

**UNITED STATE OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Broadwater Energy LLC)	Docket Nos. CP06-54-000
)	
Broadwater Pipeline LLC)	CP06-55-000
)	CP06-56-000

**MOTION FOR LEAVE TO REPLY AND REPLY COMMENTS
OF BROADWATER ENERGY LLC AND BROADWATER PIPELINE LLC**

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To: The Commission:

Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2006), Broadwater Energy LLC (“Broadwater Energy”) and Broadwater Pipeline LLC (“Broadwater Pipeline”) (collectively, “Broadwater”) hereby (i) move for leave to reply to the comments and protests respecting Broadwater’s Applications filed January 30, 2006 in the captioned proceedings, and (ii) submit their Reply Comments.

The comments submitted by intervenors opposed to the Broadwater Project (also referred to throughout as “the Project”) do not present a basis for evidentiary hearings or for a technical conference. Rather, their comments reflect issues that are readily susceptible to consideration and disposition by the Commission’s ordinary orderly processes. Contrary to the contentions of these parties, there is a pronounced and certain need, in the growing markets of New York and Connecticut in particular, for the Broadwater Project to provide ready and proximate access to needed gas supply at competitive prices. Conservation and improved efficiency measures are important, but these measures are calculated to reduce the growth of demand rather than to reduce demand in absolute terms. Broadwater undertook this Project only after serious consideration of the variety of factors, including safety concerns, now identified by parties

opposed to the Project. In fact, those concerns are not obstacles to approval; they are matters which a willing and capable applicant must master, in cooperation with the agencies charged with primary responsibility for ensuring appropriate protection of the environment and public safety. The conditions the Commission will require prior to authorizing the commencement of construction and Broadwater's commitment to observe these requirements during construction and after service begins will ensure achievement of those objectives.

Broadwater recognizes that its Application will be subject to detailed environmental review. The work done to date demonstrates that the Broadwater Project is the preferred alternative and, by every measure, the environmental impacts associated with the Project will be minor, temporary, or otherwise amenable to mitigation.

Parties opposed to the Project also present a number of subsidiary issues that, it appears, are submitted to delay approval of the Project or as impediments to the Commission's exercise of its jurisdiction. Contentions that the existence of Critical Energy Infrastructure Information ("CEII") is a bar to consideration of this Project by a state agency, or that such materials establish *per se* that this Project presents risks too grave to consider, and arguments that permits or other local approvals necessarily will be withheld, thus interfering with completion of this Project, amount to contentions that local authority may trump Commission authority. These contentions cannot be reconciled with the Energy Policy Act of 2005¹ and its amendments to the Natural Gas Act ("NGA").² While local authority must be considered—and Broadwater is committed to working cooperatively with local and state authorities—it must be acknowledged even by state and local officials opposed to the Broadwater Project that Congress did not intend the Commission's determinations of national and public need to be frustrated by more parochial

¹ Pub. L. No. 109-58, 119 Stat. 594.

² 15 U.S.C. §§ 717, et seq.

considerations. As detailed in its Application and below, the Broadwater Project is consistent with the public convenience and necessity, and it will provide a valuable and necessary public service.

In support hereof, Broadwater states as follows:

I. BACKGROUND

Broadwater announced the Project in November 2004. Since then, Broadwater has engaged in extensive outreach to agencies, legislators and other stakeholders to make available information about the Project and to identify issues that are relevant to the deliberations of government authorities with jurisdiction. In addition, numerous open houses were held in Long Island and Connecticut, and Broadwater participated in countless public meetings and forums.

On November 29, 2004, the Commission granted Broadwater's request to use the Commission's National Environmental Policy Act ("NEPA") pre-filing review process for the Project, designating the pre-filing proceeding as Docket No. PF05-4-000. Broadwater contacted key resource agencies and interested stakeholders requesting participation in the NEPA pre-filing process. Four Commission and U.S. Coast Guard ("Coast Guard") public scoping meetings have been held. Throughout the pre-filing process, Broadwater held meetings with the public and local, state, and federal agencies and officials. The Commission has determined that this pre-filing review satisfies the requirements of section 3A of the NGA.³

Accordingly, on January 30, 2006, Broadwater Energy filed in Docket No. CP06-54-000 an Application under section 3 of the NGA, 15 U.S.C. § 717b, and Part 153 of the Commission's Rules, 18 C.F.R. Part 153, seeking authorization to site, construct and operate an offshore liquefied natural gas ("LNG") receiving terminal and associated facilities in Long Island Sound,

³ Regulations Implementing Energy Policy Act of 2005; Pre-Filing Procedures for Review of LNG Terminals and Other Natural Gas Facilities, Order No. 665, III FERC Stats. & Regs., Regs. Preambles ¶ 31,195, at P 43 (2005).

approximately nine miles from the shore of Long Island in New York State waters, as a place of entry for the importation of LNG.

Broadwater Pipeline concurrently filed an Application requesting: (i) in Docket No. CP06-55-000, a certificate of public convenience and necessity, pursuant to Subpart A of Part 157 of the Commission's regulations, 18 C.F.R. Part 157, authorizing Broadwater Pipeline to construct, own, operate and maintain a 30-inch, 22-mile subsea lateral (and related facilities) as a single-use pipeline; and (ii) in Docket No. CP06-56-000, a blanket certificate under section 7(c) of the NGA, 15 U.S.C. § 717f(c), and Part 157, Subpart F of the Commission's regulations to perform routine activities in connection with the future construction, operation and maintenance of the proposed 22-mile pipeline.

On February 17, 2006, the Commission issued a Notice of Applications inviting comments on, interventions in, and protests to Broadwater's Applications on or before March 10, 2006. Such pleadings having been filed, Broadwater submits this motion and reply comments.

II. MOTION FOR LEAVE TO REPLY

Although the Commission's February 17, 2006 Notice of Applications does not contemplate reply comments to comments and protests, the Commission has accepted reply comments when such pleadings have provided the Commission with a more complete record upon which to base a decision. See, e.g., S. Natural Gas Co., 110 FERC ¶ 61,052, at P 27 (2005); Dominion Transmission, Inc., 104 FERC ¶ 61,267, at P 14 (2003); Hackberry LNG Terminal, L.L.C., 101 FERC ¶ 61,294, at P 19 (2002). Broadwater submits that good cause exists for these reply comments to be accepted because they will provide the Commission with a more complete record for its decision on Broadwater's Applications.

III. REPLY COMMENTS

A number of intervenors and commenters have raised concerns over potential environmental, safety and security considerations which they assert must be factored into the Commission's process for review of Broadwater's Applications. Broadwater understands that the Commission's review must include a robust inquiry into the anticipated environmental impacts and that upon approval the Project must conform to rigorous safety and security standards.

However, the duty of a robust inquiry must begin with the review of the record conducted by parties advancing a position to the agency. It is evident from many of the comments that the opposition is not founded on a dispassionate evaluation of the facts presented. Rather, in many instances, sharp and provocative rhetoric has been substituted for consideration of the record. Broadwater doubts that the Commission will find strident voices as persuasive as a detailed recount of the facts, and so, as will be manifest throughout this submission, Broadwater's response will be confined to the record, the facts, and expert evaluation. Broadwater is confident that the record is sufficient for completion of the requisite statutory reviews and for authorization of the Project.

A. Need For The Broadwater Project

Certain commenting parties, including Citizens Campaign for the Environment ("CCE") and Wading River Civic Association ("Wading River"),⁴ have called into question the need for the Project, arguing that Broadwater does not identify a local or regional need for the Project and that other approaches to satisfying natural gas demand exist, including increased development of

⁴ CCE attached to its March 10, 2006 comments ("CCE Comments") a report by Synapse Energy Economics, Inc. funded by Connecticut Fund for the Environment's "Save the Sound" ("Synapse Report"). Wading River also cited, but declined to submit for the record, the Synapse Report. See Wading River Civic Association Comments, at 1 (filed Mar. 5, 2006) ("Wading River Comments"). The Synapse Report is not a learned treatise on the subjects presented and should not be cited in this manner. The Synapse Report is an advocacy piece funded by an adversary party.

local storage facilities, as well as investment in energy efficiency, renewable energy, expanded use of combined heat and power technology, and repowering of existing oil- and coal-fired power plants to increase fuel efficiency. These parties also contend that the Canaport and Bear Head LNG terminals, proposed to be located in eastern Canada, would be preferable to the Project.⁵

1. Conservation Is Not Enough

Conservation and other load reducing mechanisms are practical and efficient solutions to moderate demand growth, but growth in households (reflecting, at a minimum, increases in population), increased commercial use of natural gas, and increased use of natural gas to power electric generation and industrial operations, including use as feedstock, will mean that conservation efforts, load management, demand response, and other efficiency measures are not likely to reduce demand, but only to moderate the growth of demand. Parties stating an opposing view cite to no authoritative objective analyses that support the claim that demand is anticipated to decline as a result of these measures. Rather, authoritative objective analyses suggest that even with very aggressive programs being executed by states and Independent System Operators (“ISOs”), demand is projected to continue growing. For example, the Connecticut Siting Council (“CSC”), a Connecticut state agency, reports that summer peak electric demand in Connecticut is projected by ISO New England (“ISO NE”) to grow from about 7,000 MW in 2004 (Connecticut set a peak load record of 7,135 on July 27, 2005) to about 8,300 MW in 2014.⁶ This conservative 1,300 MW estimate of growth likely will materialize in spite of effective and successful conservation programs. In 2004, conservation programs reduced energy

⁵ See CCE Comments, Synapse Report at 4, 10-11.

⁶ Connecticut Siting Council, “Review of the Ten Year Forecast of Connecticut Electric Loads and Resources 2005-2014,” Dec. 9, 2005, at 4-5 (“CSC Ten Year Forecast”), available at http://www.ct.gov/csc/lib/csc/f2005/ct_siting_council_osar.pdf. (ISO NE 50/50 forecast 8,225 by 2014, ISO NE 90/10 forecast 8,750 by 2014).

demand by only 291 GWh. Assuming an 85 percent capacity factor, a 291 GWh energy reduction would curtail the need for about 38 MW of capacity. These conservation programs are of high energy value, high environmental value, and should be continued; however, they will make up a small fraction of the demand growth, and are not without cost: the 2004 programs cost ratepayers \$73 million.⁷

The ISO NE 90/10 summer peak is projected to grow from 27,985 MW in 2005 to 32,050 MW in 2014 with a net growth of 4065 MW.⁸ This projected increase for New England would consume almost three quarters of the normal projected delivery capacity of the Broadwater Project.⁹

The region might benefit in the near term from the development of additional LNG peak-shaving facilities; however, peak-shaving facilities are not a substitute for base load capacity and supply. Rather, by their nature, peak-shaving facilities only have limited ability to refill and deliver more gas after withdrawal and these facilities typically have less storage capacity than import facilities. For example, the most recent LNG peak-shaving facility under construction in Connecticut has a storage capacity of approximately 0.5 to 1.2 Bcf.¹⁰ Thus, peak-shaving facilities can be expected to be effective to meet short peak demands, but they will not be able to meet longer-term demands that are likely to develop as general market demand increases and as repowering occurs, consistent with environmental requirements.

