

No. \_\_\_\_\_

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

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Broadwater Energy LLC and Broadwater Pipeline LLC,

Appellants

vs.

New York Secretary of State Lorraine Cortés-Vázquez,

Respondent.

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**RESPONSE OF BROADWATER ENERGY LLC  
AND BROADWATER PIPELINE LLC TO THE *AMICUS CURIAE* BRIEF  
OF THE ATTORNEY GENERAL OF CONNECTICUT**

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## INTRODUCTION

Broadwater Energy LLC and Broadwater Pipeline LLC (collectively “Broadwater”) submit the following Brief in response to arguments raised by the Attorney General of Connecticut (“CTAG”) in his August 15, 2008 *amicus curiae* Brief (“CTAG Br.” or “Brief”).

Contrary to the role of an *amicus*, CTAG’s Brief is a diatribe against the Broadwater Project.<sup>1</sup> The classic role of the *amicus* is to “advise” and “assist” a presiding officer in an impartial manner with respect to “the status of the law” to help ensure “that justice may be done.”<sup>2</sup> CTAG departs widely from the traditional role of the *amicus* by abandoning impartiality and misdirecting the Secretary as to the “status of the law” by proffering demonstrably incorrect legal arguments and factual assertions that are unsupported by a single reference to the underlying record. As a result, CTAG’s Brief is devoid of merit and should be accorded no weight by the Secretary.

## DISCUSSION

### **I. CTAG’S ARGUMENTS MISSTATE THE SUBSTANCE OF THE REGULATIONS GOVERNING THIS APPEAL AND ARE OTHERWISE LEGALLY ERRONEOUS**

Under the 15 C.F.R. Part 930, Subpart H regulations governing this appeal, the New York State Department of State’s (“NYSDOS”) April 10, 2008 objection to the Broadwater Project (“Objection”) should be overruled if the Secretary finds the Project consistent with the objectives of the federal Coastal Zone Management Act (“CZMA”) based on the three regulatory elements set forth in 15 C.F.R. § 930.121. By omitting critical text from 15 C.F.R. § 930.121, CTAG has misstated the operative legal standard governing this appeal. CTAG quotes 15 C.F.R. § 930.121(c) as follows:

- (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering previous appeal decisions, alternatives described in state objection letters and alternatives and other information submitted during the appeal.<sup>3</sup>

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<sup>1</sup> CTAG has previously characterized the Project as an “environmental atrocity” and an “aesthetic monstrosity.” Comments of CTAG on the Draft Environmental Impact Statement (January 23, 2007) (BW 12825-12895).

<sup>2</sup> Sciotto v. Marple Newtown School District, 70 F. Supp. 2d 553, 554-555 (E.D. Pa. 1999) (“Amici are not parties to the case, but rather assist the court by ‘submitting briefing designed to supplement and assist in cases of general public interest, supplement the efforts of counsel, and draw the court’s attention to law that might otherwise escape consideration.’ [] Amici status is typically granted when the following conditions are present: (1) petitioner has a ‘special interest’ in the particular case; (2) petitioner’s interest is not represented competently or at all in the case; (3) the proffered information is timely and useful; and (4) petitioner is not partial to a particular outcome in the case.”) (internal citations omitted).

<sup>3</sup> CTAG Br. at 8.

CTAG states that the “last point quoted above is critical,” because the “Secretary of Commerce may only override [NYSDOS’s Objection] if there is ‘no reasonable alternative,’” and “Broadwater cannot creditably claim that its project is the only means to supply natural gas to the region.”<sup>4</sup> Notwithstanding CTAG’s characterization of 15 C.F.R. § 930.121(c) as “critical,” CTAG omits the final sentence of subsection (c), which states:

The Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

This last sentence provides the complete context of the standard, but is ignored by CTAG.

Instead, CTAG argues repeatedly and at length that the Broadwater Project fails Element 3 because a variety of other LNG terminals proposed throughout the United States represent alternatives to the Project.<sup>5</sup> CTAG’s analysis is erroneous. None of the various and sundry LNG terminals discussed in CTAG’s Brief have even been suggested by NYSDOS as viable or “available” alternatives to the Project<sup>6</sup> because those other projects could not possibly “achieve the primary or essential” purpose<sup>7</sup> of the Broadwater Project: supplying the target market (*i.e.*, Long Island, the greater New York City metropolitan area, upstate New York, and southern Connecticut) with one billion cubic feet per day of natural gas.<sup>8</sup> Indeed, the omitted final sentence of 15 C.F.R. § 930.121(c) “makes clear that no alternative, whether submitted to the Secretary by the appellant, the State, a third party, or identified by the Secretary will be considered by the Secretary unless the State submits a written statement that the alternative will allow the activity to be conducted in a manner consistent with the enforceable policies of

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<sup>4</sup> CTAG Br. at 8.

