 2008 concerning the Consistency Appeals of Weaver's Cove Energy, LLC and Mill River Pipeline, LLC. The USCG Record of Decision describes the information supporting the LOR. The USCG's most current views are relevant to determining whether the national interests furthered by the project outweigh the adverse coastal effects. It updates the Coast Guard's assessment in the Waterways Suitability Report.

Document 4: Long Island Coastal Management Program Approval letters including the approval letter from John King, Acting Chief OCRM to George Stafford, Director, Division of Coastal Resources (Feb. 26, 2002), the Public Notice of OCRM's concurrence with the routine program change, and a copy of the Long Island Sound Coastal Management Program document.

This document package includes NOAA's approval of the Routine Program Change that incorporated the Long Island Sound Coastal Management Program (LISCMP) into the New York State Coastal Management Program (NYSCMP), as well as the LISCMP document. Broadwater has raised some concerns about whether the LISCMP was properly approved by OCRM. See Broadwater Initial Brief at page 36. Verification that the LISCMP was incorporated into the New York Coastal Management Program is relevant to the issues before the Secretary. The documents clarify information in the Consolidated Record referencing the LISCMP and NYSCMP.

Document 5: Three (3) letters from John J. Ferguson, Project Review Coordinator, New York State Department of Environmental Conservation to Murray Sondergard, Broadwater Energy LLC, (dated December 21, 2007, February 8, 2008 and June 11, 2008)

The December 21, 2007 letter contains comments by the New York State Department of Environmental Conservation on applications submitted by Broadwater for the Project including those for Section 401 Water Quality Certificates, air permits, pollution discharge elimination system permits, petroleum bulk storage, and hazardous substance bulk storage permits. Comments from the New York State Department of Environmental Conservation form a critical component of the review of the Project's adverse coastal effects and clarify information in the Consolidated Record referring to the environmental effects of the Project.

The February 8, 2008 and June 11, 2008 letters contain a status update on Broadwater's applications. Both letters indicate that Broadwater's intakes are projected to destroy, through entrainment or impingement, approximately 274 million aquatic organisms annually. In its brief, Broadwater claims that only half that number, 131.5 million organisms, will be impinged or entrained. Broadwater argues that impingement/entrainment resulting from the Project are *statistically insignificant*. See Broadwater Initial Brief at page 19. These letters indicate the Broadwater Project will result in a significant loss of fish eggs, larvae and adult fish in the region.

In its initial brief, Broadwater alleges that all agencies, except NYSDOS, forecast that the Project will have "limited" coastal effects. (See Broadwater Initial Brief at 13). These letters will be cited as part of NYSDOS's argument that many government agencies view the proposed Broadwater Project as having numerous significant adverse impacts in this coastal area.

Document 6: OCRM Approval of List of Activities Outside the State Subject to NYSDOS's Interstate Consistency Review, as a Routine Program Change

These documents indicate that, through a routine program change, OCRM expanded the geographic areas subject to New York's federal consistency review to include interstate activities occurring in Long Island Sound, among other areas, that would have reasonably foreseeable effects on coastal resources and uses in New York. This clarifies information in the Consolidated Record relating to the coastal effects of the proposed Project and is also important to the determination of whether the adverse coastal effects outweigh the national interest in the Project. See Broadwater Initial Brief at 11-33.

Document 7: Advanced Energy Initiative, White House National Economic Council (February 2006)

The Advanced Energy Initiative sets forth President Bush's plan for providing reliable, affordable, and clean supplies of energy. The document details a futuristic guide for the United States with regard to its energy policy and directly relates to whether the Project furthers the national interest. See Broadwater Initial Brief at 8-11. Additionally, Broadwater cites to this

document in its Initial Brief, but did not include it in the Consolidated Record or in the Appendix. See Broadwater Initial Brief at 9. The document clarifies information already in the Consolidated Record that refers to the need for the Project, such as the “Project Purpose and Need” section of the FEIS. See BW28776-BW28795.