⁷ Id. at 6.

⁸ ISO New England, “2005 Regional System Plan,” Oct. 20, 2005, at ES-7, (“2005 Regional System Plan”), available at <http://www.iso-ne.com/trans/rsp/2005/05rsp.pdf>.

⁹ Long Island Power Authority, “Long Island Power Authority Energy Plan, 2004-2013,” June 23, 2004, Technical Report, Vol. 3 of 5, Ex. 4-2 at 4-3, available at <http://www.lipower.org/pdfs/company/projects/v3.energyplan.pdf>.

¹⁰ Connecticut Department of Environmental Protection, “Interim Report of the Long Island Sound LNG Task Force,” at 41 (Mar. 8, 2006) (“Interim Report”), also available at http://www.ctlng.state.ct.us/interim_report_030806.doc.

Broadwater's views find support in pronouncements of ISO NE calling for new electric capacity to meet market demand, conversion of gas-fired generation to dual-fired generation, and development of additional gas infrastructure including expanding pipeline capacity and LNG storage capability, and additional LNG import and storage capability to diversify the sources of gas supply.¹¹

Data from the U.S. Department of Energy's Energy Information Administration ("EIA") also supports the contentions that natural gas use will increase with a larger proportion of gas-fired generation and industrial applications, and LNG is projected to meet much of this demand.¹²

In the EIA's Report, total domestic demand for natural gas is projected to increase at an average annual rate of 1.5 percent from 2003 to 2025.

In the *AEO2006* reference case, total natural gas consumption increases from 22.4 trillion cubic feet in 2004 to 26.9 trillion cubic feet in 2030. Most of the increase is seen before 2017, when total U.S. natural gas consumption reaches just under 26.5 trillion cubic feet. After 2017, high natural gas prices limit consumption to about 27 trillion cubic feet through 2030. Consequently, the natural gas share of total energy consumption drops from 23 percent in 2004 to 21 percent in 2030.

Id. at 85.

The EIA Report states that growth in U.S. natural gas supplies will depend on unconventional domestic production, natural gas from Alaska, and imports of LNG. Id. at 9, 14. Total non-associated unconventional natural gas production is projected to grow from 6.6 trillion cubic feet in 2003 to 8.6 trillion cubic feet in 2025. With completion of an Alaskan natural gas

¹¹ 2005 Regional System Plan at ES-14; see also ISO New England, "Power Generation and Fuel Diversity in New England: Ensuring Power System Reliability," Aug. 2005, at 3-4, available at http://www.iso-ne.com/pubs/whtpprs/iso_ne_paper.pdf.

¹² Energy Information Administration, "Annual Energy Outlook 2006, with Projections to 2030," DOE/EIA-0383(2006), Feb. 2006, at 6, 9 ("EIA Report"), available at [http://www.eia.doe.gov/oiaf/aec/pdf/0383\(2006\).pdf](http://www.eia.doe.gov/oiaf/aec/pdf/0383(2006).pdf).

pipeline in 2016, Alaska's total production is projected to increase from 0.4 trillion cubic feet in 2003 to 2.2 trillion cubic feet in 2025.

In light of the fact that the domestic pipeline industry is a reasonably efficient national grid, questions of purely local need, such as those raised by the adversary parties, miss a portion of the picture and assume that New York and Connecticut are islands, isolated from the rest of the country. But New York and Connecticut compete for supplies that may be diverted to other markets in response to competing demand. National market trends may not be ignored when local need is evaluated. But even when viewed from the narrower perspective, EIA projects sustained growth of natural gas demand in affected markets:

From 2004 to 2030, 60 percent of the projected growth in lower 48 end-use consumption of natural gas occurs east of the Mississippi River Variation in regional growth rates for natural gas consumption results from different prospects for population growth, economic activity, and natural-gas-fired electricity generation. The most rapid increases in natural gas consumption, averaging 1.3 percent per year from 2004 through 2030, are in the South Atlantic and East South Central Census divisions. In the West North Central division, consumption grows by 1.0 percent per year, and growth rates in the other Census divisions are less than that, including annual averages of 0.5 percent in New England, 0.7 percent in the Middle Atlantic, 0.8 percent in the East North Central, 0.5 percent in the West South Central, 0.8 percent in the Mountain, and 0.3 percent in the Pacific divisions.

Id. at 85.

The New York State Energy Plan projects that demand within New York is expected to grow nearly 37 percent by 2021, with nearly 61 percent of this increase due to natural gas demand for electric power generation.¹³

¹³ New York State Energy Research and Development Authority, "2002 State Energy Plan and Final Environmental Impact Statement," at 3-9 (June 2002), available at http://www.nyserda.org/Energy_Information/energy_state_plan.asp.

With greater growth projected in adjacent markets, the need for timely development of LNG import terminals such as the Broadwater Project near the market demand center is critical. Consumers in New York and Connecticut will be forced to accept higher prices and lower reliability, and they will fail to achieve the health and environmental benefits associated with the repowering of older oil- and coal-fired electric generation absent a solution which serves their acknowledged need.

2. Alternative Projects Like Canaport and Bear Head Are Uncertain and Likely Would Not Help New York/Connecticut

Alternative projects like Canaport and Bear Head are located several hundred miles away, and, at present, Bear Head is stalled. In a recent announcement, Anadarko Petroleum Corporation announced it is delaying the construction at the Bear Head site near Port Hawkesbury until it acquires a long-term supply of LNG, and analysts are speculating on whether the project will materialize.¹⁴ Maritimes & Northeast Pipeline, L.L.C. (“MNE”) has announced that expansion of its system intended to accommodate these imports has been correspondingly delayed.

Even if these projects are completed, they will be used to meet the demands of northern and central New England and will be able to displace some demand in southern New England. For New York and Connecticut, however, these projects are remote. Consequently, supply from these projects is questionable, and the costs of shipping will be significant; shipping charges will increase costs to Connecticut by as much as \$1.37 per MMBtu, or about \$1.37 million per day for delivery of gas.¹⁵ This is a significant cost and with the placement of an import terminal such

¹⁴ See Judy Myrden, “LNG project won’t start soon: Anadarko having trouble securing gas source, analyst says” Chronicle Herald (Mar. 22, 2006).

¹⁵ MNE pipeline costs under a current settlement before the Commission are C\$0.70/MMBtu for the Canadian leg and US\$0.78/MMBtu for the U.S. leg, totaling approximately US\$1.37/MMBtu at current conversion rates. See Maritimes & Ne. Pipeline, L.L.C., 112 FERC ¶ 63,019, at P 6 (2005).

as Broadwater near the demand center of New York and Connecticut, it is an avoidable cost. Broadwater offers a regional solution to make New York and Connecticut part of a world energy market. The region no longer will be at the end of the pipeline grid. Rather, it will be at the head of the system with the ability to capture the benefits from several suppliers in the Atlantic Basin.

Moreover, contrary to the contentions of Wading River, a detailed flow analysis would be necessary to determine what, if any, pipeline upgrades would be necessary to displace gas in New York or Connecticut.¹⁶ Wading River offered no such analysis. In fact, gas from Canada would have to flow to Connecticut and New York via the Algonquin Gas Transmission system. It is at best unlikely, and more probably inconceivable, that this could be accomplished without new and costly pipeline infrastructure—including a new pipeline crossing Long Island Sound—to move new supply to New York. Thus, the benefits of the Broadwater Project—associated with the avoidance of construction in sensitive shoreline and nearshore areas of Long Island Sound—would be lost, while potentially higher costs and lower reliability would be experienced.

3. There is Demand for the Broadwater Project

Perhaps the most compelling argument supporting the need for the Project is the simple fact that Broadwater has proposed the Project. There is no pre-existing customer base to subsidize this project. The Broadwater Project sponsors are sufficiently confident of market demand that they will invest millions of dollars in the Project. Likewise, Shell NA LNG Inc., the capacity holder of the proposed terminal, clearly believes that there will be need; otherwise it would not take on the economic risk associated with contracting for the capacity.

Coral Energy Resources, L.P., an affiliate of Broadwater, made the following observations:

¹⁶ See Wading River Comments at 1 (summarizing Synapse Report at 10-11).

Natural gas consumption, especially by electric generating facilities, has increased steadily in the Northeast and this trend is likely to continue. The sources of natural gas that have historically served these markets cannot meet this growing demand. Domestic production is projected to fall behind increases in demand, and Canadian imports are projected to decline because of reserve depletion and a growing Canadian domestic market.¹⁷

....

Indeed, ISO New England, the Regional Transmission Organization (“RTO”) that operates the regional electric markets and transmission grid that serves Connecticut, has found that the demand for natural gas will soon exceed the capacity of the region’s existing supply infrastructure. Since 40% of the gas consumed in New England is used to produce electricity, shortfalls in gas deliverability could easily have an adverse effect on electric reliability. Moreover, ISO New England has specifically recommended the approval of additional LNG imports into its market area because “LNG is a critical supplement to traditional natural gas pipeline supply since it allows for the direct injection of natural gas into the growing New England gas market.” The location of the Broadwater project makes it an obvious supply source for gas consumers in Connecticut, helping to meet the critical need identified by the ISO.¹⁸

....

The impact of changes in natural gas prices on power prices in the New York City and Long Island region is undeniable. According to data provided by Dr. David Patton, the Independent Market Advisor for the NYISO, for the period February – August 2005, natural gas prices were 26% higher on average in New York state than for the same period in 2004 and wholesale power prices rose 45% for the same period (\$64 - \$95 per MWhr), in significant part due to the higher price of fuel. By dampening supply driven gas price swings, the Broadwater project can play an important role in reducing power price volatility.¹⁹

Moreover, Consolidated Edison of New York, Inc. (“Consolidated Edison”), which serves over one million customers in New York City and Westchester County, stated in its comments that it

¹⁷ Motion to Intervene of Coral Energy Resources, L.P. and Comments in Support of Applications, at 3 (Mar.10, 2006) (“Coral Energy Comments”) (citation omitted); see generally *Maritimes*, 112 FERC ¶ 63,019.

¹⁸ Coral Comments at 4 (citations omitted).

¹⁹ Id. at 5-6 (citations omitted).