<sup>5</sup> CTAG Br. at 2-3, 8. CTAG also argues that Broadwater’s alleged “failure to consider alternatives, by itself, mandates the denial of approval of this project.” CTAG misunderstands the record in this matter. There are hundreds of pages in the decision record evidencing Broadwater’s extensive consideration of alternatives to its Project design. *See, e.g.*, Final Environmental Impact Statement (“FEIS”) for the Broadwater Project, Chapter 4 (BW29174-29230); Broadwater Additional Alternatives Analysis (BW18200-18225); Broadwater Response to NYSDOS Information Request 2-J (BW17079-17098); Broadwater Response to EIR 2-11 (BW17099-17109); Broadwater Response to Atlantic Alternatives Information Request NYSDOS A-1 through A-9 (BW24067-24155).

<sup>6</sup> *See* Objection at 60-73 (BW33794-33807) (the “Alternatives” section of NYSDOS’s Objection does not proffer any of the various LNG projects discussed in CTAG’s Brief as alternative to the Broadwater Project).

<sup>7</sup> Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Islander East Pipeline Co., LLC (May 5, 2004) at 40.

<sup>8</sup> FERC has also concluded that there are no viable or available alternatives that would satisfy the primary purpose and objective of the Broadwater Project. *See* FEIS, Chapter 4 (BW29174-29230); FEIS § 1.1.3.2 (BW28785) (“Several new pipeline projects have been approved or proposed within or near the regional market areas that would be served by natural gas from the Broadwater Project. [] Each of the projects would supply gas obtained from existing U.S. and Canadian sources. If all were constructed as proposed, the maximum potential increase in gas supply to the New York City, Long Island, and Connecticut markets would be a small fraction of the gas that would be supplied by the [Broadwater] Project.”).

the management program.”<sup>9</sup> Thus, the *only* cognizable alternatives in this appeal are purported “Alternative 1” and “Alternative 2” identified by NYSDOS in the Objection.<sup>10</sup> Because none of the LNG facilities discussed in CTAG’s Brief have been identified by NYSDOS as viable alternatives to the Broadwater Project, CTAG’s alternatives argument is devoid of any legal merit and must be rejected.

CTAG also mischaracterizes the nature of the arguments made in Broadwater’s Initial Brief. According to CTAG, Broadwater insists “that an LNG terminal sited in the coastal zone, without more, is entitled to priority over other CZMA (and CMA) policy objectives,” and that “FERC’s responsibilities under the National [sic] Gas Act are so important that they cancel out the applicability of the CZMA to the licensure process in which it is engaged.”<sup>11</sup> Broadwater has never made any such arguments, and CTAG is unable to cite to any page from Broadwater’s Brief where such arguments were made. Nor has Broadwater argued that FERC’s approval of the Broadwater Project under the federal National Environmental Policy Act (“NEPA”) takes “precedence over the entirely separate environmental CZMA regulations.”<sup>12</sup> Even in opposing its own straw man, however, CTAG misstates the law. CTAG attempts to dismiss the FEIS’s comprehensive environmental analysis as irrelevant to this appeal because NEPA and the CZMA are separate federal statutes.<sup>13</sup> But 15 C.F.R. § 930.58 requires Broadwater to furnish NYSDOS with all “necessary data and information,” and NYSDOS’s own website addressing CZMA consistency review states that an FEIS prepared pursuant to NEPA “may be required before [NYSDOS] formerly [sic] initiates its review.”<sup>14</sup> The FEIS for the Broadwater Project contains volumes of detailed analysis relevant to the CZMA and

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<sup>9</sup> Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 71 Fed. Reg. 798 (January 5, 2006).