Document 8: Senate Com. On Commerce, Coastal Zone Management Act Amendments of 1975, S. Rep. No. 277, 94th Cong., 1st Sess. 24 (1975), Reprinted in Legislative History of the Coastal Zone Management Act of 1972 (1976)

NYSDOS requests that the Secretary take judicial or official notice of the legislative history associated with the energy planning provisions of the 1975 Amendments to the Coastal Zone Management Act. Specifically, several pages address section 306(c)(8) [now section 306(d)(8)] of the CZMA. This document serves as clarifying information for all references to the CZMA and the meaning of “adequate consideration of the national interest” found in the Consolidated Record. _____

Document 9: Transcript: Chairman Kelliher with Mark Haines and Erin Burnett, CNBC’s “Squawk on the Street,” available at: <http://www.ferc.gov/about/com-mem/kelliher/cnbc0609.pdf>, (June 9, 2008)

In this interview, FERC Chairman Joseph Kelliher discusses the future outlook for energy use in the United States. This transcript clarifies information in the Consolidated Record related to the nation’s natural gas uses and needs. See Broadwater Initial Brief at 8-11. Transcript appears on FERC’s website at www.ferc.gov/about/com-mem/kelliher/cnbc0609.pdf

Document 10: Letter from David Kennedy, Director, Office of Ocean and Coastal Resource Management (OCRM) to Ruth E. Ehinger, (dated Oct. 4, 2006).

This letter document addresses the contention made in Broadwater’s Initial Brief at page 6, that NYSDOS should have relied on LISCMP Policy 13 in its Objection. Subpolicy 13.4, which Broadwater quotes in its brief, deals with siting LNG facilities. David Kennedy’s letter provides guidance in interpreting the effect of the amendments to the Natural Gas Act by section 311(c)(2) of the Energy Policy Act of 2005. See 15 U.S.C. § 717b(e)(1). Based on David Kennedy’s letter, NYSDOS presumed that this subpolicy, though listed in the LISCMP, is not legally enforceable because any state laws to the contrary would likely be preempted. For this reason, the subpolicy was not used in the consistency determination.

Document 11: North American LNG Import Terminals- Potential, FERC’s Office of Energy Projects (June 19, 2008)

On its official website, FERC recently updated its list of potential North American LNG Import Terminals, some of which are slated to serve the New York/New Jersey energy market. <http://www.ferc.gov/industries/lng/indus-act/terminals/lng-potential.pdf>. This list includes the Exxon-Mobil’s BlueOcean Energy FSRU proposal for the Atlantic Ocean, which would serve the metropolitan area. According to BlueOcean’s website, (www.blueoceanenergy.com), it will be

submitting an application under the Deepwater Port Act this year. BlueOcean Energy's proposal and presentation are contained in the Consolidated Record as Document 2067, BW037936 - BW037945.

Document 12: Battelle Report of July 25, 2008 Analyzing Broadwater's Proposed Supplemental Information

After receiving Broadwater's Motion to Supplement, NYSDOS commissioned Battelle Memorial Institute to conduct a follow-up analysis of the Broadwater's Supplemental Documents I and II. This report dated July 25, 2008 was prepared in a hurry and with only the limited information Broadwater provided in the documents. NYSDOS requests that submission of this report be accepted into the decision record only if the Secretary accepts any of Broadwater's Supplemental Documents I, II, and III into the decision record. Moreover, in the event the Secretary grants the motion to enter any of the supplemental documents (except Supplemental Document IV) into the decision record, NYSDOS requests an extension of 45 days beyond its August 7, 2008 principal brief submission deadline, to prepare a full counter study and, additionally, that NYSDOS be provided with the opportunity to submit a 25 page double-spaced supplemental brief by which arguments may be advanced as to the veracity and relevancy of the supplemental documents.

III. Conclusion:

In consideration of the foregoing, NYSDOS requests the Secretary to include these documents in the decision record because they are clarifying information related to information in the Consolidated Record.

Respectfully submitted,



Susan L. Watson
General Counsel to the
NYS Secretary of state