“anticipates having ongoing needs for new supplies, which could be supplied by Broadwater.”²⁰

Consolidated Edison also stated that:

The availability of a long-term and reliable supply of gas in near proximity to our market would have a beneficial impact on both security of supply and price stability in our region. In this regard, we believe that LNG imports to the Northeastern United States would be beneficial to offset anticipated declines in overall US and Canadian gas supplies. Also, additional supplies of natural gas in the Northeast can provide electric generators greater certainty of having access to clean-burning fuel. Thus, the Broadwater project proposed for Long Island Sound could positively impact the market in which Con Edison purchases gas supplies.

Id. at 3-4.

Clearly, retail providers see a need for the Broadwater Project as well.

B. Safety and Security

The Commission, the Coast Guard, and the Office of Pipeline Safety share regulatory authority over aspects of the siting, design, construction, and operation of LNG facilities, including related land and marine safety and security issues. In particular, the Coast Guard, pursuant to the Ports and Waterways Safety Act of 1972, as amended, 33 U.S.C. §§ 1221, et seq., and the Maritime Transportation Security Act of 2002, 46 U.S.C. §§ 2101, et seq., is responsible for matters related to navigation safety, vessel engineering and safety standards, and all matters pertaining to the safety of facilities and equipment located in or adjacent to navigable waters.

The Coast Guard has been a cooperating agency for the government’s review of the Project since the NEPA pre-filing process commenced in late 2004 and has conducted a Ports and Waterways Safety Assessment (“PAWSA”) for Long Island.²¹ This assessment involved a

²⁰ Motion to Intervene and Comments of Consolidated Edison Company of New York, Inc., at 4 (Mar. 10, 2006) (“Consolidated Edison Comments”).

²¹ U.S. Coast Guard, “Ports and Waterways Safety Assessment Workshop Report for Long Island Sound,” (May 3-4, 2005), available at <http://www.uscg.mil/d1/units/seclis/broadwater/adobe/LIS%20PAWSA%20Final%20Report.pdf>.

broad spectrum of waterway users and other stakeholders, including governmental representatives from Connecticut and New York. The assessment identified waterway safety hazards, risk levels and mitigation measures. This report will be used as a benchmark for the Coast Guard's evaluation of the Project. It is important to note that the report provides only limited factual information regarding the Broadwater proposal and draws no conclusions about its potential effects on the current waterway safety hazards, risk levels or mitigation measures. Further, the Coast Guard Captain of the Port Long Island Sound—the senior officer responsible for evaluation of this aspect of the Project—consistently has represented at public meetings on the Project that the Coast Guard has not yet reached conclusions about the safety and security aspects or needs of the Project.²²

The comments of intervenors and members of the public concerning the safety and security issues associated with the Project, some of which are addressed specifically below, must be measured against the objective backdrop provided by the Coast Guard for the as yet uncompleted review of the Broadwater Application.

In this regard, Broadwater's observations about the lack of factual foundation for many of the comments of Project opponents have particular force. The subject of safety is of critical significance, but the evaluation of safety considerations should not be based on unsupported accusations and assumptions. Rather, many of the answers to adversary claims are found in the public record or amid CEII, which under Commission rule, is available for review upon a showing of need. 18 C.F.R. § 388.113. This material is likely to dispose of many of the

²² See, e.g., Broadwater LNG Project, Docket No. PF05-4-000, Joint Public Meeting, Testimony of Captain Peter J. Boynton, Coast Guard Captain of the Port of Long Island Sound, at 8:19-17:12 (Sept. 14, 2005); see also Testimony of Captain Peter J. Boynton before the Connecticut Long Island Sound LNG Task Force, Nov. 4, 2005, available at <http://www.ctlng.state.ct.us/meetings.htm>.

concerns expressed. See, e.g., Letter from Joseph T. Kelliher, FERC Chairman, to Richard Blumenthal, Connecticut Attorney General (Mar. 13, 2006).

1. Terrorism

Several commenters have concluded, although they cite no record support for the proposition, that the Floating Storage and Regasification Unit (“FSRU”), the pipeline interconnection, and the LNG carriers (“LNGC”) will be attractive and vulnerable terrorist targets.²³ Security assessments evaluating the risks of terrorism to the Project refute these assertions. Since late 2004, Giuliani Partners LLC, assisted by SeaSecure LLC, has been engaged in an ongoing preliminary security assessment of the Broadwater Project. This ongoing assessment has determined that the Project is not a likely terrorist target because of its isolated location (far from population centers) and other key factors. This determination was summarized in testimony before the Connecticut Long Island Sound LNG Task Force by Richard J. Sheirer²⁴ of Giuliani Partners LLC who noted that:

Terrorist organizations seek to attack in major population centers, causing highly visible damage and disruption, and large numbers of casualties. . . . The Broadwater FSRU, located 9 miles offshore with a small crew, does not fit this profile.

Testimony of Richard J. Sheirer before the Connecticut Long Island Sound LNG Task Force (Dec. 7, 2005).

Moreover, the extensive security assessments, plans, and procedures prepared by Broadwater will be consistent with all Coast Guard and Department of Homeland Security

²³ See, e.g., Comments of the Connecticut Attorney General, at 5-6 (Mar. 9, 2006) (“Conn. A.G. Comments”); State of Connecticut LNG Terminal Safety Consideration Advisory Report, § 2 (filed Mar. 2, 2006) (“Advisory Report”); Comments of the Long Island Sound Caucus, at 1 (filed Mar. 13, 2006); Supplemental Comments of the County of Suffolk, Docket No. PF05-4, at 8-9 (Dec. 8, 2005) (“Suffolk Co. Dec. 8 Comments”) (Suffolk County resubmitted these comments with their February 22, 2006 Comments in Docket No. CP06-54, et al.)

²⁴ Richard J. Sheirer is the former Commissioner of Emergency Management for New York City.

regulations and will incorporate “best industry practices.” See Resource Report 11: Safety and Reliability, at 11-28–11-29.

2. Millstone Nuclear Power Station

Some commenters incorrectly have suggested that a terrorist attack or catastrophic failure of an LNGC could affect the Millstone Nuclear Power Station (“Millstone”) in Waterford, Connecticut (“Millstone”) causing a harmful release of radioactive materials.²⁵ In their March 8, 2006 Interim Report, the Connecticut Long Island LNG Task Force (echoing concerns previously made in the Advisory Report, asserted that a hijacked LNGC could be detonated in waters off Millstone by terrorists in order to cause the release of radioactive materials.²⁶

This scenario is not scientifically possible. LNG, by its physical nature, does not explode. LNG leaks, whether caused intentionally or accidental, can cause pool fires and/or vapor clouds (depending on the presence of an ignition source), but a catastrophic explosion of the entire FSRU or one of its associated LNGCs is not credible. Even the use of explosives on LNG storage tanks aboard the FSRU or an LNGC—however unlikely that scenario—would not cause an explosion.

Moreover, the Det Norske Veritas Report submitted by Broadwater to the Coast Guard on March 16, 2006 concluded that the maximum radius of impact from a hypothetical catastrophic release of LNG from the FSRU or an LNCG would be 0.7 miles.²⁷ Plainly put, given this impact radius and the fact that the shallow waters surrounding Millstone would prevent a deep-draft

²⁵ See, e.g., Interim Report at 21; Advisory Report, § 4; Comments of the County of Suffolk, New York to FERC’s February 17, 2006 Notice of Application for the Proposed Broadwater Energy LNG Project, at 8-9 (filed Mar. 9, 2006) (“Suffolk Co. Mar. 9 Comments”).

²⁶ Interim Report at 21.

²⁷ Det Norske Veritas Consulting, “Report No. 70015341: Broadwater Fire Modeling,” Mar. 10, 2006, at 8 (“Det Norske Veritas Report”) (Attachment to Response of Broadwater Energy’s to U.S. Coast Guard’s Letter of February 16, 2006 to FERC). This distance corresponds to the point at which there would be no thermal effect on humans; the distance at which structures and equipment would not be affected is considerably less: 0.3 miles.

LNCG from coming within one mile of the station, the contentions of the adversary commenters are unfounded.

3. Security Zones

The Connecticut Attorney General has erroneously asserted that the Coast Guard's PAWSA questioned the enforceability of the proposed safety and security zones around the FSRU and LNGCs for the Project,²⁸ but, in fact, the PAWSA was not developed based on the Broadwater Project and draws no conclusions about the potential effects of Broadwater on the current waterway safety hazards, risk levels, or mitigation measures. All issues relevant to the Project raised in the PAWSA have been presented in filings with the Coast Guard, which are available for review in the Commission's and the Coast Guard's public records systems.

4. Constraints in the Race/Marine Accidents

Several commenters incorrectly asserted that LNGC traffic will contribute significantly to congestion in the Sound and will increase the potential for a marine accident involving an LNGC and a commercial or recreational vessel.²⁹ One commenter went so far as to suggest that the safety and security zones associated with the Project would completely shut down the Sound 37% of the time.³⁰

These claims are belied by the facts. The FSRU is proposed to be located in an area beyond recognized maritime transit corridors. See Resource Report 8: Land Use, Recreation, and Aesthetics at 8-11. Further, as detailed in Resource Report 8, LNGCs will only enter the Race once every two to three days on average and although they will need to traverse the Race in the deep water channel, the approximate duration of the anticipated traveling safety and security

²⁸ See, e.g., Conn. A.G. Comments at 7-8.

²⁹ See, e.g., id. at 6-10.

³⁰ Comments of the County of Suffolk, New York in Response to FERC's Request for Comments on the Environmental Issues for the Proposed Broadwater Energy LNG Facility (Feb. 22, 2006) ("Suffolk Co. Feb. 22 Comments"); Suffolk Co. Mar 9 Comments at 14.

zone at any single point will be approximately fifteen minutes, resulting in only intermittent and temporary disruption to normal traffic patterns. See id. at 8-6, 8-7, and 8-25. There is no indication that the Race would need to be closed to accommodate LNGCs. The Coast Guard has stated that shallow draft recreation and commercial craft have the flexibility to move out of the deep channel to enter and exit the Sound. Id. at 8-25. Moreover, no more than one LNGC would be within the Sound at any given time, thereby further reducing the potential for delays due to Coast Guard safety and security zones. Id. at 8-7.

In light of the infrequency of LNGCs transiting the Race and Coast Guard safety and security zones, the potential for marine accidents involving LNGCs and other vessels is quite low. See generally Resource Report 11 at 11-35–11-40. The risk of collisions will be further reduced through the use of experienced, state-licensed pilots to maneuver the LNGCs to and from the FSRU. Id. at 42. Day-to-day vessel traffic management is the responsibility of the Pilots designated by the States to guide vessels “in the bays, rivers, harbors, and ports of the United States” and it has been so since the first Congress in 1789.³¹

5. Submarine Movement in the Sound/Race

On a related issue, a few commenters expressed concern about the potential for collisions between U.S. Navy (“Navy”) submarines and LNGCs in transit to the FSRU and/or about the impact of the Coast Guard’s proposed safety and security zones on the operations of the Navy’s submarine base in Groton, Connecticut.³²

³¹ See Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 53, 54 (currently codified at 46 U.S.C. § 8501).