<sup>10</sup> Objection at 60-73 (BW33794-33807). Broadwater has previously argued that NYSDOS’s proposal of alternatives subject to a different coastal management program than the program that served as the basis for the Objection was improper under 15 C.F.R. Part 930. See Broadwater Initial Br. at 35-37; Broadwater Reply Br. at 18-19.

<sup>11</sup> CTAG Br. at 12.

<sup>12</sup> CTAG Br. at 13.

<sup>13</sup> See CTAG Br. at 13.

<sup>14</sup> [http://www.nyswaterfronts.com/consistency\\_federal.asp](http://www.nyswaterfronts.com/consistency_federal.asp); see also March 29, 2007 letter from NYSDOS to Broadwater (BW16973) (“[NYSDOS] is awaiting receipt of the Final EIS and additional information regarding the Broadwater LNG Project.”); August 28, 2007 NYSDOS/Broadwater Stay Agreement (BW23891) (wherein the parties agreed to stay the running of the review period “to await receipt of the [FEIS] and additional information” because NYSDOS required FERC’s FEIS for the Broadwater Project before it would make a consistency determination); accord 15 C.F.R. § 930.37 (“A Federal agency may use its NEPA documents as a vehicle for its consistency determinations or negative determinations under this subpart. However, a Federal agency’s federal consistency obligations under [the CZMA] are independent of those required under NEPA and are not necessarily fulfilled by the submission of a NEPA document. [ ] If a Federal agency includes its consistency determination or negative determination in a NEPA document, the Federal agency shall ensure that the NEPA document includes the information and adheres to the timeframes required by this subpart.”). CTAG quotes language from the December 8, 2000 *Federal Register* stating that NEPA and the CZMA have different “effects tests.” CTAG Brief at 13. CTAG again omits the next sentence in the quote, thereby creating the erroneous impression that NOAA discourages addressing CZMA issues in NEPA documents, which is actually the opposite of NOAA’s intended message: “What this section [15 C.F.R. § 930.37] does do is encourage government

this appeal. Hundreds of pages of the FEIS address the coastal effects of and the lack of feasible alternatives to the Broadwater Project,<sup>15</sup> and FERC's analysis of these subjects in the FEIS is in much greater depth than that present in NYSDOS's Objection.<sup>16</sup>

CTAG's Brief is also legally incorrect (and self-contradictory) regarding the issue of domestic energy self-sufficiency.<sup>17</sup> As demonstrated in Broadwater's Reply Brief, the contention that a project cannot further the national interest under the CZMA unless it advances the goal of energy self-sufficiency is legally baseless.<sup>18</sup>

CTAG relies on "15 C.F.R. § 923.15(b)" in arguing that the LISCMP complies with the mandate of CZMA § 306(d)(8)<sup>19</sup> to adequately consider the national interest involved in "siting of facilities such as energy facilities which are of greater than local significance."<sup>20</sup> However, "15 C.F.R. § 923.15" does not exist, and the block quote on page 11 of CTAG's Brief is not taken from any section of 15 C.F.R. Part 923.

CTAG also attempts to counter Broadwater's argument that NYSDOS's Objection amounts to an illegal flat ban on offshore energy development/LNG facilities in the Sound by claiming that the policies of the LISCMP "clearly and unequivocally identify the need and importance of siting major energy facilities and dictate precisely how to do that" – "most importantly" Policy 13, which, *inter alia*, states that LNG facilities in Long Island Sound "must be safely sited and operated."<sup>21</sup> Here, CTAG does correctly identify a legal standard. Indeed CTAG's citation to and admission regarding this portion of Policy 13 clearly underscores the erroneous nature of NYSDOS's Policy 13 argument.<sup>22</sup>

In its Initial Brief (and again in its Reply Brief), Broadwater demonstrated how the Project satisfied Element 1 under 15 C.F.R. § 930.121.<sup>23</sup> Although a section of CTAG's Brief is ostensibly devoted to Element 1, CTAG's

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efficiency and reduce paperwork by specifically encouraging Federal agencies to use NEPA as a vehicle to address all CZMA consistency issues, as well as NEPA issues in the same environmental review document." Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 65 Fed. Reg. 77139 (December 8, 2000).

<sup>15</sup> See FEIS Chapters 3-4 (BW28848-29230).

<sup>16</sup> BW33735-33807.