³² See, e.g., Interim Report at 18; Advisory Report, § 3; Conn. A.G. Comments at 3-4; Suffolk Co. Mar. 9 Comments at 8. Coast Guard Captain Peter Boynton was quoted in the Connecticut newspaper *The Day* on this issue: Boynton said the Coast Guard is already charged with providing security zones around submarines as they travel through the Sound. It would have the same responsibility for safeguarding the LNG tankers. As a result, coordination of the tanker and submarine traffic should not be a problem, he said “in essence we would have to talk to ourselves. We can do that,” said Boynton generating laughter from the local officials. See Paul Choiniere, “CG Captain Sees Subs, Tankers Co-existing,” *The Day* (Mar. 16, 2006).

The existing safety and security zones for the submarines and the proposed safety and security zones for the LNGCs serving the Project, both of which are established and monitored by the Coast Guard, will mitigate the risk of potential collisions between submarines and LNGCs. Moreover, under NGA § 3(f)(3), 15 U.S.C. § 717b(f)(3), the Commission is required to “obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.” Obviously, Broadwater is committed to working with the Navy to ensure conformity of its transit plans with national defense and safety requirements.

6. Emergency Response/Firefighting Capability

Several commenters expressed concerns about shore-based emergency/first responder capabilities given the isolated location of the FSRU (i.e., nine miles from the nearest coastal community).³³ Resource Report 11 demonstrates, in detail, that Broadwater will use technology and implement procedures that will assure the safety of even these distant surrounding communities and the environment, as well as personnel onboard the FSRU.

As required by section 3A of the NGA, Broadwater will complete and submit an Emergency Response Plan (“ERP”) for the Project, in consultation with local officials, after the Project is authorized and before construction may begin. Specifically, section 3A of the NGA provides:

In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction.

³³ See, e.g., Suffolk Co. Mar. 9 Comments at 8; Conn. A.G. Comments at 10–11; Advisory Report, § 8.

15 U.S.C. § 717b-1(e)(1) (emphasis added). Broadwater has taken a proactive approach through the Commission's NEPA pre-filing process to begin early coordination with federal, state, and local agencies that will respond in the event of an emergency that requires the assistance of non-Broadwater personnel. See Resource Report 11 at 11-59–11-64. The ERP will ensure appropriate emergency coordination and, if necessary, response from personnel and local and state authorities to fires or other emergency events. In addition, the ERP will provide for contract personnel that may assist as necessary in an emergency situation. To maximize the effectiveness of the ERP, Broadwater is creating a liaison program that includes public authorities and local utilities throughout areas potentially involved in the event of an emergency. Id. at 11-60–11-64.

Considering the location of the FSRU, Broadwater will assume primary responsibility for providing emergency response actions, with appropriate regulatory authorities and local emergency/first responders being immediately notified that an emergency condition exists. Considerable resources will be available onboard the FSRU to enable facility personnel to deal with emergency situations. Broadwater's shore-based facilities also will serve as an alternative emergency response command center in the unlikely event that the FSRU is unable to manage a specific emergency situation. Extensive communications capabilities will exist at Broadwater's onshore facility. Id. at 11-60.

With the prevention of fires and other emergencies being a primary objective, Broadwater will incorporate relevant Pipeline and Hazardous Materials Administration emergency procedures in 49 C.F.R. Part 193 in its emergency response protocols. Further, Broadwater will comply with the Safety of Life at Sea Convention supplemented by the IGC³⁴ Code and will use relevant fire protection provisions of National Fire Protection Association,

³⁴ International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk.

NFPA 59A, to minimize risks associated with fires and other emergency events onboard the FSRU.

Finally, if a fire should occur at the FSRU, as discussed in Resource Report 11, the FSRU will have significant onboard fire-fighting capabilities. Resource Report 11 at 11-21. Additionally, all tugs associated with the Project will have fire-fighting capabilities. To the extent that tugs are not already deployed as a part of Project operations, there will be an adequate number of tugs available to assist in emergency response actions. Id. at 11-60. It is anticipated that each of the tugs will be manufactured specifically for the Project and will be capable of addressing fires onboard the FSRU or an LNGC.

7. FSRU Technology

Several commenters raised concerns that the FSRU is a new, unproven, or untested technology, and so must be subject to heightened scrutiny to ensure safety.³⁵ The comments also expressed concern about the interface between the FSRU and LNG tankers, as well as safety of the tankers themselves.

Broadwater's FSRU, while innovative, is a product of tested, proven technologies that provides safe and reliable maritime transportation and processing of energy sources every day and in severely adverse weather. The preliminary design has been reviewed by the American Bureau of Shipping, which is a world-recognized classification society. The FSRU consists of three components which use existing technology.

First, the FSRU's Hull and Containment System uses a design that is currently used in many LNG tankers. The Hull and Containment system will be designed using the same

³⁵ See e.g., Suffolk Co. Mar. 9 Comments at 14; Conn. A.G. Comments at 11-12; Suffolk Co. Dec. 8 Comments at 3-4.

standards as existing LNG tankers, including the IGC Code in Bulk and International Marine codes and regulations.³⁶

Second, more than 70 existing floating, production, storage, and offloading (“FPSO”) units have been in use to produce, process, and store hydrocarbon products offshore for over 25 years.³⁷ The vast majority of these FPSOs employ fixed mooring systems which are permanently attached to the seabed.³⁸ Of these 70 facilities, eight have mooring systems similar in design to the FSRU’s Yoke Mooring System. The technology used in mooring systems is tested even beyond its application to FPSOs: while “[t]here are many different mooring system designs and configurations. . . . [f]rom the seabed perspective, the mooring system would be similar to that used for other exploration and production vessels.”³⁹ These FPSOs operate in the most severe of weather conditions—Broadwater’s proposed FSRU is designed to withstand events in magnitudes as great as Category 5 hurricanes.

Third, the FSRU’s Process Equipment uses vaporization and utilities equipment found in onshore LNG terminals. It should be noted that these traditional technologies also have been proposed for use offshore in LNG deepwater ports. Deepwater ports have been approved by the U.S. Department of Transportation’s Maritime Administration.⁴⁰

Finally, the LNG tankers that will interface with the FSRU use the same design methodologies and technologies that have maintained the impeccable record of LNG

³⁶ See generally U.S. Department of Energy, “How is LNG Shipped and Stored,” available at <http://www.fossil.energy.gov/programs/oilgas/storage/lng/feature/howisitshipped.html>.

³⁷ See, e.g., Minerals Management Service, U.S. Department of the Interior, “Frequently Asked Questions About FPSO’s,” Dec. 2001, available at <http://www.gomr.mms.gov/homepg/offshore/fpso/FAQ.pdf>.

³⁸ See, e.g., Minerals Management Service, U.S. Department of the Interior, 2000, OCS Report MMS 2000-015, “Deepwater Development: A Reference Document for the Deepwater Environmental Assessment Gulf of Mexico OCS (1998 through 2007),” May 2000, at 15-17, available at <http://www.gomr.mms.gov/homepg/whatsnew/publicat/gomr/00015.pdf>.

³⁹ *Id.* at 43.

⁴⁰ See Current/Planned Deepwater Ports, available at http://www.marad.dot.gov/dwp/deepwater_ports/index.asp.

transportation safety for decades.⁴¹ This fact was highlighted in the December 2004 Sandia National Laboratories Report entitled "Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water."

During the past 40 years, more than 80,000 LNG carrier voyages have taken place, covering more than 100 million miles, without major accidents or safety problems, either in port or on the high seas Over the life of the industry, eight marine incidents worldwide have resulted in LNG spills, with some damage; but no cargo fires have occurred. Seven incidents have been reported with ship structural damage, two from groundings; but no spills were recorded. No LNG shipboard fatalities from spills have occurred.⁴²

C. Environmental Impacts and Related Issues

The approvals sought by Broadwater have been determined by the Commission to warrant preparation of an Environmental Impact Statement ("EIS") pursuant to NEPA, the Council on Environmental Quality ("CEQ") Guidelines, and the Commission's NEPA-implementing regulations, 18 C.F.R. Part 380. Pursuant to 18 C.F.R. § 380.12, Broadwater has submitted the required environmental resource reports which the Commission, consistent with its statutory obligation, will consider for the preparation of its EIS for the Project.

The Project opponents who have intervened and/or filed comments have contended incorrectly that there are preferable alternatives to the Project, and, on that basis, they seek the Commission's rejection of Broadwater's Applications. Factually, as detailed below, they are incorrect and they misconstrue the requirements of law.

⁴¹ The Future of Liquefied Natural Gas: Siting and Safety Before the Subcommittee on Energy, S. Committee On Energy and Natural Resources, 109th Cong. (Feb. 15, 2005) (statement of Captain David Scott, Commandant United States Coast Guard), available at http://energy.senate.gov/public/index.cfm/?FuseAction=Hearings.Testimony&Hearing_ID=1384&Witness_ID=4003.

⁴² Sandia National Laboratories, "Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water," § 2.12 (2004) (citations omitted); see also The Future of Liquefied Natural Gas: Siting and Safety Before the Subcommittee on Energy, S. Comm. On Energy and Natural Resources, 109th Cong. (Feb. 15, 2005) (statement of Captain David Scott, Commandant United States Coast Guard), available at <http://energy.senate.gov/public/index.cfm>.

The opposing parties misconstrue prevailing legal requirements because they appear to contend that the authority upon which they rely⁴³ dictates the outcome they prefer—rejection of the Application. Rather, NEPA requires adherence to a process for evaluating the potential impacts of a proposed project for which a federal authorization is being sought. NEPA is a procedural prerequisite to substantive determination of the applications. Its function is to promote a well-considered agency decision; the statute, however, does not impose substantive duties upon the Commission. The Commission initiated this process for the Broadwater Project in September 2004 through the then-voluntary NEPA pre-filing process and the evaluation must continue up through issuance of the Final EIS.

Project opponents also have asserted that the Project will have significant environmental impacts⁴⁴ but they offer no specific technical analysis in support of their claims. In doing so, the commenters ignore a wealth of objective technical analysis in the environmental Resource Reports which conclude that the Project's impact to the environment will be minor, temporary, and capable of being mitigated.

1. The Broadwater Project is the Preferred Alternative under NEPA

NEPA requires federal agencies like the Commission to prepare EISs that include a detailed statement of alternatives to the action (or actions) proposed. See 42 U.S.C. § 4332(C)(iii). The Council on Environmental Quality (“CEQ”) has construed this legislative mandate to require federal agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives” including “reasonable alternatives not within the jurisdiction of the lead agency” as well as “the alternative of no action.” 40 C.F.R. § 1502.14.

⁴³ See Conn. A.G. Comments at 12–16 (citing Utahns For Better Transp. v. DOT, 305 F.3d 1152, 1162 (10th Cir. 2002) and III. Commerce Comm’n v. Interstate Commerce Comm’n, 848 F.2d 1246, 1259 (D.C. Cir. 1988)).

⁴⁴ See, e.g., Suffolk Co. Mar. 9 Comments at 15.

The evaluation criteria for selecting potentially reasonable and environmentally preferable alternatives to the Broadwater Project under NEPA include whether the potential alternatives are: (1) technically and economically feasible and practical; (2) offer significant environmental advantages over the Project or segments of it; and (3) meet the objectives which the Project is intended to achieve. NEPA does not require the Commission to conclude that all conceivable alternatives are technically and economically practical and feasible. As a result, the Commission may reject some alternatives as impracticable because the sites are unavailable and/or incapable of being implemented after taking into consideration costs, existing technologies, constraints of existing system capacities, and logistics in light of the overall objectives of a proposed project. In conducting an alternatives analysis under NEPA, the Commission must consider the environmental advantages and disadvantages of a proposed project and focus its analysis on those alternatives that may reduce impacts and/or offer significant environmental advantages.

Several commenters have asserted, albeit only in general terms, that there are alternatives to the Project that have less significant environmental impacts and that are safer. In certain instances, commenters have pointed to a specific proposed or to a conceptual project (e.g., the Millennium Pipeline, the Atlantic Project, Bear Head LNG, Canaport LNG) that they claim are “preferable” to Broadwater.⁴⁵ As detailed below, each of these alternatives is evaluated in Broadwater’s filing. See Resource Report 10: Alternatives, at 10-12–10-25. Commenters fail to provide any support for their assertions or to contradict information about the Broadwater Project which appears in the record.

⁴⁵ See Conn. A.G. Comments at 18; see also Wading River Comments; Citizens Campaign for the Environment, Meeting New York’s Energy Need Without Broadwater: A Brief Overview of Proposed and Recently Added Energy Projects, at 1, 10 (Mar. 10, 2006); Town of Huntington Comments, at 3 (Feb. 23, 2006).

Resource Report 10 provides a comprehensive analysis of the potential alternatives to the Project. Contrary to the statements made by the commenters, Resource Report 10 concludes that the FSRU alternative is, from an environmental and safety perspective, the preferred alternative. In addition, since the completion of Resource Report 10, other LNG projects have been proposed in the Northeastern United States and Canada. Broadwater has analyzed these recent proposals in its alternatives analysis which will be submitted to the New York Department of State (“NYDOS”) as part of that agency’s review of the Project for consistency with the State’s coastal zone management plan. This filing will become part of the Commission record. This supplemental alternatives analysis concludes that these recently proposed projects also are not “reasonable” alternatives to the Project because they are not capable of serving the market targeted by Broadwater without further expansion of existing pipeline infrastructure. Moreover, these other projects are likely to have far greater environmental impacts than the Broadwater Project. Based upon the detailed analysis of alternatives set forth in Resource Report 10 and the consistency certification to be submitted to NYDOS, the record associated with Broadwater’s Application demonstrates that the Project is the preferred alternative to satisfy the natural gas need in the New York/Connecticut market.

2. The Cumulative Impacts Associated with the Broadwater Project will be Minor

When several actions have a cumulative or synergistic environmental effect, NEPA also requires that those impacts be considered in an EIS. The CEQ’s regulations define “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions” 40 C.F.R. § 1508.7; see also 42 U.S.C. § 4332(C)(i); 40 C.F.R. §§ 1502.16 & 1508.8. Although several

commenters have asserted that the Commission must consider the cumulative impacts associated with the Broadwater Project and a variety of other energy development projects that have been announced in the Northeast, their contentions misstate governing requirements.

The starting point for any discussion of cumulative impacts is the Supreme Court's decision in DOT v. Public Citizen, 541 U.S. 752 (2004), in which the Court held that the causal connection between an agency's action and any alleged indirect or cumulative impacts from that action must be relatively close or "proximate" to trigger inclusion in a NEPA review.

Accordingly, cumulative impacts must be considered by the Commission when effects associated with a project are superimposed upon, or added to, other impacts associated with past, present, or reasonably foreseeable future projects within the area affected by the project. The Commission is under no obligation to include in its cumulative impacts analysis for the Project: (1) the impacts associated with potential projects that are not reasonably foreseeable (i.e., those projects which have not yet been proposed or constructed); or (2) an evaluation of impacts associated with projects that are not within the area affected by the Project or that do not affect the same environmental resources as the Project. See generally id.

In comments submitted to the Commission, the Connecticut Attorney General incorrectly asserted that the Commission must consider the environmental impacts associated with the proposed Islander East pipeline project when evaluating the cumulative impacts associated with the Broadwater Project.⁴⁶ The environmental impacts from construction of the Islander East project, which will occur primarily in sensitive nearshore ecosystems (as evidenced in the Commission's EIS for that project), are far removed from the Broadwater Project. The selection of the preferred location for the Broadwater FSRU and its connecting pipeline was specifically made to avoid sensitive nearshore ecosystems, as shown in Resource Report 10.

⁴⁶ See Conn. A.G. Comments at 19.

The only potential cumulative impact of the Project and the Islander East pipeline (which may be constructed at some unknown future time) would be if the most proximate portions of both projects were to be constructed simultaneously, a proposition that is at best highly remote and speculative. While the two projects for the most part will impact different ecosystems within the Sound, there are portions of the pipelines which are 1½–2 miles apart at the nearest point in deep water. As reflected in the Islander East EIS and Broadwater’s Resource Report 2, the construction impacts (sediment re-suspension and habitat disruption) would be minor, temporary and limited to areas near the individual pipelines. These minor impacts do not ordinarily warrant a determination of significance for purposes of assessing cumulative impacts. See Resource Report 2: Water Use and Quality, at 2-44; Resource Report 3: Fish, Vegetation, and Wildlife, at 3-64.

3. Comprehensive Analysis of the Environmental Impacts

Several commenters have asserted that the Commission should not authorize the Project because it will have significant and unacceptable impacts on the surrounding environment and the ecosystem of Long Island Sound.⁴⁷ In certain instances, these commenters have concluded that the Project will have significant environmental impacts, including sedimentation and thermal impacts on water quality, as well as impacts to endangered species and essential fish habitats.⁴⁸ These commenters caution the Commission that it must perform a comprehensive analysis of the environmental impacts associated with the Project.⁴⁹

The inescapable conclusion that must be drawn from these comments is that these parties have ignored the detailed Resource Reports that Broadwater submitted to the Commission. As

⁴⁷ See Conn. A.G. Comments at 1–2; Suffolk Co. Mar. 9 Comments at 12–16.

⁴⁸ See Conn. A.G. Comments at 1–2, 14; Suffolk Co. Mar. 9 Comments at 13–17.

⁴⁹ See generally Motion to Intervene of the Town of Huntington, New York (Mar. 10, 2006); Motion to Intervene of the Town of Riverhead, New York (Mar. 8, 2006); Conn. A.G. Comments at 1-2, 16.

part of the NEPA pre-filing process, Broadwater prepared initial drafts of several Resource Reports that evaluate the potential environmental impacts associated with the Project (including onshore support facilities) and, where appropriate, identify mitigation measures necessary to offset potential environmental impacts associated with the construction and operation of the Project. The Commission is aware that the final version of the Resource Reports were comprehensive reflected modifications made in response to public comments offered during the NEPA pre-filing process, as well as from additions made as a result of extensive specific environmental data requests from Commission staff. These Resource Reports, which now provide a detailed, objective, technical analysis of potential environmental impacts associated with the Project, encompass the environmental issues raised by commenters. The Resource Reports conclude that the environmental impacts associated with the Project will be minor, temporary and, to the extent required, can be mitigated. The technical analyses and the supporting documentation contained in the Resource Reports rebut the commenters' claims that the Project will have significant and permanent impacts on the environment of the Sound. Broadwater encourages the Commission to consider the detailed material contained in the Resource Reports as it evaluates the contentions of the opposing parties.

4. Dredging and Associated Water Quality Impacts

In addition to general and overstated assertions regarding the environmental impacts associated with the Project, commenters have claimed that the construction of the mooring tower and the pipeline connecting the FSRU to the existing Iroquois Gas Transmission System, L.P. ("Iroquois") pipeline will adversely impact water quality and the marine ecosystem of the

Sound.⁵⁰ In certain cases, these commenters inaccurately contend that Broadwater failed to produce information considering these potential impacts.⁵¹

In fact, these contentions are incorrect. As part of the NEPA pre-filing process, Broadwater produced early versions of Resource Reports 2 and 3 which comprehensively analyzed the potential environmental impacts associated with construction and operation of the tower and connecting pipeline.

Resource Report 2 describes the existing water quality of the Long Island Sound and assesses the potential water quality impacts associated with the construction and operation of the Project. See Resource Report 2 at 2-3-2-41, 2-44-2-80. The Report notes that water quality impacts have been minimized, and in some cases eliminated, by siting the Project in the deep water of the central portion of the Sound, away from sensitive shoreline and nearshore ecosystems, and by implementing various technologies within the Project design. Id. at 2-44; see also id. at 2-78 (FSRU will incorporate a closed-loop glycol/water system for cooling purposes that will not have thermal wastewater discharges under normal operating conditions.).

The Report also demonstrates that water quality effects associated with the installation of the subsea pipeline and the mooring tower will be minor, localized, and short-term and will not affect the water quality of sensitive nearshore ecosystems. Id. Broadwater's selection of subsea plowing as the primary pipeline installation method will, according to the report, significantly decrease the amount of sediment introduced into the water column compared to alternative installation techniques that could have been selected. Id. at 2-44-2-45.

Resource Report 3 provides an overview of the marine ecology of the Sound and evaluates the potential impacts that the construction and operation of the Project will have on this

⁵⁰ See, e.g., Suffolk Co. Dec. 8 Comments at 5-6.

⁵¹ Suffolk Co. Mar. 9 Comments at 15.

marine ecosystem. The Report concludes that construction and operation of the Project will not result in significant adverse impacts to the marine ecosystem of the Sound. See Resource Report 3 at 3-64–3-67. For example, since the site selected for the Project is several miles from the shore, the Report finds that construction of the pipeline will not adversely impact sensitive shoreline and nearshore ecosystems that serve as important nesting, feeding, resting, spawning, and nursery areas for many species (including federally-designated essential fish habitats). Id. The Report also finds that any potential impacts on the marine ecosystem will be further mitigated by limiting construction to the winter months and using ecologically-sensitive technologies and best management practices. Id.