<sup>17</sup> On page 14 of its Brief, after asserting that "[c]ertain amendments to the CZMA in the 1970s put into higher relief the 'national objective' of 'increasing *domestic* energy production,'" CTAG faults Broadwater's Initial Brief because it "does not address the point of domestic energy self-sufficiency." On that same page, however, CTAG argues that "Broadwater's claim that its proposed project will move the nation close to energy self-sufficiency is patently false." Thus, CTAG inexplicably contends that Broadwater makes a "patently false" argument regarding a subject it "does not address."

<sup>18</sup> See Broadwater Reply Br. at 8.

<sup>19</sup> 16 U.S.C. § 1455(d)(8).

<sup>20</sup> CTAG Brief at 10-11.

<sup>21</sup> CTAG Br. at 12 (quoting 19 NYCRR § 600.6[m][4][iii]).

<sup>22</sup> See NYSDOS Br. at 4-5; Broadwater Reply Br. at 4-5.

<sup>23</sup> Broadwater Initial Br. at 8-11.

discussion of that topic is a fragmented collection of arguments that each fail to join the issue.<sup>24</sup> CTAG neither refutes Broadwater's status as a major coastal-dependent energy facility nor attempts to distinguish the secretarial precedent relied on by Broadwater in its Initial Brief. CTAG's discussion also ignores the regulatory regime governing this appeal by improperly conflating its discussion of Element 1 (national interest) with Element 3 (alternatives).

Finally, CTAG evidences a profound misunderstanding regarding the subject matter of this appeal. CTAG argues throughout its Brief that Broadwater's appeal should be denied because the Project violates various provisions of the LISCOMP.<sup>25</sup> Under 15 CFR Part 930, Subpart H, however, the only pertinent issues in this appeal are whether the significant and substantial national interests furthered by the Broadwater Project outweigh the Project's alleged adverse coastal effects and whether NYSDOS's proposed Alternatives 1 and 2 satisfy the four-part consistent/specific/available/reasonable test.<sup>26</sup>

## **II. CTAG'S DISCUSSION OF THE COASTAL EFFECTS OF THE BROADWATER PROJECT IS INHERENTLY FLAWED AND FACTUALLY ERRONEOUS**

An *amicus* such as CTAG is governed by the same record limitation rules as the parties. See Southwest Center for Biological Diversity v. Babbitt, 926 F. Supp. 920, 922 (D. Ariz. 1996). The rule for this appeal is that "supporting documentation and material shall be limited to the [] consolidated record" and any supplemental information accepted into the decision record by the Secretary; because this matter concerns an energy project, the consolidated record is defined as the record maintained by FERC (the consolidated and decision records are collectively referred to as "the record").<sup>27</sup> Despite making a variety of purported factual assertions (primarily regarding the alleged coastal effects of the Broadwater Project), CTAG's Brief lacks a single citation to the underlying record. On the few occasions where CTAG provides citations, it invariably cites to documents that are not part of the record in this matter. For instance, CTAG continually and improperly bases its factual arguments on a "Task Force Report" (*Comprehensive Assessment and Report Part II*, Task Force on Long Island Sound, June 3, 2003) that is not a part of the record.<sup>28</sup>

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<sup>24</sup> CTAG Br. at 9-17.

<sup>25</sup> CTAG Br. at 22, 30-31.

<sup>26</sup> See 15 C.F.R. § 930.121; Broadwater's Initial Br. at 7-50.

<sup>27</sup> 15 C.F.R. § 930.127(c)(3), (i); 15 C.F.R. § 930.130(a)(2).

<sup>28</sup> CTAG Br. at 5-7, 24-25, 28. In addition to the Task Force Report, Broadwater objects to all references in CTAG's Brief to materials that dehors the record (see CTAG Br. at 5-7, 24-30) or the implied request to consider such extra-record materials.

In both its Initial and Reply Briefs, Broadwater demonstrated that the national interest benefits of the Project clearly outweigh the potential and limited adverse effects to the Long Island Sound coastal zone.<sup>29</sup> CTAG's discussion of the Project's alleged coastal effects generally mirrors NYSDOS's Objection by addressing alleged diminution of open space, visual impacts, impingement/entrainment, use conflicts, and benthic impacts.<sup>30</sup> As such, Broadwater has previously addressed CTAG's unsupported and erroneous allegations regarding potential coastal effects resulting from the Project and, as a result, Broadwater will not burden the record by repeating the entirety of its previous analysis of those issues herein. However, certain of CTAG's factual inaccuracies compel a discussion here.

CTAG hyperbolically describes the FSRU as "the first of its kind, constituting an entirely novel and untested concept" because "[n]o floating facilities of this, or related, types exist anywhere in the world. In effect, it is a huge laboratory experiment, filled with billions of cubic feet of flammable gas."<sup>31</sup> In reality, the Broadwater Project is comprised of proven components and LNG re-gasification technologies that are currently in use at LNG facilities throughout the world.<sup>32</sup> As described in Broadwater's March 2006 application to the U.S. Army Corps of Engineers, all of the individual components of the FSRU "will be built to conform to International Maritime Organization standards," and a "third party ship classification society such as the American Bureau of Shipping (ABS) will verify and certify the final design and construction."<sup>33</sup> CTAG's opposition to the FSRU on the basis of technological innovation is therefore incorrect and should be rejected.

CTAG's discussion of the Project's benthic impacts and the Stratford Shoal is entirely comprised of a series of erroneous assertions that are unsupported by citations to the underlying record. For instance, CTAG claims that Broadwater's analysis of the Project's effects on the Stratford Shoal is entitled to little weight because "Broadwater commissioned a minor and superficial scan of the proposed pipeline route over the Stratford Shoals."<sup>34</sup> This assertion is incorrect. Broadwater examined the substrates of the Stratford Shoal as part of a widespread field effort that included a sampling plan that was sent to numerous interested agencies for review and comment before work

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<sup>29</sup> Broadwater Br. at 11-34; Broadwater Reply Br. at 9-18.

<sup>30</sup> CTAG Br. at 18-32.

<sup>31</sup> CTAG Br. at 4.

<sup>32</sup> See Long Island Power Authority, Broadwater LNG Technical Assessment — Market, Technology, Environmental and Safety Related Impacts in New York State (July 2007) at 59, 63, 65, 72-73 (BW32646, BW32650, BW32652, BW32659-32660); FEIS §§ 2.1.1.1, 2.1.4.1, 2.1.4.2, 2.1.4.3, 2.1.4.4, 2.1.4.5 (BW28807, BW28825-28826); Coast Guard WSR § 1.2.1 (BW29365).

<sup>33</sup> BW3982.

<sup>34</sup> CTAG Br. at 26.

began.<sup>35</sup> As noted in the FEIS, Broadwater's analysis included the collection of three cores from the Stratford Shoal itself, drop camera surveys at three locations, and benthic grab samples:

To further assess potential contaminant concentrations specifically along the proposed pipeline route, Broadwater collected sediment samples in April and May 2005 along the proposed route. Prior to undertaking the field activities, Broadwater prepared and submitted a sampling and analysis plan to regulatory agencies (including COE, EPA, NOAA NMFS, and NYSDEC). Broadwater requested comments and, if necessary, modifications from these agencies to ensure the adequacy of the data for the agency review. The sediment sampling plan was prepared according to NYSDEC's TOGS for *In-Water and Riparian Management of Sediment and Dredged Material (November 2004)*. Federal and state resource agencies with regulatory responsibility have reviewed and approved Broadwater's sediment sampling and analysis plan. The survey included analysis of several contaminants at a minimum interval of one sediment sample per mile along the proposed pipeline route. At each sampling location, a 10-foot deep sediment core was collected using a vibracore unit mounted on a 100-foot vessel. The sediment types were classified, and sediment samples were collected from the core, including the top 12 inches of sediment.<sup>36</sup>

Analytical results for these samples with respect to the Stratford Shoal can be found in Broadwater's Resource Report No. 7 – Soils.<sup>37</sup>

The incorrect nature of CTAG's claims is also confirmed by clear record evidence. Again without a citation, CTAG twice claims that Broadwater will employ blasting in the Stratford Shoal.<sup>38</sup> CTAG is mistaken. Broadwater has repeatedly and unambiguously rejected the possibility of blasting to construct the subsea pipeline.<sup>39</sup> If the subsea plow pipeline installation technique is unavailable in the Stratford Shoal, "alternatives could include use of a barge-mounted excavator or laying the pipeline on the seafloor and covering it with articulated concrete mats."<sup>40</sup>

Having erroneously criticized Broadwater's study of the Project's potential effects on Stratford Shoal as "minor and superficial," it is curious that CTAG's own analysis is uninformed by any data derived from the Shoal

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<sup>35</sup> See Spring 2005 Environmental Sampling Report for a Project to Construct and Operate an LNG Receiving Terminal in Long Island Sound (January 2006) (BW238-240).