The Report also evaluates the impact of ballast water discharges from LNGCs on the marine ecosystem of the Sound. It concludes that LNGCs will not be discharging ballast water and, therefore, will not introduce invasive species into the Long Island Sound. Id. at 3-71–3-74. Finally, in evaluating the potential impacts of the Project on threatened or endangered species, the Report finds that the Project will not have significant impacts on threatened and endangered species (including finfish, sea turtles and marine mammals) because these species are expected to either avoid the Project area during construction activities or they will not be present due to seasonal conditions. Id. at 3-80–3-86, 3-92–3-94. The Report also notes any potential impact will be mitigated through the formal Endangered Species Act § 7 consultation process. See 16 U.S.C. § 1536; see also Letter from Jim Martin, Environmental Project Manager, Office of Energy Projects, FERC, to Kristen Koyama, Ship Strike Coordinator, National Marine Fisheries Service (filed Mar. 21, 2006).

5. Coastal Zone Management Act—Safety/Security Zones in Connecticut Waters

The State of Connecticut has asserted that because the yet-to-be-established safety and security zones for the Project *likely* will encroach on Connecticut’s waters, Broadwater’s Applications are subject to a consistency review by Connecticut under the Coastal Zone Management Act (“CZMA”) regulations adopted by the National Oceanic and Atmospheric Administration (“NOAA”) at 15 C.F.R. Part 930, Subpart D.⁵²

Assuming the zones might reach into Connecticut waters, which is by no means a certainty, Connecticut is nevertheless incorrect. Establishment of these zones are “federal agency activities” (and are identified as such in Connecticut’s coastal zone management plan).⁵³ “Federal agency activities” are reviewed under the applicable provisions of 15 C.F.R. Part 930, Subpart C, of NOAA’s CZMA regulations. Under these regulations, *the Coast Guard*, not Broadwater, would be required to determine whether the safety/security zones have an impact upon Connecticut’s coastal resources.

6. Commerce and Fishing

The commenters incorrectly claim that the Project would interfere significantly with commerce and fishing.⁵⁴ Resource Report 8 and the Marine/Land Use Compatibility Assessment submitted to NYSDOS as part of Broadwater’s coastal zone consistency certification for the Project rebut this claim, providing detailed documentation showing that neither the location of

⁵² See Letter from Gina McCarthy, Commissioner, Connecticut Department of Environmental Protection to Magalie R. Salas, FERC (filed Mar. 8, 2006).

⁵³ See 15 C.F.R. § 930.31(a) (“The term “Federal agency activity” means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. The term “Federal agency activity” includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, *e.g.*, a Federal agency’s proposal to physically alter coastal resources, a plan that is used to direct future agency actions, *a proposed rulemaking that alters uses of the coastal zone.*” (emphasis added). See also State of Connecticut Coastal Management Plan and Environmental Impact Statement, at II-229 – II-230; Letter from Capt. Peter J. Boynton, USCG, Captain of the Port Long Island Sound, to Brian J. Emerick, Connecticut Department of Environmental Protection (dated Jan. 9, 2006) (available at the Coast Guard docket for the Project).

⁵⁴ See Conn. A.G. Comments at 13–14; Suffolk Co. Mar. 9 Comments at 15.

FSRU nor the transit routes of the LNGCs will have a significant impact on the uses of the Long Island Sound and the minimal impacts will be mitigated.

More specifically, Resource Report 8 demonstrates that construction and operation of the Project will have no significant or permanent impacts on commercial shipping within the Sound because the FSRU and pipeline are sited outside of shipping lanes and lightering zones. See Resource Report 8 at 8-20–8-23.

In addition, the Resource Report documents that the Project will have no adverse impacts on the nearshore shellfishing industry since the Project is sited in the deeper portion of the Sound. Id. at 8-28. Moreover, Broadwater will mitigate any minimal impacts to commercial fisheries in the Project area, including some long-term impacts on several individual lobsterman due to the anticipated establishment of the Coast Guard-assigned safety and security zone, in the following ways: (1) Broadwater will limit construction to the winter months; (2) Broadwater will coordinate with commercial fishermen during the construction period; and (3) Broadwater will work with individually impacted commercial fishermen to develop adequate compensation for demonstrated lost fishing opportunity or gear. Id. at 8-28–8-36.

7. Recreational Boating

Commenters have expressed general, albeit overstated, concern about the potential impact of the Project on recreational boating.⁵⁵ As noted in Resource Report 8 and the Marine/Land Use Compatibility Assessment which will become part of the record before the Commission, interference from LNGCs and associated safety/security zones will be temporary and will not unduly impact the transit of recreational vessels through the Sound.

The Report finds that the location of the Project in the central portion of the Long Island Sound affords recreational vessels ample room to maneuver to avoid the FSRU site through only

⁵⁵ Advisory Report, § 1; Suffolk Co. Mar. 9 Comments at 15.

minor course deviations. The conclusions in the Report are supported by an extensive evaluation that monitored the frequency of recreational vessels in the area of the proposed location of the FSRU. See Resource Report 8 at 8-23–8-26.

While acknowledging that the Coast Guard exclusion area may require modification to the location of some recreational boating events, the Report concludes that the width of the Sound will allow these events to be re-located without impact. Id. at 8-23. Furthermore, the Report finds that Broadwater has successfully mitigated any significant adverse impacts associated with recreational activities by planning construction activities during the winter months—a time when the recreational use of the Long Island Sound is substantially curtailed. Id.

D. Non-Safety and Non-Environmental Issues

1. Gas Interchangeability and Gas Quality

The conditions in the Commission’s pipeline interconnection policy obviate KeySpan Delivery Companies’ (“KeySpan”) argument that Broadwater should develop and include in its tariff gas quality or interchangeability parameters.⁵⁶ KeySpan argues that gas quality parameters consistent with the gas supply currently being delivered by Iroquois should be included in Broadwater’s tariff. In light of the circumstances detailed in its Application, Broadwater has asked to be relieved of the obligation to have a tariff. But that said, whether by virtue of a tariff or by virtue of its transportation contract with its shipper, Broadwater necessarily will require that the gas it transports will be capable of introduction into downstream systems without adverse affect. Accordingly, it is inescapable that downstream gas specifications will govern gas delivered by the Broadwater system and that the concerns that Keyspan identifies will be

⁵⁶ Motion to Intervene, Comments and Request for Technical Conference of the KeySpan Delivery Companies, at 8-10, App. B (Mar. 10, 2006) (“KeySpan Delivery Comments”).

resolved long before gas flows through the Broadwater system. KeySpan is unnecessarily concerned about the possible adverse effects on pipelines, such as Iroquois, that will receive LNG from Broadwater. Under the Commission's policy established in Panhandle Eastern Pipe Line Co., 91 FERC ¶ 61,037 (2000), a pipeline seeking an interconnection with another pipeline must satisfy five conditions:

- (1) the party seeking the interconnection must be willing to bear the costs of the construction if the pipeline performs that task. In the alternative, the party seeking the interconnection could construct the facilities itself in compliance with the pipeline's technical requirements;
- (2) the proposed interconnection must not adversely affect the pipeline's operations;
- (3) the proposed interconnection and any resulting transportation must not diminish service to the pipeline's existing customers;
- (4) the proposed interconnection must not cause the pipeline to be in violation of any applicable environmental or safety laws or regulations with respect to the facilities; and
- (5) the proposed interconnection must not cause the pipeline to be in violation of its right-of-way agreements or any other contractual obligations with respect to the interconnection facilities.

See id. at 61,141. These conditions protect entities affected by deliveries through a downstream pipeline such as Iroquois. Under the policy, Iroquois may refuse interconnection with another pipeline when the interconnection would adversely affect its operations, or would cause a violation of any environmental or safety law or regulation or of any contract. Accordingly, there is no reason for the Commission to require Broadwater to develop gas quality or interchangeability specifications.

Broadwater recognizes the importance of interchangeability concerns, but it submits that these concerns do not require resolution prior to approval of the authorizations it seeks. There will be ample time after certification and authorization for these concerns to be resolved.

It is for these reasons that interchangeability concerns ordinarily do not arise in connection with certification proceedings. Rather, in circumstances of direct connections to customers such as power plants, interchangeability concerns are commercial issues in which direct purchasers negotiate the specifications they require. In instances in which LNG is introduced via interconnection to an existing pipeline, the Commission has considered gas quality specifications in two contexts: (i) when downstream jurisdictional customers of the pipeline must incur LNG study and conversion costs in connection with the potential or actual effects to their systems occasioned by pipeline introduction of LNG to its system;⁵⁷ and (ii) in proceedings in which gas specifications are considered in an interconnecting pipeline tariff proceeding to avoid detriments to assisting customers identified in Panhandle.⁵⁸

2. Public Trust Doctrine

Suffolk County incorrectly contends that the public trust doctrine forbids granting the necessary easement of the underwater lands to Broadwater without there first being an act of the state legislature and approval under the New York State Environmental Quality Review Act.⁵⁹

Even if Suffolk County's position was supported by state law—and it is not—its argument ignores two key factors. First, whether an easement will be granted is not an issue the Commission needs to consider in issuing a certificate. Second, findings of consistency with the public convenience and necessity do not turn on questions of whether a political subdivision of a state intends to try to interfere with the Commission's jurisdiction. The Commission has asserted the contrary:

The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that

⁵⁷ See Columbia Gas Transmission Corp., Opinion No. 101, 13 FERC ¶ 61,102 (1980), reh'g denied, Opinion No. 101-A, 14 FERC ¶ 61,073 (1981), aff'd Corning Glass Works v. FERC, 675 F.2d 392 (1982).

⁵⁸ See, e.g., AES Ocean Express v. FGT, Docket No. RP04-249.

⁵⁹ Suffolk Co. Mar. 9 Comments at 11-12.

State and local agencies, through application of State or local laws, may prohibit or unreasonably delay the construction or operation of facilities authorized by this Commission.

E.g., Tractebel Calypso Pipeline, LLC, 106 FERC ¶ 61,273, at P 34 (2004) (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); Nat'l Fuel Gas Supply v. Pub. Serv. Comm'n, 894 F.2d 571 (2d Cir. 1990); Iroquois Gas Transmission Sys., L.P., 59 FERC ¶ 61,094 (1992); Iroquois Gas Transmission Sys., L.P., 52 FERC ¶ 61,091 (1990)).