<sup>36</sup> FEIS § 3.1.2.1 (BW28873).

<sup>37</sup> BW1846-1860.

<sup>38</sup> CTAG Br. at 4, 26.

<sup>39</sup> See, e.g., FEIS § 3.1.1.3 (BW28867) ("Broadwater's site-specific surveys along the proposed pipeline route have not documented the presence of any bedrock within areas proposed for trenching, and Broadwater has not proposed the use of blasting during construction or operation of the proposed Project."); Resource Report No. 6 – Geological Resources (BW1835) ("The presence of this unconsolidated material in the upper soil horizon indicates that bedrock is not present near the surface and that pipeline installation could be performed using conventional installation technology and would not require blasting.")

<sup>40</sup> FEIS § 2.3.2.2 (BW28836); see also Resource Report No. 6 – Geological Resources (BW1835) ("If adequate burial depth cannot be achieved during construction, Broadwater will utilize concrete mats to provide adequate pipeline protection."); FEIS § 3.1.2.2 (BW28874-28881); Broadwater's Initial Br. at 28-29.

itself. Despite CTAG's claim that the Stratford Shoal is "unique,"<sup>41</sup> CTAG improperly extrapolates coastal effects in the Shoal from studies conducted in several unrelated nearshore areas of the Sound with radically different benthic ecosystems and dissimilar recovery rates.<sup>42</sup> For instance, CTAG relies on affidavits and the FEIS for the Islander East Pipeline Project to claim that pipeline construction "effectively eliminates any possibility of commercial shellfishing operations into the foreseeable future."<sup>43</sup> No commercial shellfishing for bivalves (which were affected by the Islander East project) takes place on the Stratford Shoal or anywhere else along the proposed route of the Broadwater Pipeline, and CTAG's repeated suggestion that Project construction will adversely impact this type of commercial shellfish habitat is baseless.<sup>44</sup> To the extent CTAG's claims of potential impacts to the Stratford Shoal depend entirely on non-record documents pertaining to unrelated projects in dissimilar (largely nearshore) areas of the Sound, CTAG's arguments are baseless and must be rejected.

CTAG claims that there will be significant impacts to benthic habitat in the Sound from the Project and that pipeline construction in the Stratford Shoal has the potential to disrupt "northern coral and sponge communities unique to the region."<sup>45</sup> Both CTAG and NYSDOS have misstated the Project's benthic impacts, including the potential effect of the Project on the northern star coral population in Long Island Sound, with NYSDOS at one point going so far as to incorrectly characterize the northern star corals on the Stratford Shoal as a "rare ecological communit[y]."<sup>46</sup> According to the research of Professor Sean Patrick Grace (described by NYSDOS as "an expert on cold-water scleractinian corals"<sup>47</sup>), northern star coral are "plentiful" in the region, with the total population of the organism generally being underestimated.<sup>48</sup> Dr. Grace's "early dives in Narragansett Bay revealed literally millions of the creatures," and Dr. Grace has hypothesized that the northern star coral is even *more plentiful* in Long Island Sound.<sup>49</sup> Thus, the leading research demonstrates that northern star corals are common throughout Long Island Sound (not just on the Stratford Shoal), and the northern star coral is "unique" only inasmuch as all species

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<sup>41</sup> CTAG Br. at 26-27.

<sup>42</sup> CTAG Br. at 26-29.

<sup>43</sup> CTAG Br. at 27.

<sup>44</sup> FEIS § 3.3.3.2 (BW28947-28948) ("Shellfishing areas for bivalves are located primarily along the shoreline. Because the proposed Project operations would occur in the offshore areas that comprise the Project Waterway, impacts to commercial and recreational shellfishing for bivalves are not anticipated.").

<sup>45</sup> CTAG Br. at 26.

<sup>46</sup> NYSDOS Br. at 19.

<sup>47</sup> NYSDOS Br. at 18.

<sup>48</sup> "The Skeletons of Long Island Sound: Grace studies the hardy Northern Star coral" (January 2006) (BW37001).

<sup>49</sup> 2007-2008 University Research Grant Proposal from S.P. Grace, Ph.D., Department of Biology, Southern Connecticut State University (BW36998) ("Given the higher water temperature in Long Island Sound, in comparison to Narragansett Bay, it is hypothesized that coral growth in Long Island Sound is greater, and subsequently, that local corals are larger.").

are unique in their own way. The FEIS's application of Dr. Grace's research to analyze the effects of pipeline construction in the Stratford Shoal was entirely accurate:

... because northern star coral is plentiful within the Sound, it would be expected that adjacent communities not impacted by construction would aid in reestablishing populations in the disturbed area through natural recruitment.<sup>50</sup>

In addition to their ubiquity in Long Island Sound, Dr. Grace has also described the general resiliency of northern star corals; and the combination of these two features confirms that any individual northern star corals potentially impacted by pipeline construction should be replaced in a relatively brief period of time.<sup>51</sup> The best resolution of this issue is the reading of the two-page document summarizing Dr. Grace's research, which speaks for itself.<sup>52</sup>

Nothing in the record supports the contention that it will require great lengths of time for northern star coral communities impacted by pipeline construction to recover. The introduction of research relating to recovery times for cold-water coral reefs is irrelevant because the coral communities in the Stratford Shoal do not construct reefs, they instead attach themselves to purely geological formations of hard bottom habitat. While it may take "decades to centuries" for cold-water coral reefs to regenerate, that is simply because it takes decades to centuries for those coral organisms to construct their large reef structures in the first place.<sup>53</sup>

Ultimately, the route of Broadwater's subsea pipeline has been specifically selected to cross only 4,000 feet of the Stratford Shoal at one of its narrowest points while also avoiding or minimizing impacts related to other Long Island Sound features, including historic wrecks, underwater obstructions, lightering areas, the FLAG-Atlantic cable, historic dumping grounds, and essential fish habitats and commercial shellfish beds.<sup>54</sup> The impact to these sensitive features would be much greater if a pipeline route completely avoiding the Stratford Shoal was selected.<sup>55</sup>

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<sup>50</sup> FEIS § 3.3.1.2 (BW28917); see also FEIS § 3.3.1.1 (BW28914) ("There is no evidence to suggest that these scattered individuals would be considered a 'special aquatic site'...").

<sup>51</sup> "The Skeletons of Long Island Sound: Grace studies the hardy Northern Star coral" (January 2006) (BW37002) ("They're very hardy," Grace says. "You can take it out of water for several hours and transport it to the lab for experimentation without damaging it. By comparison, corals from tropical areas are much more fragile."). Compare CTAG Br. at 27; NYSDOS Br. at 18 ("Broadwater's Initial Brief cites the FEIS's incorrect characterization of Dr. Grace's research, which asserts that the northern star coral is fundamentally different from tropical, reef-building species, and hardy and plentiful in Long Island Sound. The article referenced by the FEIS actually states that the cold-water corals have the same attributes and structure as Caribbean corals..."). As the foregoing demonstrates, the FEIS and Broadwater stand alone in accurately characterizing Dr. Grace's research.

<sup>52</sup> Id.

<sup>53</sup> See Freiwald, A., Fosså, J.H., Grehan, A., Koslow, T., Roberts, J.M., Cold-water Coral Reefs, UNEP-WCMC, Cambridge, UK (2004) at 11 (BW37014).

<sup>54</sup> April 2, 2008 letter from Broadwater to NYSDOS at 20-21 (BW33247-33248).

<sup>55</sup> FEIS § 4.5.2 (BW29218).

While the area has never been classified with any kind of protected status, the Project will affect only 1.5 acres of the Stratford Shoal, which comprises an area of the Sound approximately 13 miles long by 2-4 miles wide.<sup>56</sup>

**III. CONCLUSION**

Based on the foregoing, the Secretary should not afford weight to CTAG's Brief.

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Respectfully submitted,



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<sup>56</sup> See Resource Report No. 6 – Geological Resources, Figure 6-2 (BW1819); April 2, 2008 letter from Broadwater to NYSDOS at 20-21 (BW33247-33248).

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response of Broadwater Energy LLC and Broadwater Pipeline LLC to the *Amicus Curiae* Brief of the Attorney General of Connecticut was served this 3d day of October 2008, by first-class mail unless otherwise indicated, on the following persons at the addresses listed below.

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