In any event, Suffolk's position is wrong as a matter of law. The public trust doctrine prohibits conveyances of public trust resources to private interests unless: (1) the lands conveyed would be used to promote the interests of the public; or (2) the lands could be transferred without any substantial impairment of the public interest in the remaining lands and waters. See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892). New York adopted the public trust doctrine in 1914, and has since used the doctrine to justify the grant of leases within public lands where a benefit is conferred upon the public through the subject of such leases. See Long Sault Dev. Co. v. Kennedy, 212 N.Y. 1, 8-9 (1914) (noting that the state has the right to make grants for the beneficial use of the grantees, or to promote commerce, provided that: (1) it is reasonable; and (2) can be fairly said to be for the public benefit or not injurious to the public); see, e.g., Murphy v. Long Island Oyster Farms, Inc., 491 N.Y.S.2d 721 (1985) (allowing the state to convey exclusive rights to a private party under a lease to underwater land used to harvest shellfish).

The easement sought for the Broadwater Project satisfies both prongs of the public trust doctrine test. First, the conveyance of submerged lands would promote the public interest by allowing for the construction and operation of a project to meet the public's need for an environmentally preferable form of energy, i.e., natural gas, with minimal impacts to the environment. Second, since the footprint of the Project is miniscule compared to the size of the Long Island Sound, the lands could be transferred without any substantial impairment of the

public interest in the remaining lands and waters. The granting of a small amount of underwater lands required to provide the public with a beneficial energy supply does not violate New York's public trust responsibilities.

Suffolk County, in two separate submissions, indicates that it will not grant an easement for the Broadwater project.⁶⁰ Suffolk County declares that the land that would be used to secure the FSRU to the seabed is owned by the State of New York and that the water where the FSRU and related equipment will float is "within the jurisdiction of Suffolk County."⁶¹ The County asserts its jurisdiction over the waters of the Long Island Sound through reference to Chapter 695 of the Laws of 1881. *Id.* at 12.⁶²

Consequently, Suffolk County argues that the public trust doctrine applies and requires the grant of an easement by both the State of New York and Suffolk County, and that the public trust doctrine prohibits the grant of this easement. Suffolk County also argues that the grant of an easement requires an act of the New York State Legislature.⁶³

Suffolk County is correct that, to the extent New York State has intrastate authority to require and grant an easement for use of lands underlying navigable waters in the Long Island Sound, the State has an interest in the seabed beneath the proposed facilities. Section 75 of the New York State Public Lands Law, N.Y. Pub. Lands Law § 75 (2006), permits the State to grant leases, easements, or other interests for the use of the land underlying State waters. Under Section 75(6), the State includes within its jurisdiction the power to grant interests the underwater land "[a]djacent to and surrounding Long Island . . . but not beyond any permanent

⁶⁰ Suffolk Co. Mar. 9 Comments at 11-12; Suffolk Co. Feb. 22 Comments at 9.

⁶¹ Suffolk Co. Mar. 9 Comments at 11.

⁶² Chapter 695 of the Laws of 1881 has long been abrogated by subsequent acts of the New York Legislature, including various provisions of the New York Public Lands Law, the New York Environmental Conservation Law and the New York Navigation Law. See N.Y. Pub. Lands Law § 1, *et seq.*; N.Y. Envtl. Conserv. Law § 1-0101, *et seq.*; and N.Y. Nav. Law § 1, *et seq.*, respectively.

⁶³ See Suffolk Co. Mar. Comments at 11.

exterior water line established by law.” Id. § 75(6). No law or regulation extends or subjugates the State’s authority over this submerged land to Suffolk County.

General grants of interests for structures to be placed in, on, or above state-owned submerged lands require the approval of the Commissioner of General Services. Id. § 75(7)(b). In granting these interests, the Commissioner of General Services must incorporate conditions required by the Commissioner of Environmental Conservation, as well as give “due regard” to certain recommendations of the Secretary of State. Id. § 75(7)(d)(i). Pipelines, however, are expressly excluded from the definition of a “structure” under Section 75. Id. § 75(7)(b). The Commissioner of General Services therefore retains full authority over the grant of an easement for pipelines and appurtenant structures in lands under State waters. N.Y. Comp. Codes R. & Regs. 9 § 271-1.1 (2006) (citing as authority N.Y. Pub. Lands Law § 3 (2006)). These laws are, in fact, the acts of the New York State Legislature required to grant an easement.

Suffolk County does have an interest in the waters of Long Island Sound, but its interest is not material from a jurisdictional perspective. The Supreme Court of New York consistently has held that “the regulation and authority of the tidewaters bordering on and lying within the boundaries of Nassau and Suffolk Counties have specifically been exempted from State law.” Village of Manorhaven v. Ventura Yacht Servs., Inc., 561 N.Y.S.2d 277, 278 (N.Y. App. Div. 1990). The State’s Navigation Law “provides for State control of navigation and use of ‘navigable waters of the state’ (Navigation Law, § 1).” Town of Islip v. Powell, 358 N.Y.S.2d 985, 988 (N.Y. Sup. Ct. 1974) (emphasis added). Suffolk County thus has control over Long Island Sound tidewaters adjacent to its land and the State retains control over all other navigable waters. Every facility proposed by Broadwater in its Application will be built in the open,

navigable waters of the Long Island Sound. None of these facilities will be located in the tidewaters of the Sound.

Aside from the plain text of New York State law and court decisions, the public trust doctrine provides in common law for the preservation of certain public uses of lands held in trust. This doctrine flows with the passage of land and adjacent waters from the federal government to a state when that state enters the Union. See, e.g., Montana v. United States, 450 U.S. 544, 551 (1981). Suffolk County is thus correct that the public trust doctrine is implicated in certain State actions. However, the County is incorrect that the doctrine continues to flow from the State to the County to give it powers under that doctrine.

Courts ranging from Suffolk County's neighboring county to the Supreme Court have recognized the inalienability of the public trust doctrine from the United States and the states to which it has ceded land. In a discussion of the Andros patent, which passed certain water rights to Suffolk County and Nassau County directly from the King of England, the Supreme Court of New York, Nassau County recognized that, while certain title may have passed to counties or towns, the State could not delegate its responsibilities under the public trust doctrine. See Town of Oyster Bay v. Commander Oil Corp., 677 N.Y.S.2d 746, 748-49 (N.Y. Sup. Ct. 1998), rev'd on other grounds, 700 N.Y.S.2d 47 (N.Y. App. Div. 1999), rev'd, 96 N.Y.2d 566 (2001). The Andros patent still survives to grant certain land interests to Nassau and Suffolk Counties but the State retains its public trust powers because, as the court held, any grant of private interest from the patent is "subject to the *jus publicum* which is vested in the State and includes the public right of navigation." Id. at 748. Town of Oyster Bay could not have come to another conclusion without running afoul of the Supreme Court's doctrinal interpretations. Thus, in its decision, the Town of Oyster Bay court followed the Supreme Court's holding that "[t]he trust devolving upon

the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.” Ill. Cent. R.R. Co., 146 U.S. at 453. Nor could the State relinquish its power under the public trust to Suffolk County. Similarly, the federal government may not relinquish its authority over navigable waters and submerged lands where interstate or foreign commerce may be affected. Montana v. United States, 450 U.S. at 551.

Suffolk County’s position should not influence the Commission’s consideration of the Application.

3. Critical Energy Infrastructure Information and the Ability of State Agencies to Exercise Their Duties

a. The Public’s Interest in the Record must be Balanced with the Need for Safety

The Connecticut Attorney General incorrectly asserts that all CEII in this proceeding should be made public, while Suffolk County and the Town of Riverhead are equally incorrect when they contend that state agencies, including NYDOS and New York Office of General Services (“NYOGS”), cannot lawfully perform their review obligations because information has been designated as CEII.⁶⁴ None of those adversaries acknowledge that the Commission’s rules allow authorities such as NYDOS and NYOGS to gain access to such information. The Commission recognizes that the public’s “‘need to know’ has never been absolute.”⁶⁵ As the Commission noted in Order No. 630, the Freedom of Information Act (“FOIA”), the federal law by which this Commission is bound, has nine exemptions to mandatory disclosure by a federal agency. Id. Material deemed to be CEII, is, by definition, material that would be exempt from

⁶⁴ Conn. A.G. Comments at 5; Suffolk Co. Mar. 9 Comments at 2-3; Suffolk Co. Dec. 8 Comments at 2-3; Motion to Intervene of the Town of Riverhead, New York, at 5 (Mar. 8, 2006) (“Town of Riverhead Comments”).

⁶⁵ Critical Energy Infrastructure Information, III FERC Stats. & Regs., Regs. Preambles ¶ 31,140, order on reh’g, Order No. 630-A, III FERC Stats. & Regs., Regs. Preambles ¶ 31,147 (2003).

public disclosure under FOIA. See 18 C.F.R. § 388.113(c)(1)(iii); Order No. 630 at P 13. Without the CEII disclosure procedures, CEII materials might never be released by the Commission. Therefore, as the Commission explained, the CEII disclosure procedures allow for the dissemination of information that would otherwise be prohibited, thereby expanding dissemination of such material. See Order No. 630 at P 16. State agencies, such as the NYDOS and NYOGS, are given full access to CEII material subject to their acceptance of a non-disclosure agreement. Id. at PP 50-53. Other interested parties can request CEII materials, subject also to their acceptance of a non-disclosure agreement. Id. at P 57. Therefore, contrary to the assertion of Suffolk County and the Town of Riverhead, CEII material is not “secret.”

The Commission’s position is fully consistent with the Supreme Court’s decision in Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981), which rejected arguments similar to those of Suffolk County regarding the NEPA process. In that case, the Supreme Court upheld the Navy’s refusal during the NEPA process to release information that could compromise national security. The Court did so because in crafting NEPA, Congress had expressly made disclosure of the contents of an Environmental Assessment or EIS subject to the provisions of FOIA. Id. at 143; see 42 U.S.C. § 4332(C)(v) (“[c]opies of such statement . . . shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5”). Specifically, in construing the requirements of NEPA and FOIA, the Court, held:

FOIA was intended by Congress to balance the public’s need for access to official information with the Government’s need for confidentiality.

Catholic Action of Hawaii, 454 U.S. at 144.

Thus, [NEPA] § 102(2)(C) contemplates that in a given situation a federal agency might have to include environmental considerations in its decisionmaking process, yet withhold public disclosure of

any NEPA documents, in whole or in part, under the authority of an FOIA exemption.

Id. at 143.

The Commission has structured its regulations concerning the disclosure of CEII to achieve the balance between the public’s “need to know” and the need to protect critical information. See 18 C.F.R. Parts 375 & 388; Order Nos. 630 & 630-A. The definition of CEII includes only information that could aid terrorists and is exempt from disclosure under FOIA. See 18 C.F.R. § 388.113(c)(1)(ii)-(iii). Thus, the amount of information that is considered CEII is relatively narrow.

Further, various commentators participating in the Commission’s rulemaking objected when the CEII rules were initially developed, arguing, as Suffolk County does now, that the CEII rules are inconsistent with NEPA public disclosure requirements.⁶⁶ The Court’s decision in Catholic Action of Hawaii is decisively to the contrary. Other commentators at that time argued that the public’s demand for such information outweighed any terrorist threat, as the Connecticut Attorney General argues.⁶⁷ Also, like Suffolk County and Town of Riverhead do now, commentators at that time questioned the breadth of information that could be classified as CEII.⁶⁸ Thus, the arguments advanced by the Connecticut Attorney General, Suffolk County and the Town of Riverhead, amount to a collateral challenge to the Commission’s CEII regulations.

b. The Broadwater Project Cannot Be Considered Inherently Unsafe

Suffolk County and the Town of Riverhead go further by asserting that because information is being kept from the public as CEII, the project is “inherently unsafe” and not in

⁶⁶ See Comments from the Hydropower Reform Coalition on the Critical Energy Infrastructure Information Notice of Proposed Rulemaking, Docket Nos. PL02-1-000 and RM02-4-000, at 6 (Nov. 14, 2002 as amended Nov. 15, 2002); Suffolk Co. Mar. 9 Comments at 2-3; Suffolk Co. Dec. 8 Comments at 2-3.

⁶⁷ Order No. 630 at P 11; see Conn. Attorney General Comments at 6.

⁶⁸ See Order No. 630 at PP 26-27; Suffolk Co. Mar. 9 Comments at 4-6; Town of Riverhead Comments at 3.

the public interest.⁶⁹ Because all new energy infrastructure has CEII, accepting this reasoning would mean that no new energy facilities could be approved by the Commission, and energy infrastructure would essentially be frozen in time. Clearly, this is not the case. The CEII rules serve to reduce risk by preventing needless disclosure of information when its public availability would be inimical to the public safety, while not stifling its review nor the development of new energy infrastructure. See 18 C.F.R. § 388.113(c)(1)(iii); Order No. 630 at PP 11-12, 27 (“security considerations make it advisable for the Commission to continue to protect CEII”). The reasoning of the County of Suffolk and the Town of Riverhead essentially would concede to terrorists our nation’s development of new sources of energy.

c. NYDOS and NYOGS Can Properly Make Their Determinations Using CEII

Suffolk County and the Town of Riverhead also argue that the NYDOS and the NYOGS cannot make their determinations because New York’s Open Meeting Law and Freedom of Information Law (“FOIL”) requires those agencies to make publicly available information upon which each bases its determination, preventing the NYOGS and the NYDOS from relying on CEII.⁷⁰ However, the New York Public Service Commission (“NYPSC”) argued in its comments to the Commission on the proposed CEII rules that non-disclosure agreements are unnecessary because New York State law provides a means for restricting confidential information from the public’s access.⁷¹ The NYPSC specifically cited FOIL provisions in its comments.⁷² FOIL provides a means of restricting from public disclosure trade secret

⁶⁹ Town of Riverhead Comments at 3-4; Suffolk Co. Mar. 9 Comments at 4; Suffolk Co. Dec. 8 Comments at 3.

⁷⁰ Suffolk Co. Mar. 9 Comments at 7-8; Suffolk Co. Dec. 8 Comments at 6-7; Town of Riverhead Comments at 5.

⁷¹ Comments of the Public Service Commission of New York, Critical Energy Infrastructure Information, Docket Nos. RM02-4-000 & PL02-1-000 (Nov. 14, 2002).

⁷² Id. at 1.

information, information affecting public safety, and “critical infrastructure information.”⁷³ FOIL also provides a means of restricting from public access information that is specifically exempted from disclosure by state or federal statute.⁷⁴ Material deemed to be CEII, is, by definition, material that would be exempt from public disclosure under FOIA, and therefore may be restricted under FOIL.⁷⁵ Moreover, New York’s Open Meeting Law allows meetings of state entities to be closed to the general public if they involve matters which will imperil the public safety if disclosed.⁷⁶ Accordingly, the NYOGS and the NYDOS are not barred from abiding by a non-disclosure agreement for any CEII accessed in order to make their legally required determinations. As explained above, the NYDOS may access CEII subject to acceptance of a non-disclosure agreement, which it would be able to abide under New York FOIL, and it may hold closed meetings on matters affecting public safety under New York’s Open Meeting Law. Furthermore, nothing in the NGA, including the Commission’s exclusive grant of authority to site LNG facilities, affects the rights of states under the Coastal Zone Management Act.⁷⁷

4. Regulatory Waivers

Two commenters asserted that the Commission should not waive certain regulations that may apply to Broadwater’s proposed facilities.⁷⁸ Broadwater Energy did not request waiver of any Commission regulations in its application made pursuant to section 3(a) of the NGA, 15 U.S.C. § 717(b)(a), to site, construct, and operate its FSRU receiving terminal and associated facilities. Broadwater’s request for waiver of certain of the Commission’s regulations is limited to Broadwater Pipeline’s Application under section 7(c) of the NGA, 15 U.S.C. § 717f(c), to

⁷³ N.Y. Pub. Off. Law, Art. 6 §§ 87(2)(d), 87(2)(f), 89(5).

⁷⁴ Id. § 87(2)(a).

⁷⁵ 18 C.F.R. § 388.113(c)(1)(iii); Order No. 630 at P 13.

⁷⁶ N.Y. Pub. Off. Law, Art. 7 §§ 103(3), 105.

⁷⁷ 15 U.S.C. § 717(b)(d).

⁷⁸ See Letter from Long Island Sound LNG Task Force to Magalie R. Salas, Secretary, FERC (filed Feb. 23, 2006); KeySpan Delivery Comments at 2-3, 10; Advisory Report.

construct, own, operate and maintain the pipeline lateral and related facilities. See Broadwater Pipeline Application at 4-7, 12-14.

Moreover, Broadwater is not specifically requesting waiver of regulations governing the siting or construction of the pipeline. Rather, Broadwater asks for waiver of certain Commission regulations related to rate or tariff filings that are inapplicable because the pipeline will be a single use pipeline, including: the requirement to provide open access service and operations as set out in 18 C.F.R. Part 284; the requirement, pursuant to 18 C.F.R. § 157.6(b)(8), that Broadwater provide the Commission with cost of service data and revenue responsibility for each rate schedule; the requirement that Broadwater provide Exhibit H (Total Gas Supply), Exhibit I (Market Data), Exhibit K (Cost of Facilities), Exhibit L (Financing), Exhibit N (Revenues, Expenses and Income), Exhibit O (Depreciation and Depletion), and Exhibit P (Tariff), including the electronic bulletin board requirement, under 18 C.F.R. §§ 157.14(a)(10), (11), (13), (14), (16), (17) and (18), respectively; and the accounting and reporting requirements pursuant to 18 C.F.R. Parts 201 (Uniform System of Accounts) and 250 (Approved Forms), and Section 260.2 (Form No. 2-A, Annual Report), respectively.

Broadwater requests these waivers because many of the economic regulations that are associated with tariff filings are simply not necessary where, as here, the pipeline operates as a single use pipeline. Under Hackberry, there is no open access requirement for LNG terminals and LNG terminals do not need to tariff their terminalling services. See Hackberry LNG Terminal, L.L.C., 101 FERC ¶ 61,294, at P 22 (2002). The Broadwater pipeline runs from the FSRU to the Iroquois pipeline and therefore has only one point of receipt, located at the tailgate of the FSRU, and one point of delivery, the interconnection with Iroquois. Therefore, there is no opportunity for any person other than the single terminal customer, Shell NA LNG, Inc., to use

the pipeline, and the pipeline is a single use pipeline to transport gas from the FSRU to the interstate grid. Broadwater's waiver requests are consistent with those requested and granted by the Commission to other single-use pipeline applicants whose pipelines will be used in a similar limited and discreet manner. See, e.g., White Rock Pipeline, L.L.C., 98 FERC ¶ 61,220 (2002); B-R Pipeline Co., 89 FERC ¶ 61,312 (1999), reh'g denied, 91 FERC ¶ 61,042 (2000); USG Pipeline Co., 81 FERC ¶ 61,039 (1997), order denying reh'g and reconsideration, 82 FERC ¶ 61,117 (1998). The pipeline is analogous to a stub that connects processing facilities to the interstate grid. Therefore, because Broadwater Pipeline should not be required to file a tariff it requests waiver of the Commission's requirements to the extent indicated in its Application.

5. Completeness of Application

One commenter asserted that Broadwater had yet to submit information requested by the Coast Guard, that Broadwater's Application is incomplete under 18 C.F.R. Part 157, and the filing date for the Application should be changed to reflect the date on which a complete Application is available for public review.⁷⁹

As an initial matter, the commenter incorrectly relies on the Coast Guard's request to Broadwater for follow-up information as support for their claim that Broadwater's Application to the Commission is incomplete. Broadwater applied to the Coast Guard for a Letter of Recommendation ("LOR") in November 2004. Follow-up information requested by and provided to the Coast Guard by Broadwater is part of the Coast Guard's independent LOR process and is a separate proceeding.

Moreover, under section 157.21 of the Commission's rules, 18 C.F.R. § 157.21, the Commission may determine what information is necessary to deem an application complete for review purposes. The Commission may decide that an application is complete, but that certain

⁷⁹ See Sw. Region Metro. Planning Org. Comments at 1-2.

information must be submitted to enable it to make further determinations. In its Notice of Applications, 71 Fed. Reg. 9807 (Feb. 27, 2006), the Commission accepted Broadwater's Applications for filing and set the comment period. The Commission did not deem the Application incomplete, which would have resulted in the Commission declining to establish a comment period. In its Notice, the Commission required Broadwater to submit certain information so that the Commission could set the schedule for review and issuance of the draft environmental impact statement ("DEIS") and the issuance of all federal authorizations. The requested information has been submitted, thereby allowing the Commission to set appropriate schedules.

If the application review process reveals that supplemental information is needed for required authorizations, Broadwater will furnish such information. Where this information relates to and will be contained in the DEIS, as is the case with the information the commenter referred to, an opportunity for comment will be (as is procedurally required) provided upon issuance of the DEIS.

IV. CONCLUSION

For the reasons set forth above, the Commission should accept these reply comments in aid of its decision-making process. Broadwater urges the Commission to continue the process of completing its consideration of Broadwater's Applications.

Respectfully submitted,

/s/ Lawrence G. Acker

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Dated: April 3, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C. this 3d day of April, 2006.

/s/ Brett A. Snyder
Brett A. Snyder